reconciling those two goals using the power that Congress expressly gave to the agency. *Cf. NRDC*, 859 F.2d at 199 ("it falls to the agency to reconcile competing legislative goals"). For thirty-five years, the agency has interpreted § 404(c) to allow it to act in the absence of a permit application.[43] EPA's longstanding administrative construction is entitled to significant deference. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974) ("[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration") (footnote omitted); *Smiley v. Citibank*, 517 U.S. 735, 740 (1996) ("To be sure, agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist."). That long-held view "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.*, 556 U.S. at 218.

### B. The Alaska Statehood Act and the Cook Inlet Exchange do Not Alter the Application of CWA Section 404(c).

Plaintiffs also assert APA claims asserting that EPA's initiation of its review process under CWA § 404(c) violates the Alaska Statehood Act and the Cook Inlet Exchange legislation, Dkt. 22, ¶¶ 79-87; Dkt. 48, ¶¶ 39-43, but those claims are flawed for numerous reasons. As discussed below, Plaintiffs overstate the extent to which the mineral potential of the lands overlaying the Pebble deposit played a role in the State's selection of the lands, and appear to be incorrect in arguing that Alaska received the lands through the Cook Inlet Exchange. Moreover, Plaintiffs misread the

[43] Consistent with EPA's interpretation, the Corps' regulations acknowledge that there is no temporal constraint on the exercise of authority under of §404(c): "[T]he Administrator can deny, prohibit, restrict or withdraw the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearing and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas." 33 C.F.R. § 320.2(f).

Statehood Act, which does not impinge on EPA's authorities under § 404(c). In addition, the authorities reserved to the states in the CWA also do not prevent EPA from exercising its authorities under § 404(c), and the case law on which Plaintiffs rely is inapposite.

### 1. Alaska Emphasized the Fisheries and Related Benefits of the Lands Near the Pebble Deposit That it Selected Under the Statehood Act.

As an initial matter, Plaintiffs' discussion of the historical backdrop of Alaska's selection of the lands overlaying the Pebble deposit appears to ignore subsequent developments that undercut Plaintiffs' assertions. Plaintiffs contend that Alaska selected the lands overlaying the Pebble deposit for their mineral reserves as part of the Cook Inlet Exchange. *See, e.g.*, Dkt. 24 at 29-33; Dkt. 62 at 9-10. Plaintiffs, however, overstate the extent to which the mineral potential of those lands in the area of the Pebble deposit played a role in the State's selection of the lands, and appear to be incorrect in their assertion that Alaska acquired the lands as part of the Exchange.

In arguing that the mineral potential of the lands that overlay the Pebble deposit prompted the State's selection of those lands, Pebble and APC point to the "Public Comment Draft" issued by the Alaska Department of Natural Resources ("DNR") that contained Alaska's preliminary identification of lands potentially to be selected that time. *See* Dkt. 24 at 32 n. 120 (citing Dkt. 24-28). But that document mentions the "hard rock mineral potential" of the lands only after listing numerous other reasons for the State's interests in those lands, including accessibility, possible future settlement, close proximity to Lake Iliamna and "high fisheries values." Dkt. 24-28 at 9.

Similarly, in the subsequent document where Alaska identified its "final selections" of lands, DNR's overview did not include the areas of the Pebble deposit among the "[t]wenty-five million acres of land with hard rock mineral potential," and instead mentioned later that the lands near the Pebble deposit had been rated with "moderate potential for hard rock minerals." Alaska DNR, *State of Alaska Land Selection Program – State Lands to be Conveyed by Congress* (May 15, 1978) at 8, 16 (attached

hereto as Exhibit 1). *See also* Dkt. 24 at 32 n.120 (acknowledging that "the precise extent of subsurface minerals was not then known" when the State was evaluating which lands to select). In addition, the State emphasized more strongly the other important values of the lands, including as world class fisheries and for recreation. Ex. 1 at 16 ("The fisheries value throughout the area is extremely high"), 17 ("Outstanding values in the area include fisheries, recreation potential, and access. Selection of certain units in this area would result in state ownership of major portions of the most singularly productive fisheries habitat in the state and greater management authority within the Iliamna drainage.") Indeed, the primary values listed for the selection of the lands in "Unit 23," which includes the Pebble deposit, focused on fisheries, recreation, access and consistent ownership patterns ahead of mineral potential. *Id.* at 19. Accordingly, Plaintiffs clearly overstate the importance of mineral development to Alaska in selecting these lands.[44]

