IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

NUNAMTA AULUKESTAL, JACKIE HOBSON, RICKY DELKITTIE, SR., VIOLET WILLSON, BELLA HAMMOND, and VICTOR FISCHER

Plaintiffs,

vs.

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,

Defendant,

and

PEBBLE LIMITED PARTNERSHIP, ILIAMNA NATIVES LTD., ILIAMNA DEVELOPMENT CORP., RESOURCE DEVELOPMENT COUNCIL FOR ALASKA INC., and MILLROCK RESOURCES, INC.,

Intervenors.

CASE NO. 3AN-09-9173CI

ORDER

Motion for Summary Judgment

I. Factual and Procedural Background

The Pebble Limited Partnership comprises 50% interests of subsidiaries of Anglo American plc and Northern Dynasty Minerals ltd. The State of Alaska, Department of Natural Resources (the "State") has issued miscellaneous land use permits ("MLUPs")[1] to the Pebble Limited Partnership and its predecessors in interest. The MLUPs, along with temporary water use permits ("TWUPs")[2] that were also issued, relate to a variety of hardrock mining exploration activities in a remote area approximately 200 miles southwest of Anchorage, north of Lake

1 *See* AS 38.05.850.

2 *See* AS 46.15.155.

Iliamna (the "Pebble Project"). According to plaintiffs Nunamta Aulukestai, Ricky Delkittie, Sr., Violet Willson, Bella Hammond, and Victor Fischer (collectively, "Nunamta"), DNR has issued these permits for each year from 1989 to 2010 (except for 2000 and 2001).

On July 30, 2009, Nunamta filed its first amended complaint against the State, challenging the constitutional validity of the permits. Nunamta specified six counts:

> I. Violation of the Public Trust Doctrine [under the] Alaska Constitution, Article VIII.
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> II. Violation of article VIII, §§ 1, 2 and 8 of the Alaska Constitution [relating to] Utilization, Development and Conservation of All Natural Resources For the Maximum Use Consistent with the Public Interest, For the Maximum Benefit of the People Subject to Reasonable Concurrent Uses.
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> III. Violation of Article VIII, §§ 3 and 4 of the Alaska Constitution [relating to] Reservation of fish, wildlife and waters to the people for common uses [and] Maintenance of resources on the sustained yield principle.
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> IV. Violation of Article VIII, § 10 of the Alaska Constitution [prohibiting] disposals or leases of state lands or interests therein without prior public notice and other safeguards of the public interest.
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> V. Violation of Article VIII, § 13 of the Alaska Constitution [relating to] Reservation of water for common use, fish and wildlife and appropriation among beneficial and concurrent uses.
>
> VI. Violation of Article VIII, § 17 of the Alaska Constitution[, i.e., the] Uniform Application Clause.

Based on these alleged constitutional violations, Nunamta requested declaratory and injunctive relief, including a request that the Court declare the permits that DNR issued for the Pebble Project to be void, and enjoin the State from issuing any further permits until "a constitutionally valid administration and permitting

process for upland hardrock mining exploration is enacted by the legislature and adopted by DNR."[3]

On March 8, 2010, the State filed a motion for summary judgment on all six counts. Pebble Limited Partnership, Iliamna Natives Ltd., Iliamna Development Corp., Resource Development Council for Alaska, Inc., and Millrock Resources, Inc. (collectively, "PLP"), intervenors and amici in the case, also filed a memorandum in support of summary judgment. In its motion for summary judgment, the State contends that Nunamta's claims have no basis in the Alaska Constitution. According to the State, "the constitution does not require a BIF or other procedural requirement at all, for any decision, -- whether it is a disposal, lease, permit, or any other land management decision."[4] The State's position is that the constitution leaves the legislature the choice either to specify these procedures or to provide for none at all. PLP takes essentially the same position in its memoranda.

Nunamta, however, argues that the State has numerous duties under the Alaska Constitution to, among other things, hold land in the public trust,[5] utilize, develop and conserve natural resources for the maximum benefit of the people,[6]

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[3] First Amended Complaint at 55.

[4] Motion at 36. A "BIF" is a best-interest finding.

