



# TRUSTEES FOR ALASKA

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Alaska's non-profit public interest environmental law  
Brief

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## Table of Contents

[Letter from Director](#)  
[NPDES Program Still in Court](#)  
[Support Trustees](#)  
[Pebble Trial Update](#)  
[Protect Salmon Habitat from Coal Mining](#)

## Dear Friend,

Trustees for Alaska works strategically to address some of the most important environmental issues affecting Alaska. We represent a wide range of clients from native villages, community and citizen groups, local and national conservation groups, statewide coalitions, hunting and fishing groups, as well as individual Alaskans. Please read on to learn more about some of our current work.

Sincerely,

Trish Rolfe  
Executive Director

## Challenge to EPA's Delegation of NPDES Program to Alaska Still in Court

The lawsuit challenging EPA's delegation of the National Pollutant Discharge Elimination System (NPDES) program to Alaska continues despite a three-judge panel ruling at the Ninth Circuit that did not overturn EPA's delegation decision. Trustees for Alaska sued over EPA's decision on three grounds: (1) Alaska's "loser pays" rule deters public participation and legal challenges to the State's issuance of NPDES permits in state court; (2) the delegation does not comply with the subsistence mandates of the Alaska National Interest Lands Conservation Act (ANILCA); and (3) EPA should have required the State to include the legal ability for it to assess administrative penalties rather than having to take the polluter to court to assess penalties.

## The Pebble Case Goes to Trial



After two years of investigating and litigating the constitutionality of the State's exploration and temporary water use permits for the Pebble Project, the two-week trial concluded on December 17, 2010. Superior Court Judge Eric Aarseth has begun his deliberations, and ordered the parties to submit post-trial proposed findings of fact and conclusions of law by

mid-March. This means a ruling probably won't be issued until late April. Trustees for Alaska's Proposed Findings of Fact and Conclusions of Law may be viewed by visiting: [www.trustees.org/Documents/2011-01-31-Proposed-FF--CL.aspx](http://www.trustees.org/Documents/2011-01-31-Proposed-FF--CL.aspx).

During the trial, hundreds of documents were introduced as evidence in the trial and 50 hours of testimony was taken from scientific experts, Native residents that use the area for subsistence, a driller's assistant who viewed the impacts of the exploration activities, a hunting guide who can no longer use the area for his guiding business because of the Pebble Project, and state and Pebble Limited Partnership employees.

Some highlights from the trial were:

**Dr. Stuart Smith** (expert in GIS mapping) went through a presentation in GoogleEarth-type software that showed the number of boreholes drilled (1,269) exceeded the number that had been reported by Pebble Limited Partnership, revealed that distances between boreholes and water sources were less than the 100 feet the State claimed was necessary to protect waters, and demonstrated that drilling likely occurred in areas where known cultural resources have been mapped. His presentation provided a visual picture of the amount of exploration activity that has gone on at the Pebble Project over the past two decades.

**Bobby Andrew** (spokesman for Nunamta Aulukestai, the lead plaintiff in the case) provided important information about Nunamta's involvement in the Pebble issue and the necessity of subsistence for the members of Nunamta and those that live in the Bristol Bay region.

**Gordon DeHusson** (driller's assistant at the Pebble Project in 2006 and 2008) testified about his experiences on two drill rigs at the Pebble Project. He provided evidence about a 2 1/2 - 3-day artesian flow that flooded part of the valley and about an incident where hundreds of fish fry were spewed onto the frozen tundra. He also testified about how the caustic chemicals used in drilling muds destroyed personal protective equipment.

**Dr. David Chambers** (expert in geophysics, stages of mining exploration) discussed the stages of upland hardrock mining exploration and impacts of exploration as well as the inadequacies of the permitting system to protect water quality.

**Steven Morris** (hunting guide with permits in the Pebble Project area) provided evidence about the impact to his guiding business from the Pebble Project activities and testified that he does not use his guiding permit in the area any longer due to the adverse impacts from Pebble Project helicopter activity.

**Rick Delkittie, Sr.** (Plaintiff and Nondalton resident) testified about his experiences working on a reclamation crew on the Pebble Project, discussed the negative impacts to his subsistence hunting and provided a vivid picture of the spiritual aspects of hunting and subsistence at and near the Pebble site for the village of Nondalton.

Two judges on the panel gave EPA tremendous deference and ruled that despite the uncertainty about the "chilling effect" of the "loser pays" rule, EPA's decision was lawful. In making that decision, the judges deferred to EPA's ability to de-delegate the program, if this issue becomes a problem, but after many petitions to de-delegate the NPDES program in other states, EPA has not yet de-delegated a single program, so this deference is misplaced. The other judge, however, found that Alaska's "loser pays" rule does not meet the federal standard and deters public participation and permit challenges that would further protect water quality under the Clean Water Act. All three judges agreed that EPA withstood the other two claims.

