

No. 157, Original

IN THE
Supreme Court of the United States

ALASKA,

Plaintiff,

v.

UNITED STATES, ET AL.,

Defendants.

ON MOTION FOR LEAVE TO FILE BILL OF
COMPLAINT

**BRIEF OF TROUT UNLIMITED AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF
COMPLAINT**

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

PERTINENT BACKGROUND..... 6

 A. The Bristol Bay Watershed Is A Unique And Highly Productive Natural Resource..... 6

 B. Extensive Scientific Study Overwhelmingly Demonstrates That The Proposed Pebble Mine Would Cause Irreversible Environmental Devastation To Bristol Bay..... 9

 C. Following Years Of Litigation, The EPA Issued A Final Determination Barring Large-Scale Commercial Mining In Bristol Bay. 13

 D. Alaska Has Not Approved Any Proposed Mine Operations In Bristol Bay – And May Never..... 15

ARGUMENT 18

 I. Alaska Cannot Properly Gin Up An Original Action Based On Speculative Harms Tied To Its Own Permitting Processes That Have Not Been Completed And May Never Allow Commercial Mining Operations In Bristol Bay..... 19

 II. Alaska’s Alleged Economic Injuries Are Not Redressable By A Favorable Ruling From This Court Now Either..... 22

III. The Court Should Further Decline Original Jurisdiction For Prudential Reasons.....	23
CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Abbott Lab'ys v. Gardner</i> , 387 U.S. 136 (1967)	25
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	22
<i>California v. Texas</i> , 457 U.S. 164 (1982)	23
<i>Clapper v. Amnesty Int'l USA</i> , 568 U.S. 398 (2013)	22
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<i>Louisiana v. Texas</i> , 176 U.S. 1 (1900)	24
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	20, 22, 23
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981)	24
<i>Nat'l Park Hosp. Ass'n v. Dep't of Interior</i> , 538 U.S. 803 (2003)	24, 25
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	20
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<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	20
<i>Washington v. Gen. Motors Corp.</i> , 406 U.S. 109 (1972)	24
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990)	20, 22
<u>Statutes</u>	
33 U.S.C. § 1344(c).....	12
Alaska. Admin. Code Title 11 § 16 (2023).....	17
Alaska. Admin. Code Title 11 § 86.150 (2023).....	17
Alaska. Admin. Code Title 11 § 86.800 (2023).....	17
Alaska. Admin. Code Title 11 § 93.151-93.201 (2023)	17
Alaska. Stat. § 16.05.841 (2022).....	18
Alaska. Stat. § 16.05.871 (2022).....	18
Alaska. Stat. § 27.05.010(b) (2022)	16, 21, 23

Alaska. Stat. § 27.19 <i>et seq.</i> (2022)	17
Alaska. Stat. § 38.05.035 (2022).....	17
Alaska. Stat. § 38.05.850 (2022).....	17
Alaska. Stat. § 41.35.080 (2022).....	17
Alaska. Stat. § 46.03.100 (2022).....	17
Alaska. Stat. § 46.14.120 (2022).....	17
Alaska. Stat. § 46.15 (2022).....	17
Alaska. Stat. § 46.17 (2022).....	17
Clean Water Act § 404(c)	3, 5, 11, 13, 14
<u>Other Authorities</u>	
40 C.F.R. § 231.1-231.8 (1979)	12
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79 Fed. Reg. 42,314 (July 21, 2014)	11, 12, 13
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<i>2024 Application for Permits to Mine in Alaska, Alaska Dep't of Nat. Res., https://dnr.alaska.gov/mlw/forms/apma/2024/pdf/2024-APMA-Full-Application.pdf.....</i>	16

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INTEREST OF AMICUS CURIAE¹

Trout Unlimited is the Nation's largest sporting organization dedicated to cold-water conservation, with a mission to unite diverse interests to care for and recover rivers and streams so our children can experience the joy of wild and native trout and salmon. It has more than 400 chapters with more than 300,000 active supporters nationwide, including more than 20,000 members and supporters in Alaska.

Trout Unlimited and its members have a substantial and abiding interest in the outcome of this proceeding. Many of its members rely on the Bristol Bay region's important fish, wildlife, and water resources for fishing, hunting, subsistence, and recreation, and for employment in related industries. These members include anglers, lodge owners, fishing and hunting guides, commercial fishers, those committed to subsistence ways of life, and Alaskans from other diverse walks of life.

For more than fifteen years, Trout Unlimited has worked with local tribes, anglers, hunters, commercial fishing interests, and local businesses to protect Bristol Bay's world-class fisheries – and the many rivers, streams, and lakes that sustain them – from

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.2, counsel of record for all parties received timely notice of *amicus's* intent to file this brief.

being ruined forever by large-scale, commercial mining operations. As part of that effort, it submitted extensive comments advocating for the protection of the Bristol Bay region in all relevant administrative proceedings before the Environmental Protection Agency (“EPA”), the Army Corps of Engineers (“USACE”), and other federal and state agencies. Trout Unlimited also successfully sued the EPA when that agency precipitously set aside its preliminary protection for the Bristol Bay region to further consider commercial mining plans.