Relatedly, the main attribute of the lands recommended for selection to the southwest and downstream of the Pebble deposit clearly was fisheries:

> The Nushagak River and its major tributaries are extremely valuable for commercial, subsistence, and sport fisheries. Many rich spawning areas throughout this drainage contribute significantly to overall salmon production within the Bristol Bay drainage.

*Id.* at 24. Furthermore, an Alaska DNR press release that was issued earlier, when the lands were anticipated to be part of the Cook Inlet Exchange, stated even more strongly that Alaska was interested in lands near the Pebble deposit for their fisheries and related values:

> The second area of interest is Iliamna Lake. This watershed produces the world's largest red salmon fishery and it is upon this fishery which the major portion of our citizens in the Bristol Bay Region are dependent. The area is also the focus of

[44] In addition, while Plaintiffs assert that the lands were to be "put toward maximum economic use," *see, e.g.*, Dkt. 24 at 28, Alaska's more recent designation of lands for mining purposes does not mean that other uses of the land are not to be preserved. As set forth in Alaska's Constitution, it is the State's policy "to encourage . . . the development of its resources by making them available for maximum use *consistent with the public interest.*" *See* Alaska Const., art. VIII, § 1 (emphasis added).

> the finest trophy rainbow trout[] system in North America. The State has management control of these fisheries and by gaining control of the remaining public lands would be able to more effectively manage these fisheries in the public interest.

Alaska DNR Press Release re: Background—Cook Inlet Land Trade Proposal (attached hereto as Exhibit 2).

In addition, despite Plaintiffs' extended discussions of the Cook Inlet Exchange, the documents related to Alaska's actual acquisition of the lands overlaying the main Pebble deposit specify that the lands were conveyed under the Statehood Act and not through the Exchange. At one time or another, some or all of those lands were identified to be part of the Exchange. *See* Plfs' Ex. 25 (addressing various sections of land where the main Pebble deposit is located – *i.e.*, within Seward Meridian, Township 003S, Range 035W ("T3S, R35W") – under the Cook Inlet Exchange (Public Law No. 94-204)). However, subsequent Alaska DNR documents show that those lands were instead designated and conveyed under Section 6(b) of the Statehood Act. Patent No. 50-2007-0143 (conveying T3S, R35W, sections 1-36 inclusive, under Statehood Act section 6(b) (Jan. 16, 2007) (attached hereto as Exhibit 3); *see also* BLM Tentative Approval for Alaska's acquisition under Statehood Act section 6(b) of, *inter alia*, T3S, R35W, secs. 2-8, 17-20, and 27-34 (July 11, 1988) (attached hereto as Exhibit 4); BLM Tentative Approval for Alaska's acquisition under section 6(b) of, *inter alia*, T3S, R35W, secs. 1, 9-16, 21-26, 35, and 36 (Sept. 13, 1988) (attached hereto as Exhibit 5); Statehood Act section 6(g) (authorizing the State to execute conditional leases and make conditional sales of lands selected by the State under the Statehood Act after tentative approval of such selections and prior to issuance of final patent).[45]

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[45] Nonetheless, as discussed further below, the CWA, including § 404(c), applies with full force and effect to lands selected under either the Statehood Act or the Exchange. As a result, Plaintiffs' argument that EPA may not pursue its § 404(c) review here fails regardless of which authority the lands were selected or conveyed under. *See infra*. *See also* Pub. L. 94-204 § 12(d)(1) (lands conveyed to the State pursuant to the Exchange "shall be regarded for all purposes as if conveyed to the State under and pursuant to section 6 of the Alaska Statehood Act, [except that] this grant of lands shall

