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STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES
OFFICE OF THE COMMISSIONER

SEAN PARNELL, GOVERNOR

☐ P.O. BOX 111000
JUNEAU, ALASKA 99811-1000
PHONE: (907) 465-2400
FAX: (907) 465-3886

■ 550 WEST 7TH AVENUE, SUITE 1400
ANCHORAGE, ALASKA 99501-3650
PHONE: (907) 269-8431
FAX: (907) 269-8918

November 20, 2009

Nancy Wainwright
Staff Attorney
Trustees for Alaska
1026 West 4th Avenue, Suite 201
Anchorage, AK 99501

SUBJECT: COMMISSIONER'S DECISION on Appeal of the February 26, 2009 Decision to Issue Miscellaneous Land Use Permit A096118

Dear Ms. Wainwright:

By your letter dated March 18, 2009 that was received in this office via fax on that date, on behalf of Nunamta Aulukestai, Jack Hobson of Nondalton and Rick Delkettie of Nondalton ("Appellants"), you appealed the "February 26 and February 27, 2009 exploration permit approvals" issued by the Mining Section of DNR's Division of Mining, Land and Water (MLW) to Pebble East Claims Corp., Pebble West Claims Corp., Pebble Partnership and Pebble Limited Partnership. The permit that was approved is Miscellaneous Land Use Permit for Hardrock Exploration and Reclamation (MLUP) A096118 that was signed and issued by MLW on February 26, 2009, and was sent to the applicant, Pebble Limited Partnership (PLP), by letter dated February 27, 2009.

In my April 9, 2009 letter to you, I acknowledged receipt of the appeal, that it was timely filed, and addressed several procedural matters raised in your appeal letter. One such matter was that I denied your request for a stay of MLW's decision while this appeal was under consideration. Accordingly, the permit that is the subject of this appeal became effective on the date stated in the permit, which was February 26, 2009.

In a letter dated and received in this office on April 28, 2009, Matthew Singer, as Counsel for Pebble Limited Partnership, responded to the appeal. By my letter dated April 30, 2009, I acknowledged receipt of PLP's response. Pursuant to DNR's appeal regulation, 11 AAC 02.010(b), an applicant may participate in an appeal submitted by another party. Mr. Singer's response on behalf of PLP was considered along with the administrative record in my adjudication of this appeal. In my August 11, 2009 letter to you, with a copy sent to Matthew Singer, I explained that I had decided to expedite my adjudication of the appeal.

This letter is my decision on the appeal. The case file, applicable statutes and regulations make up the administrative record upon which I based my decision.

After careful consideration, I am rejecting the appeal because the Appellants do not show that they have standing to appeal MLW's February 26, 2009 decision to issue MLUP A096118. Since this appeal is rejected for lack of standing, it is not necessary for me to review the issues raised in the appeal. Even so, I have reviewed the issues raised in the appeal and I would deny the appeal because none of the issues raised presents a legal or factual basis to reverse MLW's decision. The decision to issue MLUP A096118 is affirmed.

BACKGROUND: By letter dated December 31, 2008, the Pebble Limited Partnership (PLP) submitted its Multi-agency Permit Application (APMA) for Hardrock Exploration and Plan of Operations to MLW's Mining Section for a two-year miscellaneous land use permit (MLUP) for exploration operations for 2009-2010.

As stated on the application, the type of activity to be performed was "exploration/reclamation" on State mineral properties. As stated in PLP's letter, its existing permit expired on December 31, 2008, and PLP "wants to continue what is essentially the same mineral exploration program on its Pebble prospect in 2009 and 2010." Its application letter explained that all activities will take place on the State mining claims that are owned or controlled by PLP and anticipated that "2009 exploratory drilling activities will resume on or after February 1," pending permit approval and renewal. PLP described its anticipated activities and stated that these "activities are identical to the 2007-08 proposals, except for a change in some of the numbers of drill holes, test pits, etc. and minor corrections to clarify those activities." PLP's Plan of Operations for exploration activities from January 1, 2009 through December 31, 2010 described PLP's exploration and reclamation plans (as required by AS 27.19), the exploration work, and that 21.6 acres would be subject to these activities from January 1, 2009 to December 31, 2010.

