

No. 157, Original

IN THE
Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

On Motion for Leave to File Bill of Complaint

**BRIEF FOR THE NATIONAL MINING
ASSOCIATION, AMERICAN EXPLORATION
AND MINING ASSOCIATION, ALASKA
MINERS ASSOCIATION, ALASKA CHAMBER,
ALASKA FOREST ASSOCIATION, ALASKA
METAL MINES, ALASKA OIL AND GAS
ASSOCIATION, ALASKA SUPPORT INDUSTRY
ALLIANCE, ALASKA PENINSULA
CORPORATION, AND RESOURCE
DEVELOPMENT COUNCIL FOR ALASKA, INC.
AS AMICI CURIAE SUPPORTING PLAINTIFF**

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Alaska v. United States,
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Other Authorities:

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Int’l Energy Agency, The Role of Critical Minerals in Clean Energy Transitions (2021), <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions/executive-summary> 5, 10

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Nedal T. Nassar et al., *Investigation of U.S. Foreign Reliance on Critical Minerals— U.S. Geological Survey Technical Input Document in Response to Executive Order No. 13953* (Dec. 7, 2020), <https://pubs.er.usgs.gov/publication/ofr20201127>..... 8, 10

Nat'l Academy of Eng'g, *Time Horizons & Technology Investments 60* (1992), <https://nap.nationalacademies.org/download/1943#> 16

Nat'l Research Council, *Minerals, Critical Minerals, and the U.S. Economy* (2008), <https://nap.nationalacademies.org/download/12034> 8

Notification of Decision to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska, 84 Fed. Reg. 45749 (Aug. 30, 2019) 20

Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska, 79 Fed. Reg. 42314 (July 21, 2014) 20

Ranked: World’s biggest copper projects - 2023, Mining.com (Jan. 30, 2023), <https://www.mining.com/feature-article/ranked-worlds-biggest-copper-projects-2023/> 11

Ernest Scheyder, *Copper industry warns of looming supply gap without more mines*, Reuters (Apr. 21, 2023), <https://www.reuters.com/markets/commodities/copper-industry-warns-looming-supply-gap-without-more-mines-2023-04-20> 12

Lee Ying Shan, *There isn’t enough copper in the world — and the shortage could last till 2030*, CNBC (updated Feb. 7, 2023), <https://www.cnbc.com/2023/02/07/the-re-isnt-enough-copper-in-the-world-shortage-could-last-until-2030.html>..... 14

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U.S. Dep’t of Energy, Critical Materials Assessment (July 2023), https://www.energy.gov/sites/default/files/2023-07/doe-critical-material-assessment_07312023.pdf	11
U.S. Dep’t of Energy, Notice of Final Determination on 2023 DOE Critical Materials List, 88 Fed. Reg. 51792 (Aug. 4, 2023)	5, 9, 14
U.S. Geological Survey, Mineral Commodity Summaries 2023 (2023), https://pubs.usgs.gov/periodicals/mcs2023/mcs2023.pdf	7
Takuma Watari et al., <i>Global copper cycles and greenhouse gas emissions in a 1.5 °C world</i> , https://doi.org/10.1016/j.resconrec.2021.106118	13

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Daniel Yergin et al., <i>Growing appetite for copper threatens energy transition and climate goals</i> , S&P Global (July 18, 2022), https://www.spglobal.com/marketintelligence/en/mi/research-analysis/growing-appetite-copper-threatens-energy-transition-climate.html	13

INTEREST OF THE *AMICI CURIAE*¹

The National Mining Association (NMA) is a national trade association whose approximately 280 members include most of the domestic producers of metals, coal, agricultural and industrial minerals; manufacturers of mining equipment; and firms serving the mining industry. NMA's members explore for and develop minerals on federal, state, and private lands throughout the United States, including Alaska. NMA's members produce a range of commodities, all of which are essential to U.S. economic and national security, supply chains, and energy and infrastructure priorities.

