

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

TREFIM ANDREW, TIM ANELON,)
GARY NIELSEN, HENRY OLYMPIC,)
ABE WILLIAMS, and BRADEN)
WILLIAMS,)

Plaintiffs,)

v.)

BRISTOL BAY REGIONAL)
SEAFOOD DEVELOPMENT)
ASSOCIATION, UNITED TRIBES OF)
BRISTOL BAY, and)
SALMONSTATE,)

Defendants.)

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Case No. 3AN-19-06026CI

BRIEF OF AMICUS CURIAE STATE OF ALASKA
IN SUPPORT OF PLAINTIFFS

This case concerns whether the Bristol Bay Regional Seafood Development Association (BBRSDA) is acting in accordance with laws governing regional seafood development associations. The Alaska Legislature has authorized twelve regional seafood development associations (RSDAs) to “promot[e] and market[] Alaska seafood products harvested in” each of the State’s fishery regions.¹ Plaintiffs in this lawsuit have alleged that that BBRSDA recently entered into contracts with United Tribes of Bristol Bay (UTBB) and non-profit organization SalmonState to fund efforts to advocate against the construction of the Pebble Mine and contend that these contracts are *ultra vires* under BBRSDA’s governing statute. BBRSDA, in moving to dismiss the suit,

¹ AS 44.33.065(a).

contends that it has statutory authority to engage in these activities and that to hold otherwise would violate its First Amendment rights of free speech and free association.

But BBRSDA is mistaken. Neither the statutory text nor legislative history of its governing statute evinces any intent for RSDAs to engage in the kind of activities challenged here. The Legislature's intent in authorizing RSDAs was to promote and market regional seafood products, not to fight industrial development that might have an effect on fish habitat. And as a state-created association with a statutorily-defined membership and statutorily-limited purposes, BBRSDA is not an exercise of its members' right of freedom of association to advocate for their political goals, nor does it have the First Amendment right to spend state funds on activities inconsistent with the association's statutory mission.

INTEREST OF AMICUS CURIAE

The State of Alaska has an interest in ensuring that state law is interpreted to give effect to the Legislature's intent and that funds appropriated by the Legislature are spent in accordance with the purpose for which they were appropriated. BBRSDA's assertion that its governing statutes allow it to participate in a federal permitting process for the proposed Pebble Mine and its insistence on using funds appropriated to it by the State to do so implicate both of these state interests.

STATEMENT OF THE CASE

I. Alaska law authorizes regional seafood development associations to levy taxes on commercial fishermen to raise funds for the purpose of “promoting and marketing Alaska seafood products.”

Regional seafood development associations are creatures of state statute. The Alaska Legislature created a framework for regional associations of commercial fishermen to levy taxes on themselves to generate revenue “for the purpose of promoting and marketing Alaska seafood products harvested in [each] region.”² The Legislature delegated to the Department of Commerce, Community & Economic Development (DCCED) the duty of designating a single RSDA for each fishery region.³ To qualify as a region’s RSDA, an association of commercial fishermen must meet certain statutory criteria. An RSDA must be “organized as a nonprofit corporation ... for the purpose of marketing and promoting seafood products taken in the region,”⁴ it must “provide[] for membership in the organization by any commercial fisherman who holds a commercial fishing permit for a fishery that is conducted in the region,”⁵ and it must be “established for the following purposes”:

- (A) promotion of seafood and seafood by-products that are harvested in the region and processed for sale;
- (B) promotion of improvement to the commercial fishing industry and infrastructure in the seafood development region;

² AS 43.77.350 - .43.77.375; AS 44.33.065(a).

³ AS 44.33.065(a) – (b).

⁴ AS 44.33.065(a)(4).

⁵ AS 44.33.065(a)(3).

