IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

PEBBLE LIMITED PARTNERSHIP, acting through its General Partner, PEBBLE MINES CORP.,
Plaintiff

vs.

LAKE AND PENINSULA BOROUGH, and KATE CONLEY, in her official capacity as Clerk of the Lake and Peninsula Borough,
Defendants

Case No. 3DI-11-00053 CI

GEORGE G. JACKO and JACKIE G. HOBSON, SR.,
Intervenor-Defendants

CONSOLIDATED

STATE OF ALASKA,
Plaintiff,

vs.

LAKE AND PENINSULA BOROUGH
Defendant.

Case No. 3AN-11-011833

I. INTRODUCTION

The Alaska legislature granted the Department of Natural Resources (DNR) comprehensive authority over mineral exploration, permitting, and development, to be exercised for the benefit of all Alaskans. Has the legislature impliedly granted home rule boroughs co-equal permitting authority over large scale mining such that the Lake and Peninsula Borough may veto the Pebble Mine even if DNR would approve it?

II. STATEMENT OF FACTS

Defendant Lake and Peninsula Borough (L&PB) is a home rule borough incorporated in 1989. Located in southwest Alaska, it approximates the size of

West Virginia, extending 400 miles from Lake Clark well down the Alaska Peninsula to Ivanof Bay. Its coastline along the north side of the Alaska Peninsula defines the southern boundary of Bristol Bay. Bristol Bay hosts the largest salmon run in the world.

L&PB is very sparsely populated, with a year-round population of about 1,600. It is governed by a seven-member assembly, and has six full-time employees: a manager, clerk, administrative assistant, finance officer, community development coordinator, and economic development coordinator. The borough seat is located at King Salmon in the adjoining Bristol Bay Borough, presumably for commercial, banking and air-travel convenience.

State-owned land within L&PB cradles the largest discovery of undeveloped copper ore in the world. It is interlaced with substantial gold and molybdenum deposits. The proposed Pebble Project mining site is 200 miles southwest of Anchorage, fifteen miles north of Lake Illiamna, and twenty miles west of Lake Clark. Its generally flat terrain, interspersed with glacial ponds, lies within a broad valley separating the drainages of Upper Tularik Creek and the Koktuli River, which both flow into the Bristol Bay watershed.

Plaintiff Pebble Limited Partnership (PLP) holds the mineral rights to the site, and since 2002 has actively engaged in exploration and other pre-permitting activity. PLP has applied to the State of Alaska for a 35-billion gallon per year water-use permit for Upper Tularik Creek and the Koktuli River for use in anticipated mining operations. But PLP has not yet extensively applied

for state or federal permits, or proposed a plan of operations for mine development.

The scope of the project and its potential deleterious effects on salmon-bearing waters are discussed in a 2008 article in the Alaska Law Review,[1] which although dated, provides a useful context for the parties' motions for summary judgment.

The exploratory site measures 2.65 miles by 1.7 miles. It is estimated to contain 67 billion pounds of copper, 4 billion pounds of molybdenum, and 82 million ounces of gold. One area of the site, Pebble West, extends to a depth of 2000 feet, and is a potential locale for an open pit mine that would generate 4.5 billion tons of ore. Each ton of ore might contain up to ten pounds of copper, .16 ounces of gold, and .46 pounds of molybdenum, for a waste to metals ratio of 189 to 1. Parts of Pebble East lie below as much as 1000 feet of overburden, with a mineral depth to 5000 feet. Pebble East might be mined as a pit mine or a block-cave mine. While Pebble West is expected to yield ten pounds of metals per ton of ore, Pebble East could yield double that. Jointly, Pebble West and East can be expected to generate over seven billion tons of waste, presumably to be stored on adjoining state land forever.

The project would require a vast water system to prevent the pits and shafts from filling with water, to extract water for processing, and to transport waste slurry via pipelines. Five earthen dams, up to 700 feet high, constructed

---

[1] Geoffrey Y. Parker et al., *Pebble Mine: Fish, Minerals, and Testing the Limits of Alaska's "Large Mine Permitting Process"*, 25 Alaska. L. Rev. 1 (2008).

along nine miles of watershed, would buffer waste material from the environment, creating ten square miles of ponds. Two pipelines one hundred miles in length would parallel a newly-constructed road to Cook Inlet, terminating at a deep-water port. One of these pipelines would transport copper slurry to the port; the other would return recovered slurry water to the holding ponds. An additional four pipelines totaling 13 miles in length would transport mine waste to storage and reclaimed water to holding ponds.[2]

In addition to the mine infrastructure, a 300-megawatt power plant on the Kenai Peninsula would provide power for a mill to crush, process, and concentrate ore, and power other mine and port functions, construction camps, and permanent support facilities, via under-inlet cabling and 100-mile long transmission lines. Normal operation of the mine and ancillary facilities might require 1000 skilled workers over a 50-80 year expected mine life.

