IN THE SUPREME COURT OF THE STATE OF ALASKA

BYRON MALLOTT, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and the STATE OF ALASKA, DIVISION OF ELECTIONS, Appellants, v. STAND FOR SALMON, Appellee.	Supreme Court No. S-16862 TRIAL COURT No. 3AN-17-09183CI

BRIEF OF *AMICI CURIAE* ALASKA OIL AND GAS ASSOCIATION AND RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC.

A final judgment of the Superior Court
Third Judicial District at Anchorage

The Honorable Judge Mark Rindner

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I. INTRODUCTION

Amici curiae Alaska Oil and Gas Association (AOGA) and Resource Development Council for Alaska, Inc. (RDC) (collectively, the "Associations") respectfully submit this brief in support of the Appellants (collectively, the "State Parties"). At issue in this case is the allocation of the uses of the State of Alaska's (State) rivers, streams, creeks, lakes, ponds, sloughs, floodplains, and riparian areas. The proponents ("Stand for Salmon," or "SFS") of the initiative bill (17FSH2) want those waters and lands to be used for the conservation of salmon and salmon habitat. Unfortunately, 17FSH2 unavoidably pits SFS's interests against the interests of those in pursuit of another laudable public goal: the development of the State's natural resources. 17FSH2 places a thumb on the scale in favor of conservation by removing the State's authority to permit certain development uses—namely, large public and private projects that permanently alter waters and lands. The Associations represent some of the development interests that would be negatively affected by 17FSH2, should it become law.

Spurred on through a rushed injunction proceeding initiated by SFS, the superior court erred in rejecting the State Parties' lawful determination that 17FSH2 unconstitutionally allocates public assets to conservation uses at the expense of development uses. The court's error stems primarily from its misconstruction of 17FSH2's plain language, misapplication of established law, and disregard of unrebutted evidence demonstrating that certain development uses are, in fact, prohibited by 17FSH2. Ultimately, the superior court overlooked 17FSH2's prohibition of certain development

uses of public assets in favor of the use of those same assets for conservation, which is the root of 17FSH2's unconstitutionality.

For its part, SFS went to great lengths below to artfully interpret its proposed bill to suggest that under it the State may permit precisely what SFS has publicly said it is attempting to prohibit: "Pebble mine. Susitna-Watana dam. Chuitna coal project."[1] SFS's interpretations should be taken with a grain of salt. A core purpose of 17FSH2 is—as SFS has publicly affirmed—to *prohibit* certain uses of the State's lands and waters, such as those specifically identified by SFS as unsuited to its view of "what kind of development is compatible with salmon health."[2] Because an express prohibition of the specific projects called out by SFS would be obviously unconstitutional, SFS attempts to accomplish its purpose by outlawing them (and many other development uses as an incidental consequence) under the pretext of "regulation." However, the law is clear that initiative-based regulatory programs may not have the effect of allocating public assets, as 17FSH2 undeniably does.

Under the Alaska's Constitution, the State legislature—not special interest proponents of initiative-based legislation—must be the arbiter of the policy-laden decisions regarding the allocation of the State's natural resources among competing uses. The Associations respectfully request the Court to reverse the decision of the superior court and reinstate the State Parties' lawful determination.

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[1] [Exc. 000185-187].

[2] [Exc. 000186].

II. THE ASSOCIATIONS

AOGA is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefits of all Alaskans. AOGA represents the majority of companies that are exploring, developing, producing, refining, transporting, or marketing oil and gas on the North Slope, in the Cook Inlet, and in the offshore areas of Alaska. AOGA's members have a long history of prudent and environmentally responsible oil and gas exploration and development in Alaska. AOGA's members are proud of their history of partnership with the State and its citizens, endeavoring to provide revenue, economic opportunities, and infrastructure to the Arctic region.

RDC is an Alaskan, non-profit, membership-funded organization composed of individuals and companies from Alaska's oil and gas, mining, timber, tourism, and fisheries industries. RDC's membership includes Alaska Native Corporations, local communities, organized labor, and industry support firms. RDC's purpose is to encourage a strong, diversified private sector in Alaska and expand the State's economic base through the responsible development of its natural resources.

