

IN THE SUPREME COURT FOR THE STATE OF ALASKA

SEAN PARNELL, LIEUTENANT
GOVERNOR OF ALASKA,

Appellant,

vs.

JOHN H. HOLMAN, JACK G. HOBSON,
and LUKI AKELKOK,

Appellees.

Supreme Court No.: S-12909
Trial Court No. 3DI-07-00056 CI
(Consolidated)

JOHN H. HOLMAN, JACK G.
HOBSON, and LUKI AKELKOK,

Appellants/Cross-Appellees,

vs.

SEAN PARNELL, et al.,

Appellants/Cross-Appellants.

Supreme Court Case Nos.
S-13040/S-13059/S-13060
Trial Court Case No. 4FA-07-02696 CI
(Consolidated)

BRIEF OF AMICUS CURIAE ALASKA STATE LEGISLATURE

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CONSTITUTIONAL PROVISIONS PRINCIPALLY RELIED UPON

ALASKA CONSTITUTION

Article VIII, Section 2

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.

Article VIII, Section 3

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Article VIII, Section 4

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.

Article VIII, Section 11

Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface uses of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress. The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.

Article VIII, Section 12

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. Leases and permits giving the exclusive right of exploration for these minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law. Like leases and permits giving the exclusive right of prospecting by geophysical, geochemical, and similar methods for all minerals may also be authorized by law.

Article XI, Section 1

The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.

Article XI, Section 7

The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to AS 22.05.010. The parties timely appealed from final judgment entered by the Superior Court in Dillingham on October 23, 2007 and from final judgment entered by the Superior Court in Fairbanks on March 12, 2008. All related actions, appeals, and cross-appeals have been consolidated by order of this Court dated April 9, 2008.

ISSUES PRESENTED FOR REVIEW

1. Did the Dillingham Superior Court err when it concluded that initiative 07WATR does not appropriate state resources even though the initiative intrudes on the exclusive power of the Legislature by allocating state assets among competing users?
2. Did the Fairbanks Superior Court rule correctly when it determined that initiative 07WATR violates the constitutional precept that appropriations cannot be made through the initiative process?

STATEMENT OF THE CASE

A. Introduction

The Alaska Legislature files its brief to highlight one issue in this litigation: the prohibition against using the initiative process to appropriate state assets. The Legislature is aware that the Sponsors have now said that they plan to withdraw initiative 07WATR, but it is not clear that they can do so. Even if they are successful, there are overlapping issues with the second initiative involved in this case, 07WTR3. The Legislature files this brief since litigation involving 07WATR may go forward and because there are common questions with 07WTR3.

Article XI, section 7 of the Alaska Constitution expressly prohibits an initiative from making or repealing appropriations, thereby reserving all appropriations decisions to the Legislature. This Court has repeatedly stressed the wisdom and importance of that restriction. Any initiative precluding use of the state's water, land, and mineral assets is an appropriation; 07WATR is, and 07WTR3 may be, just such an appropriation. The Legislature therefore asks that the judgment of the Superior Court in Fairbanks be upheld.

B. Facts and Proceedings Below

The parties' briefs thoroughly present the procedural posture and underlying facts of the case, and the Legislature will not repeat those assertions at length here. Most importantly, the Legislature does not take any position on the wisdom or merits of either of the initiatives in question. Rather, the Legislature participates only to emphasize the constitutional restriction on the right to initiative, a restriction that gives the Legislature, and *only* the Legislature, the power to allocate state assets.

In response to preliminary planning for a copper, molybdenum, and gold mine located near Lake Iliamna in southwest Alaska,¹ known as the Pebble Mine, several initiatives were prepared, including 07WATR and 07WTR3.² The stated purpose of the initiatives is to protect clean water,³ but there is ample evidence that the Sponsors' intent is to stop the mine.⁴

After the initiative applications were filed, the Lieutenant Governor requested a pre-certification opinion from the Attorney General on each initiative,⁵ and the Lieutenant Governor adopted each of the Attorney General's two recommendations.⁶ First, the Attorney General concluded that 07WATR could not be certified because it eliminates all large-scale metallic mineral mines (LSMMs) and is therefore an unconstitutional appropriation.⁷ The initiative's sponsors sued in the Dillingham Superior Court, challenging the Lieutenant Governor's decision not to certify the initiative.⁸ On cross-motions for summary judgment, the Superior Court found that the initiative would indeed ban all such mining, but it nonetheless held that 07WATR was not

¹ Exc. 74, 505-06.

² Exc. 1-4; Exc. 25, 28.

³ Exc. 1, 25.

⁴ Exc. 450, 488-513.

⁵ The steps in the initiative process are set out at AS 15.45.101, *et seq.*

⁶ Exc. 172-73; Exc. 1107-08.

⁷ Exc. 5-22.

⁸ *Holman, et al. v. Parnell*, Case No. 3DI-07-56CI (Supr. Ct. Alaska 2007).

an appropriation precluded by article XI, section 7 and ordered the initiative certified.⁹

Second, the Attorney General concluded that 07WTR3 would not ban mining and therefore is a permissible regulation that does not violate the restriction against making appropriations of state assets by initiative.¹⁰ In so concluding, the Attorney General construed the initiative as barring any “adverse affect” on human health or salmon, not any effects whatsoever as the plain language of the initiative states. If the plain language were taken at face value, this initiative too would ban all large-scale metallic mineral mining.¹¹ The Lieutenant Governor certified the initiative based on the Attorney General’s opinion.

Following the Dillingham Superior Court’s decision to certify 07WATR and the Lieutenant Governor’s decision to certify 07WATR3, various parties with an interest in mining sued in the Fairbanks Superior Court, and others intervened therein. The claims were consolidated¹² and, on cross-motions for summary judgment, the Fairbanks Superior Court upheld the position of the Lieutenant Governor: 07WATR bans LSMMs and

⁹ Exc. 49-66.