The host rock of large scale mineral deposits contains metal sulfides. Exposed to air and water, sulfides form acid mine drainage, which can leach metals such as arsenic, cadmium, copper, zinc, iron, and lead from the surrounding rock base. Contaminants from acid mine drainage are the most critical challenge facing the U.S. mining industry, but quantification of that risk is problematic:

> Because the factors affecting the potential for acid mine drainage are highly variable from site to site, predicting the potential for acid mine drainage is difficult, costly, and of questionable reliability.[3]

---

[2] *Id.* at 13-21.

[3] *Id.* at 16.

Such dissolved metals if not contained can then enter the food chain. While trace copper is essential to life, concentrations above a threshold are toxic to salmon, which are quite sensitive to dissolved heavy metals. But the threshold for salmon toxicity is multi-factorial and so difficult to predict. Relevant factors include the copper concentration, water hardness, salinity and temperature, the presence of suspended solids, cross-effects between minerals, and response variations due to the genetics and prior exposure rates. Non-lethal effects of excess copper include impaired sense of smell, disrupted migration, decreased immune response, respiratory impairment, imbalanced internal salinity, weakened vibration sensation crucial to predator evasion, diminished brain function, altered metabolic and blood chemistry, and irregular hatch rates. Few scientific studies discuss the biologic "cocktail" effect of multiple metals acting in concert.[4]

In 2007 Pebble opponents propounded a statewide "Alaska Clean Water Initiative" prohibiting discharge of any pollutants that would adversely affect salmon spawning. The measure would likely have precluded development of the Pebble prospect. It was defeated by 57% of the voters in a 2008 statewide election. Then in March, 2011, sponsors including the intervenors herein filed a borough initiative popularly denominated the "Save Our Salmon Initiative" (SOS Initiative) with the L&PB clerk. The proposal sought to amend the borough's land use code to prohibit issuance of a permit for mines exceeding

---

[4] *Id.* at 20.

640 acres that would have a "significant adverse impact" on salmon-bearing waters. The initiative defined such an impact as:

> a use, or an activity associated with the use, which proximately contributes to a material change or alteration in the natural or social characteristics of a part of the state's coastal area and in which:
>
> a) the use, or activity associated with it, would have a net adverse effect on the quality of the resources of the coastal area;
>
> b) the use, or activity associated with it, would limit the range of alternative uses of the resources of the coastal area; or
>
> c) the use would, of itself, constitute a tolerable change or alteration of the resources within the coastal area but which, cumulatively, would have an adverse effect.[5]

The initiative also provided that an applicant "should" obtain a L&PB permit before "obtaining" state and federal ones.[6] The parties implicitly agree that the SOS Initiative effectively mandates co-equal borough and state permitting authority as to mining activities potentially adverse to salmon streams. The court will therefore refer to the SOS Initiative as a "gatekeeper" or "co-equal" permitting scheme.

On May 2, 2011, PLP filed a pre-election complaint for declaratory and injunctive relief challenging L&PB's authority to certify the SOS Initiative. This court granted representative SOS Initiative sponsors leave to intervene on May 24, 2011. By order of July 25, 2011, the court deferred decision on pending motions for summary judgment until after the upcoming October L&PB

---

[5] Lake & Peninsula Borough Code (L&PBC) § 09.07.020.

[6] *Id.*

election. By a 37-vote margin, 280 L&PB voters enacted the initiative into law on October 4, 2011. Then on October 28, 2011, the state filed a declaratory judgment action challenging its constitutionality.[7] On January 10, 2012, this court consolidated the two cases over the partial objection of the state. The parties withdrew their pre-election motions for summary judgment, and PLP filed an amended complaint.

In May 2013 all of the parties to the consolidated case filed motions for summary judgment. The state contends that Article VIII, the natural resources section of Alaska's Constitution, grants "pervasive state authority" to the legislature that precludes concurrent L&PB regulatory jurisdiction. Alternatively, the State argues that the legislature has impliedly preempted the SOS Initiative by delegating control of mining to DNR. Lastly, the state argues that operations on its land are immune from the SOS Initiative.

PLP joins in the state's constitutional claims, and also contends that the SOS Initiative is an impermissible appropriation of state assets. PLP further argues that the SOS Initiative violates equal protection, is unconstitutionally vague, and wrongfully circumvented L&PB's Planning Commission.

L&PB also moves for summary judgment, because plaintiffs' facial challenge to the SOS Initiative is not ripe. It contends the SOS Initiative is proper regulation under borough land use planning authority. In turn, the intervenors join L&PB's ripeness argument, and address initiative certification

---

[7] *State v. Lake and Peninsula Borough*, No. 3AN-11-11833CI (Anchorage Superior Ct.).

and other issues first raised in PLP's pre-election summary judgment motion, now withdrawn. And they argue, like L&PB, that the SOS Initiative is not constitutionally or statutorily preempted.

