

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

COUNCIL OF ALASKA PRODUCERS,
ASSOCIATION OF ANSCA REGIONAL
CORPORATION PRESIDENTS/CEO's,
ALASKA FEDERATION OF NATIVES
INC., and PEBBLE LIMITED
PARTNERSHIP, acting through its
General Partner, PEBBLE MINES Corp.,

Plaintiffs,

vs.

SEAN PARNELL, LIEUTENANT
GOVERNOR OF THE STATE OF
ALASKA, the STATE OF ALASKA,
DIVISION OF ELECTIONS,
JOHN H. HOLMAN, JACK G. HOBSON,
and LUKI AKELKOK,

Defendants.

CASE NO: 4FA-07-02696CI

FINAL JUDGMENT

On February 28, 2008 this court granted summary judgment to plaintiffs as to 07WATR and granted summary judgment to defendants as to 07WTR3. The court hereby enters final judgment in this matter as follows:

1. The court has determined that 07WATR is an improper appropriation of a public asset in violation of Article XI, Section 7 of the Alaska Constitution. Accordingly, the Lt. Governor and the Division of Elections are hereby permanently enjoined from holding an election with 07WATR on any ballot. However, because the amount of preparation time before the first state-wide election is limited, the Lt. Governor and the Division of Elections may take such action as they deem appropriate to prepare for an

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election with 07WATR on the ballot in the event this judgment is appealed and the Alaska Supreme Court rules that 07WATR should be placed on the ballot.

2. This court has determined that the bill summary and cost statement appearing on the 07WATR initiative petitions are not defective.

3. The court has determined that 07WTR3 is not an improper appropriation of a public asset. 07WTR3 would prohibit only discharges of specific toxins in amounts that will have adversely harmful effects on human health or salmon life cycles. The court has determined that, if 07WTR3 is enacted, the Department of Environmental Conservation would adopt specific water quality standards to implement 07WTR3's mandate to prohibit such adverse effects on humans and salmon from large-scale metallic mineral mining. Accordingly, the court hereby enters final judgment with prejudice that:

- A. 07WTR3 is not an improper appropriation;
- B. 07WATR and 07WTR3 are not local or special legislation;
- C. The subject matter of 07WTR3 is proper for an initiative;
- D. 07WTR3 does not constitute an unlawful amendment of the Alaska Constitution; and
- E. The bill summary and cost statement appearing on the 07WTR3 initiative petitions are not defective.

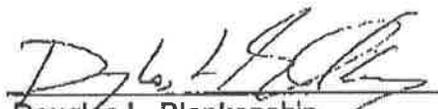
4. The court has determined that certain issues raised by the plaintiffs are not appropriate for pre-election review. Accordingly, the court hereby enters final judgment that the following issues are dismissed without prejudice to their being re-filed post-election, should 07WTR3 be enacted by the voters:

- A. Whether the Clean Water Act pre-empts 07WTR3;

- B. Whether the Federal Mining Act pre-empts 07WTR3;
- C. Whether the Alaska Native Claims Settlement Act pre-empts 07WTR3; and
- D. Whether existing law is substantially similar to 07WTR3 in relation to Article XI, section 4 of the Alaska Constitution.

Motions for attorney fees may be filed within ten (10) days after the date of the clerk's certificate of distribution as provided in Civil Rule 82(c).

Made and entered this 12th day of March, 2008.


 Douglas L. Blankenship
 Superior Court Judge

I certify that on 3/13/08
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ALASKA, DIVISION OF ELECTIONS,)
JOHN H. HOLMAN, JACK G. HOBSON)
and LUKI AKELKOK,)

Defendants.)

Case No. 4FA-07-2696 CI

ORDER ON RECONSIDERATION

Defendants, John H. Holman, Jack G. Hobson, and Luki Akelkok ("Sponsors") moved for partial reconsideration of this court's February 28, 2008 decision that the initiative denoted 07WATR constitutes an appropriation. Pursuant to Civil Rule 77(k)(3), the court requested responses from other parties. The State and the three plaintiffs opposed reconsideration. For the reasons discussed below, the court denies reconsideration.

