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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

PEBBLE LIMITED PARTNERSHIP, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and DENNIS J. MCLERRAN, in his official capacity as Regional Administrator of EPA Region 10, Defendants.	)	Case No. 3:14-cv-00097-HRH

MOTION TO INTERVENE

INTRODUCTION

Pursuant to Fed. R. Civ. P. 24, the State of Alaska (State) moves to intervene as a party plaintiff in the above-captioned case as a matter of right, or alternatively, for permissive intervention. The State is entitled to intervene as of right in the instant action for both merits and remedies purposes to protect the State, its political subdivisions, and its citizens against the socioeconomic impacts resulting from the United States Environmental Protection Agency's (EPA's) unlawful interference with State land and resource management rights and responsibilities.

This case challenges EPA's interpretation that it has the statutory authority to conduct a review, under Clean Water Act (CWA) Section 404(c) (33 U.S.C. § 1344(c)), in order to veto mining-related activities on State land currently open to mining, even though no permit applications for mine development have been filed. EPA's decision, documented in a February 28, 2014 letter from EPA's Dennis McLerran to the State and others, specifically targets the Pebble deposit, located on State lands in south central Alaska.

As further described below, the State has direct, unique, and significant interests adversely affected by EPA's decision that it can apply its Section 404(c) veto authority in the absence of a CWA Section 404 dredge and fill permit application. Alaska has vital sovereign interests in regulating and managing its lands, waters, environment and wildlife, as well as developing natural resources within its jurisdiction. Alaska also has an interest in the welfare of its citizens, including their economic welfare, which is, in part,

directly related to responsible development of the State's mineral resources. The State also seeks to intervene in this matter to protect its right as the owner of the property containing the Pebble deposit, and to protect its right to participate in the regulation of mining in Alaska. The State receives a direct pecuniary interest from its mineral resources in the form of royalties, mining taxes, and other economic benefits, and as such, any interference with the lawful and predictable permitting review of such development of those resources causes a direct impact on Alaska's economic interests.

This motion is supported by the accompanying declarations of Edmund Fogels of the Alaska Department of Natural Resources (DNR) and Michelle Hale of the Alaska Department of Environmental Conservation (DEC).

The State of Alaska has conferred with counsel for plaintiffs and defendants. Counsel for plaintiffs do not oppose the State's motion to intervene. Counsel for the federal defendants have stated that they will determine whether to take a position on the State's motion after reviewing it.

BACKGROUND

A. Factual and procedural background.

The Pebble deposit is a very large copper-gold-molybdenum deposit, located entirely on State lands within the Bristol Bay land planning area of south central Alaska. These lands lie approximately 17 miles northwest of the community of Iliamna. Pebble Partnership and its predecessors have been exploring the deposit area for several years.[1]

[1] http://dnr.alaska.gov/mlw/mining/largemine/pebble/.

If, through the established regulatory review processes, an actual mine proposal is permitted, the State would collect revenues from development of the mine, and these revenues would directly benefit the State and its residents.[2] Pebble Partnership estimates that the project will generate between $136 to $180 million in annual taxes and royalties to the State over the productive life of the mine, currently estimated to be 25 years.[3] Pebble Partnership also expects the project to generate 4,725 jobs during a five-year construction phase, 1,200 direct jobs during operations, with a total of 14,715 jobs (including direct, indirect, and induced jobs) during operations.[4]

However, no permit applications for mine construction and development have been submitted. The State has repeatedly asserted that any mine proposal would be subject to several years of rigorous environmental reviews, and will require multiple state and federal permits and other authorizations before a project could proceed, if at all.[5]

Despite the comprehensive review that any mine in Bristol Bay area would undergo, in May and August of 2010, third parties filed petitions asking EPA to veto mining of the Pebble deposit. In February 2011, EPA stated that in response to these petitions it would prepare a watershed assessment[6] identifying impacts from large-scale

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2 Fogels Decl., ¶ 11-17.

3 PEBBLE PARTNERSHIP Complaint, ¶¶ 51-52.

4 *Id*. at ¶ 52.

5 Fogels Decl., ¶ 10.

6 Formally titled: *Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, and cited herein as "watershed assessment" or "Bristol Bay watershed assessment."

development in the entire Bristol Bay watershed. The land area considered in the watershed assessment is roughly equivalent to the size of West Virginia, and the majority of the lands in the Bristol Bay watershed are owned by the State.