With its effort to gin up this Original action, Alaska seeks to undo that victory and the permanent federal protections put in place because of it. That effort, ultimately, is apparently targeted at helping a foreign mining company clear at least one regulatory hurdle necessary for it to undertake large-scale commercial mining in the heart of the unspoiled Bristol Bay watershed that Trout Unlimited and its members have worked hard for decades to permanently preserve for those who enjoy and depend on it today as well as future generations.

Toward that end, Trout Unlimited submits this brief to assist the Court as it considers whether it is an appropriate or even constitutional use of this Court’s time and finite resources to elevate a basic administrative law matter into a profound Original outing at this time.

SUMMARY OF ARGUMENT

The Court should decline to exercise jurisdiction over this proposed action, as it threatens to squander the Court’s limited resources on a premature dispute that may never ripen into any cognizable case

appropriate for its consideration. Alaska's core gripe is that the EPA carried out our Nation's federal environmental law and policy in a way with which it disagrees and may one day possibly conflict with its own local policy choices and economic interests and asserted rights. Alaska had every opportunity to participate in the administrative proceedings and litigation that led to that decades-in-the-making outcome, and selectively did so. And now that all of those administrative and statutory matters have resolved against its current prerogatives, it seeks to change the outcome through an Original action.

But Original actions are not a proper vehicle for a state to challenge basic agency decisions it does not like and have this Court exercise jurisdiction over a case that otherwise would not warrant its attention or deployment of limited time and resources. At its core, Alaska's proposed Complaint is premised on alleged economic harms from the EPA's exercise of its authority under Section 404(c) of the Clean Water Act ("CWA") to restrict mining in Bristol Bay, Alaska.

That agency stance is not new, nor its Final Determination controversial. The EPA's ultimate judgment – following many years of extensive scientific study and based on an overwhelming record – is in lockstep with the policy views of every administration since President Nixon. Nor is the EPA's determination legally strained or novel. It is a thoroughly sound administrative action in exercise of clear delegated statutory authority, rooted in science, commonsense, and an exhaustive record, and in pursuit of a longstanding environmental policy.

If Alaska wanted to challenge that determination, it had every opportunity to do so, and it actually

participated to some extent in relevant proceedings and litigation when that suited its interests, or aligned with its political prerogatives. It could and should have challenged the action in a federal district court upon completing its own permitting review to develop the record in preparation for possible review by this Court, if any. Having decided not to do so for fairly obvious reasons – the prospects of an APA challenge to the EPA’s determination would be dim indeed – it cannot properly, and should not be permitted to, short-circuit that traditional litigation path with a dubious Original action.

Aside from being procedurally improper, there are additional good reasons the Court should not, as a prudential and constitutional matter, exercise jurisdiction now. Alaska’s case is fundamentally premised on a series of highly doubtful “ifs” that show it has not suffered – and may never suffer – any real harm this Court could remedy with a favorable ruling at this time. Based on its allegations, Alaska has neither suffered any concrete injury nor identified an imminent harm that it will suffer absent this Court’s intervention.

Although the State alleges development of a mine in Bristol Bay by a foreign mining interest could hypothetically generate “billions of dollars” in revenue and thousands of jobs over a “20-year operations phase,” all of that is speculative. In a real sense, Alaska’s purported injury is just a hypothetical and politically expedient preference among economic activities. Based on a massive body of scientific evidence developed by the EPA, commercial mining in Bristol Bay would despoil a truly unique natural wonder that is tremendously commercially productive

already. The proposed mining operations would devastate a commercial and sportfishing industry that today, and in reality, generates billions of dollars annually, and supports thousands of local jobs and businesses large and small. And while Alaska would apparently prefer to exploit Bristol Bay's mineral deposits over its fishing and related industries, its alleged injury from the EPA's determination would only be real if the State one day permitted the mining project, which it has not done and may never do. Even then, Alaska would see no economic benefits until the mine actually becomes operational and profitable – which is projected to be decades after it is permitted.

Alaska's alleged harm from the EPA's determination also cannot be redressed by a favorable ruling from this Court now. Even if the Court accepted jurisdiction and invalidated the EPA's Section 404(c) determination, that ruling would not clear the way for mining because Alaska's regulatory authorities have not issued (and may never issue) the many necessary state permits for construction and operation of the project. As such, any ruling this Court makes at this stage will be nothing more than a highly-costly, time-consuming, and potentially pointless advisory opinion.

Even if there were a real case or controversy here – there is not – the Court should decline to exercise jurisdiction for basic prudential reasons too. Alaska has, and has used, another more appropriate forum to air its claims against the EPA – a federal district court. That forum would allow the parties to develop the necessary record without clogging up this Court's docket. Nor is Alaska's asserted claim even ripe, given

it has not itself permitted any commercial mining under any conditions in Bristol Bay – and may not.