The American Exploration and Mining Association (AEMA) is a 128-year-old, 1,400-member national trade association representing the mineral development and mining industry, with members residing in 45 states, including Alaska. Its members range from the largest independent, global mine owners to small exploration companies. AEMA is the recognized national representative for the exploration sector, the junior mining sector, and mineral developers interested in maintaining access to state and public lands.

The Alaska Miners Association (AMA) is a professional membership trade organization established in 1939 to represent the mining industry in Alaska. AMA's more than 1,400 members come from eight

¹ *Amici curiae* timely provided notice of intent to file this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

statewide branches: Anchorage, Denali, Fairbanks, Haines, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Alaska's miners are individual prospectors, geologists, engineers, suction dredge miners, small family placer mines, junior mining companies, major mining companies, Alaska Native Corporations, and the contracting sector that supports Alaska's mining industry.

The Alaska Chamber was founded in 1953, and its mission is to promote a positive business environment in Alaska. The Chamber is the voice of small and large business representing more than 700 businesses, manufacturers, and local chambers across Alaska. Its member companies employ more than 55,000 hard-working Alaskans. The Chamber advocates for a positive investment climate that provides certainty and stability for Alaska.

The Alaska Forest Association (AFA) serves to sustain and improve the viability of the timber industry in Alaska. Its members share common objectives, and the activities of the AFA directly impact the sustainability of Alaska's forest products sector.

Alaska Metal Mines (AKM), formed in 1992 as the Council of Alaska Producers, is a non-profit trade association for Alaska's large metal mines and advanced projects. AKM works to inspire Alaskans to realize a shared goal of safe and sustainable mineral production, providing economic and social benefits to Alaska communities and Alaskans.

The Alaska Oil and Gas Association (AOGA) is a professional trade association whose mission is to

foster the long-term viability of the oil and gas industry in Alaska for the benefit of all Alaskans.

The Alaska Support Industry Alliance is a 45-year-old trade association representing the companies who provide support to oil, gas and mining operations in Alaska. Its 500+ member companies employ 35,000 people in the state of Alaska. Its mission is to promote the responsible development of Alaska's oil, gas and mineral resources for the benefit of all Alaskans.

Alaska Peninsula Corporation (APC) is the consolidated and merged Alaska Native Claims Settlement Act Village Corporation for the Alaska Native Villages of Port Heiden, South Naknek, Ugashik, Kokhonak and Newhalen. APC, with nearly 1000 Alaska Native shareholders, owns approximately 400,000 acres of land in Southwest Alaska. Congress intended that the land grant would be used for economic development under the Alaska Native Claims Settlement Act (ANCSA) to APC and other Alaska Native Village Corporations. Because almost 200,000 acres of APC's lands are in the general area of EPA's wrongful decision, EPA's decision may both directly and indirectly impact APC's ability to implement Congress's intent.

The Resource Development Council for Alaska (RDC), originally formed in 1975 as the Organization for the Management of Alaska's Resources, is an Alaskan trade association comprised of individuals and companies from Alaska's fishing, forestry, mining, oil and gas, and tourism industries. RDC's membership includes Alaska Native corporations, local communities, organized labor, and industry support firms. RDC's purpose is to encourage a strong,

diversified private sector in Alaska and expand the state's economic base through the responsible development of our natural resources.

This case is exceptionally important to *amici's* members, to the mining industry, to workers and businesses in Alaska, and to the Nation's economy. The mining project at issue—which the U.S. Environmental Protection Agency (EPA) has unlawfully blocked—will provide a crucial source of copper, an essential metal for construction, transportation, electrical and electronic products, industrial machinery, and defense applications. It also plays an inextricable role in nearly all forms of renewable energy. This comes just as the world prepares for a global shortage of copper because of surging demand to meet these needs. And EPA's aggressive and unprecedented use of a regulatory veto, in violation of Alaska's statutorily guaranteed sovereign rights, threatens other industry projects throughout Alaska and potentially in other states and tribal lands.

Amici respectfully urge the Court to take this case without delay.

