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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT DILLINGHAM

NONDALTON TRIBAL COUNCIL,)
KOLIGANEK VILLAGE COUNCIL,)
NEW STUYAHOK TRADITIONAL)
COUNCIL, EKWOK VILLAGE)
COUNCIL, CURYUNG TRIBAL)
COUNCIL, and LEVELOCK)
VILLAGE COUNCIL,)

Plaintiffs,)

vs.)

STATE OF ALASKA, ALASKA)
DEPARTMENT OF NATURAL)
RESOURCES, and TOM IRWIN,)
Commissioner of Natural Resources,)

Defendants.)

Case No. 3DI-09-46 CI

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

COME NOW Plaintiffs Nondalton Tribal Council, Koliganek Village Council, New Stuyahok Traditional Council, Ekwok Village Council, Curyung Tribal Council, and Levelock Village Council (hereinafter "Plaintiffs"), by and through counsel, seeking declaratory judgment against defendants State of Alaska,

Alaska Department of Natural Resources, and Tom Irwin, Commissioner of Natural Resources, regarding certain acts and omissions involving the current Bristol Bay Area Plan for State Lands, adopted by the Department in 2005 (“2005 BBAP” or “BBAP”), that Plaintiffs allege were and are unlawful. Plaintiffs request that the Court declare that the acts and omissions alleged in this Complaint are contrary to law, and grant Plaintiffs appropriate relief.

I. PARTIES.

1. Plaintiff Nondalton Tribal Council is the federally recognized tribe for Nondalton, Alaska and sues on behalf of its members. They hunt and fish for subsistence on state lands in much of the Nushagak and Kvichak river drainages, to which the 2005 BBAP applies. Nondalton is located on Sixmile Lake in the Kvichak drainage, and is the community closest to certain mining claims (the “Pebble claims”) on state-owned land which are the subject of a potential and controversial large copper, gold and molybdenum mine. Tribal members hunt and fish in the area of the Pebble claims.

2. Plaintiff Koliganek Village Council is the federally recognized tribe for the Village of Koliganek, Alaska and sues on behalf of its members. The village is on the Nushagak River. Tribal members hunt and fish for subsistence on state-owned lands in much of the Nushagak River drainage, including in the vicinity of the Pebble claims.

3. Plaintiff New Stuyahok Traditional Council is the federally recognized tribe for the Village of New Stuyahok, Alaska and sues on behalf of its members. The village is on the Nushagak River. Tribal members hunt and fish on state lands for subsistence on much of the Nushagak and Kvichak river drainages, including in the area of the Pebble claims.

4. Plaintiff Ekwok Village Council is the federally recognized tribe for the Village of Ekwok, Alaska and sues on behalf of its members. Ekwok village is on the Nushagak River. Tribal members hunt and fish for subsistence on state

lands in much of the Nushagak River drainage, including in the vicinity of the Pebble claims.

5. Plaintiff Curyung Tribal Council is the federally recognized tribe for Dillingham, Alaska, has approximately 2400 members, is the largest tribe in the Bristol Bay Drainages, and sues on behalf of its members. Dillingham is on the Nushagak River. Tribal members hunt and fish for subsistence on state lands in much of the Nushagak and Kvichak river drainages, including in the vicinity of the Pebble claims, and on the Alaska Peninsula.

6. Plaintiff Levelock Village Council is the federally recognized tribe for the Village of Levelock, Alaska and sues on behalf of its members. The village is on the Kvichak River. Tribal members hunt and fish on state lands for subsistence on much of the Kvichak and Nushagak river drainages, including in the area of the Pebble claims, and on the Alaska Peninsula.

7. The plaintiffs bring this action as public interest litigants, although some members of each Tribe fish commercially in Bristol Bay.

8. Defendant State of Alaska is responsible for managing state lands, pursuant to Art. VIII of the Alaska Constitution, and Alaska Statutes and duly-adopted regulations.