By letter dated February 27, 2009, MLW notified PLP that MLW's Mining Section had issued MLUP A096118 to Pebble East Claims Corp., Pebble West Claims Corp. and Pebble Partnership for the term of approximately two years. MLW signed and issued the permit on February 26, 2009. As stated in the permit, the "effective dates of this permit shall be February 26, 2009 through December 31, 2010, unless sooner revoked for cause. This permit is also revocable at will." This permit authorized the activities described in PLP's application and made these activities subject to the terms of the permit.

In the March 18, 2009 appeal letter, you stated the appeal was "not required under 11 AAC 02.010 *et seq.* ... [and] is a courtesy appeal." Contrary to this assertion, an administrative appeal to DNR is a necessary step in order to challenge a decision of the department, such as the issuance of the MLUP. Therefore, I accepted the appeal and acknowledged that it was timely filed under DNR's appeal regulations in 11 AAC 02, as explained in my April 9, 2009 letter to you. On April 28, 2009, Attorney Matthew Singer, on behalf of the applicant, Pebble Limited Partnership, responded to the appeal, as allowed under 11 AAC 02.010(b). You were cc'd on its response. I acknowledged receipt of PLP's response in my April 30, 2009 letter and you were sent a copy of my letter.

In my letter to you dated August 11, 2009, I explained there were 38 pending appeals that were submitted prior to your appeal and I decided to take this appeal out of its chronological sequence and expedite my consideration of your appeal, with October 30, 2009 as the anticipated date by which I would issue my decision. Mr. Singer was sent a copy of this letter.

DISCUSSION: Appeal is rejected for lack of standing. I have decided to reject the appeal because the Appellants named in the appeal have failed to explain or show how they are "aggrieved by" or "affected by" MLW's February 26, 2009 issuance of MLUP A096118 to PLP and, therefore, have failed to establish that they have standing to appeal. Allow me to explain.

The first sentence of the appeal letter states: "This letter is an administrative appeal...filed on behalf of Nunamta Aulukestai, Jack Hobson of Nondalton and Rick Delkettie of Nondalton ("Appellants")." On page 2 of the appeal letter, in a paragraph titled "Appellants," it states: "The appeal is brought on behalf of Nunamta Auluketstai,[1] an association of eight Native village corporations (Ekwok, Koliganek, New Stuyahok, Clark's Point, Aleknagik, Togiak, Manakotak and Dillingham) and by individuals Jack Hobson and Rick Delkettie, who reside in Nondalton." These are the only statements in the appeal that identify or give any information about who the Appellants are.

Administrative appeals of DNR decisions are governed by AS 44.37.011 (additional procedures for administrative appeals and petitions for reconsideration to the commissioner of natural resources) and by the regulations in 11 AAC 02.010 - .900. Under AS 44.37.011(b), "if a person is **aggrieved by a decision**" of DNR and "is otherwise eligible," then the person may seek the commissioner's review of a decision not made by the commissioner by submitting an appeal. AS 44.37.011(e) authorizes DNR to adopt regulations to implement and interpret this statute. Under 11 AAC 02.010(e) (applicability and eligibility), "an eligible person **affected by a decision**" of DNR that was not signed or cosigned by the commissioner may appeal the decision to the commissioner.

DNR's appeal statute and regulation do not allow "any person" to appeal a department decision. Rather, a person must be "affected by" the DNR decision in order to have standing to appeal the decision to the DNR Commissioner. The only information in this appeal about the Appellants is their names. The appeal does not explain or show how each appellant is "affected by" MLW's February 26, 2009 issuance of MLUP A096118. The appeal fails to meet the indispensable requirement that the Appellants have standing to submit this administrative appeal to DNR. Accordingly, the appeal is rejected because the appeal does not show or establish that the Appellants named in the appeal are "affected by" MLW's February 26, 2009 decision.

