IN THE SUPREME COURT OF THE STATE OF ALASKA

Byron Mallott, Lieutenant Governor of the State of Alaska, and the Alaska Division of Elections,	)	
Appellants,	)	
v.	)	Supreme Court No.: **S-16862**
Stand for Salmon,	)	
Appellee.	)	

Trial Court Case No.: 3AN-17-09183CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE MARK RINDNER, PRESIDING

BRIEF OF STATE APPELLANTS

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ALASKA CONSTITUTION

Art. VIII, § 1: Statement of Policy

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

Art. XI, § 1: Initiative and Referendum

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

Art. XI, § 2: Application

An initiative or referendum is proposed by an application containing the bill to be initiated or the act to be referred. The application shall be signed by not less than one hundred qualified voters as sponsors, and shall be filed with the lieutenant governor. If he finds it in proper form he shall so certify. Denial of certification shall be subject to judicial review.

Art. XI, § 3: Petition

After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters who are equal in number to at least ten percent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district, it may be filed with the lieutenant governor.

Art. XI, § 4: Initiative Election

An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

Art. XI, § 6: Enactment

If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty days after certification. Additional procedures for the initiative and referendum may be prescribed by law.

Art. XI, § 7: Restrictions

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.

ALASKA STATUTES

AS § 15.45.010: Provision and scope for use of the initiative

The law-making powers assigned to the legislature may be exercised by the people through the initiative. However, an initiative may not be proposed to dedicate revenue, to make or repeal appropriations, to create courts, to define the jurisdiction of courts or prescribe their rules, or to enact local or special legislation.

AS § 15.45.040: Form of proposed bill

The proposed bill shall be in the following form:

(1) the bill shall be confined to one subject;

(2) the subject of the bill shall be expressed in the title;

(3) the enacting clause of the bill shall be: "Be it enacted by the People of the State of Alaska;"

(4) the bill may not include subjects restricted by AS 15.45.010.

AS § 15.45.070: Review of application for certification

Within 60 calendar days after the date the application is received, the lieutenant governor shall review the application and shall either certify it or notify the initiative committee of the grounds for denial.

AS § 15.45.080: Bases of denial of certification

The lieutenant governor shall deny certification upon determining in writing that

(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form;

(2) the application is not substantially in the required form; or

(3) there is an insufficient number of qualified sponsors.

AS § 15.45.090: Preparation of petition

(a) If the application is certified, the lieutenant governor shall prepare a sufficient number of sequentially numbered petitions to allow full circulation throughout the state. Each petition must contain

(1) a copy of the proposed bill;

(2) an impartial summary of the subject matter of the bill;

(3) a statement of minimum costs to the state associated with certification of the initiative application and review of the initiative petition, excluding legal costs to the state and the costs to the state of any challenge to the validity of the petition;

(4) an estimate of the cost to the state of implementing the proposed law;

(5) the statement of warning prescribed in AS 15.45.100;

(6) sufficient space for the printed name, a numerical identifier, the signature, the date of signature, and the address of each person signing the petition; and

(7) other specifications prescribed by the lieutenant governor to ensure proper handling and control.

(b) Upon request of the initiative committee, the lieutenant governor shall report to the committee the number of persons who voted in the preceding general election.

AS 16.05.851: Hatchery required

If a fishway over a dam or obstruction is considered impracticable by the commissioner because of cost, the owner of the dam or obstruction, in order to compensate for the loss resulting from the dam or obstruction shall, at the owner's option

(1) pay a lump sum acceptable to the commissioner to the state fish and game fund;

(2) convey to the state a site of a size satisfactory to the commissioner at a place mutually satisfactory to both parties, and erect on it a fish hatchery, rearing ponds, necessary buildings, and other facilities according to plans and specifications furnished by the commissioner, and give a good and sufficient bond to furnish water, lights, and necessary money to operate and maintain the hatchery and rearing ponds; or

(3) (3) enter into an agreement with the commissioner, secured by good and sufficient bond, to pay to the fish and game fund the initial amount of money and annual payments thereafter that the commissioner considers necessary to expand, maintain, and operate additional facilities at existing hatcheries within a reasonable distance of the dam or obstruction.

JURISDICTIONAL STATEMENT

The superior court entered summary judgment on October 9, 2017 [Exc. 202-230] and final judgment on October 31, 2017. This Court has jurisdiction under AS 22.05.010.

PARTIES

The appellants are the Lieutenant Governor and the Alaska Division of Elections. The appellee is Stand for Salmon, a nonprofit organization. [Exc. 2] The appellee's three directors were the original sponsors of 17FSH2, the ballot initiative that is the subject of this appeal. [Exc. 2, 41]

ISSUES PRESENTED

1. *Appropriation by initiative.* The people's power to enact laws by initiative does not include appropriating public assets. One objective of this restriction is to preserve the legislature's exclusive authority to allocate public assets among competing needs. Proposed initiative 17FSH2 will require a permit for activities that impact anadromous fish habitat and will prohibit permits for activities that permanently displace this habitat or fail to meet certain standards. As a result, some large development projects cannot receive permits, thus preventing the legislature from allocating the habitat for these projects. Will the initiative make an appropriation?

2. *Severability.* The Court will sever the impermissible part of a proposed initiative if (1) standing alone, the remaining bill can be given legal effect; (2) the severance will not substantially change the spirit of the measure; and (3) sponsors and subscribers would clearly prefer the post-severance bill to total invalidation. Proposed initiative 17FSH2 has provisions that prohibit certain uses of lands and waters and therefore makes an appropriation. Severing these provisions will leave a bill that—depending on how it is interpreted—would either continue the same prohibitions or have a perverse effect contrary to its purpose. Should the Court sever the impermissible provisions?

INTRODUCTION

This case asks whether voters may effectively prohibit some resource development projects via ballot initiative, thereby restricting the legislature's resource allocation authority. The Court should hold that they cannot.

Proposed initiative 17FSH2 would make an unconstitutional appropriation by banning the use of "anadromous fish habitat" for activities that will permanently displace it or will violate certain protection standards. In practice, 17FSH2 would outlaw some large development projects, including mines, dams,

pipelines, and oil and gas development. And it would block such projects without regard for how much, on balance, a project might further the public interest.[1]

The sponsors designed the initiative to have this impact. They said as much in an op-ed published shortly after they filed the initiative application, identifying the Pebble Mine, the Susitna-Watana Dam, and the Chuitna coal project as threats that the initiative would target. [Exc. 185-87] As the undisputed evidence in this case establishes, these projects could not go forward under 17FSH2.

Regardless of the policy merits of 17FSH2, such a law cannot constitutionally be enacted by initiative. The initiative would violate one of the core objectives of the Alaska Constitution's prohibition on making appropriations by initiative—to ensure that the legislature retains control over the allocation of state assets among competing needs. In Alaska, voters cannot dictate or prohibit uses of state resources; only the legislature has this authority.

STATEMENT OF THE CASE

I. The Lieutenant Governor denied certification of initiative 17FSH2 after determining that it made an unconstitutional appropriation.

Three sponsors applied to certify a proposed initiative, named 17FSHB, in May 2017. [Exc. 84-91] After reviewing the initiative, the Lieutenant Governor informed the sponsors that by prohibiting the permanent displacement of

[1] *See* Alaska Const., Art. VIII, § 1 ("Statement of Policy. It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.")

anadromous fish habitat, the initiative would usurp the resource allocation function that the Alaska Constitution gives exclusively to the legislature and thus would unconstitutionally appropriate state assets.[2] [Exc. 38-43]

The sponsors then withdrew 17FSHB and filed the current version of the initiative, 17FSH2, in July 2017. [Exc. 44-54] Relying on the Department of Law's advice, the Lieutenant Governor determined that the revised bill has the same problem as the original: its provisions would preclude permitting that is required for certain development projects. It would do this in several ways, including by prohibiting any activity that would permanently displace anadromous fish habitat. This would leave the legislature no discretion to allow use of this habitat for some resource development projects. [Exc. 55-63]

17FSH2's stated purpose is to protect anadromous fish habitat from the adverse effects of development and human activity.[3] The measure would repeal, amend, and reenact provisions of Alaska's existing fish habitat protection and permitting law, AS 16.05, requiring a permit from the Department of Fish and Game (ADF&G) for activities that have the potential to harm fish habitat.[4] The bill includes an uncodified policy statement, permitting standards, procedures for obtaining permits, and civil and criminal penalties for violations. [Exc. 30-37]

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2 *See* Alaska Const. Art. XI, § 2, 7.

