A JOINT LETTER
From
Nondalton Tribal Council, Koliganik Village Council,
New Stuyahok Traditional Council, Ekwok Village Council,
Curyung Tribal Council, Levelock Village Council, and
Alaska Independent Fishermen's Cooperative Association

April 23, 2010 (mailed May 21, 2010)

Representative Bryce Edgmon
Chair, House Fisheries Committee
Alaska House of Representatives
716 W. 4th Ave. Suite 390
Anchorage AK, 99501-2133

Subjects: (1) DNR's 2005 Bristol Bay Area Plan,
(2) Refuge or Critical Habitat Area legislation.

Dear Representative Edgmon:

As you know, we are plaintiffs in a lawsuit that seeks to have the 2005 Bristol Bay Area Plan (2005 BBAP) of the Alaska Department of Natural Resources (DNR) declared unlawful.[1] The 2005 BBAP applies to state land that could be developed for a potential Pebble mine. The litigation is in its early stages and is still undecided.

Although we are skeptical that a Pebble Mine can be permitted, developed, operated and closed forever in an environmentally safe manner, our concern in this letter, as it is in the lawsuit, is *not* with a Pebble mine directly, but is with DNR. For reasons explained in this letter and its attached briefing paper, DNR's 2005 BBAP makes it difficult, if not impossible, for a reasonable person to conclude that DNR can deal appropriately and in the public interest with a proposed Pebble mine, particularly under the 2005 BBAP. So, today we are taking additional steps.

First, the tribes that are signatory to this letter have government-to-government relations with the United States, recognized in federal law. Through counsel, the tribes have requested that they and the U. S. Army Corps of Engineers and the U. S. Environmental Protection Agency commence discussions about the tribes being cooperating agencies concerning any federal environmental impact statement (EIS) that may be prepared on a proposed Pebble mine.[2] Cooperating agency status may be a vehicle by which federal and state agencies involved in an EIS will benefit from the tribes' perspectives, including that the DNR's 2005 BBAP is an inadequate and unreliable basis for decision-making with respect to habitat, subsistence, and many other public interests in the area. Moreover, the decision by the Pebble Limited Partnership (PLP) to end its Technical Working Groups (TWGs) contributes to the tribes' decision to commence federal-tribal discussions of cooperating agency status. The

[1] *Nondalton Tribal Council, et al. v. State, Department of Natural Resources, et al.*, 3DI-09-46 CI.
[2] *See* enclosed letter from counsel to the Corps and EPA.

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approximately ten TWGs had been composed of federal and state officials who, in an advisory capacity, had sought over several years to review PLP's baseline study plans before they were implemented, and to review the results, in order to properly advise PLP as it progressed toward an EIS. But PLP was not forthcoming. Its decision to end the TWGs implies that federal, state and tribal entities are now likely to face greater informational deficiencies in an EIS than might have occurred otherwise.

Second, because you represent much of the area, we are enclosing two alternative draft bills that would designate most state land in the Nushagak and Kvichak drainages as either a state critical habitat area, or a state fish and game refuge.[3] They are drafted to protect fish and wildlife habitat, and the commercial, subsistence, and recreational uses of fish and game. Both drafts include land covered by a potential Pebble mine. Both would shift most functions of managing most state land in these drainages from DNR to the Alaska Department of Fish and Game (ADF&G).

We are also enclosing a briefing paper which supports doing so. It explains many of our reasons for offering such legislation. These reasons are *independent* of whether or not a Pebble mine can be permitted, operated and closed in an environmentally safe manner.[4]

We are requesting that you, while the legislature is out-of-session, take a leadership role in encouraging, facilitating and participating with us (and those who disagree with us) in public discussions in the communities in the Kvichak and Nushagak drainages on the fundamental question of whether such legislation is the best way to protect fish and wildlife habitat, and the commercial, subsistence, and recreational uses of fish and game, from the risks posed by a potential Pebble mine. The alternative draft bills and the briefing paper will facilitate such discussions. The public deserves opportunities to speak to such legislation. In contrast, any legislation that leaves decision-making with DNR certainly will not rewrite the 2005 BBAP or address the vast array of concerns arising from it.

For legislators and the public to address this situation, we recommend that they familiarize themselves with the function of area plans in general, and the methods that DNR has employed in its 2005 BBAP to facilitate a Pebble mine. Area plans (1) designate primary uses of state land and classify the land accordingly (*e.g.*, as habitat, mineral, recreation, settlement land, etc.); and (2) adopt guidelines and statements of management intent that guide DNR's decisions. The classifications, guidelines and statements of intent guide DNR's decisions, particularly with respect to permitting, for the life of a plan, which is about 20 years, unless it is revised. Designated primary uses take precedence over undesignated or secondary uses. Classifications such as habitat, mineral, recreation, transportation, forestry, grazing, etc. retain land in public ownership. Classifications such as resource management land and settlement land do not carry this requirement.

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[3] If the tribes become cooperating agencies, they may decide to support a range of alternatives in a draft EIS being released to the public *only if* each alternative that would permit a Pebble mine rests upon prior enactment of legislation establishing a refuge or critical habitat area, managed by ADF&G, and covering most state land in the Kvichak and Nushagak drainages, including the land at issue in any proposed Pebble mine.

[4] The reasons stated in the briefing paper are also consistent with the tribes seeking cooperating agency status on an EIS.

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With respect to DNR's 2005 BBAP specifically, it deliberately and directly tilts the playing field to facilitate a Pebble mine, by strategies such as these to reclassify state land:

- DNR's 2005 BBAP uses primarily *marine* criteria, such as whether land is a walrus haulout or an eel grass bed, to identify whether *inland uplands*, such as those at Pebble, qualify for a habitat land classification. No one should support using marine criteria to determine whether inland uplands qualify for classification as habitat.

- DNR's predominantly marine criteria *excluded moose and caribou habitats* from habitat designation, and DNR's implementation of the criteria also *excluded salmon habitat in non-navigable waters* from habitat designation. Everyone knows that moose, caribou and salmon are important for the local communities.

- DNR lacks a land use classification category for land used for *subsistence hunting and fishing,* but DNR has a "public recreation land" classification category that by regulation includes land used for *sport hunting and fishing*. No one should support having a land use classification category for sport fishing and hunting but not for subsistence hunting and fishing.[5]

- DNR's 2005 BBAP then defines "recreation" as *excluding sport hunting and fishing* for purposes of developing the Plan, classifications, guidelines and statements of intent. No one should support excluding sport fishing and hunting from "recreation."[6]

- DNR's 2005 BBAP defines "subsistence uses" for purposes of state land management (not fish and game harvest management) as limited to residents "domiciled in a *rural* area of the state."[7] Regardless of whether this conflicts with *McDowell v. State*, 785 P.2d 1 (Alaska 1989) (which holds that the State cannot limit subsistence benefits to rural residents), this definition puts in an untenable position those legislators who *oppose* a rural preference in the harvest fish and game, and who *support* a proposed Pebble mine proceeding through a permitting process that depends on the 2005 BBAP. They would be *supporting* Pebble mine going through a permitting process that depends in part on "subsistence uses" being defined for purposes of state land management in terms of residents "domiciled in a *rural* area of the state."

- DNR's 2005 BBAP defines "habitat" narrowly as what is necessary to prevent a "*permanent loss*" of a population or of sustained yield of a species. Defining habitat in terms of what is necessary to prevent a "permanent loss" of a population limits habitat

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[5] DNR claims that its habitat classifications accommodate subsistence, because the regulatory definition of the habitat classification category, at 11 AAC 55.230, refers to "traditional uses." Regardless of the merits of DNR's claim, the 2005 BBAP reduces the upland acreage classified or co-classified as habitat by 90 percent, from 12 million acres to 768,000 acres, when compared to the former 1984 Bristol Bay Area Plan.

[6] Although the 2005 Plan claims that it protects recreation, this definition begs the question: If sport fishing and hunting are not recreation for purposes of land management, then what are they?

[7] If Pebble mine and related roads occur, then this definition may force non-rural subsistence users to compete on the same lands with rural subsistence users.

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designations to only what is necessary to *prevent extinction,* from which no recovery of the population can occur. No legislator should support that definition. The Alaska Constitution requires sustained yield management, not management to near-extinction. Further, defining habitat in terms of what is necessary to prevent a "permanent loss" of sustained yield defines habitat in a manner that ignores the conventional definition that "sustained yield" means *annual or periodic sustained yield.*[8] Again, because the Constitution requires sustained yield management, no legislator should support DNR's definition that would prevent only a "permanent loss" of sustained yield, but would not assure annual or periodic yields on a sustaining basis.

These and other DNR strategies reflected in the 2005 BBAP eliminated existing habitat classifications in a 1984 BBAP on caribou calving grounds at Pebble, on moose wintering areas necessary for a Pebble mine, on the western half of Iliamna Lake (important for rearing sockeye salmon, and into which part of the Pebble mine would drain), on non-navigable anadromous waters in the vicinity of Pebble and elsewhere, and led to reclassifying land in the area of a Pebble mine, from co-classifications that included "habitat," to solely "mineral." In effect, the area of Pebble, which is a hundred miles from the coast, *lost its entire habitat classification* because it produces caribou, moose, salmon, and other fish and wildlife, but has no walrus.

Moreover, because area plans guide land management, these and other strategies *lie at the heart* of DNR's permitting process for a potential Pebble mine. Hence, any state legislation which would leave management of state land in the Kvichak and Nushagak drainages with DNR – even with higher standards for permitting a Pebble mine – will *not* be effective for two reasons. First, such legislation would not remedy DNR's 2005 BBAP. Second, the 2005 BBAP reflects a "development above all" institutional mindset that implies that DNR may attempt to circumvent or urge repeal of higher standards or prohibitions if such legislation were enacted.