III. ARGUMENT

A. Initiatives that allocate uses of the State's natural resources are unconstitutional.

The Alaska Constitution establishes "the policy of the State to encourage . . . the development of its resources by making them available for maximum use consistent with the public interest."[3] This balance between "maximum use" and the "public interest" is

[3] Alaska Const. art. VIII, § 1.

to be made by "[t]he legislature," which "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] The Constitution strictly prohibits initiatives that "make or repeal appropriations" of "public assets," such as land, waters, fish, and wildlife.[5] Accordingly, when, as here, an initiative addresses a public asset, the Court must determine "whether the initiative would appropriate that asset."[6]

In this context, this Court construes the term "appropriation" broadly.[7] An initiative violates the Constitution's anti-appropriation clause when it "controls the use of public assets such that the voters essentially usurp the legislature's resource allocation role."[8] This Court has been careful "to preserve legislative discretion by ensur[ing] that the legislature, and *only* the legislature, retains control over the allocation of State assets

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[4] Alaska Const. art. VIII, § 2.

[5] Alaska Const. art. XI, § 7; *Pebble Ltd. P'ship et rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1073-74 (Alaska 2009) (waters of the state are a "public asset" that cannot be constitutionally appropriated by initiative); *Pullen v. Ulmer*, 923 P.2d 54, 61 (Alaska 1996) (salmon are state assets). All parties, and the superior court, agreed that waters and fish, and associated lands, are public assets.

[6] *Lieutenant Governor of State v. Alaska Fisheries Conservation All., Inc.*, 363 P.3d 105, 108 (Alaska 2015) (internal quotation marks omitted) (quoting *Hughes v. Treadwell*, 341 P.3d 1121, 1125 (Alaska 2015)).

[7] *Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d at 108.

[8] *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1263 (Alaska 2006); *see Alaska Fisheries Conservation All., Inc.*, 363 P.3d at 109 (an initiative that places "a restriction on the legislature's ability to allocate state assets among competing needs" is a "prohibited appropriation").

among competing needs."[9] An unlawful allocation occurs "not only when [an initiative] designates public assets for some particular use, but also when it allocates those assets *away from* a particular group."[10] When evaluating constitutional resource-allocation challenges, the "primary question . . . is whether the initiative narrows the legislature's range of freedom to make allocation decisions in a manner sufficient to render the initiative an appropriation. To answer this question, [the Court] must interpret the meaning of the initiative."[11]

B. 17FSH2 pits conservation uses against development uses.

As an initial matter of fundamental importance, the superior court misconstrued the basic purpose and function of 17FSH2. Specifically, in reversing the State's determination, the court reasoned that 17FSH2 "does not explicitly favor any particular use of anadromous fish habitat between [sic] recreational fishing, kayaking, commercial fishing, hatcheries, mining, pipeline, or dams; it only concerns itself with the condition of the water."[12] The court's constrained interpretation of 17FSH2 is flawed for at least two reasons.

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[9] *Alaska Fisheries Conservation All., Inc.*, 363 P.3d at 108 (internal quotation marks and citation omitted; brackets and emphasis in original).

[10] *All. of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128, 1138 (Alaska 2012) (emphasis in original).

[11] *Pebble*, 215 P.3d at 1075.

[12] [Exc. 000219].

First, 17FSH2 does not "only concern itself with the condition of the water."[13] Rather, 17FSH2 governs "anadromous fish habitat," which is expansively defined as "a naturally occurring permanent or intermittent seasonal water body, and the bed beneath, including all sloughs, backwaters, portions of the floodplain covered by the mean annual flood, and adjacent riparian areas, that contribute directly or indirectly, to the spawning, rearing, migration, or overwintering of anadromous fish."[14] Accordingly, 17FSH2 addresses all forms of water within the State as well as the lands beneath those waters, adjacent riparian lands, and floodplains. From the standpoint of public and private development, this encompasses virtually all usable lands in the State of Alaska.

Second, the purpose of 17FSH2 is to address (and to allocate) the use of "anadromous fish habitat." Specifically, 17FSH2 implicates conservation use, on one hand, and development use, on the other hand. This is evident in 17FSH2's policy statement, which makes clear that the purposes of the bill are to "protect" anadromous fish habitat, "ensure sustainable fisheries for current and future generations," and "protect the natural fishery resources of Alaska."[15] The bill accomplishes those conservation objectives by purporting to "ensure that *development* activities comply with enforceable standards that protect wild salmon, other anadromous fish species, and important fish and

[13] *Id.*

[14] 17FSH2 § 3 (new AS 16.05.871(f)).

