4. EPA's Regulation Asserting Authority for Pre-Application Vetoes is Invalid as Applied Here.

Section 404(c) does not authorize EPA to exercise its veto power outside of the Corps' permitting process. EPA cannot circumvent the unambiguous statutory text by asserting authority to "prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state."[99] This is because "regulations, in order to be valid, must be consistent with the statute under which they are promulgated."[100] Because the statute is clear that EPA's veto authority cannot be exercised outside of the permitting process, EPA's regulation is invalid as applied to the Pebble deposit, to the extent it asserts such authority.[101]

Alternatively, if the Court deems Section 404(c) ambiguous as to whether EPA has authority to exercise its veto authority outside of the Corps' permitting process, Pebble is nevertheless likely to succeed on the merits. EPA's exercise of its Section 404(c) authority with respect to the Pebble deposit cannot be reconciled with the CWA's legislative history or federalism principles. Thus, EPA's construction of the statutory text is impermissible and warrants no deference.

B. EPA May Not Conduct a Veto Proceeding Absent a Permit Application with Respect to Lands Selected by the State Under the Statehood Act.

EPA's veto proceeding is an invalid administrative attempt to redraw the boundaries of federal and state land management authority, clearly and firmly carved out in Congress's compact with the State. It conflicts with and effectively overrides Congress's conscious agreement, after painstaking negotiations, to relinquish lands that would have otherwise remained closed to mining, and to allow the State to assume permanent ownership and control of

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[99] 40 C.F.R. § 231.1(a); *see also* 44 Fed. Reg. 58,076 (Oct. 9, 1979) ("In effect, section 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued.").

[100] *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013)

[101] The age of EPA's contrary regulatory interpretation "is no antidote to clear inconsistency with a statute." *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (invalidating a regulatory interpretation that endured without challenge for 60 years).

those lands, understanding that those lands would be put toward maximum economic use.[102] Such revocation or amendment of a Congressional statute—at the expense of state sovereignty—is legally without support.

The parcels of land containing the Pebble deposits at issue in this case were selected under an express "compact,"[103] entered into between Congress and the State of Alaska, setting forth specific terms and conditions associated with the grant of statehood to Alaska. These terms and conditions—codified in statute—included express rights with respect to lands conveyed to the State, provided in return for the State's agreement to certain obligations, and willingness to forego claims to other areas of land reserved by the federal government. As discussed in detail below, the compromise ultimately struck reflects a purposeful balancing of conservation, economic, and other interests: Congress reserved a great many lands to the federal government (including for conservation purposes) but assented to conveyance of other lands to the State. In doing so, it surrendered ownership and management authority over *all mineral lands* conveyed, including the right to decide whether and how the resources should be developed, so long as proceeds derived from such development be used to ensure the economic and social well-being of the State.

EPA's claimed veto authority conflicts with this statutory compromise and impinges on Alaska's sovereign authority over its lands. The bargained-for, legislatively enacted benefits of the State's special agreement with the federal government would be lost if EPA could, by regulatory fiat, simply retract those benefits in the absence of any development proposal or specific information on the likelihood of harm. Because EPA's assumption of veto authority exceeds the boundaries of federal administrative power and conflicts with Congress's clear intent, construing the Clean Water Act as EPA has runs afoul of constitutional principles. A finding of likely success on the merits is warranted.

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[102] *See infra* at 21-27; *see also* Alaska Const., art. VIII, § 1 (declaring State policy "to encourage . . . the development of its resources by making them available for maximum use consistent with the public interest").

[103] *See* Pub. L. No. 85-508, § 4 (1958).

1. The Terms and Conditions of the Relevant Land Grants—as Memorialized by Congress—Support Congress's Intent that the State Be Entitled to Full Economic Use of Lands Conveyed.

