

# THE CLEAN WATER INITIATIVES AND THE PROPER BALANCE BETWEEN THE RIGHT TO BALLOT INITIATIVES AND THE PROHIBITION ON APPROPRIATIONS

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## ABSTRACT

*The Alaska Constitution grants its citizens the right to ballot initiatives, but the right is limited: initiatives may not “make or repeal appropriations.” To determine whether a proposed initiative is an appropriation, Alaska courts use a two-step test that determines, first, whether an initiative deals with a state asset and, second, whether the initiative involves a giveaway or would strip the legislature of its control over state assets. This test is incomplete, however, because it does not properly consider Article XI, sections 4 and 6 of the Alaska Constitution, which give the legislature a strong check on the initiative process. The Author proposes a test that would limit the finding of giveaways to situations in which the voters themselves materially benefit from an initiative. The test would hold an initiative unconstitutional when it permanently robs the legislature of its discretion over state assets. The Author then applies this new test in a case study utilizing the recent Clean Water Initiatives.*

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## INTRODUCTION

On August 26, 2008, Alaska voters went to the polls and rejected Ballot Measure 4, known as the Clean Water Initiative, by a resounding margin. The vote marked the end of an intense legal and political struggle that began more than a year earlier and has resulted in at least a temporary victory for supporters of Pebble Mine. This vote has been so well-publicized both in Alaska and on a national level<sup>1</sup> that, at first glance, there appears to be little left to discuss. However, the saga of the Clean Water Initiative confronted issues that transcend Pebble Mine and

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1. See, e.g., William Yardley, *Vote in Alaska Puts Question: Gold or Fish?*, N.Y. TIMES, Aug. 22, 2008; Elizabeth Bluemink, *Pebble Blog*, ANCHORAGE DAILY NEWS, <http://community.adn.com/adn/blog/61223> (last visited Mar. 28, 2009) (chronicling ADN's Pebble coverage).

strike at the very heart of the right of Alaskans to sponsor and pursue ballot initiatives. In the aftermath of this struggle, it is important to focus on the principles at stake and not merely on the outcome.

Although ballot initiatives are enshrined in the Alaska Constitution, citizens are explicitly prohibited from using the ballot initiative to make appropriations.<sup>2</sup> Though the meaning of “appropriation” is not defined by the constitution, the Alaska Supreme Court has developed an approach to the term that has increasingly restricted the right. Relying on these decisions, the Alaska Attorney General rejected two earlier anti-Pebble initiatives before certifying the third attempt. The litigation that followed appeared to set the stage for the next major decision by the supreme court regarding the contours of the appropriation prohibition. However, shortly before oral argument, the sponsors withdrew the first attempted initiative (Clean Water I) from consideration, leaving the court with the decision of affirming the relatively uncontroversial decision on the third initiative (Clean Water III). One possibility for the withdrawal of Clean Water I was that supporters thought the court would strike down Clean Water I, thereby hurting Clean Water III’s chances. If so, this concern was well-founded since, under the current test employed by the supreme court, it is likely that Clean Water I would be an appropriation.

However, focusing too much on what would happen under the current test obscures the real issue: does that test reflect a correct interpretation of the appropriation prohibition? This Note will argue that the current test does not fully take into account the relationship between the initiative process and the legislature that was envisioned by the text of the Alaska Constitution and the expressed intent of the framers. Part I will provide a brief background on Alaskan ballot initiative law. Part II will summarize the controversy over Pebble Mine and the Clean Water Initiatives. Part III will turn to the development of the doctrine regarding appropriations, and Part IV will identify key constitutional issues overlooked by the current test. Part V will apply these concepts to the current test and, in the process, develop an alternative test that better reflects the text and purpose of the constitution. Finally, Part VI will display the differences between the current and proposed tests by applying them to Clean Water I.

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2. See ALASKA CONST. art. XI, § 7.

## I. BACKGROUND: THE BALLOT INITIATIVE IN ALASKA

The citizen's right to ballot initiatives is found in article XI, section 1 of the Alaska Constitution.<sup>3</sup> Alaskans have taken advantage of this right throughout their history and have passed initiatives on a wide range of issues, including hunting and fishing, English as the state's official language, and medical marijuana.<sup>4</sup> Section 7 prohibits initiatives that make appropriations, dedicate revenues, create or define the jurisdiction of the courts, prescribe the rules of the courts, or enact local or special legislation.<sup>5</sup> The legislature is heavily involved in the process and has the power to preempt an initiative by passing a substantially similar law before the initiative is voted on.<sup>6</sup> It may also repeal any initiative after two years, or amend it at any time.<sup>7</sup>

The initiative process begins with an application to the Lieutenant Governor,<sup>8</sup> who, within sixty days, will either certify the initiative or announce the grounds for its denial, which are limited to problems of form or constitutionality—particularly whether it violates the Section 7 prohibitions.<sup>9</sup> If denied, the only recourse is to redraft the initiative in compliance with the Lieutenant Governor's request or challenge the denial through the courts.<sup>10</sup>

If certified, the sponsors prepare a petition to circulate throughout the state.<sup>11</sup> Within one year of certification the petition must include signatures from a number of voters equal to at least 10% of those who voted in the preceding general election, including 7% of voters in at least three-fourths of the state house districts who voted in the preceding elections.<sup>12</sup> If the petition drive is successful and certified by the

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3. ALASKA CONST. art. XI § 1.

4. See Alaska Division of Elections, Initiatives That Have Been on Alaska's Ballots, <http://ltgov.state.ak.us/elections/initbal.php> (last visited Mar. 28, 2009).

5. ALASKA CONST. art. XI, § 7.

6. ALASKA STAT. § 15.45.210 (2008).

7. ALASKA CONST. art. XI, § 6.

8. The application includes the proposed bill, the bill's title, and the signature of 100 voters as sponsors, three of whom are designated as the initiative committee. ALASKA STAT. §§ 15.45.030–.040 (2008).

9. ALASKA STAT. §§ 15.45.070–.080 (2008).

10. ALASKA CONST. art. XI, § 2.

11. The petition must contain, among other things, the proposed bill, an impartial summary of the bill, the estimated cost of the bill, and a statement of warning that knowingly signing the same bill more than once is a misdemeanor. ALASKA STAT. §§ 15.45.090–.100 (2008). The petition's circulator must be an Alaska resident and may not be paid more than one dollar per signature, nor may any voter be paid to either sign or refrain from signing a petition. ALASKA STAT. §§ 15.45.105–.110 (2008).

12. ALASKA STAT. § 15.45.140 (2008).

Lieutenant Governor, the initiative will be placed on the ballot of the first statewide election held after filing and 120 days after the adjournment of the previous legislative session.<sup>13</sup> A successful initiative becomes effective within 90 days of the election.<sup>14</sup>

## II. THE BATTLE OVER THE CLEAN WATER INITIATIVES

Although the Clean Water Initiatives and Pebble Mine have received wide attention, they are worth discussing here to serve as a refresher and to highlight some of the legal background that has not garnered as much media attention.

### A. Background on Pebble Mine

The history of Pebble Mine began in 1986 when Cominco, a major mining corporation, first began exploration of the area that would become known as Pebble Mine, leading to the discovery of the Pebble West deposit in 1988.<sup>15</sup> By 1992, however, Cominco had essentially abandoned the project, and in 2001, its option to the area was acquired by Northern Dynasty Mining (NDM).<sup>16</sup> Subsequently, on July 31, 2007, NDM joined with Anglo American<sup>17</sup> to form Pebble Partnership, a fifty-fifty partnership to develop Pebble Mine.<sup>18</sup> The other companies with interest in Pebble Partnership are Rio Tinto, which currently owns

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13. ALASKA STAT. § 15.45.190 (2008).

14. ALASKA STAT. § 15.45.220 (2008).

15. See N. Dynasty Minerals Ltd., *The Pebble Project: The Future of U.S. Mining & Metals*, <http://www.northerndynastyminerals.com/ndm/Pebble.asp> (last visited Mar. 28, 2009).

16. *Id.* NDM is a mining company based out of Vancouver, Canada and is a part of the Hunter Dickinson group of companies, a larger organization that deals with various natural resource development projects. See N. Dynasty Minerals, Ltd., *Corporate Profile*, <http://www.northerndynasty.com/ndm/CorporateProfile.asp> (last visited Mar. 28, 2009). NDM appears to exist solely for the development of Pebble Mine. See *id.*

17. Anglo American, based in London, England, is one of the largest mining companies in the world, with annual gross revenues of \$35.7 billion and over 190,000 employees worldwide. See *Anglo American, About Us: At a Glance*, <http://www.angloamerican.co.uk/aa/about/ataglance/> (last visited Mar. 28, 2009).

18. See *Pebble Partnership, Overview and History*, <http://www.pebblepartnership.com/pages/project-information/project-overview.php> (last visited Mar. 28, 2009).

nearly 20% percent of NDM,<sup>19</sup> and Mitsubishi, which acquired a 9.1% stake in NDM on February 16, 2008.<sup>20</sup>

In early 2005, NDM claimed that Pebble West contained 4.1 billion tons of resources, including 42.1 million ounces of gold, 24.6 billion pounds of copper, and 1.4 billion tons of molybdenum and additional silver.<sup>21</sup> In September of that year, NDM announced the discovery of Pebble East, which was, at the time, believed to contain an additional 42.6 billion pounds of copper, 39.6 million ounces of gold and 2.7 billion pounds of molybdenum.<sup>22</sup> According to NDM, the combined haul from these two sites would make Pebble Mine the second largest copper porphyry mine in the world, just behind a mine in Indonesia.<sup>23</sup>

Shortly thereafter, NDM began the permitting process by applying to the Alaska Department of Natural Resources.<sup>24</sup> Although the exact details of the project have not been released, Pebble Partnership currently claims that the mine will create two thousand jobs for two to three years during the construction phase and one thousand high-skill jobs during an expected fifty- to eighty-year operation period.<sup>25</sup> Additionally, the Partnership claims that the mine will lead to hundreds of millions of dollars in annual state and local tax revenue, as well as capital expenditures of three to four billion dollars.<sup>26</sup> The mine will also require a considerable amount of infrastructure, including hundreds of miles of roads and pipelines and at least two large dams.<sup>27</sup>

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19. See Pebble Partnership, Company Overview, <http://www.pebblepartnership.com/pages/about-the-pebble-partnership/company-overview.php> (last visited Mar. 31, 2009).