[15] 17FSH2 § 1.

wildlife habitat."[16] Development activities that do not meet those standards cannot be permitted and, therefore, may not "use" State assets. SFS's public statements corroborate the conservation versus development premise of 17FSH2. Specifically, SFS asserts that 17FSH2 is "a solution that puts everyday Alaskans in control of the state's destiny . . . giving the Alaska Department of Fish and Game clear standards about what kind of development is compatible with salmon health."[17]

17FSH2 thus purports to "regulate" *development* to ensure the *conservation* of anadromous fish habitat and fish species. In general, an initiative that regulates development and conservation uses is lawful, so long as that regulation does not allocate public assets (*i.e.*, anadromous fish habitat) among the uses being regulated. However, as described below, 17FSH2 crosses the line from permissible regulation to unconstitutional allocation because the "standards" it purports to establish *remove the State's existing authority* to permit certain development uses of public lands and waters. The superior court mistakenly overlooked the obvious: 17FSH2 plainly curbs the use of "anadromous fish habitat" for development purposes in favor of using that same habitat for conservation.[18]

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[16] 17FSH2 § 1(c) (emphasis added).

[17] [Exc. 000186].

[18] The conservation of natural resources is unquestionably a "use." Indeed, the U.S. Supreme Court has held that litigants may establish standing based upon their conservation interests in public resources. *See Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

C. 17FSH2 would unconstitutionally prevent the State from allowing certain development uses of public assets.

The superior court misinterpreted 17FSH2 by holding that it gives the legislature discretion to define ambiguous terms in a way that could allow all types of development use.[19] The court was wrong in at least two ways. *First*, 17FSH2 expressly limits the legislature's discretion in deciding what uses to allow and what uses not to allow. *Second*, the court misapplied the law by incorrectly reasoning that the legislature's ability to amend an initiative to define supposedly ambiguous terms can save the constitutionality of the initiative.

1. 17FSH2 removes the State's existing authority to allow development uses that have certain impacts on anadromous fish habitat.

17FSH2 mandates that a permit "may not be granted" for an activity that falls into any one of six specifically enumerated impact categories.[20] The phrase "may not be granted" unconditionally forbids the Commissioner of the Alaska Department of Fish and Game (Commissioner) from granting a permit in these instances because this phrase, as used in 17FSH2, is a mandatory directive.[21] If a permit cannot be granted, then the

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[19] [Exc. 000215] ("it is enough that the legislature retains enough discretion such that it *could* implement 17FSH2 in a manner allowing industrial activity" (emphasis in original)).

[20] 17FSH2 § 7 (new AS 16.05.887(a)).

[21] *See, e.g.*, *Key Med. Supply, Inc. v. Burwell*, 764 F.3d 955, 958 (8th Cir. 2014) (noting use of "may not" and "shall not" to "identify prohibited actions"); *In re Brandt*, 437 B.R. 294, 298 (Bankr. M.D. Tenn. 2010) ("When used in conjunction with 'not,' however, 'may' is not deemed to connote discretion, rather 'may not' most often is construed as if it were 'shall not.'"); *Stringer v. Realty Unlimited, Inc.*, 97 S.W.3d 446, 448 (Ky. 2002) ("Courts that have construed legislative use of the phrase 'may not' have consistently held that the phrase is mandatory and not permissive or discretionary.");

activity cannot lawfully occur and is prohibited. The following three examples illustrate the mandatory restrictions established in 17FSH2.

First, the Commissioner cannot permit an activity that will "cause substantial damage to anadromous fish habitat."[22] An activity causes "substantial damage" if, despite the application of mitigation measures,[23] the anadromous fish habitat impacted by the activity "will be adversely affected *such that* it will not likely recover or be restored."[24] The superior court found that this phrase conferred wide discretion on the State because the phrase "adversely affect" is supposedly "undefined."[25] The court misread 17FSH2's plain language. The phrase "such that"—as opposed to "such as"—expressly limits the term "adversely affected" to mean only what follows "such that."[26] "Adversely affect" is not, therefore, "undefined." The court's error on this point is

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Ryan v. Montgomery, 240 N.W.2d 236, 238 (Mich. 1976) ("The phrase 'may not be recounted' means Shall not be recounted.").