- (C) establishment of education, research, advertising, or sales promotion programs for seafood products harvested in the region;
- (D) preparation of research and product development plans for the promotion of seafood and their by-products that are harvested in the region and processed for sale;
- (E) cooperation with the Alaska Seafood Marketing Institute and other public or private boards, organizations, or agencies engaged in work or activities similar to the work of the organization, including entering into contracts for joint programs of consumer education, sales promotion, quality control, advertising, and research in the production, processing, or distribution of seafood harvested in the region;
- (F) cooperation with commercial fishermen, fishermen's organizations, seafood processors, the Alaska Fisheries Development Foundation, the Fisheries Industrial Technology Center, state and federal agencies, and other relevant persons and entities to investigate market reception to new seafood product forms and to develop commodity standards and future markets for seafood products.^[6]

The Legislature gave these RSDAs the authority to levy a seafood development tax on their members.⁷ An RSDA may conduct an election to approve a tax of either 0.5 percent, 1 percent, 1.5 percent, or 2 percent of the value of fishery resources sold in each of the region's fisheries.⁸ If a majority of commercial fishing permit holders in the fishery voting in the election approve the tax levy, then all permit holders must pay it

⁶ AS 44.33.065(a)(1)(A)-(F). The lawful purposes of BBRSDA set out in its articles of incorporation and bylaws incorporate the provisions of AS 44.33.065. Complaint ¶¶ 12-13.

⁷ Ch. 53, § 3, SLA 2004, codified at AS 43.76.350 – 43.76.399.

⁸ AS 43.76.350 – 43.76.370.

(whether or not they supported it).⁹ The tax is collected by seafood buyers, who remit it to the Department of Revenue.¹⁰ The Department of Revenue deposits the seafood development tax proceeds in the State's general fund.¹¹

The proceeds of the seafood development tax are intended to support RSDAs' marketing and promotion efforts. The Legislature "may make appropriations based on this revenue to [DCCED] for the purpose of providing financing for qualified regional seafood development associations."¹² The RSDA statute in turn provides that RSDAs "may request state financial assistance from [DCCED] to aid the seafood development programs of the association."¹³ DCCED has adopted regulations governing the program, including for disbursing money appropriated by the Legislature for use by the RSDAs.¹⁴

II. BBRSDA has executed contracts to fund research and public advocacy to facilitate participation in the federal permitting process for the proposed Pebble Mine, with the goal of denying the mine permits.

BBRSDA is the qualified regional seafood development association for the Bristol Bay region.¹⁵ Earlier this year, BBRSDA entered into two contracts related to

⁹ AS 43.76.370(b). The vote requires a quorum of "30 percent of the eligible interim-use permit and entry permit holders in the fishery" voting in the election. AS 43.76.370(b)(2).

¹⁰ AS 43.76.380(a), (c).

¹¹ AS 43.76.380(d).

¹² AS 43.76.380(d).

¹³ AS 44.33.065(d).

¹⁴ See AS 44.33.065(f); 3 AAC 149.070 – 149.080.

¹⁵ Compl. ¶ 10.

the federal National Environmental Policy Act (NEPA) process for the proposed Pebble Mine, which would be located near the headwaters of the Bristol Bay region.¹⁶

The first contract, with UTBB, is entitled “Pebble Outreach and Permitting Process Engagement Project.”¹⁷ The contract recites that “BBRSDA and a large majority of its members are concerned” about the Pebble Mine, that “BBRSDA wishes to fund outreach and education activities . . . in the Bristol Bay region pertaining to the proposed Pebble Mine,” and that UTBB “has a long history of opposition towards the proposed Pebble Mine.”¹⁸ The contract lists the activities that it will fund, including “[r]esearch relating to the scope of the Pebble Mine project,” “[e]ducating the public about the scope of the Pebble Mine project,” and “[e]ducating the public about how to contact state and federal officials to communicate their views on the Pebble Mine project.”¹⁹ The contract does not specify that it will fund any activities related to promoting or marketing Bristol Bay seafood, and UTBB does not agree in the contract to undertake any such activities. The statement of purpose for the project under contract is to “ensure adequate tribal and public engagement in the NEPA federal permitting process to get the process to result in a permit withdrawal or denial for the Pebble

¹⁶ Affidavit of Andy Wink ¶ 20 (Apr. 20, 2019), attached to BBRSDA Mot. to Dismiss (Apr. 24, 2019).

