

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101


State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

February 20, 2012

**SUBJECT:** SB 152 and the Alaska Constitution  
(Work Order No. 27-LS1133\A)

**TO:** Senator Donald Olson  
Attn: David Scott

**FROM:**   
Donald M. Bullock Jr.  
Legislative Counsel

You asked whether SB 152 was in conflict with either art. I, sec. 15<sup>1</sup> or art. II, sec. 19<sup>2</sup> of the Alaska Constitution.

SB 152 would require legislative approval before an "authorization, license, permit, or approval of a plan of operation" for a mine connected by a water course to Bristol Bay could be issued.<sup>3</sup> The bill is specific to a mine affecting more than 640 acres near Bristol Bay that "may adversely affect the water flowing into or over the Bristol Bay Fisheries Reserve."

---

<sup>1</sup> Article I, sec. 15, Constitution of the State of Alaska:

**Prohibited State Action.** No bill of attainder or ex post facto law shall be passed. No law impairing the obligation of contracts, and no law making any irrevocable grant of special privileges or immunities shall be passed. No conviction shall work corruption of blood or forfeiture of estate.

<sup>2</sup> Article II, sec. 19, Constitution of the State of Alaska:

**Local or Special Acts.** The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination. Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of the qualified voters voting thereon in the subdivision affected.

<sup>3</sup> Requiring legislative approval for permitting and administration of regulatory programs by the executive could be challenged under the separation of powers doctrine. Article II, sec. 1 and art. III, sec. 1 describe the powers of the legislature and the governor, respectively.

Senator Donald Olson  
February 20, 2012  
Page 2

A conflict between art. I, sec. 15 and SB 152 is not readily apparent on the face of the bill. It may be that there are contracts that a mine, such as the Pebble mine, have entered into that would be impaired if legislative approval of the mine was denied. To further evaluate this possibility, the legislature could gather information during the committee process about the existence of contracts that would be impaired by the legislature failing to approve a mine going forward.

Because SB 152 basically identifies a single drainage in the state and possibly a single mine, the bill could be challenged as violating the prohibition against local and special legislation in art. II, sec. 19. A general law may be made applicable if it was directed at all mines that may affect water quality, or may affect water quality and a fishery. The applicability provision in sec. 2 of the bill further acknowledges the narrow scope of the bill. Given the narrow scope of the bill and the regional limitation, it may be challenged as local or special legislation. I do not speculate on the result of such a challenge.

There is one more constitutional concern raised by the effect of failing to approve the development of vested mineral rights. Using the Pebble Gold Project as an example, the developers of the project have acquired mineral rights in an area identified by the commissioner of natural resources as open to mining. The rights were acquired by discovery of the minerals, location, and the filing of the claims in the recorder's office. This process creates a protected property right that is subject to the takings clauses in art. I, sec. 18, Constitution of the State of Alaska, and Amendment V of the U.S. Constitution. If the state now takes those rights or imposes such extensive requirements for necessary permits that the developer is denied all economically feasible use of those rights, the state may be required to pay "just compensation" to the owner of those rights. Alaska courts have recognized that fair market value at the time of the taking is a basis for determining the amount of just compensation.

If I may be of further assistance, please advise.

DMB:ljw  
12-142.ljw