The Court should decline to take jurisdiction over this speculative and premature dispute, which would be a profound waste of its scarce resources.

PERTINENT BACKGROUND

As this Court considers whether to exercise jurisdiction here, it is important for it to understand the unique nature of the resource at stake, our Nation’s uniform efforts to protect that resource from being ruined by large-scale mineral exploitation activities, and Alaska’s participation in the process that led to the determination that forms the basis of its proposed Complaint and alleged harms.

A. The Bristol Bay Watershed Is A Unique And Highly Productive Natural Resource.

There is no other place on Earth like the Bristol Bay watershed of southwestern Alaska. It is a unique and unspoiled resource home to abundant wild Pacific salmon populations that support a diverse ecosystem of other fish and wildlife species, one of the largest commercial fisheries in the world generating billions of dollars in economic output annually, and a world-class recreational fishing destination. *See About Bristol Bay*, <https://www.epa.gov/bristolbay/about-bristol-bay> (Aug. 23, 2023); Trout Unlimited Comments, at 2–4 (Sept. 4, 2022).²

² Trout Unlimited, Comment Letter on Revised 404(c) Proposed Determination for the Protection of the Bristol Bay Watershed (Sept. 4, 2022), <https://www.regulations.gov/comment/EPA-R10-OW-2022-0418-1026>.

In the EPA’s words, which have been echoed down through Executive administrations since Nixon, “Alaska’s Bristol Bay watershed . . . is an area of unparalleled ecological value, boasting salmon diversity and productivity unrivaled anywhere in North America.” U.S. ENV. PROTECTION AGENCY, FINAL DETERMINATION FOR PEBBLE DEPOSIT AREA at ES-1 (Jan. 2023) (“*Final Determination*”).³

Bristol Bay salmon are the lifeblood of the region’s watershed – an area approximately the size of Ohio. The “streams, wetlands, and other aquatic resources of the Bristol Bay watershed . . . provide the foundation for world-class, economically important, commercial and sport fisheries for salmon and other fishes,” as well as a more than 4,000-year-old, subsistence-based way of life for Alaska Natives. *Id.* at ES-1 to ES-2 & § 6.3.2, at 6-21. All five species of North American Pacific salmon return to the Bristol Bay region, which supports the world’s largest sockeye salmon runs (producing approximately half of the world’s sockeye salmon) and a Chinook salmon run rivaling any other on our planet. *Id.* at ES-1 to ES-2. According to the Alaska Department of Fish and Game (“ADF&G”), the 2023 commercial season alone brought 40.6 million sockeye salmon from Bristol Bay. ALASKA DEP’T. OF FISH & GAME, 2023

³ U.S. ENV. PROTECTION AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT: PEBBLE DEPOSIT AREA, SOUTHWEST ALASKA, at ES-1 (Jan. 2023) (“*Final Determination*”), *available at* <https://www.epa.gov/bristolbay/final-determination-pebble-deposit-area>.

BRISTOL BAY SALMON SEASON SUMMARY (Sept. 22, 2023).⁴ And in 2022, more than 78 million sockeye salmon returned to the Bristol Bay region – the largest run on record. *See* Trout Unlimited Comments, at 2.

As the EPA has thus recognized, Bristol Bay is “remarkable as one of the last places on Earth with such bountiful and sustainable harvests of wild salmon.” *Final Determination*, at ES-1. Those harvests generate more than \$2.2 *billion* annually in economic output and provide more than 15,000 jobs, including half of all jobs in the Bristol Bay region. *Id.* at ES-3; *see id.* § 3.3.5, at 3-52 to 3-54; *id.* § 6.3.3.at 6-24 to 6-25.

Native Alaskans, who have lived in the Bristol Bay region for thousands of years, have also long relied on the bounty of the land and waters to sustain their traditional and customary way of life. *Id.* § 3.3.6, at 3-54. Generations of families have fished commercially in the region, and they continue to rely on subsistence fisheries. *Id.* at 54–60. “The importance of salmon as a subsistence food source is inseparable from it being the basis for Alaska Native cultures.” *Id.* at 60.

Bristol Bay’s flourishing fish populations also support a robust recreational industry made up of large and small businesses centered on sport fishing, wildlife viewing, and other outdoor activities. *Id.*

⁴ ALASKA DEP’T. OF FISH & GAME, 2023 BRISTOL BAY SALMON SEASON SUMMARY (Sept. 22, 2023), *available at* <https://www.adfg.alaska.gov/static/applications/dfnewsrelease/1541607348.pdf>. <https://www.adfg.alaska.gov/static/applications/dfnewsrelease/1541607348.pdf>.

Sport fishing activities in the Bristol Bay watershed account for approximately \$66.58 million in expenditures and employ more than 800 full- and part-time workers. *Id.* at § 3.3.7 at 3-61. These recreational businesses depend on Bristol Bay’s “intact, connected habitats – from headwaters to ocean – that support abundant, genetically diverse wild Pacific salmon populations.” *Id.* at ES-1; *see also id.* at § 3.3.7, at 3-62.

