A. The State Entered Into the Cook Inlet Land Exchange With the Intent to Convert Previously Withdrawn Lands into Lands It Could Develop.

In the Cook Inlet Exchange, "[b]ecause the State had agreed to convey significant lands to CIRI's villages in lieu of their valid Lake Clark selections, the State wanted to be made whole by the federal government."[69] As recalled by the former Director of the Alaska Division of Lands, "[t]he lands the State selected . . . were chosen for multiple resource management purposes[, b]ut many of these lands—including the area of the Pebble deposit—were specifically selected for their mineral potential."[70] In fact, the State saw the Cook Inlet Exchange process as "an opportunity to supersede the ANCSA[71] [withdrawal] provision that gave the Secretary of Interior authority to prevent state selection of federal lands in Bristol Bay."[72] "The State wanted enough land in the Bristol Bay region to block the federal government from classifying those lands, in addition to the area of the Lake Clark National Park and Preserve, in a way that would withdraw the lands from development. State officials viewed preventing withdrawal of these lands as very important to the State's well-being. Thus, the Cook Inlet Exchange gave the State the right to select lands in the Bristol Bay watershed that were at that time withdrawn from state selection."[73]

What the State acquired through the exchange, the federal government knowingly relinquished. By consenting to the exchange, Congress understood that it would be "open[ing] for development lands that should be in private ownership," and it would continue to "conserve[] for public use lands that should have that status."[74] In fact, while agreeing to cede certain land in

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[69] Dkt. No. 25 (Smith Decl.) ¶ 18.

[70] *Id.* ¶ 20; *see also id.* ¶¶ 20-23; Dkt. No. 24-27 (Letter from L. Heiner, Resource Assocs. of Alaska, Inc., to F. Ferguson, Alaska State Senate (Feb. 20, 1976)) (recommending exchange because it "[p]rovides the State with an opportunity to select valuable future mineral lands from withdrawals to be abolished by the Agreement"); Dkt. No. 24-28 (Alaska DNR, Area Descriptions of State Interest Lands (Nov. 24, 1977)) at 9 (noting interest in "hard mineral potential").

[71] Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971).

[72] Dkt. No. 25 (Smith Decl.) ¶ 19.

[73] *Id.* ¶ 21.

[74] H.R. Rep. No. 94-729 at 30-31 (1975).

the area, the federal government took care to retain its hold over the most valuable and important fisheries resources—the Federal-State Land Use Planning Commission stressed importance of federal government's interest in fisheries and concluded that federal government would retain the most valuable fisheries resources under the exchange, whereas the State would receive "lesser fishery and recreation values."[75] Thus, under the Cook Inlet Land Exchange, land previously withdrawn and closed to mining would become State land, no longer withdrawn and specifically open to mining development, ***pursuant the State's determination as to how to make maximum use of its resources***.[76]

EPA and Nunamta attempt to deny the applicability of the Cook Inlet Exchange.[77] But the evidence makes absolutely clear that the Pebble lands were the subject of ANCSA 17(d) withdrawals prior to the exchange,[78] and that most of the Pebble lands (including, but not limited to, the Pebble E and F blocks) were specifically removed from withdrawn status and conveyed by the federal government under the express terms of the exchange.[79] While it does appear that a small fraction of the land initially designated for conveyance under the exchange (3.6 of about 28 townships) was ultimately conveyed under a general Statehood Act grant (also subject to Section

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[75] *See* Dkt. No. 24-23 (Federal-State Land Use Planning Commission for Alaska, *Cook Inlet Report*) at 12, 21.

[76] *See* Pub. L. No. 94-204, § 12(d)(1); *see also* Statehood Act § 6(i); 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."); *Trustees for Alaska v. Alaska*, 736 P.2d 324, 336-38 (Alaska 1987); 104 Cong. Rec. 9361 (1958) (Statement of Rep. Dawson). EPA's arguments that Section 6(i) of the Statehood Act did not envision maximum use of mineral resources are disingenuous. EPA itself explains Section 6(i) as providing "that Alaska was to receive the mineral deposits underlying lands that it was granted *for purposes of generating revenue*." Dkt. No. 188 (EPA Br., p. 33) at 43 (emphasis added).

