

CITY OF DILLINGHAM, ALASKA

RESOLUTION NO. 2014-45

A RESOLUTION OF THE DILLINGHAM CITY COUNCIL AUTHORIZING BOYD, CHANDLER & FALCONER TO PARTICIPATE IN AN APPEAL WITH THE LAKE AND PENINSULA BOROUGH ON THE "SAVE OUR SALMON" INITIATIVE.

WHEREAS, the City Council passed Resolution No. 2010-05 approved on January 7, 2010 opposing Large Scale Mining and the Proposed Pebble Mine; and

WHEREAS, the Lake and Peninsula Borough passed a "Save our Salmon" (SOS) initiative that Pebble Limited Partnership and the State of Alaska sued to block the initiative; and

WHEREAS, the City of Dillingham had asked their attorneys to follow this lawsuit and to provide the council a status on it; and

WHEREAS, a decision was issued in March 2013 striking the Initiative and the ruling is now on appeal to the Supreme Court; and

WHEREAS, the trial court concluded that natural resources on state land are for the benefit of all Alaskans, and therefore struck down a municipal law that would allow a limited number of Alaskans to "veto" a project because of its local impacts; and

WHEREAS, if the blocking of this initiative is upheld by the Supreme Court, it could undermine the ability of local governments to regulate resource development within municipal borders; and

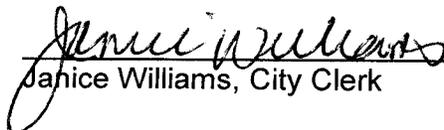
WHEREAS, the City has an interest in participating in this appeal by submitting an "amicus brief" to urge the Court to consider certain policies when reaching a decision; and

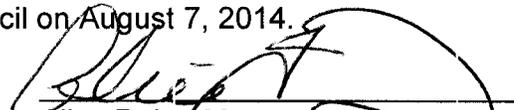
WHEREAS, the City of Dillingham has an interest in protecting its right to exercise permitting authority within its city limits;

NOW, THEREFORE, BE IT RESOLVED that the Dillingham City Council authorize Boyd, Chandler & Falconer to participate on behalf of the City if there are other municipalities involved and the cost to the City of Dillingham does not exceed three thousand dollars in appealing to the Supreme Court to reach a decision that does not reduce municipal authority to regulate its own affairs, or to overturn the trial court's decision entirely.

PASSED and ADOPTED by the Dillingham City Council on August 7, 2014.

ATTEST:


Janice Williams, City Clerk


Alice Ruby, Mayor
[SEAL]

City of Dillingham Information Memorandum Agenda of: August 7, 2014
 Attachment to:
 Ordinance No. _____ / Resolution No. 2014-45

Subject:

A RESOLUTION OF THE DILLINGHAM CITY COUNCIL AUTHORIZING, BOYD, CHANDLER & FALCONER TO PARTICIPATE IN AN APPEAL WITH THE LAKE AND PENINSULA BOROUGH ON THE "SAVE OUR SALMON" INITIATIVE

City Manager: Recommend Approval

Signature: Rose Roera

Route to	Department Head	Signature	Date
X	Finance Director	<i>Carol Shode</i>	7/28/14
X	City Clerk	<i>Janet Williams</i>	7/28/14

Fiscal Note: Yes No Funds Available: Yes No

Other Attachments:

- July 18, 2014 Letter from Boyd, Chandler & Falconer

Summary Statement:

The City's attorney has been following the Lake and Peninsula Borough's Save our Salmon Initiative lawsuit which is on appeal to the Supreme court. The attorney provided an update to this lawsuit which is attached. If the initiative is not upheld it could impact the ability of municipalities to regulate resource development within its borders.

The attorney's estimate for submitting an amicus brief on behalf of the City could cost up to \$10,000 in attorney fees. This amount would decrease if other communities choose to participate.

