

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT DILLINGHAM

JOHN H. HOLMAN, JACK G. HOBSON, )  
and LUKI AKELKOK, )

Plaintiffs, )

v. )

SEAN PARNELL, Lieutenant Governor )  
of the State of Alaska, )

Defendant. )

Case No. 3DI-07-56 CI

**Memorandum of Decision on Motions for Summary Judgment**

The Lieutenant Governor rejected a water quality initiative—07WATR—at the preliminary stage, because it went “beyond regulation,” and was “an impermissible allocation of public assets.”<sup>1</sup> Initiatives may not be used to make appropriations.<sup>2</sup> But unless “clearly inapplicable,” the people retain the power to enact laws by initiative.<sup>3</sup> Plaintiffs argue that their initiative doesn’t appropriate or allocate a public resource, and that the State has conceded that the issue is far from clear.<sup>4</sup>

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<sup>1</sup> 2007 Op. Att’y Gen (June 21; 663-06-0179) at 12, annexed to Plaintiff’s Motion for Summary Judgment, filed 8/20/07, as Ex. 3, and also annexed to Lieutenant Governor’s Opposition...and Cross Motion for Summary Judgment, filed 9/1/07, as Ex. A.

<sup>2</sup> Ak. Const. Art. XI, sec. 7, AS 15.45.010. *See also* AS 15.45.040(4) and 080(1).

<sup>3</sup> Ak. Const. Art. XII, sec 11.

<sup>4</sup> Reply, filed 9/10/07, at 3, citing Ex. 3 at 4, 12.

It may be that the parties differ by only one part per billion, or less. At oral argument,<sup>5</sup> the State agreed that if the initiative said, for example, that miners couldn't release more than one PPB of arsenic into a salmon stream, rather than none,<sup>6</sup> then that "sounded like regulation," which may be done by initiative.<sup>7</sup> But it wasn't ready to concede that mathematical closeness was, as they say, close enough for government work. In the Lieutenant Governor's view, the proposed law would still bind the hands of the legislature, so that it could not exercise the allocation authority reserved to that body. Some discussion is necessary to understand the positions of the parties.

## **I Does the initiative amount to a ban on mining?**

### **A. Standard of review for pre-election initiatives.**

The plaintiffs argue that 07WATR does not ban mining. It doesn't apply to existing mines,<sup>8</sup> or those occupying less than 640 acres,<sup>9</sup> and of course it doesn't by its terms ban even new large-scale metallic mining. But the plaintiffs have an even more fundamental objection—they argue that the Lt. Governor should not have considered the substance or effects of the proposed law.<sup>10</sup>

Plaintiffs derive this rule from both minutes of the Constitutional Convention and statements made by the Alaska Supreme Court. There are, however, two threads to the court's pronouncements on the review of initiatives,

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<sup>5</sup> Media 3DIA07-186, at 1:30-2:23 (9/28/07).

<sup>6</sup> See 07WATR Initiative, annexed to the plaintiffs' brief as Ex. 1 [hereafter 07 WATR].

<sup>7</sup> See also the Department of Law's Memorandum on 07WTR2, filed 9/27/07.

<sup>8</sup> 07WATR, *supra*, sec. 3.

<sup>9</sup> *Id.*, §§ 2 and 5(a).

<sup>10</sup> Plaintiffs' memorandum at 4-19 and reply at 10 et seq.

which may not be immediately apparent. As noted above, Article XII of the Alaska Constitution confirms the people's right to make law by initiative, unless "clearly inapplicable," and "subject to the limitations of Article XI." In *Yute Air Alaska, Inc. v. McAlpine*,<sup>11</sup> the court cited *Boucher v. Engstrom* to the effect that initiatives should be liberally construed so that the people are allowed to express their will; "all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose."<sup>12</sup> One of the issues in *Boucher* had to do with the constitutional prohibition against local or special legislation,<sup>13</sup> and the court quoted the Utah Supreme Court as noted above, concluding that an initiative should be upheld if there is "any conceivable factual basis which would render [its] classification constitutional."<sup>14</sup> So while this statement supports the plaintiffs' argument that doubts are to be resolved in favor of allowing the people to vote, it does not suggest that factual disagreements are immaterial at this stage.<sup>15</sup> In looking at the anywhere-but-Anchorage-or-Fairbanks capital move proposal in *Boucher*, the court didn't hesitate to take note of the growth patterns of the time in sustaining the initiative against the claim that it was special or local legislation.<sup>16</sup>

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<sup>11</sup> 698 P.2d 1173, 1181 (Alaska 1985).