Although I am rejecting the appeal because the Appellants have failed to show that they have the necessary standing to submit this administrative appeal, I have nevertheless reviewed the issues in the appeal. Based on my consideration of the issues, I would deny the appeal on the merits because the issues raised in the appeal provide no legal or factual grounds for reversing MLW's decision to issue MLUP A096118.

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[1] The March 18, 2009 appeal has two different spellings: Aulukestai and Auluketstai.

ISSUES RAISED ON APPEAL AND THE DEPARTMENT'S RESPONSES:

A. Basis on Which the Decision is Challenged.

Appellants' Issue 1. The Approval constitutes bad agency policy given the uncertainties and lack of DNR analysis of baseline data and impacts of the past and currently-approved exploration activities.

Department's Response: Without any supporting explanation or argument concerning what is meant by "uncertainties", or "baseline data and impacts" of exploration activities, or without any reference to a specific statute, regulation, or the policy that is "bad", this conclusory statement does not raise an issue to which I can respond and so the appeal on this issue would be denied.

Nevertheless, it should be noted that the MLUP issued on February 26, 2009 to PLP expires on December 31, 2010 and PLP must then submit a new application before it can receive authorization to continue its exploration activities. As part of its Multi-Agency Permit Application (APMA) for Hardrock Exploration, PLP must and did submit a reclamation plan and an exploration reclamation statement in support of its application. The exploration reclamation statement signed by PLP discussed prior reclamation activities and listed the reclamation measures that shall be used in accordance with AS 27.19. Further, under the terms of the permit, PLP must notify DNR in advance of any changes in the activities approved by MLUP A096118 and obtain authorization for any changes before proceeding. This and other information reflects on the impacts of past and current activities, and is part of what is reviewed by DNR.

I would also like to point out that, as mentioned in the permit, other state agencies besides DNR have a role in monitoring the mineral exploration activities authorized by DNR's permit to PLP; these include the State of Alaska's Department of Fish and Game and the Department of Environmental Conservation. This multi-agency involvement was also a consideration in MLW's decision to issue the MLUP.

Appellants' Issue 2. DNR failed to provide public notice, beyond a so-called "courtesy notice" that is insufficient to notify area residents or the public of the nature of the project, project location, affected resources, and affected mining claims.

Department's Response: Without any supporting explanation or argument, it is not clear from this statement what public notice the Appellants claim was required and not given. However, regardless of Appellants' claim, the appeal on this issue would be denied because no Alaska law required public notice before MLW issued its February 26, 2009 decision to issue MLUP A096118. AS 38.05.945 establishes the notice requirements for the departmental actions that are listed in the statute. Subsection (e) of this statute states: "Notice is not required under this section for a permit or other authorization revocable by the department." Further, a written finding is not required before the approval of a permit or other authorization revocable by the commissioner. (AS 38.05.035(e)(6)(C)).

There is no doubt that MLUP A096118 is a revocable permit for which notice under AS 38.05.945 is not required. No other Alaska law requires public notice before DNR issues a revocable permit, and no public notice was required before issuance of MLUP A096118. Although no notice was required by law, DNR nevertheless posted an on-line public notice on DNR's website that the permit had been issued, which Appellants apparently received. Accordingly, the appeal on this issue would be denied, not only because Appellants have failed to present any argument on this issue, but also because no notice was necessary under Alaska law, and because Appellants received actual notice.

Appellants' Issue 3. DNR failed to conduct a proper ACMP review of the 2009-010 exploration activities.

Department's Response: The appeal on this issue would be denied because under DNR's appeal regulations a person cannot appeal an ACMP final consistency determination through an administrative appeal of a departmental decision that simply includes a statement that a final ACMP consistency determination has been made. Nor do DNR's ACMP regulations allow an administrative appeal of a final ACMP consistency determination. This issue is an improper attempt to appeal a separate decision of another division of DNR.