### 2. The Statehood Act Provides No Legal Barrier to EPA's Proceeding With its Ongoing Review.

Neither the Statehood Act nor the Cook Inlet Exchange bars EPA from undertaking a review or making a § 404(c) determination before a permit application is submitted. Plaintiffs' argument here essentially amounts to three contentions: (1) when Alaska received the lands that include the Pebble deposit allegedly as part of the Cook Inlet Exchange, Alaska also received the underlying mineral deposits; (2) the lands and mineral deposits that Alaska received through the Exchange were to be treated as lands and mineral deposits selected under Section 6 of the Statehood Act; and (3) Section 6(i) of the Statehood Act prohibits EPA, at least prior to the submission of a section 404 permit application, from making a § 404(c) determination limiting the use of defined areas of the waters of the United States as disposal sites for dredged or fill material in connection with mining the mineral deposits that Alaska received, and so EPA is barred from doing so here. Even assuming, *arguendo*, that the first two points are correct, Plaintiffs' argument nonetheless fails because Section 6(i) of the Statehood Act does not support the contention that EPA lacks authority to make a § 404(c) determination here. In addition, Plaintiffs' arguments focus on the speculative assumption that a § 404(c) determination would somehow prohibit mining of the Pebble deposit, are undercut by Plaintiffs' acknowledgement that EPA may regulate here, including by making a final determination after a permit application has been submitted, and are not supported by the CWA or the case law.

Section 6(i) of the Statehood Act provides in full:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or

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not constitute a charge against the total acreage to which the State is entitled under section 6(b) of the Alaska Statehood Act.").

> patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of 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: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

Alaska Statehood Act, Pub.L. No. 85–508, 72 Stat. 339 (1958). This provision, which provides the fundamental basis of Plaintiffs' argument, was intended to codify two basic restrictions that also apply to other land grant states: "a requirement that grantee states reserve the mineral interest when disposing of granted lands, and a provision allowing grantee states to dispose of minerals only by lease." *Trustees for Alaska v. State of Alaska*, 736 P.2d 324, 334 (Alaska 1987) (discussing *Alaska v. Lewis*, 559 P.2d 639, 636 (Alaska 1977)) (footnote omitted). And if Alaska disposed of the lands or minerals in contravention of Section 6(i), then the State would incur the sanction of forfeiting the lands or mineral deposits back to the United States. Statehood Act, Section 6(i).

As further explained by the Alaska Supreme Court, Section 6(i) only placed Alaska on an equal footing as compared to other public land states:

> The leasing restriction in section 6(i) was intended to further the goal of state revenue production. . . That language was copied advisedly *so that Alaska would be on an equal but not a favored footing with other public land states with respect to the disposition of mineral lands.*

*Trustees for Alaska*, 736 P.2d at 337 (emphasis added). *Accord Lewis*, 559 P.2d at 638. Accordingly, while Section 6(i) clarified that Alaska was to receive the mineral deposits underlying the lands that it was granted for purposes of generating revenue, a fundamental purpose of Section 6(i) was to impose restrictions on Alaska's disposal of lands and minerals that it was granted, with forfeiture of the minerals back to the United States as the penalty for non-compliance. And contrary to any arguments that Section 6(i) placed Alaska in a unique position regarding mineral deposits, granting the mineral deposits along with the land and imposing those restrictions merely placed Alaska "on

an equal but not a favored footing" as compared to other public land states regarding such lands and deposits. *Trustees for Alaska*, 732 P.2d at 337. *See also Metlakatla Indian Cmty v. Egan*, 369 U.S. 45, 57 (1962) (the Statehood Act only created in Alaska the same authority as that given to other states).[46]

Moreover, Section 6(i) does *not* purport to limit the application of federal law to lands and mineral deposits granted to Alaska under the Statehood Act. There is nothing in the language of that section that suggests that the laws of the United States would not apply to the lands or mineral deposits granted to Alaska upon statehood. Indeed, other than providing that Alaska would receive the mineral deposits underlying the lands that Alaska was granted, the text of Section 6(i) only sets forth conditions that go with those grants and a penalty to be imposed against Alaska if it does not comply with those conditions. Plaintiffs do not point to any other provision of the Statehood Act to support their argument that the Statehood Act limits the application of federal law, including Congress's authorizing EPA to make § 404(c) determinations, to lands and mineral deposits granted to Alaska under the Statehood Act or the Cook Inlet Exchange. Accordingly, neither the Statehood Act nor the Cook Inlet Exchange provides support for Plaintiffs' contention that EPA's § 404(c) authority should be curtailed when applied to the granted lands and mineral deposits.