¹⁰ Exc. 29-46.

¹¹ *Id.* The Legislature agrees with the Attorney General’s reading of 07WTR3. If, however, 07WTR3 were construed in such a way that it precludes large-scale metallic mining, then it too would run afoul of the prohibition against allocating state assets by initiative, and the Legislature would strongly object to its constitutionality.

¹² *Council of Alaska Producers, Association of ANCSA Regional Corporation Presidents/CEOs, Inc., Alaska Federation of Natives, Inc., and Pebble Limited Partnership, action through its General Partner, Pebble Mines Corp. v. Sean Parnell, Lieutenant Governor of the State of Alaska, and the State of Alaska, Division of Elections, John H. Holman, Jack G. Hobson and Luki Akelkok*, Case No. 4FA-07-2696CI (Supr. Ct. Alaska 2007).

therefore is an unconstitutional appropriation by initiative; 07WTR3, as construed to ban only “adverse” impacts on salmon and water, is a regulation that can be adopted by initiative.¹³

Dissatisfied parties appealed each of the Superior Court decisions,¹⁴ and the Supreme Court consolidated the various appeals into this action.

STANDARD OF REVIEW

This Court undertakes *de novo* review of the grant of summary judgment. The meaning of the term “appropriation” is a question of law to which the Court will apply its independent judgment, adopting the rule of law that is most persuasive in light of precedent, reason, and policy.¹⁵ The question of whether a proposed initiative violates any of the subject matter restrictions set out in article XI, section 7 of Alaska’s Constitution is properly reviewed pre-election.¹⁶ The Court will give “careful consideration” to initiatives touching upon the allocation of public assets because the constitutional right of direct legislation is limited by the Alaska Constitution.¹⁷

¹³ Exc. 68-107.

¹⁴ S12909; S13040; S13059; S13060.

¹⁵ *Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989, 991 (Alaska 2004).

¹⁶ *Id.* at 993.

¹⁷ *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422 (Alaska 2006) (rehearing granted February 12, 2008).

ARGUMENT

I. THE LIMIT ON DIRECT LEGISLATION IS AN ESSENTIAL PUBLIC SAFEGUARD.

The delegates who drafted our constitution recognized that limiting the public's right of initiative, or direct legislation, is in the best interests of the state, and this Court has often upheld and expanded the safeguard. Article XI, section 1 of the Alaska Constitution reserves to the people the right to propose and enact laws by means of initiative: "The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum." Section 7 of Article XI, however, limits that right by setting out certain categories of laws that cannot be enacted by initiative, effectively declaring that only the Legislature may act in those areas:

The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. . . ."¹⁸

At issue in this case is the question of whether 07WATR appropriates state assets.¹⁹

In this section of its brief, the Legislature will examine the basis, purpose of, and precedents underpinning current understanding of the appropriation restriction.

Thereafter, it will apply that understanding to 07WATR.

¹⁸ These provisions are codified at AS 15.45.010.

¹⁹ The Legislature's participation in this case is not an expression of any opinion on the wisdom or value of LSMMs. It participates only to highlight the important restriction on the right of initiative dictating that the Legislature alone has the power to appropriate state assets. "The benefits or lack thereof from a policy . . . misconceives the issue. The question is whether this policy may be implemented through *initiative*, rather than through legislative action." *Thomas v. Bailey*, 595 P.2d 1, 8 (Alaska 1979) (emphasis in original).

In his 1975 book about the Constitutional Convention, delegate and author Victor Fischer noted that the Convention discussed the right of initiative and limitations to it “at length in Committee of the Whole,” and he stated that adoption of the right of initiative was

promptly followed by moves to limit [its] use. Many who had voted for [its] inclusion in the constitution now wanted to add restrictions.²⁰

Mr. Fischer went on to explain that restrictions were added because of concerns about use of the initiative affecting “critical” areas, including fiscal legislation:

The limitations upon direct popular legislative authority were a compromise designed to reserve basic authorities to the people while protecting the state against rash, discriminatory, and irresponsible acts.²¹

Starting with *Thomas v. Bailey* in 1979, this Court has adopted Mr. Fischer’s observations as a basis for understanding the initiative power and its restrictions.²² The Court in *Bailey* noted the Constitutional Convention’s “far-ranging and spirited debate” over the initiative process and declared that the limitations must be construed in light of the purpose of the provision.²³ Specifically, the provision was adopted to avoid the bad experiences of other states, in which the initiative process had been used to “enact give-

²⁰ V. Fischer, ALASKA’S CONSTITUTIONAL CONVENTION, 79-80 (1975) (footnotes omitted).

²¹ Fischer, *supra* note 20, at 80-81.

²² *Bailey*, 595 P.2d at 3 n.12, 7; *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1156 (Alaska 1991); *Pullen v. Ulmer*, 923 P.2d 54, 62 (Alaska 1996); *Anchorage Citizens for Taxi Reform*, 151 P.3d at 423. *See also Brooks v. Wright*, 971 P.2d 1025, 1029 (Alaska 1999).

²³ *Bailey*, 595 P.2d at 3 n.12, 4.

away programs, which have an inherent popular appeal, that would endanger the state treasury.”²⁴ Further, the initiative restrictions

represent a recognition . . . that certain particularly sensitive or sophisticated areas of legislation should not be exposed to emotional electoral dialogue and impulsive enactment by the general public. . . . The danger with direct legislation relating to appropriations is that it tempts the voter to prefer his immediate financial welfare at the expense of vital government activities.²⁵

Thus, the Court explained that appropriation decisions “require the reasoned deliberation characteristic of legislative actions.”²⁶

This, then, is the bedrock principle underpinning Alaska’s appropriation restriction on the initiative process: appropriation is a sensitive and sophisticated area of lawmaking that must be undertaken only via the reasoned deliberative process of the Legislature.

