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THE BRISTOL BAY FOREVER INITIATIVE & HB 14: UNCONSTITUTIONAL LEGISLATION THAT VIOLATES THE SEPARATION OF POWERS REQUIREMENT OF THE ALASKA CONSTITUTION

The Bristol Bay Forever Initiative (BBF) and HB 14 conflict with the Alaska Supreme Court's decisions in *Bradner v. Hammond* and *State v. A.L.I.V.E. Voluntary*. Specifically, the statute establishes a legislative veto over otherwise final permits and authorizations issued to a proposed mining project by numerous state and federal agencies acting under valid general laws.[1] The statute also creates an improper pocket veto for the Commissioners of DNR, Fish & Game, and DEC.

In order for a hardrock mine to be constructed in Alaska, numerous permits and licenses must be obtained from multiple state and federal agencies. Many of these permits are issued by the Department of Natural Resources, and include a plan of operations, a reclamation and mine closure plan, dam certification, water rights, rights-of-way, and more. This permitting process involves a substantial degree of scientific data collection and analysis, and ensures that any proposed mining operation, if approved, is in the state's best interest.

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[1] AS 38.05.142.

The BBF initiative and HB 14 circumvent this process by injecting legislative politics into what is otherwise a scientific permitting process, undermining Alaska's legally established hardrock mine permitting process. Moreover, by seeking to establish a legislative veto over the final permitting decisions of the executive branch, the statute runs afoul of the Alaska Supreme Court's decisions in *Bradner v. Hammond* and *State v. A.L.I.V.E. Voluntary*.

A "legislative veto" occurs when a legislative body acts to disapprove, and thus "veto," an executive branch action that has been authorized by statute.[2] There are four possibilities for structuring the veto:

> "[F]irst[,] the proposed executive action can be precluded if either house passes a resolution expressly disapproving it; second[,] the proposed executive action can be precluded if both houses pass resolutions of disapproval; third, if either house approves the proposal, it is permitted to go into effect; and fourth, if both houses approve the proposed action, it is permitted."[3]

The BBF statute involves the fourth type of legislative veto. Specifically, if both houses of the legislature give their stamp of approval to the otherwise final permits and authorizations issued to a proposed hardrock mining operation by executive branch agencies, then and only then may the mine proceed with construction. If the legislature does not issue this "final authorization," or if it fails to act, all of the final permits and authorizations issued to the mine would presumably be null and void.

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[2] 1 Norman J. Singer, *Sutherland Statutory Construction* § 3:19 (7th ed. 2012).

[3] *Id.* (quoting John R. Bolton, *The Legislative Veto: Unseparating the Powers*, 1-2 (1977)). *See also* Jacob E. Gersen and Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 583 (2008) ("the positive legislative veto forbids policy to be implemented unless Congress approves ex post.").

BBF's attempt to transform the legislature into the permitting arm of DNR's Division of Mining for Bristol Bay would impermissibly infringe upon the power of the executive branch to faithfully execute the laws, in violation of the Alaska Supreme Court's decision in *Bradner v. Hammond*.[4] In *Bradner*, the Court noted that the separation of powers doctrine is inherent in the Alaska Constitution,[5] and that its purpose is "the avoidance of tyrannical aggrandizement of power by a single branch of government[.]"[6] Finding that the appointment of executive officers was an executive, rather than a legislative function, the Court held that a statute requiring legislative approval for the deputy heads of each principal executive department and 19 specified division directors was unconstitutional.[7] In doing so, the Court held that "the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision."[8]

> To hold otherwise would emasculate the restraints engendered by the doctrine of separation of powers and result in potentially serious encroachments upon the executive by the legislative branch … .[9]

There is no question that the issuance of permits and authorizations under the hardrock mine permitting process is a function of the executive branch. The permitting

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[4] *See Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976) (citing Alaska Const., art. III, § 16).

[5] *Id.* at 5 (quoting *Public Defender Agency v. Superior Court, Third Judicial District*, 534 P.2d 947, 950 (Alaska 1975)).

[6] *Id.* (citing *Continental Ins. Cos. v. Bayless & Roberts, Inc.*, 548 P.2d 398, 410-11 (Alaska 1976)).

[7] *Id.* at 2, 6-8.

[8] *Id.* at 7 (citing *Leege v. Martin*, 379 P.2d 447, 450 (Alaska 1963); *State v. Campbell*, 536 P.2d 105, 110-11 (Alaska 1975)).

