

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

ALASKA FISHERIES  
CONSERVATION ALLIANCE, INC.,

Plaintiff,

v.

MEAD TREADWELL,  
LIEUTENANT GOVERNOR OF THE  
STATE OF ALASKA,

Defendant.

JDO

JUL 23 2014

Case No. 3AN-14-04558 CI

**ORDER**

**I. INTRODUCTION**

This case involves an election dispute over a proposed ballot initiative, 13PCAF, which proposes to ban set net fishing in urban areas of the state. Relying on a recommendation from the Attorney General, the Lieutenant Governor declined to certify the ballot initiative. Alaska Fisheries Conservation Alliance, Inc. (AFCA) filed this suit seeking declaratory and injunctive relief. The parties filed cross-motions for summary judgment. There are no material facts in dispute. This dispute presents a question of law. The question of law before this Court is whether the proposed initiative would make an “appropriation” under the Alaska Constitution, Article XI, Section 7.<sup>1</sup> The Court

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<sup>1</sup> Amicus curiae, Resources For All Alaskans, argues that the initiative would enact local or special legislation in violation of Art. XI, §7. Neither party makes that argument. The Court finds that the initiative does not enact local or special legislation because 13PCAF is “of general, statewide applicability.” See *Pebble Ltd. P’ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1078 (Alaska 2009) (characterizing *State v. Lewis*, 559 P.2d 630 (Alaska 1977) and *Boucher v. Engstrom*, 528 P.2d 456 (Alaska 1974)).

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reviews questions of law by “adopting the rule of law that is most persuasive in light of precedent, reason, and policy.”<sup>2</sup>

## II. FACTS AND ARGUMENTS

The operative language of the initiative provides:

16.05.781. Set gillnetting in nonsubsistence areas prohibited.

(a) Except for customary and traditional use or for personal use fishing, a person may not use a shore gill net or set net to take fish in any nonsubsistence area. This section shall control over any other provision to the contrary.

(b) For purposes of this section, “customary and traditional” has the meaning used in AS 16.05.940(7), “personal use fishing” has the meaning as used in AS 16.05.940(26), “shore gill net” and “set net” have the meaning as used in AS 38.05.082 and “nonsubsistence area” has the meaning as used in AS 16.05.258(c).

(c) Nothing in this section shall affect the use of shore gill nets and set nets to take fish in subsistence areas.

(d) Nothing in this section shall be construed as a limitation on the legislature’s or the Board of Fisheries’ discretion to allocate fish among competing users.

AFCA argues that the Lieutenant Governor erred in declining to certify 13PCAF because it is a permissible regulatory measure, not an appropriation. It asserts that the initiative seeks only to regulate a method of take and does not allocate fish among competing users. AFCA requests that the Court reverse the Lieutenant Governor’s decision and order that 13PCAF be certified so that its sponsors may commence signature gathering.

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<sup>2</sup> *Carmony v. McKechnie*, 217 P.3d 818, 819 (Alaska 2009) (internal quotation marks omitted).  
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The Lieutenant Governor's position is that the measure would effectuate an unconstitutional appropriation by initiative. He argues that it would appeal to the self-interests of an electoral majority and significantly reduce the Legislature's and Board of Fisheries' control of and discretion over allocation decisions. The Lieutenant Governor requests that the Court uphold his conclusion that the measure would result in an unconstitutional appropriation.

### III. DISCUSSION

Article XI, Section 1 of the Alaska Constitution grants to the people the power to "propose and enact laws by initiative." This power is not without limitations, however, as Article XI, Section 7 of the Alaska Constitution restricts initiatives that "make or repeal appropriations." Although courts "construe voter initiatives broadly so as to preserve them whenever possible[,]...initiatives touching upon the allocation of public revenues and assets require careful consideration...."<sup>3</sup>

Courts apply a two-part inquiry to determine if an initiative would result in an unconstitutional appropriation of a public asset.<sup>4</sup> First, the Court must decide whether the initiative deals with a public asset.<sup>5</sup> Second, the Court must decide whether the initiative would appropriate that asset.<sup>6</sup> Here, it is undisputed that salmon are a public asset.<sup>7</sup> So the only question for the Court to answer is whether the initiative would appropriate

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<sup>3</sup> *Pebble*, 215 P.3d 1064, 1073 (Alaska 2009) (citing *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422 (Alaska 2006)).

<sup>4</sup> *Pebble*, 215 P.3d at 1073.

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

<sup>6</sup> *Id.*

<sup>7</sup> *Pullen v. Ulmer*, 923 P.2d 54, 61 (Alaska 1996).