SUMMARY OF ARGUMENT

This is the rare case that warrants this Court's exercise of original jurisdiction. Apart from directly implicating Alaska's sovereign interests, this case is both momentous and urgent for the national economy. Declining original jurisdiction would cause this litigation to crawl slowly through the lower courts before it inevitably returns as a petition for certiorari. That would inflict serious damage on the economy and the Administration's global electrification goals. And

the Court would see little benefit from that delay, because the core question here is a purely legal one that the Ninth Circuit, in particular, is not well-positioned to tackle. *Amici* urge the Court to resolve this case now.

At the heart of this dispute is a planned mine at the Pebble deposit—the largest undeveloped copper deposit in the world. Copper is a unique metal that is “a cornerstone for all electricity-related technologies.” Int’l Energy Agency, *The Role of Critical Minerals in Clean Energy Transitions* 5 (2021).² It is particularly essential for multiple types of renewable energy. The U.S. Department of Energy and the Department of Defense agree. In short, copper is a *sine qua non* for any global energy transition.

Copper’s centrality to the world’s evolving energy needs means that demand is certain to spike—*by a lot*—in the coming years and decades. Analysts, industry leaders, and international organizations now routinely warn of a massive copper shortfall. And events are moving fast. Shortly after Alaska filed this action, the Department of Energy designated copper a “critical material” under the Energy Act of 2020, which requires finding that copper “has a high risk of a supply disruption” and that it “serves an essential function in 1 or more energy technologies.” 30 U.S.C. § 1606(a)(2); U.S. Dep’t of Energy, Notice of Final Determination on 2023 DOE Critical Materials List, 88 Fed. Reg. 51792 (Aug. 4, 2023). The abundant copper in the Pebble deposit is vital to this Nation’s

² Available at <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions/executive-summary>.

economic needs, including the Administration's planned energy transition.

To put it bluntly, that copper is needed as soon as possible. A few more years' delay in the lower courts will reverberate throughout the national and global energy markets and jeopardize our Nation's ability to meet critical renewable energy targets.

Original jurisdiction is appropriate here because Alaska has already tried to vindicate its rights in the lower courts—for almost *ten years*. The EPA settled Alaska's first lawsuit, withdrew its proposed determination to block the mine, and then (after the Ninth Circuit invalidated that withdrawal) changed its mind *again* by invoking the veto authority. So if this Court were to decline to consider the case, Alaska would need to start again from scratch, in large part due to the EPA's regulatory flip-flopping.

This case seeks to vindicate the sovereign interests of the Nation's largest state, interests recognized in statutory law at the time of statehood. Alaska's central claim is that the EPA's decision to veto the mine under Section 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c), conflicts with Alaska's sovereign authority over its subsurface minerals under the Statehood Act. That is both a legal question and an issue of sufficient magnitude to warrant this Court's exercise of original jurisdiction.

Finally, the Ninth Circuit's idiosyncratic precedent on the interplay between the Clean Water Act and Alaska-specific statutes creates the risk that the lower courts' analysis will be distorted and ultimately unhelpful for this Court's eventual resolution of the issue on certiorari.

The EPA’s unlawful action threatens lasting harm to the Nation’s ability to power its economy—literally. By the time this case gets through the Ninth Circuit, that harm will have compounded. This Court should step in now.

ARGUMENT

A. Mineral resources like those found in the Pebble deposit are essential to the Nation’s economy and security.

1. Our Nation is blessed with mineral resources that have sustained its prosperity for generations. “Without mining—from coal to iron to gold—the United States could not have emerged as a world power by the turn of the century, nor could it have successfully launched its international career of the twentieth century.” Duane A. Smith, *Mining America: The Industry and the Environment, 1800-1980*, at 2 (1987).