A. Severance Issue

Sponsors first asserted on reconsideration that the court should sever certain portions of 07WATR. The Sponsors failed to argue severance in their opposition to the Plaintiffs'

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motions for summary judgment or any other pre-decision briefing. Since the Sponsors failed to assert the severance issue in its briefings in the parties motion for summary judgment, Sponsors may not raise the issue on reconsideration. However, even if the court considers the severance argument, the argument lacks merit.

Sponsors contend that the court failed to explain whether initiative 07WATR could be valid if the impermissible sections were severed.

In *McAlpine v. University of Alaska*, the Alaska Supreme Court stated that a reviewing court should sever an impermissible portion of the initiative when certain conditions were met:

[W]hen the requisite number of voters have already subscribed to an initiative, a reviewing court should sever an impermissible portion of the proposed bill when the following conditions are met: (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 the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered rather than to be invalidated in its entirety.¹

The same conditions for severance were applied in *Alaska Action Center v. Municipality of Anchorage*.² After finding that the initiative's designation of certain municipal lands as a park would constitute an appropriation, the Supreme Court determined that the initiative's sponsors would not want the initiative to go forward with the prohibition on allowing a golf course without the park designation because it could not be assumed that the sponsors would prefer other development options over a golf course.³ Similarly, if the entire parcel was available for commercial and residential development because the park designation was deemed impermissible, a requirement that the entire parcel be sold for fair market value

¹ *McAlpine v. University of Alaska*, 762 P.2d 81, 94-95 (Alaska 1988).

² *Alaska Action Center v. Municipality of Anchorage*, 84 P.3d 989, 995 (Alaska 2004).

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

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would change the entire focus of the initiative.⁴ Such a change would constitute substantially rewriting the initiative.⁵ If the initiative merely prescribed the procedure for disposing of a relatively few acres in the parcel, the initiative would bear little resemblance to the original proposal.⁶ Finally, the Supreme Court found that without the substantive sections of the initiative, the policy statement and severability clause alone would not have any legal effect, and therefore, could not go before the electorate.⁷

The current case presents a severance issue like that in *Alaska Action Center*. The impermissible portions of 07WATR include Section 2 (a)-(e). As a practical matter, large-scale metallic mining cannot be accomplished in an economically feasible manner without the release of "any" toxic pollution into surface or subsurface waters used by humans or salmon.⁸ The prohibition on the use of any toxic agent that "may" be harmful directly, indirectly, or cumulatively to the health of humans or salmon would render it economically impossible to extract the metals from the ore.⁹ It is common sense that mining cannot be accomplished without the storage and/or disposal of some amount of mining waste that may generate dissolved metals and chemicals due to rain runoff and leaching that would lead to some release of metals and chemicals into surface and/or subsurface waters that eventually flows into a stream or river used for human drinking water or by salmon.¹⁰ The same applies to subsection (2)(d) that prohibits mining waste within 1000 feet of a stream or river, or a tributary of such a stream or river, that is used by humans or salmon.¹¹ Likewise,

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Alaska Action Center*, 84 P.3d at 995.

⁸ CAP Exh. 1, at 1 (07WATR § 2(a)).

⁹ CAP Exh. 1, at 1 (07WATR § 2(b)).

¹⁰ CAP Exh. 1, at 2 (07WATR § 2(c)).

¹¹ CAP Exh. 1, at 2 (07WATR § 2(d)).

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subsection (2)(e) prohibits mine drainage of dissolved metals directly or indirectly by subsurface water into any tributary of a stream or river used by humans or salmon.¹²

Severance is appropriate only if all three conditions are met.¹³ Impermissible portions of an initiative should be severed if, first, "standing alone, the remainder of the proposed bill can be given legal effect."¹⁴ However, Section 2 contains all of the prohibitions intended to protect waterways. If all of the subsections of section 2 are severed, the remainder of 07WATR cannot be given legal effect when standing alone. It no longer accomplishes anything.¹⁵

Furthermore, 07WTR3 provides an initiative with the same purpose that does not contain 07WATR's impermissible sections. This court found nothing improper in 07WTR3, which should appear on the ballot for the next general election.