EPA's actions in this case implicate parcels of land that were conveyed subject to specific terms and conditions of the Cook Inlet Land Exchange codified in the Alaska Native Claims Settlement Act ("ANCSA").[104] Lands selected under this legislation, including lands comprising the area of the Pebble deposit, have the same status as lands the State selected directly under the Alaska Statehood Act ("Statehood Act").[105] Together, these enactments reflect Congress's express desire—and Congress's mandated precondition to State land selection—that land granted to the State of Alaska permanently reserve *to the State* all mineral resources contained within, and include the right to develop or lease those resources for the specific purpose of ensuring the State's economic well-being.[106] EPA's assertion of 404(c) veto authority would unravel Congress's carefully crafted legislative compact with the State.

a. The Pebble Lands and Their Mineral Resources Were Specifically Made Available for Use by the State Through the Cook Inlet Land Exchange.

Lands, including the Pebble deposits, were selected by the State as the result of the Cook Inlet Land Exchange.[107] ANCSA had been enacted in response to mounting pressure on the federal government to resolve outstanding disputes related to Alaskan Native land selections under the Statehood Act. Among other things, ANCSA (i) directed the withdrawal of up to 80 million acres in Alaska from appropriation under the public land laws so that Congress could direct use of those lands for preservation, for example, as national parks or wildlife preserves, and (ii) authorized land exchanges between the federal government, Native entities, and the State "for the purpose of effecting land consolidations or to facilitate the management or development

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[104] Pub. L. No. 92-203, 85 Stat. 688 (1971).

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

[106] *See* Statehood Act § 6(i); *see also* Pub. L. No. 94-204, § 12(d)(1) (1976) (codified at 43 U.S.C. § 1611 note).

[107] *See* Pub. L. No. 94-204, 89 Stat. 1145 (1976); Smith Decl. ¶¶ 14-20.

of the land, or for other public purposes."[108] Absent the parties' agreement otherwise, exchanges were to "be on the basis of equal value" of property exchanged.[109]

Pursuant to its ANCSA § 17(d)(2) authority, the Secretary of Interior initially withdrew land encompassing the Pebble area—including the main Pebble deposit—designating those lands for conservation purposes and making them unavailable for State selection.[110] By late 1972, the Pebble area was under *federal* ownership and control, outside the reach of the State, and these lands were designated for the creation of national parks, preserves, or refuges.[111]

When Congress entered into the Cook Inlet Land Exchange, it categorically relinquished federal control over these lands and conveyed to the State the right to determine how resources in the area would be managed.[112] This exchange, authorized under ANCSA § 22(f), arose out of a three-way negotiation to resolve competing claims in the Cook Inlet area among the State, the federal government, and the Cook Inlet Region Corporation, Inc. ("CIRI"), a regional Native corporation.[113] Congress approved this exchange on January 2, 1976 "in order to facilitate land

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[108] ANCSA §§ 17(d)(2), 22(f) (codified at 43 U.S.C. §§ 1616(d)(2), 1621(f)).

[109] *Id.* § 22(f) (codified at 43 U.S.C. § 1621(f)).

[110] *See* Smith Decl. ¶¶ 12, 17; *see also* Pub. Land Order 5179, 37 Fed. Reg. 5579, 5580 (Mar. 16, 1972) (withdrawing the main Pebble deposit, located at Seward Meridian, T. 3 S, R. 35 W, along with surrounding townships); Pub. Land Order 5250, 37 Fed. Reg. 18730, 18731 (Sept. 15, 1972) (withdrawing additional townships in the Pebble area).

[111] *See, e.g.*, Ex. 22 (Federal-State Land Use Planning Commission for Alaska, *Cook Inlet Report, A report to the Senate and House of Representatives Resources Committees of the Alaska State Legislature on the Proposed Cook Inlet Land Trade*, Appendix D (Mar. 6, 1976)), at 20 (explaining that an Iliamna National Resource Range had been proposed by the federal government, including "lands in the vicinity of Iliamna Lake and in the Nushagak River drainage, and was to be a unit of the National Wildlife Refuge System.").

[112] *See* Smith Decl. ¶¶ 14-17.