After commencing its watershed assessment process, EPA narrowed its focus to consideration of hypothetical large-scale mine scenarios at the Pebble deposit. In addition to the narrowed focus on large mine hypotheticals, the process EPA used in preparing its Bristol Bay watershed assessment evolved over the course of the assessment's development. That process is not codified in EPA regulations.

The EPA variably cited Section 104 and Section 404 of the CWA for its authority to conduct the watershed assessment. Nothing in these provisions authorized the assessment. Moreover, the guidance containing the methodology that EPA used in analyzing potential impacts of a hypothetical mine does not cite the CWA as authority. In contrast to EPA's watershed assessment process, the Corps' Section 404 permitting review, coupled with the State's associated reviews under CWA Sections 401 and 402 and several other State laws and regulations, would have yielded a great deal of additional information regarding both impacts and the public interest.

Roughly one month after issuing the final January 2014 version of the watershed assessment, Defendant McLerran issued EPA's February 28th decision to initiate its Section 404(c) veto review process, on the basis of EPA's belief that discharges from dredge and fill activities associated with hypothetical large-scale mining at Pebble "would result in significant and unacceptable adverse effects to important fishery areas in

the [Bristol Bay] watershed." Defendants' February 28th decision was addressed to the State (as landowner), the Corps, and the Pebble Partnership. During the veto review process, the Corps "cannot approve a permit for the [Pebble] mine." 40 C.F.R. § 231.3(a)(2). The State has repeatedly challenged EPA's interpretation that it has the authority to conduct both the watershed assessment and a Section 404(c) veto review in the absence of a permit application.[7]

B. Alaska's interests in the instant action.

The State's interests in this case are clear and distinct. The State is both regulator and owner of the lands subject to EPA's decision.

Under the Alaska Statehood Act,[8] as well as the Cook Inlet Exchange later ratified in an amendment to the Alaska Native Claims Settlement Act (ANCSA),[9] Congress authorized the State to select lands for its own uses. The State gained all right and title to the selected lands, including mineral deposits on those lands. The Statehood Act and legislative history reflect that Congress expected the State to make land selections that would serve Alaska's overall economic and social well-being, and

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[7] The majority of the State's comments are available at the following three links: http://dnr.alaska.gov/mlw/mining/largemine/pebble/bbwa/pebble2review28jun2013.pdf; http://dnr.alaska.gov/mlw/mining/largemine/pebble/bbwa/pebble2review28jun2013enclosures.pdf; and http://dnr.alaska.gov/mlw/mining/largemine/pebble/bbwa/042914DMcLerranEPA.pdf .

[8] Pub. L. No. 85-508, 72 Stat. 339 (1958).

[9] Pub. L. No. 94-204, 89 Stat. 1145 (1976).

recognized that among those lands selected would be lands containing mineral deposits that the State could manage for prospecting and removal activities.[10]

As, the Senate Committee on Interior and Insular Affairs stated in its report on the Statehood Act, "it felt obligated to broaden the right of selection so as to give the State at least an opportunity to select lands containing real values, instead of millions of acres of barren tundra. To attain this result, the State is given the right to select lands known or believed to be mineral in character."[11] The Ninth Circuit Court of Appeals has recognized that the land grants Congress made under the Alaska Statehood Act were to allow the State to select land that provided for the State's overall economic and social well-being, and that these land selections would include mineral deposits.[12]

Under CWA Section 101(b), Congress also recognized the states' lead role in land and water resource management and pollution control: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the State to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."[13]

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10 Statehood Act, Section 6(i).

11 S. Rep. No. 1028, 83rd Cong. 2d Sess. 6 (1954).

12 *Udall v. Kalerak*, 396 F.2d 746 (9th Cir. 1968), *cert. denied*, 393 U.S. 1118 (1969). *See also*, *United States v. Atlantic Richfield Co.* 435 F. Supp. 1009 (D. Alas. 1977), *aff'd* 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980) (Congress' intent was to provide the State with a solid economic foundation).

13 33 U.S.C. §1251(b).