9. Defendant Alaska Department of Natural Resources (“DNR”) is the state agency that manages most state lands, including lands subject to the BBAP. DNR implements state land use planning statutes contained in AS 38.04, and applicable regulations adopted by it at 11 AAC Chap. 55, under which authorities DNR has adopted and revised land use plans, including the BBAP, for state lands. DNR also implements state public land laws including those codified in Title 38 of the Alaska Statutes and mining laws in Title 27, and implements the Alaska Coastal Management Program (“ACMP”) at AS 46.40.

10. Defendant Tom Irwin (“Irwin”) is the Commissioner of Natural Resources and the chief official of DNR. He is responsible for developing,

adopting and implementing the BBAP, and for implementing the above-cited statutes and regulations. Irwin is sued in his official capacity.

II. JURISDICTION.

11. The court has jurisdiction over this lawsuit pursuant to AS 22.10.020.

III. FACTUAL OVERVIEW.

12. The 2005 BBAP is the state's principal land use plan for state lands in the Bristol Bay area. It applies to approximately twelve million acres of state-owned or state-selected uplands and shorelands (*i. e.*, lands between the ordinary high water marks of navigable waters), most of which lands and waters drain into Bristol Bay. The 2005 BBAP also applies to approximately seven million acres of adjacent tide and submerged lands. The geographic scope of the BBAP extends from the Bering Sea coast in the vicinity of Quinhagak, Alaska, east across the drainages of the Nushagak and Kvichak Rivers at the head of Bristol Bay, south to the end of the Alaska Peninsula and Unimak and Krenitzin Islands. Most of the state-owned uplands and shorelands in the BBAP are in the Nushagak and Kvichak drainages and on the Alaska Peninsula. These uplands and shorelands support the state's most valuable commercial sockeye salmon fisheries, subsistence fishing and hunting which supply residents of 31 villages and communities in the area with their food and their cultural identity, and recreational businesses and uses based on sport fishing, hunting and other outdoor recreational pursuits. The 2005 BBAP applies to state-owned land at the Pebble claims, where exploration is occurring under permits issued by DNR. The claims overlap the divide between the headwaters of the Kuktuli River in the Nushagak drainage and Upper Talarik Creek in the Kvichak drainage. The claims are a few miles north of the western portion of Iliamna Lake, which is one of the primary sockeye-salmon rearing lakes in Alaska, and into which Upper Talarik Creek directly flows from portions of the Pebble claims.

13. DNR must adopt and revise state land use plans under Alaska Statutes 38.04, 38.05.300, and regulations at 11 AAC Chap. 55. Pursuant to AS 38.04.065(a), land use plans, including the BBAP, are to “provide for the use and management of state-owned land.” To prepare and adopt state land use plans, DNR must maintain, keep current, and rely upon the available inventory of resources and uses in the area. AS 38.04.060, 38.04.065(b)(4). Upon information and belief, the inventory is to be essentially all relevant available information. Pursuant to AS 38.04, AS 38.05.300, and 11 AAC Chapter 55, a plan must designate primary surface uses of units of state land (*e.g.*, for habitat, public recreation, minerals, etc.). A land classification order then converts the designations to corresponding land classifications (see definition of “Area Plan,” 2005 BBAP, page A-2; and Tables 4.2(A) and (B), 2005 BBAP, pp. 4-5 – 4-6, summarizing conversion of designated uses to classifications). A unit may have up to three classifications (“co-classifications”). 11 AAC 55.040(d). Alaska Statute 38.04.015 lists the uses and purposes – *i.e.*, the “primary public interests” - - for which land must be retained in public ownership, including subsistence, energy development, aquaculture, forestry, grazing, sport hunting and fishing, mining and mineral leasing, and habitat. DNR has adopted regulations at 11 AAC 55.050 - .230 that establish and define a land classification category for every use in AS 38.04.015(1), except subsistence. Pursuant to AS 38.04.065(c)(2) and 38.04.015, classifications such as wildlife habitat land, public recreation land, mineral land and transportation corridor land require that the land so classified remain in public ownership. Other classifications, *e.g.*, settlement land and resource management land, do not carry this requirement.