3 Exc. 30: 17FSH2 § 1.

4 Exc. 30-31: 17FSH2 § 3.

17FSH2 would create a new structure for permitting general and specific activities that could impact anadromous fish waters.[5] General permits would cover entire classes of minor activities that occur in a particular region.[6] For specific projects, the bill distinguishes between "minor" and "major" permits, depending on the level of an activity's potential impact on fish habitat.[7] "Minor permits" apply to activities with little impact on fish habitat,[8] while "major permits" are required for larger projects with the potential to significantly affect fish habitat.[9]

Most relevant to this lawsuit, 17FSH2 would prohibit a permit for any activity that would cause "substantial damage" to anadromous fish habitat.[10] The initiative defines "anadromous fish habitat" broadly to include all lands and waters that affect anadromous fish, even indirectly: " 'anadromous fish habitat' means a naturally occurring permanent or intermittent seasonal water body, and the bed beneath, including all sloughs, backwaters, portions of the floodplain covered by

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5 Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887(b)).

6 Exc. 32-33: 17FSH2 § 6 (proposed AS 16.05.884).

7 Exc. 32-34: 17FSH2 § 6.

8 Exc. 32: 17FSH2 § 6 (proposed AS 16.05.883); *see also* Exc. 31: § 4 (proposed AS 16.05.875(c)).

9 Exc. 33-34: 17FSH2 § 6 (proposed AS 16.05.885); *see also* Exc. 31: § 4 (proposed AS 16.05.875(d)).

10 Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887 (a)(1)); *see also* Exc. 34: § 6 (proposed AS 16.05.885(e)(3)). A project also cannot receive a permit if adverse effects to anadromous fish habitat cannot be mitigated in a very specific way—by restoring the habitat to a level that sustains the waterway's anadromous fish. Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887(b)(3)); *see also* Exc. 32: § 5 (proposed AS 16.05.887(b), (c)).

the mean annual flood, and adjacent riparian areas, that contribute, directly or indirectly, to the spawning, rearing, migration, or overwintering of anadromous fish."[11] And the initiative says "substantial damage" to this habitat will occur "if, despite the application of scientifically proven, peer reviewed and accepted mitigation measures under AS 16.05.887, any anadromous fish habitat will be adversely affected such that it will not likely recover or be restored within a reasonable period to a level that sustains the water body's, or portion of the water body's, anadromous fish, other fish, and wildlife that depend on the health and productivity of that anadromous fish habitat."[12] The State determined that under this provision, state officials would be prohibited from permitting any activity—most likely large development projects—that by necessity must permanently displace anadromous fish habitat. [Exc. 61-62] In addition, 17FSH2 would prohibit permits for development projects that inevitably would have certain other impacts on anadromous fish habitat. [Exc. 62]

The Lieutenant Governor therefore declined to certify 17FSH2 for placement on the ballot because it violates the constitutional prohibition on appropriation by initiative. [Exc. 55]

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11 Exc. 31: 17FSH2 § 3 (proposed AS 16.05.871 (f)).

12 Exc. 32: 17FSH2 §5 (proposed AS 16.05.877(b)).

II. The superior court held that 17FSH2 would not make an appropriation.

Stand for Salmon ("the sponsors") filed suit in September 2017 to challenge the Lieutenant Governor's conclusion, and sought a preliminary injunction to allow immediate circulation for voter signatures. [Exc. 1-4] The parties then requested that the preliminary injunction motion be converted to a motion for summary judgment, and the State filed an opposition. [Exc. 148-76] The State supported its position with affidavits of officials from ADF&G and the Alaska Department of Natural Resources, explaining that some large projects cannot be developed without impacting anadromous fish habitat in the manner prohibited by 17FSH2. [Exc. 114-131] The superior court held oral argument immediately after briefing was complete and granted summary judgment to the sponsors six days later, on October 9, 2017. [Exc. 202-22]

The superior court concluded that although anadromous fish habitat is a public asset, 17FSH2 does not interfere with the legislature's exclusive authority to allocate it among competing uses. [Exc. 202-22] It rejected the State's argument that 17FSH2 impermissibly limits legislative discretion by prohibiting projects that cannot permanently preserve all anadromous fish habitat. [Exc. 202-22]

The superior court identified the central issue in the case as whether 17FSH2 is "a permissible regulation or an allocation of public assets that impermissibly limit[s] legislative discretion." [Exc. 210] The court accepted the sponsors'

position that the language of 17FSH2 "generally mirrors" the language of 07WTR3, an initiative that this Court found to be permissible regulation in *Pebble Limited Partnership v. Parnell*.[13] [Exc. 214] The superior court explained that this Court held in *Pebble* that 07WTR3 "was a constitutional initiative" because although it prohibited the discharge of toxins in an amount that would "adversely affect" humans or habitat, it "left the legislature the discretion to determine what amount of pollutant discharge constituted 'adversely affect.' " [sic][14]

The superior court concluded that "[i]f 07WTR3 was constitutional because it left the legislature the discretion to define 'adversely affect,'[then] 17FSH2 must also be constitutional because it similarly leaves the legislature discretion in its implementation through the use of a plethora of undefined terms." [Exc. 214-15] The court rejected the State's argument that 17FSH2 would completely prohibit any development project that permanently displaces anadromous fish habitat, ruling that "no party has presented any competent evidence about what the effects of 17FSH2 will be, if passed," and finding that the State "misunderstand[s] the proper construction of ballot initiatives." [Exc. 215] The court reasoned that initiatives must be construed broadly so as to preserve them whenever possible, and that 17FSH2 is constitutional so long as the legislature retains enough

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13 215 P.3d 1064 (Alaska 2009).

14 Exc. 214 (citing *Pebble*, 215 P.3d at 1077).

discretion "such that it *could* implement 17FSH2 in a manner allowing industrial activity." [Exc. 215 (emphasis in original)]

The superior court concluded that 17FSH2 is not an appropriation and is thus constitutionally permissible, so it ordered the Lieutenant Governor to print petition booklets as required by statute. [Exc. 221]

STANDARD OF REVIEW

The Court reviews a grant of summary judgment de novo.[15] The questions the Court will address in this case—interpretation of the initiative's terms, the meaning of the constitutional term "appropriation," and the severability of parts of the initiative—are questions of law. To such questions, the Court applies its independent judgment, "adopt[ing] the rule of law that is most persuasive in light of precedent, reason, and policy."[16]

ARGUMENT

I. 17FSH2 makes an unconstitutional appropriation by initiative because it prohibits certain projects, thus restricting the legislature's exclusive authority to allocate fish habitat among competing needs.

17FSH2 cannot appear on the ballot because, if enacted, it would appropriate state assets, specifically anadromous fish habitat. Under the plain terms of the

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[15] *Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989, 991 (Alaska 2004) (citing *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 447 (Alaska 2002)).

[16] *Alaska Action Center*, 84 P.3d at 991 (citing *Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996)).

initiative, ADF&G cannot permit any development projects that will fail to permanently preserve all anadromous fish habitat or to meet specified "habitat protection standards." The initiative thus prevents the legislature—through ADF&G—from allocating this state asset for such projects.

A. An initiative that restricts the legislature's exclusive authority to allocate state assets among competing needs makes an appropriation and thus violates the Alaska Constitution.

The Alaska Constitution prohibits initiatives that make an appropriation. Article XI, section 1 authorizes "[t]he people" to "propose and enact laws by the initiative," but this authority has limits. Article XI, section 7 expressly restricts the use of the initiative power. One restriction is that "[t]he initiative shall not be used to . . . make or repeal appropriations."[17]

This limit on appropriations by initiative is not narrowly defined—instead, the Court has interpreted the term "appropriation" expansively in the initiative context. Although the Court "construe[s] voter initiatives broadly so as to preserve them whenever possible" and "liberally construe[s] constitutional and statutory provisions that apply to the initiative process,"[18] "it does not necessarily follow that a liberal construction of the people's initiative power requires a narrow

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[17] Alaska Const. Art. XI, § 7.

