IN THE SUPREME COURT FOR 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.	Case No.: S-16862

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

BRIEF OF APPELLEE

Appeal from the Superior Court
Third Judicial District, Honorable Judge Rindner, Superior Court Judge

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Marilyn May, Clerk
By: _____

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ALASKA CONSTITUTION

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, § 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 An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date.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 16.05.841: Fishway required

If the commissioner considers it necessary, every dam or other obstruction built by any person across a stream frequented by salmon or other fish shall be provided by that person with a durable and efficient fishway and a device for efficient passage for downstream migrants. The fishway or device or both shall be maintained in a practical and effective manner in the place, form, and capacity the commissioner approves for which plans and specifications shall be approved by the department upon application. The fishway or device shall be kept open, unobstructed, and supplied with a sufficient quantity of water to admit freely the passage of fish through it.

AS 16.05.871: Protection of fish and game

(a) The commissioner shall, in accordance with AS 44.62 (Administrative Procedure Act), specify the various rivers, lakes, and streams or parts of them that are important for the spawning, rearing, or migration of anadromous fish.

(b) If a person or governmental agency desires to construct a hydraulic project, or use, divert, obstruct, pollute, or change the natural flow or bed of a specified river, lake, or stream, or to use wheeled, tracked, or excavating equipment or log-dragging equipment in the bed of a specified river, lake, or stream, the person or governmental agency shall notify the commissioner of this intention before the beginning of the construction or use.

(c) The commissioner shall acknowledge receiving the notice by return first class mail. If the commissioner determines that the following information is required, the letter of acknowledgement shall require the person or governmental agency to submit to the commissioner:

(1) full plans and specifications of the proposed construction or work;

(2) complete plans and specifications for the proper protection of fish and game in connection with the construction or work, or in connection with the use; and

(3) the approximate date the construction, work, or use will begin.

(d) The commissioner shall approve the proposed construction, work, or use in writing unless the commissioner finds the plans and specifications insufficient for the proper protection of fish and game. Upon a finding that the plans and specifications are insufficient for the proper protection of fish and game, the commissioner shall notify the person or governmental agency that submitted the plans and specifications of that finding

by first class mail. The person or governmental agency may, within 90 days of receiving the notice, initiate a hearing under AS 44.62.370. The hearing is subject to AS 44.62.330--44.62.630.

AS 16.05.901: Penalty for violations of AS 16.05.871–16.05.896

(a) A person who violates AS 16.05.871--16.05.896 is guilty of a class A misdemeanor.

(b) The court shall transmit the proceeds of all fines to the proper state officer for deposit in the general fund of the state.

ISSUES PRESENTED FOR REVIEW

1. *Appropriation by initiative.* Proposed initiative 17FSH2 updates the Alaska Department of Fish and Game's (ADF&G) statutory mandate to ensure the proper protection of fish and wildlife. Among other things, the initiative establishes a framework for ADF&G to apply when evaluating an anadromous fish habitat permit application. If ADF&G determines a proposed project will result in significant adverse effects to such habitat, then ADF&G will seek to avoid, minimize, and mitigate those effects. ADF&G must deny a permit application for a project if it determines that the resulting adverse effects are substantial and cannot be reclaimed or restored within a reasonable time. Do the provisions requiring ADF&G to deny a permit application in such circumstances amount to an appropriation of state assets in violation of the subject matter restrictions on the citizen initiative rights set forth in the Alaska Constitution?

2. *Severability*. The Lieutenant Governor and Division of Elections (collectively, State) have only challenged the provisions in 17FSH2 that require ADF&G to deny permit applications under certain circumstances. The remainder of 17FSH2 includes provisions that would further the protection of anadromous fish habitat, such as requiring public notice and comment, providing authority for establishing application fees, giving ADF&G permitting authority over all anadromous fish habitat, and creating additional enforcement mechanisms for permit violations. If the Court determines any provision in 17FSH2 constitutes an appropriation, has the State carried its burden to establish that 17FSH2 cannot be severed to allow the remaining provisions to reach the voters?

STATEMENT OF THE CASE

Wild salmon are an essential part of the culture, identity, and economic well-being of Alaska. However, the current laws that aim to protect fish habitat are vague, apply to less than half of the anadromous fish habitat in Alaska, provide no public process when permits are issued, contain inadequate enforcement provisions, and have not been updated since their adoption shortly after statehood.[1] Recognizing the importance of fish habitat to the continued sustainability of Alaska's fish and wildlife, Stand for Salmon submitted a proposed ballot initiative, entitled "An Act providing for protection of wild salmon and fish and wildlife habitat." This initiative was numbered 17FSHB by the Division of Elections. [Exc. 84–91]

The Lieutenant Governor Erroneously Denied Certification of Stand for Salmon's Ballot Initiative.

The Department of Law (DOL) responded to 17FSHB with a letter informing the ballot committee that DOL considered four provisions to violate the constitutional restriction on using initiatives to appropriate state assets. [Exc. 38–43] Stand for Salmon revised those provisions to increase the discretion inherent in the initiative, and submitted a new application. [Exc. 44–54] The Lieutenant Governor denied certification of the new application, now titled 17FSH2. [Exc. 55] The denial cited the reasons provided by

[1] AS 16.05.841, AS 16.05.871. Although these provisions have not been meaningfully changed since their enactment, the authority for enforcing them was transferred from the Commissioner of ADF&G to the Alaska Department of Natural Resources in 2006, and then back to ADF&G in 2008. Alaska Laws Exec. Order 2003–107; Alaska Laws Exec. Order 2008–114.

DOL's opinion on 17FSH2, which in turn relied almost entirely on DOL's letter analyzing the previous version of the initiative, 17FSHB. [Exc. 55–63, *citing* Exc. 38–43]

After the Lieutenant Governor denied certification, Stand for Salmon filed a complaint in the Superior Court, along with a motion for a preliminary injunction requesting an order requiring the Lieutenant Governor to print petition booklets. [Exc. 4] The parties then jointly moved to convert the preliminary injunction motion into cross motions for summary judgment. [Exc. 202] Following argument, the Superior Court ordered certification of the initiative, holding that it did not appropriate state assets. [Exc. 202–22]

The Superior Court Correctly Held That 17FSH2 Would Not Make an Appropriation.

The Superior Court recognized that "[t]he central disagreement between the parties is whether 17FSH2 is a permissible regulation or an allocation of public assets that impermissibly limits legislative discretion." [Exc. 210] To decide between the two, the Superior Court considered "whether an initiative 'set[s] aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action.'"[2] The Superior Court found that the initiative leaves sufficient discretion to the legislature to implement its terms, rejecting the State's "pure speculation" about "what the impact of 17FSH2, if passed, must be." [Exc. 221] The Superior Court found that the State had presented "no competent evidence regarding the impact of the initiative[, n]or does such

[2] Exc. 210, citing *Hughes v. Treadwell*, 341 P.3d 1121, 1126 (Alaska 2015).

evidence exist." [Exc. 221] This is because, as the Superior Court acknowledged, the impact of the initiative "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." [Exc. 221] Because of the "plethora of undefined terms," the Superior Court found that, under this Court's decision in *Pebble Limited Partnership ex rel. Pebble Mines Corporation v. Parnell*, 215 P.3d 1064 (Alaska 2009), 17FSH2 does not make an impermissible appropriation. [Exc. 214–15]

17FSH2 Seeks to Modernize State Permitting of Projects that May Adversely Affect Anadromous Fish Habitat.

17FSH2 is a regulatory initiative that builds on existing law aimed at protecting anadromous fish and fish habitat. [Exc. 30–37] It seeks to modernize the fish habitat permitting process, and to ensure ADF&G protects healthy wild salmon runs, vital to Alaska's economy and culture.

17FSH2 addresses five important deficiencies in the current law. First, it provides general standards to establish basin-wide management guidelines that encourage consideration of the entire system when making permitting decisions.[3] Second, 17FSH2 addresses a significant jurisdictional limitation that currently leaves over half of Alaska's anadromous fish habitat beyond the protection of the current Anadromous Fish Act.[4]

[3] Exc. 30 (17FSH2 § 2, proposed AS 16.05.867).
[4] Exc. 30–31 (17FSH2 § 3, proposed AS 16.05.871(b)–(e)).

Third, it creates different permit-types depending on the level of effects the proposed project may have on fish habitat.[5] These range from exemptions for activities with only minor effects, to a more robust permitting process including scientific analysis and a public comment period for projects that have the potential to cause significant adverse effects to state assets. Fourth, 17FSH2 establishes a mitigation scheme that encourages the project proponent to work with ADF&G to first avoid and/or minimize significant adverse effects to anadromous fish habitat.[6] If adverse effects cannot be avoided or minimized, ADF&G may issue the permit with the condition that the permittee will reclaim or restore the project area within a reasonable period of time once the project is complete. Finally, it establishes enforcement provisions that provide ADF&G with a variety of tools to address permit violations.[7]

STANDARD OF REVIEW

The Court reviews summary judgment decisions de novo, "drawing all inferences in favor of, and viewing the facts in the record in the light most favorable to, the non-moving party."[8] The Court reviews "questions of law, including the constitutionality of a ballot initiative, using [its] independent judgment, adopting the rule of law that is most persuasive in light of precedent, reason, and policy."[9] "The interpretation of the

[5] Exc. 30 (17FSH2 § 3, proposed AS 16.05.871(a)); Exc. 32 (17FSH2 § 6, proposed AS 16.05.883–.885).
[6] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887).
[7] Exc. 36–37 (17FSH2 §§ 9–11, proposed AS 16.05.894 & proposed AS 16.05.901).
[8] *Lieutenant Governor of State v. Alaska Fisheries Conservation All., Inc.*, 363 P.3d 105, 108 (Alaska 2015) (citing *Pebble P'ship ex rel. Pebble Mines Corp.*, 215 P.3d at 1072).
[9] *Id.*; *see also State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016) (whether a ballot initiative is an appropriation is a question of law).