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salmon. To answer that question, courts look primarily to the two core objectives of the limitation against initiatives that would make an appropriation.<sup>8</sup> The first objective is to prevent “give-away programs” that appeal to the self-interest of voters and endanger the state treasury.<sup>9</sup> The second objective is to “preserve legislative discretion by ensuring that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs.”<sup>10</sup>

**A. 13PCAF does not result in a give-away program.**

The first objective of the limitation against initiatives that would make an appropriation is to prevent give-away programs that appeal to the self-interest of voters and endanger the state treasury.<sup>11</sup> The Lieutenant Governor argues that 13PCAF appeals to the self-interests of sport and personal use fishers, which are majority user groups, by effectively transferring salmon from a much smaller minority of set net commercial users.<sup>12</sup> He argues that 13PCAF is sponsored by individuals who, in addition to their interest in salmon conservation, actively support sport and personal use fishing on the Kenai River and stand to benefit personally.<sup>13</sup> The Lieutenant Governor also argues that 13PCAF would appeal to the self-interest of drift net fishers, who could benefit from the increased abundance of commercially available salmon if the Cook Inlet set net fishery

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<sup>8</sup> *Pebble*, 215 P.3d at 1075.

<sup>9</sup> *Id.*; *Anchorage Citizens for Taxi Reform*, 151 P.3d at 423; *Pullen*, 923 P.2d at 63.

<sup>10</sup> *See Pebble*, 215 P.3d at 1075; *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1156 (Alaska 1991); *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988).

<sup>11</sup> *Pebble*, 215 P.3d at 1075; *Anchorage Citizens for Taxi Reform*, 151 P.3d at 423; *Pullen*, 923 P.2d at 63.

<sup>12</sup> Def.’s Mot. for Summ. J. 17-18 (Cook Inlet has about 740 set net permits. In contrast, sport fishers in Cook Inlet waters and drainages numbered about 250,000 in 2012.).

<sup>13</sup> Def.’s Mot. for Summ. J. 9, n.24.

were eliminated. The Lieutenant Governor asserts that 13PCAF would eliminate the entire Cook Inlet commercial set net fishery and economy with no alternatives because set net permits cannot be transferred to other fisheries.

The Court disagrees with the Lieutenant Governor and finds that 13PCAF does not result in a give-away program. Initiatives that regulate public assets are not prohibited so long as the regulations do not result in the allocation of an asset entirely to one group at the expense of another.<sup>14</sup> In other words, no provision of a proposed initiative can target any particular group or person or entity to receive state money or property or indicate that by passing this initiative the voters would be voting themselves money or property.<sup>15</sup>

Here, 13PCAF would not target any particular group to receive salmon or result in the voters voting themselves salmon. In AS 06.05.251(e) the Alaska Legislature expressly provides that the Board may “allocate fishery resources among personal use, sport, guided sport, and commercial fisheries.”<sup>16</sup> While the Board of Fisheries is free to establish multiple gear types for one fishery,<sup>17</sup> the Legislature does not protect the individual gear types, only the four user groups. Urban commercial set netters are not a “user group” any more so than sport fishers using fly rods are a distinct user group from those using spinning rods.

Although the Court acknowledges the potential hardship on commercial set net fishers if 13PCAF is passed and eliminates an entire Cook Inlet fishery and economy, the

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<sup>14</sup> *Pebble*, 215 P.3d at 1077.

<sup>15</sup> *Id.* at 1075.

<sup>16</sup> AS 16.05.251(e).

<sup>17</sup> AS 16.05.940(14).

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Court does not find that 13PCAF would endanger the state treasury or eliminates the fishery in order to target a specific user group. The Court is not tasked with deciding whether 13PCAF is a good or bad initiative. The Court must only find whether the proposed initiative results in an appropriation. The Court finds that economic hardship on Cook Inlet commercial set net fishers does not result in an appropriation or trigger the limitation on the people's constitutional power to propose laws by initiative.

The fact that 13PCAF could affect the amount of salmon allocated to sport, commercial, and personal use user groups does not automatically result in a give-away program. The Alaska Supreme Court has “never held that any effect on public resources triggers the prohibition on direct legislation; nearly all legislation involves public assets to some degree.”<sup>18</sup> 13PCAF will undoubtedly affect the Board of Fisheries' allocation decisions, but 13PCAF does not mandate that the Board of Fisheries' allocate a specified amount of salmon to a specified user group. The Lieutenant Governor himself argues that sport, personal use, *or* commercial drift net fishers could all potentially benefit.

13PCAF stands in stark contrast to the initiative at issue in *Pullen*, which created an express preference for sport, subsistence, and personal use fishermen to take a portion of the salmon harvest before the remaining harvestable salmon were allocated to commercial users.<sup>19</sup> Unlike *Pullen*, 13PCAF does not direct that any user group should receive salmon. The initiative does not take fish from commercial users and allocate those fish to sport or personal users. Rather, the initiative seeks to regulate one of many

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<sup>18</sup> *Municipality of Anchorage v. Holleman*, 321 P.3d 378, 384 (Alaska 2014).

<sup>19</sup> *Pullen*, 923 P.2d at 63-64.

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methods and means used to take salmon. The creation of more abundance for all users is altogether different than bestowing an asset on a person or group. 13PCAF expressly reserves allocations decisions to the Board of Fisheries. The Court finds that 13PCAF does not result in a give-away program.

