



DEPARTMENT OF  
NATURAL RESOURCES

OCT 26 2015

COMMISSIONER'S OFFICE  
ANCHORAGE

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October 26, 2015

Commissioner Mark Myers  
Alaska Department of Natural Resources  
550 W 7<sup>th</sup> Ave, Suite 1400  
Anchorage, AK 99501

Re: Appeal of DNR Water Resources Section decision to grant Reservation of Water for Stream  
2003/Middle Creek – Lower Reach (LAS 27436)

Dear Commissioner Myers:

The Alaska Miners Association (AMA) writes to appeal the October 7, 2015 decision by the State of Alaska Department of Natural Resources, Water Resources Section, to grant a reservation of water for Stream 2003/Middle Creek – Lower Reach (LAS 27436). AMA does not wish to appeal the decisions to deny the applications for reservations at the Middle and Main Reach (LAS 27437 and LAS 27340, respectively).

AMA is a non-profit membership organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,800 members that come from seven statewide branches: Anchorage, Denali, Fairbanks, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. We look for and produce gold, silver, platinum, molybdenum, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, and other materials.

In our comments dated April 9, 2015, and in our testimony at DNR's Objection Hearing held August 21, AMA expressed grave concerns about the State of Alaska allowing the management of water resources appropriation to be done by private entities. AMA's position remains that water is a public resource and the regulation and appropriation of this critical resource should only be done by public agencies.

AMA agrees with the decision that it is not in the public interest to grant water reservations in the Middle Reach and Main Reach of Stream 2003/Middle Creek as applied for by the Chuitna Citizens Coalition. However, we strongly disagree with the granting of a reservation at the Lower Reach. AMA appeals this decision for the following reasons:

#### **Delegation of DNR Regulatory Authority**

Awarding a reservation of water to a private entity and/or citizens, who are held accountable to no one, is a delegation of DNR's regulatory and oversight authority. Regulatory agencies hold authority because they are staffed and resourced with the scientific and legal expertise necessary to administer a role so important as management of water resources. Now, with the granting of a reservation of water as it relates to a resource development project, DNR has awarded oversight to a non-profit organization with a mission to oppose resource development projects; in this case, the proposed Chuitna Coal Project. This



is nonsensical, inappropriate, and certainly not in the public's best interest. In fact, it is inconsistent with the Department's obligations under the Alaska Constitution and in statute.

In awarding the reservation of water to Chuitna Citizens Coalition, DNR granted the group the right to maintain a certain level of water in the stream. However, the data collected demonstrates that the streamflow is *naturally* lower than what is stipulated in the right approximately *one-third* of the time. At any time, this could be lengthened by a dry season, harsh winter, etc., not meeting the reservation requirements for an even longer period. Normally, in this type of situation the various public agencies involved would use its expertise to make the best decisions for fish and fish habitat. In this case, the private entity which has been given water management authority by DNR even without holding a property right and permit to access the area, can go directly to the courts and demand that all temporary water use permits and junior water rights holders upstream stop withdrawing water. This situation lacks any involvement by any public regulatory authority with fish expertise – only the private interest group and a court. Clearly, this will not maximize environmental protection, and it certainly does not treat the upstream water users fairly. Allowing a private, anti-development interest group the ability to periodically deny water use is wrong.

Instead of granting any water reservations to private entities, DNR should establish a policy that only agencies, held accountable to the public at large and elected officials, shall be allowed to manage Alaska's water resources.

### **"Need" for Awarding Water Reservation**

The requirement for an applicant to demonstrate and DNR to find "need" for a water reservation is set in statute and regulation. In granting a water reservation for the Lower Reach, the Water Resources Section made a significant error in that it ignores the permitting process in place at the Chuitna Coal Project. The protection of fish downstream from the mine area will be a critical component of the process and will be done by the experts at federal and state permitting agencies. This stringent analysis far outweighs any potential fish protections supposed by the water reservation, so the "need" for the reservation is simply nonexistent.

Fundamentally speaking, the decision by the Water Resources section to grant the water reservation suggests a deficiency in the State permitting process. AMA wonders, what does the granting of a water reservation do to protect fish downstream that DNR cannot do inside of the permitting process? Does the decision suggest that private citizens must be given authority to administer DNR's mission?

It is the opinion of AMA that DNR should establish policy to never grant water reservations to a private party for any reason. At the very least, DNR should establish policy that it will not grant water reservations to private parties under circumstances where permitting that will evaluate impacts to fish and the waterbody is underway or foreseeable.

### **Instream Flow Reservations as a Tool to Stop Resource Development**

With the decision to award a water reservation at the Lower Reach, a dangerous precedent will be set to allow opposition groups to regulate resource development projects. Indeed, the decision is being praised by anti-development groups and is now seen as a tool to stop projects rather than a legitimate objective to protect fish and wildlife. The important shift in policy that has been demonstrated by the Water



Resources Section will invite opponents to file reservations on future projects – not just mining projects and not just in Southcentral Alaska. Evidence to the point: currently, a multitude of applications await adjudication by DNR, including those on the North Slope, at the Susitna-Watana hydroelectric project, and more. Each of these reservation applicants, and likely many more to come, has undoubtedly seen the public interest determination analysis performed by the Water Resources Section in the case of the Lower Reach and will hope that their applications are decided in a similar fashion. Each of these processes will be lengthy, and highly expensive for both the agencies and project developers – but not the project stoppers.

