Chapter 15

VOTER INITIATIVES: MINERAL DEVELOPMENT AND THE WILL OF THE PEOPLE

James D. Linxwiler
Guess & Rudd P.C.
Anchorage, Alaska

Synopsis

§ 15.01 Introduction[*] [1] [2]

[*] Cite as James D. Linxwiler, "Voter Initiatives: Mineral Development and the Will of the People," 59 *Rocky Mt. Min. L. Inst.* 15-1 (2013).

[1] The author would like to thank Josh Van Gorkom of Guess & Rudd P.C. for his tireless, extensive, and careful research and review of this chapter, and Siobhan McIntire for her initial research of cases cited here. The author would also like to thank his partners Dick Veerman, George Lyle, Jim DeWitt, and Aisha Tinker Bray for their review and comments.

[2] The author represents Anglo American, one of the owners of the Pebble Project (discussed herein), and also represented the Association of ANCSA Regional Corporation Presidents/CEOs, Inc. and the Alaska Federation of Natives, Inc. in *Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064 (Alaska 2009). *See* § 15.03[3], *infra*. The author's partners serve as Borough Attorneys and represent the Lake and Peninsula Borough in ongoing litigation reported as *Pebble Limited Partnership ex rel. Pebble Mines Corp. v. Lake & Peninsula Borough*, 262 P.3d 598 (Alaska 2011). *See* § 15.03[4], *infra*. The opinions expressed in this chapter are the author's alone, and represent neither the

The use of initiatives to regulate or prohibit natural resources developments on public and private lands can have a major impact throughout the United States. While these initiatives have appeared on the ballot in numerous states, there has been no systematic legal survey and analysis of such initiatives, or the constitutional and statutory provisions under which they are proposed and enacted. This chapter is intended to begin such a review.

Initiatives pose issues of both politics and law. Thus, this chapter begins its analysis on a political level, examining the origins of the initiative process in the United States, and then moves to legal case histories arising in three key western states: (1) Alaska, which appears to be the current battleground for such efforts, surrounding the Pebble Project; (2) Montana, which banned cyanide usage in gold and silver mining 15 years ago and then voted down a repeal of the ban by an even larger margin; and (3) Colorado, where litigation kept an anti-mining initiative off the ballot. Thereafter, the chapter surveys, in less depth, a variety of other states in which courts have also addressed litigation concerning initiatives affecting natural resources developments in South Dakota, California, Idaho, Oregon, Utah, and Arizona.

Most of the cases discussed here involve mining, because that has been the focus of the initiatives to date. However, increasing controversy over subjects such as oil shale development and hydraulic fracturing (fracking) suggest that there will be initiatives on those subjects as well.

Voter initiatives can pose serious threats to resource development. In 1998, Montana voters enacted an initiative prohibiting the use of cyanide leaching in open pit gold and silver mining, thus significantly changing the face of mining in that state. In 2008, in litigation challenging an Alaska initiative seeking to prohibit large-scale mining using cyanide, the State of Alaska expressed to the court its view of the threat posed by that initiative to the state's fundamental interests in its resources. Rarely has the State of Alaska spoken to its courts so clearly about such a threat, as it did in opposing this initiative:

---

opinion of Guess & Rudd P.C. nor any of its clients.

> In conclusion, the Lieutenant Governor wishes to emphasize the importance of this matter to the court. It may well be that the future of all natural resource development in the state rides on the outcome of the decision in this matter. If measures like 07WATR are permissible, then well-financed agenda-driven organizations will be able to place on the ballot measures that will effectively terminate, not only the mining industry, but the timber industry, the oil and gas industry, and the commercial fishing industry, through the statewide prohibition of the use of public assets like land and water for resource development purposes under the guise of protecting the environment. The founders of this state believed that Alaska could become self-sufficient through reasonable development of the state's natural resources. That vision has been realized and must continue to be realized. It is clear, however, that there are organizations both within and without the state that are hostile to the founding vision and will use any legal means necessary to destroy it. The Lieutenant Governor submits that neither the founders of this state nor the framers of the Alaska Constitution would have ever intended that the initiative could be used as a tool to end responsible resource development in the state and thus end Alaska's bid for self-sufficiency.[3]

§ 15.02 The Initiative System, Its Origins, and Its Critics

Initiative and referendum provisions establish a system of direct legislation, and provide for voters to create or repeal statutes.[4] An initiative allows voters a means to enact legislation, while a referendum provides voters a means to invalidate legislation enacted by the legislature.[5]

---

[3] Lieutenant Governor's Partial Op. to Pls.' Mot. for Summ. J. & Mem. in Supp. of Cross-Mot. for Summ. J. 28–29, Council of Alaska Producers v. Parnell, No. 4FA-07-02696CI (Alaska Super. Ct., Fairbanks, filed Jan. 22, 2008).

[4] While beyond the scope of this chapter and thus not discussed herein, initiatives can also be used to amend state constitutions.

[5] There are three fundamental forms of such direct legislation adopted in various states:

> *Direct initiative*: . . . statutes . . . are proposed by petition and submitted directly to the voters for approval or rejection without any action by the legislature. Upon adoption, they have the force and effect of . . . statutes . . . .
>
> *Indirect initiative*: Statutes are proposed by petition but are submitted prior to a set date to a regular session of the legislature. If, after a specified time, the statute has not been approved by the legislature . . . the

The initiative process empowers voters to enact laws without resort to their elected representatives.[6] The process is to varying degrees founded upon hostility or mistrust of the legislatures and political parties and other established political institutions, and a preference for direct voter action.[7]

[1] Origins of the Initiative in the Progressive Era, 1900–1920

The initiative system of direct adoption of statutes by the voters was introduced in the United States as part of the democratic reforms of the Progressive Era, from about 1900–1920.[8] The system found early and broad support beginning in South Dakota in 1898, and was quickly adopted in many jurisdictions, particularly in western states.[9]

Along with the widespread adoption of initiative (and referendum) powers, other democratic reforms enacted during the Progressive Era in the United States include the vote for women, direct election of U. S. senators, the direct primary system of choosing candidates for office, recall of elected officials, and independent regulatory commissions.[10]

> proponents may then . . . submit the original initiative to the voters for approval or rejection . . . .
>
> *Popular referendum*: The voters are empowered to accept or reject specific laws enacted by the legislature when those laws are referred to them by popular petition.

David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 36 (1984). In addition, Magleby notes a fourth variation: in some states, the legislature can itself refer matters to voters for a referendum vote.

[6] John G. Matsusaka, *For the Many or the Few: The Initiative, Public Policy and American Democracy* 1 (2004).

[7] Magleby, *supra* note 5, at x.

[8] *Id*. at 20.

[9] Dennis Polhill, Initiative and Referendum Inst., Univ. of S. Cal. School of Law, *Initiative And Referendum in Colorado* 3–4 (Report 2006-4 Dec. 2006).

[10] Magleby, *supra* note 5, at 23.

Currently 24 states and about half of all cities provide for the initiative.[11] These 24 states have extensively used the initiative in the last century, enacting legislation somewhat less than half the time: as of the end of 2012, "[a] total of 2,421 state-level initiatives have been on the ballot since the first ones went before the voters in Oregon in 1904, and 984 (41 percent) have been approved."[12]

[2] Can Money Buy the Outcome?

The initiative process is not without its critics. At least some of this criticism is directed at one fundamental question: can initiative legislation be bought with campaign funds? Professor John Matsusaka has suggested not.

> The "money" question asks whether the initiative allows rich individuals and groups to advance their agendas at the expense of the general public. . . .
>
> . . . . However, the inference—only the wealthy can afford to qualify and promote ballot propositions, therefore, the initiative process ends up helping the rich and hurting the (not particularly wealthy) majority—is not generally valid.[13]

Matsusaka's analysis of election outcomes argues that monied interests are not reliably able to convince the electorate to vote against their interests; rather, such elections present the electorate with an opportunity to exercise its will that it otherwise would not have.

[3] Is the Primary Effect of the Initiative to Bring Government Policy in Line with the Electorate?

---

[11] The states are Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. Matsusaka, *supra* note 6, at 1; *see also* Initiative & Referendum Inst., "State-by-State List of Initiative and Referendum Provisions," http://www.iandrinstitute.org/statewide_i&r.htm.

[12] Initiative & Referendum Inst., Univ. of S. Cal. School of Law, *Initiative Use* 1 (Jan. 2013).

[13] Matsusaka, *supra* note 6, at 12–13.

Commentators also suggest the primary effect of the initiative is to bring government policy in line with the changing attitudes of the electorate.

Matsusaka analyzed the empirical data of initiative elections related to taxes and government spending over 30 years from 1970–2000, and concluded that initiatives resulted in smaller government, a shift of government costs to local government, and a shift from taxes to user fees.[14]

Matsusaka considered at some length whether campaign funds influenced this fiscal policy shift, and concluded that it did not influence the outcome. While money certainly plays a role in proposing initiatives, he states that the interests of the electorate are actually served because it is thereby provided with choices it did not otherwise possess.

> With the initiative, voters are given choices. If the alternative on an initiative is worse than the legislature's policy, the initiative can be rejected and no harm is done. If the alternative is better, the voters can accept the initiative and are better off. In short, even if there is unequal access when it comes to proposing initiatives, the ability of voters to filter out the bad proposals and keep the good ones allows the process to work to the advantage of the majority.
>
> To be clear, the evidence here shows that the initiative serves the many and not the few when it comes to fiscal policy.[15]

Matsusaka also analyzed whether initiative legislation embodies a politically liberal or conservative bias, and after reviewing two historical periods (1902–1942, when it increased government spending, and 1970–2000, when it cut government spending) he concluded: "The initiative does not appear to have an ideological bias. Rather, it seems to be biased toward the majority, whether conservative or liberal."[16]

---

[14] *Id*. at 29–52.

[15] *Id*. at 71.

[16] *Id*. at 79.

This same point is made in relation to a different sort of initiatives, related to land use controls and big box stores, in a joint study issued in 2007 by the USC-Caltech Center for the Study of Law and Politics and the Initiative and Referendum Institute:

> Political preferences appear to be influential in the outcome of big box measures. Communities that voted to accommodate big box development tended to have voted Republican in 2004, and those that voted to limit big box stores tended to vote Democratic.[17]

Finally, the commentators offer a thought that is quite illuminating in its simplicity and its clarity: the initiative is a direct, prompt tool of political correction, to bring government policy in line with the electorate when it has strayed from the public will. Due to the nature of the legislative process,

> representatives can get out of step with their constituents because of frictions in the representation process. When representatives get out of step, they tend to choose policies that the majority does not support. In initiative states, voters use the initiative to bring policies back into line with their preferences relatively quickly.[18]

Such a division between the government and the electorate promotes the use and enactment of initiatives, in communities of all political affiliations:

> Ballot measures flourish when the existing policy infrastructure has fallen behind what is happening on the ground and traditional institutions and leaders are unwilling or unable to change quickly enough. . . . Arising in both conservative and progressive communities, [ballot measures] have moved policies closer and faster to the apparent wishes of the majority . . . .[19]

[4] A Skeptic's View—What About *Citizens United*, Attack Ads, and the Like?

The analyses of political scientists quoted above to the effect that money does not affect the outcome of initiative elections in any meaningful and lasting way, and that initiatives simply serve to

---

[17] Phyllis Myers, USC-Caltech Ctr. for the Study of Law & Politics, Initiative & Referendum Inst., "Direct Democracy *and* Land Use: Eminent Domain and Big Box Development at the Local Ballot Box," at 27 (2007).

[18] Matsusaka, *supra* note 6, at 92.

[19] Myers, *supra* note 17, at 28–29.

align legislation with voter sentiment, are grounded in academic research, and perhaps as well in a somewhat idealistic and noncritical view of the initiative process. In addition, these analyses focus on long-term trends, not on the outcome of individual elections.