[18] *Lieutenant Governor v. Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d 105, 108 (Alaska 2015) (citing *Hughes v. Treadwell*, 341 P.3d 1121, 1125 (Alaska 2015)).

construction of the limits that define the power."[19] "On the contrary, the mandate for liberal construction of the initiative right in Article XII, section 11 concludes with a qualifying, cautionary clause: 'subject to the limitations of Article XI.' "[20] This "reiterative warning underscores the importance of the restrictions," and the "important right of the people . . . to have the constitution upheld as the people ratified it."[21] The Court "interpret[s] all constitutional provisions—grants of power and restrictions on power alike—as broadly as the people intended them to be interpreted."[22] "Plainly, the restrictions of Article XI, section 7 are important conditions on the initiative right that require strict compliance."[23] To assure that "the intent of the constitutional framers in prohibiting appropriations by initiative would be fully met," the Court has construed the term "appropriation" broadly in the initiative context. [24]

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19 *Citizens Coal. for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 168 (Alaska 1991).

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* n.14.

24 *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1156 (Alaska 1991); *see also Alaska Fisheries Conservation Alliance*, 363 P.3d at 108 (citing *Thomas v. Bailey*, 595 P.2d 1, 1-4 (Alaska 1979)).

With these considerations in mind, the Court "employ[s] a two-part inquiry to determine whether an initiative makes an appropriation of state assets."[25] First the Court determines "whether the initiative deals with a public asset."[26] The Court has held that state waters and wild fish are public assets.[27] Second, if the initiative deals with a public asset, the Court then determines "whether the initiative would appropriate that asset."[28] To answer the second question, the Court evaluates whether the proposed initiative would violate either of two core objectives of the prohibition on appropriations by initiative.[29]

Based on the history of Alaska's constitutional convention, the Court has determined that the delegates had "two core objectives" when they drafted the prohibition on appropriation by initiative: "(1) 'to prevent give-away programs that appeal to the self-interest of voters and endanger the state treasury,' and (2) 'to preserve legislative discretion by ensur[ing] that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing

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25 *Alaska Fisheries Conservation Alliance*, 363 P.3d at 108 (quoting *Hughes*, 341 P.3d at 1125).

26 *Id.*

27 *Pebble*, 215 P.3d at 1073-74 (holding that state waters are a "public asset" that cannot be constitutionally appropriated by initiative); *Pullen v. Ulmer*, 923 P.2d at 61 (holding that salmon are state assets for initiative purposes).

28 *Pebble*, 215 P.3d at 1073.

29 *Alaska Fisheries Conservation Alliance*, 363 P.3d at 108 (citing *Hughes*, 341 P.3d at 1126).

needs.' "[30] If the Court determines that an initiative is either a give-away program or a restriction on the legislature's authority to allocate state assets among competing needs, it will find the initiative to be a prohibited appropriation.[31]

17FSH2 undermines the second core objective because it restricts the legislature's authority to allocate state assets among competing needs. The prohibition on appropriations prevents initiatives that "designate the use of state assets."[32] So an initiative is unconstitutional if it allows voters to "essentially usurp the legislature's resource allocation role."[33] "The 'primary question' in assessing the second core objective '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.' "[34]

B. 17FSH2 prohibits certain development projects and thus restricts the legislature's exclusive authority to allocate fish habitat among competing needs.

If passed, 17FSH2 would make an unconstitutional appropriation because it restricts the legislature's authority to allocate state assets—anadromous fish

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30 *Id.* (citing *Hughes*, 341 P.3d at 1126 (emphasis in original)).

31 *Alaska Fisheries Conservation Alliance*, 363 P.3d at 109.

32 *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128, 1137 (Alaska 2012) (quoting *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 89 (Alaska 1988)).

33 *Id.* at 1137 (quoting *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1263 (Alaska 2006)).

34 *Id.* at 1137 (quoting *Pebble*, 215 P.3d at 1075).

habitat—among competing needs. Specifically, the initiative prohibits any use of this habitat that fails to preserve it or fails to meet certain habitat protection standards. These prohibited uses will inevitably include some large-scale mines, oil and gas operations, major pipelines, and large dams. [Exc. 114-47] The initiative thus restricts the legislature's authority to allocate fish habitat for these purposes.

1. 17FSH2 prohibits ADF&G from permitting projects that fail to satisfy its requirements.

17FSH2 "narrows the legislature's range of freedom to make allocation decisions in a manner sufficient to render the initiative an appropriation,"[35] in several ways. Among the provisions that have this effect are the bill's definition of "substantial damage"[36] and its mandatory habitat protection standards.[37] These provisions prohibit the legislature from allocating fish habitat to projects that cannot meet their requirements.

a. 17FSH2's definition of "substantial damage" prohibits ADF&G from permitting any project that permanently displaces anadromous fish habitat.

The sponsors have not disputed that, by their nature, some development projects cannot preserve all anadromous fish habitat. Rather, the parties disagree about whether 17FSH2 prohibits ADF&G from issuing permits for such projects.

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35 *Hughes*, 341 P.3d at 1126 (quoting *Pebble*, 215 P.3d at 1075).

36 Exc. 32: 17FSH2 § 5 (proposed AS 16.05.877(b))

37 Exc. 30: 17FSH2 § 2 (proposed AS 16.05.867(b))

In other words, the dispute is about how to interpret the language of the bill. The sponsors argue that 17FSH2 leaves ADF&G discretion to permit large projects that permanently displace anadromous fish habitat, and the State argues that it does not. The superior court agreed with the sponsors. [Exc. 221]

But the superior court read the initiative in a manner that is irreconcilable with its language. Although the Court will construe voter initiatives broadly so as to preserve them whenever possible,[38] it will not read into an initiative "that which is not there, even in the interest of avoiding a finding of unconstitutionality, because 'the extent to which the express language of the provision can be altered and departed from and the extent to which the infirmities can be rectified by the use of implied terms is limited by the constitutionally decreed separation of powers which prohibits [the] court from . . . redrafting defective statutes.' "[39] The superior court has read "that which is not there" into 17FSH2.

Some of 17FSH2's disputed text is found in its definition of "substantial damage."[40] The initiative creates a new statutory structure for permitting activities that could impact anadromous fish habitat.[41] 17FSH2 allows permitting for activities that could significantly affect fish habitat if the permits require certain

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38 *Pebble*, 215 P.3d at 1073.

39 *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007) (quoting *State v. Campbell*, 536 P.2d 105, 111 (Alaska 1975)).

40 Exc. 32: 17FSH2 § 5 (proposed AS 16.05.877(b)).

41 Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887(b)).

mitigation measures, but the initiative absolutely prohibits permitting any project that would cause "substantial damage" to anadromous fish habitat.[42]

"Substantial damage" will occur "if, despite the application of scientifically proven, peer reviewed and accepted mitigation measures under AS 16.05.887, an anadromous fish habitat will be adversely affected such that it will not likely recover or be restored within a reasonable period to a level that sustains the water body's, or portion of the water body's, anadromous fish, other fish, and wildlife that depend on the health and productivity of that anadromous fish habitat."[43]

This provision plainly prohibits any activity that will permanently displace fish habitat. The superior court nevertheless concluded that it leaves the State discretion to grant a permit for such a project. But the court's interpretation contravenes this Court's practice of considering the real-life impacts of initiatives.[44] Rather than analyzing the actual effect of the bill, the superior court

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[42] Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887 (a)(1)); *see also* Exc. 34; § 6 (proposed AS 16.05.885(e)(3)). A project also cannot receive a permit if adverse effects to anadromous fish habitat cannot be mitigated in a very specific way—by restoring the habitat to a level that sustains the waterway's anadromous fish. Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887(b)(3)); *see also* Exc. 32; § 5 (proposed AS 16.05.887(b), (c)).

[43] Exc. 32: 17FSH2 §5 (proposed AS 16.05.877(b)).