B. Extensive Scientific Study Overwhelmingly Demonstrates That The Proposed Pebble Mine Would Cause Irreversible Environmental Devastation To Bristol Bay.

As it happens, the Bristol Bay watershed also sits atop a large copper, gold, and molybdenum deposit known as the Pebble deposit, which, over the years, various mining interests have considered commercially exploiting. All but one to consider it have abandoned the notion as impractical and uneconomical. That is because the prime deposits for mining are so low-grade – that is, they contain relatively small amounts of metals relative to the amount of ore – that mining would be economical only if conducted over large areas that “will necessarily produce large amounts of waste material.” U.S. EPA, RESP. TO COMMENTS ON FINAL DETERMINATION 34 (Jan. 2023).⁵ In light of that hard economic and geological reality, four other major mining companies

⁵ U.S. EPA, RESP. TO COMMENTS ON FINAL DETERMINATION 34 (Jan. 2023), *available at* <https://www.epa.gov/system/files/documents/2023-01/Pebble-Deposit-Area-404c-RTC-Jan2023.pdf>.

that considered mining in Bristol Bay abandoned the idea as foolhardy.⁶

Even if successful, commercial exploitation of the extracted minerals would face serious challenges. More than 100 jewelers, including the world's leading jewelry companies and retailers, have vowed never to source any materials from any Pebble Mine, concluding that any minerals from the mine are not worth the havoc their extraction would wreak on the environment.⁷ Extracted minerals would thus have to be sold in other markets, such as to consumer electronics manufacturers in China.

Recognizing Bristol Bay's value as a unique and productive natural resource, for many decades the EPA and/ or the USACE under the administrations of

⁶ See Northern Dynasty Minerals Ltd. Schedule 13G (Feb. 25, 2011); Suzanne Goldenberg, *Anglo American pulls out of Alaska mines project*, GUARDIAN (Sept. 16, 2013, 10:59 AM), <https://www.theguardian.com/environment/2013/sep/16/anglo-american-alaska-gold-mines>; Suzanna Caldwell & Alex DeMarban, *Rio Tinto pulls out of Pebble Partnership, gifting its stake to Alaska organizations*, ANCHORAGE DAILY NEWS (July 7, 2016), <https://www.adn.com/economy/article/rio-tinto-pulls-out-pebble-partnership-gifting-its-ownership-alaska-organizations/2014/04/08/>; Avery Lill, *Pebble Mine loses funding from First Quantum Minerals*, ALASKA PUB. MEDIA (May 25, 2018), <https://www.alaskapublic.org/2018/05/25/pebble-mine-loses-funding-from-first-quantum-minerals/>.

⁷ Jen Finn, *Jewelers pledge to stop Pebble Mine*, NAT'L FISHERMAN (June 28, 2013), <https://www.nationalfisherman.com/alaska/jewelers-pledge-to-stop-pebble-mine-2>; *Jewelers Boycott Pebble Mine Gold to Save Bristol Bay Salmon*, EVN'T NEWS SERVS. (Nov. 4, 2010), <https://ens-newswire.com/jewelers-boycott-pebble-mine-gold-to-save-bristol-bay-salmon/>.

Presidents Nixon, Reagan, George H.W. Bush, Clinton, George W. Bush, Obama, and Trump all have opposed large-scale commercial mining operations in Bristol Bay.⁸ Both of Alaska's current Senators publicly have opposed the mine as well.⁹

Recognizing the risks posed by large-scale mining in Bristol Bay, numerous groups petitioned the EPA in 2010 to restrict its use as a disposal site for mining the Pebble deposit by invoking the agency's authority under Section 404(c) of the CWA. *Final Determination*, at ES-10. Under the CWA, the EPA may deny or restrict a mining disposal site "whenever [the EPA Administrator] determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water

⁸ Anthony Adragna & Annie Snider, *Trump administration rejects massive Alaska mining project*, POLITICO (Nov. 25, 2020, 2:47 PM), <https://www.politico.com/news/2020/11/25/trump-administration-alaska-mining-project-440626>; Taryn Kiekow Heimer, *Former EPA Administrators Say 'NO' To Pebble Mine in DC Ads*, NRDC.ORG (July 2, 2018), <https://www.nrdc.org/experts/taryn-kiekow-heimer/former-epa-administrators-say-no-pebble-mine-dc-ads>; Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska, 79 Fed. Reg. 42314, 42317 (July 21, 2014).

⁹ Press Release, Murkowski Statement on EPA's Final Determination for Pebble Mine (Jan. 31, 2023, *available at* <https://www.murkowski.senate.gov/press/release/murkowski-statement-on-epas-final-determination-for-pebble-mine> ("To be clear: I oppose Pebble."); Liz Ruskin, *Sen. Sullivan says Pebble can't shake his opposition to mine*, ALASKA PUB. MEDIA (Oct. 7, 2020), <https://alaskapublic.org/2020/10/07/sen-sullivan-says-pebble-cant-shake-his-opposition-to-mine-pledges-to-continue-to-monitor/>.

supplies, shellfish beds and fishery areas . . . wildlife, or recreational areas.” 33 U.S.C. § 1344(c); *see* 40 C.F.R. §§ 231.1–231.8 (1979); 44 Fed. Reg. 58,076 (Oct. 9, 1979) (to be codified 40 C.F.R. pt. 231).