<sup>12</sup> 528 P.2d 456, 462 (Alaska 1974)(citations omitted).

<sup>13</sup> Ak. Const. Art. XI, sec 7.

<sup>14</sup> *Boucher, supra*, 528 P.2d at 463.

<sup>15</sup> See plaintiffs' memorandum at 5, 7-8.

<sup>16</sup> *Boucher, supra*, 528 P.2d at 463-64.

The *Yute Air* case was different, because it was challenged for violating the single subject rule,<sup>17</sup> which also applies to bills originating with the legislature. The court rejected Justice Moore’s attempt to hold initiatives to a higher standard, citing the language from of Article XII, section 11.<sup>18</sup> From these early cases came two rules, which were recently summarized in *Alaska Action Center, Inc. v. Municipality of Anchorage*:<sup>19</sup>

One type of challenge invokes “the particular constitutional and statutory provisions regarding initiatives.”<sup>20</sup> The executive officer in charge of certifying initiatives...[here, the Lt. Governor] has discretion to reject the measure if [he] determines it “violates any of the[se] liberally construed restrictions on initiatives,”<sup>21</sup> and the courts may review the ... decision right away.<sup>22</sup> Separation of powers principles are not offended by this procedure, as these restrictions were devised to prevent certain questions from going before the electorate at all...<sup>23</sup> Other challenges are grounded in “general contentions that the provisions of an initiative are unconstitutional.”<sup>24</sup> The executive officer may only reject the measure if “controlling authority leaves no room for argument about its constitutionality...”<sup>25</sup> And absent controlling authority, the court should not decide this type of challenge until after the initiative has been enacted by the voters.<sup>26</sup>

The court cited *Brooks v. Wright* as an example of the first type of challenge, and that is what we have here—rejection of a proposed law that the legislature might enact, but which the Lt. Governor believes violates Article XI,

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<sup>17</sup> Ak. Const. Art. II, sec. 13.

<sup>18</sup> *Yute Air, supra*, 698 P.2d at 1181.

<sup>19</sup> 84 P.3d 989, 992 (Alaska 2004). See also *State v. Trust the People*, 113 P.3d 613, 624-29 (Alaska 2005).

<sup>20</sup> *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999)(citations omitted).

<sup>21</sup> *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003)(remainder of footnote omitted).

<sup>22</sup> *Brooks*, 971 P.2d at 1027.

<sup>23</sup> See *Boucher* 528 P.2d at 460.

<sup>24</sup> *Brooks*, 971 P.2d at 1027.

<sup>25</sup> *Mahoney*, 71 P.3d at 900.

<sup>26</sup> *Brooks*, 971 P.2d at 1027.

section 7 of the Alaska Constitution. Applying the “clearly inapplicable” standard<sup>27</sup> in *Brooks v. Wright*,<sup>28</sup> the court wrote that:

[W]e liberally construe constitutional provisions that apply to the initiative process.<sup>29</sup> Specifically, we narrowly interpret the subject matter limitations that the Alaska Constitution places on initiatives.<sup>30</sup> Still, we have a duty to give questions involving the propriety of an initiative’s subject matter “careful consideration because the constitutional right of direct legislation is [also] limited by the Alaska Constitution.”<sup>31</sup>

The issue in *Brooks v. Wright* had to do with a proposed prohibition on the use of snares to catch wolves. In seeking to discern what the Constitution meant in this context, the court said that it would use “basic rules of statutory construction,” and a “reasonable practical interpretation in accordance with common sense” and the intent of the framers.<sup>32</sup> It also looked “to the meaning that the voters would have placed on [the] provision.”<sup>33</sup> But because the challengers were not relying on Article XI of the constitution, but rather on the fact that Art. VIII spoke of what “the legislature” might do, the court decided that “55 idiots” would not agree that wildlife management was clearly inapplicable, and so refused to order removal of the proposal from the ballot.<sup>34</sup>

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<sup>27</sup> Note 3, *supra*.