[5] *See* Alaska Constitution, Article VIII, section 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."); *Owsichek v. State, Guide Lic. And Control Bd.*, 763 P.2d 488, 495 (Alaska 1988) (holding that "common law principles incorporated in the common use clause impose upon the state a trust duty to mange the fish, wildlife and water resources of the state for the benefit of all the people"); *Herscher v. State, Dep't of Comm.*, 568 P.2d 966, 1003 (Alaska 1977) (noting that the State acts "as trustee of the natural resources for the benefit of its citizens").

[6] *See* Alaska Constitution, Article VIII, section 2 ("The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.").

utilize, develop, maintain replenishable natural resources on the principle of sustained yield,[7] and consider concurrent uses when issuing permits.[8] According to Nunamta, the constitution imposes independent constraints on the State's management of and disposal of interests in public lands. Finally, Nunamta argues that the State's permitting system impermissibly differentiates between offshore and upland mining operations in violation of the Uniform Application Clause of Article VIII, section 17.[9]

II. Discussion

A. *Nunamta's claims are best categorized as an "as applied" constitutional challenge to the current statutory and regulatory permitting regime*

In its first amended complaint, Nunamta does not explicitly challenge the constitutionality of any particular statutes or regulations, but simply alleges that the State violated various provisions of the Alaska Constitution when it issued the MLUPs and TWUPs to the Pebble Limited Partnership and its predecessors in interest. This has led to some confusion as to whether Nunamta is challenging

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[7] *See* Alaska Constitution, Article VIII, section 4 ("Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.").

[8] *See* Alaska Constitution, Article VIII, section 8 ("The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses.").

[9] *See* Alaska Constitution, Article VIII, section 17 ("Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.").

various regulations and provisions of the Alaska Land Act[10] on their face or as applied to the specific permits issued here.

It is important to note, however, that Nunamta requested (among other relief) an injunction until a "constitutionally valid administration and permitting process *for upland hardrock mining exploration* is enacted by the legislature and adopted by DNR."[11] This prayer for relief, interpreted most broadly, only implies a challenge to the permitting regime as it applies to upland hardrock mining exploration; Nunamta has not challenged these statutes and regulations as they apply to permits for a large variety of land uses not related to hardrock mining exploration. Additionally, Nunamta has alleged facts relating only to the permits issued for the Pebble Project as an essential component of its constitutional claims, further narrowing their scope.

Constitutional challenges to statutes and regulations can be categorized either as "facial" or "as-applied."[12] According the Alaska Supreme Court, "A statute is said to be facially unconstitutional if 'no set of circumstances exist under which the Act would be valid.'"[13] As noted above, Nunamta has not alleged that the permitting statutes and regulations are unconstitutional with respect to any

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[10] AS 38.05.005 *et seq.*

[11] First Amended Complaint at 55 (emphasis added).

[12] *State v. Native Village of Nunapitchuk*, 156 P.3d 389 (Alaska 2007) (citing *Javed v. Dep't of Pub. Safety, Div. of Motor Vehicles*, 921 P.2d 620, 625 (Alaska 1996) and *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697 (1987) ("A facial challenge is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under with the Act would be valid.").

[13] *State v. Native Village of Nunapitchuk*, 156 P.3d 389 (Alaska 2007) (citing *Javed v. Dep't of Pub. Safety, Div. of Motor Vehicles*, 921 P.2d 620, 625 (Alaska 1996) and *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697 (1987) ("A facial challenge is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under with the Act would be valid.")).

land use other than hardrock mining exploration, specifically the exploration activities related to the Pebble Project. Permits for many other land uses, such as commercial recreation and scientific research, can be allowed under AS 38.05.850. Because the statutes and regulations would presumably be valid when applied to these *de minimis* land uses, Nunamta's claims fall into the category of an "as-applied" constitutional challenge, in which the "factual context involved . . . [is] critical."[14]

B. Nunamta's ultimate argument is that the State should have performed a best-interest finding encompassing numerous constitutional considerations

Although it appears that the analysis here will need to address the specific activities permitted by the State, the State and PLP argue against the applicability of each constitutional provision that Nunamta relies on as a more general matter. Nunamta has responded in kind, defending their position as to each constitutional provision or group of provisions specified in the counts of its first amended complaint. But while Nunamta has separated its constitutional arguments into seven counts, the gravamen of Nunamta's claims seems to be an assertion that the State should have performed a best-interest finding before granting the permits at issue and should have made that finding available to the public. Thus, regardless of the effect or application of any particular constitutional provision, 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.