The ACMP consistency review was done by another division within DNR, the Division of Coastal and Ocean Management (DCOM). DCOM determined that ACMP review of PLP's MLUP application for 2009-2010 work was not necessary and DCOM's determination was simply re-stated in MLW's February 27, 2009 letter to PLP (with the MLUP A096118 enclosed). MLW's letter noted at the top: "Coastal Consistency Determination by Ashley Kalli, February 23, 2009; State ID No. 2009-0115AA 'ACMP review not required at this time.'"

Under DNR's appeal regulations, a person cannot appeal a final consistency determination through an appeal of another, separate DNR decision that simply recites that the final consistency determination has been made. (11 AAC 02.015(b)). This regulation is consistent with the fact that a final ACMP consistency determination is, in itself, a final administrative order and decision that is appealable directly to the superior court. See ACMP regulation, 11 AAC 110.260(g). An appeal of a final consistency determination must be brought directly from the DCOM decision, and must be brought in the superior court, not to DNR. Even if it could be argued that DCOM's February 2009 determination that no ACMP review was necessary was not a final consistency determination, it would not be appealable through this administrative appeal to DNR. (See 11 AAC 110.600, elevation process for a proposed consistency determination that may be requested by a resource agency, applicant, or affected coastal resource district.) In accordance with the applicable law, the appeal of this issue would be denied.

Appellants' Issue 4. DNR failed to require the applicant to identify with specificity:

(a) how fuel is transported and the total amount of fuel that will be transported and stored;
(b) exact material that will be used for plugging drill holes upon completion;
(c) the number of helicopter flights per day in each month/season;
(d) the number of workers onsite at any given time; and
(e) the sources of water used, including the area of take and area of discharge.

Department's Response: The appeal on this issue would be denied because Appellants have failed to present any argument or legal support showing, in connection with PLP's application for an MLUP, that DNR is required by law to have PLP "identify with specificity" each of the matters alleged or how an alleged failure to "identify with specificity" each of the matters would require a reversal of MLW's decision. Further, PLP's application and 2009-2010 Plan of Operations provided sufficient information on which MLW could make its decision to issue MLUP A096118 to PLP. Let me elaborate.

(a) The amount of fuel and how it will be stored was described in PLP's Plan of Operations and MLUP A096118 contains terms and conditions for fuel and hazardous substances. As to how fuel will be transported, this was covered in the Plan of Operations' discussion of "site support" and "access", which is via helicopter, or fixed wing aircraft, or snowmachine. Obviously, the method of transport will be dependent on the weather and season.

(b) In the section titled "Boring," PLP's Plan of Operations described how the bore holes will be plugged: "All drill sites will be reclaimed concurrently with exploration, weather permitting. At completion all bore holes will be plugged with Volcay grout, a bentonite clay grout, or equivalent from bottom to top." It further described how the disturbed surface will be reclaimed. MLUP A096118 contains a stipulation on plugging drill holes.

(c) and (d) This kind of specificity was not necessary in order for MLW to issue MLUP A096118. The number of workers on site is addressed generally in PLP's application and by MLUP A096118, which provides that PLP's requested use of "existing facilities for camp purposes during the time frame of seasonal exploration activity is approved" and "[u]se of these facilities is authorized only for activities directly associated with the exploration activities." Helicopter use is also addressed generally.

(e) This information is not necessary for MLW's Mining Section to issue an MLUP, which concerns land use, not water use or discharge. Nevertheless, the multi-agency permit application for hardrock exploration completed by PLP in connection with the MLUP, which is also used by other agencies reviewing PLP's proposed actions, has sections on water use authorizations and water use. PLP filled out those sections and referenced temporary water use permits (TWUPs A2006-142 thru 150) that had already been issued to it by the Water Resources Section of MLW. Regardless, it is the Water Resources Section that manages the State's water resources and their uses, and obtaining an authorization to use water is a separate process from obtaining a land use permit and is governed by different laws (AS 46.15 and 11 AAC 93). Further, issues surrounding discharge of water generally involve the Department of Environmental Conservation or federal agencies.

Therefore, the appeal on this issue would be denied because it is beyond the scope of the Mining Section's decision to issue MLUP A096118 and beyond the scope of this appeal.