Then, in 2011, Pebble Limited Partnership (“PLP”), which is owned by the Canadian company Northern Dynasty Materials, Ltd., submitted plans to the Securities and Exchange Commission for mining that very site. *Final Determination*, at §§ 2.2.1, at 2-10. PLP proposed a vast mine with a mind-boggling footprint: it would carve out a pit at the headwaters of Bristol Bay nearly as deep as the Grand Canyon with infrastructure spanning an area as large as Manhattan. *See id.* at ES-3 to ES-8.

Based on PLP’s filing, the EPA undertook a three-year scientific study of the effects of large-scale mining on the watershed, culminating in a 2014 Watershed Assessment detailing how mining could impact the region under various mining sizes from PLP’s own plans. *Id.* § 2.2.1, at 2-10 to 2-13. Based on the evidence adduced during that review, the EPA issued a Proposed Determination under Section 404(c) of the CWA to restrict the disposal of dredged or fill material in the Bristol Bay watershed. 79 Fed. Reg. 42,314 (July 21, 2014).

The EPA Regional Administrator concluded the agency “ha[d] reason to believe that,” even under the rosier scenario proposed by PLP, “mining of the Pebble deposit . . . could result in significant and unacceptable adverse effects on ecologically important streams, wetlands, lakes, and ponds and the fishery areas they support.” *Id.* at 42,317.

C. Following Years Of Litigation, The EPA Issued A Final Determination Barring Large-Scale Commercial Mining In Bristol Bay.

The EPA's 2014 Proposed Determination led to a flurry of litigation, in which Alaska selectively participated. Alaska intervened in one of PLP's administrative challenges and argued that "numerous" state and local government permits and authorizations would need to be obtained before any mine could get underway. Motion to Intervene at 8–9, *Pebble Ltd. P'ship v. EPA*, 3:14-cv-97 (D. Alaska, May 30, 2014) (Dkt. 17) ("*2014 Mot. to Intervene*").

Years later, the EPA withdrew its Proposed Determination in the face of its own earlier scientific judgments and overwhelming public comments urging the agency to finish the Section 404(c) process. 84 Fed. Reg. 45,749 (Aug. 30, 2019). When Trout Unlimited challenged that abrupt and unexplained *volte face*, Alaska moved to intervene with a near carbon-copy of its motion to intervene in PLP's earlier litigation. Motion to Intervene, *Bristol Bay Econ. Dev. Corp. v. Hladick*, 3:19-cv-265 (D. Alaska, Feb. 7, 2019) (Dkt. 51) ("*2019 Mot. to Intervene*"). After the district court dismissed the case, Trout Unlimited successfully appealed to the U.S. Court of Appeals for the Ninth Circuit, which reversed, holding the agency may "withdraw a proposed determination *only* if the discharge of materials would be unlikely to have an unacceptable adverse effect." *Trout Unlimited v. Pirzadeh*, 1 F.4th 738, 757 (9th Cir. 2021) (emphasis in original).

Having conceded it had not reasonably explained its departure from its earlier judgment, the EPA readily agreed to a voluntary remand, which the

district court promptly granted. Following remand, the EPA reinitiated the Section 404(c) process and considered fresh data that had become available since its earlier Proposed Determination. The agency then issued a revised proposed determination, again concluding, based on a voluminous, science-based record, that PLP had failed to demonstrate no unacceptable adverse effects would result from its planned mining operations. 87 Fed. Reg. 32,021 (May 26, 2022). Far from it: the agency concluded that, even under the most modest version of PLP's mine, the environmental impact would be unacceptable.

After rounds of public comment (including from Alaska, PLP, and Trout Unlimited), multiple hearings, and review of the extensive record, the EPA Regional Administrator determined that the proposed mining project remained likely to have unacceptable adverse effects, and consequently issued a recommended final determination in December 2022. *Final Determination*, at ES-11.

On January 30, 2023, the EPA finished the job it started decades earlier. It issued a Final Determination pursuant to Section 404(c) of the CWA and its implementing regulations to restrict use of Bristol Bay as a disposal site for mining the Pebble deposit. *See Final Determination*; *see also* 88 Fed. Reg. 7,441 (Feb. 3, 2023). Based on the voluminous scientific and technical record compiled and supplemented over two decades, the EPA found that discharges of dredged or fill material associated with PLP's proposed mine "will have unacceptable adverse effects on anadromous fishery areas in the Bristol Bay watershed." *Final Determination*, at ES-1.