Time has not diminished this Nation’s reliance on mineral resources in the least. The opposite is true: Mining continues to form a pillar of our economic strength and stability. In 2022, “minerals remained fundamental to the U.S. economy” by “creating an estimated value of \$3.64 trillion.” U.S. Geological Survey, *Mineral Commodity Summaries 2023*, at 5 (2023).³ And it is not simply a matter of dollars and cents. The mining industry’s “contribution to downstream manufacturing and service sectors is indicative of the incredible derivative value of strategic and critical materials,” which includes creating jobs for

³ Available at <https://pubs.usgs.gov/periodicals/mcs2023/mcs2023.pdf>.

many Americans far beyond the mines themselves. U.S. Dep’t of Defense, *Securing Defense-Critical Supply Chains* 43 (2022).⁴

Mineral resources touch on nearly every aspect of our lives. “The unique properties of nonfuel minerals, mineral products, metals, and alloys contribute to the provision of food, shelter, infrastructure, transportation, communications, health care, and defense.” Nat’l Research Council, *Minerals, Critical Minerals, and the U.S. Economy* 1 (2008).⁵ It is no exaggeration to say that “[m]inerals are . . . fundamental inputs to the domestic economy and daily life at scales ranging from the individual consumer to entire manufacturing and engineering sectors.” *Id.*; *see also* Nedal T. Nassar et al., *Investigation of U.S. Foreign Reliance on Critical Minerals—U.S. Geological Survey Technical Input Document in Response to Executive Order No. 13953*, at 1 (Dec. 7, 2020) (“From infrastructure and transportation to communication and healthcare, the United States is dependent on the reliable supply of nonfuel mineral commodities critical for its economy and national security.”).⁶

Renewable energy cannot exist without minerals. As the Department of Defense recently observed, “strategic and critical minerals are critical to the

⁴ Available at <https://media.defense.gov/2022/Feb/24/2002944158/-1/-1/1/DOD-EO-14017-REPORT-SECURING-DEFENSE-CRITICAL-SUPPLY-CHAINS.PDF>.

⁵ Available at <https://nap.nationalacademies.org/download/12034>.

⁶ Available at <https://pubs.er.usgs.gov/publication/ofr20201127>.

global clean energy transition, with application in areas as diverse as high efficiency magnets for offshore wind, stationary and electric vehicle batteries, and coatings and alloys.” U.S. Dep’t of Defense, Securing Defense-Critical Supply Chains, *supra*, at 42. Thus, any “low-carbon future will be very mineral intensive because clean energy technologies need more materials than fossil-fuel-based electricity generation technologies.” World Bank, Minerals for Climate Action: The Mineral Intensity of the Clean Energy Transition 11 (2020).⁷ According to the Department of Energy, “the global deployment of clean energy technologies” is expected to drive an “unprecedented increase in demand for critical minerals and materials.” U.S. Dep’t of Energy, Notice of Final Determination on 2023 DOE Critical Materials List, 88 Fed. Reg. 51792, 51794 (Aug. 4, 2023).

2. Successive Administrations of both parties have recognized the threat to our national security that dependence on critical minerals poses—especially given weaknesses in the global supply chain and the efforts of hostile foreign governments to corner key supplies. *See* Exec. Order No. 13953, Addressing the Threat to the Domestic Supply Chain From Reliance on Critical Minerals From Foreign Adversaries and Supporting the Domestic Mining and Processing Industries, 85 Fed. Reg. 62539, 62540 (Oct. 5, 2020) (declaring “national emergency to deal with [the] threat” of “our Nation’s undue reliance on critical

⁷ Available at <https://pubdocs.worldbank.org/en/961711588875536384/pdf/Minerals-for-Climate-Action-The-Mineral-Intensity-of-the-Clean-Energy-Transition.pdf>.

minerals . . . from foreign adversaries” and “find[ing] that the United States must broadly enhance its mining and processing capacity, including for minerals not identified as critical minerals”); Exec. Order No. 14017, America’s Supply Chains, 86 Fed. Reg. 11849, 11850 (Mar. 1, 2021) (directing Secretary of Defense to “submit a report identifying risks in the supply chain for critical minerals and other identified strategic materials “ and to “update work done pursuant to Executive Order 13953”).