constitutional term 'appropriation' is a question of law to which [the Court] appl[ies its] independent judgment."[10]

ARGUMENT

17FSH2 is a permissible regulatory initiative. It adds to the existing regulatory scheme governing fish habitat without allocating any asset to one group at the expense of another,[11] and leaves significant discretion with the legislature to implement its terms.[12] Certain provisions require ADF&G to deny permit applications for projects where ADF&G determines the harm exceeds a certain threshold and cannot be reclaimed or restored. However, this does not turn the initiative into an appropriation, as it does not prohibit the allocation of *specific* state assets to *specific* uses,[13] and the question of what level of harm may be prohibited requires ADF&G to exercise its discretion. This type of regulatory initiative mirrors that upheld by the Court in *Pebble Limited Partnership.*[14] And, because 17FSH2 contains a number of different, independent sections unrelated to the State's objections, each of which further the goals of the initiative, if the Court

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[10] *Alaska Fisheries Conservation All.*, 363 P.3d at 108.
[11] *Pebble P'ship ex rel. Pebble Mines Corp.*, 215 P.3d at 1077 (clarifying that "the prohibition against initiatives that appropriate public assets does not 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.").
[12] *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 91 (Alaska 1988) (finding a portion of an initiative made an appropriation because it would "designate the use of state assets in a manner that is executable, mandatory, and reasonably definite with no further legislative action").
[13] *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 993 (Alaska 2004) (finding that "designating a *particular* tract of land as a park . . . would commit *specific* public assets to a *specific* purpose, making an appropriation" (emphasis added)).
[14] *Pebble P'ship ex rel. Pebble Mines Corp.*, 215 P.3d 1064; *see also* Exc. 50–54 (comparing provisions of 17FSHB, 17FSH2, and 07WTR3).

determines that any provision makes an appropriation, it should sever that provision and preserve the remainder of the initiative.

I. 17FSH2 Is a Permissible Regulatory Initiative.

17FSH2 falls within the constitutional parameters of an initiative that regulates state assets. This Court has held that an initiative may regulate natural resources,[15] unless it infringes on the legislature's "control over the allocation of state assets among competing needs."[16] An initiative so infringes only when it "set[s] 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."[17]

The State asserts that 17FSH2 "prohibits significant uses of state assets . . . mak[ing] an appropriation."[18] The State misconstrues applicable case law, overlooks the significant discretion left to ADF&G to interpret the initiative's terms, and improperly attempts to recast the legal test for what is an appropriation. Because 17FSH2 does not

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[15] *Pebble P'ship ex rel. Pebble Mines Corp.* 215 P.3d at 1077.
[16] *Id*., 215 P.3d at 1075.
[17] *McAlpine,* 762 P.2d at 88; *see also City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1157 (Alaska 1991); *Alaska Action Ctr., Inc.*, 84 P.3d at 993 (Alaska 2004); *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1262 (Alaska 2006); *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1075; *Municipality of Anchorage v. Holleman*, 321 P.3d 378, 385 (Alaska 2014); *Alaska Fisheries Conservation All., Inc.*, 363 P.3d at 109.
[18] Br. of State Appellants (State Br.) at 37 (Jan. 11, 2018). As to the claims raised by the *amici curiae*, the Court should apply the ordinary rule of party issue selection and preclusion. U.S. Supreme Court cases have held that the Court will not consider arguments raised only by *amici curiae*. *See, e.g., Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 & n. 4 (2013) (refusing to consider an argument that was not raised by the parties or considered by the lower courts).

violate the constitution's prohibition on making appropriations through initiatives, the Court should affirm the Superior Court's decision to certify 17FSH2.

A. Initiatives are Construed Broadly to Preserve Their Constitutionality.

The citizens of Alaska reserved to themselves the power to legislate directly, by proposing and enacting laws by the initiative, and rejecting acts of the legislature by referendum.[19] To protect this constitutional right, the Alaska Supreme Court broadly construes voter initiatives "so as to preserve them wherever possible."[20] Initiatives that deal with public assets "require careful consideration."[21] But this careful consideration includes "narrowly interpret[ing] the subject matter limitations that the Alaska Constitution places on initiatives."[22] It also requires interpreting, and sometimes altering,

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[19] Alaska Const. art. XI, § 1; *see also* AS 15.45.010 ("The law-making powers assigned to the legislature may be exercised by the people through initiative."); *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977) ("In matters of initiative . . . the people are exercising a power reserved to them by the constitution and the laws of the state.").

[20] *City of Fairbanks*, 818 P.2d at 1155.

[21] *Id.*; *see also* Alaska Const. art. XI, § 7.

[22] *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999). The State misinterprets the language in *City of Fairbanks*, 818 P.2d at 1156, arguing that it supports a broad interpretation of the term "appropriation." State Br. at 11. In *City of Fairbanks*, the Court addressed a repeal of an appropriation and noted that a number of the Court's previous cases had interpreted "appropriation" broadly, citing to the cases that clarified that the prohibition of "appropriations" was not limited to money, but also extended to land and other assets. *City of Fairbanks*, 818 P.2d at 1156, *citing Thomas v. Bailey*, 595 P.2d 1, 7 (Alaska 1979) (extending the prohibition against appropriations to include transfers of non-monetary assets such as land); *Alaska Conservative Political Action Comm. v. Municipality of Anchorage*, 745 P.2d 936, 938 (Alaska 1987) (extending the prohibition against appropriations to include "*all* state and municipal assets . . . [including a] utility" (emphasis in original)); and *McAlpine*, 762 P.2d at 89 (prohibiting the appropriation of nonmonetary assets including property). However, the *City of Fairbanks* Court then found that "the purposes of the constitution are not met by construing the term

initiatives to "preserve the people's right to be heard through the initiative process wherever possible."[23]

The Court uses a two-part test to determine whether an initiative would make an impermissible appropriation of state assets.[24] First, the Court determines whether the initiative deals with a public asset.[25] In the case of 17FSH2, the Superior Court correctly held that it does. [Exc. 208] Second, the Court examines whether the initiative would appropriate an asset.[26] To answer the second question, the Court looks to the two core objectives underlying the prohibition on appropriations through ballot initiatives: whether the initiative is a give-away program and whether it removes all legislative discretion.[27]

'appropriations' broadly in the context of an initiative which arguably repeals an appropriation," and refused to further broaden the definition of appropriation to include a repeal of a bed tax with a designated economic development purpose. *City of Fairbanks*, 818 P.2d at 1156–57. This is because a "broad construction of 'appropriations' is not necessary to accomplish" the purpose of the constitutional limitation. *Id*. at 1157. To avoid the exception (the constitutional limitations) swallowing the rule (the citizens' right to the initiative), the Court gives "carefully consideration" to constitutional limitations, but "narrowly interprets" the subject matter limitations. *Swetzof v. Philemonoff*, 203 P.3d 471, 474–75 (Alaska 2009).

[23] *McAlpine*, 762 P.2d at 94-95; *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1076–77 (affirming superior court's interpretation of initiative that inferred the inclusion of the word "adverse" to preserve its constitutionality); *see also* Dep't of Law, Office of Att'y Gen to Sean Parnell, Lieutenant Governor re: Review of 07WTR3 Initiative Application, A.G. file no: 663-07-0179, at 15 n. 17 (Oct. 17, 2007) (construing "effect" to mean "adversely effect" to avoid finding the initiative would make an impermissible appropriation). Exc. 105-106.

[24] *Holleman*, 321 P.3d at 384.

[25] *Id*.

[26] *Id.*

[27] *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1074–75.

The parties agree that 17FSH2 is not a give-away program. [Exc. 209] The issue here is whether it removes all legislative discretion.[28]

The second core objective seeks to preserve sufficient legislative discretion so that the legislature retains control over the allocation of state assets among competing needs.[29] This does not mean there can be *no* restriction on legislative discretion. The 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."[30] An initiative will be considered an appropriation if it "would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action."[31]

The Court first articulated this test in *McAlpine v. University of Alaska*,[32] and has consistently applied it in initiative cases that deal with state assets.[33] In *McAlpine*, an initiative proposed the creation of a community college system, and required: (1) the university to give the community college "such . . . property as is necessary" for

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[28] State Br. at 13–14.
[29] *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1075.
[30] *Id*. (emphasis added). The State argues that Stand for Salmon presents this as the only question to determine whether an initiative makes an appropriation. State Br. at 34–45. This mischaracterizes Stand for Salmon's briefing in the Superior Court, where this portion of the test was clearly articulated as part of the analysis of the second core objective. Exc. 22.
[31] *Staudenmaier*, 139 P.3d at 1262.
[32] 762 P.2d at 91.
[33] *See, e.g.*, *City of Fairbanks*, 818 P.2d at 1157; *Alaska Action Ctr., Inc.*, 84 P.3d at 993; *Staudenmaier*, 139 P.3d at 1262; *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1075; *Holleman*, 321 P.3d at 385; *Alaska Fisheries Conservation All., Inc.*, 363 P.3d at 109.

operation; and (2) that the amount of property transferred would be commensurate with the property held by the former community college system on a specific date.[34] The Court held that the first requirement was not an appropriation because the university retained discretion to decide what amount of property was "necessary."[35] The fact that the initiative took away the legislature's discretion to eliminate all funding did not make it an appropriation, as the legislature could determine the scale of the community college system.[36] However, the second requirement was an impermissible appropriation because it mandated a specific amount of property to be transferred to the community college system.[37] The *McAlpine* Court held that it "designate[d] the use of state assets in a manner that is executable, mandatory, and reasonably definite with no further legislative action."[38]

The State now attempts to minimize the relevance of this test.[39] But this Court reiterated the test in one of its most recent initiative cases — *Hughes v. Treadwell* — and then described how several of the Court's other decisions "illuminate this principle."[40]