[22] 17FSH2 § 7 (new AS 16.05.887(a)(1)).

[23] The application of mitigation measures in the context of an activity that will permanently destroy or alter anadromous fish habitat is irrelevant under 17FSH2 because the bill mandates that mitigation measures "may not offset the activity's adverse effects by restoring, establishing, enhancing, or preserving another water body, other portions of the same water body, or land." 17FSH2 § 7 (new AS 16.05.887(c)). Thus, any mitigation must restore, enhance, or preserve the specific water body or land being impacted.

[24] 17FSH2 § 7 (new AS 16.05.887(a)(1), (2), (6)) (emphasis added).

[25] [Exc. 000214-215].

[26] *See State Dep't of Highways v. Green*, 586 P.2d 595, 602 (Alaska 1978) (applying rule of statutory construction favoring specific language over general language).

critical because the fundamental rationale of the court's holding is that this case is controlled by *Pebble*, which involved an initiative bill that contained the open-ended phrase "adverse effect."[27]

In contrast to *Pebble*, the key question here is not whether an activity will "adversely affect" the public asset but instead whether the activity will affect the asset such that it "*will not likely recover or be restored* within a reasonable period to a level that sustains the water body's, or a portion of the water body's, anadromous fish, other fish, and wildlife that depend on the health and productivity of that anadromous fish habitat."[28] The terms "recover" and "restore" plainly do *not* include activities that will *permanently* convert anadromous fish habitat to other uses and thereby prevent the habitat from ever being used for conservation purposes. The Commissioner is required to deny permits for proposed projects that have these permanent impacts because these projects, by definition, will not "recover" or "restore" the impacted anadromous fish habitat to any degree and therefore will unavoidably cause "substantial damage" under 17FSH2.[29] Any finding by the Commissioner to the contrary would be unlawful.[30]

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[27] *See Pebble*, 215 P.3d at 1075-77.

[28] 17FSH2 § 5 (new AS 16.05.877(b)) (emphasis added).

[29] "Recover": "to get back"; "to bring back to normal position or condition" (https://www.merriam-webster.com/dictionary/recover); "Restore": "to put or bring back into existence or use"; "to bring back to or put back into a former or original state" (https://www.merriam-webster.com/dictionary/restore).

[30] *See, e.g., Binder v. Fairbanks Historical Pres. Found.*, 880 P.2d 117, 120-22 (Alaska 1994) (administrative order unlawful because it was "inconsistent with a reasonable reading of the statute's language"); *Huston v. Coho Elec.*, 923 P.2d 818

Development uses that have these types of permanent impacts on anadromous fish habitat are therefore *prohibited* by 17FSH2.

Second, 17FSH2 forbids the Commissioner from permitting an activity that "fail[s] to ensure the proper protection of fish and wildlife."[31] Under 17FSH2, the Commissioner "shall ensure the proper protection of anadromous fish habitat *by maintaining*" eight enumerated habitat elements.[32] "Maintain" is not defined by 17FSH2, but its plain meaning is "to keep in an existing state"[33] or to "[c]ause or enable (a condition or situation) to continue."[34] Therefore, to receive a permit, an activity must "maintain"—*i.e.*, continue the existing state of—the eight habitat elements listed in 17FSH2, such as "instream flows," "natural and seasonal flow regimes," "safe, timely and efficient upstream and downstream passage," and "riparian areas."[35]

Activities that eliminate or irreparably change the existing status of any of those identified elements plainly do not "maintain" them. For example, an activity that reduces or eliminates "instream flows" does not maintain those flows; an activity that changes or

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(Alaska 1996) (decision of Workers' Compensation Board conflicted with plain statutory language and was unlawful). Additionally, SFS confirmed below that the obligation to "restore" habitat, as stated in 17FSH2, is *mandatory*. [Exc. 000196.]

[31] 17FSH2 § 7 (new AS 16.05.887(a)(2)).

[32] 17FSH2 § 2 (new AS 16.05.867(b)) (emphasis added).

[33] https://www.merriam-webster.com/dictionary/maintain?src=search-dict-hed (emphasis added).

[34] https://en.oxforddictionaries.com/definition/maintain.