14. In September 1984, the Alaska Departments of Natural Resources, Fish and Game (“ADF&G”), and Environmental Conservation (“DEC”) had jointly adopted an earlier Bristol Bay Area Plan for State Lands (“1984 BBAP”). It designated primary uses (*see* Exhibit 1, 1984 BBAP, Map, “Primary Land Uses on State Lands”) that, when converted to land classifications, resulted in

classifying nearly all of the twelve million acres of uplands and shorelands as wildlife habitat land, usually as co-classifications reflecting other primary uses, and most as a co-classification with recreation, and in some instances with minerals, oil and gas, or transportation. Pursuant to AS 38.04.015, these co-classifications, in which habitat was a classification, retained nearly all the land in state public ownership.

15. The 2005 BBAP completely revises and replaces the earlier 1984 BBAP. The 2005 BBAP designates primary uses (*see* Exhibit 14, 2005 BBAP, Map 0-5, "Land Uses Designations") that, when converted to land classifications, result in reclassifying nearly all of the twelve million acres of uplands and shorelands. This has resulted in reducing the amount of uplands and shorelands classified as habitat by approximately 90 percent, from approximately twelve million acres under the 1984 BBAP to approximately 768,000 acres under the 2005 BBAP. This causes a similar reduction in land classifications that, under AS 38.04.015, would result in retaining land in public ownership. Most of the land that remains classified as habitat is coastal tide and submerged lands. In these and other respects, the 2005 BBAP drastically changes, without factual justification or compliance with legal authority, the land-use designations, classifications, and acreages assigned to them by the 1984 BBAP.

16. The 2005 BBAP was not adopted jointly by DNR, ADF&G and DEC. It was prepared and adopted by officials at DNR.

17. Since 2001, at least five former managers or lobbyists active and directly associated with the hardrock mining industry in Alaska assumed responsible management positions in DNR that have been central to the preparation, adoption and implementation of the 2005 BBAP. Several are still central to its implementation.

18. Defendant Irwin is a former manager of the Fort Knox and True North gold mines, and is former vice president of operations of Fairbanks Gold Mining, Inc. Irwin served as Commissioner of Natural Resources from January 2003 to

October 2005, during the time the 2005 BBAP was prepared and adopted, and he is serving again in that capacity. On or about April 19, 2005, Irwin approved and signed: (1) the 2005 BBAP which replaced the earlier 1984 BBAP; (2) Land Classification Order No. SC-04-002 (*see* 2005 BBAP page B-1), that classified the lands pursuant to the 2005 BBAP; and (3) the 2005 Nushagak and Mulchatna Rivers Recreation Management Plan ("2005 Rivers Plan"), which is an element of the BBAP and replaced the 1990 Nushagak and Mulchatna Rivers Recreation Management Plan ("1990 Rivers Plan").

19. Upon information and belief, Rick Fredericksen of DNR ("Fredrickson") is a former manager for WGM, Inc., a minerals exploration firm, and former director of pre-development for the mining company Echo Bay Alaska, Inc. In about March 2003, DNR hired and assigned him to the Resource Assessment and Development Section of DNR's Division of Mining, Land and Water, to manage DNR's intended revisions of the 1984 BBAP and 1990 Rivers Plan. Fredrickson essentially completed that work when Irwin approved the 2005 BBAP and 2005 Rivers Plan. Fredericksen is now chief of the Mining Section of DNR's Division of Mining, Land and Water. He assists in implementing mining laws, regulations and the 2005 BBAP as they apply to mineral exploration and development in the Bristol Bay area, including at the Pebble claims.

20. Stan Foo was a registered lobbyist for the mining companies Cominco and Placer Dome US in 2001, when he became Chief of the Mining Section in DNR's Division of Mining, Land and Water. Cominco owned the Pebble claims until 2001, when it sold them to Northern Dynasty Mines, Inc. The 2005 BBAP identifies Foo (chief of the Mining Section) as "Division of Mining" staff assigned to the revision the Bristol Bay Area Plan. Foo performed in that capacity under Irwin's supervision of DNR until about March 2005, when Placer Dome hired Foo to manage its Donlin Creek hardrock mining project in Alaska.