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[34] *McAlpine*, 762 P.2d at 83.
[35] *Id.* at 91.
[36] *Id.*
[37] *Id.*; *see also Alaska Action Ctr.*, 84 P.3d at 994 (explaining that its finding of an appropriation in *McAlpine* rested on the offensive provision "direct[ing] a *specific amount* of property to be used for a *specific purpose*" (emphasis added)).
[38] *McAlpine*, 762 P.2d at 91.
[39] State Br. at 35.
[40] *Hughes*, 341 P.3d at 1126–30. The State followed this test when evaluating the initiative at issue in *Hughes*, relying on *Pebble*. *See* Dep't of Law, Office of the Att'y Gen to Mead Treadwell, Lieutenant Governor re: Review of "Bristol Bay Forever" Initiative Application, A.G. File No. JU2012200845, 6–8 (Dec. 17, 2013), http://www.elections.alaska.gov/petitions/12BBAY/12BBAY-AG-Opinion-Final-12-17-12.pdf (DOL decision certifying the 12BBAY initiative, affirmed in *Hughes*, 341 P.3d

Far from "sometimes serving as a check,"[41] the question of "whether the initiative would set aside a certain specified amount of [state assets] in such a manner that is executable, mandatory, and reasonably definite with no further legislative action" is a key aspect of the Court's analysis of the second core objective. 17FSH2 is not an appropriation under this test.[42]

B. Initiatives May Prohibit Harmful Activities so Long as They Do Not Allocate a Specific Asset for a Specific Purpose and Leave Adequate Discretion with the Legislature to Implement Their Terms.

Regulatory initiatives by their very nature prohibit activities that fail to comply with their terms. Yet, they are constitutionally permissible where they do not allocate a specific amount of an asset for a specific purpose, and where they leave discretion with the Legislature to implement their terms, such as determining what effects rise to the level of "adverse effects."[43] 17FSH2 does just that: it establishes a permitting system where the legislature, through ADF&G, regulates adverse effects to fish habitat.[44] The

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1121).

[41] State Br. at 35.

[42] *See infra* at Section I.C.

[43] *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1077; *see also Hughes*, 341 P.3d at 1129 ("[W]e have never held that any effect on public resources triggers the prohibition on direct legislation; nearly all legislation involves public assets to some degree." (quoting *Holleman*, 321 P.3d at 384)).

[44] Some of the *amici curiae* fail to recognize that, when the Court evaluates whether an initiative has left discretion to the legislature to implement its terms, that does not necessarily mean that the legislature itself will be passing statutes to implement the initiative. *See* Council for Alaska Producers' *Amicus Curiae* Br. (CAP Br.) at 13 (Jan. 11, 2018); Br. of *Amici Curiae* Alaska Oil and Gas Association and Resource Development Council for Alaska, Inc. (AOGA Br.) at 15–16 & n. 53 (Jan. 11, 2018). Rather, just as the Department of Environmental Conservation was the agency exercising discretion over 07WTR3, in the case of 17FSH2, the legislature has already delegated the authority to ADF&G to manage fish and game in Alaska, and it is ADF&G that will be responsible for interpreting and implementing 17FSH2. *See* AS 16.05.020 ("The commissioner shall .

State's position is that initiatives may only "suggest" how public assets may be used,[45] and that if 17FSH2 would prevent ADF&G from permitting some projects, then it is an appropriation.[46] This position cannot be squared with the Court's decision in *Pebble*.

In Pebble Limited Partnership ex rel. Pebble Mines Corp. v. Parnell, the Court upheld 07WTR3.[47] That initiative prohibited both (1) the release of toxic discharges that would adversely affect "human health or welfare or any stage of the life cycle of salmon, into, any surface or subsurface water, or tributary thereto," and (2) the storage of mining waste "in a way that could result" in toxics "directly or indirectly" causing adverse effects to "surface or subsurface water or tributaries thereto used for human consumption or salmon spawning, rearing, migration or propagation."[48] To determine whether these provisions made an appropriation, the Court "consider[ed] whether the initiative would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action."[49] The Court found that it did not. Interpreting 07WTR3 to preserve its constitutionality, the Court determined that it only prohibited adverse effects, which left

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. . manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and general well-being of the state [and] have the necessary power to accomplish the foregoing. . . .").

[45] State Br. at 36.

[46] State Br. at 2 ("This case asks whether voters may effectively prohibit *some* resource development projects" (emphasis added)); *see also* State Br. at 4, 7, 14, 24, 25, 28, 29, 33, 47 (referring to how some projects may be prohibited).

[47] *Id.* at 1069.

[48] *Id.* at 1069. A copy of 07WTR3 is at Exc. 110–13.

[49] *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1075.

discretion with the legislature to determine the specific amount of toxic pollutants prohibited by 07WTR3.[50]

The State's argument that initiatives may only suggest the use of assets conflicts not only with case law, but also with DOL's prior positions.[51] When analyzing 07WTR3, the Attorney General Opinion concluded "provisions that prohibit discharges that cause adverse effects to land and water are permissible regulation." [Exc. 105–106] DOL deemed the provision of 07WTR3 that prohibited the release of a toxic pollutant "in a measurable amount that will effect human health or welfare or any stage of the life cycle of salmon" as "merely preventing harm," not "an allocation of public water resources amongst competing uses." [Exc. 106]

Like the initiative at issue in *Pebble*, 17FSH2 is a "permissible management or regulatory policy."[52] The State tries to distinguish the holding of *Pebble* by arguing that

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[50] *Id.* at 1077.

[51] DOL has previously recognized that outright bans of certain activities are not appropriations. For example, DOL found that a ban on same-day aerial hunting of grizzly bears was not an appropriation. 2007 Op. Att'y Gen 1 at *2, 2007 WL 321188 (Feb. 1, 2007). DOL certified provisions that restricted predator control programs only when data supported a "biological emergency" that could not be prevented any other way, restricted participants to state employees, and limited the number of animals that could be removed. *Id*. at *3. DOL concluded that the initiative was not an appropriation, and that any impact to the balance of uses favored between consumptive and non-consumptive users of wildlife was "only an indirect result of the initiative." *Id*. at *4.

[52] *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1075. The State incorrectly disavows the controlling nature of *Pebble*. State Br. at 37. The initiative at issue in *Pebble* is the most similar initiative to 17FSH2 considered by this Court, and adopting the State's position would require the Court to reject its previous decisions that initiatives that regulate public assets are not appropriations. *See Hughes*, 341 P.3d at 1129 ("An initiative . . . may . . . regulate the use of public assets").

07WTR3 "did not compel or forbid any use of a state asset."[53] The State misrepresents the effect that 07WTR3 would have had, if it had been adopted. The initiative would have prohibited any proposed project that the State determined would discharge an amount of toxins that would cause adverse effects to fish. And, as the Superior Court noted below, "07WTR3 could just as easily be described as an initiative prohibiting the use of state waters for mining discharge, and 17FSH2 could conversely be styled as an initiative preventing harm to the public asset of anadromous fish habitat." [Exc. 219] 17FSH2 permissibly prohibits harm to a state asset while still permitting the use of the asset with no explicit preferences among potential users.[54] Prohibiting a certain level of harm to a natural resource does not render it an appropriation. If it did, then any regulation of natural resources would not be possible by initiative. [55]

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[53] State Br. at 40. The State implies that the Court's analysis of the impact of the word "adversely" in 07WTR3 is dicta because "the parties *agreed* that it did not make an appropriation." State Br. at 38 (emphasis in original). This should be rejected. The Court had before it the question of whether 07WTR3 was an impermissible appropriation. The fact that the parties conceded that the Court could resolve the question by inferring the inclusion of the word "adverse" in the text, does not change the determination made by the Court that the initiative, read to include "adverse," was not an appropriation. *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1077; *see also Hughes*, 341 P.3d at 1128 (relying on the Court's analysis in *Pebble*).

[54] *See Alaska Fisheries Conservation All., Inc.*, 363 P.3d at 112. ("Reading *Pebble* and *Pullen* together, an initiative may constitute an appropriation if it results in the *complete* reallocation of an asset from a significant, distinct user group." (emphasis in original)); *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1077("[T]he prohibition against initiatives that appropriate public assets does not 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." (emphasis added)).

[55] *See Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1077 ("[N]atural resource management is an appropriate subject for a public initiative."); *Brooks*, 971 P.2d at 1033 (allowing an initiative banning wolf snaring); see also *Alaska Action Ctr., Inc.*, 84 P.3d at 995 (indicating that an initiative banning the use of municipality land for golf

The State argues that "17FSH2 is categorically different than 07WTR3." [56] But 17FSH2 does not dictate an appropriation any more than 07WTR3 did because it is not "executable, mandatory, and reasonably definite" without ADF&G further defining and interpreting its requirements. Because 17FSH2 leaves significant discretion with ADF&G to interpret its requirements,[57] the initiative does not cross the line between initiatives that enact regulations and those that appropriate state resources.[58]

C. 17FSH2 Does Not Set Aside Specific State Assets for a Specific Use in a Manner that is Executable, Mandatory, and Reasonably Definite with No Further Legislative Action.

17FSH2 would not "set aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action."[59] Initiatives may prohibit activities or otherwise restrict legislative choice so long as they do not allocate a specific amount of a state asset to a specific purpose, which 17FSH2 does not do. The initiative leaves significant discretion with ADF&G to define the exact contours of its regulatory requirements.

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would not have been an appropriation).
[56] State Br. at 37.
[57] *See infra* Section I.C.2.
[58] *Hughes*, 341 P.3d at 1131 ("[the initiative] undeniably would alter the legislature's existing scheme for allocating and regulating the used of the state's mineral resources. But this Court concluded in *Pebble Limited Partnership* that there is no prohibition on initiatives altering existing public resource regulations.").
[59] *Staudenmaier*, 139 P.3d at 1262.