We believe that as Alaskans and their legislators learn what DNR single-mindedly accomplished in the 2005 BBAP, most will eventually support legislation to establish a refuge or a critical habitat area for most of the state land in the Kvichak and Nushagak drainages, including at the Pebble claims, and that most people will conclude, regardless of whatever the law is, that a Pebble mine should never be permitted based on the 2005 BBAP. We believe that most will conclude, with respect to the 2005 BBAP, that it is:

(1) *absurd* to use primarily *marine* criteria to determine whether *inland uplands* qualify as fish and game habitat, and to *exclude moose and caribou*, and *salmon in non-navigable waters*, from the process of habitat designation;
(2) *divisive* to have *no land use classification category for subsistence hunting and fishing*, when DNR has one for *sport hunting and fishing*; and
(3) *ludicrous* to define recreation as *excluding* sport hunting and fishing.

Similarly, when those who support a Pebble mine learn that the 2005 BBAP appears to be legally *fatal* to any federal environmental impact statement that would support the issuance of permits for Pebble,[9] we believe that they, too, will be equally disappointed in DNR's actions to date. Moreover, those who support a proposed Pebble mine going through a permitting process

[8] *See*, AS 38.04.910(12), 16.05.255(k)(5), 41.17.950(27).
[9] *See* Briefing Paper, Part II, attached.

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that depends in part on the 2005 BBAP will necessarily have to defend all its shortcomings described above.

Our enclosed draft bills contain provisions that address a potential Pebble mine. Because most people in Southwest Alaska oppose a Pebble mine, both alternative drafts would prohibit metallic sulfide mining (as Pebble mine would be) within the designated area. And because some people, mostly elsewhere in Alaska, want to see a proposed Pebble mine go through some sort of a permitting process to see if it should be developed, the drafts also contain a provision that would render the Pebble mine prohibition inoperative, if the courts determine that the prohibition would be a legislative "taking" requiring compensation to the Pebble claimants. In that event, strict permitting provisions would apply and be implemented not by DNR, but by ADF&G.

We chose this approach for four reasons. First, it provides to the public, and to legislators, an *opportunity* to speak to an outright prohibition of metallic sulfide mining in much of the Kvichak and Nushagak drainages, versus a conventional compatibility test. Second, it ends the *pointless* political debate over what only a *court* can decide – *i.e.*, whether some clause in legislation is or is not a "taking" of private property (*i.e.*, mining claims) that would require compensation. Third, it lets the PLP (which has asserted that various legislative provisions would result in a taking) argue its case where it *belongs* – *i.e.*, before a court. If PLP were to prevail in court, then a severability clause and provisions for permitting would be triggered, thereby avoiding the taking and the compensation obligation. Fourth, the central provisions of our draft alternative bills (like any modern refuge statute) are (1) the *purposes* of protecting habitat and commercial, subsistence and sport uses of fish and game, and (2) a *compatibility test* that would allow other uses, such as a Pebble mine, to be permitted, but only if compatible with those purposes.[10] Because PLP claims that it will not develop a Pebble mine if it would be incompatible with protecting habitat or commercial, subsistence or sport uses of fish and game,[11] our alternative bills would give PLP an opportunity to support those purposes and a compatibility test, while continuing to oppose an outright ban of metallic sulfide mining in the affected area.

In weighing all this, state legislators and other officials might find it helpful to consider two matters. First, by the inherent nature of this situation, federal laws, regulations, authorities, interests, and obligations (including to Native people) are involved. Today, those of us who represent the undersigned federally-recognized tribes are seeking, through the government-to-government relationships that exist between Alaska tribes and the United States, to invoke those relationships in order to resolve some of these issues. Second, separate from doing so, ample reasons exist for the State to enact refuge or critical habitat area legislation that are independent from whether a Pebble mine can be permitted, developed, operated, and permanently closed in an environmentally safe manner. Many of these reasons are set forth in the attached briefing paper, including the inadequacy of DNR's 2005 BBAP and the likelihood that it will be legally fatal to a future EIS on a potential Pebble mine.

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[10] State game refuge and critical habitat area statutes contain compatibility tests. *See e.g.,* AS 16.20.036(c) (Susitna Flats State Game Refuge); AS 16.20.037(b)(3) (Minto Flats State Game Refuge); AS 16.20.033(b)(3) (Yakataga State Game Refuge); AS 16.20.041(b)(3) (McNeil River State Game Refuge); AS 16.20.500 (applies to all critical habitat areas); *see also* 16 U.S.C. § 668dd(d) (2000) (compatibility test applies to all national wildlife refuges), .

[11] *See*, Briefing Paper, Part V, attached.

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To reiterate, for purposes of Alaskans in general, residents of the Bristol Bay drainages specifically, and the Alaska legislature, our immediate concern is that the public should be allowed to *speak* to the enclosed draft legislation. We are asking you to help lead the discussion while the legislature is out-of-session. We appreciate your work, that of the House Fisheries Committee which you chair, and that of many other legislators. We know that these issues are not easy. We look forward to hearing from you, and to working together.

Sincerely yours,

Date: 5/2/2010

Jack H. Hobson Sr

Jack Hobson, President
Nondalton Tribal Council
P.O. Box 49
Nondalton, Alaska 99640

enclosures: (1) Briefing Paper
(2) Alternative draft legislation to designate either a state fish and game refuge or a state critical habitat area; and
(3) Copy: letter to Corps and EPA re cooperating agency status and related matters.

EPA-7609-0000697-0006

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Sincerely yours,

Date: 5/04/10

Dennis Andrew, President
New Stuyahok Traditional Council
P.O. Box 49
New Stuyahok, Alaska 99636

enclosures: (1) Briefing Paper
(2) Alternative draft legislation to designate either a state fish and game refuge or a state critical habitat area; and
(3) Copy: letter to Corps and EPA re cooperating agency status and related matters.

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Sincerely yours,

Date: 5-10-10

Angeline Chukwak Vice President
for Sergie Chukwak, President
Levelock Village Council
P.O. Box 70
Levelock, Alaska 99625

enclosures: (1) Briefing Paper
(2) Alternative draft legislation to designate either a state fish and game refuge or a state critical habitat area; and
(3) Copy: letter to Corps and EPA re cooperating agency status and related matters.

To reiterate, for purposes of Alaskans in general, residents of the Bristol Bay drainages specifically, and the Alaska legislature, our immediate concern is that the public should be allowed to *speak* to the enclosed draft legislation. We are asking you to help lead the discussion while the legislature is out-of-session. We appreciate your work, that of the House Fisheries Committee which you chair, and that of many other legislators. We know that these issues are not easy. We look forward to hearing from you, and to working together.

Sincerely yours,

Date: 5/11/10

Luki Akelkok, President
Ekwok Village Council
P.O. Box 70
Ekwok, Alaska 99580

enclosures: (1) Briefing Paper
(2) Alternative draft legislation to designate either a state fish and game refuge or a state critical habitat area; and
(3) Copy: letter to Corps and EPA re cooperating agency status and related matters.

To reiterate, for purposes of Alaskans in general, residents of the Bristol Bay drainages specifically, and the Alaska legislature, our immediate concern is that the public should be allowed to *speak* to the enclosed draft legislation. We are asking you to help lead the discussion while the legislature is out-of-session. We appreciate your work, that of the House Fisheries Committee which you chair, and that of many other legislators. We know that these issues are not easy. We look forward to hearing from you, and to working together.

Sincerely yours,

Date: 5/12/2010

Thomas Tilden, President
Curyung Tribal Council
P.O. Box 216
531 D Street
Dillingham, Alaska 99576

enclosures: (1) Briefing Paper
(2) Alternative draft legislation to designate either a state fish and game refuge or a state critical habitat area; and
(3) Copy: letter to Corps and EPA re cooperating agency status and related matters.

To reiterate, for purposes of Alaskans in general, residents of the Bristol Bay drainages specifically, and the Alaska legislature, our immediate concern is that the public should be allowed to *speak* to the enclosed draft legislation. We are asking you to help lead the discussion while the legislature is out-of-session. We appreciate your work, that of the House Fisheries Committee which you chair, and that of many other legislators. We know that these issues are not easy. We look forward to hearing from you, and to working together.

Sincerely yours,

Date: 5-13-2010

Herman Nelson, Sr.

Herman Nelson, Sr., President
Koliganek Village Council
P.O. Box 5057
Koliganek, Alaska 99576

enclosures: (1) Briefing Paper
(2) Alternative draft legislation to designate either a state fish and game refuge or a state critical habitat area; and
(3) Copy: letter to Corps and EPA re cooperating agency status and related matters.

To reiterate, for purposes of Alaskans in general, residents of the Bristol Bay drainages specifically, and the Alaska legislature, our immediate concern is that the public should be allowed to *speak* to the enclosed draft legislation. We are asking you to help lead the discussion while the legislature is out-of-session. We appreciate your work, that of the House Fisheries Committee which you chair, and that of many other legislators. We know that these issues are not easy. We look forward to hearing from you, and to working together.

Sincerely yours,

Date: 5-10-2010

David Harsila, President
Alaska Independent Fishermen's Marketing Association
P.O. Box 60131
Seattle, WA 98160

enclosures: (1) Briefing Paper
(2) Alternative draft legislation to designate either a state fish and game refuge or a state critical habitat area; and
(3) Copy: letter to Corps and EPA re cooperating agency status and related matters.

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A BRIEFING PAPER

Reasons to Support Legislation That Designates Most State Land in The Kvichak and Nushagak Drainages as a State Fish and Game Refuge, or State Critical Habitat Area, Independent of Whether a Pebble Mine can be Permitted and Operated in an Environmentally Safe Manner

Prepared by Legal Counsel[1] for:

Nondalton Tribal Council, Koliganek Village Council, New Stuyahok Traditional Council, Ekwok Village Council, Curyung Tribal Council, Levelock Village Council, and Alaska Independent Fishermen's Cooperative Association

February 25, 2010

Legislation to designate most state land in the Nushagak and Kvichak drainages as either a state fish and game refuge, or state critical habitat area:

(1) would protect fish and wildlife habitat and commercial, subsistence, and recreational uses of fish and game;

(2) would not prohibit a Pebble mine *per se* (unless expressly so provided), but would have that effect if the mine were *incompatible* with protecting fish and wildlife habitat and commercial, subsistence, and recreational uses of fish and game; and

(3) would *shift* most functions of managing most state land in these drainages from the Alaska Department of Natural Resources (DNR) to the Alaska Department of Fish and Game (ADF&G).