[77] Dkt. No. 188 (EPA Br., p. 31) at 41; Dkt. No. 185 (Nunamta, *et al.* Br., pp. 2-3) at 4-5.

[78] Dkt. No. 24 (Pls' Mot. for Prelim. Injunction, p. 22) at 30, n.110; *see also* Pub. Land Order 5179, 37 Fed. Reg. 5579, 5580 (Mar. 16, 1972), *and* Pub. Land Order 5250, 37 Fed. Reg. 18730, 18731 (Sept. 15, 1972) (withdrawing Pebble townships).

[79] *See* Dkt. No. 24-24 at 15 (Terms and Conditions, Appendix D, specifically designate these areas – T. 2 S., Rs. 37 and 38 W; T. 3 S., Rs. 37 and 38 W – for conveyance through the exchange).

6(i) of the Statehood Act),[80] this in no way diminishes the importance of the State's bargain with the federal government. In the end, the federal government got what it wanted—all of the land it had bargained for to fill out its future Lake Clark preserve. And all of the Pebble lands were deliberately conveyed to the State, either through the Cook Inlet Exchange, or because of it: indeed, all of the Pebble lands were initially designated for selection via the exchange, were previously withdrawn under ANCSA, and would have been unavailable for selection absent the government's agreement to abandon its earlier withdrawals.

B. EPA's Use of Section 404(c) Outside of the Permit Process Impermissibly Displaces the State's Land Use Authority.

EPA's assertion of pre-permit veto authority supplants the State's control over how the Pebble lands should be developed. EPA has asserted the blanket authority to issue "prohibitions or restrictions on mining the Pebble deposit."[81] In the absence of a specific mining plan, and in the absence of a decision by the State as to whether or how such mining might be conducted, EPA's assertion of authority displaces the State's right to make these decisions pursuant to its Statehood Act mineral reservation and its obligation to maximally use its resources for the welfare of the State.[82]

The unlawfulness of EPA's assertion of authority is not contingent upon the outcome of the veto proceeding.[83] Absent a permitting proposal on which to base a determination of "unacceptable adverse effect," EPA is simply assuming the authority to restrict how state

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[80] Dkt. No. 185-05 (Nunamta, *et al.* Ex. 4).

[81] Dkt. No. 24-19 (McLerran Feb. 28, 2014 Letter) at 3; *see also* Proposed Determination of the U.S. EPA Region 10 Pursuant to Section 404(c) of the CWA; Pebble Deposit Area, Southwest Alaska (July 2014), at ES5-6, *available at* http://www2.epa.gov/sites/ production/files/2014-07/documents/pebble_es_pd_071714_final.pdf (EPA Proposed 404(c) Determination, July 2014) (proposing to "restrict" discharges "related to mining the Pebble deposit," without the benefit of a permit process).

[82] *See supra*, n.76; *see also Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968) ("The purpose of the land grants under the [Statehood] Act is to serve Alaska's overall economic well-being. Some of the lands so selected will probably be used to protect mineral deposits. Others will safeguard wildlife. Still others will be used to protect domestic water supplies."); Alaska Const., art VIII, § 1 (State policy to develop resources "by making them available for maximum use consistent with the public interest").

[83] *Contra* Dkt. No. 188 (EPA Br., p.35) at 45.

lands—any state land—may be used. As discussed below, such authority conflicts with the terms under which Congress conveyed the Pebble lands to the State.

C. EPA's Intrusion on the State's Land Use Authority Unlawfully Overrides the Alaska Land Grant Statutes.

Whatever EPA's authority ***after*** a permit application has been submitted—an issue not before this Court—EPA's assertion of CWA authority outside the permitting context cannot be reconciled with the Statehood Act and Cook Inlet Land Exchange. Accordingly, this Court must do what EPA refuses to do: harmonize Section 404(c) of the CWA with Congress's "special" Alaskan land conveyances. Such harmonization will bar EPA from asserting preemptive control over the Pebble lands.