[113] *See id.* The exchange was the product of "intense discussions with the Secretary [of Interior], the State, and various other interested groups (including local government, mining interests, and environmental groups," H.R. Rep. No. 94-729 at 30-31 (1975), and ultimately "harmonize[d] conflicting interests . . . consistent with the needs of Alaska and the public at large." *Id.* Congress understood that the exchange would "open[] for development lands that should be in private ownership and conserves for public use lands that should have that status." *Id*; *see also* 121 Cong. Rec. 40821 (Dec. 16, 1975) (Sen. Young) (describing the exchange as "a workable

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management and to create land ownership patterns which *encourage settlement and development in appropriate areas*."[114] Under the terms of the exchange, the State returned certain previously selected lands to the federal government and agreed not to select any lands in the Lake Clark area. This land could then be re-conveyed by the federal government to CIRI's villages, enabling the federal government to receive land from CIRI so that the federal government could consolidate its holdings in the Lake Clark area for a future preserve.[115] In exchange for returning prior selections to the State and for refraining from selecting land in the Lake Clark area, the State was granted to right to select certain lands previously withdrawn for conservation purposes under § 17(d)(2) of ANCSA.[116] Specifically, the exchange granted the State the right to select "[a]t least 22.8 townships and no more than 27 townships of land from those presently withdrawn under section 17(d)(2) of [ANCSA] in the Lake Iliamna area and within the Nushagak River or Koksetna River drainage[.]"[117] All of these conveyances to the State included the lands' mineral resources, to be reserved to the State per § 6(i) of the Statehood Act.[118] Thus, the exchange was a *quid pro quo*, under which the federal government forfeited its conservation-based hold on the Pebble area, and allowed ownership and control of the land—and

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method by which we can make sure of the wise and sound development in the State of Alaska and the Federal involvement in Alaska takes place").

[114] Pub. L. No. 94-204 § 12 (1976) (codified at 43 U.S.C. § 1611 note) (emphasis added).

[115] *See* Smith Decl. ¶ 17; *see also State of Alaska v. Lewis*, 559 P.2d 630, 633-34 (Alaska 1977); Ex. 23 (Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area, Sections II, VI.A & Appendix C (Dec. 10, 1975, as clarified Aug. 31, 1976; ratified by Pub. L. No. 94-204)) (hereinafter, "Terms and Conditions") at 6-14.

[116] *See* Pub. L. No. 94-204 § 12(d)(1)(i).

[117] *Id.* Notably, the legislative history reveals that the issue of what lands would be conveyed to the State in exchange for the State's agreement to return its own prior selections to the federal government was not only contentious, but the "most difficult to resolve." Ex. 24 (Amendments to Alaska Native Claims Settlement Act, Part 3: Hearing Before the S. Comm. On Interior and Insular Affairs, 94th Cong. 276 (1975)) (testimony of Commissioner Martin), at 3.

[118] *See* Pub. L. No. 94-204 § 12(d)(1) ("All lands granted to the State of Alaska pursuant to this subsection shall be regarded for all purposes as if conveyed to the State under and pursuant to section 6 of the Alaska Statehood Act.").

its mineral resources—to pass fully to the State, in return for the State's relinquishment of other land.

Documents memorializing the exchange demonstrate that the Pebble deposits were indeed selected by the State, and that the Pebble land transferred from federal § 17(d)(2) ownership to State ownership and management.[119] Thus, through the exchange, Congress voluntarily made available Pebble land that was previously off-limits to mining, and expressly and purposefully removed that restriction so that the land became *State land* available for use *as the State saw fit*.[120] Importantly, as the State's lead negotiator for the Cook Inlet Land Exchange