To some of us, these views may seem somewhat counter-intuitive. Particularly since the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*[20] and related developments opened the way to massive injections of money into politics (including initiative campaigns) via indirect corporate spending and "super PACs," and limited the full disclosure of the sources of funding, many Americans have expressed a healthy level of skepticism in relation to the role of money in politics and its ability to influence outcomes.[21] These evolving public opinions of the electoral process are not based on extensive electoral research, of course, but they are still clear and unavoidable. The vast quantities of funds spent in electoral politics (including initiative campaigns), the saturation of the airwaves with anonymous attack ads and negative campaigning tactics such money enables, and the inability to obtain information about the sources of funding unavoidably raise a fair question about whether initiative election results are thereby affected in a new and different way.

§ 15.03 Alaska's Anti-Pebble Initiatives

The coordinated, persistent, and well-funded efforts to enact an initiative prohibiting development of the Pebble copper mine project make Alaska the most recent battleground over initiatives seeking to prohibit or regulate natural resources projects. Already at least five anti-Pebble initiatives have been circulated; two separate initiative elections have occurred on this topic (one state, one local), with another statewide initiative ballot measure certified and scheduled for late 2013; three lawsuits have directly

[20] 558 U.S. 310 (2010).

[21] As but one example, the Alaska Public Offices Commission issued Advisory Opinion AO 12-09-CD (June 2012), which concluded that some of the state's prohibitions on use of corporate funding in relation to initiative ballot measures and requiring disclosure of funding are probably unconstitutional in light of *Citizens United*. See discussion at § 15.03[6], *infra*.

challenged these initiatives (with one major published decision from the Alaska Supreme Court, and two published orders), with more to come; and there has been a broad array of collateral litigation and election finance enforcement proceedings.

Because of the complexity of these initiatives and litigation, the Pebble Project, the Alaska law relating to initiatives, the anti-Pebble initiatives, and the sources of their support are described separately.

[1] Pebble Project

The Pebble Project is a very large mining prospect[22] that has become controversial because of its possible effects upon commercial and subsistence fishing in the Bristol Bay region. One description of the controversy follows:

> If built, the proposed Pebble Mine would be North America's largest gold and copper mine. It is also the largest gold deposit in the world. . . .
>
> This proposal has been very controversial in Alaska and has garnered attention around the world -- in large part because the mine would sit in the headwaters of some of the most productive salmon rivers in the world. . . . While this proposal is still in the planning and pre-permitting stages, the general outline of the plan consists of a large open pit mine, a similarly large underground mine, and the impoundment of billions of tons of mining waste behind several earthen dams.
>
> Proponents argue that the mine will create jobs in the region and tax revenue for the state of Alaska, and that it is impossible to oppose a project before final plans are drawn up. Opponents argue that the

[22] The Alaska Department of Natural Resources' Division of Mining, Land and Water describes the Pebble Project as follows:

> The Pebble Project is a copper-gold-molybdenum porphyry deposit in the advanced exploration stage. . . .
>
> Pebble consists of two contiguous deposits. Pebble West is a near surface resource of approximately 4.1 billion metric tons that, if developed, would likely be mined by conventional open-pit mining techniques. Pebble East is significantly deeper than Pebble West and contains generally higher grade ore. Its size is currently estimated at 3.4 billion metric tons. If developed, Pebble East would probably be mined via bulk tonnage underground mining methods.

Alaska Dep't of Natural Res., "Pebble Project," http://dnr.alaska.gov/mlw/mining/largemine/pebble.

mine would negatively impact the entire Bristol Bay watershed regardless of design details, and create an unacceptable risk to fisheries downstream forever.[23]

[2] Summary of Alaska Initiative Provisions

[a] Constitutional and Statutory Provisions

Article XI of the Alaska Constitution grants citizens the rights of initiative, referendum, and recall. Section 1 states that "[t]he people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum."[24]

To place an initiative on the ballot, the sponsors of a proposed initiative first file a copy of the proposed enactment, along with 100 signatures, for certification by the lieutenant governor.[25] Upon certification, the lieutenant governor prepares a summary of the enactment[26] and the sponsors circulate a petition. To qualify the measure for the ballot, they must obtain the signatures of at least 10% of the voters in the last election (roughly 30,000 signatures), the signatories must reside in three-fourths of the house districts, and in each such house district the signatories must be at least 7% of the voters.[27] Upon satisfaction of these petition requirements, the lieutenant governor completes a ballot title and summary and places the matter on the ballot in the first general election to be held more than 120 days after the

---

[23] David Coil, Erin McKittrick, Andrew Mattox & Bretwood Higman, "Pebble Mine (Copper/Gold Prospect)," *Ground Truth Trekking* (revised June 6, 2013).

[24] Alaska Const. art. XI, § 1.

[25] Alaska Const. art. XI, § 2. The procedure for certification is also addressed in Alaska Stat. §§ 15.45.010–.245.

[26] See Alaska Stat. § 15.45.090 for details of the lieutenant governor's certification.

[27] Alaska Const. art. XI, § 3. Under Alaska Stat. § 15.45.140, the petition gathering process must be completed within one year.

close of the next legislative session. However, if the legislature enacts "substantially the same measure," the petition is void.[28]

As in other states, these legal requirements of quantity and geographic breadth (signatures of 10% of voters, who must reside in 75% of the state house districts, with no less than 7% of the voters in any district) increase the cost and logistical burdens on sponsors of initiatives and ensure that only a few, well-financed matters (or matters with very broad popular support) reach the ballot.

An initiative is enacted by a majority of the voters, is not subject to veto, and may not be repealed by the legislature for two years, but it may be amended at any time by the legislature.[29]

[b] Legal Challenges to Initiatives Before and After Elections: Enumerated Subject Matter Limits on Initiatives and the "Clearly Unconstitutional" Standard

The Alaska Constitution and statutes[30] provide for legal challenge of the lieutenant governor's decisions concerning initiatives.

Under the state constitution, a proposed initiative can be kept off the ballot if it concerns a topic to which the initiative process is "clearly inapplicable."[31] This provision is the subject of one of the more colorfully worded legal tests in all jurisprudence, which originates with one of Alaska's plain-speaking citizen delegates at its Constitutional Convention in 1956: "To test whether the initiative is 'clearly

---

[28] Alaska Const. art. XI, § 4. *See also* Alaska Stat. §§ 15.45.180–.210.

[29] Alaska Const. art. XI, § 6.

[30] *See* Alaska Stat. § 15.45.240 ("Any person aggrieved by a determination made by the lieutenant governor under [Alaska Stat. §§ 15.45.010–.220] may bring an action in the superior court to have the determination reviewed within 30 days of the date on which notice of the determination was given.").

[31] Alaska Const. art. XII, § 11.

inapplicable,' one must ask whether '*even 55 idiots would agree that it was inapplicable*.'"[32] In addition to this general subject matter restriction, article XI, section 7 of the Alaska Constitution contains five specific subject matter restrictions on initiatives, which provide another basis for challenge to an initiative. In practice, these restrictions are most often the only successful basis for a challenge of an initiative before voter enactment. Section 7 states that initiatives "shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation."[33]

Where a pre-election challenge goes beyond the specifically enumerated restrictions in article XI, section 7, and challenges the validity of an initiative on other grounds, a much higher standard applies to the review of the initiative before it will be kept off the ballot: the proposal must be "clearly unconstitutional"[34] or "clearly unlawful."[35]

---

[32] Kohlhaas v. State, 147 P.3d 714, 717 n.8 (Alaska 2006) (emphasis added) (quoting Brooks v. Wright, 971 P.2d 1025, 1028 (Alaska 1999)).

[33] Alaska Const. art. XI, § 7; *see also* Alaska Stat. § 15.45.010.

[34] As an example of clearly unconstitutional, the courts would reject a petition that proposed school segregation based on race in violation of *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294 (1955). *See* Kodiak Island Borough v. Mahoney, 71 P.3d 896, 900 n.22 (Alaska 2003). A more recent formulation of this rule is "[a]n executive officer may reject the measure if controlling authority leaves no room for argument about its unconstitutionality." Alaska Action Ctr. v. Municipality of Anchorage, 84 P.3d 989, 992 (Alaska 2004). In a very recent pre-election challenge, the Alaska Supreme Court rejected a petition to certify an initiative broadly banning abortion in Alaska because "[a] petition may be rejected as 'clearly unconstitutional' only 'if controlling authority leaves no room for argument about its unconstitutionality.'" DesJarlais v. State, 300 P.3d 900, 903 (Alaska 2013) (quoting *Alaska Action Ctr.*, 84 P.3d at 992). "Controlling United States Supreme Court precedent establishes that a broad ban on abortion would be 'clearly unconstitutional.'" *Id.* at 904 (quoting Roe v. Wade, 410 U.S. 113, 164

Perhaps to emphasize that successful pre-election challenges remain rare, the Alaska Supreme Court has begun to focus on the policy favoring initiative votes before judicial review. On judicial review, the court "liberally construe[s] constitutional provisions that apply to the initiative process," and "narrowly interpret[s] the subject matter limitations that the Alaska Constitution places on initiatives."[36] When considering legal challenges to initiatives intended to keep them off the ballot, the court seeks to preserve the right of the people to vote on the initiative.[37] "The general rule is that a court should not determine the constitutionality of an initiative unless and until it is enacted."[38] The Alaska Supreme Court has explained the basis for this general rule as follows: "This is because '[t]he rule against pre-election review is a prudential one, steeped in traditional policies recognizing the need to avoid unnecessary

---

(1973)).

[35] In *State v. Trust the People*, 113 P.3d 613, 614 n.1 (Alaska 2005), the Alaska Supreme Court added "clearly unlawful" to the "clearly unconstitutional" standard: "courts are also empowered to conduct pre-election review of initiatives where the initiative is clearly unconstitutional or clearly unlawful."

[36] *Brooks*, 971 P.2d at 1027.

[37] The court recently stated:

> [W]e have sought to preserve the people's right to be heard through the initiative process wherever possible:
>
> > "In reviewing an initiative prior to submission to the people, the requirements of the constitutional and statutory provisions pertaining to the use of initiatives should be liberally construed so that 'the people (are) permitted to vote and express their will on the proposed legislation . . . .' When one construction of an initiative would involve serious constitutional difficulties, that construction should be rejected if an alternative interpretation would render the initiative constitutionally permissible."

Pebble Ltd. P'ship *ex rel.* Pebble Mines Corp. v. Parnell, 215 P.3d 1064, 1076 (Alaska 2009) (quoting Boucher v. Engstrom, 528 P.2d 456, 462 (Alaska 1974)).

[38] *Trust the People*, 113 P.3d at 614 n.1.

litigation, to uphold the people's right to initiate laws directly, and to check the power of individual officials to keep the electorate's voice from being heard.'"[39]

[3] 2007–2009 Initiative Challenges to Pebble: 07WATR and 07WTR3

Three initiatives directly challenging the Pebble Project were circulated in Alaska in 2007 and 2008: 07WATR,[40] 07WTR2,[41] and 07WTR3.[42]

In concept, 07WATR operated as a prohibition against any large-scale mining using cyanide or other toxic chemicals. 07WATR prohibited any large-scale mining activity that directly or indirectly "*releases any toxic pollutant* into . . . any surface or subsurface water . . . that is utilized by humans for drinking water or by salmon in the spawning, rearing, migration, or propagation of the species," or "*uses, releases or otherwise generates*" cyanide, sulfuric acid, or other toxic agents into such waters.[43] The state attorney general issued an 18-page opinion[44] that concluded the proposed initiative violated Alaska Stat. §

---

[39] *Pebble Ltd. P'ship*, 215 P.3d at 1077 (quoting Alaskans for Efficient Gov't v. State, 153 P.3d 296, 298 (Alaska 2007)).

[40] Ballot Initiative No. 07WATR, "An Act to protect Alaska's clean water," Att'y Gen. File No. 663-07-0179 (Alaska 2007).

[41] Ballot Initiative No. 07WTR2, "An Act to protect Alaska's clean water," Att'y Gen. File No. 663-07-0179 (Alaska 2007). 07WTR2 was apparently an intermediate effort between the two other initiatives. The application "did not comply with the constitutional and statutory provisions governing the use of the initiative," and was denied. Alaska Att'y Gen. Op., "Review of 07WTR2 Initiative Application," 2007 WL 2899540 (Sept. 27, 2007); *see also* Alaska Div. of Elections, "Initiative Petition List," http://www.elections.alaska.gov/pbi_ini_status_list.php.