This Court has consistently upheld and reiterated the basis for that vital principle. For example, the Court very logically expanded the notion of “assets” to include a municipal electric utility, noting “[t]he prohibition against appropriations by initiative applies to *all* state and municipal assets.”²⁷ Therefore, an initiative directing Anchorage to sell its electric utility for far below market value (\$1.00) was an improper give-away of an asset.²⁸

²⁴ *Id.* at 7.

²⁵ *Bailey*, 595 P.2d at 8 (citation omitted).

²⁶ *Id.*

²⁷ *Alaska Conservative Political Action Committee v. Municipality of Anchorage*, 745 P.2d 936, 938 (Alaska 1987).

²⁸ *ACPAC*, 745 P.2d at 938.

Next, the Court expanded the scope of “appropriation” beyond mere “give-away” programs. In *McAlpine v. University of Alaska*,²⁹ the Court stated:

Outside the context of give-away programs, the more typical appropriation involves committing certain public assets to a particular purpose. The reason for prohibiting appropriations by initiative is to ensure that the legislature and *only* the legislature retains control over the allocation of state assets among competing needs . . . To whatever extent it is desirable for the legislature to have sole responsibility for allocating the use of state money, it is also desirable for the legislature to have the same responsibility for allocating property other than money.³⁰

This statement is an amplification of the bedrock principle articulated in *Brooks* that the sensitive and sophisticated task of appropriating state resources must be undertaken *only* through the reasoned deliberative process of the Legislature. In reaching this conclusion, the Court quoted approvingly a portion of the Massachusetts Constitutional Convention in which a delegate stated that appropriation of specific assets directly by the people would “prevent any real regulation and careful administration of the finances of the State.”³¹

The Court’s holding also recognizes that the allocation of assets among competing needs is itself an appropriation and that

the constitutional prohibition against appropriations by initiative applies to appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply *designate use* of assets.³²

This “designation of use” analysis has proven to be a central theme of subsequent

²⁹ 762 P.2d 81 (Alaska 1988).

³⁰ *McAlpine*, 762 P.2d at 88 (footnote omitted) (emphasis in original).

³¹ *Id.* at 88, n.11.

³² *Id.* at 89 (emphasis added).

decisions. It looks to whether the hands of the Legislature are tied, as opposed to the Legislature retaining discretion to allocate among competing needs. For example, if the voters approved the *McAlpine* initiative,

no further legislative action would be necessary to require the University to transfer property to the community college system, or to specify the amount of property the University must transfer.³³

The only discretion left to the Legislature would be designation of the exact assets to be transferred, and in that situation the Court held that “the initiative designate[s] the use of state assets in a manner that is executable, mandatory, and reasonably definite with no further legislative action,” and it therefore would be an unconstitutional appropriation.³⁴

In short, the Legislature must be left with broad discretion to act upon state assets. If not, the proposed initiative cannot go forward.

The concept of the Legislature’s broad discretion to allocate is the central point of *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*.³⁵ There, an initiative was proposed to change a Fairbanks ordinance that automatically allocated 70% of revenue from the bed tax to the Convention and Visitors Bureau unless the city council voted to change that amount. The proposed initiative would have revoked the automatic 70% allocation and placed 100% of the revenue in a general fund, and the city council could then have allocated the funds in any way it chose, including to the Convention and

³³ *Id.* at 91 (footnote omitted).

³⁴ *Id.* at 91.

³⁵ 818 P.2d 1153 (Alaska 1991).

Visitors Bureau.³⁶

In analyzing whether this was an appropriation, the Court began by noting that initiatives touching on the allocation of public assets must be given “careful consideration” because the Alaska Constitution limits the right of direct legislation.³⁷ The Court defined this “careful consideration” standard by stating that this is the standard it construed the appropriation restriction “broadly, so that the intent of our constitutional framers in prohibiting appropriations by initiative would be fully met.”³⁸ This adoption of a “broad construction” standard is significant, as it requires a much more rigorous evaluation than is given to other aspects of initiative review, and it therefore again highlights the importance of exclusive legislative control over the public fisc.

After announcing this exacting standard, the Court reiterated its *McAlpine* holdings by declaring that the legislative body’s retention of control over the appropriation process is the central consideration and by stating that the prohibition against appropriation by initiative applies to initiatives that “simply designate[] the use of assets.”³⁹ The *FCVB* Court held, therefore, that to invade the legislative body’s exclusive authority, all an initiative has to do is designate the use of a state asset.

The initiative in *FCVB*, however, did not allocate assets or direct their use. Rather, by placing 100% of the bed tax receipts in the hands of the legislative body, it

³⁶ *FCVB*, 818 P.2d at 1154-55.

³⁷ *FCVB*, 818 P.2d at 1155.

³⁸ *Id.* at 1156.

³⁹ *Id.*

broadened rather than reduced the council’s discretion to spend money for the benefit of the City and thus was not an unconstitutional allocation.⁴⁰ Once again, the theme of legislative control is paramount.

That theme was at the heart of this Court’s decision in *Pullen v. Ulmer*, in which the Court discussed the standards from earlier cases and then examined whether the initiative at issue would “significantly reduce the legislature’s and Board of Fisheries’ control of and discretion over allocation decisions.”⁴¹ The Court noted its emphasis in the *Bailey* decision on the dangers associated with direct legislation touching on appropriations, quoting the decision’s language that declared allocating assets to be a particularly sensitive and sophisticated subject of legislation that should not be exposed to emotional electoral dialogue and impulsive enactment by the general public and stating that appropriations decisions require the reasoned deliberation characteristic of legislative actions.⁴² And, once again, the Court repeated that the reason for the restriction on the right of initiative is to ensure that *only* the Legislature determines allocations among competing needs. It also added special emphasis to the rule that an initiative touches on appropriation if it “*simply designate[s] the use of the assets.*”⁴³

The Court distilled two “core objectives” from its prior decisions:

First, the prohibition was meant to prevent an electoral majority from bestowing state assets on itself. Second, the prohibition was designed to

⁴⁰ *Id.* at 1158.