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[119] The Terms and Conditions of the exchange specifically identified a certain townships that were to be conveyed to the State, including three sites in the Pebble area: T. 2 S., Rs. 37 and 38 W; T. 3 S., Rs. 37 and 38 W; T. 4 S., Rs. 37 and 38 W. *See* Ex. 23 at 15 (Terms and Conditions, Appendix D). The main Pebble deposit and other surrounding townships, all of which originally had been withdrawn by the federal government under Pub. Land Order 5179, were also conveyed to the State through the exchange. *See, e.g.*, Ex. 25 (Alaska Dep't of Natural Res., Alaska DNR Land Abstract, http://dnr.alaska.gov/projects/las/#meridian/S/township/003S/range/035W/section/00/casetype/105/custflag/y/activeonlyflag/n/reporttype/abstract/searchtype/land (last visited June 23, 2014)) (describing federal grant under "PL 94-204, APPX. D" as the source of the State title to the Pebble main deposit, located at Seward Meridian T. 3 S, R. 35 W).

[120] *See Lewis*, 559 P.2d at 633-34. In executing the Cook Inlet Land Exchange and selecting lands to be exchanged, both the federal government and the State were fully aware of the resource values implicated: both parties acted knowingly in agreeing to the special bargain that was struck. The federal government, for its part, had long been concerned with preserving area fisheries resources. *See, e.g.*, Ex. 22 at 12 (recognizing importance of considering "the national interest in Federal lands and in nationally and internationally important resources such as the Bristol Bay fishery."). But the Commission charged with providing recommendations on the exchange concluded that the federal government would still be left with control over the most important, most valuable fishery resources, while the State would receive "less critical lands and waters." *Id.* at 21 (Appendix D). While the precise extent of subsurface minerals was not then known, the potential mineral value of lands to be gained by the State through the exchange was not lost on the State. *See* Ex. 26 (Letter from L. Heiner, Resource Assocs. of Alaska, Inc., to F. Ferguson, Alaska State Senate (Feb. 20, 1976)) (advocating for approval of the exchange because, among other things, the exchange "[p]rovides the State with an opportunity to select *valuable future mineral lands* from withdrawals to be abolished by the Agreement.") (emphasis added); Ex. 27 (Alaska Dep't of Natural Resources, Area Descriptions of State Interest Lands, Public Comment Draft, p. 7 (Nov. 24, 1977)), at 9 (noting state's interest in the region because, among other reasons, the area "has *hard mineral potential*") (emphasis added). And the Cook Inlet Land Exchange made clear in any event that lands conveyed to the State would include and

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explains, "[u]nquestionably, the opportunity for exploration and development of mineral resources motivated the State's selection of these Bristol Bay lands," and the State "knew there were mineral resources in the vicinity of the Pebble deposit area."[121] While this land would continue to be subject to general state and federal regulation, broad-scale ownership, management, and land use decision-making was to rest firmly with the State.

b. The State Received Full Title to and Complete Control over Minerals on the Land at Issue.

That the Cook Inlet Land Exchange conferred State authority to develop minerals is clear from the fact that Congress granted the lands received pursuant to the exchange the same status as lands selected under the Alaska Statehood Act. The lands were to be treated just as lands selected under Section 6(i) of the Statehood Act.[122] That provision sets forth specific rights and obligations for lands granted to the State:

> All grants made or confirmed under this Act *shall include mineral deposits*. The grants of mineral lands to the State of Alaska . . . are made *upon the express condition that* all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and *contain reservation to the State of all the minerals in the lands* so sold, granted, deeded, or patented, *together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct*[.][123]

The background of the Statehood Act confirms the State's expansive authority over these State lands. The ability of the State to develop its land and mineral resources was a primary concern leading up to the federal government's grant of statehood to Alaska. "Of the various sources of future income [for the State], the most important source was seen [by Congress] as the land grant."[124] Many members of Congress "fear[ed] that the territory was economically

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reserve to the State all mineral resources, like all other lands conveyed under the Statehood Act. *See* Pub. L. No. 94-204 § 12(d)(1).

[121] Smith Decl. ¶¶ 18-22.

[122] *See* Pub. L. No. 94-204 § 12(d)(1).