20. See *Mitsubishi Becomes Stakeholder in Pebble*, ANCHORAGE DAILY NEWS, Feb. 16, 2008, available at <http://www.adn.com/money/industries/mining/story/316778.html> (last visited Mar. 28, 2009).

21. See Pebble Partnership, Overview and History, *supra* note 18.

22. Mary Pemberton, *Pebble Mine Prospect Keeps Getting Richer*, ANCHORAGE DAILY NEWS, Oct. 13, 2007, available at <http://dwb.adn.com/money/industries/mining/pebble/story/9376024p-9289321c.html> (last visited Mar. 28, 2009).

23. See *id.*

24. See Pebble Partnership, Regulatory Review, <http://www.pebblepartnership.com/pages/project-information/regulatory-review.php> (last visited Mar. 28, 2009).

25. See Pebble Partnership, Jobs and Business Opportunities: Overview, <http://pebblepartnership.com/pages/jobs-business-opportunities/opportunities.php> (last visited Mar. 28, 2009).

26. *Id.*

27. See Pebble Partnership, Road, Port & Power, <http://pebblepartnership.com/pages/project-information/road-port-power.php> (last visited Mar. 28, 2009) (providing details on roads and pipelines).

## B. Opposition to Pebble Mine

Organized opposition to Pebble Mine began to develop in 2005 and included the Renewable Resources Coalition (RRC), a group formed in June 2005 in part to thwart the development of Pebble Mine.<sup>28</sup> Opponents of the mine have typically focused their attacks on the potential harm the mine may cause to the salmon population of the Bristol Bay drainage.<sup>29</sup> Bristol Bay is home to one of the world's largest salmon populations and the largest population of sockeye salmon.<sup>30</sup> Commercial fishing in the area produces millions of dollars in revenue for Alaska fishermen.<sup>31</sup> The great fear of the salmon fishers is that, due to Pebble Mine's location on the headwaters of the Kvichak and Nushagak rivers, the mine will poison the water, release various toxins, and irreparably damage the Bristol Bay fishery.<sup>32</sup>

The Alaska legislature also began to respond. First, on January 26, 2007, Senate Bill 67 was put forward by Sen. Gary Stevens of Kodiak.<sup>33</sup> If passed, Senate Bill 67 would designate a significant portion of Pebble Mine to be the Jay Hammond State Park, effectively ending the development of the mine, but without affecting any other mining prospects in the state.<sup>34</sup> However, this bill has never left committee, and there has been no other recent activity, suggesting that the legislature, if it decides to act, will not do so via Senate Bill 67.<sup>35</sup> House Bill 134 was introduced by Bryce Edgmon of Dillingham on February 14, 2007 and would, if enacted, prohibit certain conduct with water and greatly limit the potential development of Pebble Mine.<sup>36</sup> This bill, like its Senate counterpart, has also languished in committee, but may have received new life on February 27, 2008, when a modified version of the bill was

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28. See Renewable Resources Coalition, About Us, [http://www.renewableresourcescoalition.org/about\\_us.htm](http://www.renewableresourcescoalition.org/about_us.htm) (last visited Mar. 28, 2009).

29. See, e.g., Geoffrey Parker et al., *Pebble Mine: Fish, Minerals, And Testing the Limits of Alaska's "Large Mine Permitting Process,"* 25 ALR 1 (2008), 17–21 (arguing that Pebble Mine would likely have negative effects on Bristol Bay salmon population).

30. *Id.* at 7.

31. See *id.* at 6–9 (describing the Bristol Bay fishing economy).

32. See *id.* at 17–21.

33. See Alaska Senate Bipartisan Working Group, Available Data for SB67, <http://www.aksenate.org/index.php?bill=SB.067> (last visited Mar. 12, 2009).

34. See *id.*

35. See *id.*

36. See Margaret Bauman, *Pebble Backers Say Fish Refuge Bill Actually Targets Mine*, ALASKA J. COM., Feb. 25, 2007, available at [http://www.alaskajournal.com/stories/022507/hom\\_20070225034.shtml](http://www.alaskajournal.com/stories/022507/hom_20070225034.shtml).

approved by the House Special Committee on Fisheries and sent to the House Resources Committee.<sup>37</sup>

### C. The Initiatives

The struggle over the Clean Water Initiatives began when opponents of Pebble Mine attempted to certify the first Clean Water Initiative (“Clean Water I”), on April 25, 2007.<sup>38</sup> This initiative sets out five broad prohibitions and restrictions that relate to large-scale mining. First, mines are prohibited from releasing “any toxic pollutant”<sup>39</sup> into water that is used by either humans or salmon.<sup>40</sup> Second, specific substances including cyanide and sulfuric acid are prohibited from being used in watersheds that could lead to direct, indirect, or cumulative harm to either humans or salmon.<sup>41</sup> Third, the initiative prohibits the storage or disposal of metallic mineral wastes and tailings that generate sulfuric acid or dissolved metals.<sup>42</sup> Fourth, the storage or disposal of metallic mineral wastes and tailings is prohibited within one thousand feet of any body of water used by humans for drinking or by salmon. Fifth, any activity that causes acid mine drainage is also prohibited.<sup>43</sup> Finally, the initiative makes clear that it only applies to new mines and does not affect pre-existing large-scale mines.<sup>44</sup> The Alaska Attorney General’s office rejected this initiative because it was found to be an appropriation, particularly the first prohibition, because it would likely preclude mining operations and would therefore interfere with the legislature’s “power to allocate resources amongst competing uses.”<sup>45</sup> In doing so, the Attorney General rejected the contention of the initiative’s sponsors that it merely contained additional

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37. See Alaska’s House Democratic Caucus, HB 134, <http://www.akdemocrats.org/index.php?bill=HB134#data>, (last visited Mar. 12, 2009) (providing information on bill including current status).

38. See Review of 07WATR Initiative Application, Office of the Attorney General of Alaska, 2007 Alas. AG LEXIS 10, \*1 (Alaska June 21, 2007).

39. This is broadly defined to include any substance that causes “death, disease, malignancy, behavioral abnormalities, or malfunctions in growth, development, behavior or reproduction, cancer, genetic mutations, physiological malfunctions or physical or physiological abnormalities.” *Id.* at \*2.

40. *Id.*

41. *Id.* at \*3.

42. *Id.*

43. *Id.*

44. *Id.* at \*3–4.

45. *Id.* at \*32.



regulations.<sup>46</sup> This decision was challenged by the sponsors and was the primary subject of both superior court opinions discussed below.<sup>47</sup>

A second Clean Water Initiative, Clean Water II, was sent to the Lieutenant Governor on July 30, 2007 as an attempt to eliminate the concerns over appropriations.<sup>48</sup> This initiative was also rejected by the Alaska Attorney General as being an appropriation.<sup>49</sup> The differences between this initiative and Clean Water I appear to be related more to form than substance. The five prohibitions were cast as three standards that could not be infringed by any activity associated with a large-scale mining operation.<sup>50</sup> The Attorney General rejected this initiative because it was found to be beyond mere regulations and was actually an allocation of water.<sup>51</sup> The sponsors have not challenged this decision and Clean Water II is no longer relevant to the struggle over Pebble Mine.

Finally, a third Clean Water Initiative (“Clean Water III”) was sent to the Lieutenant Governor on October 9, 2007.<sup>52</sup> This time, the Attorney General certified the initiative.<sup>53</sup> The Clean Water III initiative describes itself as “regulatory standards affecting streams and waters” and requires large-scale mines to comply with two standards.<sup>54</sup> The Attorney General certified Clean Water III because the initiative only prohibited the discharge of waste and pollutants that are harmful, rather than prohibiting the discharge of all waste or pollutants.<sup>55</sup> This decision was challenged by proponents of Pebble Mine.<sup>56</sup>

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46. *Id.* at \*28.

47. *See infra* Part II.D.

48. *See* Review of 07WTR2 Initiative Application, Office of the Attorney General of Alaska, 2007 Alas. AG LEXIS 25 (Alaska Sept. 27, 2007).

49. *Id.* at \*1–2.

50. *Id.* at \*2–3. These standards are: first, toxic pollutants may not be issued into water “that will effect [sic] human health or welfare or any stage of the life cycle of salmon”; second, cyanide or sulfuric acid may not be released into any watershed used by humans or salmon; third, metallic mineral wastes and tailings may not be stored or disposed in a way that could release sulfuric acid or other harmful agents into water used by humans or salmon. *Id.* at \*4–5.

51. *Id.* at \*28.

52. *See* Review of 07WTR3 Initiative Application, Office of the Attorney General of Alaska, 2007 Alas. AG LEXIS 26 (Alaska Oct. 17, 2007).

53. *Id.* at \*28–30.

54. *Id.* at \*1. These standards are: first, the release of any toxic pollutant “in a measurable amount that will effect [sic] human health or welfare or any stage of the life cycle of salmon” into water is prohibited; second, the storage or disposal of mining wastes or tailings that could release sulfuric acid or other toxic pollutants that will affect water used by humans or salmon is also prohibited. *Id.* at \*4–5.

55. *Id.* at \*28–30.

56. *See infra* Part II.D.

#### D. The Conflicting Superior Court Opinions

Following the Attorney General's decisions, there were two superior court opinions concerning Clean Water I that went in completely opposite directions.