As the State notes, the constitution does not mention a best-interest finding, and one is not specifically required by the language of the various natural resource

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[14] *United States v. Frederick*, slip copy, 2010 WL 2179102 at *6 (D.S.D. May 27, 2010) (citing *United States v. Polouizzi*, No. 06-CR-22 (JBW) 2010 WL 1048192 at *4 (E.D.N.Y. mar. 23, 2010)).

provisions. Instead, a best-interest finding is an artifact of the State's consideration of constitutional policies of maximum beneficial use, sustained yield, concurrent uses, etc.[15] All of these considerations, in turn, are expressions of the same underlying constitutional policy "to encourage the settlement of [public] land and developments of [the State's] resources by making them available for maximum use consistent with the public interest."[16] Because these intertwined constitutional considerations are encompassed by a single finding, the ultimate question here is whether the State should have made such a finding before issuing permits to the Pebble Project, or whether (as the State alleges) it was only required to adhere to its own statutory and regulatory limitations and authorizations.

As the State notes, the provisions of Article VIII were intended to operate as broad guidelines or precepts of natural resource management.[17] According to the State, "[t]he framers left it to the legislature to establish procedures for managing state lands and resources" and the State, in establishing these procedures, have provided sufficient protections of Article VIII interests.[18] Indeed, although the framers acknowledged the importance of "safeguards of the public interest" in public land transactions, they wanted to avoid extending those protections to "routine matters" (as opposed to matters "of substantial value"), such that administration of public lands became "hopelessly ensnarled in red

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15 *See Kachemak Bay Conservation Soc. V. DNR*, 6 P.3d 270276 (Alaska 2000) (stating that "DNR's obligation to consider the 'best interests of the state' and to issue written findings when it proposes to alienate state land or an interest in state land can be traced to the Alaska Constitution" and citing article VIII sections 1, 2, and 8 as the constitutional source of this requirement)

16 Alaska Constitution, Article VIII, section 1.

17 Motion for Summary Judgment at 7-8.

18 State's Reply at 11.

tape."[19] Additionally, certain Article VIII provisions refer to procedures that "may be prescribed" by the legislature, perhaps suggesting that these provisions themselves do not mandate any particular considerations or procedural protections.

Not surprisingly then, the contours of any independent requirements that Article VIII might impose on the State have not been established. In *Owsichek v. State*,[20] for example, the supreme court noted that "[t]he extent to which th[e] public trust duty, as constitutionalized by the common use clause, limits a state's discretion in managing its resources is not clearly defined."[21] But the lack of definition does not mean that these provisions have no direct effect apart from their implementation by the legislature. Thus, in *Owsichek*, the court rejected the State's argument that the common use clause imposed no limitation at all on the state management powers beyond any other applicable constitutional provisions.[22] Not only would such an interpretation render the provision a nullity, the court held, but would go against 15 years of precedent.[23] According to the supreme court, the "common use clause is intended to provide independent protection of the public's access to natural resources."[24]

Similarly, other provisions of Article VIII, in order to have any meaning at all, must be interpreted as containing independent constraints on State action.[25] As

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19 Motion for Summary Judgment at 7-8; Sec. 12 commentary on Article VIII, Proposal 8a.

20 763 P.2d, 488, 495 (Alaska 1988).

21 *Id.* at 495.

22 *Id.*

23 Id. at 495-96 (citations omitted).

24 Id. at 495.

25 *See, e.g., Northern Alaska Environmental Center v. DNR*, 2 P.3d 629, 635 (Alaska 2000) (referring to "the broad constitutional mandate to protect the public interest in disposition of state land" contained in Article VIII, section 10"); see

noted above, however, because the main dispute in this case is whether the State should have considered the content of any of these constitutional provisions before issuing the MLUPs and TWUPs, the Court need not consider the application of these provisions on a count by count basis. The State either needed to balance the policy considerations entrenched in Article VIII or it did not.