**B. 13PCAF preserves legislative discretion by leaving all allocation decisions to the Board of Fisheries.**

The primary question when assessing the second core objective is whether the initiative narrows the Legislature’s range of freedom to make allocation decisions in a manner sufficient to render the initiative an appropriation.<sup>20</sup> “An initiative is unconstitutional when it causes voters to essentially usurp the legislature’s resource allocation role.”<sup>21</sup> In analyzing this objective, courts consider whether the initiative “would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action.”<sup>22</sup>

Citing to *Pullen*, the Lieutenant Governor argues that 13PCAF violates the second core objective because the measure “significantly reduces the legislature’s and Board of Fisheries’ control of and discretion over allocation decisions, particularly in the event of stock-specific or region-specific shortages of salmon between the competing needs of

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<sup>20</sup> *Alliance of Concerned Taxpayers v. Kenai Peninsula Borough*, 273 P.3d 1128, 1137 (Alaska 2012) (internal quotations omitted).

<sup>21</sup> *Id.*

<sup>22</sup> *Pebble*, 215 P.3d 1075 (quoting *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1262 (Alaska 2006)). Order on Cross-Mots. For Summ. J.

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users.”<sup>23</sup> He argues that the lack of discretion and control would “displac[e] both the Board’s previous allocation decisions and its authority to allocate in the future.”<sup>24</sup>

Comparing this case to *Pullen* is comparing apples to oranges. The initiative in *Pullen* created an express preference for sport, subsistence, and personal use fishermen to take a portion of the salmon harvest before the remaining harvestable salmon were allocated to commercial users.<sup>25</sup> 13PCAF does not create an express preference.

13PCAF does not take fish from commercial users and allocate those fish to sport users. Eliminating commercial set net fishing in urban areas does not change the Board of Fisheries’ role in the allocation among commercial, sport, and personal use fisheries in a manner that is mandatory, definite, and reasonably definite with no further action by the Legislature or Board of Fisheries.

13PCAF would not reduce the Legislature’s or Board of Fisheries’ control of and discretion over allocation decisions and requires further action to allocate the potentially greater abundance of salmon among the various user groups. The Board of Fisheries would be free to continue to allocate the salmon presently harvested by commercial set net fishers to the other commercial fisheries. Alternatively, the Board could authorize new gear types for commercial fishermen, such as seines, fish wheels, or other available methods. The Board could also exercise its discretion and not allocate the abundance to any user group, allowing more fish to get into the rivers and streams. In any event,

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<sup>23</sup> Def.’s Mot. for Summ. J. 18.

<sup>24</sup> *Id.*

<sup>25</sup> *Pullen*, 923 P.3d at 63-64.

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13PCAF leaves the Board of Fisheries with the exact same level of control and discretion to allocate among the user groups identified by the Legislature<sup>26</sup> and the Alaska Supreme Court.<sup>27</sup>

13PCAF does not displace the Board of Fisheries' previous decisions and authority to allocate in the future. The Alaska Supreme Court has held that natural resource management is an appropriate subject for a public initiative despite the issues being sensitive and complex<sup>28</sup> and recognizes that some effect on a public asset is not sufficient to prohibit direct legislation."<sup>29</sup> The fact that 13PCAF may have some effect on allocation decisions does not usurp the Legislature's resource allocation role or even narrow its range of freedom to make allocation decisions amongst user groups in the future.

The Court finds that 13PCAF is a permissible regulatory measure leaving the Board of Fisheries, through the Legislature and only the Legislature, with the ongoing authority to continue to control the allocation of salmon among competing users.

13PCAF certainly does not set aside a certain specified amount of money or property for a specific purpose in such a manner that is executable, mandatory, and reasonably definite with no further legislative action. 13PCAF eliminates set net gear and requires the Board of Fisheries action to allocate the potential abundance of salmon. The Court

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<sup>26</sup> AS 16.05.251(e).

<sup>27</sup> *Pullen*, 923 P.2d at 63-64.

<sup>28</sup> *Pebble*, 215 P.2d at 1077; *Brooks v. Wright*, 971 P.2d 1025, 1033 (Alaska 1999) ("We find little support ... for the proposition that the common use clause of Article VIII grants the legislature exclusive power to make laws dealing with natural resource management.").

<sup>29</sup> *Holleman*, 321 P.3d at 384

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finds that 13PCAF does not usurp legislative control over the allocation of salmon among competing users.

### C. CONCLUSION

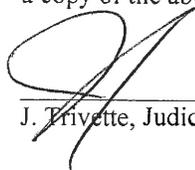
Adopting the rule of law that is most persuasive in light of precedent, reason, and policy, this Court holds that 13PCAF does not appropriate a public asset. 13PCAF does not result in a give-away program or usurp legislative control over the salmon allocation process. The Court grants summary judgment in favor of Plaintiff. The Court reverses the Lieutenant Governor's decision and orders that 13PCAF be certified.

**IT IS SO ORDERED.**

DATED at Anchorage, Alaska this 23<sup>rd</sup> day of July 2014.

  
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CATHERINE EASTER  
Superior Court Judge

I certify that on 7/23/14  
a copy of the above was mailed to:

  
\_\_\_\_\_  
J. Trivette, Judicial Assistant

M. Singer  
W. Falvey  
M. Mitchell  
E. Bakalar