The first opinion<sup>57</sup> was issued by Judge Fred Torrissi of the Third Judicial District at Dillingham on October 12, 2007. The court held that the initiative was not an appropriation and characterized the parties as differing "by only one part per billion, or less,"<sup>58</sup> due to the State's admission at oral argument that if miners could release less than one part per billion of arsenic as opposed to none, the initiative "sounded like a regulation."<sup>59</sup> The court found that, if passed, the initiative would ban all new large-scale mining for the foreseeable future.<sup>60</sup> The court struggled with the question of whether Clean Water I was an appropriation, admitting that, "[t]he answer does not leap out at us."<sup>61</sup> After deeply analyzing the supreme court jurisprudence discussed in detail below, the court concluded that the initiative was not an unconstitutional appropriation because Clean Water I did not designate property for a particular use, but rather prohibited property from one particular use and thus did not "bind the legislature's hands or require disposition of state property."<sup>62</sup>

The second opinion<sup>63</sup> was issued by Judge Douglas Blankenship of the Fourth Judicial District at Fairbanks on February 28, 2008. In contrast with the Dillingham opinion, the court held that Clean Water I was an unconstitutional appropriation.<sup>64</sup> The court began by assuming that since Clean Water I prohibited the release of "any pollutant whatsoever," the initiative would have effectively banned large-scale mining for the foreseeable future.<sup>65</sup> After reviewing the case law, the court held that the initiative "reduces the government's discretion over allocation of water use and appeals to the self-interest of users of salmon

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57. *Holman v. Parnell*, No. 3DI-07-56 (Alaska Super. Ct. Oct. 12, 2007), available at <http://www.ltgov.state.ak.us/PDFs/07WATR-SummaryJudgment.pdf>.

58. *Id.* at 2.

59. *Id.*

60. *Id.* at 7.

61. *Id.* at 10.

62. *Id.* at 16–17. The court also dismissed a separation of powers claim by the state because "the people aren't a branch of government, and we don't construe the constitution to protect us from ourselves." *Id.* at 17.

63. *Council of Alaska Producers v. Parnell*, No. 4FA-07-2696 (Alaska Super. Ct. Feb. 28, 2008), available at <http://www.ltgov.state.ak.us/PDFs/07WATR-FairbanksSuperiorCourt.PDF>.

64. *Id.* at 2.

65. *Id.* at 13.

and people currently using drinking water.”<sup>66</sup> The initiative, therefore, “essentially attempts to appropriate water only to human drinking water and salmon.”<sup>67</sup> In the view of this court, the legislature must be able to “retain discretion to allocate public assets such as water to all uses.”<sup>68</sup>

### E. The Supreme Court Litigation and the Vote

Following the conflicting superior court opinions, both sides appealed to the Alaska Supreme Court, which heard oral arguments in the case on June 18, 2008. Before oral arguments, however, the sponsors decided to withdraw Clean Water I,<sup>69</sup> and the court was left with only the issue of whether Clean Water III was an unconstitutional appropriation. On July 3, 2008, the supreme court released an order that upheld the constitutionality of Clean Water III.<sup>70</sup> The order is a brief three pages and neither lists its author nor mentions if any justices dissented.<sup>71</sup> Nevertheless, the order makes clear the validity of Clean Water III and affirms the relevant part of the Fairbanks opinion; a full opinion is expected in the future.<sup>72</sup> Following the order, Clean Water III was placed on the ballot.<sup>73</sup>

Finally, Clean Water III, now called Ballot Measure 4, was considered in the August 26, 2008, primary and was soundly defeated, with roughly fifty-eight percent of voters opposing the initiative.<sup>74</sup> Supporters of the initiative blamed the defeat on the massive amount of money spent by pro-mining groups, as well as the influence of Governor Sarah Palin’s public announcement that she would vote “No.”<sup>75</sup>

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66. *Id.* at 19.

67. *Id.* at 20.

68. *Id.* The court further held that Clean Water III was not an appropriation because it only prohibited discharge that would have had an adverse impact, and therefore allowed large-scale mines to operate if they did so cleanly. *See id.* at 21. Moreover, Clean Water III did not set aside any state assets and left it to the legislature to determine the meaning of “adverse.” *See id.* at 23.

69. *See* Elizabeth Bluemink, *Court Dismisses Anti-Pebble Initiative*, ANCHORAGE DAILY NEWS, June 9, 2008, available at <http://community.adn.com/adn/node/124949>.

70. *See* Pebble Ltd. P’ship v. Parnell, 187 P.3d 478 (Alaska 2008).

71. *See id.*

72. *See id.*

73. *See id.*

74. *See* Mary Pemberton, *Alaska Voters Decide Mining Over Fish*, AP, Aug. 27, 2008, available at [http://www.newsvine.com/\\_news/2008/08/27/1791232-alaska-voters-decide-mining-over-fish](http://www.newsvine.com/_news/2008/08/27/1791232-alaska-voters-decide-mining-over-fish).

75. *See* Mary Pemberton, *Measure 4 Supporters Regroup*, ANCHORAGE DAILY NEWS, Aug. 28, 2008, at A3.

However, initiative opponents countered that the lack of clarity about the initiative was a major reason for its defeat.<sup>76</sup>

### III. THE LEGAL EVOLUTION OF THE APPROPRIATION PROHIBITION

The Alaska constitution provides that “[t]he people may propose and enact laws by the initiative;”<sup>77</sup> however, the initiative may not be used to, among other things, “make or repeal appropriations.”<sup>78</sup> The current test to determine whether an initiative is an appropriation is a two-step inquiry. First, an initiative must deal with a state asset.<sup>79</sup> Second, if an initiative does deal with a state asset,<sup>80</sup> the court determines whether it is an appropriation.<sup>81</sup> To perform the second step, the court considers whether an initiative clashes with either of the two primary purposes of the restriction: preventing giveaways of state assets and retaining the legislature’s discretion regarding the disposition of state assets among competing uses.<sup>82</sup>

This test appears nowhere in the state constitution nor was it proposed by any of the framers. Rather, the current test was crafted by the Alaska Supreme Court through a series of significant decisions. Initially, the prohibition was arguably only implicated in initiatives that concerned the appropriation of state money. However, the court dispensed with that view in *Bailey v. Warren*, a 1979 decision holding that an appropriation occurred when there was a giveaway of state-owned land.<sup>83</sup> This decision was extended in 1987 to include giveaways of all other state assets in *Alaska Conservative Political Action Committee (“ACPAC”) v. Municipality of Anchorage*.<sup>84</sup> The second purpose of the test was added in *McAlpine v. University of Alaska*,<sup>85</sup> a 1988 decision in which the court first held that an appropriation would be found when an

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76. *Id.*

77. ALASKA CONST. art. XI, § 1.

78. ALASKA CONST. art. XI, § 7.

79. *See, e.g., Alaska Conservative Political Action Comm. v. Municipality of Anchorage*, 745 P.2d 936, 938 (Alaska 1987).

80. Courts had typically interpreted the term “state asset” quite broadly. *See Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422–23 (Alaska 2007) (explaining that public revenue, land, municipally owned utilities, and wild salmon were all found to be state assets); *but see id.* at 424 (holding that taxi permits were not state assets).

81. *Anchorage Citizens for Taxi Reform*, 151 P.3d at 423.

82. *See, e.g., id.*

83. *See Bailey v. Warren*, 595 P.2d 1, 7–8 (Alaska 1979).

84. 745 P.2d at 938.

85. 762 P.2d 81 (Alaska 1988).

initiative interfered with the legislature's discretion<sup>86</sup> by "set[ting] aside a certain specified amount of money or property for a specific purpose or object in such manner that is executable, mandatory, and reasonably definite with no further discretion."<sup>87</sup>

The test, therefore, was formalized by the late 1980s. Two major developments subsequent to *McAlpine* have resulted in a considerably broader interpretation of the prohibition than had previously existed, without adding any new factors. The first of these developments was the 1996 decision in *Pullen v. Ulmer*, in which the court seemed to stretch to find an appropriation in an initiative that, on its face, was not necessarily one. Although this decision is arguably correct, it should, in the very least, be viewed as the outermost boundary of the prohibition. The court's decision in *Alaska Action Center*, the second development, was inappropriate because the initiative at issue did not truly rob the legislature of its discretion over the state asset.<sup>88</sup>

These two decisions have created a regime where the power of the initiative to pass important legislation may be curtailed. At a certain level, it seems reasonable to imagine that any initiative could interfere with legislative discretion. To a certain extent, that is the point of the right to the ballot initiative Alaska has conferred on its citizens; without it, the legislature would be the only body able to make laws.

The court, therefore, must seek a proper balance of the right<sup>89</sup> and the restriction,<sup>90</sup> while giving full effect to both. Additionally, the court must also take into account article XI, sections 4<sup>91</sup> and 6<sup>92</sup> of the Alaska Constitution. These two provisions create a complicated interaction between citizens and the legislature that makes clear the shortcomings of the current test and has, unfortunately, been ignored by the supreme court.

The following sections elaborate on the evolution of the doctrine and discuss the pivotal decisions in greater detail.

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86. *See id.* at 88.

87. *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1157 (Alaska 1991) (reaffirming rule in *McAlpine*).

88. *See Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989, 994 (Alaska 2007).

89. ALASKA CONST. art. XI, § 1.

90. ALASKA CONST. art. XI, § 7.

91. ALASKA CONST. art. XI, § 4 (providing the legislature with the power to eliminate a pending initiative if it passes a substantially similar piece of legislation before the initiative is voted on).

92. ALASKA CONST. art. XI, § 6 (providing the legislature with the authority to overturn an initiative two years after enactment and amend the passed initiative at any time).