In addition to the foregoing federal laws, the Alaska Constitution imposes a duty on the State to responsibly manage and develop Alaska's natural resources to the maximum use consistent with the public interest and for the maximum benefit of its people.[14] It is "the policy of the state to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well-being."[15] It is also "the policy of the state to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest."[16]

Likewise, state law mandates that DNR "administer the state program for the conservation and development of natural resources, including…land, water, … and minerals."[17] The DEC is charged with regulating activities that will potentially impact State air, lands, and waters.[18] The Alaska Department of Fish and Game (ADF&G) is charged with the protection, management, conservation, and restoration of fish and game resources in Alaska, including reviewing proposed activities and structures that may occur in fish-bearing waters.[19]

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14 Alaska Const. Art. VIII, §§ 1 and 2.

15 AS 46.03.010(a).

16 AS 38.05.910.

17 AS 44.37.020(a).

18 AS 46.03.020, *et. seq*.

19 AS 16.05.841 and AS 16.05.871.

In addition to a Section 404 dredge and fill permit that may be issued by the Corps, numerous additional State, federal, and local government permits and authorizations are required before construction and operation of hardrock mining can begin in Alaska.[20] Most pertinent to the Corps' proposed issuance of a Section 404 permit is the State's certification of the Corps' permit.

In accordance with CWA Section 401(a) (33 U.S.C. § 1341(a)) and Alaska law (AS 46.03.110 and 18 AAC 15.180), DEC has exclusive responsibility for reviewing and certifying that the Corps' proposed Section 404 dredge and fill permit will comply with applicable state requirements, including Alaska water quality standards. DEC will be responsible for determining whether it is appropriate to certify any future Corps permit that might be proposed for a mining operation at Pebble, if an application is ever submitted to the Corps. As part of the certification process, DEC may impose limitations and monitoring requirements to avoid, mitigate, or identify potential impacts from activities that the Corps might authorize under the Section 404 permit. The requirements that DEC may impose through Section 401 certification become part of the Section 404 permit (33 U.S.C. §1341(d)).[21]

Other permits and authorizations that would be required for any large mine in Alaska include:

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[20] Fogels Decl., ¶ 9; Hale Decl., ¶ 8.

[21] Hale Decl., ¶ 5.

- permits required under CWA Section 402 (33 U.S.C. § 1342) for the discharge of pollutants to waters of the U.S., which permits would be developed and issued by DEC under its approved State program, the Alaska Pollutant Discharge Elimination System (APDES) Program (AS 46.03.100(h));
- DNR's approval of a proposed plan of operations (11 AAC 86.150);
- DNR's approval, in coordination with DEC, of mine reclamation plans and financial assurances (such as a reclamation bond) (AS 27.19);
- a dam safety certification from DNR's Division of Mining Land, and Water's (DMLW's) Dam Safety Unit (AS 46.17 and 11 AAC 93.151-93.201);
- DNR's approval of any right-of-way access or utilities on state land;
- a water use authorization or permit from the DMLW's Water Section (AS 46.15);
- DNR approval of the project proponent's proposed cultural resource protection plan for minimizing impacts to cultural and archaeological resources (AS 41.35.080 and 11 AAC Chapter 16);
- DEC waste management permits (AS 46.03.100);
- DEC air quality permits (46.14.120);
- ADF&G Division of Habitat permits for any activity or structure proposed to occur, regardless of land ownership, in fish-bearing waters, such as

bridges, culverts, fords, material sites, tailings facilities, and water-withdrawal structures (AS 16.05.841 and AS 16.05.871).

DNR coordinates the permitting responsibilities of all State agencies that may be involved in the permitting and authorization of mines in Alaska, and also attempts to coordinate the regulatory involvement of federal and municipal entities to the extent possible. This includes coordinating the State's involvement as a cooperating agency during any environmental reviews that the United States Army Corps of Engineers (Corps) might conduct under the National Environmental Policy Act (NEPA)[22] and the Clean Water Act (CWA) Section 404(b)(1) guidelines[23] during consideration of a CWA Section 404 dredge and fill permit.[24]

Environmental and permitting review of a mine project, particularly one relating to a significant deposit such as Pebble, would take several years, review of extensive baseline data, and considerable discussion between the applicant and regulating agencies. There will be multiple opportunities for the public to comment on proposed mine activities. As a consequence of this review process, any project that might initially be proposed by an applicant will undoubtedly change, perhaps significantly so, in order to avoid and minimize impacts, or to compensate for unavoidable impacts. There is also no

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22 42 U.S.C. § 4321, *et seq*.

23 33 U.S.C. § 1344(b).