Thus, contrary to Plaintiffs' arguments, there is no conflict between the granting of lands and mineral deposits to Alaska on the one hand and the application of the laws of the United States to the potential mining of the mineral deposits on the other. Under the Statehood Act, the laws of

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[46] The anticipated inclusion of such terms in the Statehood Act was the subject of controversy and debate at the Alaska constitutional convention, which took place before the Statehood Act was passed. *Lewis*, 559 P.2d at 636-37. The delegates to the convention were aware of the history of federal control over other states' disposition of mineral lands and the likelihood that Congress would insist on retaining these usual powers over mineral deposits in Alaska. *Id.* To many of the delegates and the people of the Territory, these restrictions were unpopular because of the federal control that would be retained. *Id.* Conversely, for state revenue purposes, the need to protect the resources of the state against exploitation and the pressure of special interest groups also was emphasized at the convention. *Id.*

the United States are to be applied to such activities (including their associated discharges of dredged or fill material) here as they would apply elsewhere.

Despite the lack of support in the Statehood Act for their arguments, Plaintiffs make the defective argument that EPA should not be able to proceed with its ongoing review because the federal government may not exercise its discretion in a manner that would "fundamentally undercut the State's ownership and management of land granted, and thereby compromise the State's bargained-for benefit." Dkt. 24 at 36 (citing *Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979)); *see also id.* at 37-38, 40, 41; Dkt. 62 at 7, 10, 20. Plaintiffs' argument is flawed for numerous reasons in addition to the lack of support the argument finds in the Statehood Act.

Plaintiffs' briefs are replete with speculative predictions that the outcome of the § 404(c) proceeding would be to preclude any mining of the Pebble deposit. *See, e.g.*, Dkt. 24 at 37 ("The State is left powerless even to consider mineral development in the area"); *id.* at 39 (EPA "has asserted authority that would thwart any meaningful use of the State's mineral grant and destroy its economic value"). *See also* Dkt. 62 at 7, 21, 22. Indeed, Plaintiffs' argument appears to rely on EPA's making a pre-permit application § 404(c) determination that somehow prohibits any mining of the Pebble deposit as the basis for its legal arguments that the Statehood Act and the Cook Inlet Exchange preclude a 404(c) determination here.[47] For example, Pebble and APC argue that Congress intended for the lands and mineral deposits that it relinquished to Alaska to remain subject to regulation "not unduly prohibitive in nature" and that "EPA's broad assumption of pre-permit application veto authority over the land at issue here overrides [Congress's] decision." *Id.* at 41. *See also id.* at 39 ("only the State has the authority to close state land to mining"), 41 ("EPA's assumption of veto authority requires Alaska to forever forego land use activities and economic benefits it was

[47] EPA's authority under section 404(c) relates to limits on the use of defined areas as disposal sites for the discharge of dredged or fill material to waters of the United States.

expressly entitled -- and in fact obligated – to avail itself of."). *See also* Dkt. 62 at 21, 22.[48] However, as discussed more fully in support of our motion to dismiss, Dkt. 150, Plaintiffs' argument is misplaced because it precedes a potential § 404(c) final determination; we do not yet know whether EPA Headquarters will make a final § 404(c) determination and, if so, what it would entail.