### A. *Bailey* and ACPAC: Beyond Money

The supreme court first expanded the definition of appropriation to include situations beyond the appropriation of money in *Bailey v. Warren*.<sup>93</sup> The initiative at issue was the Alaska Homestead Act, which would have made available a total of thirty million acres of state lands to residents who fulfilled several minimal requirements.<sup>94</sup> In interpreting the constitution, the court explained that the issue should be interpreted based on the “the language of section 7 construed in light of the purpose of the provision.”<sup>95</sup>

The court held that “appropriations” was an ambiguous term and could mean state assets beyond money.<sup>96</sup> Next, looking to the purposes behind the enactment of the provision to determine if the initiative at issue was an appropriation, the court held that “[t]he delegates wanted to prohibit the initiative process from being used to enact give-away programs, which have an inherent popular appeal, that would endanger the state treasury.”<sup>97</sup> This holding was based on the framers’ general concern about abusing the initiative process and specific concerns regarding initiatives that dealt with appropriations.<sup>98</sup> The general concern was expressed in several ways; for example, the framers reduced the time an initiative could not be repealed from three years to two and allowed for the initiative to be amended by the legislature at any time.<sup>99</sup> Also, the restrictions were seen as a “compromise designed to reserve basic authorities to the people while protecting the state

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93. 595 P.2d 1 (Alaska 1979).

94. *See id.* at 2 (including such requirements as filing an application, showing proof of residency, and paying a one hundred dollar filing fee).

95. *Id.* at 4. The court further elaborated on its constitutional theory and explained that it was “especially sensitive to the policy concerns embodied in constitutional provisions because a constitution is a document unchangeable by ordinary means” that “must be considered as a living document adaptable to changing conditions and circumstances unanticipated at the time it was written.” *See id.* (internal citations omitted).

96. *Id.* at 6–7. In doing so, the court also addressed a somewhat strange event in the legislative history. An earlier draft of the provision had proposed to include the phrase “of public funds” after “appropriations;” however, it was defeated, partly because the constitution’s framers deemed it to be unnecessary. *See id.* at 6–7. The court dismissed any possible argument that this would limit appropriations to money by explaining that, since “public funds” was just as ambiguous as “appropriations,” there was no need to revisit its earlier holding. *See id.* at 7.

97. *Id.*

98. *Id.*

99. *Id.*

against rash, discriminatory, and irresponsible acts.”<sup>100</sup> Initiatives dealing with appropriations were viewed as especially susceptible to “rash, discriminatory, and irresponsible acts,” and the restriction was adopted in part to curtail the bad experiences of states without a similar restriction.<sup>101</sup> This concern was particularly strong regarding a giveaway that “tempt[s] the voter to [prefer] . . . his immediate financial welfare at the expense of vital government activities.”<sup>102</sup> Accordingly, a massive giveaway of land is an appropriation just as much as a massive giveaway of money, since both rob the state of major assets and present the voters with the same type of temptation.<sup>103</sup>

The supreme court expanded appropriations to cover all state assets in *Alaska Conservative Political Action Committee v. Municipality of Anchorage*.<sup>104</sup> There, the initiative required Anchorage to sell its municipally-owned power company for one dollar.<sup>105</sup> This constituted an appropriation because it was exactly the type of “rash, discriminatory, and irresponsible act” the prohibition was intended to limit.<sup>106</sup> However, the court failed to address the fact that, though perhaps rash and a bad policy decision, the individuals who voted for this initiative would not materially benefit from the initiative as they would have in *Bailey*.

*Bailey* and its extension in *ACPAC* have served as the bedrock for all subsequent decisions.<sup>107</sup> *Bailey* also contains a detailed look at the

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100. *Id.* (quoting VICTOR FISCHER, ALASKA’S CONSTITUTIONAL CONVENTION, 80–81 (1975)).

101. *Id.* For example, the court quoted one delegate who explained that without a restriction on appropriations, organized interest groups would create initiatives that took the power of “making of revenue measures and expenditure of the funds away from the legislature,” which could possibly bankrupt the state. *See id.* at 7–8 (further describing initiatives that did serious harm to California, Colorado, and Washington).

102. *Id.* at 8.

103. *Id.* at 9. This decision, however, was not unanimous. First, Justices Rabinowitz and Matthews concurred in the judgment and holding on appropriations, but would have invalidated the initiative based on its violation of the Equal Protection Clause of the Alaska Constitution because the initiative would have infringed on individuals’ rights to travel and make their homes in Alaska. *See id.* at 9 (Rabinowitz, J., & Matthews, J., concurring). Justice Connor dissented and argued that the court should not have expanded the definition of appropriations beyond set-asides of money because, based on his reading of the constitutional history, that was the framers’ motivating concern. *See id.* at 19 (Connor, J., dissenting).

104. 745 P.2d 936 (Alaska 1987).

105. *Id.* at 936.

106. *Id.* at 938.

107. *See, e.g., Pullen v. Ulmer*, 923 P.2d 54, 59 (Alaska 1996) (quoting *Bailey*, 595 P.2d at 9).

intent of the framers to determine whether the initiative should be considered an appropriation.<sup>108</sup> However, the court has not followed this lead, instead focusing exclusively on other supreme court decisions. Thus, in a sense, *Bailey* has become unmoored from its firm constitutional grounding and now stands solely for the proposition that a giveaway of a state asset is an appropriation.

### B. *McAlpine*: Beyond Giveaways

Nine years after *Bailey*, the court in *McAlpine v. University of Alaska*<sup>109</sup> first held that an initiative may not interfere with the legislature's discretion over state assets.<sup>110</sup> The initiative at issue dealt with an attempt to reorganize the administration of the state university and college system to create a separate community college system.<sup>111</sup> The second and third sentences of the initiative were of particular concern,<sup>112</sup> and the supreme court held that only the third sentence was an appropriation.<sup>113</sup>

In deciding to invalidate the third sentence, the court expanded the definition of "appropriation" to include "appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets."<sup>114</sup> The court explained that, "[t]he reason for prohibiting appropriations by initiative is to ensure that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."<sup>115</sup> Under this definition, the third sentence was an unconstitutional appropriation because it "specifie[d] the amount of assets to be designated for community colleges . . . [and] no further legislative action would be

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108. See *Bailey*, 595 P.2d at 68.

109. 762 P.2d 81 (Alaska 1988).

110. See *id.* at 91 (holding further that offending clauses could be severed from initiatives).

111. *Id.* In the past, the system was organized into five administrative units, with one unit specifically dealing with the community college system; however, the system was reorganized into three geographically-based units in December 1986 and community colleges were administered based on locality. See *id.* at 82–83.

112. These sentences read: "The University of Alaska shall transfer to the Community College of Alaska such real and personal property as is necessary to the independent operation and maintenance of the Community College System. The amount of property transferred shall be commensurate with that occupied and operated by the Community Colleges on November 1, 1986." *Id.* at 83.

113. See *id.* at 89.

114. *Id.* at 89.

115. *Id.* at 88 (emphasis in original) (holding further that the initiative could still go to the voters because the unconstitutional third sentence could be severed from the constitutional second sentence). *Id.* at 93.



necessary to require the University to transfer . . . or to specify the amount of property the University must transfer.”<sup>116</sup> In contrast, the second sentence was not an appropriation because, by not requiring a specific amount of resources, the legislature still had sufficient discretion regarding the funding of community colleges.<sup>117</sup>

The rule in *McAlpine* was reaffirmed in *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*.<sup>118</sup> Before the initiative, seventy percent of the bed tax revenue in Fairbanks went to the Convention and Visitors Bureau.<sup>119</sup> The initiative aimed to remove this restriction and greatly expand the purposes for which the revenues could be used.<sup>120</sup> The court explicitly stated that an appropriation exists if an initiative conflicts with the two purposes of the prohibition.<sup>121</sup> In deciding whether the second purpose was implicated, the court explained that an initiative would be considered an appropriation when it “set aside a certain specified amount of money or property for a specific purpose or object in such manner that is executable, mandatory, and reasonably definite with no further discretion.”<sup>122</sup>

Holding that the initiative was constitutional, the court refrained from invalidating it merely because it was “arguably an appropriation.”<sup>123</sup> The court explained that “the purposes of the constitution are not met by construing the term ‘appropriations’ broadly in the context of an initiative which arguably repeals an appropriation.”<sup>124</sup> Additionally, “[t]he purpose of the prohibition . . . is to ensure that the legislative body remains in control of and responsible for the budget”<sup>125</sup> and that a broad interpretation of appropriation is not necessary in contexts that “[do] not disempower the legislative body from making annual spending decisions.”<sup>126</sup> Although made in the context of an initiative alleged to have repealed an appropriation, these statements show that the court should always consider the purposes of the prohibition.

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116. *Id.* at 91.

117. *Id.* The court further found that an offending clause could be severed from an initiative if the new form retains the primary purpose of the initiative and is still a law and not merely a broad policy statement. *Id.* at 95.

118. 818 P.2d 1153 (Alaska 1991).

119. *Id.* at 1154.

120. *Id.* at 1155.

121. *Id.* at 1156 (quoting *McAlpine*, 762 P.2d at 88).

122. *Id.* at 1157.

123. *Id.* at 1156–57.

124. *Id.*

125. *Id.* at 1157.

126. *Id.*

Over time, *McAlpine* has become the major case when considering whether an initiative is an appropriation because it is the first case where the dual purposes of the second step are stated, albeit indirectly. However, *McAlpine* does not contain the type of thorough constitutional analysis found in *Bailey* and begins the somewhat troubling reification of the doctrine that culminates with *Alaska Action Center*.