1. 17FSH2 Does Not Commit Specific Assets Toward or Away from Specific Uses.

17FSH2 does not prohibit the allocation of anadromous fish habitat to entire categories of development projects. Although the State argues at length that 17FSH2 bars *some* development,[60] it does not address the relevant question: Does the initiative give state assets — salmon and fish and wildlife habitat — "*entirely* to one group at the expense of another"[61] or commit specific public assets to specific uses?[62] It does not. All uses that may effect anadromous fish habitat are regulated under the same framework. The State expressly admits that only "some" projects will be prohibited, not entire categories.[63] The exact scope of the prohibition will depend on how ADF&G interprets and implements the initiative, such that the legislature still retains the ability to allocate resources among competing uses.

For example, the State claims that "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."[64] This is a flawed argument. First, the habitat protection standards are general, broad guidelines that

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[60] State Br. at 24–29.
[61] *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1077 (emphasis added); *see also Hughes*, 341 P.3d at 1131 ("Adding an additional regulatory step for large scale mining projects may or may not benefit the fishing industry and burden a segment of the mining industry, but it certainly does not result in the allocation of an asset entirely to one group at the expense of another." (internal citation and quotation omitted)).
[62] *Alaska Action Ctr., Inc.*, 84 P.3d at 996 (finding that "designating a *particular* tract of land as a park . . . would commit *specific* public assets to a *specific* purpose, making an appropriation" (emphasis added)).
[63] State Br. at 2, 4, 7, 14, 24, 25, 28, 29, 33, 47.
[64] State Br. at 27.

allow ADF&G to interpret how much water is needed in a stream to support anadromous fish and fish habitat.[65] And not all dam projects are the same, which means that not all dam projects will have the same level of effects to anadromous fish habitat. Throughout Alaska, hydropower projects are sited, developed, and operated in a way that minimizes effects to fish habitat. Conventional dam structures create a bank-to-bank impoundment, storing water behind.[66] Adverse effects to fish habitat can be dramatically reduced by the siting and design of these facilities, and by operating the dam to release a sufficient amount of water, based on seasonal flows to mimic natural flow regimes. Another kind of dam — run of river — maintains natural flows because it does not create an impoundment at all.[67] And communities in Alaska have harnessed the power of waterfalls and high altitude lakes, like the Black Bear Lake Hydro Project[68] on Prince of Whales Island and the Goat Lake Hydro Project[69] in Skagway, to generate power while minimizing adverse effects to anadromous fish.

The fact that not all dam projects — or road or mine projects for that matter — have the same level of effects on anadromous fish habitat or fish and wildlife populations demonstrates that 17FSH2 does not categorically prohibit any specific kind of project.[70]

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[65] *See infra* at Section I.C.2.c.
[66] *Hydropower,* National Hydropower Association, https://www.hydro.org/waterpower/hydropower/ (last visited Feb. 20, 2018).
[67] *Id.*
[68] Low Impact Hydropower Institute, http://lowimpacthydro.org/lihi-certificate-22-black-bear-lake-hydroelectric-project-alaska-ferc-10440/ (last visited Feb. 20, 2018).
[69] Low Impact Hydropower Institute, http://lowimpacthydro.org/lihi-certificate-26-goat-lake-hydroelectric-project-alaska-ferc-11077/ (last visited Feb. 20, 2018).
[70] The State expresses concern that some highway projects cause a great deal of damage and may be prohibited by the initiative. State Br. at 27–28. But all highway and pipeline

Rather, 17FSH2 establishes a permitting scheme where the State evaluates the potential harm of the project, and restricts the amount of harm to economically valuable state assets. 17FSH2 does not create a permitting scheme at the expense of any specific group or type of development project.[71] Uses of all types can still occur in salmon habitat, so long as they do not cause impermissible significant adverse effects to fish habitat and fish and wildlife, as determined by ADF&G.

2. Implementation of 17FSH2 Requires Interpretation by the Legislature.

The State argues that numerous provisions of 17FSH2 would absolutely require ADF&G to deny permit applications for any project that "permanently displace[s] salmon habitat or violate[s] the initiative's protection standards."[72] The State's interpretation ignores the discretion conferred on ADF&G, and violates the well-established rule that initiatives are read to preserve their constitutionality.[73] The legislature, through ADF&G,

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construction projects are not equal. ADF&G has a program to ensure that road culverts are designed or rehabilitated to protect fish habitat from adverse effects from road building. Alaska Department of Fish and Gaem, http://www.adfg.alaska.gov/index.cfm?adfg=fishpassage.restorationprojects (last visited Feb. 20, 2018) ("Fish-friendly, or stream simulation culverts, are constructed so that the channel inside the culvert is virtually indistinguishable to the natural stream channel up and downstream."). The initiative leaves the discretion with ADF&G to determine what level of harm is acceptable.

[71] *But see, e.g.*, *Alaska Fisheries Conservation All., Inc.*, 363 P.3d at 112 (rejecting an initiative as a give-away program violating the first core objective because it "would result in the allocation of salmon stock away from commercial set netters to some combination of all other fisheries").

[72] State Br. at 29; *see also id*. at 37–38 ("[B]y its terms, [17FSH2] will prevent the legislature from allocating anadromous fish habitat to certain large projects."). The State makes some version of this assertion throughout its brief. *See* State Br. at 1, 4, 6, 7–8 (noting the Superior Court's rejection of the argument), 10, 14–21, 23–29, 28, 36.

[73] The State also did this below, arguing that the legislature was unlikely to interpret the various portions of the initiative in a manner that allows any development activities. As

has the discretion to interpret 17FSH2's requirements, and to evaluate each project to determine whether it might cause effects that rise to a level of harm prohibited by the initiative.

a. The Initiative Gives ADF&G the Ability to Permit Some Permanent Habitat Loss.

The plain language of the initiative does not prohibit the permanent loss of habitat in all circumstances. Nothing in the initiative mandates that ADF&G find that all permanent effects are adverse effects. If ADF&G finds that the permanent loss of certain habitat would not cause impermissible significant adverse effects, the agency could grant the proposed project a permit.[74]

The State overlooks this, arguing that "adversely affected" "necessarily include[s] any impact that would eliminate habitat."[75] The State draws this conclusion by interpreting substantial damage to equate with "adversely affected," which is in turn defined by the likelihood of recovery or restoration within a reasonable time. But "adversely affected" is not defined by the likelihood of recovery or restoration, or the time frame for recovery or restoration. Rather, those three terms define substantial damage. As the Superior Court found, "adversely affected" is undefined and will need to be interpreted by ADF&G. [Exc. 221]

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the Superior Court noted, the State "misunderstand[s] the proper construction of ballot initiatives" that must be interpreted to preserve their constitutionality wherever possible. Exc. 215; *see also City of Fairbanks*, 818 P.2d at 1155.

[74] Exc. 32 (17FSH2 § 6, proposed AS 16.05.883(a)(1)).

[75] State Br. at 17.

b. The Substantial Damage Provision of 17FSH2 § 5 Leaves Significant Discretion with ADF&G.

The initiative bars ADF&G from permitting uses that it determines will cause substantial damage to anadromous fish habitat that cannot be reclaimed or restored within a reasonable time following project completion.[76] The State argues that this makes an appropriation.[77] However, the provision provides ADF&G ample discretion to determine the scope of effects that may cause "substantial damage" to anadromous fish habitat or fish and wildlife populations:

> The commissioner shall find that the proposed activity will cause substantial damage to anadromous fish habitat and fish and wildlife species if, despite the application of scientifically proven, peer reviewed and accepted mitigation measures under [proposed] AS 16.05.887, 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 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.

[Exc. 32] This definition specifically leaves ADF&G with discretion to interpret when "adverse effects" will occur to such a degree that habitat is not "likely" to "recover or be restored" within a "reasonable time."[78] None of these terms are defined, giving ADF&G wide latitude to determine on a case-by-case basis whether harm may occur, and whether it will rise to the level of substantial damage.

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[76] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(a)(1); Exc. 32 (17FSH2 § 5, proposed AS 16.05.877(b) (defining substantial damage); Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(a)(1) (prohibiting the grant of a permit for an activity that will cause substantial damage).
[77] State Br. at 16.
[78] Exc. 32 (17FSH2 § 5, proposed AS 16.05.877(b)).

The State argues that the "likely recover or be restored" portion of the definition of substantial damage precludes ADF&G from "conclud[ing] that a zero percent probability of recovery would be acceptable."[79] This argument ignores the discretion ADF&G has to determine what "recover" and "restore" mean.[80] The State also ignores that an initiative may restrict legislative choice, so long as the legislature has discretion to interpret the requirements.[81]

Next, the State narrowly interprets 17FSH2 as tying the length of a "reasonable period" to the life of a fish.[82] But 17FSH2 simply directs that the Commissioner shall "account for the life stage, life span, and reproductive behavior" of anadromous fish. [Exc. 30] This accounting does not require ADF&G to prohibit any project that adversely affects habitat for longer than the life span of a fish. Rather, it is a factor that ADF&G must consider. The State errs by advancing the most restrictive interpretation of each provision, while failing to acknowledge the discretion conferred by its terms.[83]

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[79] State Br. at 18.

[80] The ballot sponsors revised 17FSH2 § 5, proposed 16.05.877(d), to remove the requirement that ADF&G require recovery "to natural and historic levels." *See* Exc. 53, discussed in more detail below.

[81] *See McAlpine*, 762 P.2d at 91 (upholding a portion of an initiative that required the legislature to give the community college system as much property as "necessary" for its operation, and noting that the initiative precluded the legislative choice of not funding the community college system at all).

[82] State Br. at 19.

[83] *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974) ("When one construction of an initiative would involve serious constitutional difficulties, that construction should be rejected if an alternative interpretation would render the initiative constitutionally permissible."), *overruled on other grounds by McAlpine*, 762 P.2d 81.