C. *While the Court need not examine each clause relating to natural resource management, Article VIII, section 17 does not apply to the facts of this case*

The only Article VIII provision that Nunamta relies on that is clearly not implicated by the facts in this case is section 17. This clause states that "[l]aws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." "In recognition of the importance of citizens' equal access to natural resources," the Alaska Supreme Court has "interpret[ed] the Uniform Application Clause to require legislation dealing with natural resources to satisfy a heightened level of scrutiny."[26] "The protections of the Uniform Application Clause, however, extend only to persons similarly situated with respect to the subject matter and purpose of the legislation."[27]

Nunamta has relied on the Uniform Application Clause to argue that the State has "created an irrational statutory and regulatory scheme that arbitrarily allows *upland* hardrock mining exploration statewide, and at the Pebble Project,

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also *Baxley*, 958 P.2d at 434 (quoting *McDowell v. State*, 785 P.2d 1, 16 n.9 (Alaska 1989) ("The public trust doctrine provides that the state holds certain resources, such as wildlife, minerals, and water rights in trust for public uses, 'and government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.'").

[26] *Baxley*, 958 P.2d at 429 (citations omitted).

[27] *Id.*

without public notice and without a public interest review under Article VIII, despite requiring both public notice and a BIF for *offshore* hardrock mining exploration." Essentially, this argument is a different articulation of the underlying theme of Nunamta's complaint, i.e., that a best interest finding is required for upland hardrock mining exploration. Section 17, however, serves only to protect similarly situated users from exclusion from participation in the State's natural resources. Nunamta, however, argues in Count VI that the permitting regime impermissibly distinguishes between particular *uses* of public land when providing procedural protections such as public notice. Nunamta has not alleged that any similarly situated user has been excluded from either upland or offshore hardrock mining exploration, and it has thus failed to make out a claim for a violation of the Uniform Application Clause. Summary judgment is granted in favor of the State on Count VI.

D. *Although the Court has characterized Nunamta's claims as constitutionally based, the parties all have made statutory arguments related to AS 38.05.035*

Portions of the parties' memoranda relate to the application of certain provisions of the Alaska Land Act to the permits at issue. Specifically, Nunamta appears to raise a statutory argument that the State, by issuing permits that are functionally irrevocable without prior public notice, has violated AS 38.05.035, which provides that, "[u]pon a written finding that the interests of the state will be served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property, or interests in them." In addition to requiring the director to make this determination, AS 38.05.035(e) requires that a written finding be made available to public either before a public hearing. Because the parties have raised the issue in the context of

discussing *Northern Alaska Environmental Cent. v. DNR*, [28] the Court will address it below.

> *i. Under Northern Alaska, temporary permits that are not functionally revocable are subject to the best-interest-finding requirement of AS 38.05.035(e) only if no other exception applies*

Northern involved a right-of-way permit for an electronic transmission line 150 feet wide and sixty-five miles long, encompassing an area of approximately 1,200 acres.[29] When the issuance of the permit was challenged for lack of public notice and a best-interest-finding under AS 38.05.035(e),[30] DNR claimed that the permit was exempted because it was revocable and was not a disposal of an interest in land.[31] According to DNR, the issuance of the permit was governed by AS 38.05.850(a), which provides:

> The director, without the prior approval of the commissioner, may issue permits, rights-of-way, or easements on state land for roads, trails, ditches, field gathering lines or transmission and distribution pipelines not subject to AS 38.35, telephone or electric transmission and distribution lines, log storage, oil well drilling sites and production facilities for the purposes of recovering minerals from adjacent land under valid lease, and other similar uses or improvements, or revocable, nonexclusive permits for the personal or commercial use or removal of resources that the director has determined to be of limited value. .... In the granting, suspension, or revocation of a permit or easement of land, the director shall give

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[28] 2 P.3d 629 (Alaska 2000).

[29] *Id.* at 632

[30] ("Upon a written finding that the interests of the state will be best served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property, or interests in them.").

[31] *Northern*, 2 P.3d at 632. *See also* AS 39.05.035(e)(6)(C) (exempting "permit[s] or other authorization[s] revocable by the commissioner.")

> preference to that use of the land that will be of greatest economic benefit to the state and the development of its resources.