21. Upon information and belief, Tom Crafford of DNR is a former vice president of North Pacific Mining Company, and is a mining consultant. DNR

hired Crafford in about 2005, initially as chief of its Mining Section, and he is presently a large-mine permitting coordinator in DNR's Office of Project Management and Permitting ("OPMP"). Under Irwin's supervision, OPMP is a part of the Office of the Commissioner, and was created not by statute or regulation, but by Irwin. OPMP has no permit-issuing authority, but instead purports to "coordinate" permits. Crafford coordinates the permitting activities of state agencies with respect to large mining projects in southwest Alaska, including activities related to the Pebble claims within the BBAP area.

22. Bill Jeffress worked with Irwin at the Fort Knox gold mine, and was an environmental manager and engineer in Alaska and Nevada with Barrick Gold Corp. (Donlin Creek mine), Kinross Gold Corp. (True North mine, Fort Knox mine) and Amax Gold Inc. (Fort Knox mine). Jeffress served as Director of OPMP from about February 2003 to about October 2005.

23. Irwin, Fredericksen and Crafford presently remain at DNR. Irwin uses Charlotte MacCay, who is not a DNR employee but is the current manager of permitting affairs for the Pebble Partnership formed to develop a Pebble mine, to prepare agency-approved minutes of meetings of from approximately five to ten state-federal interagency "Technical Working Groups" (TWGs). These TWG's are composed mostly of state and federal agency officials assigned, in an advisory capacity, to address scientific, engineering and other studies being undertaken by the Pebble Partnership for governmental and public environmental review and agency permitting of a future Pebble mine. MacCay, by preparing and distributing the minutes of TWG meetings for agency approval, creates written records that, after agency approval, are susceptible to being putatively part of a state or federal agency record, in the event of future judicial review on the record. Prior to her employment by the Pebble Partnership, MacCay was Teck Cominco Mining Company's senior administrator for environment and government affairs in Alaska, and a registered lobbyist for Teck Cominco.

24. Upon information and belief, Irwin, Crafford, Jeffress, Foo and MacCay have served as officers or directors of the Alaska Producers Council, a trade association of the hardrock mining industry in Alaska. State records prepared under the Executive Budget Act, state budgets, and DNR records demonstrate that, after these individuals assumed their staff positions and functions at DNR, the industry has substantially funded DNR's annual budgets for OPMP staff positions in Irwin's office, through "program receipts" arising from memoranda of understanding between DNR and mining companies. Under these memoranda of understanding, the companies, as applicants or prospective applicants for mining-related permits, reimburse hourly salaries and costs incurred by OPMP staff, and other state officials.

25. In discarding the 1984 BBAP and adopting the 2005 BBAP, DNR has committed numerous unlawful acts and omissions. The result is a new Bristol Bay Area Plan skewed away from the habitat protections of the 1984 BBAP, and now oriented very strongly toward encouraging, developing, and protecting mining on nearly all of the twelve million acres of state-owned uplands that discharge into some of the world's richest salmon-producing lands and waters.

IV. FACTS RELATING TO PLAINTIFFS' SPECIFIC CLAIMS.

26. For the most part, the 1984 BBAP and 2005 BBAP address the same area of approximately twelve million acres of state uplands and shorelands, plus tide and submerged lands in Bristol Bay. The 2005 BBAP adds tide and submerged land east of the Alaska Peninsula and a relatively small amount of uplands and shorelands in the Kuskokwim River drainage.

A. The 1984 Bristol Bay Area Plan for State Lands.

27. The 1984 BBAP, which remained in effect until Irwin adopted the 2005 BBAP, had 22 management units. Unit 1 was all the tidelands and submerged lands, and Units 2 through 22 were the uplands and shorelands. The 1984 BBAP resulted in DNR issuing Mineral Closing Order ("MCO") No. 393