This briefing paper states reasons to support such legislation that are *independent* of the current debate over whether a Pebble mine can be permitted, developed, operated and closed in a manner that is environmentally safe forever. In other words, this paper identifies reasons to support such legislation that are *independent* of the Pebble Partnership's standard response that Alaskans should wait to see a final plan for a proposed Pebble mine.

I. The legislature should support refuge or critical habitat legislation because the legislature should *not* support permitting a Pebble mine under DNR's 2005 Bristol Bay Area Plan.

DNR adopts area plans for state lands pursuant to statutes at AS 38.04 and regulations at 11 AAC Chap. 55. The plans must be based on an inventory of resources and uses. The plans divide the state land into "planning units," designate the "*primary uses*" of each, and DNR then issues a land classification order that converts these designated uses to corresponding land *classifications*. DNR has eighteen land classification categories established and defined in

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[1] Geoffrey Y. Parker, 634 K St., Anchorage, AK 99501, ph. 907-222-6859; and Thomas E. Meacham, 9500 Prospect Dr., Anchorage, AK 99507, ph. 907-346-1077. Questions and comments are welcome.

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regulation at 11 AAC 55.050 -- .230, *e.g.*, mineral, fish and wildlife habitat, public recreation, forestry, agricultural, settlement land, etc. The area plans also adopt general and unit-specific *guidelines* and *statements of management intent*. All classifications are initially multiple use. However, when an undesignated use is in irreconcilable conflict with a classified, designated use, then the designated use prevails. Any unit of land can have up to three *co-classifications*. The classifications, guidelines and statements of intent guide DNR's land management during the *20-year life* of the plan.

DNR's 2005 Bristol Bay Area Plan (2005 BBAP) applies to 12 million acres of state lands in the Bristol Bay drainages, including where Pebble and associated infrastructure might be located.[2] The previous 1984 BBAP[3] had co-classified nearly the entire 12 million acres as habitat, usually as co-classifications that were as habitat and recreational land, or as habitat, recreational, and mineral land or oil and gas land. In effect, co-classifying for habitat and minerals meant that mineral development had to be compatible with habitat. In contrast, DNR's 2005 BBAP drastically reduces to about 768,000 acres (by about 94 percent) the acreage previously classified or co-classified as habitat. The 2005 BBAP reclassified the land at, and in the vicinity of, the Pebble mine site from co-classifications under the 1984 BBAP as habitat and public recreation land, or as habitat, public recreation and mineral land, to *solely* mineral land under the 2005 BBAP.

DNR's 2005 BBAP does so by employing about two dozen strategies that were intended to, and do, solely facilitate a Pebble mine.[4] The following Subparts I, A through E, address some of these strategies.

A. DNR's 2005 BBAP uses an *ad hoc* definition "habitat" and a predominantly *marine-related* list of "fish and wildlife categories" to identify and designate limited *inland uplands* that might qualify as habitat; and the list *omits* moose and caribou.

DNR's land use planning regulations contain an adopted definition of the "wildlife habitat land" classification category, as follows:

> Land classified wildlife habitat is land which is primarily valuable for (1) fish and wildlife resource production, whether existing or through habitat manipulation, to supply sufficient numbers or a diversity of species to support commercial, recreational, or traditional uses on an optimum sustained yield basis; or (2) a

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[2] DNR's 2005 BBAP is available at http://www.dnr.alaska.gov/mlw/planning/areaplans/bristol/index.htm (last visited January 6, 2010).

[3] DNR's 1984 BBAP, except for its accompanying maps of habitat types and subsistence use areas for 31 villages and communities, is also available at http://www.dnr.alaska.gov/mlw/planning/areaplans/bristol/index.htm (last visited January 6, 2010). Most co-classifications in the 1984 Area Plan were for habitat and public recreation in conjunction with oil and gas or mineral classifications.

[4] *Nondalton Tribal Council, et al. v. State, Department of Natural Resources, et al.*, 3DI-09-46 CI.

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unique or rare assemblage of a single or multiple species of regional, state, or national significance.[5]

However, DNR's 2005 BBAP discards this adopted definition, and instead uses the following *ad hoc,* unadopted definition of the "wildlife habitat" designation and the following list of "fish and wildlife categories," to identify, designate and classify land as "habitat:"

> These habitats are defined as Areas [sic] that serve as a concentrated use area for fish and wildlife species during a sensitive life history stage where alteration of the habitat and/or human disturbance could result in a permanent loss of a population or sustained yield of the species. Fish and wildlife categories used to identify "Ha" (Habitat) designations in this plan include the following:
> • Anadromous fish spawning and rearing areas in fresh water or brackish intertidal zones
> • *Estuaries* important for rearing or schooling of anadromous fish
> • *Kelp beds covering large areas that are important marine nurseries*
> • *Pacific herring spawning and rearing concentrations areas*
> • *Eel grass beds that are important marine nurseries*
> • Waterfowl and/or *shorebird concentration areas*
> • *Seabird breeding habitat* within each colony area of 500 birds and a two-mile radius around major breeding colonies (more than 20,000 birds)
> • Bald eagle nest sites or nest site areas, and known concentrations
> • *Sea lion haulouts and rookeries*
> • *Harbor seal haulouts and rookeries*
> • *Walrus haulouts and rookeries*
> • *Sea otter pupping areas*
> • Bear concentration areas (including concentrations by season)
> • Important wildlife migration corridors, including nearshore migration routes.[6]

On its face, this *ad hoc* definition and list of "fish and wildlife habitat' categories –

(1) uses a predominantly *marine related* list of fish and wildlife categories to designate habitat on *inland uplands*, so that most uplands, including at Pebble which is more than a hundred miles from the coast, will no longer qualify as habitat under DNR's 2005 BBAP;

(2) *omits* moose and caribou from the list;

(3) departs from the regulatory definition by defining "habitat" so narrowly as to be what is necessary to prevent a "*permanent loss*" of a population or of sustained yield of a species. Defining habitat in terms of what is necessary to prevent a "permanent loss" of a population essentially defines habitat in terms of what is necessary to *prevent extinction* of that population, and from which no recovery of the population would be possible. Defining habitat in terms of what is necessary to prevent a "permanent loss" of sustained yield defines habitat in terms that ignore conventional definitions of "sustained yield" as meaning an *annual or periodic sustained yield.*[7]

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[5] 11 AAC 55.230.

[6] 2005 BBAP, at p. 2-9. (Italics added)

[7] *See*, AS 38.04.910(12), 16.05.255(k)(5), 41.17.950(27).

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Under DNR's 2005 BBAP and its *ad hoc* definition and list, important fish and wildlife life habitat areas have lost their earlier habitat classifications under the 1984 BBAP. These areas lost include:

(1) the western half of Iliamna Lake and its bed. The Lake is one of Alaska's most important sockeye salmon rearing lakes, and into which Upper Talarik Creek flows from the eastern portion of the Pebble claims;

(2) most anadromous fish waters that are not navigable;

(3) most non-anadromous fish habitat that is not already within legislatively designated conservation areas;

(4) the vast majority of moose winter habitat on state land east of the Mulchatna River corridor and north of Iliamna Lake (i.e., within an area of roughly 2.5 to 3 million acres of state land), including the Upper Talarik Creek drainage, the area of Nikabuna Lakes, the area southeast of Tutna Lake, and areas along the road corridor to Pebble. ADF&G had previously identified all of these lands as "essential" moose habitat in the 1984 BBAP. The 2005 BBAP reclassifies most of these lands as mineral, settlement or resource management lands.

(5) the caribou calving areas of the Mulchatna caribou herd at and surrounding the Pebble claims and in the upper Mulchatna drainage. ADF&G had previously identified these lands as "essential" caribou habitat, in the 1984 BBAP. The 2005 BBAP reclassifies these lands as mineral or resource management lands.

(6) spring-, summer-, and fall-use habitat for moose along the proposed road corridor to the Pebble claims. ADF&G had previously identified this moose habitat as "important," in the 1984 BBAP. DNR's 2005 BBAP reclassifies these lands as settlement or resource management lands.

(7) several million acres of caribou winter-use habitat in the Nushagak and Kvichak drainages outside major river corridors of the Nushagak system. ADF&G had previously identified this as "essential" habitat, in the 1984 BBAP. DNR's 2005 BBAP reclassifies these lands as resource management land.

Therefore, when legislators (or state or federal officials) consider issues that involve the permitting of a Pebble mine under DNR's current 2005 BBAP, it will raise these questions:

- *Can DNR explain its use of a predominantly marine-related list of fish and wildlife categories for purposes of determining whether inland uplands, many miles from the coast, should be identified and classified as habitat?* DNR's 2005 BBAP puts legislators in a position where they may have to decide whether they support permitting a Pebble mine based on DNR's use of marine criteria to eliminate prior habitat classifications on inland uplands, such as at Pebble.

- *Can DNR explain its use of a list of "fish and wildlife categories" that omits moose and caribou habitats, particularly essential caribou calving grounds and moose winter use areas?* DNR's 2005 BBAP puts legislators in a position where they may have to decide whether they support permitting a Pebble mine based on DNR's use of a list of "fish and wildlife categories" that omits moose and caribou.

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- *Can DNR explain its definition of habitat that limits it to that which is necessary to prevent "a permanent loss" of a population or sustained yield of the species?* DNR's 2005 BBAP puts legislators in a position where they may have to decide whether they support permitting a Pebble mine based on DNR's definition of habitat as that which is necessary only to prevent extinction or a permanent loss of sustained yield.

B. DNR lacks a subsistence land classification category for *subsistence* hunting and fishing, but has a "public recreation land" classification category that includes land used for sport hunting and sport fishing.

DNR's land classification regulations at 11 AAC Chap. 55 provide a "public recreation land" classification category[8] that includes land used for *sport hunting and fishing*, but these regulations *lack* a parallel subsistence land classification category for land important for *subsistence hunting and fishing*. In practical terms, DNR's disparate treatment of subsistence is this: A sport hunter or fisher can go to a public meeting on a draft Bristol Bay Area Plan and urge that sport hunting and sport fishing are "primary uses" of some particular unit of state land (*e.g.*, the Koktuli River and Upper Talarik Creek drainages in the vicinity of the Pebble claims) and that they should be classified as "public recreation land." However, a subsistence hunter or fisher who goes to the same meeting can not say that the same lands should also be classified or co-classified as subsistence land, because DNR *has no subsistence land classification category*.