The permit for the right-of-way in *Northern* specified that it was granted under AS 38.05.850, and was a "revocable," "temporary authorization," that did not grant a property right to the permit holder.[32]

The court noted that DNR regulation 11 AAC 55.040(i)(6) explicitly characterized a right-of-way as a disposal, contradicting the facial terms of the permit, but went on to address DNR's argument that a license is not a "disposal" of an "interest in land."[33] The court concluded that, "focusing on substance rather than form ... licenses, such as revocable land use permits, are generally considered interests in land."[34] Although courts had generally "denied licenses the status of interests in land for the limited purposes of constitutional protections and compliance with the Statute of Frauds," the court wrote, "the broad constitutional mandate to protect the public interest in dispositions of state land" requires that interests such as licenses be treated as "interests in land."[35]

The court then addressed whether a license for a right-of-way was a "disposal" for the purposes of AS 38.05.035(e). DNR argued that the right-of-way permit was not a disposal "because of its limited duration and subject matter."[36] According to DNR, a right of way permit was not a disposal because it did not permanently convey any rights and did not grant a right of exclusive possession. The supreme court disagreed. First, because .035 referred to "leases ... or other disposal[s]," it was clear to the court that the legislature did not intend "disposal"

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32 *Northern*, 2 P.3d at 633.

33 *Id.* at 634-35.

34 *Id.* at 635 (citation omitted).

35 *Id.*

36 *Id.*

only to refer to permanent conveyances.[37] The court therefore concluded that the term "disposal ... includes property interests of limited duration such as permits and leases."[38] Second, because leases do not necessarily convey exclusive rights to possession, as in the cases of grazing and mining leases, the court held, a disposal is clearly not limited to transfers of exclusive possessory interests.[39] Therefore, exclusive possession, like permanent conveyance, is not required for a disposal. Finally, the court noted that need for a specific exemption for revocable licenses in .035 indicated that such permits would usually be included within the term "disposals" – otherwise there would be no need for the exemption.[40]

The court ultimately concluded that "the issuance of a right-of-way permit is a disposal of an interest in land for purposes of AS 38.05.035(e)."[41] To give effect to each of .035(e) and .850(a), the court held that they were of overlapping applicability, with right-of-way permits exempted from the requirement of approval by the commissioner but not from the best-interest-finding requirement.[42]

DNR's second argument was that the permit fell under the exception of AS 38.05.035(e)(6)(C) because it was "revocable by the commissioner."[43] Northern Center, however, argued that "the cost and magnitude of the construction, as well as the claimed importance" of the project, rendered it irrevocable in 'a practical, real world sense.'"[44] The court agreed that the terms of the permit or statute alone

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37 *Id.* at 636.

38 *Id.* at 636 (citation omitted).

39 *Id.*

40 *Id.*

41 *Id.* at 637.

42 *Id.*

43 *Id.*

44 *Id.*

could not govern whether the permit was actually revocable, and adopted a test from *Wilderness Society v. Morton*[45] to determine revocability. That test has two prongs. The first "focuses on the likelihood of revocation as opposed to the mere legal right to revoke."[46] "Under this test, a permit would not be revocable where revocation would result in the destruction of the licensee's sizable investments."[47] In such cases, the court noted, "the reserved right of revocation belies the reality that the permit is functionally irrevocable."[48] Under the second prong, "the court focuses on whether, upon revocation, the licensee could remove the installed structures, or otherwise vacate the land, without permanently damaging or destroying the property for governmental use."[49] In adopting the *Wilderness Society* test, the court held that "the revocable permit exception applies only if the permit is functionally revocable." "Because of the 'importance of our land resources and of the concomitant necessity for observance of legal safeguards in the disposal or leasing of state lands,' we must analyze the true nature of the proposed project and submit functionally irrevocable permits to the scrutiny of a best interest finding."[50]

The supreme court held that, under both prongs of the *Wilderness Society* test, the DNR permit was functionally irrevocable.[51] First, noting that "the project involve[d] an enormous expenditure of . . . over $40 million in funds appropriated

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45 479 F.2d 842 (D.C. Cir. 1973) (en banc).

