

Testimony of
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Before the House Subcommittee on Water
Resources and Environment

On “The Pebble Mine Project: Process and
Potential Impacts”

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I. INTRODUCTION

Dear Chariman Defazio, Ranking Member Graves, Subcommittee Chairwoman Napolitano, and Subcommittee Ranking Member Westerman, my name is Alannah Hurley and I am the Executive Director of the United Tribes of Bristol Bay (UTBB), a tribally chartered consortium of fifteen federally recognized tribes in Bristol Bay.¹ Each member tribe passed a tribal resolution delegating its governmental powers to UTBB to implement the Bristol Bay Regional Visioning Project, a region-wide action plan developed by Bristol Bay's tribal communities focused on improving economic development opportunities, preserving cultural and subsistence resources, and increasing educational opportunities for tribal youth. UTBB is organized as a consortium of tribal governments working to protect the traditional way of life of the indigenous people of Bristol Bay and the natural resources upon which that way of life depends. UTBB's mission is to advocate for sustainable communities through development consistent with our traditional values.

The Yup'ik, Dena'ina, and Alutiiq peoples of Bristol Bay represent three of the last remaining "salmon cultures" in the world.² Extending from time immemorial to the present, salmon has been the foundation of Alaska Native cultures in the region. Today, salmon makes up nearly 82% of the subsistence diet in the region.³ Individuals practicing a subsistence way of life devote innumerable hours per year preparing nets, boats, smokehouses, and other equipment just in preparation for the summer salmon runs.⁴ The subsistence way of life is viewed as full-time job and wealth is often defined in terms of a full freezer or a good stockpile of subsistence foods.⁵ Beyond subsistence harvests, salmon also serves an important cultural role. Salmon is more than food for us. Catching, preserving, and eating salmon are part of a genuine and treasured way of life. A way of life that we desire to keep living and have worked diligently to protect.

The proposed Pebble mine poses a serious threat to the extraordinary natural resources of Bristol Bay and our traditional ways of life that depend upon those resources. The pristine ecosystems in the Bristol Bay watershed are critical to the continued health of salmon populations in the region. Pebble Limited Partnership is proposing to build one of the largest open-pit mines in North America in the heart of the Bristol Bay watershed. As proposed, the mine would adversely and permanently impact Bristol Bay's extraordinarily productive system of streams, wetlands, and uplands that support the world's largest salmon fishery. As part of the proposed development of Pebble mine, Pebble Limited Partnership submitted a permit application to the U.S. Army Corps of Engineers (Corps or USACE) to discharge fill material into and perform work within the waters

¹ UTBB's member Tribes include: Aleknagik Traditional Council, Chignik Lake Tribal Council, Clark's Point Village Council, Curyung Tribal Council, Ekuik Village Council, Levelock Village Council, Manokotak Village Council, New Koliganek Village Council, New Stuyahok Traditional Council, Nondalton Village Council, Pedro Bay Village Council, Pilot Point Tribal Council, Portage Creek Village Council, Togiak Traditional Council, and Twin Hills Village Council. Each is a federally recognized Indian tribe. Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1,200, 1,204-05 (Feb. 1, 2019).

² U.S. ENVIRONMENTAL PROTECTION AGENCY, AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON ECOSYSTEMS OF BRISTOL BAY, ALASKA App. D, at 11 (2014) (EPA 910-R-14-001B).

³ *Id.* at 78.

⁴ *Id.* at 85.

⁵ *Id.* at 85, 88.

of the United States.⁶ Despite the Corps' statements that it is committed to a thorough, fair, and transparent review of the proposed Pebble mine, our Tribes' experiences participating in the environmental review process as cooperating agencies and interacting with the Corps on a government-to-government basis clearly demonstrate that the Corps is merely paying lip service to its statutory obligations and its trust responsibility to our Tribes.

II. TREATMENT OF TRIBES AS COOPERATING AGENCIES

Under the National Environmental Policy Act, the Corps is required to conduct a thorough, science-based analysis of the impacts associated with the proposed Pebble mine. NEPA fosters informed decision-making by requiring federal agencies to take a "hard look" at the environmental impacts of a proposed action.⁷ An environmental impact statement (EIS) must "provide full and fair discussion of significant environmental impacts" and "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts."⁸ Tribes, like state and federal agencies, have the ability to participate as cooperating agencies and contribute to the development of the EIS. Two of UTBB's member Tribes, Curyung Tribal Council and Nondalton Tribal Council, are participating in the NEPA process as cooperating agencies. Despite the Tribes' significant efforts to fulfill their responsibilities as cooperating agencies, they have faced substantial barriers to full and meaningful participation. The Corps' has summarily dismissed tribal cooperating agencies' substantive concerns and failed to provide the information necessary to meaningfully evaluate the impacts of the proposed Pebble mine.