⁴¹ *Pullen*, 923 P.2d at 63.

⁴² *Id.* at 61.

⁴³ *Id.* at 62 (emphasis in original).

preserve to the legislature the power to make decisions concerning the allocation of state assets.⁴⁴

Thus, once again, the Court adopted the position that an allocation decision *is* an appropriation of assets.

Against this backdrop, the Court examined a proposed initiative creating a salmon harvest priority in favor of personal users, sport users, and subsistence fisheries before allocating any of the harvestable surplus to commercial fisheries.⁴⁵ The Court found that the initiative was a give-away, as it was designed to appeal to the self-interests of these priority groups in that they were specifically targeted to receive state assets, namely wild salmon. Additionally, because these groups could be competing users in times of shortage, the groups' priority position impinged on the Legislature's discretion to make allocation decisions among the competing needs of users.⁴⁶ For both of these reasons, the initiative was an allocation.

The thrust of this decision is very clear. First, if users set up a preference for themselves then it's a give-away; second, if users are at all in competition for a state resource, then the Legislature must retain a broad range of freedom to allocate the asset

⁴⁴ *Id.* at 63.

⁴⁵ *Id.* at 63-64.

⁴⁶ *Id.* at 64. *See also Brooks*, 971 P.2d at 1033. There, the Court described its *Pullen* decision as based on the view that the initiative gave preferential treatment to certain fisheries over others. Such preferential treatment is an appropriation that cannot be made by initiative. Justice Carpeneti recently described the *Pullen* initiative as favoring non-commercial over commercial users of salmon. *Anchorage Citizens for Taxi Reform*, 151 P.3d at 426 (Carpeneti, J., dissenting).

among those users.

The issue of legislative discretion over assets next arose in *Alaska Action Center, Inc. v. Municipality of Anchorage*.⁴⁷ There, the Court struck down a portion of an initiative that would have preserved a particular parcel of municipal land as a park. The initiative implicated the second “core objective” underlying the ban on appropriating by initiative, namely, preserving to the Legislature the power to make decisions allocating state assets and ensuring “that the legislature, and *only* the legislature,” retains control over the allocation of state assets among competing needs.⁴⁸

In *Alaska Action Center*, however, the Court expanded the scope of the rule in an important manner. It said that allocation is implicated even when the designated state assets will not be transferred, will remain in public ownership, and will be managed by the same body.⁴⁹ Therefore, even though the proposed initiative merely shifted municipal land from one public use to another, it was an improper use of the initiative power because it encroached on the legislative branch’s exclusive control over the allocation of public assets among competing needs.⁵⁰ The Court in particular reemphasized that

our cases establish that the prohibition against appropriating land by initiative in this manner is meant to retain control of the appropriation process *in the legislative body*.⁵¹

⁴⁷ 84 P.3d 989 (Alaska 2004).

⁴⁸ *Alaska Action Center*, 84 P.3d at 994.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (emphasis in original).

In *Staudenmaier v. Municipality of Anchorage*,⁵² the Court struck down a proposed initiative that would have directed the Municipality to sell certain utilities for fair market value. The fair market value requirement took the matter out of the realm of a give-away,⁵³ but the Court again explained “the term ‘appropriation’ covers not only give-aways, but also allocations that deprive the legislature of its discretion to designate the use of public assets.”⁵⁴ The appropriation process is exclusively the Legislature’s, and

[g]enerally speaking, an initiative is unobjectionable so long as it grants the legislature sufficient discretion in actually executing the initiative’s purpose. But where an initiative *controls* the use of public assets such that the voters essentially usurp the legislature’s resource allocation role, it runs afoul of article XI, section 7.⁵⁵

Once again the Court focused squarely on the need for the Legislature to retain broad discretion and control over state assets. Any encroachment on those areas is an appropriation that cannot be undertaken by initiative. The forced sale of the utilities was just such an appropriative action.⁵⁶

These precedents establish the central importance of the initiative restriction and teach that preservation of legislative authority is paramount. From the time of the Constitutional Convention, the clear thrust of thinking has been that appropriation is a

⁵² 139 P.3d 1259 (Alaska 2006).

⁵³ *Staudenmaier*, 139 P.3d at 1262.

⁵⁴ *Id.* (footnote omitted).

⁵⁵ *Id.* at 1263.

⁵⁶ *Id.*

critically important function of government, necessary for the health and success of the state. For the good of the citizens, the process therefore must be undertaken with thoughtful deliberation by the Legislature and insulated from the vagaries of the initiative process.

II. THE SUPREME COURT IS BROADLY PROTECTIVE OF LEGISLATIVE DISCRETION.

The foregoing discussion confirms that this Court takes a broad view of the Constitution's restriction on the initiative power, construing it in accord with its purpose of protecting the public.⁵⁷ Not only has the Court explicitly stated its expansive approach to defining unconstitutional appropriations, but the arc of its decisions over time clearly illustrates that the Court resoundingly protects the Legislature's exclusive right to appropriate state assets.⁵⁸

In *Bailey*, the Court could have narrowly defined "appropriation" as applying only to money, but it reasoned that protection of the public fisc required finding that the

⁵⁷ *State v. Trust the People*, 113 P.3d 613, 625 (Alaska 2005).