1. EPA's Assertion of Preemptive 404(c) Authority Overrides the Alaska Statehood Act and Cook Inlet Exchange.

Congress's conveyance of the Pebble lands to the State undid their withdrawal, which foreclosed mining.[84] EPA's preemptive veto action re-asserts the authority that Congress gave up—the power to prevent mining or other development on those lands.[85] Section 404(c) cannot properly be interpreted as a license to re-assert such authority. Congress knows how to provide for withdrawal authority, and when it does so, it does so explicitly.[86] In fact, in ANILCA,

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[84] *See, e.g.*, Dkt. No. 24 (Pls' Mot. for Prelim. Injunction, pp. 23-24) at 31-32; Dkt. No. 25 (Smith Decl.) ¶¶ 17-21; *State of Alaska v. Lewis*, 559 P.2d 630, 633-34 (Alaska 1977).

[85] *See* 43 U.S.C. § 1702(j) (defining withdrawal as the "withholding [of] an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program"). While "withdrawal" under the Federal Land Planning and Management Act ("FLPMA") and other federal statutes refers to the closing of federal public lands, this case reflects EPA's intent to take similar action with respect to State lands and its use of the CWA as its vehicle for doing so, lacking any express authority. *See also* Dkt. No. 24 (Pls' Mot. for Prelim. Injunction, p. 31) at 39.

[86] *See, e.g.*, 42 U.S.C. § 1714 (1976) (FLPMA withdrawal authority); ANCSA § 17(d)(2) (allowing federal government to withdraw up to eighty million acres of federal land in Alaska, an opportunity the government initially availed itself of when it originally withdrew the lands at issue in this case); Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (1980) (creating additional conservation lands in Alaska). FLPMA Section 704(a) even went so far as to expressly retract other earlier withdrawal authorities, including prior implied executive withdrawal authority. 90 Stat. 2792 (1976).

Congress went so far as to specifically legislate against additional withdrawals of federal Alaskan land, expressing its intent that "no more" significant acreage be withdrawn absent its approval.[87] Section 404(c) does not confer on EPA the power to do what no other federal agency can do: to withdraw *State* land.[88] And certainly, nothing confers on EPA the authority to override the Alaska Statehood Act, Cook Inlet Land Exchange, and federal actions pursuant to them.[89] If EPA were allowed to proceed with its pre-permit veto process, important terms of the exchange that benefited the State would be retroactively eliminated.

Further, EPA's asserted pre-permit veto authority is land use planning, an activity squarely placed within the State's domain under the Statehood Act and Cook Inlet Exchange. As discussed above, all conveyances of land to the State, both under Section 6 of the Statehood Act and under the Cook Inlet Exchange specifically, were subject to the conditions that the State permanently reserve its right to all the underlying mineral resources and that the State refrain from disposing of these minerals.[90] The purpose underlying these conditions was clear: to ensure development of the mineral resources conveyed for the benefit of the State and at the discretion of the State.[91] This purpose is patently undermined by EPA's veto process, which, absent a permit application, necessarily strips the State of its ability to make even the most basic, threshold decisions about resource use.

Such a sweeping exercise of policy-making authority is also contrary to longstanding federalism principles, under which the State retains its traditional authority over land use planning functions.[92] As discussed in Plaintiffs' preliminary injunction motion, land-planning is "a quintessential state and local power," and concern arises where an administrative

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[87] 16 U.S.C. § 3213(a).

[88] Dkt. No. 24 (Pls' Mot. for Prelim. Injunction, p. 31) at 39; *Pebble Ltd. P'ship v. Lake & Peninsula Borough*, No. 3DI-11-00053 CI, Order and Decision slip op. at 24 (Alaska Sup. Ct. Mar. 19, 2014).

[89] *See United States v. 111.2 Acres of Land in Ferry Cty.*, 293 F. Supp. 1042, 1048 (E.D. Wash. 1968), *aff'd*, 435 F.2d 561 (9th Cir. 1970) ("Administrative practice cannot amend an act having the force of law.").