### C. *Pullen*: Stretching to Find an Appropriation

The next major decision regarding appropriations was *Pullen v. Ulmer*.<sup>127</sup> This case is important not because it provides an additional factor or step, but rather because the court appears to have stretched the test to find an appropriation. The challenged initiative provided that subsistence, personal use, and sport fisheries would receive preference in apportioning the salmon harvest before the remaining harvest would be available to other users.<sup>128</sup> The portion was limited to five percent of the total statewide harvest, but that limit could be exceeded for any particular species or region.<sup>129</sup> The Lieutenant Governor certified the initiative and the superior court held that the initiative was not an appropriation.<sup>130</sup>

The supreme court disagreed and held that the initiative was an appropriation because it violated both purposes of the constitutional prohibition.<sup>131</sup> First, the initiative was a giveaway because it appealed to the immediate self-interest of sport, personal, and subsistence fishers.<sup>132</sup> According to the court, this “tempt[s] the voter to [prefer] . . . his immediate financial welfare at the expense of vital government

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127. 923 P.2d 54 (Alaska 1996).

128. *Id.* at 55.

129. *Id.*

130. *Id.* at 56–57. According to the superior court, the initiative merely created a “new system of preference among beneficial users of the statewide salmon harvest” that required further action by the Board of Fisheries to determine how much salmon each group was entitled to, thus preserving the Board’s “broad discretion” to make allocations. *Id.* at 57, n.7.

131. *Id.* at 63–64. Before discussing whether there was an appropriation, the court first held that salmon were a state asset even though “the state does not own wildlife in precisely the same way that it owns ordinary property.” *Id.* at 59. Rather, salmon, and wildlife in general, were state assets due to the benefit the state gained from wildlife in the form of increased tourism, business taxes, and hunting fees, and the constitutional importance of fish. *Id.* at 59–60. Public assets such as fish were deemed to be “held in trust for the benefit of all of the people of the state,” giving the state the authority to regulate and control their numbers. *Id.* at 60–61.

132. *Id.* at 61.

activities” in the same way as the massive land giveaway in *Bailey*.<sup>133</sup> The initiative also violated the prohibition’s second purpose since the initiative “significantly reduces the legislature’s and Board of Fisheries’ control of and discretion over allocation decisions, particularly in the event of stock-specific or region-specific shortages of salmon between the competing needs of users.”<sup>134</sup> The court was primarily concerned about how the initiative would work during times of shortages and reasoned that the Fairness in Salmon Harvest (FISH) initiative could possibly result in the closure of some commercial fisheries.<sup>135</sup> Accordingly, the initiative called for an actual allocation of resources that removed a considerable amount of discretion from either the legislature or the Board.<sup>136</sup> The court explained that this conclusion accorded with the principle expressed in *McAlpine*: that an appropriation exists if the initiative sets aside a specific amount of property for a specific purpose, by holding that the initiative would require the Board to adhere to the initiative and that legislative freedom is not retained in shortages.<sup>137</sup>

#### D. *Alaska Action Center: Crossing the Line*

The supreme court followed *Pullen* by further expanding the definition of appropriation in *Alaska Action Center, Inc. v. Municipality of Anchorage*<sup>138</sup> when the court found that an initiative that would have retained the state’s ownership of an asset was nevertheless an appropriation because it interfered with the legislature’s discretion.<sup>139</sup> The proposed initiative would have dedicated 730 acres in Girdwood that was owned by the Municipality of Anchorage to be a public park, although the municipality was in the midst of developing the land into a private golf course.<sup>140</sup>

The court analyzed the case under the second purpose of the prohibition.<sup>141</sup> In comparing the initiative to that in *McAlpine*, the court

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133. *Id.* at 63. The court does not address how this applies to voters who would not benefit from the legislation, nor does it define how the initiative would necessarily harm “vital government activities.” *Id.*

134. *Id.* at 63.

135. *Id.* at 64. The court’s focus on shortages is odd because the term does not appear anywhere in the initiative, which deals with how the harvest should be dealt with on all occasions.

136. *Id.*

137. *Id.* at 64 n.15.

138. 84 P.3d 989 (Alaska 2004).

139. *Id.* at 994.

140. *Id.* at 990.

141. *Id.* at 994.

emphasized that both initiatives designated specific amounts of property to be used for specific assets, even though the state retained ownership of the asset.<sup>142</sup> Thus, by telling the legislature what it must do with a specific piece of property, the initiative “encroache[d] on the legislative branch’s exclusive control over the allocation of state assets among competing needs.”<sup>143</sup> The court explained that “by limiting the mechanism for future change to another initiative process, the initiative’s dedication requirement necessarily intrudes on the legislature’s control over future designation.”<sup>144</sup> However, this ignores the ability of the legislature to overturn initiatives after two years.<sup>145</sup> Thus, even assuming the court was correct that the initiative robs the legislature of its discretion, this alleged theft would only be for two years.

### E. Turning Back from the Edge?

Although the court considerably expanded the prohibition in *Pullen* and *Alaska Action Center*, there may be reason to believe that the court has stepped back from an ever-expanding definition of “appropriation.” First, in *Staudenmaier v. Municipality of Anchorage*,<sup>146</sup> the supreme court held that an initiative requiring Anchorage to sell the municipal power company for market value or to the highest bidder was an appropriation because, by usurping the legislature’s resource allocation role, the initiative interfered with the second purpose of the constitutional prohibition.<sup>147</sup> In his concurrence, Justice Matthews attempted to “dispel any possible conclusion that the court’s broad interpretation of the term ‘appropriations’ prohibits any substantive lawmaking by initiative that properly should be within the initiative power.”<sup>148</sup> Matthews made clear that it was not the objective of the initiative that was the problem, but rather the requirement that Anchorage sell tangible property.<sup>149</sup> Accordingly, Matthews suggests that an initiative would be proper if it were to “directly prohibit the Municipality from, after a certain date,

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142. *Id.*

143. *Id.* (internal quotations and citations omitted).

144. *Id.* at 994–95.

145. See ALASKA CONST. art. XI, § 6.

146. 139 P.3d 1259 (Alaska 2006).

147. *Id.* at 1260–63. This was somewhat similar to the initiative in *ACPAC*, which required the municipality to sell the power company for one dollar. See *Alaska Conservative Political Action Comm. v. Municipality of Anchorage*, 745 P.2d 936, 936 (Alaska 1987).

148. *Staudenmaier*, 139 P.3d at 1265 (Matthews, J., concurring).

149. *Id.*

selling or distributing electricity.”<sup>150</sup> Matthews concluded by explaining that, “laws effecting substantial changes in policy can be made by initiative, but when they create surplus property, the disposition of such property is a matter for the representative lawmaking body.”<sup>151</sup>

Next, the supreme court limited the definition of state asset in *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*.<sup>152</sup> The case concerned an initiative that would have required the municipality to issue taxicab permits to any qualified applicant who paid the administrative fee.<sup>153</sup> The court held that the permits were not state assets because they did not authorize a holder to take a public resource and because the purpose of the permit was to regulate the industry for public safety.<sup>154</sup> Justice Carpeneti dissented and argued that the majority mischaracterized the nature of the asset.<sup>155</sup> Under Carpeneti’s analysis, the permit allows drivers to use the roads, a public resource, for private gain, and, since the administrative fee is well below the fair market value of a permit before the initiative, the initiative was essentially a giveaway.<sup>156</sup>

#### IV. THE PROCEDURAL INTERACTION BETWEEN THE LEGISLATURE AND BALLOT INITIATIVES

The general tendency of the Alaska Supreme Court has therefore been to adopt an increasingly broader view of what constitutes an appropriation. However, the supreme court has never truly taken into account the impact of sections 4 and 6 of article XI of the Alaska Constitution on the proper balance between the right to initiative and the appropriation prohibition.<sup>157</sup> This is an error since all provisions of the constitution should be given effect. Additionally, these provisions are part of the general regulation of ballot initiatives and are necessary to fully understand the intention of the framers. Sections 4 and 6 are especially important in this regard because they show that the constitution envisions a dynamic relationship between citizens and the legislature in the ballot initiative process. The supreme court should

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150. *Id.*

151. *Id.* at 1266.

152. 151 P.3d 418 (Alaska 2006).

153. *Id.* at 420.

154. *Id.* at 423–24.

155. *Id.* at 427 (Carpeneti, J., dissenting).

156. *Id.*

157. In fact, the only time these provisions were ever mentioned was in *Bailey*, where the power of the legislature to overturn initiatives was mentioned briefly. See *Bailey v. Warren*, 595 P.2d 1, 7 (Alaska 1979).

therefore give full effect to these provisions when deciding whether an initiative is an appropriation.

First, article XI, section 4 of the Alaska Constitution allows the legislature to preempt an initiative by passing a substantially similar bill before the election.<sup>158</sup> Although it is not entirely clear when a legislative act is “substantially the same” as an initiative, it is clear that the legislature has the power to void a pending initiative through legislation. Thus, the constitution supports an important and often overlooked aspect of the initiative: the power to spur legislative action over issues that the legislature, for whatever reason, either ignores or has not chosen to address. This appears to be happening to a certain degree regarding Pebble Mine, since there has been action in both the House and Senate, although nothing definitive has been done.<sup>159</sup> Additionally, this power is especially useful for issues that have potentially broad support among the populace, but may cut against the grain of traditional partisan alliances. *Pullen* provides a good example since the initiative had the potential to create a coalition of traditionally conservative rural voters and anti-big business liberal voters.<sup>160</sup> This coalition makes it possible that, if the issue had been allowed to go on the ballot, the legislature would have been prompted to reach some sort of consensus.

Section 6 gives the Alaska Legislature the power to amend passed initiatives at any time and repeal initiatives after two years.<sup>161</sup> The power to repeal allows the legislature to eliminate initiatives that prove to be unpopular or are simply bad policy after a relatively brief period of time. To be sure, this does not help in pure giveaways of state resources such as in *Bailey*,<sup>162</sup> but it would allow the legislature to overturn the park in *Alaska Action Center*,<sup>163</sup> as well as to overturn the restrictions in the Clean Water Initiatives<sup>164</sup> if the legislature decides that large-scale mining in general, and Pebble in particular, are better uses of the resources. Thus, this two-year window acts as experimental time for the initiative and allows for proponents of the initiative to develop the

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158. In relevant part, section 4 states that, “If, before the election, substantially the same measure has been enacted, the petition is void.” ALASKA CONST. art. XI, § 4; see also ALASKA STAT. §15.45.210 (2008) (codifying provision).