⁵⁸ *FCVB*, 818 P.2d at 1156; *Staudenmaier*, 139 P.3d at 1265 (Matthews, J. concurring). A broad construction of the limits on the initiative power recognizes that the people of Alaska adopted the restrictions for important reasons and that it is their right to have the Constitution upheld as they ratified it. *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 168-69 (Alaska 1991). The issue also raises the notion of separation of powers: just as certainly as the Constitution's framers and the citizens of the state elected to divide governmental powers among the legislative, judicial and executive branches, so too did they grant aspects of the legislative power *solely* to the Legislature and not to the people. That separation of powers decision is coequal to the separation among the three branches of government, and it must be enforced with no less rigor. *But see Brooks*, 971 P.2d at 1027, in which the court states that it narrowly interprets the Constitution's subject matter restrictions.

restriction applies to land as well.⁵⁹ In *Alaska Conservative Political Action Committee*, the initiative sponsors argued that only land and money were subject to the restriction, but the Court broadened the analysis to hold that *all* state assets are subject to the ban on appropriation by initiative.⁶⁰ In *McAlpine*, the Court could have adopted a narrow view of appropriations and held that an initiative could allocate state assets so long as it was not giving them away, but instead it recognized that the reason for prohibiting appropriation by initiative is to ensure that *only* the Legislature can allocate assets among competing needs,⁶¹ a rule that it has consistently applied ever since. In *Pullen*, a restrictive interpretation would have found that salmon are not a state asset, but instead the Court expanded its definition of what falls within the appropriations analysis.⁶² In *Alaska Action Center*, the Court could have found no appropriation when the asset would remain in public ownership and under management of the same legislative body, but instead it recognized that the initiative limited legislative discretion and therefore was an unconstitutional appropriation.⁶³ The same is true of *Staudenmaier*, where the Court held that an initiative cannot mandate sale of a public utility—even for fair market value—

⁵⁹ *Bailey*, 595 P.2d at 6, 8-9.

⁶⁰ *ACPAC*, 745 P.2d at 937-38.

⁶¹ *McAlpine*, 762 P.2d at 88.

⁶² *Pullen*, 923 P.2d at 60-61.

⁶³ *Alaska Action Center*, 84 P.3d at 994-95.

because doing so would usurp the Legislature’s resource allocation role.⁶⁴

In short, at every opportunity this Court has broadly and strongly supported the intent of the framers to remove resource allocation issues from the initiative process and to place responsibility squarely in the hands of the Legislature, where it will conduct reasoned deliberation insulated from emotional public dialogue and impulsive enactment. The Legislature urges the Court to continue in that vein in the instant case because 07WATR clearly and unequivocally appropriates state assets.

III. 07WATR ALLOCATES PUBLIC RESOURCES AND THEREFORE IS AN UNCONSTITUTIONAL USE OF THE INITIATIVE PROCESS.

A. Water, Land, and Minerals are Public Resources that Cannot Be Allocated By Initiative.

This Court has held that land is a state asset subject to appropriation analysis, but it has never explicitly held that water or minerals are within that category. It should do so now.

The first step in deciding if an initiative makes an appropriation is to determine whether it deals with a public asset.⁶⁵ 07WATR explicitly touches on use of public water and land, and it implicitly impacts minerals by precluding their extraction. The Court has stated that land is a public asset,⁶⁶ and it has twice suggested that minerals are a state

⁶⁴ *Staudenmaier*, 139 P.3d at 1263. Indeed, in his concurrence Justice Matthews made note of the Court’s “broad interpretation of the term ‘appropriations’.” *Id.* at 1265 (Matthews, J., concurring).

⁶⁵ *Anchorage Citizens for Taxi Reform*, 151 P.3d at 422.

⁶⁶ *See Bailey*, 595 P.2d 1,8; *Alaska Action Center*, 84 P.3d at 93.

asset in the initiative context.⁶⁷ The Court's expansive view of what constitutes a public asset also encompasses money,⁶⁸ municipal utilities,⁶⁹ personal property,⁷⁰ and salmon.⁷¹

With respect to water and minerals, clear guidance is found in the Court's conclusion in *Pullen* that salmon are a public asset. In reaching its decision, the *Pullen* Court considered the fact that salmon are a significant element in the state's economy, as Alaska "benefits from the harvest of salmon through collection of taxes imposed on business enterprises engaged in the fishery and license fees imposed on sport, personal use, and commercial fees."⁷² Like salmon, water use and mineral extraction unquestionably are enormously important to the economic health of Alaska, a fact that requires their recognition as public assets.

⁶⁷ *Anchorage Citizens for Taxi Reform*, 151 P.3d at 424 ("Unlike . . . a permit to extract mineral resources, a taxicab permit does not authorize the holder to take a public resource."); *Pullen*, 923 P.2d at 65 (observing that "hydrocarbons and minerals found on or under state owned lands . . . are assets of the state in a sense of the term that readily can be understood") (Compton, J., concurring).

⁶⁸ *Anchorage Citizens for Taxi Reform*, 151 P.3d at 423 n.14 (citing *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977)).

⁶⁹ *ACPAC*, 745 P.2d at 937-8; *Staudenmaier*, 139 P.3d at 1260-61, 1263.

⁷⁰ *McAlpine*, 762 P.2d at 88-89.

⁷¹ *Pullen*, 923 P.2d at 61-62.

⁷² *Pullen*, 923 P.2d at 59. See also *Anchorage Citizens for Taxi Reform*, 151 P.3d at 424 ("Alaska's economy and revenue base depend on the health of the salmon fisheries."). Justice Carpeneti has referred to this as a "revenue-raising" standard. *Id.* at 427 (Carpeneti, J., dissenting).