DNR now claims, in on-going litigation,[9] that its "wildlife habitat land" classification category accommodates subsistence. As said above, 11 AAC 55.230 defines that category as land "primarily valuable for ... fish and wildlife resource production ... to supply sufficient numbers or a diversity of species to commercial, recreational and traditional uses on an optimum sustained yield basis." DNR's claim that fish and wildlife habitat "production areas" are "the equivalent of "harvest areas" is belied by multiple facts:

(1) The list of "fish and wildlife categories," which the 2005 BBAP uses to identify habitat, does *not even mention* subsistence. That list also omits moose and caribou, which are important for subsistence.

(2) The 2005 BBAP reduces upland acreage classified as habitat by *94 percent*, from about 12 million acres co-classified as such in the 1984 BBAP, down to about 768,000 acres in the 2005 BBAP. Thus, if DNR really uses the habitat classification to accommodate subsistence, then DNR has reduced the acreage where DNR can claim it does so by *94 percent*. DNR did so without the 2005 BBAP ever telling people of Southwest Alaska that DNR's habitat classification was in fact the only land classified to accommodate subsistence.

(3) The 2005 BBAP does not designate subsistence as a primary use on *any uplands*. Instead, all "harvest area" designations in the 2005 BBAP are on *marine tidelands and offshore submerged land*, as if subsistence of up-river villages somehow occurs in marine waters.

(4) *Nothing* in the 2005 BBAP advised rural villagers that they should understand that if they wanted to protect a subsistence area, they needed to support a "habitat" classification to do so. DNR never imposed this leap of logic on sport hunters and fishers, because it is obvious that the "public recreation land" classification category, by its definition and by implication, protects sport

[8] 11 AAC 55.160.

[9] *Nondalton Tribal Council, et al. v. State, Department of Natural Resources, et al.*, 3DI-09-46 CI.

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hunting and fishing. In other words, DNR imposes upon villagers what it does not impose on urban residents – *i.e.*, the villagers must *infer* that a habitat designation is for subsistence, while urban residents do not have to infer that a public recreation designation is for recreation, because that is obvious.

(5) If DNR's assertion that it uses the "wildlife habitat" land category to "accommodate" subsistence were credible, then DNR would have *no reason* to include sport fishing and hunting in its public recreation land category, because the habitat category is defined in terms of land that produces fish and game for "commercial, recreational and traditional uses."

Therefore, when legislators (or state or federal officials) consider issues that involve the permitting of a Pebble mine under DNR's current 2005 BBAP, it will raise these additional questions:

- *Can DNR explain why its regulations have a "public recreation land" classification category for sport hunting and fishing, but have no parallel land classification category for subsistence hunting and fishing?* DNR's 2005 BBAP puts legislators in a position where they may have to decide whether they support permitting a Pebble mine based on a lack of a subsistence land use classification category for subsistence hunting and fishing, while DNR has a "public recreation land" category for sport hunting and fishing.

- *If DNR uses habitat classifications to "accommodate" subsistence, then can DNR explain why its list of "fish and wildlife categories used to identify" habitat" lands does not mention subsistence?*

- *Can DNR explain why it makes Native villagers in Southwest Alaska infer that DNR allegedly uses habitat classifications to "accommodate" subsistence, when DNR never imposes upon urban residents any equivalent obligation with respect to sport hunting and sport fishing?*

- *In particular, can DNR explain, to the satisfaction of legislators from rural Alaska, DNR's lack of a subsistence land use classification category?*

C. DNR's 2005 BBAP uses an *ad hoc* definition of "recreation" that expressly excludes sport hunting and sport fishing.

Although DNR's adopted land use planning regulations include a "public recreation land" classification category, and define it as including land used for sport hunting and fishing,[10] DNR's 2005 BBAP, p. A-11, uses an unadopted, *ad hoc* definition of "recreation" as follows:

> **Recreation.** Any activity or structure intended for recreational purposes, including but not limited to hiking, camping, boating, fishing, and sightseeing. "Recreation" does not refer to subsistence or *sport hunting and fishing*. [Underscoring original; italics added]

[10] 11 AAC 55.160.

The following example demonstrates the effect. The 2005 BBAP, p. 3 – 175, contains this statement of management intent for part of the Pebble planning units: "Impacts to dispersed recreation along Talarik Creek should also be avoided." Because the 2005 BBAP defines "recreation" as excluding sport hunting and fishing, these activities are excluded from this statement of intent, and thus would not be protected from adverse impacts.

Sport fishing and sport hunting are the most common recreational uses of the Bristol Bay drainages. Although portions of the 2005 BBAP specifically address (or in some places even seek to protect) sport fishing and sport hunting, DNR's general definition excludes them from "recreation," and thus operates as a device for DNR to ignore adverse impacts that a Pebble mine may have on sport fishing and sport hunting.

Therefore, when legislators (or state or federal officials) consider issues that involve the permitting of a Pebble mine under DNR's current 2005 BBAP, it will raise these additional questions:

- *Can DNR explain its definition of "recreation" that excludes sport hunting and sport fishing from recreation?* DNR's 2005 BBAP puts legislators in a position where they may have to decide whether they support permitting Pebble based on DNR's definition of "recreation" as specifically excluding sport hunting and sport fishing.

- *If sport hunting and sport fishing are not recreation, then what are they?*

- *In particular, can DNR explain to the satisfaction of urban legislators why "recreation" does not include sport hunting or fishing?*

D. DNR's 2005 BBAP makes habitat, subsistence and recreation "prohibited uses" whenever they irreconcilably conflict with mining or mineral exploration on 9.4 million acres of state land in the Bristol Bay drainages.

DNR's 2005 BBAP, at pages 3-5, treats mining (which it defines as including mineral exploration),[11] as a "co-designated use" on all state land open to mineral entry, which is almost the entire 12 million acres. The 2005 BBAP employs an unadopted, *ad hoc* definition of "designated use" (at p. A-3), as follows:

> **Designated Use.** An allowed use of major importance in a particular management unit. Activities in the unit will be managed to encourage, develop, or protect this use. * * *

Thus, DNR's 2005 BBAP makes mining and mineral exploration a "designated use" to be encouraged, developed and protected *on almost the entire twelve million upland acres within the BBAP*, regardless of what any inventory may say about minerals being present or not.

[11] The 2005 BBAP (p. A-8) defines "Mining" as "Any . . . activity for commercial exploration and recovery of minerals . . . ."

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Moreover, this includes 9.4 million acres that have no other designated use.[12] Subsistence, recreation and habitat are merely undesignated uses on these 9.4 million acres. However, it is important to recognize that under the 2005 BBAP, a designated use *prohibits* an undesignated use if the undesignated use "conflicts with the management intent, designated primary or secondary uses, or management guideline" applicable to the land.[13] Thus, on these 9.4 million acres, DNR's 2005 BBAP allows the undesignated uses of subsistence, recreation and habitat to continue only so long as they are compatible with mining and mineral exploration. The 2005 BBAP transforms subsistence, recreation and habitat (including its production of salmon, moose, caribou, and other fish and wildlife) into "*prohibited uses*" whenever they conflict with mining or mineral exploration on these 9.4 million acres.

Therefore, when legislators (or state or federal officials) consider issues that involve the permitting of a Pebble mine under DNR's current 2005 BBAP, it will raise these additional questions:

- *Can DNR satisfactorily explain its decision to make mining and mere mineral exploration a designated use on almost all of the 12 million acres of state land in the Bristol Bay drainages, when no statutorily required inventory of resources appears to support such a broad designation?*[14] DNR's 2005 BBAP puts legislators in a position where they may have to explain why mining and mineral exploration receive area-wide status as a "designated use," when habitat, subsistence, and recreation, which in fact are much more area-wide, do not deserve area-wide status as "designated uses."

- *Can DNR explain its decision that subsistence, recreation and habitat must be treated as "prohibited uses" anywhere that they are in irreconcilable conflict with mining (or mere mineral exploration) on the above described 9.4 million acres?*

II. The legislature should support refuge or critical habitat legislation, because DNR's 2005 Bristol Bay Area Plan appears to be fatal to any federal environmental impact statement that would support issuance of permits for a Pebble mine.

A Pebble mine will require federal permits. The possible issuance of these permits will trigger an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). NEPA regulations provide:

> (d) To better integrate environmental impact statements *into State or local planning processes*, statements *shall discuss any inconsistency of a proposed action with any approved State* or local *plan and laws* (whether or not federally sanc-

[12] These 9.4 million acres are classified as "resource management land."

[13] 2005 BBAP, p. A-10, defining "prohibited use"; *see also id.* at pp. 2-2 – 2-3, 3-2, and 11 AAC 55.040(c).

[14] This point cannot be overemphasized. By law, agencies must engage in reasoned decision-making. It is not reasonable to assume that valuable minerals are found on all 12 million acres of state land in the Bristol Bay drainages.