“The United States is highly net import reliant for a large and growing number of mineral commodities,” while the world has seen a “remarkable increase in the concentration of production of many mineral commodities that can be largely attributed to the growth in China’s minerals industry.” Nassar et al., *supra*, at 24. No wonder that government studies have recommended “shift[ing] mine to manufacturer supply chains . . . to the United States and countries with strong ties to the United States” in order to “provide significant improvements in the future security of supply.” *Id.* at 25; *see also* U.S. Dep’t of Defense, Securing Defense-Critical Supply Chains, *supra*, at 43 (highlighting “four key pillars to the U.S. Government’s approach to increasing the resiliency of [the strategic minerals] sector,” including “[e]xpand[ing] sustainable production and processing”).

3. Copper stands out as uniquely vital for emerging clean energy infrastructure. “Electricity networks need a huge amount of copper and [aluminum], with copper being a cornerstone for all electricity-related technologies.” Int’l Energy Agency, The Role of

Critical Minerals in Clean Energy Transitions 5 (2021).⁸ “Thanks to its unmatched thermal and electrical conductivity, copper is widely used in a broad range of electronic and industrial applications. Its attributes make it challenging to substitute.” *Id.* at 135. In addition, “[c]opper is indispensable to the appropriate functioning and efficiency of wind turbines.” U.S. Dep’t of Energy, Critical Materials Assessment 36 (July 2023).⁹ And, crucially, “[u]nlike other materials, [copper] is 100% recyclable and can be recycled perpetually without loss of performance.” *Id.* at 77.

Copper looms large in this case. The Pebble deposit at the center of this case “is the world’s largest undeveloped copper deposit.” IHS Markit, Economic Contribution Assessment of the Proposed Pebble Project to the U.S. National and State Economies 3 (Feb. 2022), bit.ly/3MAERej. Indeed, among known copper projects across the globe the proposed Pebble mine “takes the lead by a distance.” *Ranked: World’s biggest copper projects – 2023*, Mining.com (Jan. 30, 2023).¹⁰ Under the latest proposal, the mine site would “produce on average 613,000 tons of copper-gold concentrate” annually. Final Determination of the U.S. Environmental Protection Agency Pursuant

⁸ Available at <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions/executive-summary>.

⁹ Available at https://www.energy.gov/sites/default/files/2023-07/doe-critical-material-assessment_07312023.pdf.

¹⁰ Available at <https://www.mining.com/featured-article/ranked-worlds-biggest-copper-projects-2023/>.

to Section 404(c) of the Clean Water Act: Pebble Deposit Area, Southwest Alaska 2-2 (Jan. 2023).¹¹

B. Given the global copper crisis, this case is too urgent to wait while it wends through the lower courts and inevitably returns to this Court as a certiorari petition.

This Court should not wait to take this case. Beyond Alaska’s sovereign interests, the outcome of this case implicates the global copper shortfall and international ambitions for an energy transition—ongoing issues that mining of the Pebble deposit could help address. Sooner rather than later, investors, the national (and global) mining industry and policymakers need to know whether or not the Pebble deposit will be able to be put to use. This mine has already been blocked for nearly a decade. There is no good reason to allow that uncertainty to linger for even more years, with EPA’s veto in place throughout lengthy proceedings in the district court and Ninth Circuit.

1. As discussed above, huge quantities of copper are essential to renewable energy and other applications. *See* pp. 10-11, *supra*. This reality is driving a global surge in demand for copper. Industry leaders and analysts alike are warning that “[t]he world’s appetite for copper to build most electronic devices will exceed supply over the next decade and imperil climate targets unless dozens of new mines are built.” Ernest Scheyder, *Copper industry warns of looming supply gap without more mines*, Reuters (Apr. 21,

¹¹ Available at <https://www.epa.gov/system/files/documents/2023-01/Pebble-Deposit-Area-404c-FD-Jan2023.pdf>.