The *Pullen* Court also looked to the inclusion of fish in the Constitution’s Natural Resources Article (article VIII, sections 2, 3, and 4).⁷³ It found that the state has a trust responsibility to manage fish, wildlife and water resources for the benefit of the public, which helped to compel the conclusion that fish are public assets in the initiative context.⁷⁴ Clearly, since these same provisions mention water, it too is subject to the same analysis—and to the same conclusion. Likewise, the Natural Resource Article addresses the state’s mineral interests in article VIII, sections 11 and 12, so minerals too must be held to be state assets subject to the ban against appropriation by initiative.

In short, water and minerals meet all tests for state assets. The Legislature asks the Court to formally make these valuable and limited public resources subject to article XI, section 7 analysis.

B. The Initiative Allocates Public Resources Among Competing Users.

The Court’s Article XI, section 7 jurisprudence establishes that an unconstitutional appropriation exists when an initiative allocates state assets among competing users. 07WATR does just that: it stops LSMMS by allocating resources away from mining and to users of salmon and water.

The Court first declared that allocating assets *is* an appropriation in *McAlpine*:

Outside the context of give-away programs, the more typical appropriation involves committing certain public assets to a particular purpose [and] [t]he reason for prohibiting appropriations by initiative is to ensure that the

⁷³ *Pullen*, 923 P.2d at 60.

⁷⁴ *Id.* at 59-60.

legislature and *only* the legislature, retains control over allocation of state assets among competing needs.⁷⁵

Since then, the Court has strongly and consistently reiterated that rule, with a particular emphasis on the Legislature's retention of control over the allocation process.⁷⁶

07WATR strips the Legislature of control by allocating water, land, and minerals among competing users.⁷⁷ The Superior Court in Dillingham and the Superior Court in Fairbanks both found that the initiative would stop new LSMMs in their tracks.⁷⁸ Their analysis is correct. The uncontroverted facts before both courts show that the Sponsors' intent is to stop Pebble, and the effect of the initiative does just that. With respect to intent, public statements, letters to the editor, quotations, media articles, and web pages all confirm that stopping Pebble is the goal.⁷⁹ With respect to effect, 07WATR would accomplish the Sponsors' plan. The initiative bars release of *any* quantity of listed substances into water used by humans or salmon and from storing or disposing of mine

⁷⁵ *McAlpine*, 762 P.2d at 88 (emphasis in original).

⁷⁶ *See FVCB*, 818 P.2d at 1156; *Alaska Action Center*, 84 P.3d at 994; *Pullen*, 923 P.2d at 62-63; *Staudenmeier*, 139 P.3d at 1262; *Anchorage Citizens for Taxi Reform*, 151 P.3d at 424.

⁷⁷ As noted previously, the Legislature agrees with the interpretation of 07WTR3 adopted by the Fairbanks Superior Court. If, however, the language of that initiative is construed so as to preclude mining, then 07WTR3 is also an unconstitutional appropriation for the same reasons as 07WATR.

⁷⁸ Exc. 57 (new mines will be banned for the foreseeable future if the initiative becomes law); Exc. 87-88 (the initiative effectively prohibits allocation of water to mining interests).

⁷⁹ Exc. 488-513, 838-887; http://renewableresourcescoalition.org/action_center.htm.

wastes that may generate *any* quantity of listed substances.⁸⁰ The State’s Mining Director testified that this would “effectively prohibit new large scale metallic mineral mines in Alaska. It would make new mining impossible.”⁸¹ This occurs because LSMM’s use of water and land necessarily releases some quantities—in regulated amounts considered safe—of the substances that 07WATR bans completely.⁸² Quite simply, if LSMMs cannot release *any* quantity of these substances whatsoever, then they cannot operate. 07WATR therefore accomplishes the Sponsors’ stated goal: it terminates Pebble and other new LSMMs.

Thus, state resources now available for use in mining will no longer be allocated to that purpose. Instead, water, land, and mineral assets will be reserved for the use and benefit of salmon and one constituent group of people. Whether or not this may be a desirable result is not at issue; the only question is whether this action can be taken by initiative. It cannot. Precluding one group from using state assets while reserving those assets for other groups is a clear allocation of state resources among competing users.⁸³ That task can be undertaken only by the Legislature.

To conclude otherwise would fly in the face of this Court’s long line of precedents. These cases require that *only* the Legislature retain control over allocating

⁸⁰ Exc. 1, 2.

⁸¹ Exc. 486 ¶ 9.

⁸² Exc. 484-85, ¶¶ 4-6.

⁸³ As Judge Blankenship of the Fairbanks Superior Court held, “[i]nitiative law in Alaska requires that the legislature retain discretion to allocate public assets such as water to all uses, including large-scale metallic mining, and not just to salmon and downstream communities.” Exc. 88.

assets among competing needs. Approving the initiative also would expose a vital state revenue issue to the special danger of “rash, discriminatory, and irresponsible acts.”⁸⁴ It would endanger the state treasury by preventing the Legislature from opening a resource for the purpose of generating revenue and would limit the Legislature’s ability to diversify the state economy through use of the public’s mineral resources in large-scale metallic mineral mining.⁸⁵ These sensitive and sophisticated areas of legislation “should not be exposed to emotional electoral dialogue and impulsive enactment by the general public;”⁸⁶ instead they require the reasoned deliberation of the Legislature.

Additionally, this allocation among competing users sets aside a specific amount of property (all water, land, and minerals that would be allocated to LSMMs) for a specific purpose or object (to benefit salmon and drinking water users) in a manner that is executable, mandatory and reasonably definite with no further legislative action (the Legislature will have no power whatsoever to allocate any water, land, or minerals to a currently-acceptable user). This is one description the Court has employed to explain when an initiative is an unconstitutional appropriation,⁸⁷ and 07WATR fails on each point.

⁸⁴ *Bailey*, 595 P.2d at 7; *ACPAC*, 745 P.2d at 938; *FCVB*, 818 P.2d at 1156; *Pullen*, 923 P.2d at 63; *Anchorage Citizens for Taxi Reform*, 151 P.3d at 423.