[90] Statehood Act § 6(i); Pub. L. No. 94-204 § 12(d)(1).

[91] *See supra*, Section II.A.

[92] *See* Dkt. No. 24 (Pls' Mot. for Prelim. Injunction, p. 32) at 40.

interpretation of statute "alters the federal-state framework by permitting federal encroachment upon a traditional state power."[93] This Court should avoid a construction of the CWA that usurps the State's sovereignty and traditional land planning authority.[94]

None of the case law cited by EPA or Nunamta diminishes the conflict between EPA's asserted pre-permit veto authority and the Alaska lands legislation. EPA relies heavily on *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, and specifically its holding reaffirming Congress's "authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal laws."[95] But such displacement or preemption of state law has nothing to do with this case, which is about an agency's construction of a statute in a way that intrudes on State authorities ***specifically bestowed through an Act of Congress.***

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[93] *Rapanos*, 547 U.S. at 738-39; *SWANCC*, 531 U.S. at 172-73. Both EPA and Nunamta dispute the applicability of *Rapanos* and *SWANCC*, which dealt with the scope of jurisdictional waters under the CWA pursuant to the Commerce Clause. *See* Dkt. No. 188 (EPA Br., p. 37) at 47, n.49; Dkt. No. 185 (Nunamta, *et al.* Br., pp. 11-12) at 13-14. First, these cases show that EPA may not overstep its delegated authority under 404(c) and to intrude on state land use planning prerogatives – something that, even Nunamta concedes, the CWA proscribes. *See* Dkt. No. 185 (Nunamta, *et al.* Br., p. 10) at 12, n.65 (citing 33 U.S.C. §§ 1251(a), (d), 1311(a), 1362(7), (12)). Second, just as in *SWANCC*, 531 U.S. at 172-73, EPA's action here "invokes the outer limits of Congress's power": even Congress cannot "upset[] settled expectations through a belated effort to render [the conditions of a land conveyance] more onerous," or "create a retroactive 'cloud' on the title" to land granted. *Asarco*, 490 U.S. at 632; *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009); *see also* Dkt. 24 (Pls' Mot. for Prelim. Injunction, p. 32) at 40.

[94] *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Jones v. United States*, 529 U.S. 848, 857 (2000) (emphasizing longstanding principle that courts are to avoid statutory interpretations that would implicate constitutional questions). EPA, of course, denies that any constitutional principles are implicated in this case. In doing so, EPA disputes Plaintiffs' comparison to *Printz v. United States* and *New York v. United States*, contending that "those cases involved constitutional challenges . . . where states were being forced into service to execute federal laws . . . ." Dkt. No. 188 (EPA. Br., p. 37) at 47, n.49 (discussing *Printz*, 521 U.S. 898 (1997); *New York*, 505 U.S. 144 (1992)). However, this basic distinction misses the forest for the trees. If the federal government's commandeering of a state to carry out federal purposes unconstitutionally encroaches on State authority, surely the federal government's usurping of a State's authority over its own land cannot be tolerated.

[95] *See* Dkt. No. 188 (EPA. Br., p. 37) at 47, n.49 (discussing 452 U.S. 264, 290 (1981)).

Nunamta further quibbles with Plaintiffs' characterization of EPA's pre-permit veto process as land-use planning rather than environmental regulation.[96] However, EPA's action plainly falls within the former category, even applying Nunamta's own distinction between the two. Specifically, Nunamta cites *California Coastal Commission v. Granite Rock Co.* as supporting that "[l]and use planning in essence chooses particular uses for the land," while environmental regulation "requires only that, however the land is used, damage to the environment is kept within prescribed limits."[97] Here, EPA's assignment of limits on resource use within a given area has the precise effect of "choos[ing] particular uses for the land," and thus fits squarely within the definition of land use planning.[98]

In sum, EPA's asserted pre-permit veto process directly conflicts with the Statehood Act and Cook Inlet Exchange. EPA asserts the authority to recapture the former withdrawn status of the lands, unlawfully supplanting the State's Congressionally-intended role as owner, manager, and policy-maker for the Pebble lands.