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> tioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.[15]

Presently, under the 2005 BBAP, the only way that any application for permit would arrive in front of any federal, state or local agency is if the land remains classified as *solely mineral land*, because any other basis will require a new Bristol Bay Area Plan. All alternatives in an EIS that would permit a Pebble mine under the 2005 BBAP must be based upon the land at Pebble being classified solely as *mineral land* by the 2005 BBAP. As long as the 2005 BBAP remains in effect, an EIS will face the following problem:

If the EIS recommends an alternative that would permit a Pebble mine, then the EIS would necessarily be *consistent* with the 2005 BBAP with respect to the land at Pebble being classified solely as mineral land (and presumably with respect to many matters involving DNR's inventory, land classifications, statements of intent, or guidelines in the 2005 BBAP). But federal regulations at 40 CFR § 1501(b) also require that federal procedures on an EIS –

> must *insure* that environmental information is *available to public officials and citizens* before decisions are made and before actions are taken. The information must be of *high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential* to implementing NEPA.[16]

The EIS must *insure* that information about the methods that DNR employed in the 2005 BBAP to reclassify land, including at Pebble, is *available* to the public and to other agencies. Thus, the draft EIS released to the public and other agencies is legally bound to disclose that:

(1) DNR's 2005 BBAP uses a predominantly *marine*-related list of fish and wildlife categories to designate *inland upland* habitat;
(2) DNR's 2005 BBAP *omits* moose and caribou from the list of fish and wildlife categories used to designate habitat;
(3) DNR's 2005 BBAP limits habitat to that which is necessary to prevent *extinction* instead of that which is necessary to supply all user groups on a sustained yield basis;
(4) DNR's 2005 BBAP defines recreation to *exclude sport hunting and sport fishing* for purposes of developing the 2005 BBAP including its land classifications, guidelines and statements of management intent;
(5) DNR has *no* subsistence use classification category;
(6) DNR failed to maintain and rely upon a current inventory of uses, particularly subsistence uses, in developing its 2005 BBAP; and
(7) DNR's 2005 BBAP engages in other legally-questionable methods that are at issue in *Nondalton Tribal Council, et al. v. DNR.*

Moreover, the last thing a federal agency should intend to do is ignore its obligation to disclose the problems that DNR has created in its 2005 BBAP – because to do so will make those problems grounds for a legal challenge to the final EIS.

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[15] 40 CFR § 1506.2(d) (italics added).
[16] 40 CFR § 1501(b) (italics added).

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In other words, if the EIS were to rely on the land at Pebble being classified as solely mineral land by the 2005 BBAP, then the EIS would be *consistent* with the 2005 BBAP, but the EIS would not be legally defensible. It would have to *unreasonably* rely on each of the above DNR actions and inconsistencies, and the EIS would have to disclose that it does so. Hence, the 2005 BBAP is fatal to an EIS that would permit Pebble under the terms of the 2005 BBAP, including land classification of the Pebble area as solely mineral land. Only the "no-action alternative" would remain.[17] Under the no-action alternative, no permits would be issued, at least until DNR revises the Bristol Bay Area Plan.[18]

Thus, for state legislators, any effort to permit a Pebble mine under DNR's current 2005 BBAP is again likely to raise in the EIS process all of the questions which are raised, above.

III. The legislature should support refuge or critical habitat legislation because a Pebble mine may necessitate changes in federal and state subsistence laws that will drive the state and federal government further apart.

The Pebble Limited Partnership predicts that the mine will require several thousand workers to build it, and a thousand workers to operate it. This increased activity will bring additional residents to the area in other roles, also. Even if mining permit stipulations could protect fish and wildlife habitat, significant increases in the number of local rural residents, in access demands, and in secondary development are likely to increase competition for subsistence resources. A Pebble mine may increase pressure (which already exists) to revise federal subsistence law to be protect only Alaska Native people, and to apply it more broadly than only on federal land (*i. e.*, to Native corporation lands also). Doing so would drive state and federal governments further apart on subsistence law.[19]

Most of the central provisions of State and federal subsistence laws were drafted nearly thirty years ago. Both provide two "tiers" of a subsistence preference (16 U.S.C. § 3114; AS 16.05.258), but they differ with respect to who can participate. Federal law limits subsistence on federal lands to *rural* Alaska residents. State law allows *all* Alaskans to qualify, preliminarily,

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[17] Every EIS must contain a "no action alternative." 40 CFR 1502.14(d).

[18] Federal agencies do not determine land classifications, guidelines and statements of management intent under state law. It should now be obvious to supporters of a Pebble mine that DNR's 2005 BBAP has created problems for the Pebble Partnership, and for federal and state agencies that will prepare and participate in the EIS process.

[19] Congress probably could adopt a "Native only" subsistence provision under the Indian Powers clauses of the US Constitution, but the Alaska legislature cannot do so under the Alaska Constitution. This distinction between federal and state constitutional powers may create pressure on Congress to redefine subsistence as for "Natives only" and then perhaps to protect and regulate subsistence on both federal and Native lands. This would be very divisive among state residents, but a proposed Pebble mine is likely to add to pressures to do so. The only alternative to such a course may be state legislation that establishes a state fish and game refuge or critical habitat area on most state lands in the Kvichak and Nushagak drainages. Such legislation would have to be carefully drafted. Its probably would have to be drafted to (1) protect habitat and commercial, subsistence and recreational uses, *including* "productivity" for subsistence users, and (2) allow a Pebble mine only if compatible with these purposes.

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for subsistence on non-federal lands.[20] Under both schemes, when the total harvest by subsistence and other users of a fish or game stock exceeds sustained yield, the Tier I preference restricts or eliminates nonsubsistence users. When the subsistence harvest alone exceeds sustained yield, the Tier II preference is triggered and subsistence is restricted by statutory criteria that allocate subsistence opportunities. On federal lands, 16 U.S.C. § 3114 allocates subsistence opportunities by three criteria: (1) customary and direct dependence on the populations as the mainstay of livelihood; (2) local residency; and (3) availability of alternative resources. The State, however, must avoid local residency criteria as being unconstitutional under the Alaska Constitution. These distinctions in who can hunt and fish in particular situations have divided Alaskans and are known colloquially as the "subsistence dilemma."

Pebble mine, and all agencies involved in an EIS on Pebble mine, are likely to be caught upon the horns of this dilemma, because the Bristol Bay drainages (unlike locations of other large mines in Alaska) are the source of world-class fish and game resources (*e.g.*, salmon, trout, char, grayling, pike, lake trout, caribou, moose, and bears) that attract users locally, regionally, nationally, and internationally. No other large Alaskan mine is located in a region that does so. Because of this distinction, Pebble and associated development are likely to increase the number of new local rural residents, visitors from Alaska and perhaps elsewhere, and secondary development.[21] Because of the pattern of land ownership, new local residents are likely to settle in the vicinity of Iliamna, Newhalen and Nondalton. However, their uses of lands and resources will reach beyond, to state lands in the Kvichak and Nushagak drainages (and to private land, including Native land, with and without permission) where state subsistence law applies, and to federal land (Lake Clark and Katmai nationals parks and preserves, and BLM lands) where federal subsistence law applies. The Pebble Partnership may restrict fishing or hunting by employees while at the mine site, but it cannot limit the development of private land, or the activities of new local residents who are either not its employees, or are visitors. Even well-intentioned restrictions on access to protect subsistence uses of resources tend to be transitory and ineffective (*e.g.*, the Dalton Highway, formerly "the North Slope Haul Road" is now open to public use).

With respect to federal law, the *new* local residents will be *rural* residents for purposes of subsistence in federal parks and preserves and BLM lands. They will compete with *current* rural residents and visitors. This has implications for the EIS and Tier I and Tier II subsistence preferences under state and federal subsistence laws. First, as the *total* number of rural residents increases, the Federal Subsistence Board is likely to restrict or eliminate sport hunting in the federal Lake Clark and Katmai Preserves where sport hunting has been allowed. Second, when subsistence demand of all (new and current) rural residents surpasses sustained yield of a fish or game population (most likely a game population) on federal land, some rural residents will be disqualified under the criteria at 16 U.S.C. § 3114. However, the local-residency criterion will not be particularly effective, because new and current rural residents will *all* be "local rural residents." The first and third criteria – *i.e.*, (1) customary and direct dependence as the mainstay

[20] *McDowell v. State*, 785 P.2d 1 (Ak. 1989)(Alaska constitution bars State from limiting subsistence to rural residents).

[21] For reasons not addressed here, additional visitors may not result in more commerce, because resource and industrial development may alter recreational trip durations, expenses, activities and visitor demographics.

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of livelihood; and (3) availability of alternative resources – will disqualify some subsistence users on federal lands, not unlike the disqualification that occurs under the State's divisive and controversial Tier II hunts. Hence, *current* rural residents may experience increased competition, diminished subsistence opportunity, and disqualification on federal lands, because of an influx of *new* rural residents.[22]

With respect to state subsistence law, conflicts are likely to be more intense because all Alaska residents qualify for subsistence on nonfederal lands. Some game populations, such as Mulchatna caribou and Nushagak moose, may have to be managed as Tier II state subsistence hunts, in which all sport hunters and many subsistence hunters would be excluded.

Therefore, when legislators consider issues that involve the permitting of a Pebble mine under DNR's current 2005 BBAP, it will raise this additional question:

- *Is Pebble mine worth the further division among Alaskans that will arise from increased pressure to make federal subsistence law "Native only" and applicable to federal and Native lands?*

IV. The legislature should support refuge or critical habitat legislation because the economic production from fish and game in the Kvichak and Nushagak drainages surpasses that from all other refuges in the United States.

Duffield et al. estimate that total direct expenditures/sales in the Alaskan regional economy resulting from commercial, recreational, subsistence and nonconsumptive use of fish and wildlife in the Bristol Bay drainages were approximately $324 million in 2005.[23] By way of comparison, the U. S. Fish and Wildlife Service has estimated that total direct expenditures/sales in the regional economies from consumptive and nonconsumptive use of fish and wildlife in all 548 national wildlife refuges in the nation totaled almost $1.7 billion in 2006.[24] Thus, the regional expenditures and sales derived from fish and wildlife of the Bristol Bay drainages is equal to approximately 20 percent of the total regional expenditures and sales derived from all of the 548 national wildlife refuges in the United States.

The Kvichak drainage is historically the most productive for sockeye salmon, and therefore the most economically productive; and the Nushagak drainage is historically the most productive for other salmon species.[25] Although not all of the fish-and-wildlife-related

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[22] None of this implies that impacts of population are limited to subsistence. For reasons not addressed here, commercial and recreational fishing may also suffer impacts arising from increased population.

[23] See Duffield et al., Economics of Wild Salmon Watersheds: Bristol Bay, Alaska 15 *at* http://www.housemajority.org/coms/hfsh/trout_unlimited_report.pdf (Feb. 2007) (last visited Jan. 6, 2010).

[24] See Carver & Caudill, USFWS, Div. of Economics, Banking on Nature 2006: The Economic Benefits to Local Communities of National Wildlife Refuge Visitation ES-ii (2007), http://www.fws.gov/refuges/policyMakers/BankingOnNature.html.