2023).¹² Indeed, analysts project “a chronic shortfall in copper supply from 2024 onward.” Daniel Yergin et al., *Growing appetite for copper threatens energy transition and climate goals*, S&P Global (July 18, 2022).¹³

Consider the prediction of the former Minister of Energy and Mining of Chile, the world’s largest copper producer: “Copper is usually invisible, but its omnipresence in the solutions required for the energy transition means that by 2040 global demand for copper will increase by 40 percent, basically driven by the climate agenda.” Juan Carlos Jobet, *Q&A | Copper Supply and the Energy Transition*, Center on Global Energy Policy at Columbia University (May 13, 2022) (footnote omitted).¹⁴ Academic studies similarly project that “global final demand (inflow) for copper will increase 2.5-fold from 2015 to 2050,” owing in large part to a “33-fold increase in . . . copper demand” from “renewable energy-based power plants and electric vehicles.” Takuma Watari et al., *Global copper cycles and greenhouse gas emissions in a 1.5 °C world*, 179 *Resources, Conservation & Recycling* 5 (2022).¹⁵ In short, the world desperately needs more copper.

¹² Available at <https://www.reuters.com/markets/commodities/copper-industry-warns-looming-supply-gap-without-more-mines-2023-04-20>.

¹³ Available at <https://www.spglobal.com/marketintelligence/en/mi/research-analysis/growing-appetite-copper-threatens-energy-transition-climate.html>.

¹⁴ Available at <https://www.energypolicy.columbia.edu/publications/qa-copper-supply-and-energy-transition>.

¹⁵ Available at <https://doi.org/10.1016/j.resconrec.2021.106118>.

To make matters worse, there *already is* “a global copper shortage, fueled by increasingly challenging supply streams in South America and higher demand pressures,” Lee Ying Shan, *There isn’t enough copper in the world — and the shortage could last till 2030*, CNBC (updated Feb. 7, 2023).¹⁶ And “analysts say a lack of new mined resources is the main hurdle.” Yusuf Khan, *Copper Shortage Threatens Green Transition*, Wall St. J. Pro (Apr. 18, 2023).¹⁷

2. Recognizing the cascading threats to the national copper supply, the Department of Energy recently designated copper a “critical material” under Section 7002 of the Energy Act of 2020, Pub. L. No. 116-260, Div. Z, 134 Stat. 2562, which involves a finding that copper “has a high risk of a supply disruption” and that it “serves an essential function in 1 or more energy technologies.” 30 U.S.C. § 1606(a)(2); 88 Fed. Reg. at 51792. The Department explained that its assessment of criticality was “forward looking,” with a view toward “global demand trajectories.” *Id.* at 51793. This “critical material” finding triggers a statutory mandate for the Department of Energy to, among other things, “promote the efficient production, use, and recycling of” copper, “with special consideration for domestic” copper, and “to ensure [its] long-

¹⁶ Available at <https://www.cnbc.com/2023/02/07/there-isnt-enough-copper-in-the-world-shortage-could-last-until-2030.html>.

¹⁷ Available at <https://www.wsj.com/articles/copper-shortage-threatens-green-transition-620df1e5>.

term, secure, and sustainable supply.” 30 U.S.C. § 1606(g)(1).¹⁸

Until this latest development, copper was treated as “*essential* to the economy in certain applications but . . . *not critical*, at least at present, because the risk of supply restriction is low.” Nat’l Research Council, Minerals, Critical Minerals, and the U.S. Economy, *supra*, at 11. No longer. The situation is now urgent, and it will only get worse if this Nation cannot factor in the Pebble deposit supply as it once did. *See id.* at 90 (listing “Pebble, Alaska” among other “[e]xamples of underground copper mines in the planning, construction, or production stages”).

3. Delaying resolution of this case by declining to exercise original jurisdiction would exacerbate the copper supply shortfall. The EPA’s flip-flopping has already consumed substantial time. *See* p. __, *infra*. If Alaska is compelled to litigate its claims through the district court and the Ninth Circuit before the EPA’s veto is overturned, with the project unable to begin during those years of review, valuable time will be lost right when the world’s need for copper is dramatically spiking.