[123] Statehood Act § 6(i) (emphasis added).

[124] *Alaska v. United States*, 35 Fed. Cl. 685, 700 (1996), *cert. denied*, 522 U.S. 1108 (1998).

immature and would be unable to support a state government."[125] Thus, "[t]he primary purpose of the statehood land grants . . . was to ensure the economic and social well-being of the new state."[126]

The Statehood Act's "special" provisions with respect to conveyances of land and underlying mineral resources, and the development of such resources, reflect this primary purpose.[127] Specifically, the Statehood Act granted the new State of Alaska the right "to select, within twenty-five years after the admission of Alaska into the Union, not to exceed [102,550,000] acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection[.]"[128]

Section 6(i) sets forth specific rights and obligations with respect to this land grant so as to ensure that the Act's economic purposes would be met. These provisions work to ensure the economic well-being of the new State.[129] Indeed, the mineral resource conveyances and their reservation to the State "are the foundation upon which Alaska can and will build to the enormous benefit of the national economy shared by her sister States. [Congress] cannot make Alaska a 'full and equal' State in name and then deny her the wherewithal to realize that status in fact."[130]

The importance of Section 6(i)'s mineral grant to the State is further elevated by what was *not* granted. In particular, it was well-known that the federal government had already

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[125] *Trustees for Alaska v. State*, 736 P.2d 324, 335-36 (Alaska 1987); *see also, e.g.*, 104 Cong. Reg. 12422 (1958) (Rep. Johnston expressing "worr[y] about making a State of Alaska, knowing the distressed financial condition in which the State will be."); 104 Cong. Rec. 9498 (1958) (statement of Rep. Smith) ("Alaska is not capable of sustaining statehood unless it is heavily subsidized by the other 48 States of the Union.").

[126] *Trustees*, 736 P.2d at 336 (citing *Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968); *United States v. Atl. Richfield Co.*, 435 F. Supp. 1009, 1016, 1021 n.47 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980)); *see also, e.g.*, *Alaska v. Lyng*, 797 F.2d 1479, 1483 (9th Cir. 1986).

[127] *See, e.g.*, 104 Cong. Rec. 12,297 (1958) (Sen. Talmadge) (noting "generous special considerations" made to address financial concerns in granting statehood).

[128] Statehood Act § 6(b).

[129] *See Trustees*, 736 P.2d at 337.

[130] 104 Cong. Rec. 9361 (1958) (Statement of Rep. Dawson).

reserved for itself "the most valuable land and the new state would, in effect, have second choice."[131] Thus, the mineral land grant was critical to ensuring that the State's land selections would actually have "real value[]," and could actually be put to economic use.[132] In essence, the Statehood Act represents a bargained-for promise by Congress that the State could retain management authority and control over state mineral resources for the benefit of the State and its residents.

2. EPA's Veto Process Impermissibly Conflicts with the Statehood Act, ANCSA, and the Cook Inlet Land Exchange.

a. EPA's Veto Process Illegally Violates the Compact Between Congress and the State.

The agreement struck by virtue of the State's compromise with the federal government and CIRI is not merely symbolic: by its express terms, the Alaska statehood land grant, like other state enabling acts before it, was "in the nature of a bilateral compact entered into between two sovereigns[,]" with consideration exchanged by each party.[133] Parties to such compacts are

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[131] *Trustees for Alaska*, 736 P.2d at 336, n.23 (citing 104 Cong. Rec. 9340 (1958)) ("[T]he choice areas, more than 95 million acres, have been reserved for Federal agencies."); *see also Statehood for Alaska: Hearings Before the Subcomm. On Territorial and Insular Affairs of the House Com. On Interior and Insular Affairs*, 85th Cong., 1st Sess. 201-02 (1957) (Rep. Miller and Alaska Territorial Sen. and Pres. of Alaska Constitutional Convention William Egan) (quoted in *Trustees*, 736 P.2d at 336) (identifying mineral deposits as source of income available to state, in light of the federal government's reservation of "most of the forests and good land").