The State attempts to bolster its argument that the substantial damage provision makes an appropriation by asserting that restoring adverse effects from projects such as large mines is "imaginative."[84] But habitat restoration is exactly what recent large mine proposals have included in their restoration plans.[85]

Contrary to the State's interpretation, the discretion left to ADF&G in the substantial damage provision is similar to the discretion that the *Pebble* Court found conferred in 07WTR3.[86] The State recognizes that 07WTR3 gave the legislature discretion to determine what amounts of specific toxic pollutants would cause adverse effects.[87] The State agreed that because the initiative only prohibited adverse effects, but left it to the legislature to determine what would rise to the level of "adverse effects," it was not an appropriation.[88] Similarly, 17FSH2 could result in a permit being denied if ADF&G determines that the proposed use would cause adverse effects that cannot be restored in a reasonable time (with "adverse effects," "restored," and a "reasonable time" left to the discretion of the agency).[89] Both 07WTR3 and 17FSH2 set standards, and require further decision making to implement those standards. The potential prohibition

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[84] State Br. at 20.
[85] R. 561 (the now defunct proposed Chuitna Mine committed to fully restoring anadromous fish habitat following mine closure). *See also infra* pp. 28–29, n. 117.
[86] *See Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1077 (finding that 07WTR3, which prohibited discharges that adversely affect "humans, salmon, and waters used for human consumption and as salmon habitat" is not an appropriation because it leaves discretion to the legislature "to determine what amounts of specific toxic pollutants may or may not be discharged").
[87] State Br. at 40.
[88] *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1071, 1077.
[89] Exc. 32 (17FSH2 § 5, AS 16.05.877(b)).

on projects that would cause substantial damage, like the prohibition on adverse effects in 07WTR3, is a permissible regulatory provision that can be enacted by initiative.

c. The Habitat Protection Standards of 17FSH2 § 2(b) are Not Prescriptive.

Contrary to the State's arguments,[90] the provisions of Section 2(b) set forth the general habitat criteria that ADF&G should maintain to ensure the proper protection of fish and wildlife.[91] These standards are not prescriptive. They are broad and general guidelines, intended to inform ADF&G's current statutory charge to ensure "the proper protection of fish and game."[92] For example, the standard that directs ADF&G to maintain water quality is open to a wide range of interpretations.[93] ADF&G might interpret this provision to require applicants to meet the state's established water quality standards, or to specifically protect water quality in sensitive spawning habitat. Likewise, the standard that directs ADF&G to maintain instream flow does not specify what level of instream flow is required to protect fish and wildlife.[94] That is up to ADF&G to decide. ADF&G will also have the discretion to interpret what "maintain" means, and to adopt regulations to interpret these standards and how to apply them.[95] While ADF&G cannot simply ignore the initiative's provisions, it has significant discretion to interpret

[90] State Br. at 14 (referencing generally all of (b)(1)–(7); 21 n. 52 (specifically taking issue with proposed AS 16.05.867(b)(2) and 16.05.867(b)(5), with a general reference to all seven standards); & 27–28 (challenging (b)(2)).
[91] Exc. 30 (17FSH2 § 2, proposed AS 16.05.867(b)).
[92] AS 16.05.871(d).
[93] Exc. 30 (17FSH2 § 2, proposed AS 16.05.867(b)(1)).
[94] Exc. 30 (17FSH2 § 2, proposed AS 16.05.867(b)(2)).
[95] Exc. 30 (17FSH2 § 2(c), proposed AS 16.05.867(c)).

the terms of the initiative that set out the factors the agency must consider when ensuring the proper protection of fish habitat.

d. The Permitting Requirements of 17FSH2 § 7(a) Leave Discretion in ADF&G.

The permitting requirements of 17FSH2 § 7(a) set out requirements that permit applications need to meet for ADF&G to issue a permit.[96] These requirements may, depending on how they are interpreted, prevent ADF&G from permitting a project.[97] But the exact contours of what will be prohibited under these standards requires ADF&G to interpret the standards, such that the agency retains significant discretion in implementing the initiative, even if not every project will be allowed under its terms.

The first standard the State objects to, subsection (a)(2), requires the "proper protection" of fish and wildlife, which ADF&G will need to interpret.[98] "Proper protection" is undefined, as the State agrees.[99] Despite this, the State argues that "permanent displacement of a fish stream could only be considered a failure to properly protect the fish within the stream."[100] The State is advancing a more stringent interpretation than ADF&G may adopt, reading the provision to require a permittee to protect all the fish within a particular stream. ADF&G is currently is required to ensure the "proper protection of fish and game," and has never interpreted this requirement that

[96] Exc. 35 (17FSH2 §7, proposed AS 16.05.887(a)).
[97] State Br. at 23.
[98] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(a)(2)).
[99] State Br. at 23.
[100] State Br. at 23.

way.[101] But the issue for the Court is not how ADF&G might interpret the provision, but whether it has the discretion to do so.

Next, the State argues that subsection (a)(5) has "clear meaning[] incompatible with any activity that permanently displaces a stream"[102] This subsection limits the withdrawal of water from anadromous fish habitat that will "adversely affect" that habitat, fish, or wildlife.[103] This provision leaves ADF&G with the discretion to determine how much water removal can be permitted before it will cause adverse effects. The State's objection to this provision is the same that it made to the previous version of this provision included in 17FSHB. [Exc. 39] The State ignores the fact that the sponsors substantially modified the provision in response to that objection.[104] The version in 17FSH2 removes the prohibition on "permanent or long lasting" effects and increased ADF&G discretion to determine what amount of water withdrawal would adversely affect fish. [Exc. 51] The State errs by interpreting the provision in the strictest way possible, ignoring the discretion contained in the rewritten provision.

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[101] *See* AS 16.05.871(d) (requiring the commissioner to deny projects that fail to ensure the "proper protection of fish and game").
[102] State Br. at 24.
[103] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(a)(5)).
[104] *See* Exc. 51 (comparing the original and rewritten provisions, noting that the provision was revised as follows: "[**THE COMMISSIONER SHALL NOT ISSUE**] an anadromous fish habitat permit **may not be granted** for an activity that will . . . (5) **withdraw water from** [**DEWATER**] anadromous fish habitat **in an amount that will** [**FOR ANY DURATION SUFFICIENT TO CAUSE PERMANENT OR LONG-LASTING**] adverse**ly affect** [**EFFECTS TO**] anadromous fish habitat or fish and wildlife species").

The State also interprets subsection (a)(6) as an outright bar with no "room for interpretation."[105] This provision bars stream relocation if that relocation either does not provide for fish passage or will "adversely affect" fish habitat.[106] The requirement for fish passage is a carry-over from current law.[107] And the second part of the clause allows for relocation unless ADF&G determines there would be adverse effects.[108] Again, it does not prohibit stream relocation absolutely, and was revised substantially from the earlier version in 17FSBH to add discretion.[109] ADF&G will need to determine what kind of passage is acceptable and what level of impact rises to "adverse."

The fact that some projects may be denied under the standards of the initiative does not make the initiative an appropriation. All of the subsections the State identified as conceivably prohibiting some uses leave discretion to ADF&G to determine the level of adverse effects that could trigger the denial of a permit.

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[105] State Br. at 24.
[106] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(a)(6)).
[107] AS 16.05.841 ("If the commissioner considers it necessary, every dam or other obstruction built by any person across a stream frequented by salmon or other fish shall be provided by that person with a durable and efficient fishway and a device for efficient passage for downstream migrants.").
[108] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(a)(6)).
[109] *See* Exc. 52 (comparing the original and rewritten provisions, noting that the provision was revised as follows: "[**THE COMMISSIONER SHALL NOT ISSUE**] an anadromous fish habitat permit **may not be granted** for an activity that will . . . (6) **[PERMANENTLY] dewater and** relocate a stream or river if the relocation **does not provide for fish** passage, [**WILL DISRUPT FISH PASSAGE BETWEEN**] or will **adversely affect** [**CAUSE PERMANENT OR LONG-LASTING ADVERSE EFFECTS TO**] anadromous fish habitat**, fish,** or [**FISH AND**] wildlife species").

e. The Mitigation Requirements of 17FSH2 § 7(b) & (c) Do Not Make an Appropriation.

17FSH2 § 7(b) establishes a mitigation scheme that requires ADF&G to avoid and/or minimize significant adverse effects to anadromous fish habitat.[110] Under the regulatory scheme, ADF&G requires an applicant to use the best available scientific techniques to avoid or minimize the severity of effects,[111] and to restore the area if adverse effects occur.[112] The State interprets this as prohibiting projects that "cannot be mitigated in a very specific way," i.e., differently than under current law.[113] The State misinterprets the initiative's provisions, and incorrectly suggests that initiatives cannot limit activities that the current laws allow.

The specific subsection the State takes issue with, (b)(3), requires that if an activity will have adverse effects, ADF&G can permit it but must require that the habitat be restored.[114] The State argues that the requirement to "restore" habitat is "imaginative" — implying it is impossible and, therefore, an appropriation.[115] The State lists examples of potential projects that it speculates might not be able to meet its interpretation of a requirement to restore anadromous fish habitat.[116] But the State's interpretation is not necessarily the one the ADF&G will apply. Moreover, one of the projects cited by the State — the now defunct proposed Chuitna Mine — did propose that it would fully

[110] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(b)).
[111] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(d)).
[112] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(b)(3)).
[113] State Br. at 5 n.10 & 16 n.42.
[114] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(b)(3)).
[115] State Br. at 20.
[116] State Br. at 26.

restore anadromous fish habitat to pre-mining conditions following mine closure. [R. 561] Another large mining project, the proposed Pebble Mine, has committed to not developing if the mine would significantly impact fish.[117]

The definition of "restore" is within the discretion of ADF&G. The agency has the discretion to accept less than full function as restoration. This discretion is illustrated by the changes the sponsors made to the original version of the initiative: the sponsors took the requirement that restoration had to be to "natural and historic levels" out of 17FSHB based on the DOL's analysis.[118] As a result, 17FSH2 does not require "restoration" to be defined as restoring the entire area to pre-project conditions as the State suggests. This change from the first iteration of the initiative increased ADF&G discretion to determine what levels of restoration are acceptable to achieve the initiative's purposes.