¹⁷ Wink Aff. Ex. 1 at 1.

¹⁸ Wink Aff. Ex. 1 at 1.

¹⁹ Wink Aff. Ex. 1 at 2.

Project.”²⁰ The work has the “ultimate goal of a [Pebble Mine] permit withdrawal or denial.”²¹

BBRSDA’s contract with SalmonState likewise states that SalmonState “is part of the Save Bristol Bay Coalition, a group of various stakeholders who are opposed to the Pebble Mine.”²² The specific activities funded by the contract are characterized as modeling aspects of the mine’s construction and operation.²³ One stated purpose of the modeling is to inform the NEPA decision process.²⁴ A second purpose is to build the administrative record “to serve as material evidence should the matter ever go to court.”²⁵ The contract does not specify that it will fund any activities related to promoting or marketing Bristol Bay seafood, and SalmonState does not agree in the contract to undertake any such activities.

²⁰ Wink Aff. Ex. 1 at 14.

²¹ Wink Aff. Ex. 1 at 15.

²² Wink Aff. Ex. 2 at 1.

²³ Wink Aff. Ex. 2 at 12-13.

²⁴ Wink Aff. Ex. 2 at 15.

²⁵ Wink Aff. Ex. 2 at 15.

ARGUMENT

I. BBRSDA’s governing statute authorizes it to “promot[e] and market[] Alaska seafood products harvested in the [Bristol Bay] region,” not to participate in a federal permitting process for a proposed mine in the region.

Regional seafood development associations exist for the “purpose of promoting and marketing Alaska seafood products harvested in the region.”²⁶ BBRSDA contends that this statutory purpose authorizes its participation in the federal regulatory process to permit the proposed Pebble Mine. But the statutory text and legislative history show that the Legislature did not establish RSDAs for the purpose of trying to stop other commercial and governmental activities—like mining, oil production, or urban and residential development—that might have a downstream impact on fish habitat.

When interpreting a statute, the Alaska Supreme Court looks “at both its plain language and ... its legislative history.”²⁷ The Court employs a “sliding scale approach under which the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be.”²⁸ “The goal of statutory construction is to give effect to the Legislature’s intent, with due regard for the meaning the statutory language conveys to others.”²⁹

²⁶ AS 44.33.065(a).

²⁷ *Cent. Recycling Servs., Inc. v. Municipality of Anchorage*, 389 P.3d 54, 57 (Alaska 2017).

²⁸ *Id.*

²⁹ *Parks Hiway Enterprises, LLCs v. CEM Leasing, Inc.*, 995 P.2d 657, 663 n.19 (Alaska 2000).

Here, the Legislature chose its words carefully, authorizing creation of RSDAs “for the purpose of promoting and marketing Alaska seafood products harvested in” each designated region.³⁰ Participating in the federal regulatory process for a proposed mine is certainly not marketing Alaska seafood products. Nor is it promoting Alaska seafood products. BBRSDA, citing the broadest possible definition of “promoting” in the dictionary, argues that it means “to contribute to the growth or prosperity of” something.³¹ But because the Legislature specified that RSDAs are for promoting seafood products—a commercial product—it is more likely that the Legislature intended “promote” in the narrower commercial sense—“to help bring (something, such as an enterprise) into being” and “to present (merchandise for buyer acceptance) through advertising, publicity, or discounting.”³² The Legislature said “promoting ... seafood products,”³³ not “promoting fish habitat” or “promoting fishery resources”—i.e. the natural resource that a commercial fishery exploits.³⁴ By tying RSDAs to the end product of the commercial fishing process, the Legislature evinced no intent that

³⁰ AS 44.33.065(a).

³¹ BBRSDA Mot. at 12 (citing Merriam-Webster Online Dictionary).

³² Merriam-Webster Online Dictionary.

³³ AS 44.33.065(a); *accord* AS 44.33.065(a)(1)(A) (establishing RSDAs for specific purpose of “promotion of seafood and seafood by-products *that are harvested in the region and processed for sale.*” (emphasis added)).