Furthermore, Plaintiffs' argument misses the fact that the State would be able to exercise its authorities under the CWA (and state law) even if EPA made a pre-application § 404(c) final determination; the State would then exercise its authorities within the context of that determination. In addition, in addressing its role under the CWA, Alaska relies too heavily on the Act's general provisions recognizing certain State authority. Dkt. 62 at 10, 18 (citing CWA § 101(b), 33 U.S.C. § 1251(b)). The broad statement of policy in 33 U.S.C. § 1251 is not instructive on the question at issue here. Although it recognizes the "primary responsibility and right of States" to reduce pollutants and plan development, it also gives EPA the authority to "administer this chapter," providing that the States may "consult with the Administrator in the exercise of his authority." Id. § 1251(b), (d). Moreover, the specific provision at issue here expressly authorizes the EPA Administrator to limit the use of any defined area for the discharge of dredged or fill material "whenever he determines . . . that the discharge of such materials into such area will have an unacceptable adverse impact . . .." 33 U.S.C. § 1344(c). So while the State has multiple opportunities to provide input during EPA's regulatory review process, *see, e.g.*, 40 C.F.R. § 231.3, 231.4, 231.6, the CWA does not make EPA's authority to make § 404(c) final determinations

[48] Conversely, Pebble and APC concede that the lands at issue "would continue to be subject to general state and federal regulation . . . ." Dkt. 24 at 33. Similarly, they concede that "EPA may reasonably regulate in accordance with its statutorily delegated authority under the Clean Water Act . . ." and that "the federal government may reasonably regulate with respect to state land, pursuant to Congressionally-delegated authority." *Id.* at 38, 39. Likewise, they expressly admit that Congress's relinquishment of the lands and mineral deposits at issue remained subject to "reasonable regulation." *Id.* at 41.

contingent upon any action by the State. *See supra* at 22-23. The State also cites its responsibility to make a certification under CWA § 401, *see* Dkt. 62 at 11, but any argument regarding § 401 also is misplaced. Regardless of whether or not EPA Headquarters makes a § 404(c) final determination before Pebble submits a permit application to the Corps, the State would retain the authority and responsibility to make its § 401 certification before the Corps issues a permit. While any § 404(c) determination (before or after a permit application) may limit the discharges of dredged or fill material to a defined area, the State's certification role under § 401 would remain intact.[49]

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[49] It appears that Pebble and APC also argue that EPA's authority under section 404(c) conflicts with State management prerogatives under state law or powers generally reserved to the states. Dkt. 24 at 38-39, 40. Alaska does not appear to be making such broad arguments; Alaska asserts specifically that EPA's review would interfere specifically with "the State's land management rights and responsibilities granted to it by Congress under the Statehood Act, as well as the CWA," Dkt. 62 at 20, and we address those issues above. In any event, to the extent that an argument is being made that the application of section 404(c) here unconstitutionally invades Alaska's land management or other state prerogatives, such argument must fail. No claim regarding a violation of the U.S. Constitution has been plead, and the Supreme Court has rejected a similar argument, anyway. *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 283-292 (1981) (rejecting arguments that the Surface Mining Control and Reclamation Act, which required the reclamation of mining sites, illegally infringed on the "States' freedom to make decisions in areas of 'integral governmental functions'" or illegally "interferes with the States' ability to exercise their police powers by regulating land use."). Citing numerous cases, *Hodel* also clarified that "[a] wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal laws." 452 U.S. at 290. Plaintiffs cite no applicable or persuasive contrary authority. Pebble and APC rely most heavily on *Printz v. United States*, 521 U.S. 898 (1977), and *New York v. United States*, 505 U.S. 144 (1992). Dkt. 24 at 41 n. 152. However, those cases involved constitutional challenges (which we do not have here) to very different situations where states were being forced into service to execute federal laws, *see, e.g., Printz*, 521 U.S. at 905, 918, *New York*, 505 U.S. at 175-76, 188, and those cases did not back away from the Court's holding in *Hodel*. Plaintiffs' reliance on *Rapanos v.United States*, 547 U.S. 715 (2006), and *Solid Waste Agency of Northern Cook Cty. v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), also is misplaced. Those cases addressed the scope of federal jurisdiction under the CWA, which extends to "waters of the United States." 33 U.S.C. § 1362(7); *United States v. Akers*, 785 F.2d 814, 818 (9th Cir. 1986). Here, Plaintiffs do not challenge the scope of Congress's or EPA's authority to regulate "waters of the United States" that may be included within the defined areas addressed in a § 404(c) final determination, nor could they. Until and unless EPA Headquarters makes a § 404(c) final