B. There is not a genuine issue of material fact?

In oral argument on February 12, 2008, Sponsors abandoned the existence of a genuine issue of material fact:

ATTORNEY: Let's assume for argument's sake, because to get summary judgment we have to eliminate any questions, so let's assume for argument's sake and the rest of my discussion here this morning, that two things are true. Let's assume it's a public asset that is at issue in this case, and let's assume also for argument's sake that although some of the experts disagree and there may be questions of fact about this, let's assume for argument's sake, so we can walk out of here with summary judgment, that in fact the effect of these initiatives would be to ban all large-scale mining, so let's get those questions off the table, we're just going to assume those to be true for the rest of the discussion, but what I'll tell you honor is that even making those assumptions it's still not an impermissible appropriation.¹⁶

¹² CAP Exh. 1, at 2 (07WATR § 2(c)).

¹³ *Alaska Action Center*, 84 P.3d at 995.

¹⁴ *McAlpine*, 762 P.2d at 94.

¹⁵ *Alaska Action Center*, 84 P.3d at 995.

¹⁶ CD 4FA4408-15, 11:49:01 – 11:49:45 (Feb. 12, 2008).

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However, even if the court considered whether Sponsors raised an issue of fact as to whether 07WATR would in effect ban large-scale metallic mining, the court would not find that Sponsors had raised a genuine issue of material fact on this issue.

In Sponsors' Exhibit "A," there is no differentiation between the two initiatives, and much of the affiant's opinion refers to language that is only in 07WTR3. The affidavit in Sponsors' Exhibit "B" reviews only 07WTR3. Affidavit "E" purports to review both 07WATR and 07WTR3, but the subsequent short discussion does not distinguish between the two initiatives and never discusses either one separately. The affidavits in Sponsors' Exhibits "C," "D," and "E" assert primarily that salmon fry imprint on a chemical map of a stream as they migrate to saltwater; the long-term viability of salmon populations may depend upon the survival of smaller sub-populations; and certain metals have a toxic effect upon salmon. However, any factual dispute is not over whether the release of certain metals would damage salmon populations; it seems clear that certain metals have a deleterious effect when salmon come in contact with toxic amounts. Minute quantities of copper, for example, interfere with the salmon's sense of smell, which is essential for salmon to reach its spawning area.¹⁷ Any material factual dispute is over whether 07WATR intrudes upon the legislature's discretion to appropriate some Alaskan streams and rivers to large-scale mining, rather than to salmon and human drinking water.

The affidavit of Richard Mylius submitted by CAP specifically addresses each subsection of 07WATR by itself.¹⁸ He explains that each subsection prohibits an aspect of large-scale metallic mining that is essential for operation. Each subsection does this by

¹⁷ E.g., Exh. E (Aff. Thomas P. Quinn).

¹⁸ See CAP Exh. 2.

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prohibiting any use, release, or discharge of certain chemicals as a result of the activity addressed in the subsection.

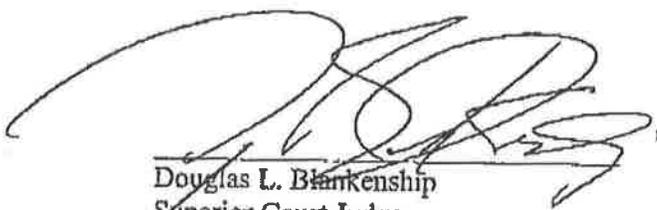
Sponsors' Exhibit "A," the affidavit of Bruce Switzer, addresses mining and water quality. Mr. Switzer's affidavit does not distinguish between the two initiatives sufficiently for the court to find that the affidavit raises an issue of fact with respect to 07WATR, rather than only to 07WTR3.

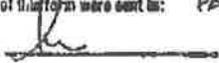
Therefore, this court finds there are no genuine issues of material fact that would preclude summary judgment.

C. Conclusion

The court DENIES the Sponsors' Motion for Reconsideration.

IT IS SO ORDERED. Dated this 12th day of MARCH, 2008, at Fairbanks, Alaska.


Douglas L. Blankenship
Superior Court Judge

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