The parties agree that the SOS Initiative campaign materials, pro and con, often characterized the SOS Initiative as an outright ban of the Pebble Mine.[8] Initiative advocates in general portrayed the mine as a broad threat to the wellbeing of L&PB's populace. For example, the Bristol Bay Native Corporation distributed a letter to its shareholders expressing support for the SOS Initiative:

> After much research and deliberation, [the Bristol Bay Native Corporation] has concluded that the proposed Pebble Mine project . . . is too big, of the wrong type and in the wrong location. It poses unacceptable risks to salmon and other resources of the region. These risks threaten the economic, social and cultural wellbeing of our shareholders and all residents of the Bristol Bay region.[9]

Other less measured campaign rhetoric depicted the SOS Initiative as a *de facto* ban on large scale mining.

Under the L&PB code as amended by the SOS Initiative, PLP must apply to the borough manager, who would then submit the permit application to the planning commission for review, subject to an appeal to the assembly.[10] The commission is a lay body with no full-time staff. At oral argument, L&PB noted that it has no process or personnel in place to manage a permit application,

---

[8] *See, e.g.*, State's Mot. for Summ. J. Exs. 4-23.

[9] State Mot. for Summ. J. Ex. 9.

[10] L&PB Code § 09.07.040(A), (C).

but that it will retain an expert if the SOS Initiative survives this court challenge.

In pre-election briefing the L&PB lauded the SOS Initiative as resolving all permitting issues without further resort to laborious and expensive state and federal permitting processes. As a first-in-line gatekeeper, L&PB could spare Pebble the expense of a federal permit application:

> If the borough denies all permits for a large-scale mine as contemplated by the initiative, then the mining companies and Borough can avoid going through the lengthy and expensive federal permitting process altogether.[11]

L&PB did not envision a scientifically rigorous permitting process:

> [The] initiative does not require any special skill or expertise. No special knowledge or experience is needed under the initiative to prohibit large-scale mining operations significantly affecting [salmon-bearing] streams, which is the overall purpose and effect of the initiative. . . . Since there is effectively no permitting process to go through for large-scale mining, no specialized knowledge or experience is needed.[12]

The borough later receded from such innuendoes of inevitable permit denial, instead characterizing them as views of the sponsors.[13]

The existent state and federal permitting regime would require upwards of fifty discrete permits for the Pebble Prospect. At the state level, multiple agencies, including the Departments of Natural Resources, Environmental Conservation, and Fish and Game would review PLP's permitting applications. They would utilize the expertise of mining, geotechnical, civil, and

---

[11] L&PB Opp'n to PLP's Mot. for Summ. J. 13 (pre-consolidation with 3AN-11-11833 CI).

[12] *Id.*

[13] L&PB Consol. Opp'n to Pls.' Mot. for Summ. J. 8..

environmental engineers, as well as geologists, geochemists, meteorologists, ground and surface water hydrologists, fish habitat biologists, botanists, and air quality experts.[14]

III. APPLICABLE LAW

This is an action for a declaratory judgment. The superior court has jurisdiction pursuant to AS 22.10.020(g).

Article X of Alaska's Constitution emphasizes that the powers of local governments shall be broadly construed:

> The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government.[15]

Specifically, Article X § 11 confers to local governments any authority "not prohibited by law or charter." The state legislature has granted planning, platting, and land use regulation authority to home rule boroughs.[16]

Article VIII of Alaska's Constitution devolves control of all state lands to the Alaska legislature.[17] It reads in pertinent part:

> § 1. Statement of Policy
> It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

---

[14] Affidavit of Tom Crafford, State Mot. for Summ. J. 14-15.

[15] Alaska Const. article X, § 1.

[16] AS 29.35.180(b).

[17] *State, Dep't of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1212 (Alaska 2010).

§ 2. General Authority
The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

§ 4. Sustained Yield
Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

§ 5. Facilities and Improvements
The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and waters.

§ 8. Leases
The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. . . .

§ 12. Mineral Leases and Permits
The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law. . . .

Pursuant to Article VIII § 2, the Alaska Legislature comprehensively conferred authority over all aspects of mining in Alaska to DNR, ordering all other state departments to consult with DNR before acting in ways that would affect any aspect of such mining:

§ 27.05.010. Department responsible for mineral resources

(a) The department has charge of all matters affecting exploration, development, and mining of the mineral resources of the state . . . and the administration of the laws with respect to all kinds of mining.

(b) The department is the lead agency for all matters relating to the exploration, development, and management of mining, and, in its capacity as lead agency, shall coordinate all regulatory matters

> concerning mineral resource exploration, development, mining, and associated activities. . . . Before a state agency takes action that may directly or indirectly affect the exploration, development, or management of mineral resources, the agency shall consult with and draw upon the mining expertise of the department.