From the beginning, the Corps arbitrarily limited the involvement of tribal cooperating agencies. In November 2018, the Corps distributed an internal draft EIS to cooperating agencies for review and comment. At that time, Shane McCoy, program manager for the Corps' Alaska District, informed tribal cooperating agencies that the Corps would only consider their comments on subjects the Corps identified as their areas of expertise—cultural resources, subsistence, land use, and socioeconomics.⁹ Despite requests from tribal cooperating agencies to remove these limitations, the Corps has imposed them throughout the NEPA process.¹⁰ Most recently, when the Corps held cooperating agency meetings in July and August 2019, McCoy again informed tribal cooperating agencies that their participation would be limited to the subjects that the Corps identified as their areas of expertise.¹¹ Though tribal cooperating agencies were invited to attend

⁶ U.S. Army Corps of Engineers, *Public Notice of Application for Permit*, POA-2017-271 (Jan. 5, 2018).

⁷ *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011).

⁸ 40 C.F.R. § 1502.1.

⁹ See Email from Shane McCoy, Program Manager, U.S. Army Corps of Engineers, Alaska District, to cooperating agencies (Oct. 17, 2018) ("When revising the draft EIS prior to public comment, USACE will consider those comments which are related to the CA's identified area of special expertise. Other comments related to the DEIS will be considered at the same time as the public's comments, after the Notice of Availability for the dEIS.").

¹⁰ Letter from William Evanoff, President, Nondalton Tribal Council, to Lieutenant General Todd T. Semonite, Commanding General and Chief of Engineers, U.S. Army Corps of Engineers, at 1 (Sept. 5, 2018).

¹¹ See Email from Shane McCoy, Program Manager, U.S. Army Corps of Engineers, Alaska District, to cooperating agencies (July 22, 2019) ("All agencies can attend any of the meetings, however, discussions on topics will be limited to the agencies with that expertise.").

all the meetings, they were only permitted to participate in the discussion at one. Tribes, as sovereigns, have broader interests, concerns, and expertise, than the arbitrary and insulting limits that the Corps placed upon tribal cooperating agencies.¹²

The Corps' improper treatment of cooperating agencies is not limited to Tribes. Throughout the NEPA process, the Corps has inhibited the ability of cooperating agencies to participate and failed to properly consider cooperating agencies' substantive comments and concerns. The Department of Interior's (DOI) comments on the draft EIS raised serious process-related concerns, stating that "we must note that, despite being cooperators, [U.S. Fish and Wildlife Service, National Park Service, and Bureau of Safety and Environmental Enforcement] were only provided certain sections of the Administrative DEIS to review as it was prepared and were not able to access the entire document until after it was released for public comment."¹³ Addressing the Corps' failure to meaningfully consider and respond to cooperating agencies' comments, the DOI recommended that the Corps "more effectively and directly address prior comments . . . For example, responses to previous comments often cited conclusions from other sections of the DEIS to resolve concerns, but these citations did not sufficiently address the issues that were originally raised."¹⁴ The Environmental Protection Agency (EPA) also raised concerns about the manner in which the Corps limited cooperating agencies' participation, stating that it would continue to provide "special expertise in specific areas requested by the Corps," but would "also continue to request the ability to assist the Corps in additional areas . . . including fisheries and air quality, where [the EPA has] special expertise and jurisdiction."¹⁵

In addition to process-related concerns, cooperating agencies submitted extensive comments on the draft EIS's substantive deficiencies, including insufficient analysis of impacts to watershed health, including impacts to fish and fish habitat;¹⁶ insufficient analysis of "potential impacts to subsistence resources and the communities that depend on them;"¹⁷ and insufficient analysis of spill risk associated with tailing storage and other facilities.¹⁸ Based on these and other deficiencies, the DOI concluded that the draft EIS did not follow NEPA requirements and was so

¹² See Letter from William Evanoff, President, Nondalton Tribal Council, to Lieutenant General Todd T. Semonite, Commanding General and Chief of Engineers, U.S. Army Corps of Engineers, at 1 (Sept. 5, 2018).