[42] Ballot Initiative No. 07WTR3, "An Act to protect Alaska's clean water," Att'y Gen. File No. 663-07-0179 (Alaska 2007).

[43] 07WATR § 2(a), (b) (emphasis added).

[44] *See* Alaska Att'y Gen. Op., "Review of 07WATR Initiative Application," 2007 Alaska Op.

15.45.040 because it constituted an appropriation of state resources (water) by designating a single restrictive use of state resources in violation of the public use and benefit principles of article VIII of the Alaska Constitution,[45] and the provisions of article XI, section 7 that prohibit initiatives from containing appropriations. Accordingly, the lieutenant governor did not certify the matter.

07WTR3 was a more complex proposal that at least facially regulated (not prohibited) release of toxic chemicals associated with large-scale metal mining:

> (a) . . . approvals, authorizations, licenses and permits for a prospective large scale metallic operation may not be granted or issued to a person or entity to allow activity that directly or indirectly:
>
> (1) releases or discharges a toxic pollutant or toxic pollutants, in a measurable amount that will effect (sic) human health or welfare or any stage of the life cycle of salmon, into, any surface or subsurface water, or tributary [thereto]; or that
>
> (2) stores or disposes of metallic mineral mining wastes . . . in a way that could result in the release or discharge of . . . toxic pollutants . . . that will effect (sic), directly or indirectly, surface or subsurface water or tributaries thereto used for human consumption or salmon spawning, rearing, migration, or propagation;
>
> (b) This measure is intended to regulate the operations described herein to prevent the release or discharge of toxic pollutants and other chemicals into the waters of the state. This measure shall not result in the appropriation of lands or waters of the state . . . . Use of the surface and subsurface waters and the land of the state for a prospective large scale metallic mining operation is not prohibited but is subject to regulation . . . .[46]

Att'y Gen. 1 (June 21, 2007).

[45] *See* Sullivan v. Resisting Envtl. Destruction on Indigenous Lands (REDOIL), No. S-14216, 2013 WL 1281786, at *10 (Alaska Mar. 29, 2013) ("A bedrock principle in Article VIII of the Alaska Constitution mandates that the State's natural resources are to be made 'available for maximum use consistent with the public interest.'" (quoting Alaska Const. art. VIII, § 1)).

[46] 07WTR3 § 2.

The state attorney general issued another 18-page opinion approving this initiative for the ballot, and the lieutenant governor certified it.[47]

07WATR and 07WTR3 were subject to two separate challenges in the superior court.[48] Eventually, the Alaska Supreme Court upheld the inclusion of 07WTR3 on the ballot.[49] The court addressed three issues:

(1) Did 07WTR3 constitute an appropriation? The court concluded:

> Initiative 07WTR3—as interpreted to prohibit only discharges that "adversely affect" humans, salmon, and waters used for human consumption and as salmon habitat—therefore prohibits harm to public assets while permitting the use of public assets and exhibiting no explicit preference among potential users . . . . There is nothing clearly unconstitutional or clearly unlawful about regulating the discharge of toxic materials into state waters.[50]

(2) Was it "local and special legislation?"[51] The court found it was not.

---

[47] *See* Alaska Att'y Gen. Op., "Review of 07WTR3 Initiative Application," 2007 WL 3118191 (Oct. 17, 2007).

[48] Holman v. Parnell, No. 3DI-07-00056CI (Alaska Super. Ct. Oct. 12, 2007) (brought in remote Dillingham); Council of Alaska Producers v. Parnell, No. 4FA-07-02696CI (Alaska Super. Ct. Feb. 28, 2008) (brought in Fairbanks).

[49] Pebble Ltd. P'ship *ex rel.* Pebble Mines Corp. v. Parnell, 215 P.3d 1064 (Alaska 2009). The court's decision was first announced in a brief expedited order, published at 187 P.3d 478 (Alaska 2008) and issued to allow the matter on the ballot, and then was the subject of a full opinion issued more than a year later.

[50] *Parnell*, 215 P.3d at 1077.

[51] The Alaska Supreme Court employs "a two-stage analysis for determining whether proposed legislation is 'local or special legislation' barred by article XI, section 7." *Id*. at 1078. "The first stage is a threshold inquiry as to whether the proposed legislation is of general, statewide applicability." *Id*. (citing Boucher v. Engstrom, 528 P.2d 456, 461 (Alaska 1974)). The second stage is "whether the legislation

> Pebble contends that the initiative applies only to the Pebble and Donlin Creek mines. However, 07WTR3 does not specifically relate only to the Pebble and Donlin Creek mines. . . . Although the Pebble and Donlin Creek mines may be the only proposed mines currently affected by 07WTR3, the language of the initiative is sufficiently broad that it would apply to any new LSMM mines.[52]

(3) Were the summary and cost statement defective? The court approved both the summary ("As we have stated, '[t]he summary need not recite every detail of the proposed measure.' Here, the summary adequately discloses the important details of the initiative."[53]) and cost statement ("[W]e defer to the DNR's expertise in this area and uphold its reasonable conclusion that there will not be any substantial fiscal impact as a result of the initiative."[54]).

The result of the court's decision was to place the initiative on the ballot.

However, during the trial court litigation, the sponsors dropped 07WATR from consideration, preferring to proceed only with 07WTR3. Thus, while there was no final Alaska Supreme Court adjudication of the lawfulness of 07WTR, it did not appear on the ballot.

After a vigorous statewide election campaign, 07WTR3 was defeated by the voters, 108,138 to 83,574, a margin of 56% to 44%.[55]

[4] 2011–2012 Lake and Peninsula Borough Initiative Challenges to Pebble: "Save Our Salmon"

'bears a fair and substantial relationship to legitimate public purposes.'" *Id*. at 1079 (quotations omitted) (quoting State v. Lewis, 559 P.2d 630, 643 (Alaska 1977)).

[52] *Id*. at 1080.

[53] *Id*. at 1083 (alteration in original) (quoting Alaskans for Efficient Gov't v. State, 52 P.3d 732, 736 (Alaska 2002)).

[54] *Id*. at 1084.

[55] *See* Ballot Measure No. 4 - 07WTR3, "Bill Providing for Regulation of Water Quality"; *see also* Alaska Div. of Elections, "Initiatives Appearing on the Ballot in Alaska," http://www.elections.alaska.gov/doc/forms/H26.pdf.

The Pebble Project was next challenged in the "Save Our Salmon" Initiative #2 (LP Initiative),[56] an initiative proposed for adoption by the voters in the Lake and Peninsula Borough (Borough), the local governmental unit within which the Pebble Project is located. The existing Borough Code required a development permit for resource extraction and industrial uses of lands. The LP Initiative proposed to amend Borough Code § 9.07.050 to contain a requirement that "[w]here a Resource Extraction activity could result in excavation, placement of fill, grading, removal and disturbance of the topsoil of more than 640 acres of land and will have a Significant Adverse Impact on existing anadromous waters, a development permit shall not be issued . . . ."[57]

In an action challenging the LP Initiative,[58] the superior court ruled in favor of the Borough and allowed the LP Initiative on the ballot in its July 25, 2011 Decision and Order.[59] The Alaska Supreme Court denied a petition for review (interlocutory appeal) in a memorandum order.[60]

---

[56] "An Act Protecting the Salmon of Bristol Bay by Prohibiting the Destruction or Degradation of Salmon Bearing Waters."

[57] LP Initiative § 2. Borough Code § 09.07.020 defines "Significant Adverse Impact" as follows:

> "Significant Adverse Impact" means a use, or an activity associated with the use, which proximately contributes to a material change or alteration in the natural or social characteristics of a part of the state's coastal area and in which
>
> (A) the use, or activity associated with it, would have a net adverse effect on the quality of the resources of the coastal area;
>
> (B) the use, or activity associated with it, would limit the range of alternative uses of the resources of the coastal area; or
>
> (C) the use would, of itself, constitute a tolerable change or alteration of the resources within the coastal area but which, cumulatively, would have an adverse effect.

[58] *See* Pebble Ltd. P'ship *ex rel.* Pebble Mines Corp. v. Lake & Peninsula Borough, 262 P.3d 598 (Alaska 2011) (order denying review). In April 2011 the clerk of the Borough certified the LP Initiative as "meet[ing] the requirements of Alaska law and the Alaska Constitution." *Id.* at 598 (Winfree, J., dissenting) (alteration in original). The plaintiffs sought to invalidate the LP Initiative and keep it off the

In an unusual fashion, the court's memorandum order contained both a detailed dissent and a concurrence. Among other things, the concurrence argued that remand would allow a full airing, after the initiative's possible enactment, of the amicus curiae State of Alaska's argument that "[i]f enacted, the initiative would be preempted by state law":

> [T]his will also give the State of Alaska an opportunity to either intervene in the present superior court case or file a separate action and obtain a ruling after full briefing on the new issue it seeks to raise in this emergency petition—namely, whether the initiative would be unenforceable as a matter of law because "*[i]f enacted, the initiative would be preempted by state law*" "*[b]ecause article VIII of the Alaska Constitution expressly mandates that the state legislature has exclusive authority over the state's natural resources [and] the initiative therefore will inevitably conflict with, and be preempted by, state law*."[61]

After the Alaska Supreme Court's action, the LP Initiative was enacted by a vote of 280 to 246 at a Borough election held October 4, 2011, and certified October 24, 2011.[62] Note that the margin of victory on this question with a multi-billion-dollar effect was 34 voters, 6.5% of the total of 526 votes cast.

[5] 2012–2013 Initiative Challenges to Pebble: 12BBAY

---

ballot, on the grounds it was "local or special legislation" and because it violated Alaska municipal law. *Id*. at 600 (Winfree, J., dissenting).

[59] Decision and Order, Pebble Ltd. P'ship *ex rel.* Pebble Mines Corp. v. Lake & Peninsula Borough, No. 3DI-11-00053CI (Alaska Super. Ct. July 25, 2011).

[60] *See Lake & Peninsula Borough*, 262 P.3d 598.

[61] *Id*. at 602 (Stowers, J., concurring) (second, third, and fourth alterations in original) (emphasis added) (quoting Amicus State of Alaska's Response at 8). The matter returned to the trial court, where post-election briefing on the validity of the LP Initiative is currently underway. The state has also filed a separate lawsuit challenging the LP Initiative.

[62] Lake and Peninsula Borough Assembly, Special Assembly Minutes (Oct. 24, 2011).

Another statewide anti-Pebble initiative has now been proposed, dubbed the "Bristol Bay Forever" initiative by the sponsors, and referenced by the lieutenant governor as "12BBAY."[63] The substance of this initiative is a requirement that the legislature must finally authorize any major mine in the watershed of the Bristol Bay Fisheries Reserve (in which the Pebble Project is located):

> In addition to permits and authorizations otherwise required by law, a final authorization must be obtained from the legislature for a large-scale metallic sulfide mining operation located within the watershed of the Bristol Bay Fisheries Reserve designated in AS 38.05.140(f). This authorization shall take the form of a duly enacted law finding that the proposed large-scale metallic sulfide mining operation will not constitute danger to the fishery within the Bristol Bay Fisheries Reserve.[64]

The state attorney general reviewed and approved this initiative proposal in an opinion, "Review of Bristol Bay Forever Initiative Proposal," dated December 17, 2012.[65] The 12BBAY initiative was certified by the lieutenant governor on December 20, 2012,[66] and it is currently in the petition booklet process, in which 500 booklets are prepared for the initiative committee prior to signature gathering.[67] There has been no litigation filed challenging the 12BBAY initiative at the time of writing.

[6] Financial Support, Collateral Litigation, and Controversy

A fundamental part of the Alaska "story" is the singular source of financing of these anti-Pebble initiatives and litigation, which is particularly relevant in light of the criticisms of the initiative process

---

[63] Ballot Initiative No. 12BBAY, "For an Act Providing for Protection of Bristol Bay Wild Salmon and Waters Within or Flowing into the Existing 1972 Bristol Bay Fisheries Reserve," Att'y Gen. File No. JU2012200845 (Alaska 2012).