<sup>28</sup> 971 P.2d at 1027.

<sup>29</sup> See *Interior Taxpayers Association, Inc. v. Fairbanks North Star Borough*, 742 P.2d 781, 782 (Alaska 1987).

<sup>30</sup> See *Citizens’ Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 168 (Alaska 1991)(quotation omitted).

<sup>31</sup> *Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996) (quoting *City of Fairbanks v. Convention & Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991)).

<sup>32</sup> *Brooks, supra*, 971 P.2d at 1028.

<sup>33</sup> *Id.*, citing *Division of Elections v. Johnston*, 669 P.2d 537, 539 (Alaska 1983).

<sup>34</sup> *Id.* at 1029, referring to the comments of Delegate George McLaughlin, 4 Proceedings of the Alaska Constitutional Convention (PACC) 2849 (January 21, 1956).

The challenge in *Pullen v. Ulmer*<sup>35</sup> was made under Article XI, and once again the court inquired into both the purpose and the effect of the proposed law,<sup>36</sup> noting at some length which regions of Alaska had conflicts over exactly which species of salmon.<sup>37</sup> The State collects other cases making similar inquiries,<sup>38</sup> and discusses several of them in support of its argument that review of an initiative is not limited to “form,” in the strictest sense of the word.<sup>39</sup> Its argument is persuasive. The Lieutenant Governor’s concern with 07WATR is based upon Section 7 of Article XI, which is to be liberally construed, which means a narrow interpretation of the subject matter limitations. But there is no prohibition on examining the intent and effects of the proposed law,<sup>40</sup> and the constitutional provisions must be viewed in a reasonable, practical manner, in accordance with common sense and the intent of the framers.

#### **B. To what extent does 07WATR ban large scale mining?**

The parties contemplated early that evidence might be taken in this matter on an expedited basis,<sup>41</sup> and the State offered to present the testimony of Richard Mylius.<sup>42</sup> But the plaintiffs’ opposition to the State’s motion was unaccompanied by any affidavits, and so the evidentiary hearing was canceled.<sup>43</sup> The plaintiffs,

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<sup>35</sup> *Supra* note 31.

<sup>36</sup> 923 P.2d at 63.

<sup>37</sup> 923 P.2d at 64 n.16.

<sup>38</sup> State’s opposition at 11.

<sup>39</sup> *Id.* at 11-12.

<sup>40</sup> See *McAlpine v. University of Alaska*, 762 P.2d 81, 89-90 (Alaska 1988).

<sup>41</sup> Media 3DIA07-147 at 9:00 (8/3/07).

<sup>42</sup> State’s opposition at 2.

<sup>43</sup> Order of 9/17/07.

however, contend that the Mylius affidavit is irrelevant, immaterial, not based on personal knowledge and not in conformance with Civil Rule 56(c).<sup>44</sup>

While both parties maintain that the present motions can be decided as a matter of law, the question of whether the initiative is an appropriation may turn on whether, or to what extent, it bans mining. It is one thing to say that Mr. Mylius' opinions on state policy and otherwise are irrelevant,<sup>45</sup> but the real question is whether his opinion that 07WATR "would effectively prohibit new large scale metallic mineral mines in Alaska"<sup>46</sup> is in any way incompetent or improper.

Plaintiffs have properly set forth the standard for summary judgment.<sup>47</sup> Civil Rule 56(e) requires that affidavits be made on personal knowledge, setting forth facts that would be admissible, and affirmatively showing that the affiant is competent to testify on the matters stated. Evidence Rule 703 allows an expert to base an opinion on facts perceived or made known to him, which means that an affidavit based on unverified hearsay evidence may satisfy the requirements of Rule 56(e).<sup>48</sup> "The burden then shifts to the non-moving party to 'demonstrate that a genuine issue of fact needs to be litigated by showing that it can produce admissible evidence reasonably tending to dispute the movant's evidence.'"<sup>49</sup>

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<sup>44</sup> Plaintiffs' reply/opposition at 2.

<sup>45</sup> *Id.* at 18-20.

<sup>46</sup> Affidavit of Richard Mylius ¶9, summarizing.

<sup>47</sup> Plaintiffs' memorandum at 5.