¹³ Letter from Philip Johnson, Regional Environmental Officer, Office of Environmental Policy and Compliance, Anchorage Region, to Shane McCoy, Program Manager, U.S. Army Corps of Engineers, Alaska District, at 1 (July 1, 2019) (hereinafter "DOI Comment Letter").

¹⁴ *Id.* at 3.

¹⁵ Letter from Chris Hladick, Regional Administrator, Environmental Protection Agency, Region 10, to Shane McCoy, Program Manager, U.S. Army Corps of Engineers, Alaska District, at 6 (July 1, 2019) (hereinafter "EPA Comment Letter").

¹⁶ See *e.g.*, DOI Comment Letter at 5; EPA Comment Letter at 4; Comments of the Nondalton Tribal Council and the United Tribes of Bristol Bay on the U.S. Army Corps of Engineers' Draft Environmental Impact Statement for the Proposed Pebble Mine POA-2017-271 (July 1, 2019) (hereinafter "Nondalton and UTBB Comment Letter"); Letter from Robert Heyano, President, Ekuk Village Council, to Colonel Phillip J. Borders, District Commander, U.S. Army Corps of Engineers, Alaska District, at 1 (April 11, 2019) (hereinafter "Ekuk Comment Letter").

¹⁷ See *e.g.*, DOI comment letter at 3; Nondalton and UTBB Comment Letter at 2; Ekuk Comment Letter at 1-2.

¹⁸ See *e.g.*, Nondalton and UTBB Comment Letter at 2; EPA Comment Letter at 5.

inadequate that it “preclude[d] meaningful analysis.”¹⁹ Ultimately, the DOI recommended that the Corps undertake additional analysis—“Due to the substantial deficiencies and data gaps identified in the document and as a department with multiple cooperating agencies, the DOI recommends that the USACE prepare a revised or supplemental DEIS.”²⁰ Nondalton Tribal Council repeatedly raised the same concern with the Corps, requesting that the Corps prepare a supplemental EIS in accordance with its obligations under NEPA. In multiple letters, Nondalton Tribal Council explained to the Corps that failure to produce a supplemental EIS would deny Bristol Bay Tribes, the public, and state and federal agencies the ability to fairly and objectively review the proposed project and make informed decisions about its impacts.²¹ Senator Lisa Murkowski, Alaska’s senior Senator, also recognizes that the Corps’ process is broken. A committee report accompanying the appropriations bill for DOI, environment, and related agencies included language, drafted by Senator Murkowski, stating that “[a]dverse impacts to Alaska’s world-class salmon fishery and to the ecosystem of Bristol Bay, Alaska, are unacceptable” and directing other federal agencies “to exercise their discretionary authorities . . . to ensure the full protection of the region” if they continue to be unsatisfied with the Corps’ analysis of the project.²²

Though the Corps has repeatedly stated that it is committed to a fair and transparent review of the proposed Pebble mine, its course of action reveals the disingenuousness of that commitment. In response to cooperating agencies’ substantial criticisms of the draft EIS and recommendations to develop a supplemental EIS, the Corps has indicated that it will not undertake additional analysis. On a press call with reporters in July 2019, David Hobbie, chief of the Corps’ Alaska District Regulatory Division, stated that he was not considering a supplemental draft EIS “at this point.”²³ Similarly, on a call with reporters last month, Shane McCoy, program manager for the Alaska District stated that despite significant changes to plans for the proposed Pebble mine submitted by the project proponent, the Corps “would not be publishing a supplemental [environmental impact statement], and there wouldn’t be an opportunity for the public to comment.”²⁴ Despite the fact that the Corps was “still working through all the comments” and was “still waiting on additional data on groundwater modeling, wetlands and cultural resources” from the project proponent, McCoy stated that the Corps was still on pace to issue a final EIS in early 2020.²⁵ McCoy then went a step further, essentially agreeing with claims the project proponent made in a recent presentation to investors that the proposed Pebble mine “will not harm salmon and will not affect water resources of Bristol Bay.”²⁶

¹⁹ DOI Comment Letter at 3.