Appellants' Issue 5. DNR failed to address the cumulative impacts of the exploration activities.

Department's Response: This issue does not explain what is meant by "cumulative impacts" or what law allegedly requires that MLW analyze such information prior to issuing a permit of this

type. Without any supporting explanation or argument, this conclusory statement does not raise an issue to which I can respond and so the appeal on this issue would be denied. See my response to Issue # 1.

Appellants' Issue 6. DNR failed to analyze baseline information or independently verify baseline conditions upon which to base the Approval.

Department's Response: This issue does not explain what is meant by "baseline information" or "baseline conditions," or what law allegedly requires that MLW analyze such information prior to issuing a permit of this type. Without any supporting explanation or argument, this conclusory statement does not raise an issue to which I can respond and so the appeal on this issue would be denied. See my response to Issue #1.

Appellants' Issue 7. The Approval is unconstitutional under Article VIII of the Alaska Constitution.

Department's Response: Article VIII of the Alaska Constitution is titled "Natural Resources" and contains 18 sections. The Appellants provide no argument as to which section or sections allegedly prohibit the approval of the permit, or how the approval is "unconstitutional." Without any supporting explanation or argument, this conclusory statement does not raise an issue to which I can respond and so the appeal on this issue would be denied.

Appellants' Issue 8. DNR failed to consider the Bristol Bay Area Plan designations for the project area, and analyze the project's consistency with those designations.

Department's Response: It is not clear what is meant by "project area." The permit issued by MLW on February 26, 2009 authorized exploration activities on the state land described in PLP's application and the activities are confined to that area. If the "project area" is intended to go beyond the area authorized by MLUP A096118, then the appeal on this issue would be denied because it would be outside the scope of MLW's decision and beyond the scope of this appeal. However, if I interpret "project area" as only the area affected by MLUP A096118, then the appeal on this issue would be denied because Appellants failed to provide any facts to support their conclusion that DNR failed to consider the Bristol Bay Area Plan or analyze the project's consistency with the Plan's designations in deciding to approve the application. More importantly, it is readily apparent that MLW's decision to issue MLUP A096118 is in fact consistent with the BBAP's land use designation for the area affected by the application and permit.

According to the BBAP, the area affected by the permit is within the "Pebble Copper area deposit" and the land use designation for this area is "Mi – Minerals." (BBAP, p. 3-92, 3-111.) The BBAP describes the Minerals designation as follows: "Areas associated with significant resources, either measured or inferred that may experience minerals exploration or development during the planning period are designated Minerals. This is a designation that includes surface uses in support of minerals exploration and development. ... Lands designated Minerals are to be retained in state ownership. This designation has been applied at the Shotgun, Sleitat, Kemuk, and Pebble Copper

deposits." (BBAP, p. 3-98.) Accordingly, MLW's issuance of MLUP A096118 is consistent with the BBAP's land use designation for the area where PLP's exploration activities are being done.

Further, the exploration activities authorized by MLUP A096118 are being conducted on valid mining claims on state land that are owned or controlled by PLP. Those mining claims could only have been staked at a time when the area was open to mining and mineral exploration, and the claims became valid existing rights at the time they were created. Exploration on and development of valid, pre-existing mining claims on state land is allowed even if an area plan or mineral closing order has subsequently closed the area to mining. Accordingly, the application for the permit was, on its face, consistent with the BBAP's land use designation for the "project area." The appeal on this issue would be denied.

B. Appellants' Requested Remedy.

Based on these grounds, the Appellants seek a rescission of MLUP A096118 and plan of operations approval, a stay of the permit approval, until this appeal is resolved, and a moratorium on any new approvals for the Pebble project until DNR carries out its regulatory, statutory and constitutionally-mandated duties.

Department's Response: The Appellants' requested remedy to rescind MLUP A096118 and the plan of operations' approval is denied because I have rejected this appeal on the ground that the Appellants do not have standing. The requested remedy would also be denied because the basis on which the decision is challenged (i.e., the "issues") would be denied. As to a stay of the permit and a moratorium on new approvals, I denied the stay and the moratorium and explained my reasons for doing so in my April 9, 2009 letter that acknowledged receipt of this appeal, which is incorporated here by reference.