³⁴ *See* AS 16.43.990(4) (“‘fishery’ means the commercial taking of a specific fishery resource in a specific administrative area with a specific type of gear....”), incorporated by reference in AS 44.33.065(g).

RSDAs play a role advocating against other industries that might have an effect on fish habitat.

The six specific purposes enumerated in AS 44.33.065(a)(1) do not support BBRSDA's position either. To begin, these enumerated purposes must be construed consistently with RSDAs' overall purpose of "promoting and marketing Alaska seafood products."³⁵ Doing otherwise would contravene the basic presumption that "the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect."³⁶ So while true that RSDAs may engage in education and research programs, this education and research must be in the service of its overall mission to promote and market regional seafood products. BBRSDA could conceivably undertake research to ascertain the effects of the proposed mine on regional fishery resources and consumer perceptions in order to more effectively promote and market Bristol Bay seafood. But that is not what it appears to be doing here. Instead, it is undertaking research for use in opposing the federal permits the mine is seeking and encouraging others to do the same. That is not a plausible reading of what the Legislature meant when it created RSDAs to undertake "consumer education," research in the "production, processing, or distribution of seafood," or "education . . . and research . . . programs for seafood products."³⁷

³⁵ AS 44.33.065(a).

³⁶ *Cent. Recycling Servs.*, 389 P.3d at 58.

³⁷ AS 44.33.065(a)(1)(C), (E).

The legislative history confirms that the Legislature intended for RSDAs to promote seafood products by marketing them on regional level and by investing in the commercial fishing industry to maintain or improve the quality of seafood products. It does not suggest that the Legislature intended for RSDAs to use tax funds to fight local mining projects, oppose federal protections for marine mammals that eat salmon (leaving fewer for commercial fishermen), or advocate against municipal land use regulations that might affect the health of salmon streams in quasi-urban areas of the State—all of which would be permitted under BBRSDA’s expansive definition of “promote.”

The sponsor of the legislation creating RSDAs, Rep. Dan Ogg, explained that the bill would authorize creation of “regional marketing development associations”³⁸ “in order to enhance [individual regions’] ability to sell their own fish.”³⁹ The legislation was developed in recognition of the success of regional fisheries like Copper River and Kodiak that were “developing their own marketing.”⁴⁰ In response to the increase in availability of farmed salmon, which caused salmon prices to plummet, Alaska’s fishermen had found that “regional marketing” had been effective in “differentiat[ing]

³⁸ HB 419, Minutes of H. Sp. Comm. Econ. Dev., Int’l Trade and Tourism at 3 (Feb. 10, 2004).

³⁹ HB 419, Minutes of H. Sp. Comm. Econ. Dev., Int’l Trade and Tourism at 3 (Feb. 24, 2004).

⁴⁰ HB 419, Minutes H. Sp. Comm. Econ. Dev., Int’l Trade and Tourism at 3 (Feb. 10, 2004).

wild fish from their penned counterparts.”⁴¹ However, much of the grant money these regional associations depended on was drying up, and the bill was conceived to replace those grants by “allow[ing] regional seafood development associations to assess themselves between one-half and two percent to provide a steady stream for marketing dollars.”⁴² The legislation was also intended to allow RSDAs to fund improvements in regional commercial fishing infrastructure: accordingly the bill “gives [RSDAs] the power to provide an infrastructure for improvements like fish chillers for members’ use.”⁴³

Industry representatives too understood RSDAs as associations for marketing and improving the quality of seafood products. The president of Cordova District Fisheries United testified that the bill would provide a new funding source for his union’s “marketing committee,” which had been dependent on grants, and would help the union “expand its business from the Copper River salmon into chum salmon and other species.”⁴⁴ He envisioned his association “coming up with better advertising, more effective marketing, and increased sales of their product.”⁴⁵ The president of United

⁴¹ HB 419, Minutes of H. Fin. Comm. at 7-8 (Mar. 23, 2004).