Because the decision did not consider all of the problems with Alaska's "loser pays" rule, Trustees for Alaska filed a Petition for Rehearing by both the three-judge panel and an *en banc* panel. *En banc* review is a request to have 11 judges from the Ninth Circuit take another look at the case. After filing, the judges requested briefs from EPA and the State, which intervened in the case, and accepted an *amici curiae* brief from Minnesota Center for Environmental Advocacy, People for Puget Sound, Puget Soundkeeper Alliance, Florida Wildlife Federation, Inc., Environmental Confederation of Southwest Florida, and forty-eight members of the Waterkeeper Alliance coalition supporting our petition. The petitioners in the case are Akiak Native Community, Nunamta Aulukestai, Nondalton Tribal Council, Curyung Tribal Council, Cook Inletkeeper, Alaska Center for the Environment, Alaska Community Action on Toxics, Center for Biological Diversity, the Center for Water Advocacy, Ekwok Tribal Council, New Stuyahok Traditional Council, and Prince William Soundkeeper.

### Support Trustees

Trustees for Alaska is the only Alaska-based non-profit public interest law firm providing legal counsel to protect and sustain Alaska's natural environment. We provide legal counsel to diverse constituencies on the major environmental policy issues facing Alaska.

Our work is far from over -- and relies on donations from foundations and individuals who care about protecting Alaska's special places. Support us today! Your contribution of \$50, \$75 or \$100 is an investment in Alaska's future.

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**Bella Hammond** (Plaintiff, former Alaska First Lady and resident of Lake Clark) talked about her experiences with the numerous helicopters at the Pebble Project, the noise impacts to wildlife as well as the lack of public notice for the exploration activities that have gone on at the Pebble Project.

**Dr. Kendra Zamzow** (expert in water chemistry) provided testimony about anomalous water chemistry data from Pebble that she has reviewed as well as acid rock drainage and the likelihood of water quality impacts.

**Rick Halford** (works for Trout Unlimited and is a former Alaska Senate President) testified about his experiences flying in the area for decades and the impacts that he has seen from the exploration activities. He also talked about the long-term visual impact from the air of the seismic lines that Pebble has cut, and is cutting, in the area and the decrease in wildlife in the Pebble Project area.

**Dr. Carol Ann Woody** (fish biology expert) testified to the tremendous fish resources in Bristol Bay as well as fish behavior and the impact of copper on salmon. She also discussed how the fish use the groundwater (hyporheic zone) to travel between streams and ponds, and how drilling mud discharges to those regions adversely impact fish.

**Lance Trasky** (expert in fish and wildlife biology and former Alaska Department of Fish and Game employee) testified about his experiences with the Pebble Project and the impacts to fish and wildlife in the region as well as the inadequacies of the permitting process.

The plaintiffs in the lawsuit are Nunamta Aulukestai; Rick Delkittie, an Alaska Native and resident of Nondalton; Violet Willson, a resident of Naknek; former Alaska First Lady Bella Hammond; and Alaska Constitutional Convention Delegate, and constitutional scholar, Victor Fischer.

## The State Holds Hearings on Trustees for Alaska's Petition to Protect Important Salmon Habitat from Coal Mining

The first of two public hearings on a petition filed by Trustees for Alaska to designate the Chuit River and its tributaries as unsuitable for surface coal mining was held in Kenai, Alaska on January 19, 2011, with over 150 people showing up to support protecting the important river. Fifty-two individuals testified in support of the petition while only one, the project manager for Texas-based leaseholder PacRim Coal, LP, spoke in favor of coal mining.



The Chuit River is one of the most important salmon-producing rivers in Cook Inlet. It produces all five species of Pacific salmon and supports vital subsistence, commercial and sport fisheries. The Native Village of Tyonek and the small community of Beluga, both isolated from the rest of Alaska's road system, are near the mouth of the Chuit River and depend upon the river's abundant fish and wildlife habitat to maintain their local subsistence way-of-life.

Despite designation by the State of Alaska as a "River of Statewide Significance," proposed coal development threatens to obliterate over eleven miles of one of the Chuit River's most productive tributaries, dump over seven million gallons of polluted wastewater per day into the Chuit River, forever alter the landscape and local ecology, and contribute to the ever-increasing impacts of climate change. If developed, the Chuitna Coal Strip Mine would be the first large-scale mine of any type permitted to mine directly through waters identified by the state as important to salmon, and set an unacceptable precedent for the destruction of salmon streams throughout the state.

In Trustees' ongoing efforts to protect the Chuit River and its important fish and wildlife, Trustees for Alaska has petitioned the Alaska Department of Natural Resources to designate the Chuit River and all its tributaries as unsuitable for surface coal mining. If the Unsuitable Lands Petition is granted, the Alaska Department of Natural Resources would designate the Chuit River, its tributaries, and its riparian areas off limits to all surface coal mining. A second hearing is set to occur in the Native Village of Tyonek in March 2011, with a final decision on the petition expected from the State by April 4, 2011. The petitioners are the Chuitna Citizens Coalition and Cook Inletkeeper.

To read more about our work on Chuitna, please go to <http://www.trustees.org/Programs/Global-Warming/Chuitna-Coal-Project.aspx>.