[35] 17FSH2 § 2 (new AS 16.05.867(b)).

eliminates "natural and seasonal flow regimes" does not maintain those flow regimes; an activity that eliminates the ability for fish to pass upstream does not maintain "safe, timely and efficient upstream and downstream passage"; and an activity that eliminates "riparian areas that support adjacent fish and wildlife habitat" does not maintain those areas.[36] Any activity that has any of these effects (and many major development projects do) cannot be permitted under 17FSH2.[37] Any determination by the Commissioner to the contrary—*e.g.*, that a proposed project that unavoidably and permanently eliminates instream flows nevertheless "maintains" those flows—would be an unlawful application of plain statutory terms.[38]

Third, 17FSH2 removes the Commissioner's authority to permit an activity that "dewater[s] and relocate[s] a stream or river if the relocation does not provide for fish passage."[39] Under their plain meaning, the terms "dewater" and "relocate" limit this condition to activities that "remove water from" anadromous fish habitat and "move [it] to a new location."[40] This impact cannot be offset by preserving another stream in another location (as is typically done under existing permitting programs) because 17FSH2 requires mitigation to recover or restore *the specific stream, or section of a*

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[36] *See* 17FSH2 § 2 (new AS 16.05.867(b)(2), (3), (6)).

[37] 17FSH2 § 7 (new AS 16.05.887(a)).

[38] *See supra* note 30.

[39] 17FSH2 § 7 (new AS 16.05.887(a)(6)).

[40] https://www.merriam-webster.com/dictionary/dewater; https://www.merriam-webster.com/dictionary/relocate.

stream, that is impacted.[41] Activities that dewater and relocate a stream or river, and that do not correspondingly provide for fish passage, cannot be permitted by the Commissioner and are therefore *prohibited* under 17FSH2.

SFS argued below that the mandatory provisions described above do not render 17FSH2 unconstitutional because "[t]he standards are not prescriptive" and the Commissioner "has the discretion [in Sec. 16.05.867(c)] to adopt regulations to interpret what the broad standards mean to guide specific types of project permitting."[42] That rationale may have sufficed for the single ambiguous term ("adverse effect") at issue in *Pebble*, but it does not save 17FSH2 here.

Although the Commissioner may issue regulations to reasonably interpret ambiguous statutory terms, he may not issue a regulation that "differs substantively from the clear language of the statute."[43] For example, the Commissioner cannot interpret terms like "recover" and "restore" to apply to situations in which literally no on-site restoration or recovery of the impacted waters or lands will occur. The State is constrained to define those specific terms (should it choose to do so) in a manner that is consistent with their plain meaning. The plain language of 17FSH2 itself mandates that

[41] 17FSH2 § 7 (AS 16.05.887(c)).

[42] [Exc. 000198].

[43] *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1132 (Alaska 2017) (internal quotation marks and citation omitted); *see also Grunert v. State*, 109 P.3d 924, 936 (Alaska 2005) (invalidating regulation that conflicted with Limited Entry Act's definition of "fishery").

any regulations or administrative actions must be "consistent with" 17FSH2.[44] In any event, SFS's argument that the Commissioner may issue regulations to effectively allow development uses is dubious given its publicly stated opposition to the very types of projects it contends the Commissioner may allow via regulation.[45]

In sum, the superior court incorrectly concluded that, under 17FSH2, "the legislature retains enough discretion such that it *could* implement 17FSH2 in a manner allowing industrial activity."[46] As demonstrated above, 17FSH2 *mandates* that the Commissioner cannot grant permits for certain "industrial activities," such as those that permanently block salmon-bearing streams, reduce or eliminate instream flows, relocate streams without preserving fish passage, or otherwise affect the habitat in such a manner that it can never be restored to support anadromous fish. Many large projects—with important countervailing public benefits to the State and its citizens—unavoidably have these impacts and would therefore be prohibited by 17FSH2. By removing the State's authority to permit projects with permanent and unavoidable impacts to salmon habitat,

[44] 17FSH2 § 2 (new AS 16.05.867(c)).

[45] [Exc. 000186]; *see Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192-93 (Alaska 2007) (statute must be construed "in light of its purpose").

[46] [Exc. 000215] (emphasis in original). Additionally, as addressed below, this sentence underscores the court's mistaken view of the legislature's role. The legislature does not "implement" 17FSH2. 17FSH2, if passed, will automatically become law and will be implemented by the Alaska Department of Fish and Game.