159. See *supra* Part II.B (explaining ongoing legislative actions).

160. *Pullen v. Ulmer*, 923 P.2d 54, 55 (Alaska 1996).

161. See ALASKA CONST. art. XI, § 6.

162. See *Bailey*, 595 P.2d at 2.

163. See *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 991 (Alaska 2004).

164. See Review of 07WATR Initiative Application, Office of the Attorney General of Alaska, 2007 Alas. AG LEXIS 10, \*1 (Alaska June 21, 2007).

necessary support to hold a legislative majority. Additionally, by giving the legislature the power to amend an initiative, the constitution acknowledges that initiatives may not be perfect when passed and may require legislative amendment. Although one could debate the definitions of “amending” and “repealing,” it is clear that the legislature maintains the power to change an initiative that needs to be modified and, after two years, the greater power to repeal an initiative that has lost political support.<sup>165</sup>

Taken together, article XI, sections 4 and 6 demonstrate the complicated interaction between citizens and the legislature in the creation and maintenance of ballot initiatives. Citizens have the right to sponsor and pass initiatives, but an initiative may be superseded by the legislature either before or after its passage. This creates a system where legislative will acts as a strong democratic check on the impact of initiatives that either have only a passing popularity or are not ideal for reaching popular goals. The courts should be hesitant to interfere with this constitutionally created dynamic; rather, they should allow the design to play itself out in the public arena. By not allowing for such development, a court created regime will fail to properly balance the rights created in section 1, the prohibitions of section 7, and the citizen-legislature interactions of sections 4 and 6.

## V. DEVELOPING A PROPER TEST

In any effective test, the Alaska Supreme Court must take into account the complex back-and-forth between the legislature and the citizens envisioned by the framers of the Alaska Constitution and enshrined in sections 4 and 6. In order to reach that goal, this Part will propose an amended test that keeps the same overall structure of the current test but has the following changes: first, the court should determine whether an initiative *directly* deals with a state asset; second, a giveaway should only be found when the *voters themselves* benefit from the initiative and not when a third-party is the beneficiary; third, the second purpose should only be implicated when the initiative robs the legislature of its discretion when it *permanently* disposes of the asset or involves some other irreversible action.<sup>166</sup>

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165. See ALASKA CONST. art. XI, § 6.

166. This final reform was suggested in an email exchange between the Author and Geoffrey Parker. Email from Geoffrey Parker, Attorney, Law Office of Geoffrey Parker, to Tim Mullins, Executive Editor, Alaska Law Review (Apr. 14, 2008).

### A. The First Step: Defining a State Asset

Under the current test, a court must decide whether an initiative deals with a state asset.<sup>167</sup> This step has been broadly interpreted to include a variety of assets well beyond money, including land, salmon, and public utility companies.<sup>168</sup> However, it raises one potential objection<sup>169</sup> and two further considerations. The current test should be improved by determining that an appropriation only exists when an initiative *directly* deals with a state asset; further, courts should carefully consider how they define the state asset at issue since this will have major implications on step two.

First, it is potentially objectionable to include non-monetary assets as state assets. Under this regime, the power of the initiative would increase and voters would be further empowered because any non-monetary initiatives would be permitted. However, the court correctly decided against this approach. The state owns many assets beyond money and allowing groups to deplete the state treasury by robbing it of non-monetary assets seems to be incongruous with a restriction designed to limit that very power.<sup>170</sup> Thus, the fear of “rash, discriminatory, and irresponsible” acts that animates the restriction is not limited to money.<sup>171</sup> The constitution itself appears to envision a definition of appropriation that includes more than money since the restriction on appropriations comes directly before the restriction on revenues.<sup>172</sup>

There are two further issues that must be considered. First, a test must define when an initiative actually deals with a state asset. This is important because it provides some limit to the reach of the restriction. For example, an extreme view may lead to the conclusion that anything tangentially dealing with a state asset, such as an initiative that would

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167. *See, e.g., Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422–23 (Alaska 2006).

168. *Id.*

169. There exists a secondary objection, which, while not disputing the importance of the requirement that a state asset be at issue, does raise the issue of whether it must necessarily be considered as a separate prong. That is, if we, for now, presuppose that the second step is correct, it may make more sense to consider whether the initiative deals with a state asset as merely an element of the test. Although this has some logical appeal, it is, in the end, not worth the disturbance it will cause because, either way, the court must decide whether there is a state asset involved at all; moreover, the current view allows for the court to kill initiatives without having to also go into the analysis of the second step. *See, e.g., id.* at 424.

170. *See Bailey v. Warren*, 595 P.2d 1, 8 (Alaska 1979).

171. *Id.* at 6–7.

172. *See ALASKA CONST.* art XI, § 7.



ban smoking in public parks, could possibly run afoul of the appropriation restriction. The court dealt with this issue squarely in *Anchorage Citizens for Taxi Reform*, where it refused to find that the taxi permits were state assets,<sup>173</sup> implicitly rejecting the dissent's argument that the initiatives dealt with the roads, an obvious state asset.<sup>174</sup> At one level, the dissent is correct because roads are clearly a state asset. However, this argument is far too attenuated and indirect because the purpose of the initiative was unrelated to roads and only affected roads because taxis must drive on them. To prevent this argument from taking hold, the court should clarify the doctrine by requiring a challenged initiative to *directly* deal with a state asset. This would have the advantage of keeping intact a rather expansive definition of asset, but would also provide a useful limit to the reach of the prohibition.

The test must also precisely define the asset.<sup>175</sup> Although this issue evades any bright-line rules, two principles will be useful in guiding courts to reach the correct conclusion. First, in cases where the asset could be defined in one of several ways, the best approach would be to look to the underlying purposes and motivations behind the initiative. For example, in *Pullen*, the issue was how much salmon each interest could take in a given year;<sup>176</sup> accordingly, the asset should be viewed as the salmon taken that year and not the overall salmon population. This has the advantage of preserving the motivating purpose behind the initiative and allowing for a more complete interaction between citizens and the legislature.

In many cases, the relevant asset will be money, which can be defined in at least two different ways: the individual dollars spent or the general amount necessary to implement the initiative. To resolve this issue, the court should turn to the specificity of the initiative. Thus, if an initiative specifies the amount of money that must be spent each year, then the asset will be the dollars spent. On the other hand, initiatives that are more general policy statements and do not require a specific expenditure should be viewed in the latter way: as an implementation cost.<sup>177</sup>

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173. See *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 424 (Alaska 2006).

174. See *id.* at 427 (Carpeneti, J., dissenting).

175. This issue is extremely important when analyzing whether the initiative actually robs the legislature of its discretion over the asset. See *infra* Part V.B.2.

176. *Pullen v. Ulmer*, 923 P.2d 54, 55 (Alaska 1996).

177. The further implications of this point will be discussed in Part V.B.2.

## B. The Second Step: Interfering with the Dual Purposes of the Restriction

The second step in the current test is ascertaining whether the initiative interferes with the dual purposes of the restriction on appropriations: the prevention of giveaways and the preservation of legislative discretion over state assets. Here, the court closely examines the initiative to determine what effect the initiative will have on the relationship between the legislature and the people. This part will make two key arguments. First, giveaways should only be found in instances where the *voters themselves* would benefit from the initiative and not where the beneficiary would be a third party. Second, the court should only find that an initiative unconstitutionally interferes with the legislature's discretion over state assets when the initiative would *permanently* rob the legislature of that discretion.<sup>178</sup>

### 1. Giveaways

Under the current test, an initiative may not constitute a giveaway of state assets.<sup>179</sup> This issue raises two questions: Should giveaways be considered appropriations? If so, when should they be found?

First, giveaways should clearly be considered appropriations. The court in *Bailey* makes clear that the framers were very concerned about initiatives that could bankrupt the state by appealing to voters' self-interest.<sup>180</sup> This is a major problem because these initiatives present the voter with a heavily weighted question: should they give themselves

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178. A third point concerns whether the dual purpose test is actually required or whether the test would be better if there were merely one overarching purpose, i.e., that issues concerning the state treasury should be kept under the control of the legislature. This argument has some merit. For example, a giveaway clearly infringes upon the legislature's discretion over that asset. In fact, in *McAlpine*, the court concluded that "the constitutional prohibition against appropriations by initiative applies to appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets." *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 89 (Alaska 1988). Additionally, under the proposed test, the major difference is who is the beneficiary of the initiative: if the people benefit, there is a giveaway, but if a third party benefits, it is an interference with the legislature's discretion. However, this step is not worth taking. First, it does not add anything to the way things are currently since courts would still look to see if there is a giveaway, as that would rob the legislature of its discretion. The change would thus be almost entirely cosmetic. Second, giveaways are a useful shorthand for initiatives that are clearly problematic because they go against the clear intent of the framers to prevent rash and discriminatory acts that appeal solely to voter self-interest.

179. See, e.g., *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991).

180. See *Bailey v. Warren*, 595 P.2d 1, 7-8 (Alaska 1979).

something for free or deny themselves that benefit so that the state can effectively govern? Perhaps at a philosophical level this presents something of a conundrum, but it may often lead to the rash decisions specifically condemned by the framers of the Alaska Constitution.<sup>181</sup> Moreover, banning giveaways promotes a healthy relationship between the legislature and the citizens by prohibiting voters from making policy choices that will materially benefit them. For example, if an initiative sponsor who wants to incentivize home-ownership could follow the lead in *Bailey* and just give away land, the legislature could not amend or repeal the initiative, and any attempts to preempt it would require convincing people that free land was bad for them. In contrast, with giveaways prohibited, the sponsor would have to craft an initiative that promotes this incentive in some other way that the legislature could preempt with another bill, amend after passage, or kill following a two-year wait.