2. Because EPA's Pre-Permit Veto Process Conflicts with the Alaska Land Grant Statutes, EPA's Preemptive Process Must Be Set Aside.

Because the specific provisions of the Statehood Act and the Cook Inlet Land Exchange conflict with EPA's purported authority under a general enactment (the CWA), it is the latter which must give way.[99] Congress withdrew the Pebble lands, and then surrendered its right to

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[96] *See* Dkt. No. 185 (Nunamta, *et al.* Br., pp. 10-11) at 12-13.

[97] *Id.* at 13 (quoting 480 U.S. 572, 587 (1987)).

[98] Nunamta also argues that even if EPA's action were characterized as land use planning, Section 404(c) conveys "clear and manifest" intent to override the State's traditional authority in this area by allowing action "at *any* time." Dkt. No. 185 (Nunamta, *et al.* Br., p. 11) at 13, n.70 (quoting *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 613 (D.C. Cir. 2013)). However, even if Section 404(c) allowed EPA to act at any time as a temporal matter, this does not mean that Congress ever expressed an intent that EPA could act in a way that would arrogate to itself state land use planning authority. Nunamta effectively concedes as much, having recognized elsewhere that "EPA cannot usurp the State's land use authority because Congress has authorized it only to regulate waters of the United States, not to engage in land use planning." *Id.* at 12.

[99] *See Utah v. Andrus*, 486 F. Supp. 995, 1009 (D. Utah 1979); *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1073 (9th Cir. 2010); *Dep't of State Lands v. Pettibone*, 702 P.2d 948, 956 (Mont. 1985); *cf. Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 996-97 (9th Cir. 1994). In

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control their use so the federal government could achieve other goals. The State subsequently selected those lands subject to Section 6(i)'s mineral reservation. EPA cannot now impose a new restrictive federal policy limiting how those lands may be used.[100] EPA's assertion of such authority must be vacated.

As discussed in Plaintiffs' preliminary injunction motion, case law has repeatedly confirmed that federal action that unduly impinges on State prerogatives pursuant to specially-enacted Congressional land grants will be set aside.[101] *Lyon*, *Andrus*, and *Pettibone* all involve issues that have arisen under school trust land grants, the antecedent to and express basis for Section 6(i) of the Statehood Act.[102] Each recognizes the limits on federal regulatory action that has the effect of upsetting special conveyances of mineral lands to the State. And while the federal government may continue to regulate with respect to State lands, given the purpose of the

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Koniag, the Ninth Circuit held that a native village corporation had an implied servitude over a subsurface estate for purposes of developing surface lands it selected under ANCSA in light of "ANCSA's requirement that Natives form corporations to receive and administer the land they receive. There would be little purpose in this requirement if Congress did not expect Natives to benefit from the economic development of their land." 39 F.3d at 997.

[100] Contrary to Nunamta's suggestion, Plaintiffs have never argued that State lands are not subject to federal regulation. *Contrast* Dkt. No. 185 (Nunamta, *et al.* Br.) at 11 *with* Dkt. No. 24 (Pls' Mot. for Prelim. Injunction) at 38. Rather, the issue is that EPA may not supplant the State's fundamental ownership and management prerogatives over its own lands, conveyed under the terms of the Alaska Statehood Act and Cook Inlet Exchange.

[101] Dkt. No. 24 (Pls' Mot. for Prelim. Injunction, pp. 30-32) at 38-40.