[44] *See, e.g., Pullen v. Ulmer*, 923 P.2d at 64 (finding that initiative would allocate assets, based on the possibility that commercial fishers could be excluded from fisheries if certain salmon species suffered shortages in a given region); *see also* , 818 P.2d at 1157 (determining that initiative to eliminate restrictions on use of bed tax would increase discretion of city council to appropriate funds); *Pebble*, 215 P.3d at 1077 (determining that initiative would leave to Legislature and agencies the discretion to determine amounts of specific toxic pollutants that may be discharged at a mining site).

accepted the sponsors' view that it is acceptable regulation—not a prohibition—because the definition of "substantial damage" includes "a plethora of undefined terms." [Exc. 214-15] Specifically, the court reasoned that ADF&G has discretion to define "[1] 'accepted mitigation measures,' [2] what level of impact 'adversely affects' the habitat, [3] the acceptable probability of recovery for fish habitat to 'likely recover,' and [4] what timeframe constitutes recovery within a 'reasonable period.' " [Exc. 214] The court decided that these "undefined terms" preserve legislative discretion to allocate fish habitat among competing uses. [Exc. 214-15]

But these terms are not undefined in 17FSH2, nor do they allow ADF&G to allocate fish habitat to any development project that would not preserve it. For a project that will permanently displace such habitat, these terms cannot logically be interpreted to provide any discretion to issue a permit, as explained below:

[1] The level of impact that "adversely affects" the habitat. The superior court said that ADF&G is free to define what level of impact will adversely affect fish habitat for purposes of determining whether an activity will cause substantial damage. [Exc. 214] But this is incorrect; the bill's definition of substantial damage defines "adversely affect" to necessarily include any impact that would eliminate habitat. The bill says that an activity will cause substantial damage if the anadromous fish habitat "will be adversely affected *such that* it will not likely

recover or be restored within a reasonable period to a level that sustains" the fish.[45] If an activity will permanently displace an anadromous stream, that stream obviously "will not likely recover or be restored," and this provision thus leaves ADF&G no discretion to determine that it will not be "adversely affected."

[2] The acceptable probability of recovery for fish habitat to "likely recover." The superior court found that the initiative gives ADF&G discretion to determine the "acceptable probability" that fish habitat will "likely recover" within a reasonable period from the permitted activity. [Exc. 214] Under a common understanding of word "likely," habitat would be "likely to recover" if the probability of recovery exceeds fifty percent.[46] Even if this phrase leaves room for ADF&G to consider some probability lower than fifty percent to be "likely"—as the superior court suggested—surely ADF&G could not legally conclude that a zero percent probability of recovery would be acceptable. Unless the impossible can be considered "likely," the definition leaves ADF&G no discretion to permit a development project that will permanently displace habitat.

[3] The timeframe that constitutes recovery within a "reasonable period." The superior court found that the definition of "substantial damage" gives

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45 Exc. 32: 17FSH2 §5 (proposed AS 16.05.877(b) (emphasis added)).

46 *See*, *e.g.*, Alaska Pattern Jury Instruction – Civil No. 2.04 (stating in part: "In more familiar language, something is more likely true than not true if you believe that there is a greater than fifty percent (50%) chance that it is true").

ADF&G discretion to determine what would be a "reasonable" timeframe for disturbed anadromous fish habitat to recover. [Exc. 214] But although 17FSH2 does not precisely define the length of a "reasonable period," it sets boundaries that definitively rule out the life of a large-scale project. The initiative states that "[i]n determining whether anadromous fish habitat will recover or be restored within a reasonable period under this section, the commissioner shall account for the life stage, life span, and reproductive behavior of the species of anadromous fish that depend on the habitat adversely affected by the proposed activity using the best available scientific information."[47] Although the superior court had no evidence of the life stage, life span, and reproductive behavior of anadromous fish, the Court can take judicial notice that no fish will ever return to a stream to spawn when the stream no longer exists. Thus, 17FSH2 leaves ADF&G no discretion to decide that anadromous fish habitat that is eliminated by a project will recover within a "reasonable period," accounting for the life cycle of salmon.

[4] Accepted mitigation measures. The court found that ADF&G "is free to define 'accepted mitigation measures.' " [Exc. 214] But the initiative's definition of "substantial damage" says that it occurs if an activity will cause permanent harm "despite the application of" mitigation measures.[48] And the bill's

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47 Exc. 32: 17FSH2 §5 (proposed AS 16.05.877(c)).

48 Exc. 32: 17FSH2 §5 (proposed AS 16.05.877(b)).

accepted mitigation measures exclude off-site mitigation—i.e., creating habitat elsewhere to replace what is lost—and require at the very least that a stream be restored.[49] So even if a stream could be restored after a large mine is closed or a large dam is removed—an imaginative proposition—ADF&G could not permit the project because "despite the application" of this mitigation measure, the stream would not be restored within a "reasonable period," determined according to the life span and reproductive behavior of anadromous fish.[50]

Thus, although the definition of "substantial damage" has a few phrases that seem open to interpretation, in reality it leaves ADF&G no discretion to permit any activity that would permanently displace anadromous fish habitat. Without such discretion, 17FSH2 eliminates the legislature's authority to allocate such fish habitat to large projects that cannot completely preserve all habitat.[51] The bill's text is so clear on this point that *granting* a permit for such a project would likely trigger a successful legal challenge against ADF&G.

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[49] The mitigation measures in proposed AS 16.05.887 are three-tiered, requiring first, changes in siting, timing, or procedure of the activity. If those measures will not prevent adverse effects, the second tier of mitigation requires minimization of the effects by limiting the degree, magnitude, duration, or implementation of the activity. And if those measures will not prevent adverse effects, then the third tier level requires that the anadromous fish habitat be restored.

[50] Exc. 32: 17FSH2 §5 (proposed AS 16.05.877(b), (c)).

[51] *See infra* section I(B)(2).

b. 17FSH2's mandatory "habitat protection standards" prohibit ADF&G from permitting any project that fails to maintain those standards.

In addition to prohibiting permits for activities that permanently displace fish habitat, 17FSH2 also prohibits permitting activities that do not maintain specified "habitat protection standards," including "instream flows, the duration of flows, and natural and seasonal flow regimes"; and "stream, river and lake bank and bed stability."[52] Section 2 of 17FSH2 requires ADF&G, when issuing a permit, "to ensure the proper protection of anadromous fish habitat" by maintaining seven standards for this habitat, including instream flows and bed and bank stability.[53]

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52 Exc. 30: 17FSH2 §2 (proposed AS 16.05.867(b)).

53 Proposed AS 16.05.867 (b) would provide:

(b) When issuing a permit under AS 16.05.867-16.05.901, the commissioner shall ensure the proper protection of anadromous fish by maintaining:

(1) water quality and water temperature necessary to support anadromous fish habitat;

(2) instream flows, the duration of flows, and natural and seasonal flow regimes;

(3) safe, timely and efficient upstream and downstream passage of anadromous and native resident fish species to spawning, rearing, migration, and overwintering habitat;

(4) habitat-dependent connections between anadromous fish habitat including surface-groundwater connections;

(5) stream, river and lake bank and bed stability;

(6) aquatic habitat diversity, productivity, stability and function;

(7) riparian areas that support adjacent fish and wildlife habitat; and

(8) any additional criteria, consistent with the requirements of AS 16.05.867-AS 16.05.901, adopted by the commissioner by regulation.

Under this section, ADF&G cannot allow any activity that does not maintain these standards.

This section is not simply directory, as the sponsors argued below. [Exc. 198] Viewed in isolation, subsection (b) of the new statute could be interpreted to merely provide guidance, directing that when issuing a permit, ADF&G "shall ensure the proper protection of anadromous fish habitat" through the listed standards. But this subsection is not isolated, and other provisions add teeth to its requirements. Subsection (c) emphasizes that these standards must be followed, specifying that "[a]ll regulations, administrative actions and other duties carried out under this chapter shall be consistent with and in furtherance of the standards set out in this section." And 17FSH2 further clarifies the mandatory nature of the section by subjecting any person who fails to follow it to criminal penalties.[54] The ADF&G commissioner is the only person who *could* fail to follow subsection (b)'s mandate to maintain the listed standards when issuing permits. Thus, should the commissioner fail to ensure that all permits maintain the listed standards, he or she would be "guilty of a class A misdemeanor"[55] and subject to criminal penalties.[56]

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[54] Exc. 36: 17FSH2 § 10 (proposed AS 16.05.901(a)

[55] Exc. 36: 17FSH2 § 10 (proposed AS 16.05.901(a)).

[56] The bill states that the violation must be made with "criminal negligence" as defined in AS 16.81.900(a). The bill presumably means to refer to AS 11.81.900(a).