[25] ALASKA DEP'T OF FISH AND GAME, SOCKEYE SALMON [hereinafter SOCKEYE SALMON], http://www.adfg.state.ak.us/pubs/notebook/fish/sockeye.php (1994); R. ERIC MINARD, EFFORT

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expenditures and sales in the Bristol Bay drainages are attributable to the Kvichak and Nushagak drainages, they appear to surpass the economic production of every other state and federal refuge in the United States. The reason is that the Kvichak and Nushagak drainages produce salmon in sustainable commercial quantities.

In addition, measuring expenditures and sales does not capture the net economic value of subsistence.[26] Duffield estimates that subsistence harvest of fish and game accounts for 2.4 million pounds of subsistence harvest per year for an average of 315 pounds per person annually,[27] and that this results in an estimated net economic value annually of between $78 and $143 million.[28]

When legislators consider issues that involve the permitting of a Pebble mine under DNR's current 2005 BBAP, it will raise this additional question:

- *Why has the legislature to date designated most state refuges and critical habitat areas (mostly for the purpose of game protection) in areas that do not produce nearly as much economic benefit from wildlife as the Kvichak and Nushagak drainages, which the legislature has yet to designate and protect?*

V. The legislature should support refuge or critical habitat legislation because the Pebble Limited Partnership has, in effect, embraced the central provisions of such legislation.

The central provisions of modern refuge statutes, including Alaska's, are the "refuge purposes" and the "compatibility test." Refuge purposes generally are to protect fish and wildlife, their habitats and public uses of fish and game, particularly subsistence, commercial and sport fishing, hunting, etc. The compatibility test allows non-refuge uses, such as mining on pre-existing mining claims, but only if compatible with refuge purposes.[29] Under Alaska's state refuge statutes, ADF&G is the chief land manager, and DNR retains subordinate authority. Alaska statutes creating critical habitat areas are similar.

In 2007, Senator Gary Stevens introduced the "Jay Hammond Refuge Bill" (SB 67, 25th Alaska Legislature). Thereafter, the Pebble Limited Partnership announced its "core principles" for developing the mine. The Partnership declared:

AND CATCH STATISTICS FOR THE CHINOOK SALMON (ONCORHYNCHUS TSHAWYTSCHA) SPORT FISHERY IN THE LOWER NUSHAGAK RIVER, 1986, 1 FISHERY DATA SERIES NO. 15, *available at* http://www.sf.adfg.state.ak.us/FedAidPDFs/fds-015.pdf (Oct. 1987).

[26] See Duffield et al., at 15 – 16.

[27] Duffield et al., at 84 – 85.

[28] Duffield et al., at 107 – 108.

[29] AS 16.20.036(c) (Susitna Flats St. Refuge); AS 16.20.037(b)(3) (Minto Flats St. Refuge); AS 16.20.033(b)(3) (Yakataga St. Refuge); AS 16.20.041(b)(3) (McNeil River St. Refuge); 16 U.S.C. § 668dd(d) (compatibility test for national wildlife refuges).

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"If a mine cannot be designed that protects the water, fisheries, and wildlife resources of Bristol Bay, it will not be built."[30]

"Pebble will be . . . engineered to protect all things Alaskans value. Or it won't be built at all."[31]

"Fish come first. We simply won't develop Pebble if it harms commercial, subsistence or sport fishing in this remarkable region."[32]

"We simply will not develop a mine that damages Alaska's fish and wildlife."[33]

"We will not be associated with the development of a mine that damages Alaska's Bristol Bay fishery and wildlife, or those in the communities whose livelihoods depend on those resources. If the mine cannot be developed in a way that provides proper protections, we will not build it."[34]

"If the mine cannot be planned in a way that provides proper protections, it should not be built."[35]

Such statements clearly appear to support the purposes of protecting habitat and public uses of fish and game, and pledge to not build a Pebble mine if it is incompatible with those purposes. Therefore the Pebble Partnership is on record as supporting what would be the *purposes* and *compatibility test* of any refuge legislation.

Moreover, such statements have meaning only if they have legal effect. To oppose such legislation, the Partnership would have to support the issuance of permits under DNR's 2005 BBAP that –

(a) *lacks a subsistence land use classification category* for subsistence hunting and fishing, when DNR has a "public recreation land" classification category that includes sport hunting and sport fishing;

(b) *omits moose and caribou* from the process of designating habitat;

(c) uses a predominantly *marine-related* list of "fish and wildlife categories" to limit the designation of *inland uplands* habitat, including at and in the vicinity of Pebble;

(d) extinguishes prior habitat classifications on (i) the western half of Iliamna Lake into which the Pebble claims drain, (ii) the caribou calving grounds of the Mulchatna herd which

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[30] PEBBLE PARTNERSHIP, SETTING EACH PIECE IN PLACE (quoting C. Carroll, CEO, Anglo American), http://www.pebblepartnership.com/files/5%20Principles%20Mosaic.pdf.

[31] PEBBLE PARTNERSHIP, NOT YOUR GRANDFATHER'S COPPER MINE, http://www.pebblepartnership.com/files/Pebble%204%20Science.pdf.

[32] PEBBLE PARTNERSHIP, FISH COME FIRST, http://www.pebblepartnership.com/files/Pebble%203%20Fish.pdf.

[33] *Id.* (quoting C. Carroll, CEO, Anglo American).

[34] C. Carroll, Editorial, *Pebble Partnership Promises Responsible Development*, ANCHORAGE DAILY NEWS, 12-1-07, http://dwb.adn.com/opinion/compass/story/9490777p-9401615c.html.

[35] C. Carroll, CEO, Anglo American plc, speech to Resource Development Council, in Anchorage, Alaska (10-23-07) http://www.pebblepartnership.com/related_media/speech.pdf.

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include the Pebble claims, and (iii) all essential moose winter habitat proximate to the Pebble claims;

(e) limits habitat to that necessary to prevent *extinction* and a "*permanent loss*" of sustained yield, instead of that which is necessary to *supply and continue* sustained yield; and

(f) defines "recreation" to *exclude sport hunting and fishing* for purposes of developing the 2005 BBAP, including land classification at and in the vicinity of Pebble.

The Partnership may contest other elements of refuge or critical habitat area legislation (such as provisions that would ban or otherwise address metallic sulfide mining), but it does not appear to be in a position to oppose the central provisions of such legislation, because the Partnership has already, in effect, embraced them through its numerous public statements..

CONCLUSION

Unless the legislature enacts new law, any permits issued by DNR will depend on statutes replete with wide-open agency discretion,[36] and the demonstrably deficient 2005 BBAP, which –

(1) uses predominantly marine criteria to designate habitat on inland uplands;

(2) omits moose and caribou from those criteria;

(3) limits habitat to that which is necessary to prevent extinction;

(4) extinguishes prior habitat classifications on the western half of Iliamna Lake into which the Pebble claims drain, on the caribou calving grounds of the Mulchatna herd which include the Pebble claims, and on all essential moose winter habitat proximate to the Pebble claims;

(5) has no subsistence land use classification category when there is one for sport hunting and sport fishing; but then defines recreation to exclude sport hunting and sport fishing.

Legislators, and for that matter all Alaskans, should consider whether those are appropriate methods for permitting a Pebble mine, and for that matter whether DNR is the appropriate land management agency for most state land in the Kvichak and Nushagak drainages.

[36] *See* Parker, et al., Pebble Mine: Fish, Minerals and Testing the Limits of Alaska's Large Mine Permitting Process, Alaska Law Rev., Vol. XXV No. 1 (June 2008) 21-31.

EPA-7609-0000697-0027

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SEVENTH LEGISLATURE – FIRST SESSION

BY

Introduced:
Referred:

A BILL
FOR AN ACT ENTITLED

"An Act establishing the Jay Hammond Alaskan Heritage State Fish and Game Refuge and conserving fish, game, public lands and public uses of them in Southwest Alaska."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Sec. 1.** AS 16.20 is amended by adding a new section to read:

Sec. 16.20.045. Jay Hammond Alaskan Heritage State Fish and Game Refuge. (a) The state owned surface and subsurface land and water and interests therein, including those that may be acquired by the state in the future, within the following described boundaries are designated as the Jay Hammond Alaskan Heritage State Fish and Game Refuge: Beginning at the SE corner T. 7S., R. 54W., S. M., at the boundary of Wood-Tikchik State Park, which is the True Point of Beginning; thence northerly following that boundary in a northerly, easterly, and westerly direction to a point where said boundary first intersects the drainage divide between the Nushagak River and Kuskokwim River drainages; thence in an easterly, northerly, westerly and southerly direction following that drainage divide to the boundary of Lake Clark National Park and Preserve; thence in a southerly, easterly, westerly, and northerly direction following that boundary to the boundary of the Lake and Peninsula Borough; thence southerly and westerly following that Borough boundary to the SW corner of T. 5S., R. 26W., S. M.; thence southerly to the SW corner of T. 6S., R. 26W., S. M.; thence west to the Borough boundary; thence southerly and westerly following that boundary to the boundary of Katmai National Park and Preserve; thence northerly, westerly, southerly and easterly following the boundary of that Park and Preserve to the township line separating Township 14 from Township 15, S. M.; thence west following that township line to the SW corner of T. 14S., R. 42W., S. M.; thence north to the NW corner of T. 13S., R. 42W., S. M.; thence west to the SW corner of T. 12S., R. 42W., S. M.; thence north to the SE corner of Section 24, T. 11S., R. 43W., S. M.; thence northerly, westerly and southerly, following the boundary of land in Native ownership as of the date of enactment of this Act to the SW corner of T. 11S, R. 45W., S. M.; thence west to the SW corner of T. 11S., R. 52W., S. M.; thence north to the NE corner of Section 24, T. 11S., R. 53W., S. M.; thence west to the NW corner of Section 19, T. 11S, R. 53W., S. M.; thence north to the NW corner of Section 30, T. 10S., R. 53W., S. M.; thence east to the NE corner of Section 30, T. 10S., R. 53W., S. M.; thence north to the NE corner of Section 7, T. 10S., R. 53W., S. M.; thence westerly to the SW corner of Section 4, T. 10S., R. 54W., S. M.; thence northerly and easterly following the boundary of land in Native ownership as of the date of enactment of this Act to the SW corner of Section 36,

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T. 8S., R. 53W., S. M.; thence east to the SW corner of T. 8S., R. 52W., S. M.; thence north to the NW corner of T. 8S., R. 52W., S. M.; and thence west to the True Point of Beginning; but excluding from the above-described tract of land any private land including Native-owned land, and further excluding state-owned land that has previously been improved or dedicated for schools, roads, airports, utilities, public facilities, materials sites, or other governmental purposes.