[132] S. Rep. No. 83-1028 at 6 (1954); *see also* 104 Cong. Rec. 12035 (1958) (statement of Sen. Kuchel) ("[T]he State of Alaska will be able to make maximum use of the property which it will obtain under the bill from the Federal Government."); *see also Trustees*, 736 P.2d at 338 (state should proactively collect rent or royalties on mining leases in order to fulfill obligations to fund the State); *id.* at 337 ("Congress, then, granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state's government.").

[133] *See Utah v. Andrus*, 486 F. Supp. 995, 1001 (D. Utah 1979) (addressing school lands grants); Statehood Act § 4; *Lewis*, 559 P.2d at 640; *see also Utah v. Kleppe*, 586 F.2d 756, 758-59 (10th Cir. 1978), *rev'd on other grounds*, *Andrus v. Utah*, 446 U.S. 500, 507 (1980) (school lands grants).

bound by its terms, and their material provisions may not be unilaterally redefined or revoked by federal agency action.[134]

Moreover, under analogous school lands legislation—the forerunner to the Statehood Act and § 6(i) in particular[135]—the Statehood Act and Cook Inlet Land Exchange are properly afforded "special" priority status over general enactments in the event of a conflict, and are to be construed liberally in favor of the recipient state.[136] Thus, where land has been specifically granted to a State via statutory compact, the federal government is prevented from exercising its discretion in a way that would fundamentally undercut the State's ownership and management of land granted, and thereby compromise the State's bargained-for benefit.[137]

EPA's action plainly violates the terms of the compact at issue here and undoes the careful balancing of state, federal, and tribal interests embodied in the Statehood Act and Cook Inlet Land Exchange. Prior to the exchange, the Pebble lands at issue in this case were designated for conservation purposes.[138] By agreeing to the Cook Inlet Land Exchange, the federal government knowingly forfeited this designation, and in doing so, fully understood that the State could select and repurpose the Pebble land for mineral development.[139] Specifically, all parties to the exchange agreed:

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[134] *See, e.g.*, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (a compact is "a contract," and thus "a legal document that must be construed and applied in accordance with its terms."); *Cooper v. Roberts*, 59 U.S. 173, 177 (1855) ("settled terms of compact" were "unalterable except by consent."); *see also West Virginia v. Sims*, 341 U.S. 22, 35-36 (1951) (Jackson, J. concurring).

[135] *See Trustees*, 736 P.2d at 333-34.

[136] *Utah v. Kleppe*, 586 F.2d at 768-69 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Sutherland Statutory Construction*, 4th Ed., Vol. 2A § 51.05); *Utah v. Andrus*, 486 F. Supp. at 1009-10; *Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1072-73 (9th Cir. 2010).

[137] *See Utah v. Andrus*, 486 F. Supp. at 1002, 1009-10.

[138] *See supra* at 22.

[139] Importantly, Congress has not been ambiguous in asserting the federal government's conservation interests in Alaska, *e.g.*, under ANCSA. *See* ANCSA § 17(d)(2), 43 U.S.C. § 1616(d)(2)(A) (directing the withdrawal of up to 80 million acres of federal land for inclusion in conservation units). It has been equally clear when deciding *not* to conserve additional land and instead to expressly *accommodate* mineral development reveal Congress's intent to limit federal government set-asides of land in Alaska. In enacting the Alaska National Interest Lands

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1. The lands conveyed to the State under the exchange would be subject to Section 6 of the Statehood Act,[140] and thus,
2. Lands conveyed would include all mineral deposits, on the "express condition" that any disposition of the lands *reserve to the State* all minerals, and the right to mine those minerals or lease them at the direction of the State legislature.[141]

The grant to the State of all mineral lands conveyed through the exchange, and the required reservation of mineral rights to the State, are rendered meaningless if EPA is permitted to proceed with its veto process. The veto process effectively divests the State of its reserved mineral rights, in contravention of Section 6(i), and gives EPA the authority to nullify the mineral resource rights that the federal government granted to the State to induce the State to exchange its valuable lands. The State is left powerless even to consider mineral development in the area, notwithstanding Congress's "express condition" that the State retain authority over its mineral lands for the economic well-being of the State. Whether considered a breach of contract or retroactive and *ultra vires* amendment of an Act of Congress, EPA's action impermissibly turns the tables on the State and deprives the State of the fundamental benefit of its bargain.