46 *Northern*, 2 P.3d at 638 (quoting *Wilderness Society*, 479 F.2d at 870).

47 *Id.* at 638.

48 *Id.*

49 *Id.* (quoting *Wilderness Society*, 479 F.2d at 872).

50 *Id.* (quoting *Alyeska Ski Corp. v. Holdsworth*, 426 P.2d 1006, 1011 (Alaska 1967)).

51 *Id.* at 639.

by the legislature" that would be destroyed if the permit were revoked, the court held that the possibility of revocation was "extremely remote."[52] Second, the court determined that the project "present[ed] the likelihood or irreversible ecological changes."[53]

ii. *As a reaction to Northern Alaska, the legislature exempted all permits issued under AS 38.05.850 from the best-interest-finding requirement of AS 38.05.035(e)*

Nunamta cannot rely on *Northern* to argue that the permits in question were issued in violation of AS 38.05.035 because they were functionally irrevocable. The exception for revocable permits was central to the decision in *Northern*, but in 2000 the legislature amended AS 38.05.035(e)(6) to add a section (I) (now (H)) stating that a "written finding is not required before the approval of ... (H) a permit, right-of-way, or easement under AS 38.05.850."[54] Under this amendment, even functionally irrevocable permits for commercial uses of public land would be exempted from .035's procedural requirements.

Nevertheless, AS 38.05.035's exemption of all permits issued under .850 might be constitutionally problematic in some factual circumstances. The fact that the Alaska Statutes appear to exempt all permits from a best interest finding does not shield the state from a challenge that the issuance of certain permits violated constitutional standards. The question of whether AS 38.05.035 can constitutionally exempt certain conduct from a best interest finding is the same as asking whether such a finding is constitutionally required, which is the crux of Nunamta's complaint.

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52 *Id.*

53 *Id.*

54 Ch. 27 SLA 2000 § 3.

As noted above, many routine land uses for which permits are issued would not raise any constitutional issues related to the public notice clause or other Article VIII provisions. As the State points out, the drafters of the constitution wanted to give the legislature the flexibility to craft statutes that would not tie up permitting for "routine" uses of public lands in undue red tape. The DNR website accordingly states that MLUPs are "intended for temporary, non-permanent uses such as floating lodges, log storage, scientific research, guide camps, equipment storage and commercial recreation uses."[55] As the constitutional commentary suggests, authorizing these routine and relatively low-impact uses should not require extensive procedural protections or trigger difficult constitutional considerations. Moreover, these permits appear to be issued on the assumption that the particular uses allowed will have no permanent effect on public lands, as they prohibit permanent improvements, and require restoration of the land to its original state.[56] The permitting statute thus addresses the concern that routine permits should not be tied up in expensive and time-consuming bureaucratic delay.

DNR issues MLUPs for many types of land use, however, from the "floating lodges, log storage, scientific research," etc., described on its website to the hardrock mining exploration at issue in this case. Permits are limited in time to five years from issue, however, they are renewable in perpetuity in one year increments.[57] The indefinite total duration of the permits and broad range of activities allowed by them creates the possibility that certain permitted uses would go beyond those routine uses contemplated by the framers when they gave the legislature discretion to craft procedural protections. And while many low impact

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[55] Division Permits, http://dnr.alaska.gov/mlw/permit_lease/index.cfm (last visited 6/2/2010).

[56] *See* Intervenors' Memoranda at 12.

[57] *See* 11 AAC 96.040(c).

and *de minimis* uses are allowed under .850, it does not follow as a matter of logic that all uses allowed under .850 are routine and *de minimis*.

As noted above, the court in *Northern* concluded that, "focusing on substance rather than form ... licenses, such as revocable land use permits, are generally considered interests in land."[58] The supreme court's willingness to look past the facial terms of the permit to the factual circumstances of the land use in that case is illuminating. If, as described above, the constitution imposes independent obligations on the State with respect to the management and disposal of natural resources, then the Court is obligated to look past the facial terms of the permit to the underlying use in order to determine whether the conduct allowed by the permit comports with constitutional standards. The State repeatedly asserts that only short term and revocable uses are allowed under AS 38.05.850, but looking past the facial terms of the permit, the permitting process has (according to Nunamta's assertions) been used to allow more than twenty years of exploration and water use. At the very least, the impact and duration of the particular uses of public lands here are hotly disputed, and the Court cannot rely on what the existing statutes and permits allow to establish what has actually occurred.