C. Appellants' Material Facts in Dispute.

Since there is no analysis provided by DNR of any material fact either in the Approval or in DNR's files, it is impossible to dispute material facts. However, based upon information available, the following are disputed facts:

- That the activities contemplated are a modification of an existing project and do not require review for consistency with the ACMP or district coastal management plan.
- That the activities contemplated are consistent with the Bristol Bay Area Plan.
- That the APMA/AHEA contained specific information upon which DNR could adequately identify activities and base a rational decision.
- That the exploration reclamation plan and bonding are sufficient.
- That the activities avoid impacts to waters of the U.S. and minimizes unavoidable impacts to waters of the U.S. including wetlands.
- That the Approval allows for reasonable concurrent use, maximum beneficial use, common use, a general reservation for fish and wildlife of water resources, allows for and protects wildlife under the principle of sustained yield, or protects the public interest and the public trust.

Department's Response: First, it is important to note that MLW was not required either to make, or to make available to the public, a written finding of the material facts or analysis of its decision to issue MLUP A096118. Under AS 38.05.035(e)(6)(C), a written finding is not required before the approval of a permit or other revocable authorization. And see AS 38.05.850. Second, I disagree that this appeal has raised a legitimate dispute with any of the facts listed. See particularly, my responses to Issue # 3 and Issue #8, and see generally, my responses to all issues.

PERMIT APPLICANT'S RESPONSE TO APPEAL: In a letter dated April 28, 2009, counsel for the Pebble Limited Partnership responded to the appeal submitted by Trustees for Alaska on March 18, 2009. In accordance with DNR appeal regulation 11 AAC 02.010(b), PLP, the permit applicant, could respond to Trustees' appeal.

PLP Response 1. At minimum, an appeal under 11 AAC 02.030(a)(8)[2] should provide DNR and the permit applicant "sufficient notice and information to understand the nature of the proceedings." (citation omitted) In this instance, the appeal letter is so devoid of legal or factual support that it renders it virtually impossible to know how to respond. As such, we respectfully request that the Commissioner deny the appeal for failing to meet the basic requirements of 11 AAC 02.030(a)(8).

PLP Response 2. Furthermore, there is neither a factual nor a legal basis for revoking PLP's permit for limited exploration activities. The permit request met all statutory and regulatory requirements. PLP respectfully requests that you deny the appeal because it fails to state a valid legal or factual basis for revocation of the permit.

Department's Response: My responses to the above issues address each of these points raised by PLP, where applicable.

DECISION: I have decided to reject this appeal because the Appellants named in the appeal do not show that they meet DNR's statutory and regulatory requirements to establish standing to submit an administrative appeal to DNR of MLW's February 26, 2009 decision to issue MLUP A096118. Additionally, I would deny this appeal based on the issues raised in the appeal, which are either insufficiently presented or do not provide a legal or factual basis on which to reverse MLW's issuance of the permit. By this decision, I am affirming MLW's February 26, 2009 decision to issue MLUP A096118 to PLP.

APPEAL: This decision is a final administrative order and decision of the department for the purpose of an appeal to Superior Court. An appellant affected by this final administrative order and

[2] 11 AAC 02.030(a)(8) states: "(a) An appeal or request for reconsideration under this chapter must (8) specify the basis upon which the decision is challenged."

decision may appeal to Superior Court within 30 days in accordance with the Alaska Rules of Court and to the extent permitted by applicable law.

Sincerely,

Thomas E. Irwin
Commissioner

cc: Dick Mylius, Director, Division of Mining, Land and Water, DNR
Rick Fredericksen, Mining Section Chief, MLW, DNR
Tom Crafford, Mining Coordinator, Office of Project Management and Permitting, DNR
Matthew Singer, Jermain Dunnagan & Owens, P.C., Counsel for Pebble Limited Partnership, 3000 A Street, Suite 300, Anchorage, AK 99503