D. Alaska Has Not Approved Any Proposed Mine Operations In Bristol Bay – And May Never.

While Alaska’s complaint is premised on the Final Determination, it overlooks that PLP also needs various state regulatory approvals, including from the Alaska Department of Natural Resources (“ADNR”), before it could proceed. But PLP has not obtained any such approvals, and may never. As things stand, Alaska has yet to complete its review of any of the proposed mining permits, and there is no certainty if and when that review will be concluded or what the outcome will be. *See Pebble Project*.¹⁰

Similar to the federal regulatory reviews required to undertake commercial mining operations, Alaska maintains its own extensive regulatory process for projects seeking “to explore for and mine locatable minerals and to conduct reclamation” within the state. ADNR, *Application for Permits to Mine in Alaska* (“APMA”).¹¹ The ADNR is the “the lead agency for all matters relating to the exploration, development, and management of mining” and “coordinate[s] all regulatory matters concerning mineral resource exploration, development, mining, and associated activities.” ALASKA. STAT. § 27.05.010(b) (2022).

¹⁰ *Pebble Project*, ALASKA DEP’T OF NAT. RES., <https://dnr.alaska.gov/mlw/mining/large-mines/pebble/> (last visited Nov. 8, 2023).

¹¹ *Application for Permits to Mine in Alaska*, ALASKA DEP’T OF NAT. RES., <https://dnr.alaska.gov/mlw/mining/apma> (last visited Nov. 8, 2023).

Accordingly, proposed mine operators must file with the ADNR an application to conduct any mining activity, including “exploration, mining, or transportation or equipment and maintaining a camp.” *Id.* The APMA is extensive and requires licenses from several state and local agencies. *See, e.g., 2024 Application for Permits to Mine in Alaska.*¹²

An APMA, which is reviewed by the Mining Section of the ADNR, requires details about, among other things, the type of project, equipment used, mining method, drilling and trenching plans, water use authorizations, and temporary structures and facilities. *Id.* Once an APMA is received, ADNR assigns a designated project leader to coordinate the “interaction of the State agencies” along with facilitating cooperation with federal reviews. Declaration of Edmund Fogels In Support of State of Alaska’s Motion to Intervene ¶ 6, *Pebble Ltd. P’ship v. EPA*, 3:14-cv-97 (D. Alaska, May 20, 2014) (Dkt. 18) (“Fogel Decl.”).

Before it can move forward with any mining, PLP must therefore apply for and obtain a number of state permits and authorizations, including:

- A certification from the Alaska Department of Environmental Conservation (“ADEC”) of compliance with state water quality standards, *see* ALASKA. STAT. § 46.03.100(h) (2022);

¹² *2024 Application for Permits to Mine in Alaska*, ALASKA DEP’T OF NAT. RES., <https://dnr.alaska.gov/mlw/forms/apma/2024/pdf/2024-APMA-Full-Application.pdf>.

- Approval by the ADNR of a proposed plan of operations, *see* ALASKA. ADMIN. CODE tit. 11 §§ 86.150 & 86.800 (2023);
- Approval by the ADNR, in coordination with the ADEC, of mine reclamation plans and financial assurances, *see* ALASKA. STAT. § 27.19 *et seq.* (2022);
- Certification of dam safety by the ADNR’s Division of Mining Land and Water’s (“DMLW’s”) Dam Safety Unit, *see* ALASKA. STAT. § 46.17 (2022); ALASKA. ADMIN. CODE tit. 11 §§ 93.151-93.201 (2023);
- Approval by the ADNR of any right-of-way for access or utilities on state land, *see* ALASKA. STAT. §§ 38.05.035 & 38.05.850 (2022);
- Water use authorization from the DMLW’s Water Section, *see* ALASKA. STAT. § 46.15 (2022);
- Approval by the ADNR of PLP’s proposed cultural resource protection plan for minimizing impacts to cultural and archaeological resources, *see* ALASKA. STAT. § 41.35.080 (2022); ALASKA. ADMIN. CODE tit. 11 § 16 (2023);
- Waste management permits by the ADEC, *see* ALASKA. STAT. § 46.03.100; (2022)
- Air quality permits by the ADEC, *see* ALASKA. STAT. § 46.14.120 (2022); and
- Permits by the ADF&G Division of Habitat for any activity or structure proposed in fish bearing waters, *see* ALASKA. STAT. §§ 16.05.841 & 16.05.871 (2022).

2019 Mot. to Intervene, at 17.

Despite this laundry list of required approvals, Alaska and PLP have not completed any substantive part of this permitting process. *See Pebble Project*. At this point, PLP holds only limited-term, land-use permits authorizing “drilling and associated reclamation . . . to advance understanding . . . for future development planning and for ongoing resource evaluation.” Letter from ADNR to Pebble Ltd. P’ship (Apr. 19, 2018)¹³; Letter from ADNR to Pebble Ltd. P’ship (Mar. 29, 2019).¹⁴ That permit authorized only limited exploration activities and expires at the end of this year. *Id.* PLP has not completed (or possibly even initiated) the APMA process or received another extension of its existing exploratory permit. *See Pebble Project*.