17FSH2 places "a restriction on the legislature's ability to allocate state assets among competing needs" and, therefore, is a "prohibited appropriation."[47]

2. The superior court's holding is premised on a mistaken reading of the law governing the initiative process.

The superior court based its holding, in substantial part, on the rationale that future legislative action could save the constitutionality of 17FSH2:

> What the impact of the initiative will be *necessarily will depend on what the legislature does in determining* what constitutes an adverse effect, what risk to fish population is acceptable, what a reasonable time frame to restore fish habitat is, and thereafter on what mitigation measures are required as part of the permitting process. Because the impact of the initiative can only be determined *after legislative action occurs*, the court finds, as a matter of law, that the initiative is not an allocation and is thus constitutionally permissible.[48]

The court apparently believed that, if 17FSH2 passes, the legislature can simply define or redefine the problematic terms and, thereby, fix the constitutional shortcomings of 17FSH2. The court fundamentally misapplied the law.

The constitutionality of an initiative measure must be determined *by the court* based upon the *form in which it is proposed*. When an initiative is passed, "the initiated measure *is enacted*."[49] "An initiated law becomes effective ninety days after certification, is not subject to vote, and may not be repealed by the legislature within two

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[47] *Alaska Fisheries Conservation All., Inc.*, 363 P.3d at 109.

[48] [Exc. 000221] (emphasis added).

[49] Alaska Const. art. XI, § 6 (emphasis added).

years of its effective date."[50] Consequently, there is nothing for the legislature to "do" if and when the bill passes, and, if that occurs, 17FSH2 will be enacted in the currently proposed form without any further "legislative action." Accordingly, if approved by the voters, 17FSH2 will automatically become the law (within 90 days of certification), the legislature may do nothing for decades, and 17FSH2 will be the law that entire time despite its unconstitutionality.

In sum, the Court "must interpret the meaning of the initiative" to determine its constitutionality, not defer the question to hypothetical future situations in which the initiative's language may or may not be amended in a manner that makes unconstitutional terms constitutional.[51] Were it otherwise, no initiative measure could ever be judged unconstitutional because the court could merely hold that the problematic terms will be fixed at some later date by the legislature.[52] The superior court's rationale is contrary to the law and should not be affirmed.[53]

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[50] *Id.*

[51] *Pebble*, 215 P.3d at 1075.

[52] *Cf.* [Exc. 000216] (court mistakenly concluding that "all of these clauses have an undefined term requiring legislative interpretation before they can be implemented and enforced"); *see McAlpine v. Univ. of Alaska*, 762 P.2d 81, 91 n.14 (Alaska 1988) ("[T]he fact that the legislature can amend an initiative appropriating state assets does not cause the initiative to make less of an appropriation, or to remove it from the prohibitions of article XI, section 7 of the Alaska Constitution.").

[53] Alternatively, if the superior court meant to refer to future "regulatory action" by the Commissioner (instead of "legislative action"), it would still have been mistaken for the same reasons that SFS's regulatory implementation argument is mistaken. *See supra* Section III.C.1. The superior court never addressed the limits on the ability of a state agency to interpret a statute through implementing regulations.

D. 17FSH2 will prohibit certain development uses.

In the proceedings below, the court was presented with three *unrebutted* affidavits and numerous exhibits demonstrating that the Commissioner would be unable to permit certain development uses under 17FSH2.[54] These affidavits identified specific projects and activities, described their effects in detail, and showed how they could not be authorized under 17FSH2 because they would plainly fall within one or more of the six categories for which permits "may not be granted." Indeed, as demonstrated in those affidavits, the three projects publicly targeted by SFS—the Susitna-Watana Dam, the Chuitna Coal Project, and the Pebble Mine—could not be permitted under 17FSH2 (as intended by SFS). Those projects would permanently convert anadromous fish habitat to development uses, permanently change instream flows and seasonal flow patterns, and permanently dewater and relocate streams, thereby meeting numerous conditions that remove the Commissioner's authority to grant a permit under 17FSH2.[55]

Notwithstanding the record below, the superior court inexplicably found that "no party has presented any competent evidence about what the effects of 17FSH2 will be, even if it passes."[56] However, regardless of the ample unrebutted evidence provided below, the court was required to "interpret the meaning of the initiative" even if no such evidence was presented.[57] The superior court did not do so. Instead, the court

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[54] *See* [Exc. 000132-147]; [Exc. 000114-118]; [Exc. 000119-131].