[64] *Id*.

[65] Alaska Att'y Gen. Op., "Review of 'Bristol Bay Forever' Initiative Petition," 2012 WL 6736206 (Dec. 17, 2012).

[66] Mead Treadwell, 12BBAY Initiative Application Certificate (Dec. 20, 2012).

[67] Alaska Div. of Elections, "Initiative Petition Process," http://www.elections.alaska.gov/pbi/ini/gi.php.

noted above relative to whether monied interests can influence the outcome of initiative elections.[68] The primary source of funding for all five of the anti-Pebble initiatives[69] is widely reported to be an individual who was reported by CBS News to have spent approximately $1.6 million in an unsuccessful effort to enact the 2008 initiative.[70]

After the 2008 election, the Pebble Limited Partnership and others filed a campaign finance disclosure complaint with the Alaska Public Offices Commission (APOC) alleging that in spite of efforts to disguise the source of funding of the 2008 initiative by using a series of groups (Americans for Job Security, Renewable Resources Coalition, and Alaskans for Clean Water) that appeared as the nominal sponsors and financial support for that initiative, all or most of the financial support for the 07WATR and 07WTR3 election and litigation effort had actually come from one individual. The complainants further alleged that these parties failed to accurately report their contributions, in violation of state law. The individual and the groups denied all charges, and eventually executed a consent decree in which they admitted no wrongdoing, but agreed to pay APOC $100,000, at that time reputed to be the largest amount of any payment for election campaign matters in Alaska. Americans for Job Security executed a separate consent decree. [71]

---

[68] *See* §§ 15.03[2], [5], *supra*.

[69] *See* Rosanne Pagano, "Pebble Mine's Formidable Foe," *Alaska Magazine* (Feb. 2010); *see, e.g.*, Mike Dingman, "Politicizing Pebble," *Anchorage Press* (Sept. 14, 2011).

[70] Laura Strickler, "Who Is Bankrolling the Ballot?," *CBS News* (Oct. 14, 2010), http://www.cbsnews.com/8301-31727_162-20019641-10391695.html.

[71] Copies of both consent decrees are located on the APOC website at http://aws.state.ak.us/apocInterim/ViewCommissionComplaints.aspx (complaint no. 09-01-CD). "While this was not technically a 'fine'. . . , it is a larger sum than APOC's largest fine . . . ." Dingman, *supra* note 69.

From these events and the text of the consent decree, it appears that the same parties have been very active in financially supporting the LP Initiative in the Lake and Peninsula Borough, the 07WATR and 07WTR3 initiatives, and the 12BBAY initiative.[72]

On June 12, 2012, APOC issued Advisory Opinion AO 12-09-CD, addressing the applicability to an independent expenditure group (IEG) of certain State of Alaska campaign expenditure limits, disclosure requirements, and prohibitions upon corporate contributions to political campaigns, including to ballot measures (initiative campaigns), in light of *Citizens United v. Federal Election Commission*.[73] The opinion states that the request for the opinion extensively addressed whether initiative proponents remained subject to the disclosure requirements for groups funding campaigns (including ballot measures), and the opinion analyzes whether the group would be insulated from allegations such as those leveled against the parties in the APOC complaint leading to the consent decree referenced above.[74]

AO 12-09-CD concludes that *Citizens United* probably invalidates certain Alaska prohibitions and restrictions upon contributions to groups and IEGs,[75] but it also states carefully that all disclosure requirements of the sources of such funds for future initiative campaigns will be enforced: "[APOC reiterates] that the group is charged with knowing the true source of its donations. Without exception

---

[72] *See* Complaint, Joel Natwick v. Robert B. Gillam, RGB Bush Planes LLC & McKinley Capital Mgmt. LLC, No. 12-08-CD, at 4–7 (Alaska Pub. Offices Comm'n filed Aug. 29, 2012); *see also* Renewable Res. Coal., "Bristol Bay Forever Initiative" (Oct. 29, 2012), http://www.renewableresourcescoalition.org/newsroom/2012-10-29/bristol-bay-forever-initiative.

[73] APOC, Advisory Op. 12-09-CD (June 6, 2012) http://aws.state.ak.us/ApocInterim/ViewCommissionAdvisoryOpinions.aspx (opinion no. 12-09-CD); *see Citizens United*, 558 U.S. 310 (2010).

[74] *See* APOC, *supra* note 73.[75] *Id*. at 7.

[75] *Id*. at 7.

groups that fail to report accurate true sources are subject to potential complaints . . . . The Commission's opinion should leave no room for plausible deniability."[76]

A substantial amount of additional collateral litigation is being brought by or involves the opponents of the Pebble Project. While it is beyond the scope of this chapter, the magnitude of this litigation is important to understanding the breadth and nature of the challenges that are directed against the Pebble Project, and the implications for the initiative process.

This litigation and related controversies are summarized in four related articles published in the *Anchorage Daily News* on May 18, 2013.[77] These articles discuss events surrounding the initiatives and document the existence of at least eight legal proceedings (lawsuits, arbitrations, and bankruptcy proceedings). When added to the two 2008 Pebble initiative lawsuits, a total of at least 10 legal proceedings have surrounded these initiatives, not including various APOC campaign finance complaints.

§ 15.04 Montana and the Cyanide Prohibition: I-137, I-147, and the Seven Up Pete Venture Litigation

[1] Initiative Process in Montana

Article III, section 4(1) of the Montana Constitution provides for the enactment of legislation by initiative: "The people may enact laws by initiative on all matters except appropriations of money and local or special laws."[78] In Montana, initiative petitions to enact legislation must be signed by qualified

---

[76] *Id*. at 8.

[77] Lisa Demer, "Pebble, foes play high-dollar hardball," *Anchorage Daily News*, May 18, 2013; "Mine development the backdrop to legal warfare," *Anchorage Daily News*, May 18, 2013; "Players in the Pebble wars," *Anchorage Daily News*, May 18, 2013; "Businesses and organizations involved in the fight over Pebble," *Anchorage Daily News*, May 18, 2013.

[78] In addition to the provisions cited here relating to the enactment of statutes, there are different requirements relating to amendment of the Montana Constitution by initiative. *See, e.g.*, Mont. Const. art. XIV, § 9(1) (authorizing constitutional amendments by initiative); art. XIV, §§ 9(1), 10 (number of

electors equal to 5% of the total number of votes cast for the office of governor in the preceding general election,[79] including 5% of the voters in one-third of state house districts.[80] The state constitution bars the governor from vetoing a statutory initiative.[81]

Pre-election challenges to initiatives are disfavored: Montana courts will only exercise jurisdiction over a pre-election challenge to an initiative where the challenged measure is "facially defective."[82] As the Montana Supreme Court recently explained,

> "[J]udicial intervention in referenda or initiatives prior to an election is not encouraged." We have reasoned that to effectively protect and preserve the rights which Montanans have reserved to themselves to change the laws or the Constitution through the initiative process and to approve or reject by referendum legislative acts (except appropriations of money) and proposed constitutional amendments, pre-election judicial review should not be routinely conducted.[83]

[2] Initiative 137 and Its Legal Challenges

---

petition signatures required for constitutional amendments); art. XIV, § 9(1) (minimum number of state house districts in which petition signatures are required for constitutional amendments).

[79] Mont. Const. art. III, §§ 4(2), 7.

[80] Mont. Const. art. III, § 4(2). The current text of this constitutional provision actually requires the minimum number of signatures "in each of at least one-half of the counties," but the U.S. District Court for the District of Montana has found that this requirement violates the equal protection clause of the federal constitution. Mont. Pub. Interest Research Grp. v. Johnson, 361 F. Supp. 2d 1222 (D. Mont. 2005). Following *Johnson*, Montana's attorney general issued an opinion that the state should revert to the house district requirement found in Montana's original constitution, and Montana's secretary of state has done so. *See* Mont. Sec'y of State, "Ballot Issue Overview, Forms and Guidelines," http://sos.mt.gov/Elections/Ballot_Issues.

[81] Mont. Const. art. VI, § 10(1).

[82] Reichert v. State *ex rel.* McCulloch, 278 P.3d 455, 474 (Mont. 2012).

[83] *Id*. at 473 (citations omitted).

In November 1998, Montana voters enacted Initiative 137 (I-137), which prohibited the use of cyanide leaching in open pit gold and silver mining. The margin of victory was 169,991 to 155,034, or about 52% to 48%.[84] Montana thus became the first and only state to ban cyanide usage in mining.

The motivation for enactment of I-137 appears to have been the fear of environmental pollution resulting from inappropriate handling of mining waste. Professor Jan Laitos stated that "[t]he I-137 ban on cyanide in Montana was influenced in large part by the Summitville disaster in Colorado."[85]

As codified and subsequently amended, this legislation provides as follows:

> (1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2).
>
> (2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.[86]

I-137 was challenged in three lawsuits: one raising federal election campaign financing issues and two challenging I-137 directly. The latter two cases were brought by an affected mining company, the Seven-Up Pete Venture, and other mining companies and related parties.

[a] Federal Campaign Financing Litigation Challenging I-125 and I-137 Filed Before I-137 Election

In November 1996, Montana voters enacted Initiative 125 (I-125), a measure prohibiting direct corporate spending in ballot initiative campaigns. I-125 was not directly related to I-137, but it significantly affected the manner in which mining industry opposition to I-137 could be financed. I-125 prohibited direct corporate spending in connection with ballot issues (other than by nonprofit corporations

---

[84] Mont. Sec'y of State, "Statutory Initiative and Referendum Issues Since Adoption of Constitutional Amendment, Article V, Section I, Permitting the Referendum and Initiative," at 18, http://sos.mt.gov/Elections/Ballot_Issues/initandref2010tbl.pdf.

[85] Jan G. Laitos, "The Current Status of Cyanide Regulations," 213 *Eng'g & Mining J.* no.2, at 34 (Feb. 2012).

[86] Mont. Code Ann. § 82-4-390.

formed solely for political purposes). The measure allowed a corporation to establish and administer a separate, segregated fund that could solicit contributions from shareholders, employees, or members of the corporation.[87]

The Montana Chamber of Commerce and others filed a federal lawsuit, asking the court to (1) invalidate I-125 on the basis that it unconstitutionally restricted their freedom of speech, (2) delay the vote on I-137, and (3) (after its passage) invalidate the enactment of I-137 on the grounds that I-125 unconstitutionally restricted their opposition to I-137. The U. S. District Court for the District of Montana agreed that I-125 violated the First Amendment and, 11 days before the vote on I-137, lifted the corporate spending restrictions, but it refused to delay the vote on I-137 and later refused to invalidate the vote.[88] The Ninth Circuit affirmed this decision:

> Here, even though there was evidence that I-125 had affected [the Montana Mining Association]'s ability to campaign, there was also evidence that it had no substantial impact. Eleven days remained before the election after the district court lifted the I-125 restrictions. And the state has a significant interest in avoiding the costs of a special election. In these circumstances, we cannot say that the district court abused its discretion in failing to void the results of the election.[89]

[b] State Court Taking and Contract Clause Litigation—*Seven Up Pete Venture v. State*

The Seven Up Pete Venture (Venture) held six Montana state mining leases that would be directly affected by I-137's ban on cyanide leaching. For years the Venture had been pursuing operating permits for its proposed mining activities on these leases, but the permits had not yet been granted. In its decision in the state court action, [90] the Montana Supreme Court recited that these leases were potentially

---

[87] *See* Mont. Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1052–53 (9th Cir. 2000).

[88] *See* Mont. Chamber of Commerce v. Argenbright, 28 F. Supp. 2d 593, 600–01 (D. Mont. 1998).

[89] *Argenbright*, 226 F.3d at 1058.