⁸⁵ The record indicates that LSMMs may have a \$10 billion or more benefit to the state. Exc. 24. This is unquestionably a significant amount. See *ACPAC* 745 P.2d at 938 (\$32.6 million utility is a significant asset).

⁸⁶ *Bailey*, 595 P.2d at 8.

⁸⁷ See e.g. *Staudenmeier*, 139 P.3d at 1262.

The Sponsors argue that the Legislature has discretion over what to do with the public resources touched on by 07WATR, but their argument does not tell the full story. *Pullen* is instructive, as that case addressed an initiative that would have allocated 5% of the salmon harvest to specified users in times of shortage. In other words, the Legislature would have retained full discretion over 95% of the statewide harvest, and its discretion *might* be curtailed *only* in certain geographic regions with respect to certain salmon species *if* there were insufficient stock.⁸⁸ Even though the Legislature would retain full control over the vast majority of the harvest, the Court found that this initiative impinged on the Legislature’s “discretion to make allocation decisions among the competing needs of users.”⁸⁹ 07WATR is identical: even if the Legislature could be said to retain some discretion over the public resources in question, the initiative ties the Legislature’s hands with respect to allocation of water, land, and minerals for use in LSMs, and it therefore is an appropriation.

Indeed, the lesson of *Pullen* is that the mere favoring of one group over another *is* an appropriation. In *Brooks* the Court explained the *Pullen* decision by saying that it

⁸⁸ *Pullen*, 923 P.2d at 63-64.

⁸⁹ *Id.* at 64. *See also Anchorage Citizens for Taxi Reform*, 151 P.3d at 424 (explaining that the initiative in *Pullen* “would have given subsistence, personal use, and sport fisheries priority over commercial fisheries to harvest salmon” and thus rendered the initiative an appropriation because it reduced government’s discretion over fisheries).

viewed the preferential treatment of certain fisheries over others as an appropriation and so removed the initiative from the ballot.⁹⁰

McAlpine reaches the same result. There, the Court ruled that an initiative could be used for the general purpose of establishing a community college system, but it could not designate an amount of resources for that purpose.⁹¹ In other words, it was acceptable for an initiative to direct that some resources be expended for a community college system, but assigning assets was an improper allocation even though the Legislature retained discretion to select articles and parcels of property. The Court's reasoning is applicable here too, since even if the Legislature could be said to retain some discretion, 07WATR directs that an identifiable amount of state resources (that which would be used by LSMMs) be allocated to users of salmon and drinking water. It also directs how much water, land, and minerals can be allocated to LSMMs: none. As in *McAlpine*, that is an unconstitutional invasion of the Legislature's exclusive responsibility.

In short, 07WATR is a clear case of allocating state assets among competing users. It violates the rule that control of the appropriation process must remain in the legislative body and it usurps the Legislature's resource allocation role. Thus, it runs afoul of article XI, section 7.⁹²

⁹⁰ *Brooks*, 971 P.2d at 1033.

⁹¹ *McAlpine*, 762 P.2d at 90-91.

⁹² *See Staudenmeier*, 139 P.3d at 1263.

C. The Initiative Changes the Use of Public Resources.

This Court cautions against initiatives that change the function of state assets because a change in function does nothing more than circumvent the prohibition against appropriation by initiative.⁹³ Currently, state water, land, and mineral resources are available for use by properly-permitted LSMMs. If 07WATR becomes law, however, that use will be eliminated, effectively changing the use of those assets from mining to salmon and drinking water. The Fairbanks Superior Court correctly held that this “would foil[] the legislature’s role as the sole appropriator under the Alaska Constitution.”⁹⁴

In short, 07WATR changes the use of public resources by declaring that assets currently available for mining can only be used for salmon and drinking water. The Court has held that a change in use is an appropriation, and appropriations can only be undertaken by the Legislature, not by initiative.

D. The Initiative Gives Away Public Resources.

This Court’s decision in *Pullen* establishes that 07WATR gives away public resources.⁹⁵ The starting point for analysis is the Fairbanks Superior Court’s decision. Judge Blankenship got it right in concluding that 07WATR appeals to the self-interest of users of salmon and drinking water:

⁹³ *McAlpine*, 762 P.2d at 89.

⁹⁴ Exc. 88.

⁹⁵ This issue was not considered by the Superior Courts, but this Court may reach a decision on different grounds than those advanced by the Superior Court and even on grounds not raised by the parties below. *FVCB*, 818 P.2d at 1156 (citing *Sisters of Providence v. Municipality of Anchorage*, 672 P.2d 446, 448 n. 2 (Alaska 1979)).

07WATR reduces the government's discretion over allocation of water use and appeals to the self-interest of users of salmon and people currently using drinking water from sources that might be used by large-scale mining. Initiative 07WATR allocates water to the use of salmon and people using the same water source for drinking water and effectively prohibits an allocation to large-scale metallic mining interests.⁹⁶

The discussion in the foregoing sections shows that his conclusion is fully supported by the facts and law.

The Judge used this declaration as a basis for concluding that the initiative unconstitutionally reduces the Legislature's discretion. However, under *Pullen*, the declaration and the facts underpinning it establish that 07WATR *also* meets the test for a give-away.

In *Pullen*, the initiative at issue would have created a salmon harvest priority in favor of personal users, sport users, and subsistence fishers before allocating any of the harvestable surplus to commercial users. The Court held that this was a give-away of state assets, as it was designed to appeal to the self-interests of these priority groups in that they were specifically targeted to receive state assets in the circumstance of a resource shortage.⁹⁷

07WATR is indistinguishable. The initiative unquestionably appeals to the self-interest of a segment of the public: it directly favors users of salmon and drinking water over mining interests by allocating state water, land, and minerals to the former groups. Water and land that is now available for mining could no longer be used for that purpose

⁹⁶ Exc. 87.