<sup>48</sup> *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1216 (Alaska 1991).

<sup>49</sup> *Guerrero v. Alaska Housing Finance Corp.*, 123 P.3d 966, 971 (Alaska 2005), quoting *Charles v. Interior Regional Housing Authority*, 55 P.3d 57, 59 (Alaska 2002).

Mr. Mylius is the Director of the Division of Mining, Land and Water and a 26 year employee of the State Department of Natural Resources.<sup>50</sup> He goes through the prohibitions contained in the 07WATR initiative, noting that they prohibit new large scale metallic mineral mines from releasing “any toxic pollutant” into “any surface or subsurface water, or tributary thereto, that is utilized for humans for drinking water or by salmon...”<sup>51</sup> It also bans the use of cyanide or sulfuric acid, and disallows the storage of tailings within 1000 feet of any salmon stream. It would seem difficult to dispute Mr. Mylius’ statement that all large scale mines generate tailings,<sup>52</sup> and his ultimate conclusion appears virtually unassailable, assuming present day technology. The plaintiffs have filed no affidavit to the contrary.

What the plaintiffs say instead is that 07WATR does not affect small mines, that it doesn’t apply to existing mines and that by its terms the initiative “merely places a number of restrictions upon how mining is done.”<sup>53</sup> They also note that the State has conceded that it knows of only two large mines that would be affected by the initiative.<sup>54</sup> But accepting all of these arguments still leaves us with the conclusion that new large metallic mines will be banned for the foreseeable future if the initiative becomes law, and it makes sense to start from this premise.

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<sup>50</sup> Mylius Affidavit, ¶1.

<sup>51</sup> *Id.* ¶ 4, quoting 07WATR §2(a).

<sup>52</sup> Mylius Affidavit, ¶ 6.

<sup>53</sup> Reply at 10, 20.

<sup>54</sup> *Id.* at 21, citing the State’s opposition at 7.

(Because I have come to this conclusion, I have not found it necessary to go through the initiative’s provisions at length; they are fully explained in the parties’ memoranda and in the first three pages of the opinion of the Attorney General.)

## II Is 07WATR an appropriation of State resources?

### A. Appropriations from *McAlpine* to *Staudenmaier*.

Section 7 of Article XI provides that initiatives “shall not be used to...make or repeal appropriations.” The term “appropriations” has not been limited to revenue, as public land,<sup>55</sup> a city-owned utility<sup>56</sup> and wild salmon<sup>57</sup> have all been included within the prohibition in past decisions of the supreme court. In *Thomas v. Bailey*, the court reasoned that it wouldn’t make sense for the framers to “prohibit an initiative from giving away \$9,000,000,000 but...permit it to give away 30 million acres, valued at that sum.”<sup>58</sup> “The danger with direct legislation relating to appropriations is that it “tempt[s] the voter to [prefer]...his immediate financial welfare at the expense of vital government activities.”<sup>59</sup>

The plaintiffs, however, are not seeking a direct appropriation of land, water or salmon, and so the framers’ concern with rash “give-away” programs is

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<sup>55</sup> *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979).

<sup>56</sup> *Alaska Conservative Political Action Committee v. Municipality of Anchorage*, 745 P.2d 936 (Alaska 1987).

<sup>57</sup> *Pullen v. Ulmer*, *supra*.

<sup>58</sup> 595 P.2d at 8.

<sup>59</sup> *Id.*, quoting Note, *Referendum: The Appropriations Exception in Nebraska*, 54 Neb.L.Rev. 293, 394 (1975).

not at issue. This case instead turns on whether 07WATR impermissibly invades upon the other objective, which is to ensure that “the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs.”<sup>60</sup> And, once again, it is not as simple as deciding whether an initiative that transfers “such real and personal property as is necessary to the independent operation and maintenance of the Community College System”<sup>61</sup> is an appropriation. The question is narrowed to whether 07WATR would impermissibly “designate the use of [state] assets.”<sup>62</sup>

The answer does not leap out at us. The initiative does not say what the State has to do with its resources, but rather excludes but one—new, large-scale, metallic mineral mines. In *McAlpine v. University of Alaska*, the court looked carefully at the intent and effects of the initiative, concluding that it could “significantly alter the present allocation of assets to the community colleges.”<sup>63</sup> The court made clear that not every proposal which required spending state dollars could be deemed an appropriation, since the funding level would be retained by the legislative body. But in that instance, it held that the initiative designated the use of state assets in a manner that was executable, mandatory and

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<sup>60</sup> *McAlpine v. University of Alaska*, supra, 762 P.2d at 88), citing 2 *Proceedings of the Alaska Constitutional Convention* 931-32 (Dec. 16, 1955).