Alaska Statute 38.04.005 requires DNR to allow maximum use of state lands consistent with the public interest. AS 38.05.135(a) provides that mineral deposits on state land are to be held open for exploration under permits or leases conferred by DNR:

> Except as otherwise provided, valuable mineral deposits in land belonging to the state shall be open to exploration, development, and the extraction of minerals. All land . . . may be obtained by permit or lease for the purpose of exploration, development, and the extraction of minerals. . . .

Under AS 38.05.300, state land parcels exceeding 640 acres may only be withdrawn from mineral development by the legislature. AS 16.05.871 confers authority on the Alaska Department of Fish and Game (ADF&G) to review land uses which may pollute a salmon bearing stream.

IV. DISCUSSION

A. Is the initiative challenge ripe for decision?

L&PB, joined by intervenors, contends that a challenge to the SOS Initiative is not ripe until the borough's planning commission denies PLP a permit. It views plaintiffs' challenge as factually undeveloped. L&PB disputes plaintiffs' foreshadowing of an inevitable rejection; litigation is avoided if a permit issues. Implicitly, L&PB contends that the state and PLP have no immediate stake in the SOS Initiative's dilution of state control over mineral development, absent permit denial.

The statute conferring superior court jurisdiction over declaratory judgment actions requires an "actual controversy."[18] The Alaska Supreme Court discussed Alaska's ripeness doctrine in *Brause v. State*:[19]

> The ripeness doctrine requires a plaintiff to claim that either a legal injury has been suffered or that one will be suffered in the future. The degree of immediacy of a prospective injury needed to satisfy the ripeness doctrine has not been systematically explored in our case law. . . . [T]here is no set formula that can identify whether a case is or is not ripe for decision.[20]

Nonetheless the Court balanced the need for decision against the risks of decision. The need to decide turns on the probability and gravity of the anticipated injury absent a remedy. The risks of decision include ruling on undeveloped facts, or on difficult and sensitive issues that could be advantageously deferred.[21]

The *Brause* Court found unripe a challenge to a statute denying marital recognition to same-sex partners. The Court concluded that the statute was largely symbolic, and that litigation should await an actual denial of a marital benefit. A useful dissent surveyed Alaska's ripeness jurisprudence, observing that in general courts may adjudicate an injury consisting of a mere "identifiable trifle."[22] Ripeness existed even where applicants for limited-entry

---

[18] AS 22.10.020(g).

[19] 21 P.3d 357 (Alaska 2001).

[20] *Id.* at 359.

[21] *Id.*

[22] *Id.* at 360 (Bryner, J., dissenting) (quoting *Bowers Office Prods., Inc. v. University of Alaska*, 755 P.2d 1095, 1097 (Alaska 1988)).

fishing permits had not yet been turned down.[23] It is "bad law and bad policy to approve a rule which shuts the courthouse doors until . . . it may be too late to obtain meaningful judicial relief."[24]

The Alaska Supreme Court revisited the topic in *State v. ACLU of Alaska*.[25] The Court declined to review the constitutionality of a statute criminalizing possession of small amounts of marijuana. The Court held that deferring decision would impose minimal hardship on the marijuana-smoking plaintiffs because they were concurrently subject to federal prosecution. And the Court discerned decisional risks because case-specific facts might have induced it to qualify earlier decisions decriminalizing possession of small amounts in private homes. Finally, due respect for the legislature mandated that the Court declare a statute unconstitutional only when necessary.

As in *Brause*, the *ACLU of Alaska* decision generated a bewildered dissent that chided the majority for overlooking long-established Alaska precedent. It noted that "Alaska law on ripeness historically has kept the barriers to the courtroom low in order to favor access for Alaska's citizens to Alaska courts." The dissent surveyed prior decisions and concluded:

> [W]e routinely accept and decide cases raising the constitutionality of statutes as an abstract proposition. . . . [and] have done so in virtually every major constitutional case to come before us in recent years. . . . Indeed, illustrative of Alaska's lenient ripeness jurisprudence, of eighteen cases since 2001 that raised abstract constitutional issues, we reached the merits in seventeen, often

[23] *Id.* at 361 (citing *Johns v. Commercial Fisheries Entry Comm'n*, 699 P. 2d 334 (Alaska 1985)).

[24] *Id.* (quoting *Johns v. Commercial Fisheries Entry Comm'n*, 699 P. 2d at 338).

[25] 204 P.3d 364 (Alaska 2009).

> without even discussing ripeness. In only [*Brause*] . . . did we uphold a ripeness challenge.[26]

The dissent's empirical observations powerfully suggest that *Brause* and *ACLU* are relatively rare outliers.