⁹⁷ *Pullen*, 923 P.2d at 63.

because users of salmon and drinking water would preferentially have access to it. Additionally, the state's minerals are effectively given to users of salmon and drinking water and taken from mining interests—by precluding LSMMs, 07WATR requires that the state's minerals remain in the ground, unavailable to miners. This water, land and mineral preference favoring some groups over others appeals directly to the self-interests of those who use salmon and drinking water, and the initiative specifically targets those groups to receive a benefit.

Staudenmaier is in accord. There the Court noted that the *Pullen* initiative was a give-away because it “required the state to give sport, personal, and subsistence fishers priority over commercial fishers.”⁹⁸ 07WATR requires the state to give users of salmon and drinking water priority over mining interests. The conclusion here can be no different than that in *Pullen*: these interest groups are bestowing the beneficial use of public resources upon themselves. This is a classic give-away of state assets and is therefore unconstitutional when done by initiative.

E. The Sponsors' Position Is Inconsistent With Precedent.

The Sponsors single out one phrase from the Court's appropriations decisions and declare it to be the sole test for whether an initiative is an unconstitutional

⁹⁸ *Staudenmeier*, 139 P.3d at 1262 n.9. See also *Anchorage Citizens for Taxi Reform*, 151 P.3d at 424.

appropriation.⁹⁹ 07WATR does in fact meet that purported test,¹⁰⁰ but the Sponsors' position is wrong from the outset because it severely and improperly narrows this Court's appropriations jurisprudence and purports to identify a bright-line "test" where none exists.

The thrust of the Sponsors' argument is that an initiative is an appropriation *only* if it "would set aside a specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action."¹⁰¹ They then assert that in 07WATR no "specific" state assets are "set aside" for a "particular use or purpose,"¹⁰² and they downplay the Court's clear holdings about legislative discretion and control. Their position is wrong for several reasons.

First, the Court has never adopted a single definition of "appropriation" as it applies to the initiative process. The word was defined in a 1977 decision,¹⁰³ but the Court later stated that that definition was unique to the specific provision in question and

⁹⁹ Brief of Appellants John H. Holman, Jack G. Hobson, and Luki Akelkok (Fairbanks Appeal), April 25, 2008, pp. 14-27 (hereinafter "Sponsors' Brief").

¹⁰⁰ 07WATR sets aside a specific amount of property (all water, land, and minerals that would be used by LSMMS) for a specific purpose or object (to benefit salmon and drinking water users) in a manner that is executable, mandatory and reasonably definite with no further legislative action (the Legislature will be powerless to allocate any land, water, or minerals to a currently-acceptable user).

¹⁰¹ Sponsors' Brief at 16, (quoting *FCVB*, 818 P.2d at 1157).

¹⁰² Sponsors' Brief at 17, *et seq.*

¹⁰³ *Thomas*, 569 P.2d at 796.

was not a general definition of appropriations.¹⁰⁴ The Court subsequently has never adopted a specific definition of “appropriation” in the initiative context, and, indeed, it has suggested that the language quoted by the Sponsors is just one of many examples or interpretation aids:

[T]he point of the quoted language [Sponsors’ “test”] is that where the legislature retains a broad range of freedom to make allocation decisions, an appropriation will not be found.¹⁰⁵

In short, the Court has used broad language in crafting aids with which to evaluate initiatives. The Sponsors’ “test” is no more than one in a number of these.

Second, the Sponsors’ position ignores the Court’s requirement that the restriction be “construed in light of the purpose of the provision” in a manner that is “especially sensitive to the policy concerns embodied” in the restriction.¹⁰⁶ In turn, the Court has said that the purpose of the constitutional limitation is to protect the public: “[t]he people for their own protection have provided that the initiative shall not be employed with respect to certain matters.”¹⁰⁷ The key to protecting the public is the bedrock principle of appropriations analysis: appropriation is a sensitive and sophisticated area of lawmaking to be undertaken only via the reasoned deliberative process of the Legislature. In other words, and as repeatedly articulated in the Court’s decisions, the correct point of inquiry is whether the Legislature retains the power to allocate state assets among competing

¹⁰⁴ *Bailey*, 595 P.2d at 5, n.21.

¹⁰⁵ *Pullen*, 923 P.2d at 64, n.15.

¹⁰⁶ *Bailey*, 595 P.2d at 4

¹⁰⁷ *Trust the People*, 113 P.3d at 625 (footnotes omitted).

users, not whether an initiative passes muster after analysis under a narrow and restrictive definition of the term “appropriation.”

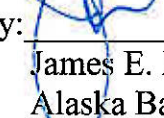
The Sponsors’ position is contrary to the broad interpretation given to initiative restrictions. As discussed above, this Court has recognized the protective purpose of the restriction and framed its jurisprudence accordingly: the rule that assets may not be appropriated by initiative is broadly construed. The Sponsors’ position goes in the opposite direction, creating a rigid and narrow definition of “appropriation” that largely ignores the central theme of initiative analysis, namely that *only* the Legislature can appropriate public resources. Their position is contrary to the intent of the Constitution’s framers and to this Court’s decisions.

CONCLUSION

The Legislature, and *only* the Legislature, has the authority to allocate state assets. 07WATR usurps that power by giving the state’s water, land, and minerals to salmon and drinking water users and excluding LSMMs. In order to protect the public and to ensure that all appropriation decisions are made in an informed, deliberative manner, the Legislature asks the Court to uphold the decision of the Fairbanks Superior Court and to reverse that of the Dillingham Superior Court.

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DATED: 5/23/08

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CERTIFICATE OF SERVICE

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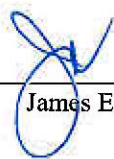
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