The flaws in Plaintiffs' arguments are revealed more fully because Plaintiffs apparently challenge only EPA's authority to make a § 404(c) determination before a permit application has been submitted, and concede that EPA would have the authority to make such a determination after submission of a permit application. *See, e.g.*, Dkt. 22, ¶¶ 1-5, 66, 86; Dkt. 48, ¶¶ 1-3, 34, 40; Dkt. 62 at 19-20; Dkt. 24 at 28 (arguing that EPA may not conduct a § 404(c) process absent a permit application with respect to lands selected by Alaska under the Statehood Act because the benefits to Alaska in becoming a state "would be lost if EPA could . . . simply retract those benefits in the absence of any development proposal or specific information on the likelihood of harm"). The Statehood Act provides no basis for distinguishing between EPA's potentially making a § 404(c) final determination before a permit application is submitted versus doing so afterwards. And as discussed above, *supra* at 18-28, the CWA provides EPA with the authority to make such a determination before a permit application is submitted.[50]

Plaintiffs' arguments also should fail because the case law that they rely upon is inapposite. Plaintiffs appear to rely primarily on a Utah district court case that addressed an "implied easement by necessity" for a mining company's access to state school trust lands that were surrounded by federal lands. *Utah v. Andrus*, 486 F. Supp. 995.[51] The Utah court emphasized that while land grants

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determination, it will not be known what, if any, areas into which EPA has limited the disposal of dredged or fill material.

[50] The State also is deriving, and would continue to derive, vast benefits from the lands it selected in the Bristol Bay area, even if EPA were to make a § 404(c) final determination that prohibited, denied and restricted the use of the area overlaying the Pebble deposit for specification. The areas that may be affected by mining that deposit already yield vast economic benefits, primarily from the world-class fisheries resources present there. *See supra* at 8-9.

[51] Implied easements by necessity have been described as follows: "An easement by necessity arises by implication of law where the grantor sells land without an outlet. The law implies a right of access over the grantor's property to ensure that the grantee has reasonable access to his property. This common-law principle derives from the long-standing rule of 'public policy that lands should not be

by the federal government generally are construed strictly in favor of the United States, "legislation dealing with school trust land has always been liberally construed" in favor of the states, and that one of Congress's primary purposes in such school grant legislation was specifically to enable each State to "produce a fund, accumulated by sale and use of the trust lands, with which the State could support the (common schools)." 486 F. Supp. at 1001-02. The court then determined:

> Given the rule of liberal construction and the Congressional intent of enabling the state to use the school lands as a means of generating revenue, the court must conclude that Congress intended that Utah (or its lessees) have access to the school lands. Unless a right of access is inferred, the very purpose of the school trust lands would fail. Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend.

*Id.* at 1002.[52]

The instant case obviously does not involve an easement issue or whether Alaska or another entity would be denied entirely the ability to access the granted lands or mineral deposits. This case involves the separate issue of whether a duly enacted law of the United States applies to regulation of the discharge of dredged or fill material from mining activities into waters of the United States. There is no suggestion in *Utah v. Andrus* that the mining company there would be excused from complying with federal laws that governed the mining of the claim, as Plaintiffs would have it here. And as discussed above, the Statehood Act and the applicable case law (along with Plaintiffs' concession that EPA could pursue and make a § 404(c) final determination after a permit application was submitted) make it clear that federal laws such as the CWA apply to the lands and mineral

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rendered unfit for occupancy or . . . cultivation . . .."' *Lake Pleasant Group v. United States*, 32 Fed. Cl. 429, 439 (Ct. Fed. Cl. 1994) (citations omitted).

[52] School land grants have included certain sections (*e.g.*, every section sixteen and thirty-six) within each township of the states granted them, and are set up specifically for the purpose of supporting the state's public schools. *See, e.g., Andrus v. Utah*, 446 U.S. 500, 506-07, n. 7 (1980) (reversing *Utah v. Kleppe*, 586 F.2d 756 (10th Cir. 1978)); *Lassen v. Arizona Highway Dept.*, 385 U.S. 458, 466-67 (1967).

deposits granted to Alaska. In addition, this case does not involve school trust lands and the attendant "rule of liberal construction" on which *Utah v. Andrus* relied.