24 Fogels Decl., ¶ 6.

guarantee that after being subjected to this multi-faceted state-federal permitting review that a mine project would be approved.[25]

The State also has a duty to promote and advance economic development in the State.[26] The State's economy is largely based on nature resource industries. The socio-economic benefit of the mining industry to the State and its citizens is significant.[27]

For example, mineral development expenditures in Alaska in 2012 increased by nearly 26 percent over the previous year, to approximately $342.4 million. Revenues to the State and municipalities, in the form of mineral-related fees, rent, sales, royalties, and taxes, exceeded a total of $124.8 million. Employment rose to 4,366 full-time equivalent jobs, a 416 (11 percent) increase over the previous year. In the last ten years, mine wages have grown by more than 18 percent, the highest wage growth of any industry in the State. The Alaska mineral industry also generated an estimated 4,700 indirect jobs in the same ten-year period. The average annual wage for mining employees in Alaska during 2012 was $98,909, and the average annual wage for employees in mineral support activities was $81,775.[28]

Thus, DNR and its sister agencies have numerous rights and responsibilities and extensive expertise in considering a variety of environmental and land management issues relating to potential mine development in the Alaska, including at the Pebble

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25 *Id*. at ¶ 10.

26 AS 44.33.020(a)(30)-(35).

27 Fogels Decl., ¶ 11- 17.

28 Fogels Decl., ¶ 15.

deposit. EPA's expertise does not extend to areas where DNR and DEC have superior expertise, such as DNR's expertise on dam safety, mine reclamation, and financial assurance issues, or DEC expertise on Alaska water quality standards. In any of these areas of the State's expertise, the State agencies may determine there are conditions that should be imposed or which will help avoid, mitigate, or compensate for impacts from mining activities. But EPA's premature action based on hypothetical mining at Pebble, however, deprives the State agencies of their right and opportunity to apply their expertise to an actual application.[29]

Because the State's ability to protect its interests could be impaired or impeded by the disposition of this action, State intervention is justified.

POINTS AND AUTHORITIES

I. The State is entitled to intervene as a matter of right.

Pursuant to Fed. R. Civ. P. 24(a)(2), a court must, upon timely motion, permit intervention as a matter of right by anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Courts construe the rule liberally and in favor of potential intervenors.[30] The court's evaluation is "guided

[29] Fogels Decl., ¶¶ 20-22; Hale Decl., 8-10.

[30] *Sw. Ctr. For Biological Diversity v. Berg,* 268 F.3d 810, 818 (9th Cir. 2001).

primarily by practical considerations,"[31] and a court must accept as true the non-conclusory allegations made in support of an intervention motion.[32]

The Ninth Circuit has adopted a four-part test for intervention as of right: (1) the motion must be timely; (2) the applicant must claim a "significantly protectable interest" relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the parties to the action.[33] The State meets all four facets of this test.

A. The State's motion is timely.

Timeliness is dependent on the stage of the proceedings, potential prejudice to the parties, and the reason for any delay.[34] Prejudice to existing parties is the most important timeliness consideration.[35]

The State has moved to intervene at the earliest stage of this case, within days of the plaintiff filing the complaint, and before the federal defendants have answered and

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[31] *Id.*, at 818; *see also United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) ("[a] liberal policy in favor of intervention serves both efficient resolution of issues and broad access to courts").

[32] *Sw. Ctr. For Biological Diversity*, 268 F.3d at 819 (citing to *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995)).

[33] *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (citing *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)).

[34] *State of Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1319 (9th Cir. 1997).

[35] *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984).

before any substantive motions have been made. The State's intervention will not cause undue delay or otherwise prejudice any parties' rights in this action. Thus, the State's intervention at this stage is timely. The proposed intervenor has prepared and is ready to file its Complaint, which is lodged with this motion.

B. The State claims a significantly protectable interest in this action.

To intervene as of right, an applicant need not establish standing, or show a particularized injury of the type used to establish standing.[36] No specific legal or equitable interest need be established.[37] An applicant need only demonstrate a "significantly protectable interest."[38]

A proposed intervenor will "generally demonstrate a sufficient interest" if "it will suffer a practical impairment of its interests as a result of the pending litigation."[39] The Ninth Circuit applies this broad interest criterion to involve "as many apparently concerned persons as is compatible with efficiency and due process."[40] It is generally enough that the interest asserted is protectable under some law and that there is a

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36 *Didrickson v. United States Dept. of Interior*, 982 F.2d 1332, 1340 (9th Cir 1992).