⁴² HB 419, Minutes of H. Fin. Comm. at 8 (Mar. 23, 2004); *accord* CS HB 419, Minutes of S. Fin. Comm. at 38 (May 4, 2004) (explaining that the bill “would provide a replacement funding mechanism” for the regional associations currently engaging in marketing of salmon, like the Copper River Red Salmon Association, which had “been quite successful in its marketing endeavors.”).

⁴³ CS HB 419, Minutes of S. Labor & Comm. Comm. at 28 (Apr. 27, 2004).

⁴⁴ HB 419, Minutes of H. Sp. Comm. Econ. Dev., Int’l Trade and Tourism at 4 (Feb. 24, 2004).

⁴⁵ *Id.*

Fishermen of Alaska supported the bill because “[t]he opportunity for fishermen to do their own thing and market by region would be vastly facilitated through the legislation.”⁴⁶ He also believed that the RSDAs would enable fishers “to put promotional programs together and get more value off the salmon and work on quality problems, such as installing ice machines in remote areas.”⁴⁷

When BBRSDA’s cherry-picked quotes from the legislative history are read in context, they do not support its view that the Legislature intended RSDAs to do more than market regional seafood products and invest in the commercial fishing industry to ensure the quality of its seafood products. BBRSDA notes that Rep. Ogg stated that RSDAs could use the seafood development tax proceeds for “the development of their fishery resources in that region.”⁴⁸ But that statement was prefaced by his explanation that the bill was conceived in order to give commercial fishers “the ability to utilize a mechanism that would allow them to regionally market their seafoods” and to help them “further their industries on a local basis.”⁴⁹ In context, Rep. Ogg’s statement meant that RSDAs would develop their fishery resources by “regionally market[ing] their seafoods” and investing in their “industries,” a reading consistent with the rest of his testimony on the bill. So too with his statement that RSDAs would “build[] on Alaska’s

⁴⁶ HB 419, Minutes of H. Fin. Comm. at 13 (Mar. 23, 2004).

⁴⁷ SCS CS HB 419, Minutes of Senate Labor & Comm. Comm. at 28 (Apr. 27, 2004).

⁴⁸ BBRSDA Mot. at 12 (quoting HB 419, Minutes of H. Res. Comm. at 4 (Mar. 5, 2004)).

⁴⁹ HB 419, Minutes of H. Res. Comm. at 3 (Mar. 5, 2004).

reputation for pristine waters that yield superior fish.”⁵⁰ His preceding statements explain that RSDAs would do this by using seafood development tax proceeds as “a steady stream for marketing dollars” to distinguish regional seafood offerings from increasing amounts of “imported and farmed seafood.”⁵¹ Nothing in Rep. Ogg’s testimony indicates his (or anyone else’s) belief that RSDAs could use tax receipts to publicly advocate against development of other natural resources due to the risk of downstream effect on fish abundance or public perception.

BBRSDA’s argument boils down to the assertion that its mandate to promote regional seafood products entitles it to take any action that could have an indirect effect on the value of those products. By this logic, BBRSDA may not only participate in a federal permitting process for industrial development in its region, but may also engage in electoral politics at the state and even national level—supporting some candidates for public office, opposing others—to seek environmental policies that it believes are more favorable to fish habitat. But there is no suggestion that the Legislature intended such a broad and controversial mandate when it created regional association to promote “seafood products.”

⁵⁰ BBRSDA Mot. at 12 (quoting HB 419, Minutes of H. Fin. Comm. at 8 (Mar. 23, 2004)).

⁵¹ HB 419, Minutes of H. Fin. Comm. at 8 (Mar. 23, 2004).

II. The statutory limitations on RSDAs' ability to spend state money do not violate the First Amendment.

A. Because RSDAs have statutorily-defined memberships and statutorily-defined purposes, they are not an exercise of their members' First Amendment freedom to associate with others.