[90] Seven Up Pete Venture v. State, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009.

highly valuable, if they could be mined by cyanide methods. On the leases "the Venture discovered roughly 9 million ounces of gold, and 20 million ounces of silver, approximately half of which could profitably be recovered and sold by means of a surface mine combined with cyanide leaching of the ore."[91]

The Venture attacked I-137 on two basic grounds: (1) that I-137 constituted a taking by inverse condemnation of the Venture's mining property, in which the Venture had a vested property interest subject to protection under the U.S. and Montana Constitutions; and (2) that I-137 impaired the Venture's right of contract under the leases, protected under the U.S. and Montana Constitutions.[92]

[i] Takings Claim

As to its taking argument, the Venture did not contend that it had a vested right to mine with cyanide, since it had not yet obtained the required operating permit when the initiative was enacted. Instead, it argued it had a protected property right in the opportunity to obtain such a permit:

> The Venture argues that I-137 effectuated a regulatory taking of its property rights without compensation . . . .
>
> *The Venture emphasizes that it is not contending it had a vested right to mine with cyanide, but that it had a property right in "the opportunity for a favorable ruling on its mining permit application"* which existed prior to the passage of I-137. The Venture offers that this "opportunity" is a constitutionally protected property right that became obsolete after the passage of I-137. The Venture explains that contract rights and leases are forms of property, and as such, when taken for a public purpose, require payment of just compensation.[93]

The court rejected this argument, holding that the Venture's "opportunity" to obtain the permit did not constitute a cognizable property interest that was subject to a taking under the federal and state constitutions, because the state would have had discretion to deny the requisite permit even if the

---

[91] *Id.* ¶ 8.

[92] *See generally id.*

[93] *Id.* ¶¶ 21, 22 (emphasis added).

initiative had failed. The court held that, under Montana law, "the right to mine is conditioned upon the acquisition of an operating permit" and "a property-holder possesses a legitimate claim of entitlement to a permit or approval" of a permit only if the "agency lacks all discretion to deny issuance of the permit . . . ."[94] Thus, the court found the agency's discretion prevented the mining company from having a compensable interest in receiving the permit.[95]

[ii] Impairment of Contract Claim

The Montana Supreme Court also rejected the Venture's contract clause claim. In addressing that contract clause claim, the court applied a three-part test:

> (1) Is the state law a substantial impairment to the contractual relationship;
>
> (2) Does the state have a significant and legitimate purpose for the law; and,
>
> (3) Does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose?[96]

The court held that I-137 substantially impaired the contractual relationship between the Venture and the state, because that relationship was based on the assumption that the Venture would use cyanide leaching and that the method would continue to be legal.[97] In other words, the lease provision that required the Venture to comply with all applicable laws and regulations could not "reasonably be construed to contemplate a first in the nation, statewide ban of the one mining method admittedly contemplated by the parties."[98]

---

[94] *Id*. ¶ 28 (quoting Kiely Constr. v. City of Red Lodge, 2002 MT 241, ¶ 28, 312 Mont. 52, 57 P.3d 836).

[95] *Id*. ¶ 34.

[96] *Id*. ¶ 41.

[97] *Id*. ¶ 45.

[98] *Id*. ¶ 44. In reaching that holding, the court expressly distinguished the decision of the California Court of Appeal in *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534 (2001) (*Stop Oil I*), discussed in § 15.06[2][b], *infra*. Specifically, the court explained:

Having found a substantial impairment of the contract, the court proceeded to the second and third parts of its contract clause analysis. While the court found that the initiative constituted a *substantial* impairment of the contractual relationship between the Venture and the state, it rejected the argument that the initiative amounted to an *unconstitutional* impairment of the relationship. The court held that the people of the state had a significant and legitimate purpose for the law—environmental protection—and that the total ban on cyanide leaching was a reasonable means of achieving that purpose.[99] Therefore, application of the initiative to the Venture's project did not violate contract clauses of the state and federal constitutions.

[c] Federal Court Takings Litigation Challenging I-137

On the same day that it filed suit in state court, the Venture filed a separate taking claim in federal court.[100] The federal district court first stayed the suit pending the resolution of the state court action. When it finally heard the case, the federal court held that a federal court lawsuit for a taking, brought against state officials acting in their official capacity, was barred by the state's sovereign immunity from

---

> Although the *Stop Oil* court reasoned that the subject company was sophisticated and should have contractually protected itself from the possibility of the ban, the contract there had been negotiated in a regulatory environment wherein development had been *banned* for fifty-two years prior to the change in the law which permitted it. In contrast, mining based upon cyanide heap leaching has always been legal in Montana, and, in fact, the country at large. In the context of Montana's long association with mining, we cannot conclude that a party, even one considered sophisticated, could have reasonably anticipated, at the time the agreement was entered in 1986, that Montana would enact the first state ban of this form of mining twelve years later.

Seven Up, 2005 MT 146, ¶ 44.

[99] *Id*. ¶ 55.

[100] *See* Seven-Up Pete Venture v. Schweitzer, No. CV 00-13-H-CCL, 2006 WL 1194088 (D. Mont. Apr. 11, 2006).

suit under the Eleventh Amendment to the U.S. Constitution,[101] and the U.S. Court of Appeals for the Ninth Circuit affirmed.[102]

[3] I-147—Unsuccessful 2004 Attempt to Repeal I-137

The Montana mining industry did not give up. In 2004, the industry and its supporters put on the ballot I-147, an initiative that would have had the effect of repealing I-137's ban on cyanide usage. Montana voters rejected I-147 by a wide margin, 257,280 to 185,974, or about 58% to 42%.[103] This was a significantly greater margin than originally enacted I-137 in 1998. Whatever the merits of its legal challenges, the mining industry in Montana apparently had not succeeded in changing the voters' minds.

§ 15.05 Colorado

[1] Initiative Process in Colorado

Article V, section 1 of the Colorado Constitution provides for the enactment of legislation and amendments to the state constitution by initiative, and for popular referenda:

> [T]he people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.[104]

Initiative petitions must be signed "by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election . . . ."[105]

To facilitate the initiative process, Colorado statutes require an assigned "title board" to fix a proper fair title and submission clause for each initiative.[106] The board also ensures compliance with other

---

[101] *See id*. at * 4.

[102] Seven Up Pete Venture v. Schweitzer, 523 F.3d 948 (9th Cir. 2008).

[103] Mont. Sec'y of State, *supra* note 84.

[104] Colo. Const. art. V, § 1(1).

[105] Colo. Const. art. V, § 1(2).

legal requirements, including the single subject requirement in the Colorado Constitution.[107] Challenges to the title board's actions are one course to challenge the inclusion of an initiative on the ballot.[108]

However, in Colorado the judiciary generally does not have jurisdiction to review the substance of initiatives or referenda prior to their approval by the electorate.[109] As stated by the Colorado Supreme Court,

> Governmental officials have no power to prohibit the exercise of the initiative by prematurely passing upon the substantive merits of the initiated measure. Nor may the courts interfere with the exercise of this right by declaring unconstitutional or invalid a proposed measure before the process has run its course and the measure is actually adopted. Then and only then, when actual litigants whose rights are affected are before it, may the court determine the validity of the legislation.[110]

Thus, Colorado case law addressing initiatives is basically limited to challenges to the initiative titles, ballot title and submission clauses and summaries, and challenges under the single subject requirement in the Colorado Constitution.

[2] Ballot Title No. 215 Cyanide Initiative

---

[106] Colo. Rev. Stat. § 1-40-106; *see also In re* Title, Ballot Title, Submission Clause, & Summary, Adopted Apr. 4th, 1990, Pertaining to the Proposed Initiative on Surface Mining, 797 P.2d 1275, 1277 (Colo. 1990) (*In re 1990 Surface Mining Initiative*).

[107] *See* Colo. Const. art. V, § 1(5.5) ("No measure shall be proposed by petition containing more than one subject . . . .").

[108] *See In re* Title, Ballot Title, & Submission Clause for 2011–2012 No. 3, 274 P.3d 562 (Colo. 2012) (*In re Ballot Title No. 3*); *In re* Title, Ballot Title & Submission Clause, & Summary for 1999–2000 No. 215, 3 P.3d 11 (Colo. 2000) (*In re Ballot Title No. 215*); *In re 1990 Surface Mining Initiative*, 797 P.2d at 1276.

[109] Bd. of Cnty. Comm'rs of Cnty. of Archuleta v. Cnty. Rd. Users Ass'n, 11 P.3d 432, 438 (Colo. 2000).

[110] McKee v. City of Louisville, 616 P.2d 969, 972–73 (Colo. 1980) (citations omitted).

One year after Montana voters banned cyanide usage by passing I-137, two Colorado citizens proposed Ballot Title No. 215, a nearly identical initiative to amend the Colorado Constitution by prohibiting new "[o]pen mining (including open-cut and open-pit mining) for gold or silver using heap or vat leaching with cyanide ore-processing reagents . . . ."[111] The initiative would have allowed any such mine operating on November 7, 2000, to continue to do so under its existing permits but would have barred modification of the permits to allow such operations to be expanded.[112] In *In re Ballot Title No. 215*,[113] the Colorado Mining Association (CMA) challenged the title board's assigned titles and summary for this initiative on seven grounds.

Among other challenges, the CMA argued that the initiative would only affect the Cresson mine in Teller County—the only mine then employing cyanide leaching in the state—and that the ballot titles were misleading due to their implication that the initiative would affect several mines.[114] The Colorado Supreme Court disagreed, holding that the initiative could affect other existing mines and future mines.[115] The CMA also asserted that the term "open mining" in the titles was misleading and that the terms "cyanide" and "leach" in the titles were both misleading and unfairly prejudicial.[116] The court held that the meaning of "open mining" was made sufficiently clear by statute and in the initiative summary and that voters would not be misled or swayed by the use of the terms "cyanide" and "leach."[117] However, the court ordered the titles amended because they suggested that the initiative would prohibit expansion even

[111] *In re Ballot Title No. 215*, 3 P.3d at 18.

[112] *Id*.

[113] *Id*.

[114] *Id*. at 14.

[115] *Id*.

[116] *Id*. at 15.

[117] *Id*. at 15–16.

if allowed by existing permits, while in truth the initiative would have barred only the *modification* of existing permits to allow expansion.[118]

Stuart Sanderson, president of the CMA, presented a short paper entitled "Anti-Mining Ballot Initiatives in Colorado and the West - Some Legal and Practical Considerations" to the Society of Mining Engineers in 2001 that discussed the CMA's strategy and the practical outcome of the case. Sanderson cited its early pre-election legal challenge as the key to the CMA's success, stating:

> Although the Supreme Court's action appeared to only resolve a technicality in the working of the proposed initiative, the effect of the decision was substantial. Without a valid title to the measure, the proponents were required to appear once again before the Title Board to secure a new, corrected title. Because no valid title could be set until the board met again on May 26, all the petitions circulated and signatures gathered by the proponents of the measure were null and void. In the meantime, the August 7 deadline for submitting the requisite number of signatures was fast approaching.
>
> Initiative No. 215 met its ultimate demise on August 7, 2000, when the proponents missed a statutory deadline for filing the verified petitions and requisite signatures with the office of the Secretary of State. In the meantime, the mining industry had begun to speak out publicly on the initiative, and a grass-roots coalition of opponents of the measure was gathering strength and attracting new members. . . .
>
> . . . .
>
> The Colorado experience demonstrates the value of early action. By simply asserting the legal rights available under state law for administrative and judicial review of the anti-mining measure, the mining industry was able to correct the defective language of the proposal. Meanwhile, the proponents of the

[118] *Id*. at 16. After the title board revised the initiative's titles in accordance with the court's instructions, the CMA filed a second motion for rehearing, alleging problems with the titles that it could have raised in its original motion for rehearing. The board found that it lacked jurisdiction to consider objections that could have been raised in the original motion, and the court affirmed. *See In re* Title, Ballot Title & Submission Clause, & Summary for 1999–2000 No. 215 (Prohibiting Certain Open Pit Mining), 3 P.3d 447 (Colo. 2000).