L&PB asserts that making PLP defer litigation until permit denial is harmless, because PLP will prepare for permitting regardless of the court's decision on ripeness or on the merits. But the real burden upon PLP lies elsewhere. In September of 2013 the British mining giant Anglo American withdrew from PLP, abandoning its $541 million investment and citing a need to focus on more promising prospects. Anglo American's departure left Northern Dynasty Minerals the sole stakeholder in the project. Northern Dynasty announced that it would seek a replacement partner. Any investor conducting due diligence will necessarily factor in the risks of permit denial. That the SOS Initiative exerts a dissuasive effect on potential investors seems inarguable.

The state also expresses a clear need for decision. If local government entities statewide impede natural resource development via permitting ordinances, the regulatory climate in Alaska is profoundly affected. Disincentives to investment adversely affect the State's royalty and tax revenues. From the state's perspective, a degradation of the investment climate damages all Alaskans from the moment such risks are manifest in local laws, and not only at the moment of permit denial.

---

[26] *Id.* at 374-75.

This case falls squarely within the broad swath of Alaska cases found, explicitly or impliedly, to be ripe for adjudication. *ACLU of Alaska* and *Brause* are inapposite broad-brush social-issue challenges to legislative power, where the palpable risks of decision were not counterbalanced by punishing hardship. Indeed, the wisdom of the *Brause* abstention was highlighted within four years by an issue-specific decision entitling publicly employed same-sex domestic partners to insurance and other employment benefits.[27] The instant case is devoid of comparable justification for delay, and so is ripe for decision.

B. Is the SOS Initiative an outright ban on large scale mining?

The Alaska Legislature has reserved to itself sole authority over outright closures of state land to large-scale mineral development.[28] The state repeatedly characterizes the SOS Initiative as an absolute prohibition of large scale mineral development within L&PB.[29] It projects this stance onto the L&PB electorate, because both supporters and detractors of the SOS Initiative sometimes portrayed it as an outright ban on large-scale development.[30] The state then argues that this inference of the voters' intent should inform the court's textual interpretation of the SOS Initiative, consistent with the holding in *Alaskans for a Common Language, Inc. v. Kritz*:

---

[27] *See Alaska Civil Liberties Union v. State,* 122 P.3d 781 (Alaska 2005).

[28] AS 38.05.300(a).

[29] *See, e.g.*, State Reply to Mot. for Summ. J. 2.

[30] *Id.*

> [W]hen we review a ballot initiative, we look to any published arguments made in support or opposition to determine what meaning voters may have attached to the initiative. . . . To the extent possible, we attempt to place ourselves in the position of the voters at the time the initiative was placed on the ballot, and we try to interpret the initiative using the tools available to the citizens of this state at that time.[31]

L&PB counters that voter intent is irrelevant, because the SOS Initiative's text is unambiguous. L&PB pledges that it will marshal expert input in aid of its administrative permitting process, and that it will dispassionately weigh evidence such that the outcome of a PLP application is not a foregone conclusion.

The state's contention that overheated campaign rhetoric plus L&PB's pre-election legal posturing should decisively inform textual interpretation of the SOS Initiative is unpersuasive. While voter intent can resolve ambiguity in an appropriate case, the state does not portray the SOS Initiative as textually ambiguous. Its provisions set forth standards for decision and define an administrative process. Campaign predictions that the Pebble project could not survive such scrutiny were just that: predictions amounting to political opinion. But no reasonable resident could have concluded, even in the heat of battle, that borough officials would ignore the initiative's mandated process to further a political agenda.

---

[31] 170 P.3d 183, 192-93 (Alaska 2007) (citations omitted).

The state's fallback textual analysis comports with its voter-intent one–it reads the SOS Initiative as a *de facto* ban on all large-scale mining. The state focuses on the Initiative's alternative-use clause, which proscribes:

> a use, or an activity . . . which proximately contributes to a material change or alteration in the natural or social characteristics of a part of the state's coastal area and would limit the range of alternative uses of the resources of the coastal area . . . [32]

The state argues that this standard is so broad that any alternative land use would run afoul thereof. For example, Pebble's large geographic footprint would be read to limit on-site subsistence hunting in violation of the alternate use clause.[33]

But courts often import a rule of reason into legislation, or decline to adjudicate facial challenges based on hypothetical worst-case interpretations thereof. The court accordingly reads a rule of reasonable materiality into the alternate-use clause: would the proposed use materially impede, for example, subsistence hunting within the coastal region as a whole? So interpreted, the SOS Initiative does not inevitably ban large-scale mining within the L&PB, but rather imposes a permitting regime with articulated standards to be evaluated by neutral borough adjudication. No controlling intent of the voters requires a contrary reading of the initiative.

---

[32] L&PBC § 09.07.020.

[33] State Opp'n to Mots. for Summ. J. 23-25.