BBRSDA's invocation of its members' right to freedom of association misses the mark because membership in an RSDA is not an exercise of the "freedom to associate with others for the common advancement of political beliefs and ideas."⁵² First, RSDA members are not choosing whom to associate with. By statute, an RSDA must "provide[] for membership in the organization by any commercial fisherman who holds a commercial fishing permit for a fishery that is conducted in the region."⁵³ Thus the core freedom of the freedom of association—"the freedom to identify the people who constitute the association, and to limit the association to those people only"⁵⁴—is not a feature of RSDAs. Second, RSDA members do not choose the association's goals. The association's goals are those the Legislature has chosen and set forth in statute.⁵⁵ So RSDAs are not a collective extension of "an individual's freedom to speak, to worship, and to petition the government for the redress of grievances" entitled to First Amendment protection as a "correlative freedom to engage in group effort toward those

⁵² *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159 (9th Cir. 2010) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56-67 (1973)).

⁵³ AS 44.33.065(a)(3).

⁵⁴ *Democratic Party of U.S. v. Wisconsin ex rel. La Follete*, 450 U.S. 107, 122 (1981).

⁵⁵ AS 44.33.065(a).

ends.”⁵⁶ Instead they are associations with legislatively-defined membership that exist to levy tax assessments on commercial fishermen in order to promote and market seafood products.⁵⁷ BBRSDA cannot invoke the right to freedom of association to disregard its statutory limitations.

B. Limiting RSDAs’ use of state funds does not violate their members’ association or speech rights because the State may choose which categories of speech or activity to subsidize.

Neither BBRSDA nor its members have a First Amendment right to use state funds for any purpose they desire. BBRSDA’s suggestion that forcing it to abide by its governing statutes would violate its First Amendment rights overlooks two important points.⁵⁸ First, the money it is speaking with is state money. Second, the State can decide what its money can and cannot be spent on. BBRSDA may be free to express its opinions, but the First Amendment does not authorize it to do so with state money that has been limited to specific purposes.

The proceeds generated by the seafood development tax and then appropriated for distribution to RSDAs are state funds. To be sure, the tax is voluntarily assessed in the sense that an RSDA’s membership votes on whether to tax itself and may choose the tax rate from among four statutorily-provided options, from 0.5 percent to 2 percent.⁵⁹ But once a tax is approved by a simple majority of the RSDA’s members, it

⁵⁶ *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

⁵⁷ AS 44.33.065(a), (d); AS 43.77.350 – AS 43.77.370.

⁵⁸ BBRSDA Mot. at 22-24.

⁵⁹ AS 43.76.350 – 43.76.370.

is like any other tax. All commercial fishermen participating in the fishery must pay it (even if they voted against it),⁶⁰ and the tax proceeds are remitted to the Department of Revenue and deposited in the State's general fund.⁶¹ At that point, the tax proceeds are indistinguishable from other sources of state revenue. The Legislature "may make appropriations based on this revenue to [DCCED] for the purpose of providing financing for qualified regional seafood development associations."⁶² By statute, funds so appropriated are to be used "to aid the seafood development programs of the association"⁶³—in other words, consistently with the purpose for which the RSDAs were created. And the Legislature reiterates that limitation in appropriating these funds for distribution to RSDAs, as in the most recent State operating budget:

An amount equal to the seafood development tax collected under AS 43.76.350 – 43.76.399 in calendar year 2017, estimated to be \$2,150,000, and deposited in the general fund under AS 43.76.380(d), is appropriated from the general fund to [DCCED] for payment in the fiscal year ending June 30, 2019 to qualified regional seafood development associations for [the purposes established in AS 44.33.065].^[64]

BBRSDA mistakenly contends the statutory limitation on "state financial assistance" to RSDAs refers to a separate category of money BBRSDA calls "grants,"

⁶⁰ See, e.g., AS 43.76.350(a) ("A person holding a limited entry permit or interim-use permit under AS 16.43 shall pay a seafood development tax..."); AS 43.76.370(b) (providing seafood development tax is levied on fishery resources taken in a fishery if approved by majority vote of permit holders who vote in election).

⁶¹ AS 43.76.380(d).

⁶² AS 43.76.380(d).