> measure faced increasing pressure to meet statutory guidelines, particularly after the initial court ruling, which had the effect of invalidating all the signatures proponents had collected prior to May 1.[119]

Ballot Title No. 215 was the most recent attempt to place a statewide anti-cyanide initiative before the voters in Colorado. Since then, proponents of limiting or prohibiting the use of cyanide in mining operations appear to have concentrated their efforts on pursuing county ordinances prohibiting cyanide usage. The Colorado Supreme Court recently decided a challenge to one of these efforts on preemption grounds. In *Colorado Mining Ass'n v. Board of County Commissioners of Summit County*,[120] the court found that a Summit County ordinance (enacted by ordinary local legislative means, and not by initiative) prohibiting the use of cyanide or other toxic/acidic ore-processing reagents in mining was preempted by Colorado's Mined Land Reclamation Act (MLRA), which had been amended in 1993 in response to the Summitville mine disaster.[121] The court summarized its holding as follows:

> We conclude that Summit County's existing ordinance is not a proper exercise of its land use authority because it excludes what the General Assembly has authorized. Due to the sufficiently dominant state interest in the use of chemicals for mineral processing, we hold that the MLRA impliedly preempts Summit County's ban on the use of toxic or acidic chemicals, such as cyanide, in all Summit County zoning districts.[122]

It appears the legal outcome would have been the same, and this enactment would have been found to be preempted, had it been enacted by initiative.

[3] 1990 Surface Mining Initiative

In *In re 1990 Surface Mining Initiative*,[123] the Colorado Supreme Court reviewed multiple challenges to the title board's actions with regard to an initiative to amend the Colorado Constitution to

---

[119] Stuart A. Sanderson, "Anti-Mining Ballot Initiatives in Colorado and the West - Some Legal and Practical Considerations," *Soc'y of Mining Eng'rs Annual Meeting* (2001).

[120] 199 P.3d 718 (Colo. 2009).

[121] *Id*. at 726 (citing Colo. Rev. Stat. §§ 34-32-103, -112.5, -116.5).

[122] *Id*. at 723.

[123] 797 P.2d 1275 (Colo. 1990).

prohibit surface mining of aggregate and gravel, and related activities, that may scar the landscape (1) along the east slope of the Front Range within view of certain cities or counties; or (2) within view of parks, monuments, wildlife refuges, or hiking trails.[124] In addition, the proposed initiative would have permitted local governments to adopt reclamation or performance bond requirements more stringent than those imposed by the Colorado Mined Land Reclamation Board (CMLRB).[125] A voter challenged the title, submission clause, and summary set by the CMLRB, arguing that (1) the board failed to note ambiguities in the initiative, (2) the title language did not clearly express the meaning of the initiative, (3) the title and submission clause improperly proposed two separate measures, (4) the title and submission clause failed to state how the constitution would be amended, (5) the title and submission clause failed to specify certain aspects of the initiative, and (6) the summary failed to specify certain aspects of the proposed amendment.[126]

In rejecting these claims, the court first noted that its review of CMLRB actions is limited and that it "must not in any way concern [itself] with the merit or lack of merit of the proposed [law or constitutional] amendment . . . ."[127] The court then found that the board's summary was not ambiguous, despite language that proposed to both limit mining activities and increase reclamation efforts.[128] The court explained that the board's summary "is not intended to fully educate the people on all aspects of the proposed law . . . ."[129] The court also rejected the petitioner's challenge to the subjective nature of the word "scar," holding that the board's title accurately and fairly expressed the intent of the initiative and its

---

[124] *See id*. at 1277.

[125] *See id*. at 1278.

[126] *Id*.

[127] *Id*. at 1278–79 (second alteration in original) (quoting *In re* Increase of Taxes on Tobacco Prods. Initiative adopted on March 2, 1988, 756 P.2d 995, 998 (Colo. 1998)).

[128] *Id*. at 1279.

[129] *Id*. (quoting *Increase of Taxes on Tobacco Prods. Initiative*, 756 P.2d at 998).

practical effect.[130] The court emphasized that it only reviews the board's title to determine whether the language reflects the purpose of the proposed initiative, not to rule on the legal effect of proposed initiatives.[131]

[4] Single Subject Requirement

As in many states, the Colorado Constitution requires voter initiatives be limited to a single subject.[132] The single subject requirement is addressed by the CMLRB and has been the basis for both successful and unsuccessful challenges to natural resource initiatives raising water law issues.[133] *In re Ballot Title No. 3* provides an extensive summary of the case law on the single subject requirement rule in water resource initiative cases.[134]

§ 15.06 Natural Resources Initiative Litigation in Other States

[1] South Dakota—Federal Preemption of Local Initiative Banning Surface Mining on Federal Lands, and Geographic Discrimination Barred by Dormant Commerce Clause

[a] Initiative Process in South Dakota

---

[130] *Id*. at 1280.

[131] *Id*. at 1280–81.

[132] Colo. Const. art. V, § 1(5.5).

[133] *See, e.g.*, *In re Ballot Title No. 3*, 274 P.3d at 566; *In re* Title, Ballot Title & Submission Clause for Proposed Initiative 2001–02 No. 43, 46 P.3d 438, 442 (Colo. 2002); *In re* Title, Ballot Title, Submission Clause, & Summary Adopted April 5, 1995, by Title Bd. Pertaining to Proposed Initiative "Public Rights in Waters II," 898 P.2d 1076 (Colo. 1995); *In re* Title, Ballot Title & Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colo. Adding Subsection (10) to Section 20 of Article X (Amend TABOR 25), 900 P.2d 121, 125–26 (Colo. 1995).

[134] *In re Ballot Title No. 3*, 274 P.3d at 566.

Article III, section 1 of the South Dakota Constitution provides that "the people expressly reserve to themselves the right to propose measures, which shall be submitted to a vote of the electors of the state . . . ."[135] Initiative proponents must gather signatures equal to at least 5% (for statutes) or 10% (for constitutional amendments) of the total votes cast for governor in the last gubernatorial election.[136] It does not appear that the South Dakota Supreme Court has ruled definitively on the proper scope of pre-election review of proposed initiatives, but it explained long ago that the judiciary generally should not review the merits of proposed legislation before it is enacted.[137]

Two natural resources initiatives in South Dakota have been invalidated in ways that illustrate the federal constitutional limits on state initiatives.

[b] Federal Mining Laws Preempt a Local Initiative Banning Mining on Federal Lands

In South Dakota, a locally enacted voter initiative prohibiting surface metal mining on federal lands was invalidated by the U.S. Court of Appeals for the Eighth Circuit because the federal mining laws preempted the field of mining uses of federal lands and thus prevent state (and local) prohibitions on such uses.

In *South Dakota Mining Ass'n v. Lawrence County*,[138] a local government voter initiative was enacted that prohibited "new permits or amendments to existing permits . . . for surface metal mining

---

[135] S.D. Const. art. III § I.

[136] *Id*. (statutes); S.D. Const. art. XXIII, § 1 (constitutional amendments); *see also* S.D. Codified Laws §§ 2-1-1, -5.

[137] *See* State *ex rel.* Cranmer v. Thorson, 68 N.W. 202, 204 (S.D. 1896) (stating that it cannot "say what laws shall or shall not be enacted" or "interpose in any case to restrain the enactment of an unconstitutional law" (citing Mississippi v. Johnson, 71 U.S. 475, 500 (1866))).

[138] 155 F.3d 1005 (8th Cir. 1998).

extractive industry projects in the Spearfish Canyon Area."[139] The Eighth Circuit held that the purposes of the federal mining laws were to make all federal lands available for mining and to allow local regulation to the extent it did not interfere with mining uses:

> Congress has set out several purposes and objectives in the Mining Act. These include the encouragement of exploration for and mining of valuable minerals located on federal lands, providing federal regulation of mining to protect the physical environment while allowing the efficient and economical extraction and use of minerals, and allowing state and local regulation of mining so long as such regulation is consistent with federal mining law.[140]

The Eighth Circuit then considered whether this enactment "stands as an obstacle to these purposes and objectives,"[141] and held that this initiative was a de facto prohibition of mining on federal lands under the federal mining laws, rather than a reasonable regulation of such mining. Accordingly, the court held that the prohibition on surface mining imposed by the initiative was preempted because it frustrated the achievement of these federal goals:

> The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act. Congress has encouraged exploration and mining of valuable mineral deposits located on federal land and has granted certain rights to those who discover such minerals. Federal law also encourages the economical extraction and use of these minerals. The Lawrence County ordinance completely frustrates the accomplishment of these federally encouraged activities. A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. The ordinance is prohibitory, not regulatory, in its fundamental character. The district court correctly ruled that the ordinance was preempted.[142]

---

[139] *Id*. at 1007.

[140] *Id*. at 1010.

[141] *Id*.

[142] *Id*. at 1011.

[c] Voter Referendum Discriminating Against Interstate Commerce Invalidated Under Dormant Commerce Clause

In *SDDS, Inc. v. South Dakota*,[143] a voter referendum opposed to a large-scale multi-solid waste facility was invalidated because it violated the Dormant Commerce Clause of the U.S. Constitution, which prevents states from interfering with the federal government's authority to regulate interstate commerce. While this case did not focus upon disposal of mining waste, it is included here because of the general importance of waste disposal to mining. An initial voter initiative required legislative approval of any large-scale solid waste disposal facility.[144] Upon approval by the legislature, citizens certified a referendum specifically to prohibit South Dakota Disposal Systems' (SDDS) project because "95% of waste will come from out-of-state" and "South Dakota is not the nation's dumping grounds."[145] SDDS challenged the referendum as a violation of the Dormant Commerce Clause's prohibition on discrimination against interstate commerce.[146] The Eighth Circuit found that the referendum, aimed specifically at SDDS, possessed a discriminatory purpose,[147] inhibited interstate commerce, and was thus unconstitutional.[148]

[2] California—Prohibitions Upon Oil Development and Mining Activities

[a] Initiative Process in California

Article II, section 8 of the California Constitution provides for enactment of legislation by initiative. California voters can propose an initiative by gathering signatures equal to 5% (for statutes) or

---

[143] 47 F.3d 263 (8th Cir. 1995).

[144] *Id*. at 266.

[145] *Id*.

[146] *Id*.

[147] *Id*. at 269.

[148] *Id*. at 271.

8% (for constitutional amendments) of the total votes cast in the last gubernatorial election.[149] California courts apply a "strong presumption" against substantive pre-election review of proposed initiatives, but pre-election review may be appropriate when the challenge rests "on a contention that the measure is not one that properly may be enacted by initiative."[150]

[b] Hermosa Beach Oil Development Ban

The California Court of Appeal issued four opinions over the course of 10 years in a single piece of litigation arising from the passage of a series of local ballot measures first prohibiting, then allowing, then finally prohibiting again oil and gas development within the city of Hermosa Beach.[151]

In 1932, city voters enacted a ban on all such operations.[152] Then, in 1984, voters passed measures creating exceptions to the ban for two city-owned sites.[153] Macpherson Oil Company (Macpherson), a leading force behind the 1984 measures, responded to a request for proposals for oil exploration and production at the two sites, and, in 1992, entered into an oil and gas lease with the city.[154] Macpherson paid the city $90,000 and began the permitting process, but in 1995, before Macpherson had

---

[149] Cal. Const. art. II, § 8(b).

[150] Indep. Energy Producers Ass'n v. McPherson, 136 P.3d 178, 184 (Cal. 2006) (emphasis omitted).

[151] Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach, 86 Cal. App. 4th 534 (2001) (*Stop Oil I*); Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach, No. B147849, 2002 WL 1340955 (Cal. Ct. App. June 19, 2002) (*Stop Oil II*); Windward Assocs. v. City of Hermosa Beach, No. B174240, 2005 WL 2010275 (Cal. Ct. App. Aug. 23, 2005); City of Hermosa Beach v. Super. Ct., No. B218010, 2010 WL 459609 (Cal. Ct. App. Feb. 11, 2010).

[152] *Stop Oil I*, 86 Cal. App. 4th at 540.

[153] *Id*. at 540–41.