<sup>61</sup> *Id.* at 83, 87.

<sup>62</sup> *Id.* at 89. See also *Pullen*, supra, 923 P.2d at 63.

<sup>63</sup> *Id.* at 90.

reasonably definite with no further legislative action, and so constituted an appropriation.<sup>64</sup>

Three years later, in *City of Fairbanks*,<sup>65</sup> the court looked at a proposal that would redirect the proceeds from a bed tax, and noted that “the purposes of the constitution are not met by construing the term ‘appropriations’ broadly in the context of an initiative which arguably repeals an appropriation.”<sup>66</sup>

The purpose on the prohibition on repeal of initiatives is to ensure that the legislative body remains in control of and responsible for the budget. A broad construction of “appropriations” is not necessary to accomplish this purpose. Repealing a particular law that is an appropriation in a broad sense, because, for example, it permanently designates assets for a special purpose, does not disempower the legislative body from making annual spending decisions. It follows that the general rule that the initiative power would be construed broadly should control in the repeal context, and result in a more narrow construction of the term “appropriations.”<sup>67</sup>

There is arguably some relevance of this reasoning to the issue at hand, which could be viewed as a repeal of sorts, with the initiative in a sense withdrawing one “stick” from the bundle that makes up ownership of property.<sup>68</sup> The court went on to find that the direction to place the bed tax receipts into the discretionary fund was also not an appropriation, citing the language from *McAlpine v. University of Alaska*: “[W]e must ask whether the initiative would set aside a certain specified amount of money or property for a specific purpose or

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<sup>64</sup> *Id.* at 91.

<sup>65</sup> *City of Fairbanks v. Convention & Visitors Bureau*, *supra*.

<sup>66</sup> 818 P.2d at 1156-57.

<sup>67</sup> *Id.* at 1157.

<sup>68</sup> B. Cardozo, *Paradoxes of Legal Science* 129 (1928)(reprint 2000); *cf. Moore v. State Dept. of Natural Resources*, 992 P.2d 576, 579 (Alaska 1999).

object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action.”<sup>69</sup> The court concluded that redirecting funds as the initiative would require actually gave the council *more* discretion as to spending and so could not be considered an appropriation.<sup>70</sup>

The next opinion relied on by the parties is the 1996 case of *Pullen v. Ulmer*. Fairness in Salmon Harvest sought to reserve a small allocation of the available salmon to subsistence and sport fishers before any commercial harvest was allowed. While noting that the state can’t quite “own” anadromous fish as it does the capitol or tax revenues, the majority readily found the state’s interest to be sufficiently strong to warrant characterizing salmon as public assets which may not be appropriated by initiative.<sup>71</sup> It also concluded that the FISH initiative would violate *both* of the basic purposes underlying the Art. XI, sec. 7 constitutional restriction. First of all, the proposal would constitute a give-away of a state asset, albeit a small percentage, in times of shortages. While the legislature is free to do this, the prohibition against doing so by direct vote of the people goes back to the Beirne Initiative, and is not allowed for the reasons discussed earlier.<sup>72</sup>

The court also found that the FISH initiative significantly reduced the legislature’s and Board of Fish’s control of and discretion over allocation decisions.<sup>73</sup> As noted earlier, the court looked at both the purpose and possible

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<sup>69</sup> *City of Fairbanks, supra*, 818 P.2d at 1157.

<sup>70</sup> *Id.*

<sup>71</sup> *Pullen v. Ulmer, supra*, 923 P.2d at 59-61.

<sup>72</sup> See *Thomas v. Bailey*, nn. 58-59 and accompanying text.

<sup>73</sup> *Pullen, supra*, 923 P.2d at 63.

effects of the initiative, and it worried that even a 5% allocation might close certain fisheries entirely to some commercial users.<sup>74</sup> Given this “very real possibility,” the court concluded that the initiative was an impermissible appropriation and did not allow it to be placed on the ballot.