This lost time will be felt well into the future. A mining project of this magnitude cannot be switched on and off like a light. This Court has recognized that

¹⁸ Due to the Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 13501(b), 136 Stat. 1970, the Department of Energy’s “critical material” finding also makes certain investments in copper eligible for a tax credit as a “qualifying advanced energy project” under Section 48C of the Internal Revenue Code, 26 U.S.C. § 48C(c)(1)(A)(iii).

major capital investments of this type typically require “considerable advance planning,” and that “decisions to be made now or in the short future may be affected’ by whether [this Court] act[s].” *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 201 (1983) (citation omitted). And it is a truism that “too much uncertainty is the natural enemy of long-term investment.” Nat’l Acad. of Eng’g, *Time Horizons & Technology Investments* 60 (1992).¹⁹ For close to a decade now, ever since EPA formally began to invoke the Section 404(c) veto, the Pebble mine project has been dogged by deep uncertainty regarding its regulatory approval. That uncertainty will persist until this Court resolves this case—and *only then* can the necessary investments be put in place to construct the mine and begin extracting its much-needed copper and other minerals. There is no more time to waste.

4. If this Court declines to exercise original jurisdiction here, the high legal and factual stakes make it a virtual certainty that, however the lower courts rule, this case will return to this Court as a petition for certiorari. And the likelihood of the Court’s hearing the case is especially high given this Court’s repeated reversals of the Ninth Circuit’s decisions in Alaska-based environmental cases. *See, e.g., Sturgeon v. Frost*, 139 S. Ct. 1066 (2019); *Sturgeon v. Frost*, 577 U.S. 424 (2016); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009) (Clean Water Act § 404 case). In another case between Alaska and the United States, this Court chided the government

¹⁹ Available at <https://nap.nationalacademies.org/download/1943#>.

when it “chose not to bring an original action in this Court” but instead to proceed through the lower courts. *United States v. Alaska*, 422 U.S. 184, 186 n.2 (1975). There is no reason to subject Alaska to that circuitous route here when this case is bound to come back to this Court anyway.

C. Alaska’s central claim presents a question of law that needs no factual development, and this Court’s analysis would not significantly benefit from lower-court decisions.

Routing this dispute between Alaska and the United States through the lower courts is particularly inappropriate in this case because of the nature of Alaska’s central claim. The state-owned mineral resources at issue here implicate “state sovereignty over natural resources.” *Herrera v. Wyoming*, 139 S. Ct. 1686, 1695 (2019). Indeed, the Clean Water Act itself powerfully reaffirms “the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b); *see also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (explaining that “significant impingement of the States’ traditional and primary power over land and water use” raises serious “federalism questions”). This is exactly the type of subject matter that this Court’s original jurisdiction regularly considers. *See Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (original jurisdiction is appropriate in cases raising “serious and important concerns of federalism” (citation omitted)). This case would fit neatly alongside the disputes over submerged land title and water rights that this Court has resolved on its original docket. *See*,

e.g., *Alaska v. United States*, 545 U.S. 75 (2005); *United States v. Alaska*, 521 U.S. 1 (1997); *United States v. Maine*, 469 U.S. 504 (1985). And here, unlike in many of those disputes, Alaska presents a pure question of law: Whether EPA’s use of the Section 404(c) veto is contrary to the statutory land grants guaranteeing that Alaska’s “[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct.” Alaska Statehood Act, Pub. L. No. 85-508, § 6(i), 72 Stat. 339, 342 (1958). This claim does not require any factual development.

Moreover, diverting this case to the district court and the Ninth Circuit may be counterproductive for an additional reason: pre-existing circuit precedent could well warp the lower courts’ approach to this case, as well as the parties’ arguments and briefing. The nub of the dispute in this case is whether the EPA’s veto under Section 404(c) of the Clean Water Act can override the specific mineral rights guaranteed to Alaska by the Statehood Act. One relevant principle, therefore, is the ordinary rule that “a specific statute will not be controlled or nullified by a general one.” *Morton v. Mancari*, 417 U.S. 535, 550–551 (1974). Here Alaska’s submission is that the Statehood Act is properly characterized as the more specific statute that should take precedence over the generally applicable Clean Water Act.