Furthermore, *Utah v. Andrus* recognized that there were limits to the access rights attendant to the mining claims and that the federal land management agency retained its right to regulate the method and route of access consistent with its constitutional authority. *Utah v. Andrus*, 486 F. Supp. at 1009. In the instant case, Plaintiffs similarly are subject to the limits that federal law may impose on the discharge of dredged or fill material from mining the Pebble deposit into waters of the United States, and there is no claim here that Congress or EPA would be exceeding its constitutional authority to regulate waters of the United States, even if EPA were to make a § 404(c) final determination. The Utah court also emphasized that, without access, the land at issue would become worthless, and sought an accommodation to prevent that. *See id.* at 1002. But as mentioned above, that situation is not present here; no § 404(c) final determination has been made.[53]

Pebble and APC's reliance on *Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1072-1073 (9th Cir. 2010), is similarly flawed. That case also addressed an implied easement to access lands that were conveyed as part of a school land grant. *Lyon*, 626 F.3d at 1072. The Ninth Circuit relied on the determination in *Utah v. Andrus* that "[w]ithout access the state could not develop the trust

[53] In addition, while the Proposed Determination remains only a proposal, it would not prohibit all discharges to waters of the United States of dredged or fill material from mining the Pebble deposit, and would not apply to other potential 404 discharges not associated with mining the Pebble deposit. Dkt. 116-1 (Executive Summary of Proposed Determination) at 9. And as noted above, even if a final determination prohibited any discharge of dredged or fill materials in a defined area, Alaska would continue to reap vast economic benefits from the lands it selected in the Bristol Bay area, along with the attendant resources there. *See supra* at 8-9. *Cf. Lake Pleasant Group*, 32 Fed. Cl. at 440 (distinguishing *Utah v. Andrus* on grounds that, in the case before it, the state already was obtaining revenue from the lands at issue). Further, even if Plaintiff believed that a § 404(c) final determination fully destroyed the value of the lands at issue and wanted to pursue a takings claim, such a claim obviously would be premature, and jurisdiction over a subsequent takings claim would be in the Court of Federal Claims. *See* 28 U.S.C. § 1491.

lands in any fashion and they would become economically worthless," and simply held that, under similar circumstances, it was proper to imply an easement to access the granted land that was surrounded by an Indian Reservation. *Id.* at 1073-74. Thus, *Lyon* is inapplicable here just as *Utah v. Andrus* is.[54]

Overall, nothing in the Statehood Act, including Section 6(i), changes the federal-state balance regarding lands and mineral deposits owned by Alaska. Neither the Statehood Act nor any other relevant authority provides that Alaska's selection of certain areas to be granted under the Statehood Act precludes the application of federal law, including CWA § 404(c), to such areas. As a result, the Statehood Act (and the Cook Inlet Exchange) provide no barrier here, either specifically to EPA's ongoing § 404(c) review or more generally to the application of § 404(c) to the discharge into waters of the United States of dredged or fill material generated by mining the Pebble deposit.

## III. **Plaintiffs Would Not Suffer Irreparable Harm in the Absence of an Injunction.**

To obtain a preliminary injunction, a plaintiff must establish that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original); *Alliance for the Wild Rockies*, 632 F.3d at 1135. "Speculative injury does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984).

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[54] Pebble and APC's reliance on *Dep't of State Lands v. Pettibone*, 702 P.2d 948, 956 (Mont. 1985), fares no better because that case also is inapposite. It is another school trust lands case, and it addressed the following question: "Who is the owner of a water right diverted or developed on school trust land; the State or the lessee?" 702 P.2d at 952. The case did not address the question of whether the CWA and its implementing regulations, or any other federal law, applied to the lands or waters at issue; it also obviously did not address lands and mineral deposits granted to the State of Alaska. In addition, the statements in *Pettibone* on which Pebble and APC rely – regarding infringement on the state's managerial prerogatives over the school trust lands and devaluing such lands – emphasized that the lands were held in a "school trust." That discussion also focused mainly on state and private actions affecting the State's managerial prerogatives, and addressed federal involvement in the implied easement context, which is inapplicable here. 702 P.2d at 953-58.