Ordinance No. _____ / Resolution No. 2014-45

Summary Statement continued:

**City of Dillingham
Fiscal Note**

Agenda Date August 7, 2014

Request: _____

ORIGINATOR: Carol Shade

FISCAL ACTION (TO BE COMPLETED BY FINANCE)		FISCAL IMPACT	
AMOUNT REQUESTED:	\$ 10,000.00	FUNDING SOURCE	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
		General Fund	
FROM ACCOUNT		Project	
1000 7020 10 15 0000 0	\$ 10,000	Save our Salmon brief	
TO ACCOUNT:	VERIFIED BY: Carol Shade	Date:	8/7/2014

EXPENDITURES

OPERATING	FY15	FY16	FY17	FY18
Personnel				
Fringe Benefits				
Legal	\$10,000.00			
Major Equipment				
Land/Buildings				
Construction				
TOTAL OPERATING	\$ 10,000.00	\$ -	\$ -	\$ -

Capital				
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REVENUE				
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FUNDING

General Fund	\$ 10,000.00			
State/Federal Funds				
BBEDC CDBG				
TOTAL FUNDING	\$ 10,000.00	\$ -	\$ -	\$ -

POSITIONS

Full-Time				
Part-Time				
Temporary				

ANALYSIS: (Attach a separate page if necessary)

See R 2014-45

PREPARED BY: Carol Shade

August 7, 2014

DEPARTMENT: Finance Department

August 7, 2014

BOYD, CHANDLER & FALCONER, LLP

ATTORNEYS AT LAW
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ANCHORAGE, ALASKA 99501
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July 18, 2014

RECEIVED

JUL 21 2014

CITY OF DILLINGHAM

Rose Loera
City Manager
City of Dillingham
P.O. Box 889
Dillingham, AK 99576

Re: Status of SOS Initiative Lawsuit on Appeal to the Supreme Court

Dear Rose,

A little over a year ago, you and Mayor Ruby asked us to follow the lawsuit regarding the Lake and Peninsula Borough's "Save our Salmon" Initiative and update you on significant developments. As I'm sure you know, the initiative sought to amend the borough land use code to prohibit issuance of a borough land use permit for mines exceeding 640 acres that would have a "significant adverse impact" on salmon-bearing waters. Pebble Limited Partnership sued to block the initiative, arguing that the borough did not have authority to enact a "co-equal" permitting system that could preclude a mine that the State of Alaska might otherwise permit. The judge declined to rule on the lawsuit until after the election. The initiative passed by 37 votes on October 4, 2011. At that point, the State also sued to block implementation of the initiative. PLP and the State's suits were combined, and a decision was issued in March 2013 striking the Initiative. The ruling is now on appeal to the Supreme Court.

The Trial Court's Decision

In short, the trial court ruled that the L&PB did not have authority to enact a permitting system that could prevent large scale mining within borough boundaries. The main basis for the decision was that the Alaska Constitution conferred authority over all state lands to the Alaska legislature. In turn, the legislature gave vast authority to DNR to regulate mining. Critically, the legislature reserved for itself the authority to withdraw parcels larger than 640 acres from mineral development. Based on that limitation, the trial court concluded that the borough's permitting system was unlawful because it purported to give the borough a power (*i.e.*, preventing mineral development over 640 acres by denying a permit) that only the legislature has under state law. It therefore struck down the initiative, meaning the borough's permitting system will not go into effect even though it was supported by a majority of the local citizens.

Although there are other issues on appeal to the Supreme Court, this is the one that we view as most important to local governments in Alaska and to Dillingham in particular. The trial court concluded that natural resources on state land are for the benefit of all Alaskans, and therefore struck down a municipal law that would allow a limited number of Alaskans (*i.e.*, locals near the proposed project) to "veto" a project because of its local impacts. Additionally, the trial court seemed skeptical that local governments could be trusted to make informed decisions about large mineral

developments because local officials and citizens are so close to the politics, impacts, and passions of such projects. These are some of the principals the Alaska Supreme Court is now being asked to consider on appeal. If broadly upheld by the Supreme Court, the trial court's decision could undermine the ability of local governments to regulate resource development within municipal borders. The Supreme Court could, at worst, rule that municipalities do not have the authority to enact permitting systems that *might* block a project that the state would otherwise permit.¹