C. Does the Alaska Constitution confer exclusive gatekeeper permitting authority to the State of Alaska?

Article X § 11 of the Alaska Constitution grants home rule boroughs "all legislative power not prohibited by law or by charter."[34] But the state argues that Article VIII of the Alaska Constitution carves out a zone of "pervasive state authority" over natural resource management, wherein home rule boroughs may only exercise powers expressly delegated by the legislature.[35] Since state law contains no such express grant of mineral development permitting power, the state argues that the SOS Initiative is invalid.

The state buttresses its lead argument—a constitutionally based requirement of affirmative state delegation of power, plus no delegation in fact—with a statutory one: the legislature has so comprehensively delegated natural resource authority to DNR that any assertion of concurrent gatekeeper jurisdiction by LP&B is impliedly prohibited.[36] In turn, L&PB and the intervenors assert the opposite: that the statutory grant of land use planning authority, liberally construed, forecloses any finding of preemption of the SOS Initiative. But all parties implicitly agree that a judicial finding of preemption by implied prohibition alone is sufficient to decide the case.

The state rests its constitutional argument on a doctrine of "pervasive state authority" announced in the 1971 case *Macauley v. Hildebrand*.[37] The

---

[34] Alaska Const. art. X, § 11.

[35] State Mot. for Summ. J. 18-19.

[36] *Id.* at 43.

[37] 491 P.2d 120 (Alaska 1971).

Macauley court held that Article VII of the Alaska Constitution so thoroughly confers authority over statewide education policy to the legislature that only express statutory grants of education-related power to local governments may authorize local regulation. But in over four decades since *Macauley* was decided, the doctrine has never been extended to areas beyond education. Subsequent cases have instead relied upon express or implied statutory preemption of classes of local government action.

Were this court to decide the case on constitutional grounds, it would frame the issue differently than the state has, by asking instead whether Article VIII's mandate that natural resources be maximally developed for the benefit of all Alaskans affirmatively precludes the legislature from delegating co-equal permitting authority to local governments unconcerned with statewide equity. The SOS Initiative asserts, for all practical purposes, that the L&PB is an equal sovereign with the state as to significant adverse mining impacts on salmon bearing streams. This assertion that a local planning and zoning commission may exercise veto power over a natural resources project is unfettered by any obligation to consider the interests of all Alaskans. Rather, the SOS Initiative empowers the commission to unilaterally focus upon local interests by calibrating its "significant adverse impact" standard impossibly low.

But it is unnecessary to resolve whether the legislature could constitutionally delegate such extraordinary power, if the court first determines that the legislature has not done so. The court can refrain from unnecessarily

resolving the constitutional question if the plaintiffs prevail on implied statutory preemption grounds.[38] Accordingly the court first turns to the statutory issue of implied preemption.

D. Is the SOS Initiative preempted by state law?

Several Alaska Supreme Court cases in the 1970s refined the boundaries between state and local government power. First, in the 1970 case *Chugach Electric Association v. City of Anchorage*[39] the State Public Service Commission authorized the Chugach Electric Association to operate within a specified area of Anchorage. Anchorage, a home rule municipality, then overrode the Commission and denied the association a building permit on local regulatory grounds. Anchorage argued that Article X §11 meant that only express legislative constraints limited its powers. The Court disagreed, and instead adopted a "local activity rule" to resolve direct state-local conflicts of law.[40] It decided that allocation of public utility service areas was a matter of statewide concern such that the commission's regulatory power trumped the local building permit denial.

But within a short time the Court receded from the beguiling simplicity of the *Chugach* local-activity formulation. In 1974 the Court in *Jefferson v. State*[41] found that a state statute overruled a citizen's procedural objection to the

---

[38] *See, e.g., Alaska Fish & Wildlife Conservation Fund v. State, Dep't of Fish & Game, Bd. of Fisheries*, 289 P.3d 903, 907 (Alaska 2012)("if a case may be fairly decided on statutory grounds or on an alternative basis, we will not address the constitutional issues").

[39] 476 P.2d 115 (Alaska 1970).

[40] *Id.* at 122-23.

[41] 527 P.2d 37 (Alaska 1974).

transfer of assets between the City of Anchorage and the new configuration of the Municipality of Anchorage as a home rule borough. The Court shifted from its local activity formulation in *Chugach* to a firm focus on legislative intent: did the legislature expressly or impliedly decree local government abstention from a particular area of concern?

> [T]o say that home rule powers are intended to be broadly applied in Alaska is not to say that they are intended to be pre-eminent. The constitution's authors did not intend to create city states with mini-legislature[s]. They wrote into Art. X, § 11 the limitation of municipal authority "not prohibited by law or charter." The test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern. A municipal ordinance is not necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities. The prohibition must be either by express terms or by implication such as where the statute and ordinance are *so substantially irreconcilable* that one cannot be given its substantive effect if the other is to be accorded the weight of law.[42]

The *Jefferson* Court served notice that it would not find an implied preemption of local regulation merely because the State had extensively legislated in a particular area:

> We reaffirm our rejection of the doctrine of state pre-emption by "occupying the field." We will not read into a scheme of statutory provisions any intention to prohibit the exercise of home rule authority in that area of the law. If the legislature wishes to "preempt" an entire field, they must so state.[43]

---

[42] *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974) (emphasis added) (footnotes and quotations in original omitted).