The sponsors also argued that this provision could be considered more discretionary when read in conjunction with some of 17FSH2's other sections, but they are simply highlighting ambiguities in the bill. [Exc. 198] Even if 17FSH2 is open to multiple interpretations, the criminal penalties for violating its habitat protection standards will surely compel the commissioner to follow the standards' express terms. The choice to adopt a more flexible interpretation under threat of criminal charges is no choice at all.

c. Several other provisions of 17FSH2 prohibit ADF&G from permitting any project that permanently displaces anadromous fish habitat.

In addition to the provisions discussed above, 17FSH2 contains several others that would prevent ADF&G from permitting a project that would permanently displace fish habitat. All carry criminal penalties for a person, such as the ADF&G commissioner, who "permits a violation" of their terms.[57]

The initiative prohibits a permit for "an activity that will fail to ensure the proper protection of fish and wildlife."[58] Although "proper protection" is undefined, permanent displacement of a fish stream could only be considered a failure to properly protect the fish within the stream.

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57 Exc. 36: 17FSH2 §10 (proposed AS 16.05.901).

58 Exc. 35: 17FSH2 §7 (proposed AS 16.05.887(a)(2)).

The initiative also prohibits a permit for activities that will "withdraw water from anadromous fish habitat in an amount that will adversely affect anadromous fish habitat, fish, or wildlife species," will "adversely affect anadromous fish habitat, fish, or wildlife species," or will "dewater and relocate a stream or river if the relocation does not provide for fish passage."[59] Although the first and second of these provisions include the phrase "adversely affect"—which the sponsors consider to be a shield against a finding of appropriation[60]—both have clear meanings incompatible with any activity that permanently displaces a stream. And the third provision outright prohibits a permit for permanent displacement of fish habitat, without room for interpretation. And again, even if any of this language were open to interpretation, the threat of criminal penalties for failing to follow the provisions would resolve the ambiguity.

2. 17FSH2 would prohibit many of Alaska's large development projects because they cannot be accomplished without forbidden impacts to fish habitat.

Because 17FSH2 eliminates the State's authority to use anadromous fish habitat for any activity that fails to preserve it or violates its protection standards, the initiative would effectively prohibit some significant resource development projects. In superior court, the State and amicus Council of Alaska Producers

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59 Exc. 35: 17FSH2 §7 (proposed AS 26.05.887(a)(5), (6)).

60 Exc. 19, 23-27, 193-94.

provided specific evidence—through affidavits—of past, existing, and future projects with these forbidden impacts. [Exc. 114-47] Although the sponsors disagree with the State's interpretation of 17FSH2, they have not disputed the facts in the affidavits.

Throughout Alaska's history, the legislature has permitted large development projects that require a significant infrastructure, including oil and gas projects, large mines, dams, pipelines, and roads. In permitting large projects, the State has provided significant protections for lands and waters, and has sometimes required offsite mitigation as a condition of permitting. [Exc. 137-38] Even so, some large development projects have a footprint that necessarily disrupts at least some salmon habitat for long periods or permanently. [Exc. 123-24, 143-46] The State's process for permitting a project to dewater a stream contains incentives to avoid irreversible damage, and allows dewatering only if, after carefully balancing statutory criteria, the State determines that this allocation of water best serves the public interest. [Exc. 121-23]

The State has also sometimes allowed permanent displacement of salmon habitat, allocating this asset to a development project. [Exc. 146] But under 17FSH2, the State could never again make this choice, regardless of the importance of the project to the public interest or the relative unimportance of the

particular fish habitat. Many large development projects in Alaska could never receive the necessary fish habitat permit under 17FSH2.

This includes hard rock mines, which in Alaska have footprints ranging from hundreds of acres to more than a thousand acres. [Exc. 137-38] With17FSH2's expansive definition of anadromous fish habitat—including potentially all streams and waterbodies and adjacent riparian areas—any large hard rock mine project will permanently displace at least some anadromous fish habitat. [Exc. 143-46] For example, the proposed Donlin Prospect mine could not get a permit because the ore body and the tailing dam/impoundment area would permanently eliminate two anadromous fish streams [Exc. 116-17, 128-29], thus causing "substantial damage" under section 5 of 17FSH2. Because 17FSH2 forbids offsite mitigation, the loss could not be mitigated by enhancing Coho salmon rearing habitat in the Crooked Creek floodplain in areas of historic placer mining, as planned. [Exc. 118] The proposed Chuitna Coal Project (not currently pursuing permitting) and the Pebble Mine also could not proceed under this law for the same reason. [Exc. 116-17, 129] Other mines would face the same problem. [Exc. 129, 143-46]

And even some projects that would not permanently displace fish habitat could not be permitted under 17FSH2. The initiative's "habitat protection standards" will make any large acreage development impossible to permit, because all large acreage development in Alaska will impact at least one of these standards.

[Exc. 139] For example, any dam and most water withdrawal from a stream would negatively impact "instream flows, the duration of flows, and natural and seasonal flow regimes," which the habitat protection standards prohibit. [Exc. 139]

17FSH2 would also prevent the State's use of waters for larger hydroelectric dams. Large dams—such as the proposed Susitna-Watana Dam—would violate both the habitat protection standard on water flow[61] and the prohibition on permitting a project that causes "substantial damage" to any anadromous fish habitat.[62] [Exc. 116] A dam as large as Susitna-Watana would make fish ladders for passage of anadromous species impracticable. [Exc. 116] Currently, the State can permit this level of habitat disruption with significant off-site mitigation.[63] But 17FSH2 prohibits off-site mitigation,[64] so the Susitna-Watana project and similar large dams could not be permitted. [Exc. 116]

17FSH2 would prevent some pipelines and highway projects as well. [Exc. 117-18, 130] Major highway projects parallel to rivers often require extensive erosion control measures to keep the highway intact and passable, and some of these could not be permitted. [Exc. 117-17] For example, repair work is underway on spur dike fields in the Sagavanirktok River—which is anadromous

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61 Exc. 30: 17FSH2 § 2 (proposed AS 16.05.867(b)(2)).

62 Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887(a)(1)).

63 *See* AS 16.05.851.

64 Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887(c)).

fish habitat—to protect the Dalton Highway and the buried oil pipeline south of Prudhoe Bay. [Exc. 117] The spur dikes redirect the river's main channel away from the highway and the pipeline for miles, significantly altering the habitat. [Exc. 118] Such significant stream modification will not maintain "stream, river and lake bank or bed stability" and thus could not be permitted under 17FSH2's habitat protection standards.[65] [Exc. 139]

Perhaps the clearest demonstration of how 17FSH2 interferes with the legislature's authority to allocate state assets is the reality that, had it been in force, the measure would have prevented development of Alaska's oil and gas resources on the Kenai Peninsula and on the North Slope. [Exc. 131]

The affidavits explaining the impacts of these large projects were uncontested. The sponsors have not disputed that major development projects in Alaska sometimes must permanently displace anadromous fish habitat or violate 17FSH2's seven habitat protection standards. [Exc. 8-29, 188-201] Although the superior court declared that it had "no competent evidence regarding the impact of the initiative," [Exc. 221], it did not reject the affiants' statements about the impact that some major projects would have on anadromous fish habitat. Rather, the court thought that the "impact of the initiative" was unknown because it "necessarily will depend on what the legislature does" in interpreting the "plethora of undefined

[65] Exc. 30: 17FSH2 § 2 (proposed AS 16.05.867).

terms" in 17FSH2's definition of "substantial damage." [Exc. 221] But as explained above, the initiative leaves ADF&G no choice but to deny permits to projects that permanently displace salmon habitat or violate the initiative's protection standards. For this reason and because the undisputed evidence establishes that some proposed projects will have these impacts, 17FSH2 prohibits the allocation of anadromous streams to such projects.

3. By prohibiting some large development projects, 17FSH2 restricts the legislature's exclusive authority to allocate state resources among competing needs.

17FSH2 prevents the legislature from using state lands and waters for some resource development projects that are extremely important to Alaska. This puts 17FSH2 firmly in the category of prohibited initiatives that make appropriations.

This Court has held that the legislature must be exclusively responsible for allocating non-monetary state assets because otherwise, the prohibition against appropriations by initiative could be circumvented by initiatives "changing the function of assets the State already owns."[66] Although 17FSH2 does not directly change the function of assets that the State already owns, it does something equally crippling to the legislature's ability to use state assets for the benefit of the State and its citizens: It *prevents* the legislature from changing the function of assets the State already owns, directing that certain uses of state assets are off limits. The

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66 *McAlpine*, 762 P.2d at 89.

initiative usurps the legislature's authority to determine how to allocate state lands and waters by prohibiting certain uses.