⁶³ AS 44.33.065(d).

⁶⁴ HB 286, § 11(e) (2018).

not to proceeds from the seafood development tax that it receives through DCCED.⁶⁵ But there is no basis for this imagined distinction: the term “grant” does not appear anywhere in the statutes or regulations governing RSDAs.⁶⁶ Rather, the term “state financial assistance” refers quite straightforwardly to the revenues from the seafood development tax receipts appropriated by the Legislature for distribution to the RSDAs for use in accordance with their statutory purposes. If there were any doubt, DCCED’s regulation clears it up by providing that if an RSDA has not yet established its tax-exempt status with the IRS, “the department will withhold from any *state financial assistance provided under AS 44.33.065(d)* an amount equal to 40 percent of the total seafood development taxes collected under AS 43.76.350 – 43.76.399 within the seafood development regions represented by the association.”⁶⁷ The funds RSDAs receive from DCCED are state funds that can be used only as provided for in statute and the language of the legislative appropriation itself.

The limits on how RSDAs may spend state funds do not violate the First Amendment. The State does not violate First Amendment rights “by declining to subsidize ... First Amendment Activities.”⁶⁸ And “[w]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it

⁶⁵ BBRSDA Mot. at 17-18.

⁶⁶ See AS 43.76.350 – 43.76.399; AS 44.33.065; 3 AAC 149.010 – 149.950.

⁶⁷ 3 AAC 149.070(b) (emphasis added).

⁶⁸ *Regan v. Taxation Without Representation of Washington*, 461 U.S. 540, 548 (1983) (holding Congress did not violate First Amendment by adopting law providing that charitable contributions to groups that engage in lobbying are not tax-deductible).

wishes,” and can take “appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”⁶⁹ To the extent the State subsidizes expressive activity through the RSDAs, it seeks to communicate the unique qualities of regional seafood products. It need not also fund an entirely different category of speech—political advocacy about industrial development.⁷⁰

BBRSDA’s reliance on *Rosenberger v. Visitor and Rectors of University of Virginia*⁷¹ is misplaced. In that case, the university had a policy of subsidizing printing costs for student publications, but refused to pay the printing costs of a Christian magazine. The Court ruled that the university had engaged in viewpoint discrimination that violated the First Amendment.⁷² But there is no viewpoint discrimination in the RSDAs’ governing statute. It does not permit RSDAs to use state funds to advocate for or against habitat protections or mining projects. Rather, state funds may be used only for a limited category of speech: speech related to promoting and marketing regional seafood products.

“[E]ven where the Constitution prohibits coercive governmental interference with specific individual rights, it does not confer an entitlement to such funds as may be

⁶⁹ *Rosenberger v. Rector and Visitors of Univ. of Vir.*, 515 U.S. 819, 833 (1995).

⁷⁰ While RSDA might protest that these funds do not look like a subsidy when they are equal to the amount of taxes raised from their members, the subsidy here lies in the power to impose a tax on non-consenting members. Without that power, RSDAs would be in the same position as any non-profit, able to collect only as much as they could persuade people to donate.

⁷¹ 515 U.S. 819.

⁷² *Id.* at 834-35.

necessary to realize all the advantages of that freedom.”⁷³ The commercial fishers who make up BBRSDA are entitled to participate in the federal permitting process for the proposed Pebble mine, to encourage others to do so, and to band together to fight development of the mine. But they do not have the right, under the First Amendment or otherwise, to do so using state funds earmarked to regional seafood development associations for promoting Alaska seafood products.

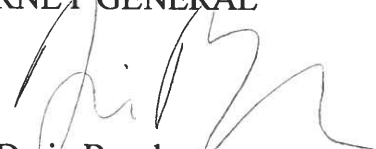
CONCLUSION

For these reasons, the Court should rule that AS 44.33.065 precludes BBRSDA’s use of state funds for the activities described in its contracts with UTBB and SalmonState.

Dated May 6, 2019.

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⁷³ *Lying v. Int’l Union, United Auto, Aerospace and Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 369 (1988).