In any case, because *Northern* dealt with a statutory interpretation of AS 38.05.035, and that statute was subsequently amended to avoid the implications of that decision, it is not dispositive here. *Northern* does not, as Nunamta argues, conclusively show that the permits at issue here were disposals subject to certain procedural requirements under the constitution. Nor does the holding in *Northern*, as the State and PLP contend, indicate that the permits at issue were constitutionally valid.

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[58] *Id.* at 635 (citation omitted).

E. *The Intervenors are dismissed from this action*

On October 21, 2009, Judge Stowers granted Pebble Limited Partnership's and Iliamna Natives Ltd.'s motion to intervene, "on the basis of permissive intervention." Remaining proposed intervenors were treated as *amici*, who were in turn permitted to submit argument and responsive briefing. The record is somewhat unclear, but it appears that these *amici* were later allowed to intervene on a permissive basis, and for the purpose of this order the Court will refer to them as the remaining permissive intervenors.

Judge Stowers, by allowing Pebble Limited Partnership and Iliamna Natives Ltd to intervene on a permissive basis, expressed a determination that, although the disposition of the action might affect the intervenors' interests, those interests were adequately protected by the State.[59] The Court now characterizes Nunamta's claims as an "as-applied" constitutional challenge to the statutory and regulatory upland hardrock mining exploration permitting regime, to the extent that these provisions allowed the State to issue MLUPs and TWUPs for the Pebble Project. Because this case now centers on the validity of the specific permits issued to Pebble Limited Partnership, rather than the validity of the entire permitting regime, the Court finds that Pebble Limited Partnership should be treated as an intervenor as a matter of right.

Just as the Court's characterization of Nunamta's claims has forced it to reexamine Pebble Limited Partnership's position as an intervenor, the absence of any facial constitutional challenge appears to necessitate dismissal of the remaining intervenors. No party other than Pebble Limited Partnership holds any

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[59] Civil Rule 24(a) requires intervention as a matter of right when the "applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant interest is adequately represented by existing parties." Under 24(b), intervention may be permitted when an "applicant's claim or defense and the main action have a question of law or fact in common."

of the permits at issue, nor does disposition of this case place these parties' interests in other hardrock mining exploration ventures at risk. It therefore appears to the Court that the remaining parties who were allowed to intervene on a permissive basis (and whose interests in the case have become even more attenuated in the absence of a facial challenge) should be dismissed.[60] These parties shall have until **July 19, 2010** to oppose their dismissal.

III. Conclusion

"A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."[61] 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 MLUPs and TWUPs relating to the Pebble Project. Whether these permits themselves are disposals, and whether the nature of the land use triggers constitutional considerations requires an examination of the underlying activities. These activities and their impact on the land, resources, and other users are disputed in the exhibits and affidavits.

Based on the foregoing analysis, summary judgment in favor of the State is GRANTED to the extent Nunamta has raised any facial challenge to the statutory and regulatory permitting regime for upland hardrock mining exploration. With respect to Count VI, which is based on the Uniform Application Clause, summary

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[60] *See Anchorage Baptist Temple v. Coonrod*, 166 P.3d 29 (Alaska 2007) (quoting *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 913 (Alaska 2000)) ("We presume that the state will adequately represent the interests of all of its citizens in trying to uphold a statute against a constitutional challenge, because the state is 'charged by law with representing the interests of the people.'").

[61] *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998) (citations omitted).

judgment in favor of the State is GRANTED as to both a facial or as-applied challenge. Nunamta's claim that the State should have performed a best-interest finding that encompassed various constitutional considerations (as stated in counts I through V) before it issued the permits for the Pebble Project remains.

DONE this 9th day of July 2010, at Anchorage, Alaska.

Eric A. Aarseth
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 9 July 2010 a copy of the above was mailed to each of the following at their addresses of record:
Tangen, Singer, Heese, Clark, Fjelstad, Johnson, Leik, Wainwright, Leonard, Trickey, Albert

Nancy McKewin
Judicial Assistant