(b) The refuge shall be managed to achieve the following primary purposes:

(1) protect fish and wildlife habitat and populations, including salmon and trout spawning and rearing habitats, and caribou, moose, and brown bear habitats; and

(2) protect public uses of fish, wildlife and their habitat, particularly for subsistence, commercial, and recreational fishing, hunting, trapping, viewing, and public recreation in a high quality natural environment.

(c) The use or disposition by the state of other natural resources may be permitted only if such activities are compatible with the purposes stated in subsections (b)(1) and (b)(2).

(d) Subject to valid existing rights, the lands and waters of the refuge are closed under authority of AS 38.05.185 - 38.05.275 to mineral entry. State land or water within the refuge may not be sold, transferred or exchanged without legislative approval.

(e)(1) Within the refuge, no state agency may issue a permit for a metallic sulfide mining operation. In the event that a court of competent jurisdiction issues a final decision holding that this paragraph takes without compensation any mining claims that, if developed, would result in a metallic sulfide mining operation, then appropriate state agencies may issue permits under paragraphs (2) through (4) of this subsection, to avoid an uncompensated taking.

(2) A state agency may issue permits, authorizations and approvals necessary for a metallic sulfide mining operation only if:

(A) the agency uses the precautionary approach defined by this section, and the commissioner of fish and game concurs with how the agency used the precautionary approach; and

(B) the applicant proves by clear and convincing evidence, and the commissioner of fish and game finds, that –

(i) a comparable metallic sulfide mine of similar size and in a similar environment has operated for at least ten years without adverse impacts to fish or water quality and quantity, and that a comparable mine of similar size and in a similar environment has been closed for at least ten years without adverse impacts to fish and water quality and quantity;

(ii) the proposed mining operation – (a) is compatible with the purposes in (b)(1) and (b)(2); (b) will not directly, indirectly or cumulatively adversely affect water, fish or wildlife exceeding existing baseline conditions; (c) will not contribute significantly to increased pressure on fish and game resources or competition among user groups; and (d) will not adversely affect the opportunities of persons who have engaged in subsistence, commercial, or sport use of fish and game, trapping, or the lodge, guiding and tourism industries to continue to do so without diminished productivity; and

(iii) the proposed mining operation will not require long-term or perpetual care or storage or disposal of mining wastes within the refuge

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boundary. Such a finding at the time of permitting shall not prevent the state from requiring long-term or perpetual care, monitoring, or removal of mining wastes from the refuge, if such requirements become necessary during construction and operation or after closure of the mine.

(3) Notwithstanding any other law, before the commissioner makes any decision under paragraph (e)(2), and before any state agency issues a permit, lease, authorization or approval for a metallic sulfide mining operation or associated facilities within the refuge, the agency shall:

(A) issue public notice and afford opportunities for public comment for a period of at least 90 days;

(B) respond in writing to comments received, and provide scientific or technical support for its responses; and

(C) provide for administrative appeals from final agency decisions, under AS 44.62.330-.630. An aggrieved person may appeal administratively and thereafter seek judicial review, or may file a complaint in Superior Court without exhausting administrative remedies. Any final agency decision shall be stayed during administrative or judicial proceedings.

(4) In this subsection –

(A) "long-term or perpetual care" (i) means the deliberate dewatering of surface or ground water, in a reasonably consistent manner over a period of time, to prevent water pollution, including acid mine or acid rock drainage, from entering or occurring in waters used by salmon; and (ii) includes any unbonded or uninsured water treatment, including passive means such as lime;

(B) "metallic sulfide mining operation" means a mining operation in which sulfides and iron are present in mined, processed or excavated rock, including pyrite, chalcopyrite and bornite, or is for (i) antimony, arsenic, copper, iron, lead, mercury, molybdenum, nickel, palladium, platinum, silver, or zinc; or (ii) gold associated with any mineral listed in (i) of this definition, but this definition does not include placer mining operations or the methods of placer mining.

(C) "precautionary approach" means that agency decisions shall –

(i) err on the side of conservation and the public interest when evidence is uncertain, by using conservative assumptions;

(ii) shift burdens of proof to the applicant;

(iii) use prudent foresight taking into account uncertainties in fish, wildlife and habitat management and the biological, social, cultural, and economic risks;

(iv) consider the needs of future generations and avoid potentially irreversible changes;

(v) undertake prior identification of undesirable outcomes and of measures that will avoid undesirable outcomes or correct them promptly should they occur;

(vi) initiate any necessary corrective measure without delay and prompt achievement of the measure's purpose, on a time scale not exceeding five years, which is approximately the generation time of most salmon species; and

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(vii) where the impact of resource use is uncertain, but likely presents a reasonably measurable risk to sustained yield, priority shall be given to conserving the productive capacity of the resource.

(f) Except as is provided in (a) - (e) of this section, the Department of Fish and Game and the Department of Natural Resources shall exercise their respective authorities over the refuge consistent with a management plan prepared by the Department of Fish and Game, in consultation with the Department of Natural Resources.

(g) The state may not acquire by eminent domain private land, including Native-owned land, located within the boundary of the refuge. The state may acquire private and other public land lying within the refuge boundary by purchase, exchange, or otherwise from willing owners for inclusion in the refuge. Municipally owned land within the refuge boundary may be included in the refuge for management purposes by mutual agreement between the municipal landowner and the Department of Fish and Game.

(h) Establishment of the refuge shall not impair valid Native allotment applications under the Alaska Native Allotment Act, 43 U.S.C. Sections 270-1 through 270-3, pending with the United States before the effective date of this Act, and shall not impair reasonable surface access to allotment tracts and to other private real property lying within the exterior boundaries of the refuge.

(i) The Department of Fish and Game shall allow fishing, hunting, and trapping within the refuge under state and federal statutes and regulations. The department shall also permit support activities normally associated with recreational, guided, and subsistence hunting, and sport, commercial and subsistence fishing, and trapping, where reasonably necessary and consistent with the purposes of this section, including aircraft support, light (ATV) off-road vehicle use, and landing strips. The department may establish a citizens' advisory commission to make recommendations to it regarding management of the refuge.

* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INITIAL MANAGEMENT PLAN. The Department of Fish and Game shall complete the initial management plan for the Jay Hammond Alaskan Heritage State Fish and Game Refuge to be prepared under AS 16.20.045(f) within two years after the effective date of this Act.

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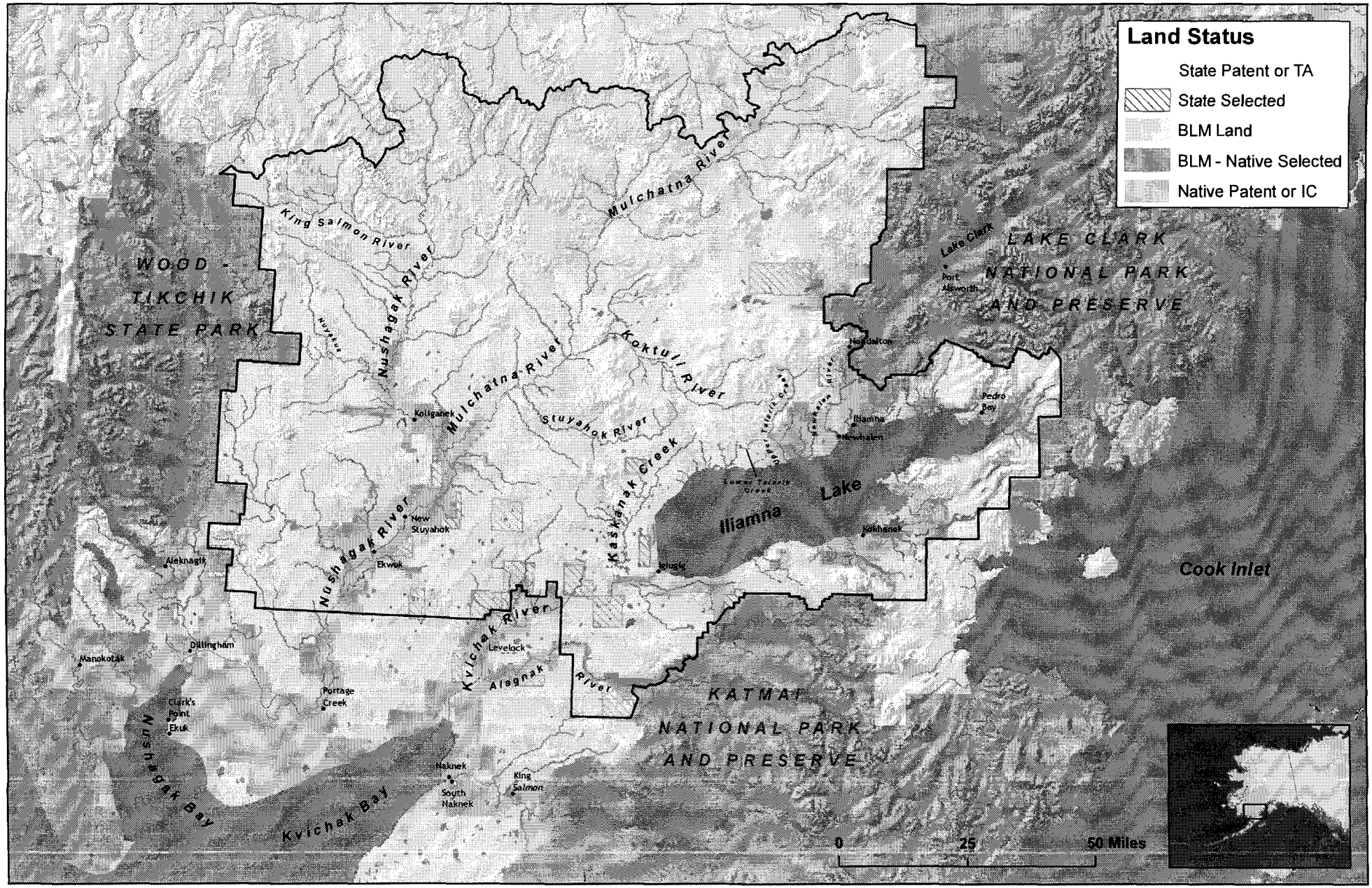
Land Status
State Patent or TA
State Selected
BLM Land
BLM - Native Selected
Native Patent or IC
WOOD - TIKCHIK STATE PARK
LAKE CLARK NATIONAL PARK AND PRESERVE
KATMAI NATIONAL PARK AND PRESERVE
Lake Iliamna
Cook Inlet
Kvichak Bay
Nushagak Bay
Mulchatna River
King Salmon River
Nushagak River
Koktuli River
Stuyahok River
Kaskanak Creek
Kvichak River
Alagnak River
Koliganek
New Stuyahok
Ekwok
Aleknagik
Dillingham
Manokotak
Clark's Point
Ekuk
Portage Creek
Levelock
Naknek
South Naknek
King Salmon
Iliamna
Newhalen
Pedro Bay
Kokhanok
Igiugig
Port Alsworth
Lake Clark
0
25
50 Miles