Given the state of Alaska’s own review of PLP’s proposed mine, it could not proceed now even in the absence of the Final Determination. Alaska itself has not approved, and it may never approve, PLP’s proposed mining operations in Bristol Bay.

ARGUMENT

The Court need not and should not exercise its Original jurisdiction over Alaska’s proposed Complaint. Alaska could and should have pursued its run-of-mill administrative law challenge to the Final

¹³ Letter from ADNR to Pebble Ltd. P’ship (Apr. 19, 2018) (*available at* https://dnr.alaska.gov/mlw/mining/large-mines/pebble/pdf/A20186118_FINAL_PACKAGE.pdf).

¹⁴ Letter from ADNR to Pebble Ltd. P’ship (Mar. 29, 2019) (*available at* <https://dnr.alaska.gov/mlw/mining/large-mines/pebble/pdf/A20196118-FINALPACKAGE-SIGNED.pdf>).

Determination in federal district court like any other aggrieved litigant, and it cannot dodge that traditional path by trying to gin up some strained exotic claim based on speculative harms that have yet to – and may never – befall it. It would be exceedingly premature and potentially pointless for the Court to entertain its claim when Alaska has not authorized any commercial mining operations in Bristol Bay, has yet to complete its review of PLP’s proposed mining operations, and may never permit *any* mining in Bristol Bay. Taking on this case would squander the Court’s limited resources on an unripe dispute premised on speculative harms that are neither cognizable nor redressable now.

I. Alaska Cannot Properly Gin Up An Original Action Based On Speculative Harms Tied To Its Own Permitting Processes That Have Not Been Completed And May Never Allow Commercial Mining Operations In Bristol Bay.

In addition to commonsense prudential reasons for refusing to exercise jurisdiction, there are fundamental constitutional problems with the Court doing so at this stage. Article III grants the federal judiciary only limited authority to decide actual “cases” and “controversies.” That careful limitation prevents federal courts, including this one, from weighing in on theoretical disputes and offering advisory opinions by requiring a plaintiff to “show that the conduct of which he complains has caused him to suffer an ‘injury in fact’ that a favorable judgment will redress.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Alaska has alleged no such injury. While it alleges economic harms from the EPA’s Final Determination, its speculative references to projected revenue and job creation do not establish an imminent or concrete injury. *Bill of Complaint* ¶¶ 70–74, 101, No. 22O157 (July 26, 2023); *Lujan*, 504 U.S. at 560. To base standing on such alleged economic injuries, Alaska must show its injury is “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Lujan*, 504 U.S. at 560–61 (cleaned up); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740–741, n.16 (1972). But its alleged injuries are neither.

Alaska’s purported economic injury is abstract, not concrete at this point in time. The revenue and jobs that Alaska supposes are “at risk” are years away, if they ever materialize as they hinge on regulatory approvals that have not come and may never. *Bill of Complaint*, ¶¶ 71–74.¹⁵ As Alaska represented in the earlier suits over the Pebble Mine, all mining projects within the State are subject to a lengthy review and approval process by the ADNR, which is separate and apart from any EPA or USACE federal review. *See* ALASKA. STAT. § 27.05.010(b) (2022); *2019 Mot. to Intervene*, at 15–18. But this process has not concluded and may never. *See Pebble Project*.

¹⁵ Alaska currently receives millions of dollars in revenue from the 54.5 million salmon that returned to the Bristol Bay area in 2023. *See* ADF&G, *2023 Bristol Bay Salmon Season Summary* (Sept. 22, 2023), *available at* <https://www.adfg.alaska.gov/static/applications/dcfnewsrelease/1541607348.pdf>.

Alaska has told multiple federal courts that its touted economic benefits from a proposed Pebble Mine depend on “if” the mine is permitted at the federal *and state* levels and described its extensive regulatory process that, to this day, remains open. *2014 Mot. to Intervene*, at 9; *2019 Mot. to Intervene*, at 8. In that same vein, Alaska also has acknowledged the scope of any approved project (and hence its economic benefits, if any) could “undoubtedly change” as a result of the permitting process, including because of required mitigation and “compensat[ion] for unavoidable impacts.” *2014 Mot. to Intervene*, at 11; *2019 Mot. to Intervene*, at 18.

Even assuming state approvals come along, Alaska would not see economic benefits for many years. Even if Alaska permitted PLP’s proposed mine, there still would be “a five-year construction phase” before that mine could operate. *Bill of Complaint*, ¶ 72. And even then, the billions of dollars the State theorizes it will receive would not materialize until a “20-year operations phase.” *Id.*

Alaska’s “injury” is thus hardly imminent. Alaska has its own regulatory process that must separately permit the proposed Pebble Mine. ALASKA. STAT. § 27.05.010(b); *see Pebble Project*. As a result, Alaska *could not* suffer any harm unless and until ADNR approves PLP’s permit applications – which may be years from now, if ever. This speculative, future harm is precisely the “‘some day’ intentions” that lack “any description of concrete plans” and “do not support a finding of the ‘actual or imminent’ injury that [this Court’s] cases require.” *Lujan*, 504 U.S. at 564 (emphasis in original).

