



# TRUSTEES FOR ALASKA

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Alaska's non-profit public interest environmental law

July 2010 Legal Brief

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Sincerely,

Trish Rolfe  
Executive Director

***"This decision means that the people whose rights and livelihoods are being jeopardized by intensive exploration activities at Pebble will have their day in court to show that the State has violated the Alaska Constitution. The State has issued permits behind closed doors without even looking at the harms to public resources. At last those harms will be addressed in court."***

Nancy Wainwright  
Trustees for Alaska Attorney

## Judge Orders Trial in Lawsuit Challenging the Proposed Pebble Mine's Exploration Permits



Trustees for Alaska had a big victory in court on July 12, in our landmark constitutional lawsuit challenging exploration and water use permits for the proposed Pebble Mine. The judge ruled in our favor and against the State of Alaska and Pebble Limited Partnership on their motions for summary judgment. The court's decision means that the plaintiffs, Nunamta Aulukestai, an association of nine Bristol Bay village corporations; former First Lady Bella Hammond; former

State constitutional delegate Victor Fisher; and Bristol Bay residents Ricky Delkittie, Sr. and Violet Willson have cleared the final hurdle to trial, which is scheduled for December 6, 2010.

The State and Pebble Limited Partnership sought to avoid a trial by claiming that, as a matter of law, the State was not required to provide public notice or any kind of public interest analysis before issuing permits for Pebble exploration and temporary water use.

The State has issued permits behind closed doors without even looking at the harms to public resources. This decision means that the people whose rights and livelihoods are being jeopardized by intensive exploration activities at Pebble will have their day in court to show that the State has violated the Alaska Constitution.

"We applaud the court's ruling," said Bobby Andrew, spokesman for Nunamta Aulukestai, the lead plaintiff in the case. "As subsistence users of the region, we know that exploration is having a serious impact on water, wildlife, and fish. We rely on these resources for survival, yet the Department of Natural Resources (DNR) continues to rubber stamp permits without public notice and without any analysis to justify these impacts. There needs to be a trial on that."

Anchorage Superior Court Judge Eric A. Aarseth held that "the most basic question in this case is whether the State was required to balance various constitutional interests when considering whether to issue the permits and do so in a transparent way." He further held that provisions of Article VIII of Alaska's Constitution "in order to have any meaning at all, must be interpreted as containing independent constraints on State action." He concluded, in a 20-page decision, that the plaintiffs have "demonstrated that material issues of fact exist regarding its claims that the State did not comply with the provision of Article VIII."

The court also ruled that the trial would focus only on the State's approval of Pebble exploration and water use, and not on hardrock mining exploration in other areas of the state. As a result, because the case is no longer a challenge to the statewide permitting scheme, the other intervenors who had previously been

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allowed in as permissive intervenors (Council of Alaska Producers, Alaska Miners Association, Resource Development Council, Millrock Resources) should be dismissed. Those parties can file objections to this specific finding.

The court concluded that "Nunamta has demonstrated that material issues of fact exist regarding its claims that the State did not comply with the provisions of Article VIII when it issued the [Miscellaneous Land Use Permits] and [Temporary Water Use Permits] relating to the Pebble Project." So, we are set to go to trial on the case, and the intense trial work now begins.

The suit was filed in July 2009 against DNR, which issued the permits for exploration activities at Pebble for over two decades with no public notice and no findings with respect to impacts to the constitutionally protected public resources in the area. Mine developer Pebble Limited Partnership was allowed to intervene in the case to defend the permits.

Exploration and water use at Pebble has resulted in drilling over 900 boreholes, disposing of thousands of gallons of drilling fluids onto the tundra, using explosives over a wide area, and withdrawing millions of gallons of water from lakes and anadromous streams important for spawning Bristol Bay salmon.

To read more of the story, please [click here](#).

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## The Native Village of Eklutna, Conservation and Health Organizations Seek to Halt Railroad Herbicide Spraying

The Alaska Supreme Court has continued a stay preventing the Alaska Railroad Corporation (ARRC) from spraying toxic herbicides on 30 miles of track between Indian and Seward. Trustees for Alaska filed an emergency petition for review of the superior court's denial of a preliminary injunction and an emergency motion for continuance of the stay in the Alaska Supreme Court on behalf of the Native Village of Eklutna, Alaska Community Action on Toxics, Cook Inletkeeper, Alaska Center for the Environment, and Alaska Survival.



The filing comes on the heels of an Anchorage Superior Court judge's denial of a preliminary injunction to halt the herbicide spraying by the ARRC but he did continue a stay of herbicide spraying to allow time to file the appeal. The ARRC gave notice that the spraying would begin at 9 a.m. Friday, July 9, 2010, but a court-ordered stay has been in place since July 8, 2010. The permit would allow the ARRC to spray glyphosate, the active ingredient in Roundup, and Agridex, the chemical composition of which is unknown, along its right-of-way.

"We are relieved that the court gave us the opportunity to take the ruling to the Alaska Supreme Court," said Pamela Miller, Executive Director of Alaska Community Action on Toxics. "Recent scientific research demonstrates that the herbicide and its associated solvents and surfactants can cause serious human health effects including increased risk of birth defects and certain cancers."

Marc Lamoreaux, Land and Environment Director with the Native Village of Eklutna, was also pleased by the stay: "The people of Eklutna depend on the harvest of berries, medicinal plants, fish and wildlife for our spiritual, cultural and physical sustenance. Stopping the use of herbicides along the Alaska Railroad is essential to keep our community healthy."

On June 2, 2010, Trustees for Alaska filed a request for an adjudicatory hearing. The groups challenged the two-year permit, the first to be issued in 26 years, on the grounds that the groups' due process rights were violated by the lack of legally required information that should have been provided in the public process and that the Department of Environmental Conservation (DEC) arbitrarily approved this permit when a nearly identical permit was denied three years ago. A stay is necessary to allow the administrative process to be completed.

The Alaskans appealing the decision, citizens, public officials, borough governments and municipalities have consistently opposed the railroad's proposed use of herbicides during the last 26 years. Documents and photographic evidence conclusively demonstrate that the Alaska Railroad failed to consider the effects spraying would have on numerous water bodies within permit areas.

Trustees for Alaska attorney Austin Williams said, "This decision, while only temporary, gives us an opportunity to achieve protection of human health as well as water quality and salmon habitat in numerous vulnerable streams, rivers, lakes, wetlands, and other water bodies along the railroad."

Becky Long, Alaska Survival Director, stated, "We believe that this court action shows the need for Alaska to adopt the Precautionary Principle, which provides

that when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established."

To read the full story and related legal documents, please [click here](#).

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