This would have a significant impact in Alaska, because resource development here is meant to partially replace the revenue-generating measures available to other states. Congress granted Alaska over a hundred million acres of land and mineral rights for this very purpose,[67] recognizing that as a state, Alaska would have little ability to generate tax revenue due to its lack of industry, its low population, and the 98% federal ownership of its land—much of it tied up in federal reservations.[68] Congress and Alaska's constitutional convention delegates intended the State to use resource development to build an economy and fund self-governance.[69] The discovery and subsequent development of oil on a large scale

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67 *See Trustees for Alaska v. State*, 736 P.2d 324, 337 (Alaska 1987) ("That Congress recognized the financial burden awaiting the new state is clear from its debates. It is equally clear that the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden.")

68 *See Id.* at 336 n.23 (citing 104 Cong. Rec. 12,019 (1958) ("[T]his tremendous acreage of [federal withdrawals might well embrace a preponderance of the more valuable resources needed by the new State to develop flourishing industries with which to support itself and its people."); *see also Sturgeon v. Frost*, __ U.S. __;136 S.Ct. 1061, 1065 (2016) ("Out of the 365 million acres of land in Alaska, 98 percent were owned by the Federal Government.").

69 *See Sturgeon*, 136 S.Ct. at 1065 ("With over 100 million acres of land now available to the new State, Alaska could begin to fulfill its state policy 'to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.'") (citing Alaska Const., Art. VIII, § 1).

has allowed Alaska to provide the full services of state government[70] and has positively contributed to Alaska's economy and the quality of life of its citizens. 17FSH2 thus not only would interfere with the legislature's authority to allocate anadromous fish habitat to development projects, it would interfere with the legislature's ability to generate revenue from other state assets through development projects. If initiatives like 17FSH2 could prevent such projects, this would give life to the concern that Delegate Taylor cited at the constitutional convention—that when in other states the citizen initiative power had taken the "expenditure of . . . funds away from the legislature, . . . in some instances the governmental functions and governmental institutions suffered a great deal."[71]

This Court has accordingly held that an initiative preventing the legislature from changing the function of assets is an unconstitutional appropriation. In *Alaska Action Center, Inc. v. Municipality of Anchorage*,[72] citizens of Girdwood proposed an initiative to preserve much of the lower end of Girdwood valley as a park.[73] The sponsors argued that this did not make an appropriation because the Municipality of Anchorage would still own and manage the property, but the Court rejected that

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70 *See Williams v. Zobel*, 619 P.2d 448, 461 n.37 (Alaska 1980) (citing C.-M. Naske, An Interpretative History of Alaskan Statehood 169-70 (1973)).

71 *McAlpine*, 762 P.2d at 89 n.22 (citing 2 *Proceedings of the Alaska Constitutional Convention*, 931-32 (Dec. 16, 1955))

72 84 P.3d 989.

73 *Id.* at 990.

argument.[74] The Court found that the initiative, meant to prevent a prospective golf course, would designate the use of a public asset in a way that encroached on the legislative branch's exclusive control over the allocation of state assets among competing needs.[75] The Court found that the initiative "intrudes on decisions reserved by statute and the constitution to the assembly."[76]

Although the Girdwood park initiative would have specified the public assets to be set aside, the Court has not limited its appropriation findings to initiatives with this characteristic. In *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough,*[77] the Court examined an ordinance passed by initiative that required prior voter approval for all borough capital projects with a cost of more than one million dollars.[78] The Court found that the voters' ability to veto a capital project undermined the Borough's control over the allocation of assets, even though the initiative did not set aside a particular amount of assets.[79] The initiative only created the possibility that the Borough would not, in the future, be able to use an unknown amount of borough funds for capital projects.

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74 *Id.* at 994-95.

75 *Id.* (citing *Pullen*, 923 P.2d at 63).

76 *Id.* at 995.

77 273 P.3d 1128.

78 *Id.* at 1130.

79 *Id.* at 1138.

The same was true in *Pullen v. Ulmer*, where the proposed F.I.S.H. initiative would have created a priority for some uses of salmon without setting aside a particular amount of salmon for a particular purpose.[80] The Court nevertheless found that the F.I.S.H. initiative would make an appropriation because establishing a salmon harvest priority system "would lead to the 'very real possibility that [some groups] will be excluded' from using the resource."[81]

17FSH2 is even a clearer example of an initiative that violates the underlying purposes of the constitutional restrictions on citizens' initiative power. 17FSH2 prohibits allocation of anadromous fish habitat to certain uses by its own terms; it does not leave open any possibility that those uses might be allowed, as the Kenai capital projects and F.I.S.H. initiatives did. 17FSH2 will inevitably prevent some projects, because Alaska has tens of thousands of anadromous fish waterways[82] and 17FSH2 defines anadromous fish habitat very broadly.[83]

17FSH2 is also like the unconstitutional capital projects initiative in *Alliance of Concerned Taxpayers* initiative in that it is not saved by the fact that the

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80 923 P.2d 54 (Alaska 1996).

81 *Alliance of Concerned Taxpayers*, 273 P.3 at 1138 (quoting *Pullen v. Ulmer*, 923 P.2d at 64).

82 ADF&G has catalogued Alaska's anadromous rivers, lakes, and streams. *See* http://www.adfg.alaska.gov/index.cfm?adfg=wildlifenews.view_article&articles_id=502&_ga=2.247644103.1957736472.1512064976-1852023520.1462469828 (last viewed Nov. 30, 2017). Although the list includes over 17,000 waterways, ADF&G estimates that this is fewer than half of the waters used by anadromous fish species in Alaska. *Id.*

83 17FSH2 § 3 (proposed AS 16.05.871(f)).

appropriated assets—there the municipal funds and here the fish habitat—remain available for other uses. The fact that the Borough would have been free to use the municipal funds for other things if voters vetoed a capital project did not save that initiative.[84] The law "infringe[d] on the assembly's ability to allocate resources among competing uses because there [would be] nothing that the assembly [could] do to appropriate money *for that project*."[85] This violated "the underlying purposes of the constitutional restrictions" on the initiative power because it "interfere[d] with the Borough's exclusive power to allocate funds among competing uses."[86] The same is true here—17FSH2 would allow other uses of fish habitat, but would leave the legislature no freedom to allocate it to prohibited projects.

Thus, the Court's cases demonstrate that 17FSH2 would violate the second core objective of the constitution's prohibition on appropriations by initiative by interfering with the legislature's ability to permit the resource development intended in part to finance Alaska's government and economy.

The sponsors argued below that the State based its analysis on selective use of the Court's standards for an appropriation and failed to address a "critical aspect" of the test: the Court's "consistent position that initiatives infringe on the legislature's 'control over the allocation of state assets among competing needs'

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84 *Alliance of Concerned Taxpayers*, 273 P.3d at 1138.

85 *Id.* (emphasis added).

86 *Id.*

only when they 'set aside a certain specified amount of money or property for a specific purpose or object in a manner that is executable, mandatory, and reasonably definite with no further legislative action.' "[87]

But this standard does not play the pivotal role in the Court's cases that the sponsors suppose. The Court has recited this standard "as simply part of the case law from which the 'two core objections . . . can be distilled.' "[88] When evaluating "whether the initiative would appropriate [public] assets," the Court "look[s] primarily to the 'two core objectives' of the constitutional prohibition against initiatives that would make an appropriation."[89]

The standard the sponsors cite thus has not functioned in the Court's case law as a formulaic prerequisite for finding an appropriation. At most it has sometimes served as a check on whether an initiative violates the second core objective. The Court has discussed the standard when determining whether "an initiative 'narrows the legislature's range of freedom to make allocation decisions in a manner sufficient to render the initiative an appropriation.' "[90] "[T]he point of

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87 Exc. 190-92 (citing several initiative cases that include this definition).

88 *Alaska Fisheries Conservation Alliance*, 363 P.3d at 109 (quoting *Pullen v. Ulmer*, 923 P.2d at 63).

89 *Id.* (quoting *Pebble*, 215 P.3d at 1074-75).

90 *Hughes*, 341 P.3d at 1126 (quoting *Pebble*, 215 P.3d at 1075).