[55] [Exc. 000147]; [Exc. 000116]; [Exc. 000121, 126, 130-131].

[56] [Exc. 000215].

[57] *Pebble*, 215 P.3d at 1075.

erroneously demanded an undefined evidentiary threshold to demonstrate the future effects of the initiative and, absent that, punted its duty to construe the plain language of the initiative to a hypothetical future "action" by the legislature that may never occur. As demonstrated in Section III.C above, any rational interpretation of 17FSH2 must conclude that certain development uses (*e.g.*, large projects that permanently eliminate anadromous fish habitat) will not and cannot be permitted. No "evidence" is required to reach that conclusion—it is evident from the plain language of the initiative.

Numerous development uses, such as mining, hydroelectric, oil and gas, transportation, and water use, will be prohibited by 17FSH2. Any project that converts anadromous fish habitat into a development use cannot be permitted because permanently converted habitat plainly cannot be "recovered" or "restored" to, or "maintained" as, anadromous fish habitat within any period of time under any standard. Many large projects unavoidably have these impacts but are nonetheless permitted under existing state and federal regulatory programs that provide government authorities with the discretion to balance various public benefits and uses. One of the primary reasons these projects are permitted under such programs is that permanent effects are allowed to be offset by *offsite* mitigation. By contrast, under 17FSH2, mitigation measures "may *not* offset the activity's adverse effects by restoring, establishing, enhancing, or preserving *another water body, other portions of the same water body, or land*."[58] In other words, the only mitigation allowed under 17FSH2 is that which restores, enhances, or preserves

[58] 17FSH2 § 7 (new AS 16.05.887(c)) (emphases added).

the *same habitat* that is impacted. Obviously, a water body or land that is permanently and unavoidably impacted will not be restored, enhanced, or preserved.

The Associations respectfully provide the following illustrative examples of development uses that either would have been prohibited under the terms of 17FSH2 (had it been law at the time) or will be prohibited under the terms of 17FSH2 (should it become law). Again, the unlawfulness of 17FSH2 is evident from its plain language and the superior court's decision should be reversed on that basis alone. The Associations provide these examples to further show how 17FSH2, as written, unconstitutionally prohibits development uses.[59]

Trans Alaska Pipeline System (TAPS). TAPS would not have been permitted had 17FSH2 been the law at the time it was constructed. TAPS caused permanent impacts to "anadromous fish habitat" (as broadly defined by 17FSH2) "from pump stations, river crossings, mainline refrigeration units, material sites, the workpad, and access roads, as well as the pipeline itself."[60] TAPS crosses 80 major rivers and numerous smaller streams, and runs through (and permanently impacts) many riparian areas and river valleys. Some of the impacts from TAPS include "alteration of localized surface water

[59] Almost all significant mines would be prohibited under 17FSH2. We do not describe any mining examples below because the applicability of 17FSH2 to mines is addressed in detail in the Council for Alaska Producers' amicus brief and in the affidavits contained in the record.

[60] *See* U.S. Department of the Interior, Bureau of Land Management, *Final Environmental Impact Statement, Renewal of the Federal Grant for the Trans-Alaska Pipeline System Right-of-Way*, BLM/AK/PT-03/005+2880+990, http://tapseis.anl.gov/documents/eis/index.cfm, at 4.2-1 (Nov. 2002).

drainage and flood patterns," "alteration of river channels," "changes to erosion patterns," "bank scouring," "highly modified" river embankments, "stream migrations," and "impact to the near-shore marine environment."[61] TAPS is permanent, and many of its impacts are consequently permanent—the impacted areas will be forever in a developed state. Recovery or restoration of the impacted areas cannot occur during TAPS' life and, accordingly, TAPS caused "substantial damage," as that term is defined by 17FSH2, to anadromous fish habitat and could not have been lawfully permitted by the Commissioner had 17FSH2 been the law at the time.

Alaska LNG. For similar reasons, the Alaska LNG project cannot be permitted under 17FSH2. The Alaska LNG project will construct a new pipeline running from Alaska's North Slope to Nikiski. It will include the construction of gas treatment plant in Prudhoe Bay and a liquefaction facility and marine terminal in Cook Inlet.[62] Both of these facilities will permanently impact and convert anadromous fish habitat into the intended development uses. Additionally, 5,350 acres of wetlands—many of which are within "riparian areas" (as referenced in 17FSH2's definition of "anadromous fish habitat") or "contribute" to spawning, rearing, migration, or overwintering of anadromous fish under 17FSH2—will be permanently converted to industrial or open land by construction of the Alaska LNG project.[63] Because these impacts will be

[61] *Id*.