²⁰ *Id.*

²¹ See e.g., Letter from George Alexi, President, Nondalton Tribal Council, to Lieutenant General Todd T. Semonite, Commanding General and Chief of Engineers, U.S. Army Corps of Engineers, at 1–2 (Sept. 27, 2019); Letter from George Alexi, President, Nondalton Tribal Council, to Lieutenant General Todd T. Semonite, Commanding General and Chief of Engineers, U.S. Army Corps of Engineers, at 2 (Aug. 27, 2019).

²² S. Rep. No. 116-123, at 87 (2019).

²³ Ariel Wittenberg, *EPA punts on latest Pebble mine decision*, E&E News (July 29, 2019), <https://www.eenews.net/greenwire/stories/1060806401>.

²⁴ Dylan Brown, *Revised mining plan won’t require new review — Army Corps*, E&E News (Sept. 18, 2019), <https://www.eenews.net/greenwire/stories/1061134919> (alteration in original).

²⁵ *Id.*

²⁶ *Id.*

Hobbie and McCoy’s statements are consistent with the Corps’ pattern of summarily dismissing the significant concerns and substantive recommendations of cooperating agencies. This pattern is particularly alarming in contrast to the Corps’ conduct toward Pebble Limited Partnership. As the Nondalton Tribal Council explained to the Corps in a recent letter, these statements “clearly demonstrate a significant bias in favor of the applicant, the intent to implement a politically driven fast-track schedule, and a pre-decisional mindset that sets aside any attempt to make a reasonable, fair, and objective final permit decision.”²⁷

III. TREATMENT OF TRIBES ON A GOVERNMENT-TO-GOVERNMENT BASIS

The Corps, like all federal agencies, owes a trust responsibility to Tribes. Because of Tribes’ legal status as sovereigns, the federal government has an obligation to consult with Tribes on a government-to-government basis when contemplating actions that may affect tribal lands, resources, members, and welfare. Executive Order 13175 mandates that all executive agencies recognize and respect Tribes’ sovereign status.²⁸ The order also requires agencies to establish policies and procedures to ensure meaningful and timely consultation with tribes when an action affects tribal interests.²⁹ Under the Corps’ own guidance, it must “ensure that all Tribes with an interest in a particular activity that has the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands are contacted and their comments taken into consideration.”³⁰ The Corps’ guidance also emphasizes beginning consultation at “the earliest planning stages, before decisions are made.”³¹ Though the Corps often recites its obligations in communications with Bristol Bay Tribes, its course of action falls far short of its recitals. In stark contrast to its promises, the Corps has ignored tribal concerns, withheld information from Tribes, refused to meet on a government-to-government basis, and treated Tribes like stakeholders instead of sovereign Nations.

The Corps’ failure to meaningfully consult with Tribes on a government-to-government basis is a concern that UTBB and its member Tribes have continuously raised with the Corps. We have extended countless invitations to the Corps to visit our villages and to engage in open dialogue about the issues that are most important to us. We have explained that meeting with us in our communities provides the most inclusive participation of our Tribal leaders and members. Traveling to our communities would also provide the Corps leadership and staff with a better understanding of the resources, and in turn the traditional ways of life, that would be adversely affected by the proposed Pebble mine. But the Corps has been unresponsive to our requests.

The Corps’ monthly tribal teleconference is another illustrative example of the way in which the Corps views its government-to-government relationship with Tribes. Though a teleconference

²⁷ Letter from George Alexi, President, Nondalton Tribal Council, to Lieutenant General Todd T. Semonite, Commanding General and Chief of Engineers, U.S. Army Corps of Engineers, at 2–3 (Sept. 27, 2019).

²⁸ Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,249–50 (Nov. 6, 2000) (mandating that agencies “respect Indian tribal self-government and sovereignty” when “formulating and implementing policies” that affect tribal interests).

²⁹ *Id.* at 67,250.

³⁰ U.S. ARMY CORPS OF ENGINEERS, TRIBAL CONSULTATION POLICY, at 4 (Nov. 2012).

³¹ *Id.* at 2–3.

with thirty-five Tribes is not an appropriate means to engage in government-to-government consultation, the Corps includes its monthly tribal teleconferences in its record of tribal consultation.³² Monthly teleconferences could be an appropriate mechanism to provide Tribes with information and updates that implicate tribal interests; however, the Corps' tribal teleconferences fail to achieve even this more limited purpose. As a result, Tribes are forced to rely on the media for critical information that the Corps should provide directly to Tribes. News articles about the recent changes to the proposed mining plan are just one of the many instances where Tribes learned of significant project-related information from the news instead of the Corps.³³ This is unacceptable and sends a clear message to Tribes that the Corps' recitals of its obligations are merely hollow words.