This conflict does not hinge on the outcome of EPA's veto process, or what decision the State ultimately were to make in deliberating over any future 404(c) permit application. As recognized by the Ninth circuit, "[t]he purpose of the land grants under the Act is to serve Alaska's overall economic and social well-being. Some of the lands so selected will probably be

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Conservation Act ("ANILCA"), 94 Stat. 2371 (1980) (codified at 16 U.S.C. § 3101 *et seq.*), Congress included what has been referred to as the "no more" clause, which prevents any additional significant federal government withdrawal of public land in Alaska absent Congressional approval. *See* 16 U.S.C. § 3213(a). Likewise, Congress prohibited the further study of federal lands in Alaska for the single purpose of considering conservation efforts without explicit Congressional approval. *Id.* § 3213(b). Given Congress's intent that "no more" federal land in the State could be readily withdrawn, surely Congress could not have thought that land granted to the *State*, owned and managed by the *State*, could be set aside *en masse* for conservation purposes at the federal government's whim, and without Congress's or the State's say-so.

[140] *See* Pub. L. No. 94-204, § 12(d)(1).

[141] Statehood Act § 6(i).

used to protect mineral deposits. Others will safeguard wildlife. Still others will be used to protect domestic water supplies."[142] Here, the State designated some of the lands it selected under the exchange for fishery and wildlife use, *but specifically designated the Pebble deposit lands for mineral resource development.*[143] And in any case, the choice as to how to balance competing land uses on State lands was the State's decision to make, in accordance with its state constitution and laws, and the terms and conditions underlying its statutory grant.

b. EPA's Regulatory Authority Cannot Be Used to Override Congress's Intent that the State Exercise Authority over Lands Granted under the Statehood Act.

EPA can do only what Congress authorizes. While EPA may reasonably regulate in accordance with its statutorily delegated authority under the Clean Water Act or other statutes it implements, it may not exercise that authority in a way that would override an Act of Congress—here, several acts: the Statehood Act, ANCSA, and Cook Inlet Land Exchange—and thereby use that general authority to thwart specific Congressional decisions.[144]

EPA's pre-permit veto process does exactly this. In *Utah v. Andrus*, addressing analogous school lands legislation, the court recognized that "because it was the intent of Congress to provide [school trust] lands to the state so that the state could use them to raise revenue, the access rights of the state cannot be so restricted as to destroy the lands' economic value. That is, the state must be allowed access which is not so narrowly restrictive as to render the lands incapable of their full economic development."[145] In *Lyon v. Gila River Indian*

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[142] *Udall*, 396 F.2d at 749.

[143] *See* Buell Decl. ¶¶ 22-23; *see also* Ex. 1 (Alaska Dep't of Natural Res., Bristol Bay Area Plan (Sept. 1984) (excerpts)); Ex. 2 (Alaska Dep't of Natural Res., Bristol Bay Area Plan (Apr. 2005) (excerpts)).

[144] *See, e.g.*, *Utah v. Andrus*, 486 F. Supp. at 1009-10 ("special acts" like school lands grants prevail over more general statutes); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *United States v. Beaver*, 984 F.2d 989, 991 (9th Cir. 1993) (Sentencing Commission not authorized by general statute "to override congressional intent" as expressed in more specific provisions).

[145] 486 F. Supp. at 1009 (internal citation omitted). *Andrus* considered whether the state had any guaranteed right to use *federal* land to access state school trust lands. In finding that the state

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