The *Alaska Action* case is next. This opinion was discussed at some length at oral argument, because it involved an initiative that both said no to a golf course and yes to a park, and the parties disagreed on whether the result would have been the same if they’d just said no. Justice Fabe discussed the opinion in *McAlpine v. University of Alaska*, and concluded that the Girdwood initiative could not be distinguished:

In both cases, the initiative “designates the use of”<sup>75</sup> specified amounts of public assets in a way that encroaches on the legislative branch’s exclusive “control over the allocation of state assets among competing needs.”<sup>76</sup>

The discussion in *Alaska Action* then turned to whether severance was appropriate, which the backers of 07WATR take as evidence that only the park dedication violated Article XI, not the prohibition against using the land for a golf course. In trying to determine whether the sponsors would prefer the measure to stand as altered, the court subtracted golf and substituted a theoretical “high density residential or commercial development,” and concluded that they couldn’t “assume that that golf would never be the...preference when weighed against the

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<sup>74</sup> *Id.* at 64 n. 16.

<sup>75</sup> *McAlpine, supra*, 762 P.2d at 89.

<sup>76</sup> *Alaska Action*, 84 P.3d at 994, quoting *Pullen, supra*, 923 P.2d at 63.

other development options. We cannot allow the golf prohibition to go before the voters without the park designation.”<sup>77</sup>

While *dicta*, these sentiments cut in favor of the plaintiffs, as does Justice Matthews’ concurring opinion in *Staudenmaier v. Municipality of Anchorage*.<sup>78</sup> The initiative at issue in that case called for the sale of city-owned utilities, and the court had little difficulty in concluding that it set aside municipal assets in a manner that was “executable, mandatory and reasonably definite with no further legislative action.”<sup>79</sup> It relied upon the *McAlpine* rationale, finding that the initiative did not grant the city sufficient discretion in carrying out its purpose, instead usurping the role of the legislative body in allocating resources.<sup>80</sup>

Justice Matthews made the following comment on this:

I write these additional words to dispel any possible conclusion that the court’s broad interpretation of the terms “appropriations” prohibits substantive lawmaking by initiative that properly should be within the initiative power. The proposals with which we are concerned seek to get the Municipality of Anchorage out of the electrical and garbage collection utility businesses. But they do so by requiring the Municipality to sell the tangible property that it uses in those businesses.

The anti-appropriations clause of article XI, section 7 of the Alaska Constitution does not prohibit the objective of these proposals, only their means. This, if the proposals were phrased to directly prohibit the Municipality from, after a certain date, selling or distributing electricity or offering garbage collection services, the anti-appropriations clause would not render the proposals illegitimate. The lesson of today’s opinion is that laws effecting substantial changes in policy can be made by initiative, but when they create surplus property, the disposition of

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<sup>77</sup> *Id.* at 995.

<sup>78</sup> 139 P.3d 1259 (Alaska 2006).

<sup>79</sup> *Id.* at 1262, quoting *City of Fairbanks, supra*, 818 P.2d at 1157.

<sup>80</sup> *Id.* at 1262-63.

such property is a matter for the representative lawmaking body.<sup>81</sup>

## **B. Application to 07WATR.**

This somewhat lengthy review of past decisions does not reveal an initiative quite like this one. The plaintiffs do not propose a give-away and they do not dictate to the State how to use its land. As counsel pointed out (more than once), the State could build a nuclear reactor on the land. Mines occupying less than 640 acres are allowed. And the plaintiffs argue strenuously that their proposal passes the *McAlpine/City of Fairbanks* test—it does not designate the use of state assets in a manner that is executable, mandatory and reasonably definite with no further legislative action.<sup>82</sup> They also contend that it lacks the specificity noted by the court in *Pullen*,<sup>83</sup> and that its purpose is not allocation at all, but rather protection of State water.

The language from *McAlpine* and later cases speak generally to how significantly the proposed initiative alters the allocation of state resources, and the State views this as the core issue—does this initiative bind the hands of the legislature so that it can't exercise its allocation authority? But is withdrawing one use enough? The supreme court looks carefully at the goals of the anti-appropriations clause, and in *City of Fairbanks* held that redirection of tax proceeds away from the convention and visitors bureau was not an appropriation;

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<sup>81</sup> *Id.* at 1265-66 (concurring opinion).