[this] quoted language is that where the legislature retains a broad range of freedom to make allocation decisions, an appropriation will not be found."[91]

In other words, if the initiative suggests a use of state assets but leaves the actual allocation decision to the State, it is not an appropriation. For example, an initiative that creates a program to put a swimming pool in every school in Alaska may not sufficiently infringe on the legislature's allocation authority to be an appropriation because the legislature remains free to decline to fund the program.[92] Because the funding is left to the legislature's discretion, this hypothetical initiative would not be "executable, mandatory, and reasonably definite with no further legislative action."

But applying this check to 17FSH2 produces the opposite conclusion. By prohibiting a permit for a project that will permanently displace salmon habitat, 17FSH2 leaves no room for legislative choice. No further legislative action is needed to prohibit the use of fish habitat for such a project. The initiative is self-executing—executable, mandatory, and reasonably definite with no further legislative action—and thus violates the second core objective.[93]

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91 *Pullen v. Ulmer*, 923 P.2d at 64 n.15.

92 *See McAlpine*, 762 P.2d at 90 (discussing initiative considered in *District of Columbia Bd. of Elections and Ethics v. District of Columbia*, 520 A.2d 671 (D.C. App. 1986), which established an overnight shelter program without committing assets to it).

93 *See Pullen v. Ulmer*, 923 P.2d at 64 n.15 ("The [F.I.S.H.] initiative . . . would suffice without further [legislative] action to direct the Board of Fisheries to allocate salmon in accordance with its terms.")

Because 17FSH2 prohibits significant uses of state assets, it "controls the use of public assets such that the voters essentially usurp the legislature's resource allocation role,"[94] and thus makes an appropriation.

C. 17FSH2 is categorically different than 7WTR3, the initiative the Court approved in *Pebble*, and therefore *Pebble* does not control.

In the superior court, the sponsors argued—and the court agreed—that 17FSH2 is like 07WTR3, the initiative the Court approved in *Pebble Limited Partnership v. Parnell*,[95] and therefore it is permissible regulation rather than an appropriation.[96] The superior court characterized *Pebble* as holding that 07WTR3 did not make an appropriation because it "left to the legislature the discretion to determine what amount of pollutant discharge" would "adversely affect" human health or the life cycle of salmon. [Exc. 214] With this background, the superior court concluded that "[i]f 07WTR3 was constitutional because it left the legislature the discretion to define 'adversely affect,' [then] 17FSH2 must also be constitutional because it similarly leaves the legislature discretion in its implementation through the use of a plethora of undefined terms." [Exc. 214-15]

But 17FSH2 is categorically different than 07WTR3. As explained above, 17FSH2, by its terms, will prevent the legislature from allocating anadromous fish

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94 *Hughes*, 341 P.3d at 1128 (quoting *Staudenmaier*, 139 P.3d at 1263).

95 215 P.3d 1064.

96 Exc, 19, 23-27, 193-94, 214-15.

habitat to certain large projects. In contrast, with a small tweak that the Court made to its text, 07WTR3 did not prevent any use of water and the parties *agreed* that it did not make an appropriation.

The sponsors also relied on language in *Pebble* to argue below that 17FSH2 would not make an appropriation because it does not commit public assets to one group over another. [Exc. 19] But the language they cite is not an exclusive definition of appropriation; it is merely one example of an appropriation.

1. Had it been enacted, the initiative in *Pebble* would not have allocated any water among competing uses.

Rather than supporting the superior court's order, *Pebble* demonstrates why 17FSH2 falls on the other side of the line separating an initiative that permissibly regulates state assets from one that impermissibly appropriates them.

The initiative reviewed in *Pebble*, 07WTR3, prohibited a mining operation from releasing toxic pollutants into water in an amount that would "affect" human health or the life cycle of salmon.[97] The Lieutenant Governor certified the measure only after interpreting the word "affect" to mean "adversely affect," in order to make the initiative's substantive standards consistent with the initiative's stated purpose to "assure no adverse effects" to state waters.[98] In recommending that the Lieutenant Governor certify the initiative, the Department of Law noted that

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97 215 P.3d at 1069.

98 *Id.* at 1071.

without changing "affect" to "adversely affect," it would have recommended denying certification of 07WTR3 as an impermissible appropriation.[99]

But with the addition of the word "adversely," the appropriation issue was resolved.[100] The appellants had challenged the State's addition of the word as unauthorized, and argued that without that added modifier, 07WTR3 would prohibit large scale metallic mineral mines and thus make an appropriation.[101] But because the Court found that the Lieutenant Governor could add the word "adversely," it did not need to reach the appropriation issue.[102] With that change, all parties agreed that the initiative would not make an appropriation.[103]

In its *Pebble* opinion, the Court nevertheless explained why the modified initiative did not make an appropriation. It cited a statement from *Pullen* that an initiative that "simply amend[ed] 'a series of general legislative criteria to add more specific ones to guide the [state agency] in its future allocation decisions' " would be "a presumptively constitutional hypothetical initiative."[104] This was all 07WTR3 did; indeed, the Lieutenant Governor had noted that the initiative's

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99 *Id.*

100 *Id.* at 1077.

101 *See* Brief of Appellee/Cross-Appellant Pebble Limited Partnership, dated April 25, 2008, 2008 WL 5371089 at *34.

102 215 P.3d at 1077.

103 *Id.*

104 *Id.* at 1077 (quoting *Pullen v. Ulmer*, 923 P.2d at 63-64).

language "[did] not differ significantly from existing water quality standards."[105] More importantly, 07WTR3 "prohibited harm to public assets while permitting the use of public assets and exhibiting no explicit preference among potential users."[106] No party had provided any evidence that the initiative, as amended, would prevent any use of the water. That is because 07WTR3 left to the legislature "the discretion to determine what amounts of specific toxic pollutants may or may not be discharged."[107] The legislature could set these amounts so as to effectively preclude hard rock mining, but that allocation choice was not mandated by 07WTR3. The initiative itself did not compel or forbid any use of a state asset.

In contrast, 17FSH2 does not merely add more specific criteria "to guide the [state agency] in its future allocation decisions." By prohibiting projects that do not meet its permitting requirements, it dictates future allocation decisions without any further action of the legislature.[108]

2. The sponsors' reliance on *Pebble* dictum is misplaced, because the Court was merely citing one way—not the *only* way—that an initiative can make an appropriation.

In the trial court, the sponsors also relied on the Court's statement in *Pebble* that "the prohibition against initiatives that appropriate public assets does not

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105 *Id.* at 1071.

106 *Id.* at 1077.

107 *Id.*

108 *See supra* section I (B)(3).

extend to prohibit initiatives that regulate public assets, so long as the regulations do not result in the allocation of an asset entirely to one group at the expense of another."[109] The sponsors argued that 17FSH2 is not an appropriation because it "does not commit public assets to one group over another." [Exc. 19] But an allocation to one group over another is not a prerequisite for an appropriation.

The quoted language from *Pebble* describes one way that an initiative can make an appropriation, not the definitive line between acceptable regulation and unconstitutional appropriation. In *Hughes v. Treadwell*, the Court clarified the proper interpretation of this language, citing it as one example of a type of initiative that would be unconstitutional.[110] In *Hughes*, the Court listed several categories of initiatives that make appropriations, and then noted, "*Additionally*, an initiative that regulates the use of public assets may not 'result in the allocation of an asset entirely to one group at the expense of another."[111] Thus, although an initiative that allocates an asset entirely to one group at the expense of another makes an appropriation, this is not the only way it can do so.

This interpretation from *Hughes* is supported by other initiative cases. For example, in *Lieutenant Governor v. Alaska Fisheries Conservation Alliance, Inc.*, the Court cautioned that the *Pebble* language should not be given "an overly

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109 Exc. 19 (citing 215 P.3d at 1077)

110 341 P.3d at 1130.

111 *Id.* (emphasis added) (citing *Pebble*, 215 P.3d at 1077).

narrow and literal reading."[112] The Court noted that an initiative that allocates to more than one user group may also make an appropriation, citing *Pullen*.[113] So might an initiative that allocates an asset away from more than one distinct user group. An initiative that prevents use of state assets for several purposes—mining and dams for example—is a greater infringement on the legislature's allocation authority than an initiative that prevents only one of these uses.