[102] *Trustees*, 736 P.2d at 333. Given this history, EPA's and Nunamta's differentiation between the school lands cases and this one is a false distinction. *See* Dkt. No. 188 (EPA Br., pp. 40, 41) at 50, 51, n.54; Dkt. No. 185 (Nunamta, *et al.* Br., p. 7) at 9. In fact, case law Nunamta relies upon only further proves the point. Citing *Pom Wonderful LLC v. Coca-Cola Co.*, Nunamta argues that a more specific statute does not prevail over a more general enactment unless "'[the two statutes] cannot be implemented in full at the same time.'" Dkt. 185 (Nunamta, *et al.* Br., p. 7) at 9, n.40 (quoting 134 S. Ct. 2228, 2240 (2014)). Of course, this is precisely the issue here: EPA's interpretation of its 404(c) authority is incompatible with the Alaska land grants. While Nunamta also highlights several other "special" Alaska land conveyances and suggests that they are somehow different, *id.* at 9, n.42, neither Nunamta nor EPA provide any reason for denying the land grant at issue here – one that arose out of a Congressionally-ratified three-way negotiation – the same "special" status afforded to these other conveyances and the predecessor school lands grants, similarly meant to ensure revenue generation.

land grant, "the regulation may not . . . prevent the state or its lessee from gaining access to its land, *nor may it be so prohibitively restrictive as to render the land incapable of full economic development*."[103] Likewise, here, EPA's assertion of pre-permit veto authority impinges on the State's land management rights, effectively devaluing the Pebble lands and preventing their full economic use.[104]

EPA and Nunamta try to diminish these holdings, but their arguments fail on several levels. For example, EPA argues that cases like *Lyon* and *Andrus* are immaterial because they concern easements over federal land.[105] The holdings in these cases are not so limited. In fact, *Andrus* itself had to do with environmental regulation: the federal government sought to deny an easement over federal land for access to school trust lands, where the federal land had been designated as a Wilderness Study Area under FLPMA and the federal government found that the state's requested access "would impair wilderness characteristics."[106] The court expressly rejected this argument, finding that the school land grants were "special" legislation that enjoyed priority over the more general FLPMA statute, "regardless of whether the special acts were passed prior to or after the general act."[107] Lacking any indication of intent by Congress "to modify the special act," the court held that the federal government's regulation of wildlife under

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[103] *Andrus*, 486 F. Supp. at 1009, 1010 (emphasis added); *see also Pettibone*, 702 P.2d at 956 ("[A]ny infringement on the use or management prerogatives of the State that effectively devalue[s] school lands is impermissible."). Though the dispute in *Pettibone* was an internal issue between the state and private parties, the court's reasoning, including its express reliance on *Andrus*, makes clear that the holding extends to situations involving federal actions that have the same effect. *Id.*

[104] EPA argues that the State could potentially retain substantial economic benefit from the lands. Dkt. No. 188 (EPA Br., p. 40) at 50. Yet, EPA cannot seriously contest the simple reality that for whatever land EPA ultimately withdraws from development, that land has lost much, if not all, of its economic value. Certainly, that land is no longer capable of "full economic development." *See Andrus*, 486 F. Supp. at 1009-10; *Pettibone*, 702 P.2d at 95. Moreover, assertion of this authority plainly compromises the State's prerogatives granted by Congress.

[105] Dkt. No. 188 (EPA Br., pp. 39, 40, 41) at 49, 50, 51, n.54.

[106] 486 F. Supp. at 1009.

[107] *Id.* at 1009-10.

FLPMA could not be exercised in a way that would be "so prohibitively restrictive as to render the land incapable of full economic development."[108]

These principles apply equally here.[109] EPA's authority under the CWA is not materially different from Interior's claimed authority under FLPMA in *Andrus*: neither can be interpreted in a way that would unduly impinge on the State's authority over its statehood lands and its ability to pursue economic development as intended under the terms of Congress's conveyances. Here, there is no mining plan, permit application, or corresponding record to guide a scientific judgment on the question of "unacceptable adverse effect."[110] Where decision-making occurs in such a vacuum, EPA cannot be said to be "regulating" an existing or proposed activity; EPA is instead asserting the authority to foreclose activity.[111] Such a process is as "prohibitively restrictive" as that considered in *Andrus* and *Lyon*.[112]

Nunamta's reliance on *Case v. Bowles* and *Board of Natural Resources v. Brown* is likewise misplaced.[113] While both cases declined to find a conflict between land grant statutes

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[108] *Id.* at 1010. By contrast, cases cited by Nunamta involving the federal government's superior authority over wildlife issues on *federal* land do not give the federal government authority to take action that would prohibitively restrict activities on *State* land, conveyed under the Alaskan lands legislation. *See* Dkt. No. 185 (Nunamta, *et al.* Br., p. 9) at 11, n.57 (citing *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 57 (1962); *Alaska v. Andrus*, 429 F. Supp. 958, 961-62 (D. Alaska 1977)).