[43] *Id.* at note 33 (citation omitted).

Jefferson involved an express conflict between a state statute and a local ordinance, and the Court found the former preempted the latter. Four years later, in *Johnson v. City of Fairbanks*,[44] the Court decided an implied preemption case. Fairbanks had enacted a notice-of-claim provision requiring potential litigants to announce their intention to sue the city well before the running of the state statute of limitations. The Court held the state statute of limitations impliedly preempted shorter municipal notice-of-claim provisions, even though such ordinances merely conditioned but did not abrogate the statute of limitations. The Court telegraphed its sense that unequal treatment of potential litigants based on locale was unfair, and not what the legislature desired. It reasoned:

> The two-year statute of limitations reflects a state policy. . . . The uniform limitations period impliedly allows every victim of tortious conduct in Alaska, regardless of where he resides and regardless of whether the alleged tortious conduct was by a governmental unit or not, to commence an action for damages within two years without complying with any other time limit. We think the notice of claims provision in the Fairbanks City Charter seriously impedes implementation of this statewide legislative policy and therefore is impliedly prohibited.[45]

Shortly after the Court's decision in *Johnson* it further refined its implied preemption standard, articulating the applicable preemption standard in terms of "substantial interference":

> Merely because the state has enacted legislation concerning a particular subject does not mean that all municipal power to act on the same subject is lost. . . . We believe that an appropriate

---

[44] 583 P.2d 181 (Alaska 1978).

[45] *Id.* at 187.

> accommodation can be made between the state and general law municipalities by a rule which determines preemption to exist, in the absence of an express legislative direction or a direct conflict with a statute, only where an ordinance *substantially interferes* with the effective functioning of a state statute or regulation or its underlying purpose.[46]

Applying this standard, the Supreme Court held that the Bristol Bay Borough's imposition of a local fish sales tax did not substantially interfere with the extensive state fish and game regulatory regime.

Guided by this precedent, the court turns to the issue at hand. The legislature's grant of power to DNR does not mince words. DNR has "charge of all matters affecting the mineral resources of the state."[47] Similarly DNR is designated the lead state agency on such issues, and all other agencies "shall coordinate all regulatory matters concerning mineral resource exploration, development, mining, and associated activities" with DNR.[48] But not even the otherwise dominant DNR is vested with power to close an area to large-scale mining; that decision is for the legislature alone.[49]

The legislature has also granted home rule boroughs authority to engage in land use planning and regulation.[50] And, as the intervenors point out, boroughs do regulate mining operations.[51] The City and Borough of Juneau Code regulates the mining industry for the purpose of "minimizing the

---

[46] *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1122 (Alaska 1978) (emphasis added).

[47] AS 27.05.010(a).

[48] AS 27.05.010(b).

[49] AS 38.05.300.

[50] AS 29.35.180(b).

[51] Intervenor's Mot. for Summ. J. 37-39.

environmental and surface effects of mining projects for which an exploration notice or mining permit is required."[52] In the same vein, the Fairbanks North Star Borough imposes "conditions for mining use licenses to ensure that mining activities do not result in the creation of hazards or undue degradation of borough land."[53] And the North Slope Borough created a Resource Development District to preclude activities which will "permanently and seriously impair the capacity of the surrounding ecosystem to support the plants and animals upon which Borough residents depend for subsistence."[54] How, wonder the intervenors, have such ordinances survived for decades if the state is the sole arbiter of mineral development?

The mere existence of other local government permitting regimes for large scale mineral extraction does not establish that the SOS Initiative is legitimate. Certain tailoring of extractive processes to local standards is not obviously incompatible with the state scheme. For example, local regulation of dust, noise, and transportation routes do not clash with DNR's authority insofar as it fills in unregulated interstices of state law.

To the extent that broad regulatory assertions of authority in home rule borough codes theoretically conflict with DNR authority but lie dormant, the state has scant incentive to challenge them. But the code provisions intervenors reference are not analogous to the asserted equal and concurrent

---

[52] Juneau Code of Ordinances § 49.65.110(a).

[53] Fairbanks North Star Borough Code § 25.20.100(B).

[54] North Slope Borough Code § 19.40.080(A)(1).

gatekeeper natural resources regulation at bar here. The SOS Initiative goes further than simply tailoring mining processes under the borough's land use authority; it instead forecloses the state's due exercise of its natural resources authority. And L&PB would derive this co-equal power not from state mineral development statutes but from a generic statutory grant of land use planning authority to local governments. The specific and comprehensive statutory designation of natural resources management authority to the state may not be overridden by a general grant of land use planning authority to home rule boroughs.