IV. LAND OWNERSHIP AND REASONABLE ALTERNATIVES

The Corps must “[r]igorously explore and objectively evaluate all reasonable alternatives.”³⁴ Failing to meet this basic NEPA requirement, the Corps merely tweaked Pebble Limited Partnership's proposal. The two additional action alternatives the Corps included in the draft EIS are variations on access to the mine and transportation of mine products; they are not alternatives. The inadequacy of the range of alternatives is further undermined by the fact that the only feasible and practicable alternative is Pebble Limited Partnership's proposal, suggesting that the Corps is attempting to improperly select the company's preferred alternative.

Most of the alternatives that the Corps considered in its draft EIS include building components of the transportation corridor over Native allotments and lands where an Alaska Native Claims Settlement Act corporation owns the surface or subsurface.³⁵ The Corps considered alternatives using these lands even if the landowners did not extend their permission to use the land, or in some cases expressly refused permission. For example, despite Pedro Bay Corporations' refusal to allow Pebble Limited Partnership to use its land, two of the three alternatives considered in the draft EIS would cross the corporation's lands.³⁶ Pebble Limited Partnership's preferred alternative is the only alternative that does not cross Pedro Bay Corporation's lands. On two occasions the corporation's board of directors voted unanimously against providing access to its lands, first in 2014 and again in January 2019.³⁷ Pedro Bay Corporation explained to the Corps that the proposed Pebble mine does not satisfy its “responsible development standards” and for “Alaska Natives who depend on the natural environment for traditional and cultural hunting, fishing, and gathering, the

³² U.S. ARMY CORPS OF ENGINEERS, PEBBLE PROJECT EIS: DRAFT ENVIRONMENTAL IMPACT STATEMENT, at 6-2 to 6-6 (Feb. 2009).

³³ Dylan Brown, *Revised mining plan won't require new review — Army Corps*, E&E News (Sept. 18, 2019), <https://www.eenews.net/greenwire/stories/1061134919>.

³⁴ 40 C.F.R. § 1502.14(a).

³⁵ See U.S. ARMY CORPS OF ENGINEERS, PEBBLE PROJECT EIS: DRAFT ENVIRONMENTAL IMPACT STATEMENT, at 3-2.1.

³⁶ *Id.*

³⁷ Ariel Wittenberg, *Native corp.: Pebble mine can't use our land*, E&E News (Feb. 28, 2019), <https://www.eenews.net/stories/1060122683>.

Pebble Project represents an existential threat to their ways of life.”³⁸ An alternative is not reasonable or feasible when a landowner has not, and will not, consent to the use of its lands.

In developing and analyzing alternatives, the Corps disregarded the property interests of individual Alaska Native allottees and Alaska Native Claims Settlement Act corporations, leaving Pebble Limited Partnerships’ proposal as the only feasible and practicable option considered in the draft EIS. Again, the Corps ignored the indigenous people of Bristol Bay in favor of furthering Pebble Limited Partnership’s interests.

V. CONCLUSION

I would like to thank Chariman Defazio, Ranking Member Graves, Subcommittee Chairwoman Napolitano, and Subcommittee Ranking Member Westerman for inviting me to testify today. One thing is clear, the proposed Pebble mine will have significant and permanent adverse impacts on the extraordinary natural resources of Bristol Bay and our traditional ways of life that are so closely tied to those resources. With so much at stake, the people of Bristol Bay, and all Alaskans, deserve a fair, thorough, and transparent review of the proposed Pebble mine. In contrast, the Corps’ opaque process is moving toward a permit decision at an unprecedented pace, ignoring substantial criticism and concern from Bristol Bay Tribes, other federal agencies, and the public. Under the Corps’ current timeline, it is planning to issue a final EIS in early 2020 and make a permit decision in mid-2020.³⁹ The Corps has made clear that it will not listen to our voices, so we ask this Committee to act now and help us protect Bristol Bay.

³⁸ Letter from Matt McDaniel, CEO, Pedro Bay Corporation, to Shane McCoy, Program Manager, U.S. Army Corps of Engineers, Alaska District, at 1–2 (July 1, 2019).

³⁹ U.S. Army Corps of Engineers, *Pebble Project EIS*, <https://pebbleprojecteis.com/schedule> (last visited Oct. 16, 2019).