[109] In fact, EPA in this case goes further than did the federal government in *Lyon* and *Andrus*. Whereas those cases concerned federal regulatory action with respect to *federal* land that impeded access to state land, here, the EPA's assertion of veto authority exerts direct and primary authority over *state* land, notwithstanding the purpose of the land grants to convey the land to Alaska, to make its own judgments with respect to broad questions of resource use. *See* Dkt. No. 24 (Pls' Mot. for Prelim. Injunction, pp. 30-31) at 38-39, n.145.

[110] 33 U.S.C. § 1344(c).

[111] *Cf. Calif. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987).

[112] *Andrus*, 486 F. Supp. at 1010. Though EPA and Nunamta might pretend the pre-permit veto process merely restricts activity from exceeding "unacceptable" limits, in reality, such a process expresses a much broader policy choice of a kind that had been left to the State. *See* Dkt. No. 24-14 (EPA's September 2010 "Bristol Bay 404(c) Discussion Matrix" refers to the 404(c) veto process as "proactive watershed planning for sustainability").

[113] *See* Dkt. No. 185 (Nunamta, *et al.* Br., p. 8) at 10, nn. 48-49 (discussing *Case*, 327 U.S. 92 (1946); *Bd. of Natural Res.*, 992 F.2d 937 (9th Cir. 1993)).

and federal action pursuant to Congressional legislation, neither case disturbs the general principle that federal regulation can go too far. (And, in fact, in *Board of Natural Resources*, the Ninth Circuit ultimately struck down the legislation at issue on Tenth Amendment grounds.[114]). Moreover, far from fostering increased national uniformity, as did the action considered in *Board of Natural Resources*,[115] EPA's assumption of pre-permit veto authority does just the opposite: it singles out the Pebble lands and asserts the power to designate some or all of them as essentially re-withdrawn from availability for mining.[116] Such a retrospective attempt to reinstate withdrawal is not valid regulation pursuant to general Congressional purposes. It is the equivalent of "a veiled attempt to alter the conditions of the trust," or, in this case, the Statehood Act compact and Cook Inlet Exchange.[117]

3. This Court Should Harmonize CWA Section 404(c) With Congress's Alaska Lands Legislation by Rejecting EPA's Flawed Construction of Section 404(c).

We submit that EPA has no veto authority outside the permitting context, but even if it did, it could not exercise such authority here, where such exercise would override the Alaska Statehood Act and Cook Inlet Land Exchange.[118] Because of this conflict, this Court should "harmonize" the two statutory schemes so as to give effect to both.

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[114] 992 F.2d at 949. Here, the Court can avoid implicating constitutional concerns in its construction of the CWA.

[115] *See id.* at 944.

[116] *See* Dkt. No. 24-19 (McLerran Feb. 28, 2014 Letter).

[117] *Cf.* 992 F.2d at 944; *see also Asarco*, 490 U.S. at 632 ("Congress could not . . . grant lands to a State on certain specific conditions and then later, after the conditions had been met and the lands vested, succeed in upsetting settled expectations through a belated effort to render those conditions more onerous.").

[118] *See, e.g.*, Section II.C.1, *supra*; Dkt. No. 24 (Pl. Mot. for Prelim. Injunction, p. 33) at 41 ("EPA's broad assumption of pre-permit application veto authority over the land at issue here overrides [Congress's decision that the State be allowed to pursue mineral development, subject only to reasonable regulation not unduly prohibitive in nature].").