Second, a giveaway should only be found in instances where the initiative promises a direct benefit to the voters. Once again, *Bailey* provides the clearest example of an initiative that meets this test because, by voting for the initiative, the voters would give themselves a rather large amount of land.<sup>182</sup> These types of giveaways squarely implicate the framers' fear that the initiative could lead to "rash, discriminatory, and irresponsible acts." However, perhaps due to the relative clarity of its rule, *Bailey* is the only decision where the court was confronted by such an initiative.

In contrast, the court has found giveaways in situations where, although a state asset was technically given away, the recipient of the asset was some entity other than the citizens themselves. This was the case in *ACPAC*, where the court held that an initiative that would have sold the public power company to a private company for the trivial price of one dollar was a giveaway.<sup>183</sup> To be sure, this would have given away a state asset, but it does not appeal to the voters' self-interest since voting for privatization benefits the receiving company. This is the primary justification for the rule and, without voter self-interest being present, makes finding that an initiative constitutes a giveaway more difficult. One argument in favor of keeping the rule could be that voters should not have this type of power and that giving away a state asset, even to a third party, is simply too reckless to be decided by the voters.

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181. *See id.* at 6–7 (explaining that the framers' motivation was to prevent "rash, discriminatory, and irresponsible acts").

182. *See id.* at 8.

183. *See Alaska Conservative Political Action Comm. v. Municipality of Anchorage*, 745 P.2d 936, 938 (Alaska 1987).

However, this is distinct from the fears of reckless self-interest articulated by the framers of the Alaska Constitution.<sup>184</sup>

Another problem with finding a giveaway in these instances is that it forces the court to make a quantitative judgment about when an initiative is a giveaway and when it is merely selling at a low price. In *ACPAC*, would there have been a giveaway if the selling price were \$100 or \$1000? Fortunately, the supreme court essentially answered this question in *Staudenmaier v. Municipality of Anchorage*, which dealt with an initiative that would have required the state to sell the power company for a reasonable price.<sup>185</sup> There, the court found that the initiative was an appropriation because it violated the second purpose by robbing the legislature of its discretion and requiring the state to take a specific action with a specific state asset.<sup>186</sup> There are problems with the application of the second purpose, but in this case, that purpose points to a better solution to *ACPAC*-like initiatives than fitting them into the giveaway category.

Left unresolved by this dichotomy are cases like *Pullen*, where the initiative confers a direct benefit to some, but not all, citizens.<sup>187</sup> These initiatives, by only appealing to more limited types of self-interest, are better seen as policy statements; for example, in *Pullen*, the initiative seemed to ask citizens to express a general preference for small fishers over large commercial fishers, which is hardly a “rash, discriminatory, and irresponsible act” that would bankrupt the state treasury.<sup>188</sup> Therefore, initiatives such as this should not be considered giveaways. Although drawing this line may not always be easy, the court should always consider the scope of the alleged giveaway, both in terms of who it will benefit and how large that benefit will be.

## 2. *Interfering with the Legislature’s Discretion*

Under the current test, an appropriation exists if the initiative “sets aside a certain specified amount of money or property for a specific

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184. See *Bailey*, 595 P.2d at 6–7.

185. *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1263 (Alaska 2006).

186. See *id.*

187. The benefit would only have gone to people who fished salmon for personal, subsistence, or sport uses. See *Pullen v. Ulmer*, 923 P.2d 54, 63 (Alaska 1996). Additionally, this alleged benefit may not even exist for a large percentage of fishers. For example, if the Board of Fisheries decides one year to grant that year’s permits primarily to subsistence fishers, none of the recreational or sport fishers would receive a personal benefit from the initiative. Thus, not every citizen would benefit from the initiative, and it would not be guaranteed that any benefit would even exist from year to year.

188. See *Bailey*, 595 P.2d at 7.

purpose or object in a manner that is executable, mandatory and reasonably definite with no further legislative action.”<sup>189</sup> Similar to giveaways, this section also revolves around two primary questions: whether the second purpose should exist at all, and, if so, how far should it reach? This section will argue that the court was correct to include this purpose as part of the current test. However, it has been misapplied in at least one case because the court failed to properly account for the legislature’s power to amend or repeal an initiative after passage. Accordingly, this purpose should only be used to invalidate an initiative when the initiative would *permanently* remove the legislature’s discretion over a state asset.

First, *McAlpine* was correct to include this purpose in the test to determine whether an initiative is an appropriation.<sup>190</sup> The court in *McAlpine* turned to dictionaries and the use of “appropriation” in other legal contexts to conclude that “*setting aside* funds for a particular purpose” was an appropriation.<sup>191</sup> Therefore, the court did not conduct the type of thorough constitutional analysis that occurred in *Bailey*.<sup>192</sup> This lack of analysis is somewhat troubling because by not inquiring into the purpose of the prohibition the court may have expanded the prohibition to a place it was never intended to go. Nothing in *Bailey*, however, precludes this holding. In fact, the speech by Delegate Taylor quoted in *Bailey* appears to support applying the restriction to instances that remove the legislature’s power to designate the use of state assets.<sup>193</sup> Finally, the court’s textual analysis is not without merit since the court correctly asserts that the typical type of legislative appropriation involves “committing certain public assets to a particular purpose.”<sup>194</sup>

This purpose, however, must have a limit, or else it has the potential to swallow the entire rule because, at a certain level of abstraction, any initiative could interfere with the legislature’s discretion. For example, an initiative that would lower the state highway speed limit to fifty-five miles per hour appears to represent a clear policy preference for reducing traffic speed. However, it would also require significant expenditures to train police officers and to replace speed limit signs, thus robbing the legislature of the discretion to use that money for another purpose. Moreover, other initiatives that initially appear to be entirely concerned with policy could, on closer inspection,

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189. *Staudenmaier*, 139 P.3d at 1262.

190. *See McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988).

191. *See id.*

192. *See Bailey*, 595 P.2d at 6–8.

193. *Id.* at 7.

194. *McAlpine*, 762 P.2d at 88.

be viewed as appropriations. For example, the recently defeated Clean Elections Initiatives expressed a clear policy-goal of minimizing political corruption by providing public funding for state elections.<sup>195</sup> However, this initiative also would have given hundreds of thousands of dollars to qualifying candidates,<sup>196</sup> money which would otherwise have been spent according to the legislature's discretion. These policy-based initiatives are precisely the type of initiatives that invoke the "basic authorities" of the people and would benefit most from the interaction between the legislature and the people envisioned by the Alaska Constitution.

A limiting principle is therefore necessary to protect policy-based initiatives. The court has held that an appropriation will only be found when the initiative tells the legislature that it must take a specific action with a specific asset.<sup>197</sup> This principle is what distinguished the two clauses in *McAlpine*, since the offending clause mandated that the legislature spend a specific amount of money, but the unoffending clause only required that the community college system be administered independently.<sup>198</sup> This distinction is sensible and provides a useful check on initiatives that are so general that they are clear statements of policy, such as an initiative that would create an after-school program for all needy children. Additionally, the specificity requirement fits in clearly with the above discussion regarding how monetary assets should be defined.<sup>199</sup>

However, the specificity requirement is insufficient because it fails to fully account for the constitutionally-created relationship between the legislature and the public. *Alaska Action Center* provides a clear example of this problem because, by requiring that the specific piece of land be dedicated as a state park,<sup>200</sup> the initiative satisfies that specificity requirement. The decision is still problematic, however, because the state retains ownership of the land and the legislature still has the power to overturn the initiative in two years if it decides that the land could be put to better use, either as a golf course, as was initially intended, or as

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195. See Alaskans for Clean Elections, *Why Clean Elections*, <http://www.alaskansforcleanelections.org/whyCleanElections.htm> (last visited Nov. 18, 2008).

196. See Alaskans for Clean Elections, *How Clean Elections Work*, <http://www.alaskansforcleanelections.org/howCleanElectionsWork.htm> (last visited Nov. 18, 2008).

197. *McAlpine*, 762 P.2d at 91.

198. *Id.* at 91-94.

199. See *supra* Part III.A.

200. See *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 994 (Alaska 2004).

something else. The initiative therefore would have allowed voters to express their policy decision that a piece of public land be kept as a park, but would not have permanently removed the asset from the legislature's discretion.

This situation could be fixed by adding one word to the current test: an appropriation should only be found when the initiative would require the legislature to use a specific asset for a specific purpose that *permanently* robs the legislature of its discretion over that asset. Under this test, an initiative that did not permanently strip the legislature of its discretion would be allowed to go through the entire process created by the constitution. The legislature would first have the chance to preempt the initiative by passing a substantially similar act and, since this would involve a decision that does not involve voter self-interest, the debate could focus more on the relative merits of the initiative. Then, after passage, the legislature could choose to amend the law or, after two years, repeal it. The supreme court's decision in *Alaska Action Center* was therefore incorrect.<sup>201</sup>

Two other decisions are worth discussing because they also present important issues. First, *McAlpine* confronts the issue of how the proposed test affects initiatives that deal with money. This issue is primarily resolved by applying the principle previously discussed regarding how to categorize money.<sup>202</sup> Under this approach, *McAlpine* appears to be correctly decided. The second sentence was correctly invalidated<sup>203</sup> because, by specifically defining the amount of money to be spent, the legislature was permanently robbed of its discretion over that money. On the other hand, the third sentence was correctly allowed to go to the voters<sup>204</sup> because it merely required that the legislature create a separate community college department,<sup>205</sup> leaving the legislature with discretion over that money because it could repeal the statute after two years.