The state suggests that even if the SOS Initiative is not an outright ban on large scale mining within the L&PB, it is a *de facto* one. The argument has some force. The initiative campaign likely created in L&PB residents some expectation that the Pebble project could never withstand local scrutiny. It may be unrealistic to expect the five members of the land use planning commission, or the elected assembly members, to be immune from pressures inhering in these expectations. Any local decision green-lighting Pebble would be seen by many as a betrayal of local values. Likewise L&PB decision makers may have an incentive to demand near zero risk, or at least a level of risk lower than might be tolerated by their state and federal counterparts. This tendency towards risk-aversion may be exacerbated by fear of the unknown. To the extent that the L&PB lacks the financial and technical resources to comprehensively evaluate a multi-faceted undertaking as massive in scale and

technically complex as Pebble, a rational response to ensuing unevaluated risks might result in reflexive permit denial.

It is perhaps useful to recall the course of the state's history with its preeminent natural resource development project: the North Slope oilfields and the Alyeska Pipeline. Local concerns in the Arctic predicted that a pipeline would interfere with migratory patterns of the region's massive caribou herd and endanger subsistence harvest. Had any local political entity acted with SOS Initiative-style veto power and denied a permit for the pipeline, the entire course of state history would have been significantly altered. Likewise, Prince William Sound representatives of the local fishing interests could have argued that the risks of an oil spill would be catastrophic to their livelihood. Later events would have shown such a claim to be prescient. But in any case—caribou migration, maritime oil spill, or as here, watershed pollution—the successful assertion of self-proclaimed local veto authority has the potential to supersede state-guided natural resources development with no input from the political community as a whole. It is precisely this level of veto authority that the SOS Initiative confers upon the L&PB's land use planning commission, by a majority of 37 votes.

Is such a power shift consistent with the implied intent of the legislature as inferred from the statutes through which the legislature has expressly apportioned natural resources management power to DNR? The most pertinent statute reads:

§ 27.05.010. Department responsible for mineral resources

(a) The department has charge of all matters affecting exploration, development, and mining of the mineral resources of the state . . . and the administration of the laws with respect to all kinds of mining.

(b) The department is the lead agency for all matters relating to the exploration, development, and management of mining. . . . Before a state agency takes action that may directly or indirectly affect the exploration, development, or management of mineral resources, the agency shall consult with and draw upon the mining expertise of the department.

If the SOS Initiative holds, DNR is no longer in charge; it will be forced to share power with a local government that, unlike all state agencies, may ignore DNR's rulings. Under such a scheme, DNR no longer functions as the sole gatekeeper from whom "[a]ll land . . . may be obtained by permit or lease for the purpose of exploration."[55] And to the extent that the SOS Initiative may be seen as potentially closing the entire L&PB watershed to large scale mineral development, it would violate the clear purpose of AS 38.05.300, through which the legislature jealously guarded that prerogative to itself.

This is not a case about the wisdom of developing the Pebble Mine in a salmon-bearing watershed, and the court obviously takes no position on the matter. Rather, it is a case about who is to decide whether Pebble poses unacceptable risks. By so definitively conferring gatekeeper permitting authority upon DNR, the legislature impliedly prohibited local governments from assuming a concurrent role. Such a grant of power to local governments would Balkanize state natural resource policy. "The constitution's authors did

---

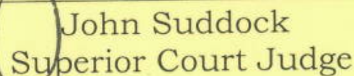
[55] AS 38.05.135(a)

not intend to create [of home rule boroughs] city states with mini-legislature[s]."[56] Nor did the legislature so intend when it conferred land use planning authority on home rule boroughs. The SOS Initiative is "so substantially irreconcilable" with state natural resource statutes and the constitutionally based principles informing them that "one cannot be given its substantive effect if the other is to be accorded the weight of law."[57]

V. ORDER

The court finds that state law impliedly prohibits the SOS Initiative, and accordingly enjoins its enforcement. The court grants the motions for summary judgment by the state and PLP consistent with the precepts stated above, and likewise denies the motions for summary judgment of L&PB and the intervenors. The court finds it unnecessary to reach contentions of the parties not here discussed in light of its disposition of the preemption issue.

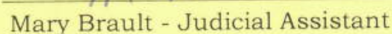
DATED at Anchorage, Alaska this 19th day of March, 2014.



John Suddock
Superior Court Judge

I certify that on 3-19-14
a copy of the above was e-mailed to each of the following at their addresses of record:

Matthew Singer	*Howard Trickey*
Aisha Tinker Bray	*Gary Zipkin*
John Baker	*Ruth Botstein*
Joanne Grace	*Margaret Patton Walsh*
Scott Kendall	*Victoria Clark*
Nancy Wainwright	*Daniel Cheyette*



Mary Brault - Judicial Assistant

[56] *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974) (quotation and citation in original omitted).

[57] *Id.*