[9] *Id.* at 8.

process is conducted under valid general grants of authority to principal executive branch departments, including the Department of Natural Resources, the Department of Fish and Game, and the Department of Environmental Conservation.[10] In issuing these permits and authorizations, the executive branch carries out its duty to faithfully execute the law.[11] Indeed, "under our system of government, it is the function of the executive department, honestly and efficiently, to administer, enforce, or faithfully execute the laws, as interpreted by the courts, subject only to limitations which are contained in the state constitution."[12] BBF's attempt to transfer the final step in approving a proposed mine to the legislature constitutes an impermissible infringement upon the core function of the executive branch, in violation of the Alaska Supreme Court's decision in *Bradner*.[13]

Moreover, the manner in which BBF seeks to review the decisions of an executive branch agency, the "legislative veto," was specifically disapproved by the Alaska Supreme Court in *State v. A.L.I.V.E. Voluntary*. In this case, the Court analyzed a statute which allowed the legislature, by concurrent resolution, to annul a regulation of an agency or department.[14] Although this specific type of legislative veto violated the bicameralism and

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[10] *See* Alaska Const., art. III, § 22; AS 44.17.005.

[11] *See* Alaska Const., art. III, § 16. *See also* Alaska Const., art. III, § 24 ("Each principal department shall be under the supervision of the governor.").

[12] 16 C.J.S. Constitutional Law § 354 (collecting cases).

[13] *Bradner*, 553 P.2d at 6-8. *See also INS v. Chadha*, 462 U.S. 919, 958 (1983) ("once Congress makes its choice in enacting legislation, its participation ends."); *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them[.] … The latter [is an] executive function[.]").

[14] *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 770 (Alaska 1980).

presentment requirements of the Alaska Constitution,[15] the Court proceeded to note that the existence of two specific veto provisions in the Alaska Constitution "leads logically to the conclusion that no other [legislative] veto power is implied."[16] The Court also observed the numerous problems created by the legislative veto, including "infring[ing] on the executive's power to administer and enforce the laws[,]"[17] and potential dual officeholding violations under article III, § 26.[18] The Court also cited a study which concluded that "the legislative veto encourages secretive, poorly informed, and politically unaccountable legislative action."[19]

In addition, the statute also gives unprecedented authority to the Commissioners of DNR, DEC and Fish & Game to exercise a "pocket veto" over a fully permitted mine. Under the statute, each of the Commissioners is charged with making an independent finding about whether a mine will harm fisheries, and each is required to prepare a report to the legislature. But there is no time limit or due date for such a report, so any one of the Commissioners could delay in perpetuity the progress of a fully permitted mine merely by not acting. Further, any one of the Commissioners could issue the required report, but

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15 *Id.* at 772-73.

16 *Id.* at 774-75. These veto provisions include article III, § 23 and article X, § 12. *See id.* at 775 n.19 and n.20.

17 *See id.* at 776.

18 *See id.* at 777-78.

19 *Id.* at 779. *See also* Richard J. Pierce, *Administrative Law Treatise* § 2.4 at 61 (5th ed.) ("The threat of potential legislative veto increased the power of factions in the agency decisionmaking process. A representative of a special interest could wield the threat of legislative veto to force an agency to act in a manner favorable to its interests by enlisting the support of one or a handful of strategically placed members of a single House of Congress.").

opine that the mine may harm fisheries, and that action also would invalidate duly executed permits. This gives each of the Commissioners essentially unfettered authority to invalidate permits and side step the administrative process that typically governs permit applications.

Given the Court's decisions in *Bradner v. Hammond* and *State v. A.L.I.V.E. Voluntary*, there is little question that the legislative and Commissioner vetoes contained in the BBF statute would impermissibly interfere with the core function of the executive branch to faithfully execute the law. Because the Initiative violates the separation of powers doctrine, it is unconstitutional and will ultimately be invalidated in a court challenge.

Notably, the legal issues discussed in this memorandum have not and could not have been litigated in the prior Alaska Supreme Court case called *Hughes v. Treadwell*. That case was a pre-election challenge to the BBF initiative. Under Alaska law, a pre-election challenge is generally limited only to consideration of whether a ballot initiative violates one of the subject matter restrictions contained in the Alaska Constitution. These include the limitations on initiatives that make appropriations or enact local or special legislation. Alaska courts generally do not consider constitutional challenges unless and until an initiative is enacted. Thus, the issues discussed above were not ripe for consideration by the courts at the time of the *Hughes v. Treadwell* litigation.