37 *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993).

38 *Id.*, 996 F.2d at 976, citing *Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 309 (9th Cir 1989), *cert denied*, 492 U.S. 911 (1989).

39 *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1180 (9th Cir. 2011) (citations omitted).

40 *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (citations omitted).

relationship between the protected interest and the claims at issue.[41] As detailed in this motion, the State's interests satisfy the second element of the intervention analysis.

The State has both a direct economic interest and a regulatory interest in the result of the instant dispute. The State has a right to royalties, mineral license taxes, and corporate income taxes on minerals produced from the Pebble project.[42] EPA's initiation of the Section 404(c) veto immediately chills investment and development opportunities, along with potential state revenues from, the development of valuable resources located on State lands. [43]

EPA's premature decision to conduct a Section 404(c) veto review in the absence of a Section 404 permit application also thrusts aside the regulatory reviews that the State, as the primary land and water resource management authority, is allowed to apply in reviewing whether or not to approve of a proposed mine in Alaska.[44] As a consequence, EPA's action deprives the State of a meaningful review of an actual mine proposal.[45]

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41 *Sw. Ctr. For Biological Diversity,* 268 F.3d at 818.

42 Fogels Decl., ¶¶ 10-17.

43 *Scotts Valley Bank of Pomo Indians of the Sugar Bowl Rancheria v. U.S.*, 921 F.2d 924, 928 (9th Cir. 1990) ("[a]llowing the City to intervene in this action is the only practical means of protecting its taxing and regulatory interest").

44 *Id*.

45 Fogels Decl., ¶ 22.

C. Absent intervention, disposition of this dispute would impair and impede the State's ability to protect its interests.

The third criterion for intervention as of right is that the action's disposition, as a practical matter, may impair or impede the intervenor's ability to protect its asserted interests.[46] The question of impairment is not separate from the question of existence of an interest.[47] In reviewing this criterion, the courts look to the "'practical consequences' of denying intervention, even where the possibility of future challenge to the regulation [remains] available."[48]

Disposition of this action may result in a continued constraint upon or circumvention of State regulatory and land use authorities for development at the Pebble deposit. In addition to the direct impacts such a result would have on Alaska's management of its wildlife, natural resources, environment, and economy, as discussed above, disposition of this lawsuit may have far-reaching consequences to the State. Pursuant to the principles of res judicata, claim preclusion, *stare decisis*, and/or related doctrines, the effects of the legal and factual determinations made in this litigation may constrain the State's ability to challenge future federal actions that press the limits of federal authority.[49] For these reasons, the State satisfies the impairment requirement.

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46 *Wilderness Soc. v. U.S. Forest Serv.,* 630 F.3d at 1177.

47 *See, e.g., Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n,* 578 F.2d 1341, 1345 (10th Cir. 1978).

48 *Natural Res. Def. Council v. Costle,* 561 F.2d 904, 909 (D.C. 1977).

49 *U.S. ex rel. McGough v. Covington Technologies Co.,* 967 F.2d 1391, 1396 (9th Cir. 1992); *Fund for Animals, Inc. v. Norton,* 322 F.3d 728, 735 (D.C. Cir 2003) (disposition of lawsuit would impair intervenor's ability to protect its interests regardless

D. The State's interests are not adequately represented.

The final criterion for intervention is whether the representation of the State's interests by existing parties "may be" inadequate. The burden of that showing is minimal.[50]

In assessing the adequacy of representation, courts consider 1) whether the present parties' interests are such that they will undoubtedly make all the intervenor's arguments; 2) whether the present parties are capable of and willing to make those arguments; and 3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.[51] The court's inquiry focuses on the subject of the action, not just the particular issues before the court at the time of the motion.[52] Where an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises.[53]

In seeking intervention, the State requests that the Court vacate EPA's February 28, 2014 decision and premature application of EPA's CWA Section 404(c) veto authority on State lands. Despite seeking similar relief, the above-captioned plaintiff, Pebble Limited Partnership, does not adequately represent the State's interests.

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of whether intervenor could reverse unfavorable ruling by bringing a separate lawsuit; noting that "[t]here is no question that the task of reestablishing the status quo if [plaintiffs] succeeds in this case will be difficult and burdensome.").

50 *Sw. Ctr. For Biological Diversity,* 268 F.3d at 823.