[62] *See* http://alaska-lng.com/.

[63] Alaska LNG, *Docket No. CP17-___-000 Resource Report No. 2 Water Use and Quality Public*, Document No. USAI-PE-SRREG-00-000002-000, http://alaska-

permanent, there will be neither "recovery" nor "restoration" of the impacted habitat, nor will the elements of the impacted habitat be "maintained" to "ensure the proper protection of anadromous fish habitat."

Bradley Lake Hydroelectric Project. The Bradley Lake hydroelectric project has a capacity to provide 120 megawatts of power to the City of Anchorage. The project consists of a 125-foot-high concrete-faced, rock-filled dam structure, three diversion dams (Battle Creek, Middle Fork Bradley River, and Upper Nuka River), a 3.5-mile-long power tunnel and vertical shaft, generating plant, substations, and 20 miles of transmission line.[64] The project permanently blocks rivers, diverts water, changes flow patterns, and impacts riparian habitat. Because the "anadromous fish habitat" permanently impacted by the project will not be "recovered" or "restored" under any rational interpretation of those terms, the project could not have been permitted under 17FSH2.

Ambler Access Road. This transportation project will involve the construction of a 211-mile road and associated facilities to connect the Dalton Highway to the Ambler Mining District.[65] All wetlands occurring within the road footprint will be permanently

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lng.com/regulatory-process/ferc-application-exhibits/resource-reports/, at 2-181 (Apr. 14, 2017).

[64] *See* Alaska Energy Authority, *Project Fact Sheet: Bradley Lake Hydroelectric Project*, http://www.akenergyauthority.org/Content/Programs/AEEE/PDF%20files/8BProgramFactSheets.pdf (July 20, 2015).

[65] U.S. Department of the Interior, Bureau of Land Management, *Ambler Road Environmental Impact Statement, Fact Sheet - Alaska*, at 1 (Nov. 21, 2017 release date),

filled or used as materials sites.[66] These wetlands belong to five riverine wetland types and are associated with major rivers and small streams, such as the Kobuk and Reed rivers, both of which support anadromous fish. Because these wetlands are "riparian areas" included within "anadromous fish habitat," and because they will be permanently and unavoidably converted for the construction of the road, they will not be "recovered" or "restored." Accordingly, the Ambler Access Road will cause "substantial damage" and could not be permitted under 17FSH2.

Prudhoe Bay Operations. The ongoing operations at the Prudhoe Bay Unit (the largest producing oil field in North America) must, among other things, have access to substantial water sources in order to maintain drilling and other production operations. Many of the required water withdrawals are from waters included within 17FSH2's broad definition of "anadromous fish habitat." Because of the ongoing need for these water withdrawals, the "instream flows" and "natural and seasonal flow regimes" of the affected waters are not, and cannot be, "maintained," as that term is used in 17FSH2. If these waters cannot be maintained, then the Commissioner cannot find that the activities "ensure the proper protection of anadromous fish habitat," and no permit can be issued.

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https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=111130.

[66] ABR, Inc., *Assessment of Potential Changes in Wetland and Riverine Functions for the Proposed Ambler Mining District Industrial Access Project in Gates of the Arctic National Park, Alaska*, at 39 (Jan. 2017), ftp://ftp.ambleraccess.org/Reports/Project_Field_Studies/2017/NPS_ABR_AMDIAP-GAAR_Wetland_Functions_Jan2017.pdf.

IV. CONCLUSION

Stand for Salmon intends for 17FSH2 to prevent large public and private projects, and that is precisely what it will do should the initiative become law. However, the State's allocation of natural resources among development uses and conservation uses must be determined by the legislature, not by initiative proponents. 17FSH2 constitutes an unlawful appropriation of State assets by allocating the use of those assets to the conservation of fish and fish habitat at the expense of using those same assets for development. AOGA and RDC therefore respectfully request that this Court reverse the superior court's decision and reinstate the State Parties' lawful determination.

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Respectfully submitted,

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