*Pullen* is also correctly decided under the proposed test, although it is a much closer call. The salmon at issue are the salmon from that year, and no later reversal by the legislature would ever get those salmon

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201. On the other hand, *Staudenmaier* is clearly correct, since the initiative would have required the legislature to sell the power company for a determined price, thus severing the tie between the state and the asset permanently. *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1262–63 (Alaska 2006).

202. See *supra* Part III.A.

203. *McAlpine*, 762 P.2d at 91.

204. *Id.* at 93.

205. *Id.*

back, short of raiding freezers and shelves.<sup>206</sup> Additionally, the court is right that in times of shortage the state would be required to meet the five percent guarantee.<sup>207</sup> Reading *Pullen*, however, one is left with an uneasy feeling that something is wrong with the court's analysis even if the decision is technically correct. This result is partially because the initiative itself does not discuss shortages and the court's preoccupation with this issue makes one wonder how the initiative would work when there is no shortage of salmon. It therefore appears that the court was stretching to find an appropriation in an initiative that, in most years, would not constitute one. Thus, *Pullen*, unlike *Alaska Action Center*, is not an incorrect decision, but should rather be considered the outer limits of the appropriation prohibition. The courts, however, should be wary of extending those limits any further.

### C. Conclusion

With several minor adjustments, the current test could be vastly improved to better reflect the entire initiative process envisioned by the framers of the Alaska Constitution. The proposed test will, of course, not provide easy answers for every possible initiative because these issues are rarely cut and dry. Instead, the proposed test provides a usable framework that would assist judges and practitioners who confront this confusing area of the law, while simultaneously improving the constitutionally-created interaction between citizens and the legislature.

## VI. IS CLEAN WATER I AN APPROPRIATION?

This Part will analyze whether Clean Water I would be considered an appropriation under both the current test and the proposed test described above. Under the current test, the court would have likely decided that Clean Water I would have been an appropriation; under the proposed test, however, it would not have been found to be an appropriation because, although the initiative would have severely restricted the legislature's discretion in the short run, the legislature would ultimately retain control over the assets.<sup>208</sup>

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206. See *Pullen v. Ulmer*, 923 P.2d 54, 63–64 (Alaska 1996).

207. *Id.*

208. This section does not include a discussion of the constitutionality of Clean Water III because, since the proposed test is more inclusive than the current test, all initiatives that qualify under the current tests will almost certainly also qualify under the proposed test. Additionally, Clean Water III, by merely proposing additional and not even particularly burdensome regulations,



### A. Clean Water I Deals with a State Asset Under Either Test

First, under both tests, Clean Water I deals with state assets. The initiative confronts fears of injury to people and salmon by regulating the amount of waste allowed to enter the water.<sup>209</sup> The state assets in this situation are the water, because the initiative prevents pollution, and the salmon, because salmon are the beneficiaries of the initiative. As with *Pullen*, both of these are public goods and would therefore be considered state assets under the current test.<sup>210</sup> The proposed test would also have little problem declaring the fish and water state assets because the initiative directly deals with the quality of the water and is for the direct benefit of the salmon. The distinction between both tests, therefore, is not particularly important to determine what state assets are involved here because of the initiative's clarity. The two tests, however, might diverge in categorizing the specific state asset involved. The original test might view the individual salmon as benefitting from the initiative as the assets at issue, which might affect the permanence evaluation in the later part of the test. In contrast, the proposed test would make clear that the state asset affected is the salmon population in general because that is the sponsors' apparent concern.

### B. Clean Water I Would Likely Not Be Considered a Giveaway Under Either Test

Next, it is unlikely that Clean Water I would be considered a giveaway under either test, although there is a possibility that a radical reading of *Pullen* would allow for the original test to find a giveaway. The initiative is, at the very least, not the explicit type of giveaway condemned in *Bailey* because citizens are not being asked whether they want to give themselves a gift.<sup>211</sup> What, though, do citizens get if they vote for the initiative? In a sense, they get the guarantee that the salmon industry will survive and are allowed to vent their frustration towards, and disapproval of, Pebble Mine.<sup>212</sup> This situation is clearly not a

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does not implicate the larger issues regarding the use initiatives that animate Clean Water I.

209. See Review of 07WATR Initiative Application, Office of the Attorney General of Alaska, 2007 Alas. AG LEXIS 10, \*1-4 (Alaska June 21, 2007).

210. See *Pullen*, 923 P.2d at 59.

211. Conversely, an initiative that, for example, dealt with this issue by giving everyone a percentage share in the income from the mine or the salmon industry would almost certainly be a giveaway.

212. The author is not attempting to argue that the opponents of Pebble Mine are correct in their scientific assertions but is rather hypothesizing what may cause a citizen to vote for the initiative.

giveaway because citizens are not gaining any material benefit; instead, they are acting from ideological or policy motivations, not rash self-interest.

The motivations of the salmon industry in supporting the initiative are more of an issue. As *Pullen* suggested, many people in Alaska are involved in salmon fishing, ranging from large-scale commercial fishers to occasional recreational fishers.<sup>213</sup> In fact, the proponents of the initiatives emphasize just how important the salmon industry is to Alaska.<sup>214</sup> Some people, especially those with considerable financial interests in the salmon industry, may support the initiative because, by securing the health of the salmon population, they may directly benefit from the initiative. The two tests might reach somewhat different results here. In *Pullen*, a giveaway was found because the initiative was said to appeal to the self-interest of non-commercial fishers.<sup>215</sup> Though neither trial court did so, this logic could be further applied to the Clean Water Initiative because it does appeal to the self-interest of those involved in the salmon industry.

This application would be wrong for the same reasons that *Pullen's* finding of a giveaway was incorrect. First, not all Alaskans would benefit from this initiative because many Alaskans have no involvement with the salmon industry and many possible supporters are likely motivated by ideological and environmental reasons. Second, the benefit itself is far from certain because no one is guaranteed to gain anything since the initiative is neither giving away nor otherwise guaranteeing a certain amount of salmon. Additionally, opponents of the initiatives who stand to benefit from Pebble Mine will also vote out of their self-interest, meaning that the initiative deals with competing material interests and is not a giveaway.

### C. The Analysis for the Second Purpose Varies Greatly Depending on the Test Used

Finally, the analysis of Clean Water I under the second purpose clearly shows the significant differences between the two tests. Under the current test, interference with the legislature's discretion occurs when an initiative "set[s] aside a certain specified amount of money or property for a specific purpose or object in a manner that is executable,

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213. See *Pullen*, 923 P.2d at 63–64.

214. See, e.g., Parker et al., *supra* note 29, at 6–9.

215. See *Pullen*, 923 P.2d at 63.

mandatory and reasonably definite with no further legislative action,”<sup>216</sup> while under the proposed test, the standard is altered to only affect initiatives that *permanently* rob the legislature of its discretion.

Under the current test, Clean Water I would likely be found to interfere with the legislature’s discretion because, by essentially being a ban, the initiative decides the distribution of state assets among the competing mining and salmon fishing interests. The legislature would therefore be robbed of any discretion regarding whether or not Pebble Mine should exist or what the conditions of its existence should be. Finding that the initiative interferes with the legislature’s discretion would expand the current doctrine because the initiative merely prevents one situation from occurring, rather than dictating exactly what should occur.<sup>217</sup> However, the extension seems logical under the current test because of the clear interference with the legislature’s discretion regarding the mine, water, and salmon. Additionally, by not allowing mining, the initiative essentially requires that salmon fishing be the paramount use of Bristol Bay and therefore tells the legislature what it must do with an asset. Furthermore, there does not appear to be any instruction from the supreme court that would limit the reach of the prohibition in situations such as this one.

On the other hand, under the proposed test, the initiative would not be considered an appropriation because the initiative does not permanently change anything. The initiative creates a new and more burdensome regulation on mines that will effectively prevent large-scale mines such as Pebble from operating. Though this is a significant act, the legislature retains the power to overturn the initiative in two years. Thus, the initiative serves merely as a check on the development of Pebble Mine, not a complete ban. Additionally, the legislature remains free to enact similar legislation that could assuage the concerns of the initiative’s supporters while still allowing the mine to be developed. This distinction is important because Clean Water I is a much stronger initiative than Clean Water III and more directly opposes the development of Pebble Mine, while Clean Water III merely expresses the desire that Pebble be developed in an environmentally safe manner. Though Clean Water III may have had a greater chance of gaining popular support due to its relative moderation, this is a decision for the

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216. See *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1262 (Alaska 2006).

217. This is the distinction raised by the Dillingham court which approved Clean Water I. See *Holman v. Parnell*, No. 3DI-07-56, 16–17 (Alaska Super. Ct. Oct. 12, 2007), available at <http://www.ltgov.state.ak.us/PDFs/07WATR-SummaryJudgment.pdf>.

voters, not the courts, and the sponsors should have had the opportunity to present the clearest expression of their views.

### CONCLUSION

The struggle over the Clean Water Initiatives has exposed a problem that goes even deeper than Pebble Mine and involves the power of Alaskans to enact meaningful and important legislation through the ballot initiative process. That this power should have limits is beyond debate. The contours of those limits, however, are extremely important in preserving the dynamic relationship between the citizenry and the legislature envisioned by the framers of the Alaska Constitution. In recent years, the supreme court has regrettably expanded the prohibition on appropriations in a way that disrupts this relationship and threatens to limit the use of the initiative process to confront the important issues facing Alaska.

There is a way out of this problem that keeps intact much of the supreme court's jurisprudence, but which, by finding appropriations only in situations that permanently rob the legislature of its discretion, fully acknowledges both the powers and limits of the ballot initiative. In its most recent opinions, the supreme court has acknowledged that its earlier opinions may be read too broadly in restricting initiatives. By adopting the proposed test, the court would continue upon this path and create an approach that allows for citizens to more fully express their constitutional right to sponsor ballot initiatives. Although this change may not affect Pebble Mine, there is hope that it will allow for greater citizen participation in the next major issue that confronts Alaskans.