51 *Id.,* at 822.

52 *Id.,* at 823

53 *Id.*

The State has separate and distinct interests, including: 1) direct economic interests including a right to royalties and taxes from mineral production; 2) insuring that its environment is protected and its environmental laws complied with; and 4) managing its resources, including the habitat for fish and wildlife to protect the State's significant interests in Bristol Bay fisheries.[54]

The Alaska Constitution and statutes impose a duty on the State to protect the interests of the people of the State in a number of respects including managing and conserving wildlife, promoting the use of natural resources, and ensuring that the environment is protected.[55] These are non-delegable duties. Pebble Partnership has no such duties.[56] The possibility that the interests of the State and Pebble Partnership may diverge "need not be great" to satisfy the minimal burden of showing that representation "may" be inadequate.[57]

Pebble Partnership will not raise arguments in this litigation regarding State's interest in the development of its resources, management of its wildlife and protection of its environment, the protection of the economic welfare of the State or its citizens. For example, no other party can

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54 Alaska Const. Art. VIII, §§ 1, 2 & 4; AS 16.05.020.

55 Alaska Const. Art. VIII, §§ 1, 2 & 4; AS 16.05.020, AS 38.05.180(a)(1)(A) and (C), AS 43.55.011 and AS 46.03.110(3).

56 *Fund for Animals, Inc. v. Norton,* 322 F.3d 728, 736 (D.C. Cir 2003)

57 *Utahns For Better Transportation v. U.S.,* 295 F.3d. 1111, 1117 (10th Cir. 2002)

- bring to this lawsuit the perspective of the State in seeking to preserve a long-standing, stable permitting framework within which mineral production can proceed in Alaska;
- shares DEC's role, under CWA Section 401, of certifying a Section 404 permit;
- has ADF&G's unique access to scientific data and staff experience with respect to many of the species located on or near the Pebble deposit, including salmon resources and habitat.

Accordingly, Alaska has satisfied its burden of showing that its interests may not be adequately represented by Pebble Partnership and which interests may be adversely affected by the outcome of this case.

In short, the State of Alaska satisfies all elements under Fed. R. Civ. P. 24(a) and is entitled to intervene in this case as a matter of right for all purposes.

II. The State should be granted permissive intervention.

Alternatively, if this Court finds that the State is not entitled to intervention as a matter of right, the State requests permissive intervention under Fed. R. Civ. P. 24(b)(2). Upon timely filing of a motion, a court may permit a party to intervene who "has a claim or defense that shares with the main action a common question of law or fact" after considering whether "intervention will unduly delay or prejudice the adjudication of the rights of the original parties."[58] The Ninth Circuit applies a three-prong test to determine

[58] Fed. R. Civ. P. 24 (b)(1)(B), (b)(3).

if permissive intervention is appropriate: "(1) the movant must show an independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant's claim or defense and the main action must have a question of law and fact in common."[59]

First, this Court has jurisdiction to hear this case as a federal question and under the Administrative Procedure Act. 28 U.S.C. § 1331; 5 U.S.C. §§ 701 *et. seq.* Second, Alaska's motion is timely for the reasons presented in Section I.A, above. Third, Alaska satisfies the commonality requirement because the State seeks to challenge the same EPA action that is the subject of the original complaint in this case. The State's claim, therefore, necessarily has common questions of law and fact in common with the main action.

Further, the State submits that its participation in this case will "contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented."[60]

The State's intervention will also benefit the Court in considering the public interests at stake and balancing the hardships of injunctive relief, if such relief is considered.[61]

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[59] *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989) *aff'd sub nom. Venegas v. Mitchell*, 495 U.S. 82, 110 S. Ct. 1679, 109 L. Ed. 2d 74 (1990) (citations omitted).

[60] *U.S. Postal Service v.Brennan,* 579 F.2d 188, 192 (9th Cir. 1978).

[61] *Amoco Production Co. v. Village of Gambell,* 480 U.S. 531, 541- 542 (1987) (in balancing the competing claims of injury "particular regard should be given to the public interest").

CONCLUSION

For the reasons set forth above, this Court should grant the State's Motion to Intervene as of right under Fed. R. Civ. P. 24(a), or alternatively, permit the State to intervene under Fed. R. Civ. P. 24(b)(2).

Respectfully submitted May 30, 2014 by:

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