[154] *Id*. at 541.

obtained all authorizations or begun operations, city voters passed a ballot initiative—Proposition E—that reinstated the complete ban on oil development in the city.[155]

Notwithstanding the passage of Proposition E, the city, concerned that it would face legal exposure if it terminated the Macpherson lease, continued to perform under the lease.[156] The Hermosa Beach Stop Oil Coalition, the primary proponent of Proposition E, filed suit seeking an injunction requiring the city to apply the law to the Macpherson project.[157] The trial court denied the request for an injunction, concluding that application of Proposition E to the Macpherson project would violate the contract clauses of the federal and state constitutions[158] and that Macpherson was therefore entitled to specific performance of the lease.[159]

In the first of its four opinions, the California Court of Appeal reversed the trial court's ruling on the contract clause issue.[160] The court applied a three-step test: (1) whether Proposition E was "a legitimate exercise of the City's police power"; (2) if so, whether "application of Proposition E to the Macpherson project operate[d] as a substantial impairment of Macpherson's contract rights"; and (3) if so, "whether the means chosen to implement the regulation is 'of a character appropriate' to its legitimate

---

[155] *Id*. at 542–45; *Windward Assocs.*, 2005 WL 2010275, at *2.

[156] *Stop Oil I*, 86 Cal. App. 4th at 545.

[157] *Id*.

[158] U.S. Const. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"); Cal. Const. art. I, § 9 ("A . . . law impairing the obligations of contracts may not be passed").

[159] *Stop Oil I*, 86 Cal. App. 4th at 546–48 & 547 n.7; *Stop Oil II*, 2002 WL 1340955, at *4.

[160] *See Stop Oil I*, 86 Cal. App. 4th at 553–71. The appellate court also addressed several related issues, including affirming the trial court's holding that the doctrine of vested rights/government estoppel did not preclude the application of Proposition E to the Macpherson project because the company had not yet acquired all required permits or incurred any "hard costs" of development. *Id*. at 551–53.

public purpose."[161] The court concluded that reinstituting a total ban on oil drilling was a legitimate exercise of the city's police power;[162] that the ban probably did not substantially impair Macpherson's contract rights, in part because Macpherson was well aware of the "pervasive governmental regulation to which the oil exploration industry has in the past been subjected,"[163] including the city's previous ban;[164] and that even if Proposition E constituted a substantial impairment, it was a reasonable and necessary means of protecting public health and safety.[165] Therefore, application of the measure to the Macpherson project did not constitute an unconstitutional impairment of the lease.[166]

Notwithstanding its holding that Proposition E could be constitutionally applied to terminate the Macpherson project, the court later held, in a series of three unpublished opinions, that the city may nonetheless be liable to Macpherson for damages for breach of contract.[167]

[c] Initiative Banning Mining Inapplicable to Previously Permitted Quarry

In 2000, voters in Alameda County, California, passed an initiative requiring voter approval of new quarries. In *Save Our Sunol, Inc. v. Mission Valley Rock Co.*,[168] the California Court of Appeal held

---

[161] *Id*. at 554–55 (quoting U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 22 (1977); Energy Reserves Grp. v. Kan. Power & Light Co., 459 U.S. 400, 412 (1983)).

[162] *Id*. at 555–56.

[163] *Id*. at 557.

[164] *Id*. at 556–58. The court suggested that it might have reached a different conclusion on the substantial impairment question if Macpherson had "bargain[ed] for a lease provision imposing on the City the risk of a performance-defeating change in the law" or "insist[ed] that the City enter into a development agreement pursuant to Government Code section 65864 et seq." *Id*. at 557, 558.

[165] *Id*. at 559–71.

[166] *Id*. at 571.

[167] *See Stop Oil II*, 2002 WL 1340955; *Windward Assocs.*, 2005 WL 2010275; *City of Hermosa Beach*, 2010 WL 459609.

that under its terms, the initiative did not apply to prevent the development of a sand and gravel quarry that the county had previously approved by issuing a surface mining permit, even though excavation had not yet begun, and even though the initiative confusingly stated the contested quarry "should not be established."[169]

[d] Anti-Surface Mining Initiative

In 1984, a California trial court ordered struck from the ballot an El Dorado County initiative that would have completely banned surface mining in the county, finding that the short title of the initiative would have been misleading to the voters and that the initiative was an unreasonable exercise of the police power.[170] The California Court of Appeal reversed, holding that the title was adequate and that the police power challenge "falls within the general rule limiting judicial inquiry into the validity of [an] initiative to postelection review."[171]

[3] Idaho

[a] Initiative Process in Idaho

The Idaho Constitution provides that "legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same

---

[168] 21 Cal. Rptr. 3d 171 (Ct. App. 2004).

[169] *Id*. at 174.

[170] Bailey v. Cnty. of El Dorado, 162 Cal. App. 3d 94 (1984). The court noted that the California Supreme Court has frequently observed that "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." *Id*. at 99 (quoting Legislature v. Deukmejian, 669 P.2d 1734, Cal. App. 3d 658, 665 (1983)).

[171] *Id*. at 99.

to be submitted to the vote of the people at a general election for their approval or rejection."[172] State statutes require that, before initiatives can be placed on the ballot, proponents must gather "the signatures of legal voters equal in number to not less than six percent (6%) of the qualified electors of the state at the time of the last general election," and county clerks must certify that minimum number of signatures.[173] Idaho courts will not entertain a challenge to the substance of a proposed initiative before an election but will review whether the initiative is procedurally proper.[174]

[b] Challenge to Signatures of Unregistered Voters

In *Dredge Mining Control-Yes!, Inc. v. Cenarrusa*,[175] the Idaho Supreme Court was asked to order an initiative restricting dredge mining onto the ballot for the next general election, under earlier versions of the constitutional and statutory provisions cited above. The proponent of the initiative had circulated a petition and gathered the requisite number of signatures, but county court clerks did not certify the signatures of those who were not listed as registered voters in county records.[176] In turn, the secretary of state refused to place the initiative on the ballot. The court affirmed the actions of the clerks and the secretary, holding that a person must be registered to vote in order to be a "legal voter" for purposes of the provisions above.[177]

[c] Challenges to State Mining Statute

The Idaho Supreme Court has also considered multiple constitutional challenges to the Idaho Dredge and Placer Mining Protection Act (Act),[178] which was created by initiative in 1954. In *State v.*

---

[172] Idaho Const. art. III, § 1.

[173] Idaho Code Ann. § 34-1805; *see id.* § 34-1807.

[174] *See* Davidson v. Wright, 151 P.3d 812, 816–17 (Idaho 2006).

[175] 445 P.2d 655 (Idaho 1968).

[176] *Id.* at 656.

[177] *Id.* at 657.

[178] *See* Idaho Code Ann. § 47-1322.

Finch,[179] the court found that the Act's judicial review provision violated the state constitution. In *State ex rel. Andrus v. Click*,[180] the court rejected several federal and state constitutional challenges to the Act.

[4] Oregon

[a] Initiative Process in Oregon

Article IV, section 1 of the Oregon Constitution provides: "The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly."[181] An initiative proponent must present a petition signed by a number of qualified voters equal to 6% (for statutes) or 8% (for constitutional amendments) of the total votes cast at the last gubernatorial election.[182] Oregon courts will prevent an initiative from being placed on the ballot if the measure is "legally insufficient,"[183] that is, if it does not satisfy "language in the constitution that qualifies or limits the initiative power,"[184] such as the single subject requirement[185] or the requirement for separate votes on multiple constitutional amendments.[186] However, courts

---

[179] 315 P.2d 529 (Idaho 1957).

[180] 554 P.2d 969 (Idaho 1976).

[181] Or. Const. art. IV, § 1(2)(a).

[182] Or. Const. art. IV, § 1(2)(b), (c).

[183] Foster v. Clark, 790 P.2d 1, 4 (Or. 1990).

[184] Meyer v. Bradbury, 134 P.3d 1005, 1009 (Or. Ct. App. 2006), *rev'd on other grounds*, 142 P.3d 1031 (Ore. 2006).

[185] *See* Or. Const. art. IV, § 1(2)(d) ("A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith.").

[186] *See* Or. Const. art. XVII, § 1 ("When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.").

generally "will not inquire into the substantive validity of a measure—i.e., into the constitutionality, legality or effect of the measure's language—unless and until the measure is passed."[187]

[b] Oregon Initiative Challenges to Titles and Summaries

Because of the limits on pre-election review, Oregon case law addressing initiatives relating to natural resource development is limited to challenges to the titles and summaries of such initiatives. The Oregon Supreme Court has reviewed the titles and summaries of initiatives to regulate chemical process mining,[188] to limit nuclear power generation,[189] to amend certification requirements for radioactive waste disposal sites,[190] and to create a commission to develop renewable energy.[191]

[5] Utah: Constitutionality of Multi-County Signature Quotas for Voter Initiatives

[a] Current Initiative Process in Utah

In Utah, the state constitution grants the power of initiative but allows the legislature to establish the conditions under which the power may be exercised.[192] The lieutenant governor must reject an initiative application if the proposed law (1) "is patently unconstitutional," (2) "is nonsensical," (3) "could not become law if passed," (4) "contains more than one subject," (5) "is not clearly expressed in the law's title," or (6) "is identical or substantially similar to a law proposed by an initiative . . . within [the

[187] *Foster*, 790 P.2d at 4 (emphasis omitted).

[188] Bernard v. Keisling, 858 P.2d 1309 (Or. 1993).

[189] June v. Roberts, 724 P.2d 267 (Or. 1986); Portland Gen. Elec. Co. v. Roberts, 707 P.2d 1229 (Or. 1985), *vacated*, 709 P.2d 1086.

[190] Teledyne Wah Chang Albany v. Paulus, 670 P.2d 1021 (Or. 1983).

[191] Bartels v. Paulus, 645 P.2d 1059 (Or. 1982).

[192] *See* Utah Const. art. VI, § 1(2)(a) ("The legal voters of the State of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: . . . initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute . . . .").

previous] two years."[193] While this provision appears to give the lieutenant governor substantial discretion to reject proposed initiatives, pre-election judicial review is more limited. In a recent decision, the Utah Supreme Court made clear that courts should not exercise jurisdiction over substantive challenges to an initiative before the voters pass the measure; pre-election review is limited to procedural and "subject matter" challenges.[194]

[b] *Gallivan v. Walker* and Multi-County Signature Quotas for Voter Initiatives

In *Gallivan v. Walker*,[195] proponents of an initiative to restrict radioactive waste disposal in Utah challenged the constitutionality of Utah Code Ann. § 20A-7-201, which at the time required initiative proponents to obtain signatures equal to 10% of the total votes cast in the last gubernatorial election, including that percentage from each of at least 20 of the state's 29 counties. The proponents of the initiative obtained that number of signatures, but while county clerks worked to certify the signatures, opponents of the initiative were able to disqualify the measure by convincing a sufficient number of signers from rural, sparsely populated counties to remove their signatures from the petition.[196]

The initiative proponents challenged the multi-county signature requirement on the basis that this non-population-based, purely geographic voter signature requirement discriminated against voters in more populous counties and thus constituted a violation of the state and federal constitutions. The initiative proponents argued that this provision had

---

[193] Utah Code Ann. § 20A-7-202(5).

[194] Carter v. Lehi City, 269 P.3d 141 (Utah 2012) (reviewing claim that regulation of salaries and residency requirements for certain city employees is not proper subject for initiative, but refusing on ripeness grounds to review claim that proposed initiative would, if enacted, violate various constitutional and statutory provisions).

[195] 2002 UT 89, 54 P.3d 1069.

[196] 2002 UT 89, ¶¶ 8, 9.

> the effect of heightening the relative weight of the signatures of registered voters in rural, less populous counties and diluting the weight of the signatures of registered voters in urban, more populous counties, thus impermissibly skewing in favor of rural registered voters the power to determine whether an initiative is placed on the ballot under the initiative process.[197]

The Utah Supreme Court agreed and held that the requirement violated the uniform operation of laws provision of the Utah Constitution[198] and the equal protection clause of the U.S. Constitution.[199] The Utah Legislature later amended the statute to require a minimum number of signatures from each of at least 26 state senate districts (which were population-based), and the Utah Supreme Court has held that this population-based requirement—as opposed to a non-population-based multi-county requirement—is constitutional.[200]

[6] Arizona

[a] Initiative Process in Arizona

In Arizona, the people can enact any law that the legislature could enact; there are no additional subject matter restrictions on the initiative.[201] Initiative proponents can place a measure on the ballot by presenting a petition signed by a number of qualified electors equal to 10% (for statutes) or 15% (for constitutional amendments) of the total number of votes for all candidates for governor at the last

---

[197] *Id*. ¶ 34.