And the Court has found an initiative to make an appropriation even when it did not result in the "complete reallocation" of an asset from a distinct user group. In *Pullen*, the Court rejected the State's argument that the F.I.S.H. initiative was a mere regulation that simply "amend[ed] a series of general legislative criteria to add more specific ones to guide the Board in its future allocation decisions."[114] The Court disagreed because the initiative "call[ed] for an actual allocation of salmon [from commercial fishers] in the event of a shortage of a given salmon species in a given geographical region."[115] But the initiative did not allocate salmon "entirely to one group at the expense of another"; it created a priority. Thus, in the case of only a small salmon shortage, the F.I.S.H. initiative might have required full allocation of salmon to personal, sport, and subsistence users and only partial

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112 363 P.3d at 111-12.

113 *Id.* at 112 (citing *Pullen*, 923 P.2d at 55).

114 923 P.2d at 64.

115 *Id.*

allocation to commercial users—thus causing a reallocation but not a complete reallocation. It nonetheless made an unconstitutional appropriation.

The initiative found unconstitutional in *Alliance of Concerned Taxpayers*—the capital projects veto case—similarly did not allocate an asset "entirely to one group at the expense of another."[116] The Court found the initiative to be an appropriation even though voters might not veto some projects, thus allowing the Borough Assembly to allocate money to them. And even when the voters did veto a project, the Assembly could reallocate the money to a different capital project or to the same project scaled down to cost less than a million dollars. Despite the retained authority to allocate some money to capital projects, the Court still found the initiative to unconstitutionally infringe on the assembly's appropriation power.

II. Severance cannot save the initiative.

Finally, although the Court sometimes salvages unconstitutional initiatives by severing improper provisions, this is not an option for 17FSH2. If the impermissible parts of 17FSH2 are severed—that is, the provisions that prohibit permits for projects that permanently displace fish habitat or that violate the habitat protection standards—a plain reading of the remaining sections would still bar the same projects prohibited by the severed sections. Alternatively, if the post-severance version of 17FSH2 were somehow interpreted to *allow* projects that

116 273 P.3d 1128.

permanently displace fish habitat, the spirit of the bill will be substantially changed and substantially different than the version subscribed to by the sponsors and petition signors. Neither alternative meets the Court's standard for severance.

The Court applies a three-part test when considering whether to sever problematic portions of initiatives not yet enacted but already subscribed to by the requisite number of voters.[117] The Court will sever a portion when: (1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirt of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety.[118] The Court will exercise its "power to sever an impermissible section of an initiative 'circumspectly.' "[119]

The Court first applied this test to sever one of the four sentences in the initiative it reviewed in *McAlpine v. University of Alaska*. That initiative proposed an independent community college system, but its third sentence improperly

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[117] *McAlpine*, 762 P.2d at 94-95; *cf. Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d at 209-10 (deciding that the two-part test of *Lynden Transport, Inc. v. State*, 532 P.2d 700, 713 (Alaska 1975) applies to initiatives already enacted); *cf. Kohlhaas v. State, Office of Lieutenant Governor*, 147 P.3d 714, 720 (Alaska 2006)(holding that the Court will not sever impermissible provision from an initiative that has not yet been subscribed to by the requisite number of voters, as "the burden on the initiative's sponsors to redraft and resubmit the initiative is not too onerous.")

[118] *McAlpine*, 762 P.2d at 94-95.

[119] *Alaska Action Center*, 84 P.3d at 995.

mandated that a certain amount of state university system assets be given to the new system.[120] The Court severed this sentence. It found "that the primary goal of the sponsors and subscribers" was to reorganize the University so that the "community colleges will be administered separately from the other programs."[121] Although the sponsors and subscribers wanted to specify an amount of assets to fund the new community college system, the Court had "little doubt that they would be content to leave that decision to the legislature, rather than to have their proposal invalidated in its entirety," and concluded that severing that provision would not substantially change the spirit of the measure.[122] Thus, the Court found that the bill remained viable without the impermissible appropriation provision.

In contrast, the Court declined to sever the impermissible appropriation provision in *Alaska Action Center,* which designated municipal property in Girdwood as a park.[123] The impermissible provision in the initiative dedicated the land as a park, while a permissible provision barred the use of the park for golf-related uses.[124] The Court determined that although the initiative sponsors wanted a golf-free park, without the park designation the measure would eliminate any golf

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120 *McAlpine*, 762 P.2d at 90-91.

121 *Id.* at 95.

122 *Id.*

123 84 P.3d at 991.

124 *Id*.

use of the land "while leaving open the full range of options for other development of the land."[125] The Court could not "assume that golf would never be the initiative sponsors' preference when weighed against . . . other development options" such as "high-density residential or commercial development."[126] It thus could not "allow the golf prohibition to go before the voters without the park designation."[127]

17FSH2 is even less salvageable without its offending provisions than the park initiative in *Alaska Action Center*. When the "substantial damage" and "habitat protection standards" provisions are eliminated, the remaining provisions require that habitat be protected from "significant adverse impacts" through mitigation measures that, at a minimum, require the habitat to be restored.[128]

With the "substantial damage" and "habitat protection standards" provisions severed, the initiative would work as follows: If a permitted activity cannot avoid "significant adverse effects" to anadromous fish habitat, ADF&G must require a permittee to mitigate these effects.[129] When establishing mitigation conditions for such an activity, ADF&G has three options presented as consecutive tiers: the first option is to limit adverse effects "by changing the siting, timing, procedure, or

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125 *Id.*

126 *Id.*

127 *Id.*

128 Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887(a), (b)).

129 Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887(a)).

other manageable qualities of the activity."[130] If those measures cannot prevent adverse impacts to anadromous fish habitat, then the impacts must be minimized "by limiting the degree, magnitude, duration, or implementation of the activity."[131] If the activity cannot be implemented in a manner that prevents adverse effects to anadromous fish habitat by applying the first two tiers of mitigation measures, then the permittee must "restore the affected anadromous fish habitat."[132]

But of course, the affected fish habitat cannot be restored when an activity would permanently displace the habitat, as would some large development projects. And the remaining provisions do not allow ADF&G to waive these mitigation measures, as it can issue a permit only if the mitigation measures are "mandatory and enforceable."[133] The ADF&G commissioner will not overlook this requirement in light of the criminal penalties applicable either for violating this requirement, or for allowing anyone else to do so.[134]

The mitigation requirements cannot be severed, because without them the measure is gutted of the mechanisms by which it protects anadromous fish habitat while allowing use of the water. Severance would not leave a measure that

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130 Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887(b)(1)).

131 Exc. 35: 17FSH2 § 7 (proposed AS 16.05.887(b)(2)).

132 Exc. 35;17FSH2 § 7 (proposed AS 16.05.887(b)(3)).

133 Exc. 34: 17FSH2 § 6 (proposed AS 16.05.885(e)(2)).

134 Exc. 36: 17FSH2 § 10 (proposed AS 16.05 901(a)).

"standing alone . . . can be given legal effect."[135] But leaving the mitigation provisions intact is not an option, because the remaining initiative would still appropriate state assets by forbidding a permit for a project that cannot preserve fish habitat.

And even if severance of the "substantial damage" and "habitat protection standards" provisions left a bill that was somehow interpreted to allow permits for activities that would permanently displace the habitat—a reading contrary to the bill's mitigation requirements—severance of those two provisions would have the perverse effect of requiring strictly enforced mitigation measures for activities that harm anadromous fish habitat while simultaneously allowing unmitigated activities that destroy it. This would "substantially change the spirit of the measure," contrary to the second of the three severance conditions.[136] In addition, because this would contradict the understanding of the sponsors[137] and of the voters who have already signed 17FSH2's booklets,[138] the Court could not assume that "the

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135 *McAlpine*, 762 P.2d at 94.

136 *McAlpine*, 762 P.3d at 94.

137 *See* Exc. 185-87.

138 *See* Impartial Summary for 17FSH2, published in the signature booklets and found at http://elections.alaska.gov/petitions/17FSH2/17FSH2%20Impartial%20Summary.pdf (last viewed Jan. 5, 2018) (stating in part that "[t]he act would require ADF&G to avoid or minimize adverse effects [to fish habitat] through mitigation measures and permit conditions," and "[t] he act would also require ADF&G to deny a permit if the proposed activity would cause substantial damage to fish habitat").

subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety," the third severance condition.[139]

CONCLUSION

For these reasons, the Court should reverse the judgment of the superior court.

[139] *McAlpine*, 762 P.2d at 94-95.