Analysis of Dillingham's Interests

We believe the City of Dillingham may have an interest in participating in this appeal. The context of the City's participation would be quite limited. When an entity not otherwise involved in a lawsuit believes that the Supreme Court's decision will impact its legal rights and powers in the future, it may submit an "*amicus* brief" to urge the Court to consider certain policies when reaching a decision. In this case, the City of Dillingham may decide that it has an interest in protecting its right to exercise permitting authority within city limits. For example, a broad Supreme Court decision would call into question the City's permitting authority over material sites and perhaps other activities intended to be covered by the City's recently-enacted land use permitting system. Moreover, should the Supreme Court reach a very broad decision that significantly limits municipal authority to exercise permitting authority, future cases could draw upon its reasoning to further limit municipal power and self-determination.

The City may decide it wants to defend its municipal authority by submitting an *amicus* brief that urges the Supreme Court to reach a very narrow decision, or to overturn the trial court's decision entirely. Note that neither position *requires* the City to endorse or oppose the Pebble Project or even the SOS Initiative. The City's position could be narrowly-tailored to simply urge the Court to reach a decision that does not reduce municipal authority to regulate its own affairs. The City, on behalf of itself and other Alaskan cities, would ask the Court to limit its decision to the facts presented in the lawsuit: whether a borough can enact a law that could veto a project of 640 acres or more (no matter what the Court decides on the merits of the SOS Initiative). That type of narrow decision would have the least impact on the City's ability to regulate mining (and potentially other activities) within its borders in the future.

Significantly, we believe the Court will reach a narrow decision on its own. The Supreme Court typically avoids making broad pronouncements of law that are not necessary to decide a specific case. If the Court follows that practice here, it will reach a limited decision that applies only to ordinances that could effectively veto large resource extraction projects over 640 acres. Thus, the City's position might be one that the Court will adopt anyway whether or not the City gets involved.

¹ The SOS Initiative sponsors also point out that PLP has not applied for a borough permit under the new system, much less been denied, so the case should not even be decided at this time. We believe that issue is secondary to the issues noted elsewhere in this letter, but we are somewhat troubled by the court's willingness to preemptively strike down a municipal permitting system based on the idea that it *might* prevent a development, not that it has actually done so.

Rose Loera
July 18, 2014
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On the other hand, a municipal voice urging the Court to reach a narrow conclusion will help ensure that this case does not reduce municipal self-determination and local control. Other communities are also considering whether to get involved in the way we described here.

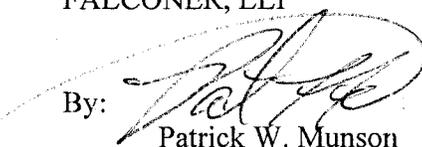
Participation would not be without costs. We believe the City's limited role would require less than \$10,000 in attorney's fees and minimal costs, limited to copies and legal research. This amount would decrease if other communities participate. Additionally, we understand that the SOS Initiative and Pebble Project are a hot button issue in the community and that the City may not want to get involved. This is completely understandable as well. Note, however, that the City could participate in this limited manner without taking a position on Pebble or even the validity of the Initiative because we would be urging the Court to make whatever decision it reaches in a way that least damages other cities' ability to regulate their own affairs. On the other hand, if the City wanted to take a position, it could direct us to defend municipal authority in that way while also arguing either in favor of or against the SOS Initiative (and perhaps by extension, the Pebble Project).

We are presenting this analysis for your review and consideration. We do not have a recommendation on whether the City should participate because the costs and benefits are ultimately something for you and the City Council to weigh. If you believe that the City Council would be interested in reviewing this information, please provide it to them as soon as possible so they can provide instructions to us in time to participate if that is the City's preference. The latest we could decide to participate is approximately August 15 because our brief would likely be due on September 2. Therefore, if you believe the City Council should consider the matter, we will draft a resolution directing our firm to represent the City in the Supreme Court, which the Council may approve or reject at its August 7 meeting.

Please feel free to call anytime to discuss this or any other matter.

Very truly yours,

BOYD, CHANDLER &
FALCONER, LLP

By: 

Patrick W. Munson

PWM/lkr
cc: Mayor Ruby