[198] Utah Const. art. I, § 24.

[199] U.S. Const. amend. XIV; *see also* Idaho Coal. United for Bears v. Cenarrusa, 342 F.3d 1073 (9th Cir. 2003) (invalidating Idaho's multi-county signature requirement on equal protection grounds); Mont. Pub. Interest Research Grp. v. Johnson, 361 F. Supp. 2d 1222 (D. Mont. 2005) (applying *Idaho Coal. United for Bears* to invalidate Montana's multi-county signature requirement).

[200] Utah Safe to Learn—Safe to Worship Coal., Inc. v. State, 94 P.3d 217 (Utah 2004).

[201] Ariz. Const. art. XXII, § 14 ("Any law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative.").

preceding general election.[202] The legislature cannot repeal any initiative, and it can only amend or supersede an initiative if the new measure furthers the purposes of the initiative and is approved by at least three-fourths of the members of each house.[203] Arizona courts generally will not review the substantive validity or constitutionality of an initiative before an election; if a proposed measure is in the required form and is procedurally proper, it will go to the voters.[204]

[b] Qualifying Voter Signatures on Initiative Petitions

In *Energy Fuels Nuclear, Inc. v. Coconino County*,[205] the Arizona Supreme Court addressed a challenge to an initiative to prevent the mining, transportation, and processing of radioactive substances in Coconino County. The proponents of the initiative had filed petitions bearing sufficient signatures to have the measure placed on the ballot.[206] Opponents of the initiative sued to keep it off the ballot, and the trial court invalidated enough of the signatures to disqualify the measure because the signers had moved from one precinct in the county to another without re-registering or transferring their registrations.[207] The court agreed, holding "that persons who sign initiative petitions must be properly registered to vote on the date they sign the petition . . . ."[208] The Arizona Legislature later amended the relevant statutes to overrule the holding in *Energy Fuels*.[209]

---

[202] Ariz. Const. art. IV, pt. 1, § 1(1), (2), (7); Ariz. Const. art. XXI, § 1.

[203] Ariz. Const. art. IV, pt. 1, § 1(6)(B), (6)(C), (14).

[204] *See* Winkle v. City of Tucson, 949 P.2d 502, 504 (Ariz. 1997) ("Voter initiatives, part and parcel of the legislative process, receive the same judicial deference as proposals before the state legislature—courts are powerless to determine their substantive validity unless and until they are adopted.").

[205] 766 P.2d 83 (Ariz. 1988).

[206] *Id*. at 84.

[207] *Id*.

[208] *Id*. at 86.

§ 15.07 Summary

Legal challenges to initiatives directed at natural resource projects have met with varied success. Examining these case histories leads to some final thoughts on effective challenges:

[1] The Initiative Process Means Modern Major Resource Projects Must Remain Acceptable to the Voters

Perhaps the most fundamental political point to be made on this subject is this: the widespread availability and use of the initiative process means that a majority of the voters must support a major resource development project, if it is to survive a possible initiative challenge. This means that the developer's good faith with the public should be established from the beginning. Sometimes the relationship between the actions of a developer and the public's attitude seems distant: the Summitville mine disaster in Colorado led to I-137 in Montana. In Alaska, the proponents of initiatives have subjected the Pebble Project to continual voter scrutiny, even before a final project design is proposed.

[2] Extremely Diverse Law

The initiative system is a common political feature, but it is presented in as many ways as there are states and local governments with initiative provisions. Thus, a defense that might work in one jurisdiction may not work in another.

[3] Early Legal Challenges Appear to Have a Better Chance of Success

While the scope of allowable pre-election legal challenges to an initiative is quite different from state to state, one thing appears to remain constant: the strategy and timing of a legal challenge are at least as important as the legal basis of a challenge. Early, aggressive challenges appear to have a better chance of success. The success of the Colorado Mining Association's challenge to Ballot Title No. 215 demonstrates the advantage of this strategy. As stated in Stuart Sanderson's short article, "Anti-Mining Ballot Initiatives in Colorado and the West - Some Legal and Practical Considerations":

---

[209] *See* Pacuilla v. Cochise Cnty. Bd. of Supervisors, 923 P.2d 833, 835 (Ariz. 1996).

> It is indeed preferable to exercise the right to judicial review as soon as possible. Post-election challenges to initiatives can be difficult. Witness the dilemma faced by the Montana Mining Association in trying to set aside the election that resulted in the passage of I-137. In *Montana Chamber of Commerce v. Argenbright* . . . the court ruled unconstitutional a ballot initiative, I-125, that had prohibited corporations from contributing to ballot initiative campaigns. The passage of this measure had prevented the mining industry in Montana from contributing to its own defense of the anti-cyanide initiative, I-137. Despite the court ruling, the Ninth Circuit refused to set aside the election, in large part because of the "havoc" that disruption of the election would have upon "local political continuity." Courts can be reluctant to intervene in the democratic process to set election results aside.[210]

[4] Such Initiatives Can Pose a Direct Threat to Resource Development, and Must Be Taken Seriously

Initiatives can directly threaten resource development in a state. As Alaska's attorney general wrote in 2008:

> It may well be that the future of all natural resource development in the state rides on the outcome of the decision in this matter. If measures like 07WATR are permissible, then well-financed agenda-driven organizations will be able to place on the ballot measures that will effectively terminate, not only the mining industry, but the timber industry, the oil and gas industry, and the commercial fishing industry, through the statewide prohibition of the use of public assets like land and water for resource development purposes under the guise of protecting the environment.[211]

As one industry figure told the author, affected interests may be fighting a battle for their economic life, and must respond appropriately.

[5] Grounds for Legal Challenges to Initiatives

[a] Legal Challenges to Petitions and Registered Voters

---

[210] Sanderson, *supra* note 119.

[211] Lieutenant Governor's Partial Op. to Pls.' Mot. for Summ. J. & Mem. in Supp. of Cross-Mot. for Summ. J. 28, Council of Alaska Producers v. Parnell, No. 4FA-07-02696CI (Alaska Super. Ct., Fairbanks, filed Jan. 22, 2008).

In some states, challenges to signatures of voters on initiative petitions, including whether the voters were properly registered, have been a fruitful area of legal activity, but these challenges must adhere to state law requirements and federal constitutional requirements as well. Note the effect of non-population-based geographic breadth requirements invalidated in *Gallivan* (as previously used in Utah, and apparently still used in some states), versus population-based requirements using state senate or house districts (as currently used in Utah and other states, including Alaska).

[b] Legal Challenges to Ballot Summaries and Titles

Challenges to ballot title and summary provisions are essentially procedural, but have been successfully used in some states (such as Colorado) to invalidate initiatives.

However, this ground for invalidation has not been universally accepted, and in other states (such as Alaska), it is generally not used to remove initiatives from the ballot.

[c] Pre-Enactment Legal Challenges to the Lawfulness and Constitutionality of Initiative

[i] States with Constitutionally Enumerated Limitations on Initiative Power

In some states, the constitution may contain specific enumerated limitations on the initiative power (Alaska prohibits initiatives that dedicate revenues, enact appropriations, enact local and special legislation, etc.; Montana prohibits appropriations of money and enactment of local or special laws by initiatives; Utah delegates to the legislature the right to create such proscriptions). Generally, these states allow pre-election challenges where it is asserted that initiatives violate these specific, enumerated limitations.

[ii] States That Allow Other Pre-Enactment Challenges to Validity of Initiatives

Some states also allow other pre-enactment challenges to the constitutionality of initiatives (Alaska's "55 idiots" standard for determining whether an topic is "clearly inapplicable" to the initiative process and "clearly unconstitutional and clearly unlawful"; Montana's "facially defective" standard;

California courts' "strong presumption" against substantive pre-election review of proposed initiatives with an exception to prevent proscribed subject matter; Utah pre-election challenges limited to procedural and subject matter challenges).

[iii] States That Prohibit Pre-Enactment Challenges

Other states prohibit basically all such pre-enactment challenges. Colorado's "[g]overnmental officials have no power to prohibit the exercise of the initiative by prematurely passing upon the substantive merits of the initiated measure,"[212] and South Dakota's courts may not "interpose in any case to restrain the enactment of an unconstitutional law."[213]

[d] Pre-Election Legal Challenges to Single Subject Requirements

Nearly all states have single subject requirements, either broadly applicable to all legislation, or directly applicable to initiatives. The single subject requirement has been used in relation to initiative measures, particularly in Colorado water rights cases.

[e] Post-Enactment Legal Challenges to the Lawfulness and Constitutionality of Initiative

Post-enactment challenges to the lawfulness and constitutionality of initiatives appear to be uniformly allowed. However, sometimes this may be a case of "justice delayed, justice denied." For instance, in Montana, despite extensive post-election litigation, the plaintiffs were unable to overturn the initiative after the election. Similarly, in California, in the Hermosa Beach initiative, Macpherson Oil was not able to successfully mount a pre-election challenge to an initiative election, and once it reinstituted a ban on oil development, the court ruled against the plaintiffs and kept the litigation pending for nearly 10 years. This may be a result of a tendency of courts to wish to avoid undoing the results of an election,

[212] McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980) (citing City of Rocky Ford v. Brown, 293 P.2d 974 (1956)).

[213] State *ex rel.* Cranmer v. Thorson, 68 N.W. 202, 204 (S.D. 1896).

once the results are known. The failure to identify an effective strategy early may mean that there is less likelihood of success later.

[f] Legal Challenges Based upon Preemption

Challenges on the basis of preemption have been a successful area of challenge. These challenges may involve:

[i] Federal Preemption

Some challenges involve preemption by federal law over state law (including local initiatives). *South Dakota Mining Ass'n v. Lawrence County*[214] is a good example of a local initiative seeking to bar federal resource development on federal lands encountering the Property Clause and the Supremacy Clause. Federal preemption law can be complex, and the subject is beyond the scope of this chapter, but the opportunity may be present to pursue this remedy.

[ii] State Preemption

State preemption involves the supremacy of state law or constitution over local initiatives. Several of these cases discussed above pose this issue, including the dissent in the recent decision on interlocutory appeal in the presently pending Alaska case *Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Lake & Peninsula Borough*.[215]

[g] Fifth Amendment Takings and Inverse Condemnation

Challenges can be brought alleging violations of the Fifth Amendment or equivalent state provisions via inverse condemnation or as actual takings. Potentially complex issues involve whether a party actually possessed a vested, constitutionally protected property right, or simply a right to apply for permits that, if granted, would result in a property right. Like federal preemption, Fifth Amendment takings law and the equivalent state provisions are complex, and the subject is beyond the scope of this chapter, but the opportunity may also be present to pursue this remedy.

---

[214] 155 F.3d 1005 (8th Cir. 1998).

[215] 262 P.3d 598 (Alaska 2011).

[h] Contracts Clause and Impairment of Contract

Similar to Fifth Amendment claims, Contract Clause claims may encounter legal dispute concerning whether the interest the challenger possessed was sufficiently vested so as to be protected, and whether the contract limitation was justified. As discussed above, this issue has arisen in cases in which the natural resource developer obtained a right such as a lease or contract, and the lessor (or other litigant) seeks to prevent the exercise of the lease or contract right. In the Montana I-137 and the Seven Up Pete Venture[216] litigation, as well as the California Hermosa Beach/Macpherson Oil local initiative and oil leasing ban litigation, the courts allowed initiatives to render a government resource lease effectively valueless.

[i] Dormant Commerce Clause

The Dormant Commerce Clause prevents interference by the states with the federal government's regulation of interstate commerce and arises when a state inhibits interstate commerce. This has proven to be an effective basis for challenge of initiatives in certain cases[217] and may be relevant in instances where the activity involves interstate commerce, such as mining operations or oil and gas pipelines that ship materials, product, or even waste materials to a different state.

[216] *See* Seven Up Pete Venture v. State, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009.

[217] *See* SDDS, Inc. v. South Dakota, 47 F.3d 263 (8th Cir. 1995).