The Ninth Circuit, though, has made a mess of the specific/general rule in an arguably analogous context. It rejected an argument that the Clean Water Act “is a statute of general application and [the Alaska National Interest Lands Conservation Act (ANILCA)] is a specific statute.” *Akiak Native Cmty. v. EPA*, 625

F.3d 1162, 1173 (9th Cir. 2010). Confusingly, the court reasoned that the Clean Water Act’s discharge permitting provisions were somehow “more specific” than the subsistence resource protections mandated by ANILCA, the Alaska-specific statute, simply because “ANILCA does not address” the particular Clean Water Act provision at issue in that case. *Id.* The Ninth Circuit thus treated the Clean Water Act, which applies nationwide, as the “more specific” statute—in lieu of the statute enacted by Congress *specifically for Alaska* to protect the State’s unique resources.

Proponents of the EPA’s veto may well urge the Ninth Circuit to take a similarly idiosyncratic approach toward the key issue in this case—how the Clean Water Act interacts with the Statehood Act. Something similar happened in *Sturgeon* case: After this Court heard the case the first time and vacated the Ninth Circuit’s decision, the court of appeals’ analysis on remand was stunted by its belief “that it was bound by three circuit decisions,” while this Court later decided that those circuit decisions were not implicated at all. 139 S. Ct. at 1078, 1080 n.2. The Ninth Circuit’s prior treatment of another Alaska-specific statute could potentially distort the arguments and analysis in this case should it proceed in the courts below. This would, in turn, limit the usefulness of any lower-court opinions as an aid to this Court’s understanding of the issues. The Court is better off taking a clean shot at the case now.

D. The government has already prevented mining in the Pebble deposit for a decade with regulatory flip-flops while piggybacking on lower-court litigation.

Alaska did not rush into this Court. For nearly a decade, Alaska has been challenging the EPA’s efforts to block the Pebble mine—engaging in both litigation and face-to-face dialogue with the agency. Through twists and turns, and despite several years of apparent success, that litigation eventually wound up clearing the way for the current EPA to invoke its Section 404(c) veto this year. Over nine years after first filing suit, Alaska now faces the unenviable prospect of having to start from scratch in the District of Alaska unless this Court accepts original jurisdiction. There is no good reason to send Alaska for another spin through the lower courts before vindicating its sovereign and statutory rights.

The State of Alaska has been in dialogue with the EPA since 2014, when the agency took its “first step in the regulatory process pursuant to Section 404(c).” Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska, 79 Fed. Reg. 42314, 42317 (July 21, 2014). Shortly afterward, Alaska intervened in a lawsuit challenging the EPA’s 2014 Proposed Determination. *See Pebble Ltd. P’ship v. EPA*, 155 F. Supp. 3d 1000, 1004 (D. Alaska 2014). Alaska initially prevailed in that litigation—first obtaining a preliminary injunction and then reaching a settlement with the EPA in 2017, which culminated in 2019 when the EPA formally withdrew the Proposed Determination. *See* Bill of Complaint ¶¶ 81-82; 84 Fed. Reg. 45749 (Aug.

30, 2019). Alaska also intervened in the subsequent lawsuit challenging the EPA’s 2019 withdrawal. *See* Dkt. 56, *Bristol Bay Econ. Dev. Corp. v. Pirzadeh*, No. 3:19-cv-00265 (D. Alaska). Specifically, Alaska called out the EPA for years of regulatory “seesaw[ing]” and “endless stalling,” and noted that further delay would “frustrat[e] the State’s efforts to challenge [the] legality” of the EPA’s decision. Dkt. 104 at 2-4, *Bristol Bay Econ. Dev. Corp. v. Pirzadeh*, *supra*.

But now the EPA has changed its mind *again* and reverted to the same position it initially adopted in 2014, which led to the prior litigation and settlement. Alaska has already waited almost a decade to vindicate its rights in court, and yet it is now back to square one. This is an unusual situation in which this Court’s exercise of original jurisdiction is both appropriate and warranted.

CONCLUSION

The motion for leave to file a bill of complaint should be granted.

Respectfully submitted.

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September 26, 2023