<sup>82</sup> Plaintiffs' reply/opposition at 5-10 (especially at 6-7 as to specificity).

<sup>83</sup> 923 P.2d at 63; *see also Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 423 (Alaska 2006).

contrary to the argument of the *amicus*,<sup>84</sup> a broad construction of the term was “not necessary” to allow the legislative body to retain control of its budget.<sup>85</sup> The council could spend the money however it wanted, so long as it didn’t dedicate 70% to the visitors bureau.

The decision in *Pullen v. Ulmer* went the other way, but might be distinguished in two important ways. First, the court saw the 5% salmon allocation as a give-away in times of shortage, implicating the first purpose of the anti-appropriations clause, which was not an issue in *City of Fairbanks* and is not raised in the present case. Secondly, the court discussed the intent and effects of the FISH initiative, and found that its overriding purpose was to reallocate shares of the salmon harvest from one user group to another. Finding that this might close down certain fisheries entirely, the court concluded that the initiative deprived the legislature of its authority to allocate state assets among competing needs, and so violated article XI, section 7.<sup>86</sup>

The last two cases discussed above were *Alaska Action* and *Staudenmaier*, and quotations from them are set forth at the end of the last section. Both suggest that policy decisions such as are implicit in 07WATR are permissible by initiative, as long as they don’t designate what the legislature has to do with its assets. If the people can veto golf courses and city utilities, there would seem to be no compelling reason why they can’t prohibit new large-scale mines, so long as they

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<sup>84</sup> Brief of *Amicus Curiae* Legislative Council, filed 9/24/07, at 11.

<sup>85</sup> See text accompanying note 67 for the full quotation.

<sup>86</sup> Notes 71-74, *supra*.

do so in a manner that doesn't bind the legislature's hands or require disposition of state property.<sup>87</sup> The State's position<sup>88</sup> is not wholly illogical or unsupported, but it paints with a broad brush, rather than the narrow interpretation that is supposed to be afforded the subject matter limitations imposed on initiatives.

Plainly the plaintiffs sought a ruling on narrower grounds than this decision. The Legislative Council does not view this case as even close—if we ban large mines today, might not oil and gas be next?<sup>89</sup> The Council also somehow views this as a separation of powers issue.<sup>90</sup> But the people aren't a branch of government, and we don't construe the constitution to protect us from ourselves.<sup>91</sup> I conclude that the 07WATR initiative is not barred by the anti-appropriations clause of the Alaska Constitution.

### III Conclusion.

To some extent, the State relied upon Article VIII of the Alaska Constitution as part of its contention that 07WATR was an appropriation of State resources.<sup>92</sup> But to the extent that the Lieutenant Governor relies independently on the concurrent use doctrine,<sup>93</sup> the argument that “large-scale mining operators are [constitutionally] entitled to use state lands and waters for mining purposes”<sup>94</sup> would have to pass the “55 idiots” test referenced earlier. Does controlling

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<sup>87</sup> See also Plaintiffs' reply/opposition at 7-9.

<sup>88</sup> Op. Atty Gen., *supra* note 1, at 4-9.

<sup>89</sup> Amicus Brief at 13-14.

<sup>90</sup> *Id.* at 5.

<sup>91</sup> See Ak. Const. Art. XII, sec. 11.

<sup>92</sup> State's memorandum at 8, 13.

<sup>93</sup> Ak. Const. Art. VIII; AS 38.05.255(a), 285 & 300(a).

<sup>94</sup> State's opposition/cross motion at 10-11.

authority leave no room for argument about its constitutionality?<sup>95</sup> Plainly, this is not the case, and so, like a bill pending before the legislature, this particular issue should not be reviewed until and unless it is approved by the voters.

Plaintiffs' motion for summary judgment is granted and the defendant's is denied.

Dated: 10/12/07

Fred Torrasi  
Fred Torrasi, Judge



I certify that on 10/12/07  
a copy of this document was sent/faxed to  
the attorneys of record or other

[Signature]

Clerk

Fosler  
McKeever  
Barnhill

<sup>95</sup> Note 26, *supra*.