The State asserts that because 17FSH2 § 7(c) removes offsite mitigation as a valid way to offset adverse effects caused by proposed activities,[119] the initiative will bar many projects that would be allowed under current state law.[120] However, this provision does not restrict all mitigation, only mitigation measures that are proposed offsite rather than

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[117] Pebble Partnership's CEO recently said the mine does not threaten the fishery, "[a]nd if it does, it won't be built . . . We've said from the get go that if we're gonna do — if it's determined that we would [cause] significant damage to that fishery, we're not gonna build the project." Anne Thompson & David Douglas, *Proposed Pebble Mine in Alaska Could Threaten World's Largest Salmon Fishery*, NBC News (Feb. 3, 2018, 6:08 PM EST), https://www.nbcnews.com/nightly-news/proposed-pebble-mine-alaska-could-threaten-world-s-largest-salmon-n844431.

[118] *See* Exc. 53 (showing changes made between 17FSHB and 17FSH2).

[119] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(c)).

[120] State Br. at 25, 26.

where the potential damage to fish habitat and fish and wildlife populations will occur.[121] This does not allocate anything to or away from anyone. Offsite mitigation is a controversial undertaking, often used to justify large-scale disruption of habitat in exchange for adding legal protections to other lands. But, as the Superior Court noted, there is no constitutional bar to initiatives that reject the current policy position of the State or that tackle difficult policy issues. [Exc. 220]

The State's argument that the initiative makes an appropriation because it may allow ADF&G the discretion to prohibit projects that are currently allowed reveals a misunderstanding of the constitutional right to enact law by initiative.[122] As noted by the Court, "the framers of the constitution chose to include the initiative process as a law-making tool with full knowledge of the risks inherent to direct democracy. "And the public's disagreement with legislative and administrative officials can just as easily be taken as evidence of the appropriate use of the initiative process."[123] As the Superior Court observed, "[t]he proposition that any ballot initiative which would replace an existing statute is an unconstitutional repeal of an appropriation must be false if the constitutional right to enact laws through initiatives is to mean anything." [Exc. 220]

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[121] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(c)).
[122] *Amici curiae* repeat this error, arguing that the citizens cannot replace the "Legislature's current priorities and standards." CAP Br. at 1, 5–10; *see also* AOGA Br. at 7–8, 18.
[123] *Brooks*, 971 P.2d at 1029–30.

3. The Criminal Liability Imposed by 17FSH2 § 10 Does Not Justify the State's Failure to Interpret the Initiative In the Way Most Likely to Preserve its Constitutionality.

The inclusion of a criminal liability section in an initiative does not change the rule that initiatives must be interpreted in the way most likely to preserve their constitutionality, despite the State's suggestions to the contrary. The State argues, for the first time on appeal, that because the Commissioner may be subject to criminal penalties under 17FSH2 § 10,[124] 17FSH2 leaves the Commissioner no discretion to interpret its terms.[125]

The logical reading of this provision is that it allows DOL to bring such charges against a permittee, its contractors, successors, or assigns. However, even if the language was interpreted to create a criminal cause of action against a state employee, Section 10 does not confer the right to enforce its criminal sanction on the general public.[126] The recourse available for an affected person against the Commissioner for any violation would be a civil claim under the Alaska Administrative Procedure Act.[127] DOL is the

[124] Exc. 36 (17FSH2 § 10, proposed AS 16.05.901(a)).
[125] *See* State Br. at 22–23, 47.
[126] *Lundquist v. Dep't of Pub. Safety*, 674 P.2d 780, 785 (Alaska 1983) ("If all statutory duties of governmental officials were held to create a duty to anyone allegedly harmed by the violation of that enactment, the financial resources of the government would seriously be diminished, and the legislature would be disinclined to enact operating procedures for fear of the exposure to liability they might create.").
[127] *See generally* AS 44.62.330–44.62.630.

only entity that could charge the Commissioner with a violation under 17FSH2.[128] And DOL has the prosecutorial discretion to decline to charge criminal activity.[129]

Under section 10, if DOL charged the Commissioner, he could only be liable if he failed to ensure all permits maintain 17FSH2's standards while acting with "criminal negligence."[130] This means that, before criminal liability could attach, the Commissioner would have to fail to perceive a substantial and unjustifiable risk that is of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.[131] The reasoned, supported, and documented decision-making process involved in permitting would, in practicality, insulate the Commissioner from criminal liability for those resulting decisions, even if the Commissioner could be held liable under the statute.

The State's argument ignores the fact that the statute currently provides for criminal penalties,[132] and appears to have never been enforced against a government

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[128] *See Alexiadis v. State*, 355 P.3d 570, 573 (Alaska App. 2015) (explaining that "decisions on whether to bring criminal charges, or what offenses to charge, [fall] within the long-recognized charging discretion of the executive branch").
[129] *See State v. Dist. Court*, 53 P.3d 629, 631 (Alaska Ct. App. 2002) (stating that trial court has no authority to reject plea agreement on basis that state could prove more serious charge at trial and instead agreed to resolve case with plea to lesser charges).
[130] Exc. 36 (17FSH2 § 10, proposed AS 16.05.901(a)).
[131] *See* AS 11.81.900(4) ("[A] person acts with 'criminal negligence' with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.").
[132] *See* AS 16.05.901(a) ("A person who violates AS 16.05.871–16.05.896 is guilty of a class A misdemeanor.").

employee. Nor has the State cited to any instance in which the decision of a commissioner of a state agency on questions of statutory interpretation was affected by the presence of a criminal enforcement provision in a statute the commissioner was administering.

The State's assertions that potential criminal penalties "add teeth" to its interpretation that renders the otherwise nonprescriptive elements of the initiative an appropriation are unfounded.[133] The Court should reject this justification for the State's refusal to interpret 17FSH2 in a way most likely to preserve its constitutionality.

4. The Affidavits Relied on By the State are Not Relevant.

The only issue before this Court is a question of law. The Court must interpret one provision of the Alaska Constitution and determine whether 17FSH2 offends the ban on initiatives that appropriate state assets. Despite agreeing that this case only raises questions of law,[134] the State argues this Court must give weight to affidavits that speculate about how 17FSH2 might apply to past, current, or proposed projects in Alaska.[135] The State's focus on the affidavits despite the fact this is a constitutional interpretation question highlights how far its interpretation of "appropriation" veers from the established legal test running through this Court's cases. The Superior Court correctly determined that predictions about 17FSH2 are "pure speculation." [Exc. 221] The affidavits are not competent evidence, because "such evidence [does not] exist." [Exc.

[133] State Br. at 22.
[134] State Br. at 9.
[135] State Br. at 3, 24–25, 28.

221][136] The affidavits are not relevant to the legal question before the Court and should be disregarded.

D. The Constitution Does Not Require Initiatives to Be Wise Public Policy.

The Court's pre-election review of initiatives is limited and does not include whether the initiative would be wise public policy.[137] The State makes numerous arguments irrelevant to the question of whether 17FSH2 would make an unconstitutional appropriation. The State argues that the initiative "interfer[s] with the legislature's ability to permit the resource development intended in part to finance Alaska's government and economy."[138] The State then suggests that an initiative that effects state lands and waters that are "extremely important to Alaska" are impermissible appropriations because of effects to resource development and "the legislature's ability to generate revenue."[139] These are political concerns that have no bearing on the legal question of whether 17FSH2 may be put before the Alaska voters. The opponents of the initiative will

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[136] The State also points the Court to an op-ed that was published by the initiative sponsors to support its premise that 17FSH2 is a prohibition on certain proposed projects. State Br. at 3, citing Exc. 185–87. The State's interpretation of the editorial is irrelevant and unsupported. The column acknowledged recent megaprojects including the proposed Pebble Mine, "that, as designed" threaten fishing livelihoods and salmon. [Exc. 186] The sponsors discuss how the proposals have united Alaskans in recognizing the importance of salmon protection and explain why they seek to update Title 16 permitting standards. [Exc. 186]

[137] *See DesJarlais v. State, Office of Lieutenant Governor*, 300 P.3d 900, 903 (Alaska 2013) (recognizing the limitation on pre-enactment of initiatives to compliance with "constitutional and statutory provisions regulating initiatives" and to whether the initiative is "clearly unconstitutional or clearly unlawful.").

[138] State Br. at 34.

[139] State Br. at 29, 31.

undoubtedly make such arguments to the electorate to attempt to persuade them to vote against it. The Court should not accept the State's invitation to impose additional limitations on the citizen right to the initiative because of its policy concerns about the wisdom of the initiative.[140]

The balance between reserving legislative power to the people through citizen initiative and safeguarding against rash acts by the electorate has already been struck. The constitutional delegates considered the potential dangers of citizen legislation and included numerous provisions to prevent the disaster the State foretells.[141] First, there are numerous hurdles to getting an initiative on the ballot.[142] Then, once certified, the

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[140] *See Hughes*, 341 P.3d at 1129 ("[W]e have never held that any effect on public resources triggers the prohibition on direct legislation; nearly all legislation involves public assets to some degree." (quoting *Holleman*, 321 P.3d at 384)).