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SEVENTH LEGISLATURE – FIRST SESSION

BY

Introduced:
Referred:

A BILL
FOR AN ACT ENTITLED

"An Act establishing the Jay Hammond Alaskan Heritage Critical Habitat Area and conserving fish, game, public lands and public uses of them in Southwest Alaska."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Sec. 1.** AS 16.20 is amended by adding a new section to read:

Sec. 16.20.635. Jay Hammond Alaskan Heritage Critical Habitat Area established. (a) The state owned surface and subsurface land and water and interests therein, including those that may be acquired by the state in the future, within the following described boundaries are designated as the Jay Hammond Alaskan Heritage State Fish and Game Refuge: Beginning at the SE corner T. 7S., R. 54W., S. M., at the boundary of Wood-Tikchik State Park, which is the True Point of Beginning; thence northerly following that boundary in a northerly, easterly, and westerly direction to a point where said boundary first intersects the drainage divide between the Nushagak River and Kuskokwim River drainages; thence in an easterly, northerly, westerly and southerly direction following that drainage divide to the boundary of Lake Clark National Park and Preserve; thence in a southerly, easterly, westerly, and northerly direction following that boundary to the boundary of the Lake and Peninsula Borough; thence southerly and westerly following that Borough boundary to the SW corner of T. 5S., R. 26W., S. M.; thence southerly to the SW corner of T. 6S., R. 26W., S. M.; thence west to the Borough boundary; thence southerly and westerly following that boundary to the boundary of Katmai National Park and Preserve; thence northerly, westerly, southerly and easterly following the boundary of that Park and Preserve to the township line separating Township 14 from Township 15, S. M.; thence west following that township line to the SW corner of T. 14S., R. 42W., S. M.; thence north to the NW corner of T. 13S., R. 42W., S. M.; thence west to the SW corner of T. 12S., R. 42W., S. M.; thence north to the SE corner of Section 24, T. 11S., R. 43W., S. M.; thence northerly, westerly and southerly, following the boundary of land in Native ownership as of the date of enactment of this Act to the SW corner of T. 11S, R. 45W., S. M.; thence west to the SW corner of T. 11S., R. 52W., S. M.; thence north to the NE corner of Section 24, T. 11S., R. 53W., S. M.; thence west to the NW corner of Section 19, T. 11S, R. 53W., S. M.; thence north to the NW corner of Section 30, T. 10S., R. 53W., S. M.; thence east to the NE corner of Section 30, T. 10S., R. 53W., S. M.; thence north to the NE corner of Section 7, T. 10S., R. 53W., S. M.; thence westerly to the SW corner of Section 4, T. 10S., R. 54W., S. M.; thence northerly and easterly following the boundary of land in Native ownership as of the date of enactment of this Act to the SW corner of Section 36,

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T. 8S., R. 53W., S. M.; thence east to the SW corner of T. 8S., R. 52W., S. M.; thence north to the NW corner of T. 8S., R. 52W., S. M.; and thence west to the True Point of Beginning; but excluding from the above-described tract of land any private land including Native-owned land, and further excluding state-owned land that has previously been improved or dedicated for schools, roads, airports, utilities, public facilities, materials sites, or other governmental purposes.

(b)(1) Within the above-described area, no state agency may issue a permit for a metallic sulfide mining operation. In the event that a court of competent jurisdiction issues a final decision holding that this paragraph takes without compensation any mining claims that, if developed, would result in a metallic sulfide mining operation, then appropriate state agencies may issue permits under paragraphs (2) through (4) of this subsection, to avoid an uncompensated taking.

(2) A state agency may issue permits, authorizations and approvals necessary for a metallic sulfide mining operation only if:

(A) the agency uses the precautionary approach defined by this section, and the commissioner of fish and game concurs with how the agency used the precautionary approach; and

(B) the applicant proves by clear and convincing evidence, and the commissioner of fish and game finds, that –

(i) a comparable metallic sulfide mine of similar size and in a similar environment has operated for at least ten years without adverse impacts to fish or water quality and quantity, and that a comparable mine of similar size and in a similar environment has been closed for at least ten years without adverse impacts to fish and water quality and quantity;

(ii) the proposed mining operation – (a) is compatible under AS 16.20.500 with the Critical Habitat Area; (b) will not directly, indirectly or cumulatively adversely affect water, fish or wildlife exceeding existing baseline conditions; (c) will not contribute significantly to increased pressure on fish and game resources or competition among user groups; and (d) will not adversely affect the opportunities of persons who have engaged in subsistence, commercial, or sport use of fish and game, trapping, or the lodge, guiding and tourism industries to continue to do so without diminished productivity; and

(iii) the proposed mining operation will not require long-term or perpetual care or storage or disposal of mining wastes within the Critical Habitat Area boundary. Such a finding at the time of permitting shall not prevent the state from requiring long-term or perpetual care, monitoring, or removal of mining wastes from the area, if such requirements become necessary during construction and operation or after closure of the mine.

(3) Notwithstanding any other law, before the commissioner makes any decision under paragraph (e)(2), and before any state agency issues a permit, lease, authorization or approval for a metallic sulfide mining operation or associated facilities within the refuge, the agency shall:

(A) issue public notice and afford opportunities for public comment for a period of at least 90 days;

(B) respond in writing to comments received, and provide scientific or technical support for its responses; and

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(C) provide for administrative appeals from final agency decisions, under AS 44.62.330-.630. An aggrieved person may appeal administratively and thereafter seek judicial review, or may file a complaint in Superior Court without exhausting administrative remedies. Any final agency decision shall be stayed during administrative or judicial proceedings.

(4) In this subsection –

(A) "long-term or perpetual care" (i) means the deliberate dewatering of surface or ground water, in a reasonably consistent manner over a period of time, to prevent water pollution, including acid mine or acid rock drainage, from entering or occurring in waters used by salmon; and (ii) includes any unbonded or uninsured water treatment, including passive means such as lime;

(B) "metallic sulfide mining operation" means a mining operation in which sulfides and iron are present in mined, processed or excavated rock, including pyrite, chalcopyrite and bornite, or is for (i) antimony, arsenic, copper, iron, lead, mercury, molybdenum, nickel, palladium, platinum, silver, or zinc; or (ii) gold associated with any mineral listed in (i) of this definition, but this definition does not include placer mining operations or the methods of placer mining.

(C) "precautionary approach" means that agency decisions shall –

(i) err on the side of conservation and the public interest when evidence is uncertain, by using conservative assumptions;

(ii) shift burdens of proof to the applicant;

(iii) use prudent foresight taking into account uncertainties in fish, wildlife and habitat management and the biological, social, cultural, and economic risks;

(iv) consider the needs of future generations and avoid potentially irreversible changes;

(v) undertake prior identification of undesirable outcomes and of measures that will avoid undesirable outcomes or correct them promptly should they occur;

(vi) initiate any necessary corrective measure without delay and prompt achievement of the measure's purpose, on a time scale not exceeding five years, which is approximately the generation time of most salmon species; and

(vii) where the impact of resource use is uncertain, but likely presents a reasonably measurable risk to sustained yield, priority shall be given to conserving the productive capacity of the resource.

(c) The state may not acquire by eminent domain private land, including Native-owned land, located within the boundary of the Critical Habitat Area. The state may acquire private and other public land lying within the Critical Habitat Area boundary by purchase, exchange, or otherwise from willing owners for inclusion in the area. Municipally owned land within the Critical Habitat Area boundary may be included in the Critical Habitat Area by mutual agreement between the municipal landowner and the Department of Fish and Game.

(d) Establishment of the Critical Habitat Area shall not impair valid Native allotment applications under the Alaska Native Allotment Act, 43 U.S.C. Sections 270-1 through 270-3, pending with the United States before the effective date of this Act, and

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shall not impair reasonable surface access to allotment tracts and to other private real property lying within the exterior boundaries of the area.

(e) The Department of Fish and Game shall allow fishing, hunting, and trapping within the Critical Habitat Area under state and federal statutes and regulations. The department shall also permit support activities normally associated with recreational, guided, and subsistence hunting, and sport, commercial and subsistence fishing, and trapping, where reasonably necessary and consistent with the purposes of this section, including aircraft support, light (ATV) off-road vehicle use, and landing strips. The department may establish a citizens' advisory commission to make recommendations to it regarding management of the area.

* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INITIAL MANAGEMENT PLAN. The Department of Fish and Game shall complete the initial management plan for the Jay Hammond Alaskan Heritage Critical Habitat Area within two years after the effective date of this Act.

EPA-7609-0000697-0036