Today, then, Alaska's alleged economic injury is purely hypothetical. And such remote "fears of hypothetical future harm" cannot support constitutional standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). This Court has soundly rejected similar alleged injuries based on a highly-attenuated speculative chain and should do so again here. *Id.* at 410; *see, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (rejecting standing premised on speculative chain of possibilities); *Whitmore*, 495 U.S. at 157–60 (same); *see also Texas v. Pennsylvania*, 141 S. Ct. 1230 (mem.) (2020) (denying "motion for leave to file a bill of complaint . . . for lack of standing under Article III of the Constitution"). The bottom line: there is just no case or controversy the Court should decide now.

II. Alaska's Alleged Economic Injuries Are Not Redressable By A Favorable Ruling From This Court Now Either.

Alaska's alleged economic harms also are not redressable by a favorable ruling now. For an alleged injury to be redressable, it must be "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (internal citations omitted). Thus, even where there is a causal connection between agency action and a plaintiff's injury, standing remains wanting if the Court's ruling would not or could not redress the alleged injury. *Lujan*, 504 U.S. at 568–71. That is the case here.

To forestall its supposed economic losses, Alaska asks the Court to vacate the EPA's Final Determination, enjoin its enforcement, and award the State damages. *See Bill of Complaint*, at 40. But

granting Alaska’s requested relief could not, in fact, redress its alleged harms. Construction of any mine (and any purported downstream economic benefits to the State years later) still could not proceed until if and when Alaska gets around to issuing its own permits and authorizations. *See* ALASKA. STAT. § 27.05.010(b); *Pebble Project*.

In other words, vacating or enjoining the EPA’s Final Determination will not “likely” or even partially redress Alaska’s purported economic injury because it would not clear the way for any Pebble Mine to go forward. *See Lujan*, 504 U.S. at 560–61, 568–71. And while it is apparently Alaska’s political prerogative to support the Pebble Mine, its perspective could change overnight as well. For these reasons, too, a ruling from the Court would be little more than a wildly premature advisory opinion.

III. The Court Should Further Decline Original Jurisdiction For Prudential Reasons.

Even if Alaska could establish standing and demonstrate that its hypothetical injuries are redressable – neither is the case – there remain other good reasons to decline jurisdiction. Of course, even if the Court “has original jurisdiction over a case” it is “not require[d] . . . to exercise that jurisdiction.” *California v. Texas*, 457 U.S. 164, 168 (1982). For there are “prudential and equitable limitations upon the exercise of . . . original jurisdiction.” *Id.*

One such limitation is the availability of other forums. For obvious reasons, the Court “seek[s] to exercise [its] original jurisdiction sparingly and [is] particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in

which to settle his claim.” *United States v. Nevada*, 412 U.S. 534, 538 (1973); *see also Maryland v. Louisiana*, 451 U.S. 725, 744 (1981) (same). That is because the Court’s Original jurisdiction is both “delicate and grave,” *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), and must be guarded from unnecessary burdens, “lest [its] ability to administer [its] appellate docket be impaired,” *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 113 (1972) (citations omitted).

Here, the lower federal courts provide Alaska an adequate forum to pursue what are in reality basic APA claims. It knows that forum well. Alaska and PLP previously have sought relief in the District of Alaska for claims involving the Pebble Mine. Because that same venue remains available, there is no reason for the Court to waste its limited time and resources on a run-of-the-mill administrative law case that can be fully and fairly litigated below. *See Washington*, 406 U.S. at 114 (“[W]e conclude that the availability of the federal district court as an alternative forum and the nature of the relief requested suggest we remit the parties to the resolution of their controversies in the customary forum.”).

There is more. Ripeness is another important prudential limitation on this Court’s Original jurisdiction, and it counsels in favor of declining jurisdiction too. *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003) (“The ripeness doctrine is ‘drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction’” (citation omitted)). That doctrine “prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over

administrative policies.” *Abbott Lab’s v. Gardner*, 387 U.S. 136, 148 (1967). It also protects “agencies from judicial interference until an administrative decision . . . and its effects [are] felt in a concrete way by the challenging parties.” *Id.* at 148–49.

As the foregoing makes clear, Alaska’s case is not – and may never be – ripe for review. Although the EPA’s 2023 determination is final, no one knows when and how Alaska will proceed with its own, permitting process for a Pebble Mine. And without those required approvals, there simply can be no mine. As such, further factual development is necessary before Alaska’s challenge could be ripe for review. *See Nat’l Park Hosp. Ass’n*, 538 U.S. at 812 (declining to exercise Article III jurisdiction over “final agency action” because “further factual development would ‘significantly advance our ability to deal with the legal issues presented’”) (internal citations omitted).

CONCLUSION

For the foregoing reasons, *amicus* Trout Unlimited respectfully requests the Court to decline to exercise its Original jurisdiction and deny Alaska’s motion for leave to file a Bill of Complaint.

Dated: November 9, 2023

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