[141] In 1911, then-governor Woodrow Wilson said citizen initiatives were "merely a means to an end—that end being the restoration of the control of public opinion," And that initiatives help to ensure that legislatures remain responsive to public opinion by providing a check on the dominance of special interests. Letter from Woodrow Wilson (Dec. 26, 1911), quoted in *The American City*, Volume 6 (Buttenheim Publishing Corp. 1912). The constitutional delegates reviewed the use of initiatives in other states, and thought it important to include the right to the initiative, as a way to hold legislators accountable to the will of the people. Delegate Metcalf recognized this during the Alaska Constitutional Convention when he observed that the initiative "will give the common man further checks and balances on his legislature." Statement of Delegate Irwin Metcalf, 1 Proceedings of the Alaska Constitutional Convention (PACC) 441 (Nov. 30, 1955). Delegate Sweeney commented that the ability to request the introduction of a bill by a legislator would not have the same power as an initiated bill: "But a bill that is brought to you by initiative is going to mean you had better get on it and do something about it, it is the will of the people. So I believe there is a need for the initiative and not to go back to the old system of introducing bills by request." Statement of Delegate Dora Sweeney, 2 Proceedings of the Alaska Constitutional Convention (PACC) 951 (Dec. 13, 1955). The initiative, referendum and recall section passed 43 votes to 10. Proceedings of the Alaska Constitutional Convention, 4 Proceedings of the Alaska Constitutional Convention (PACC) 2992 (Jan. 24, 1956).

[142] Alaska Const. art. XI, § 4.

legislature has a full session to consider passing a "substantially similar" measure.[143] If it passes such a measure, then the initiative is voided.[144] If the legislature does not pass a substantially similar measure, then the ballot proponents must win a majority of voters. And should the voters enact the initiative, the legislature may amend it at any time.[145] A citizen-enacted law can be repealed by the legislature in its entirety after two years.[146] Both the State and the *amici curiae* have ample opportunity to air their political and economic arguments leading up to the election.[147] But this political opposition has no place in the Court's pre-election determination of whether 17FSH2 offends the restrictions placed on initiatives by Article XI, § 7.

[143] Alaska Const. art. XI, § 4.
[144] Alaska Const. art. XI, § 4. House Bill 199 was introduced last year and is being considered in committee now. Bill History/Action for 30th Legislature, The Alaska State Legislature, http://www.legis.state.ak.us/basis/get_bill.asp?bill=HB%20199&session=30 (last visited Feb. 20, 2018). Whether it will pass or be substantially similar is not yet known.
[145] Alaska Const. art. XI, § 6; *see also* Timothy J. Mullins, *The Clean Water Initiatives and the Proper Balance Between the Right to Ballot Initiatives and the Prohibition on Appropriations*, 26 Alaska L. Rev. 135, 157 (2009) (noting that this provision is an "acknowledge[ment] that initiatives may not be perfect when passed and may require legislative amendment.").
[146] Alaska Const. art. XI, § 6.
[147] Opponents of 17FSH2, including many of the entities involved with *amici* in this case, have raised $1,285,177.54 dollars to fight the initiative. *See* Stand for Alaska Independent Expenditures Form 15-6, Alaska Public Offices Commission, https://aws.state.ak.us/ApocReports/IndependentExpenditures/View.aspx?ID=2683 (last visited February 20, 2018).

II. If the Court Determines that Any Provision of 17FSH2 is Unconstitutional, the Appropriate Remedy is to Sever that Provision and Allow the Remainder to Go Before the Voters.

The Court has a duty to interpret 17FSH2 broadly to preserve its constitutionality.[148] This also means that, if the Court finds that part of the initiative makes an appropriation, the Court should sever that part and allow the rest of the initiative to appear on the ballot.[149] Once sponsors of an initiative have obtained the necessary number of signatures to appear on the ballot, the Court applies a three part test to determine if it should sever an impermissible provision: "(1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and 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."[150]

The State has failed to carry its burden to show that 17FSH2 is not severable.[151] The State argues that even if the Court severed the portions that the State affirmatively argues would cause an impermissible allocation — the "'substantial damage' and 'habitat protection standards' provisions" — the initiative "would still bar the same projects

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[148] *Pebble Partnership ex rel. Pebble Mines Corp.*, 215 P.3d at 1076, citing *Boucher*, 528 P.2d at 462.
[149] *McAlpine*, 762 P.2d at 94–95.
[150] *Id.*
[151] *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 210–11 (Alaska 2007), ("The severability clause places on those challenging the statute the burden of showing that the [severability] test is *not* satisfied by a redaction."(emphasis in the original)).

prohibited by the severed sections."[152] But, in making this argument, the State only points to the restoration requirement of § 7(b)(3).[153] The State offers no reason why, if the Court agrees that this additional provision is also unconstitutional, it could not also be severed while retaining the remainder of the initiative. The State then goes on to argue in the alterative that, if the Court severs only the provisions related to substantial damage and habitat protection standards, that this "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."[154] The State again is creating the very problem of which it complains, and has failed to carry its burden to show that severance is unworkable or that a severed version of 17FSH2 cannot be given legal effect, further protection for anadromous fish habitat, and be in line with the sponsors' intent.[155]

A. Even a Bluntly Severed Version of 17FSH2 could be Given Legal Effect.

The first part of the severability test requires the Court "to examine whether the severed [initiative] requires action or if it is merely a statement of public policy."[156] "This is a relatively low threshold test that merely requires an enforceable command to

[152] State Br. at 43; *see also id*. at 48 (arguing that, with those portions severed, the initiative would "forbid[] a permit for a project that cannot preserve fish habitat").
[153] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(b)(3)); State Br. at 47.
[154] State Br. at 48.
[155] *Alaskans for a Common Language, Inc*, 170 P.3d at 210–11.
[156] *Id*. at 211.

implement the law."[157] 17FSH2 contains multiple provisions, completely unchallenged by the State, which meet this test.

Section 2. The State specifically challenges (b)(2) and (b)(5).[158] Removing these two subsections would leave the requirement that the Commissioner ensure the proper protection of fish and game by maintaining the remaining standards,[159] and other consistent regulations adopted pursuant to the section.[160]

Section 3. The State has not challenged any provision in Section 3.[161] This section contains the requirement to obtain a permit before undertaking an activity in anadromous fish habitat.[162] It retains the current anadromous fish habitat catalogue system,[163] and creates a presumption that ADF&G has permitting authority in all waters connected to anadromous fish habitat or marine waters.[164] This presumption addresses a significant jurisdictional limitation in the current law that leaves over half of Alaska's anadromous fish habitat outside of ADF&G's permitting authority. [Exc. 164] The section also

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[157] *Id.*
[158] State Br. at 21 n. 52 (specifically taking issue with proposed AS 16.05.867(b)(2) and 16.05.867(b)(5)); State Br. at 27–28 (challenging (b)(2))
[159] The State challenges Section 2, proposed AS 16.05.867(b)(1)–(7). State's Br. at 14 (referencing generally all of (b)(1)–(7)), 21 (challenging (b)(2) and (b)(5)), 27–28 (challenging (b)(2)). On its own, this section does not even arguably make an appropriation, but the State has argued that the criminal provision "adds teeth" making this an appropriation. State Br. at 22. If the Court agrees with this argument, any one of the three sections challenged, or all seven of those habitat standards could also be severed, leaving the rest of the initiative to go to the voters.
[160] *See* Exc. 30 (17FSH2 § 2, proposed AS 16.05.867).
[161] Exc. 30–31 (17FSH2 § 3, proposed 16.05.871).
[162] Exc. 30 (17FSH2 § 3, proposed AS 16.05.871(a)).
[163] Exc. 30 (17FSH2 § 3, proposed AS 16.05.871(b)).
[164] Exc. 31 (17FSH2 § 3, proposed AS 16.05.871(c)–(d)).

provides a process for excluding a water body from inclusion in the anadromous fish catalogue.[165] And, finally it defines anadromous fish habitat.[166]

Section 4. The State has not challenged any provision in Section 4. This section specifies the procedure for applying for a fish habitat permit, allows ADF&G to collect information, and requires the applicant to provide the necessary information to support the application.[167] It allows ADF&G to work with the applicant to modify the application to avoid or minimize potential adverse effects that might lead to a project falling within the major permit category.[168] It establishes the process for ADF&G to determine whether the permit application is a minor or major permit application.[169] And finally, Section 4 provides for public notice of ADF&G's determination.[170]

Section 5. The State does not challenge subsection (a), (c) or (d) of Section 5.[171] Subsection (a) is the test for "significant adverse effects," which is the threshold for ADF&G's decision in Section 4 whether a permit application will be processed as minor or major.[172] Subsection (c) requires ADF&G to use best available scientific information in analyzing the possibility for substantial damage.[173] Subsection (d) requires ADF&G to

[165] Exc. 31 (17FSH2 § 3, proposed AS 16.05.871(e)).
[166] Exc. 31 (17FSH2 § 3, proposed AS 16.05.871(f)).
[167] Exc. 31 (17FSH2 § 4, proposed AS 16.05.875(a)).
[168] Exc. 31 (17FSH2 § 4, proposed AS 16.05.875(b)).
[169] Exc. 31 (17FSH2 § 4, proposed AS 16.05.875(c)–(d)).
[170] Exc. 31 (17FSH2 § 4, proposed AS 16.05.875(e)).
[171] Exc. 32 (17FSH2 § 5, proposed AS 16.05.887).
[172] Exc. 32 (17FSH2 § 5, proposed AS 16.05.877(a)).
[173] Exc. 32 (17FSH2 § 5, proposed AS 16.05.877(c)).

use best available scientific information in analyzing whether habitat can recover from substantial damage.[174]

Section 6. The State does not object to any of Section 6,[175] except for one portion of its subsections: proposed AS 16.05.885(e)(3), which allows ADF&G to issue a major permit only if it will not cause substantial damage as defined in Section 5.[176] [Exc. 34] The rest of Section 6 sets up a permitting system for minor permits, general permits for minor activities, and major permits, all of which include public notice procedures.[177] The major permitting section also requires bonds and shifts certain costs away from the State and onto permit applicants.[178] All of these sections can operate independently of proposed AS 16.05.885(e)(3).