Plaintiffs have failed to make the required showing. Pebble claims that the § 404(c) proceeding now underway has "chilled potential investment." Dkt. 24 at 45. "The lack of investment means, most fundamentally, that Pebble Partnership cannot proceed with further design and planning of the project." Thiessen Decl., Dkt. 26 ¶ 18. APC's and the State's alleged economic harms (e.g., loss of jobs and revenues) flow from the stalled progress resulting from the lack of investment. Dkt. 24 at 44; Dkt. 62 at 24. Plaintiffs' only evidence that the absence of new investment is caused by the § 404(c) proceeding is the declaration of NDM CEO Ronald Thiessen who states only that an unspecified number of unnamed executives at unidentified corporations have told him that they will not or are reluctant to invest in the Pebble project. Dkt. 26, ¶ 17. Such hearsay testimony is inadmissible. Fed. R. Evid. 802. Moreover, Thiessen offers no facts or data on which an economic expert could reasonably rely in forming an opinion regarding Pebble's prior or current inability to attract or retain investment partners. *See* Dkt. 26, ¶ 17; Meyer Decl., ¶ 44. Thiessen's unsupported statement is insufficient to prove irreparable harm. *See Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 1000 (9th Cir. 2011) (Corporation's evidence that "consists primarily of the unsubstantiated testimony of its President" was not sufficient for court to find irreparable harm); *see also Ukiah Valley Medical Center v. Fed. Trade Comm'n*, 911 F.2d 261, 264 n.3 (9th Cir. 1990) ("[T]here is no substantial evidence of a 'direct and immediate effect' upon daily business resulting from issuance of the FTC complaint" where plaintiffs "offer only a conclusory statement by the President of Ukiah Valley Medical Center, that '[t]he pendency of the FTC investigation and the threat of divestiture create a cloud of uncertainty that hurts Ukiah Valley in physician recruitment, hiring nurses and staff, undertaking certain consolidation efforts, capital expenditures, facilities planning and the provision of higher quality medical care.'").

Moreover, expert analyses of the many factors affecting investment in mining ventures shows that the predominant factor deterring investment in the Pebble project is the recession

affecting the minerals market, not EPA's ongoing § 404(c) process. Christopher Lattanzi, a mining engineer by training with more than 50 years of experience in technical and economic assessment of mineral properties and the management of mining companies, examined Pebble's particular circumstances and market conditions generally. Among other things, Mr. Lattanzi explains: "Market conditions in the mining industry, worldwide, are notoriously volatile and, since early 2011, have been in a downturn which, as yet, shows no sign of sustained recovery." Lattanzi Decl., ¶ 8. *See also id.* ¶ 50; Meyer Decl., ¶¶ 61-62. In addition, "[i]n the face of weak market conditions, it is standard practice for mining companies to review their portfolios of undeveloped projects, and to prioritize those projects in a manner that optimizes the allocation of capital." Lattanzi Decl., ¶ 8; *see also id.* ¶ 70. In response to these market conditions, Anglo American conducted such a review and then withdrew from the Pebble Partnership based upon that review. *Id.* ¶¶ 8, 41, 70. Furthermore, as a result of the current market conditions, Mr. Lattanzi also concludes: "[T]here is currently little interest among mining companies or other investors in assisting with the financing of long-lead time, capital intensive mining projects such as Pebble. Accordingly, . . . Northern Dynasty is highly unlikely to find an appropriate partner for the Pebble project until such time as market conditions within the mining industry show significant signs of sustained improvement." Lattanzi Decl., ¶ 56; *see also id.* ¶ 9. Accordingly, the ongoing § 404(c) proceedings are not the cause of Pebble's current financial difficulties. Instead, those problems are the result of current market conditions that prompted Anglo's American's portfolio review and withdrawal from the project: "[T]he major recent set-back experienced by the Pebble project was the withdrawal of Anglo American at a time when market conditions in the industry were depressed, rather than the institution of the EPA review under the Clean Water Act." *Id.* ¶ 9; *see also id.* ¶ 70.

An independent analysis by Joan Meyer, a Ph.D. economist with expertise in environmental and natural resource economics and corporate finance, arrived at the same conclusions. In her