Section 7. The State does not challenge subsections (a)(3), (a)(4), (d), or (e) of Section 7.[179] The first part of subsection (a) requires ADF&G to prevent or minimize significant adverse effects to anadromous fish habitat.[180] Subsection (a)(3) prevents permits being issued if waste disposal will adversely affect anadromous fish habitat.[181] Subsection (a)(4) disallows hatcheries to be used to replace or supplement wild fish.[182]

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[174] Exc. 32 (17FSH2 § 5, proposed AS 16.05.877(d)).
[175] Exc. 32–34 (17FSH2 § 6).
[176] Exc. 32 (17FSH2 § 5, proposed AS 16.05.877(b)).
[177] Exc. 32–33 (17FSH2 § 6, proposed AS 16.05.883–885).
[178] Exc. 33–34 (17FSH2 § 6, proposed AS 16.05.885).
[179] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887).
[180] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(a)).
[181] *Amicus curiae* CAP challenges subsection (a)(3), but that section is almost identical to that upheld by the Court in *Pebble P'ship ex rel. Pebble Mines Corp.*, 215 P.3d 1064. CAP Br. 23–24.
[182] *Amici curiae* Bristol Bay Fishermen's Association and Ekwok Village Council challenge subsection (a)(4), but misunderstand that subsection's requirements, mistakenly

Subsection (d) requires the use of the best available, scientifically supported techniques when mitigating effects of projects to anadromous fish habitat.[183] Subsection (e) expressly gives ADF&G regulatory authority to establish permit conditions and mitigation measures.[184]

Sections 8–14. The State has not challenged the remaining portions of the initiative. Section 8 is the administrative and judicial review process for ADF&G permitting decisions.[185] Sections 9–11 includes the criminal liability provision, and adds additional enforcement provisions for permit violations.[186] Section 12 is a grandfather clause for existing facilities already permitted.[187] Section 13 repeals two existing sections of Title 16 of the Alaska Statutes.[188] Finally, Section 14 is the severance clause that establishes the clear intent of the sponsors and subscribers that if there is no possible constitutional construction of specific provisions, the Court should sever them and give full effect to the remaining provisions. [189]

These unchallenged provisions all contain actionable provisions that would "require action by government officials and employees."[190] Even a blunt severing of

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reading it to bar all hatcheries. Br. of *Amici Curiae* Bristol Bay Fisherman's Association and Ekwok Village Council at 19–21 (Jan. 11, 2018). This is incorrect. It only bars hatcheries as a mitigation tool in fish habitat permitting.

[183] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(d)).
[184] Exc. 35 (17FSH2 § 7, proposed AS 16.05.887(e)).
[185] Exc. 35–36 (17FSH2 § 8, proposed AS 16.05.889).
[186] Exc. 36–37 (17FSH2 §§ 9–11, proposed AS 16.05.894 and 16.05.901).
[187] Exc. 37 (17FSH2 § 12, proposed AS 16.05).
[188] Exc. 37 (17FSH2 § 13).
[189] Exc. 37 (17FSH2 § 14).
[190] *Alaskans for a Common Language, Inc.*, 170 P.3d at 211.

17FSH2 that wholesale removes the provisions argued by the State as problematic would leave an initiative that can be given legal effect. A less severe version of severance is proposed below in Section II.D.

B. Severance will not Destroy the Spirit of the Initiative.

The State argues that severing 17FSH2 would result in a "substantially different [initiative] than the version subscribed to by the sponsors and petition signors."[191] The State fails to meet its burden to establish that this different version destroys the spirit of the initiative.[192] Even if the Court severed every provision that the State has objected to, it would not substantially change the spirit of the measure. The primary goal of the sponsors and subscribers is to reform and improve the existing habitat protections. This is apparent from 17FSH2 § 1, which is the initiative's policy statement.[193] This statement demonstrates that the sponsors and the signers seek statutory changes that further protections for fish, wildlife, and the water resources and habitat that sustain those resources. As described above in Section II.A, much of the initiative would remain to achieve these purposes.

The State argues that 17FSH2 is "even less salvageable" than the park initiative in *Alaska Action Center*.[194] The State is incorrect. In *Alaska Action Center*, the Court declined to sever because, with the provision creating the park severed, the remaining ban on golf course construction was not enough to protect the sponsors from an outcome of

[191] State Br. at 43–44.
[192] *McAlpine*, 762 P.2d at 95.
[193] Exc. 30 (17FSH2 § 1).
[194] State Br. at 46.

high density development.[195] The court reasoned that was contrary to the sponsors' desires, and that, if they could not have a park, they legitimately might prefer a golf course to some other possible scenarios.[196] There is no such danger here. As detailed above, 17FSH2 contains several provisions, each of which independently improves habitat protections.[197]

The State's conclusory statement that without the provisions it argues are unconstitutional, "the measure is gutted of the mechanisms by which it protects anadromous fish habitat while allowing the use of the water."[198] The State ignores the other protections for fish habitat that would remain in 17FSH2 and that can be given legal effect: increased enforcement mechanisms; public notice and comment on permit actions; increased scrutiny and data collection on projects that could cause significant adverse effects to fish habitat; and the expansion of ADF&G permitting authority to an additional 20,000 water bodies.[199] Even with portions severed, 17FSH2 provides several improvements over the current permitting scheme, providing additional measures that achieve the intent of the sponsors to have a more robust permitting law that better protects anadromous fish habitat.

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[195] 84 P.3d at 995.
[196] *Id.*
[197] *See supra* Section II.A.
[198] State Br. at 47.
[199] Exc. 164 (ADF&G estimates "an additional 20,000 or more anadromous water bodies have not been identified or specified under AS 16.05.871(a)").

C. The Severability Clause Demonstrates the Sponsors' and Subscribers' Preference that the Initiative Be Severed Rather than Completely Invalidated.

The final prong of the severability test is a determination of the intent of the sponsors and subscribers. Relying on its incorrect conclusion that severance would change the spirit of 17FSH2, the State dismisses the possibility that severance could be the sponsors' and subscribers' preference.[200] In so doing, the State fails to mention 17FSH2's severance clause, or account for it in its analysis of the sponsors' intent. However, the Court has found that the most important consideration under this portion of the severance test is whether there is a severability clause.[201] The severability clause demonstrates the sponsors' interest in preserving as many of the important proposed reforms as possible in the event any provision is found unconstitutional.[202] This clause is also part of the language that was in front of the approximately 49,000 Alaskans who signed the ballot proposition.[203]

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[200] State Br. at 48–49.

[201] *Planned Parenthood of The Great Nw. v. State*, 375 P.3d 1122, 1153 (Alaska 2016); *see also Alaskans for a Common Language, Inc.*, 170 P.3d at 213 (The inclusion of a severability clause "*indicates that the legislature intended the remainder of the Act to stand if part of it were invalidated*." (emphasis in original), *citing State v. Alaska Civil Liberties Union*, 978 P.2d 597, 633 (Alaska 1999)).

[202] Exc. 37 (17FSH2 § 14).

[203] As of February 16, 2018, the Department of Elections had verified 33,712 signatures, which is above the required number of 32,127. *See* State of Alaska Petition Summary Report (Feb. 16, 2008 7:31 AM), http://elections.alaska.gov/doc/info/17FSH2.pdf. Approximately 15,000 signatures are still being verified.

D. Severance Should Be Done In a Way That Preserves as Much of the Initiative as Possible.

The State fails to clearly identify the exact provisions that it would have the Court sever to allow the remainder of the initiative to go before the voters, but seems to request that the Court invalidate the "'substantial damage' and 'habitat protection standards' provisions."[204] This references entire provisions, rather than the specific aspects of those provisions that cause the alleged problem. The Court should not bluntly sever these provisions. Rather, it should sever only the portions of those provisions that make an impermissible appropriation.

The State's main complaint is against the substantial damage provision of Section 5 and the permitting requirements of Section 7.[205] If the Court determines that there is merit to the State's argument that 17FSH2 makes an appropriation through those provisions, there is a simple solution. ADF&G's discretion can be further increased by simply deleting proposed AS 16.05.877(c) from Section 5, and striking the first occurrence of the phrase "anadromous fish habitat" from proposed AS 16.05.877(b) in Section 5, and the phrase "anadromous fish habitat" in four places in Section 7: proposed AS 16.05.887(a)(1),(3),(5), and (6). [Exc. 32, 35] Deleting proposed AS 16.05.877(c) from Section 5 would result in the definition of "substantial damage" being untethered from any "reasonable period" related to the life span of fish. And striking "anadromous

[204] State Br. at 48.
[205] State Br. at 5 ("[M]ost relevant to this lawsuit, 17FSH2 would prohibit a permit for any activity that would cause 'substantial damage' to anadromous fish habitat").

fish habitat" in the five indicated places would mean that ADF&G would consider effects only to fish and wildlife species as a whole, and not specifically to the impacted habitat; limiting the scope this way would more closely mirror the requirements of current law.[206]

The removal of one specific provision and the phrase "anadromous fish habitat" in five places would not significantly alter the initiative, while leaving the many other provisions of the initiative. The State has not challenged the bulk of these other provisions, and those portions can move forward, fulfilling the intent of the sponsors to update state laws to provide for a more protective permitting process.

[206] *See* AS 16.05.871(d) ("The commissioner shall approve the proposed construction, work or use . . . unless the commissioner finds the plans and specification insufficient for the *proper protection of fish and game*." (emphasis added)).

CONCLUSION

17FSH2 does not make an appropriation. It establishes a regulatory scheme with layers of agency discretion, leaving the ultimate decision that a project complies with its requirements to ADF&G. However, should the Court determine that any provision in 17FSH2 violates the prohibition on appropriations, the remedy is to sever that provision and order the rest of the ballot certified.

Respectfully submitted February 21, 2018.

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