### **Permitting Uncertainty**

On a similar note, the decision by the Water Resources Section to grant a reservation at the Lower Reach sends a policy message that increases permitting uncertainty and project risk. The 47-page Findings document is full of examples that would alarm those contemplating investment in Alaska. The decision preempts the permitting process by assuming impacts to the Lower Reach, prior to the completion of an Environmental Impact Statement that determines whether that assumption is valid. It establishes downstream enforceable restrictions conducted by a private interest group that could at any time interrupt project construction or operation. Finally, it suggests that DNR's permitting process is unstable and therefore requires a supplemental action of involving private regulatory authority.

Certainly, in the current environment of a state fiscal crisis, globally low commodity prices, and limited financial capital, this is no time to shut the door to economic diversity and the attraction of investment in our state. However, the uncertainty that comes with the decision to grant the reservation at the Lower Reach is just one more barrier to future economic development opportunities.

Clearly, there are many compelling reasons to appeal the decision. To that end, AMA urges you to overturn the decision made by the Water Resources Section to grant a reservation of water at the Lower Reach of Stream 2003, and to uphold the decision to deny the applications for reservations at the Middle and Main Reaches of the stream.

Thank you for the opportunity to comment on this important issue.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Crockett", is written over a light blue horizontal line.

Deantha Crockett  
Executive Director



THE STATE  
of **ALASKA**  
GOVERNOR BILL WALKER

**Department of Law**

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October 26, 2015

Mark Myers, Natural Resources Commissioner  
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DEPARTMENT OF  
NATURAL RESOURCES

OCT 26 2015

COMMISSIONER'S OFFICE  
ANCHORAGE

Re: *Notice of Administrative Appeal: Decision of Division of Mining, Land & Water on Application for Reservation of Water, Middle Creek/Stream 2003, LAS 274346 (Lower Reach)*

Dear Commissioner Myers:

The Alaska Mental Health Trust Lands Office appeals the October 6, 2015, decision of the Division of Mining, Land, and Water to grant a reservation of water rights under AS 46.15.145 to Chuitna Citizens Coalition, Inc. for the lower reach of Middle Creek/Stream 2003 (LAS 27436). The decision's analysis is arbitrary, lacks substantial evidence, and rests on an erroneous interpretation of the water reservation statute, AS 46.15.145.

The way the Department interprets and applies AS 46.15.145 in the first-ever adjudication of a private party's application for reserved water rights has enormous implications for the Alaska Mental Health Trust, which has a statutory duty to develop its lands and resources for the benefit of Alaskans with mental health needs. Reserved water rights are an important tool for conservation, but they can also be misused to thwart or discourage responsible resource development in a state whose socio-economic well-being depends on it. An overly expansive interpretation of AS 46.15.145 could jeopardize development across the Alaska and, with it, the Trust's ability to provide for its beneficiaries.

**I. The Trust must develop its lands to improve its ability to meet Alaskans' mental health needs, but its power to do so would be threatened by an overly expansive regime of reserved water rights.**

The Alaska Mental Health Trust is a public trust responsible for meeting the mental health needs of Alaskans. The Trust's roughly 80,000 beneficiaries include Alaskans suffering from mental illness, from dementia and the effects of aging, and from addiction. The Trust was endowed by Congress with over a million acres of land at its inception in 1956. These lands were specifically selected for the value of their resources, so that the Trust could develop them to finance services for the mentally ill. Royalties and other proceeds from mineral development are deposited into the corpus of the Trust, a portion of which is spent annually to help meet the mental health needs of Alaskans.

The lands adjacent to the Stream 2003 are owned by the Trust. These lands lie in an area that is classified and managed for coal mining, and the Department of Natural Resources has previously rejected a petition under the Alaska Surface Coal Mining and Restoration Act (ASCMRA) to designate these lands unsuitable for coal mining. The lands have been leased to PacRim Coal, LP, which proposes to develop a mine producing coal for export. It is estimated that the coal produced by the mine would net between \$200 million and \$300 million in royalties for the Trust. These royalties would greatly enlarge the Trust corpus and enable the Trust to significantly increase spending on meeting Alaskans' mental health needs in the coming decades.

Although the project has not yet been fully permitted, PacRim proposes to develop the mine by diverting Stream 2003 above the mine site. PacRim intends to replicate the natural stream channel in the portion of the stream that is diverted and to return the full flow to Stream 2003's original channel below the mine site, upstream of the stream's eventual confluence with the Chuitna River.

In an attempt to derail the project, a private group called the Chuitna Citizens Coalition (CCC) has submitted three applications for instream flow reservations in Stream 2003. One application is for the "Main Reach" of Stream 2003 (LAS 27340), which represents a stretch from a tributary 7.7 miles upstream to the confluence with the Chuitna River. The two other applications are overlapping applications for smaller portions of the Main Reach: the "Middle Reach" (LAS 27437) from a tributary 6.6 miles upstream to a point approximately 1.4 miles upstream of the confluence; and the "Lower Reach" (LAS 27436), which is from river mile 1.4 to the confluence.

In the decision below, the Division of Mining, Land & Water denied CCC's application for reservations in the main reach and middle reach, but granted a reservation in the Lower Reach, which is downstream from the mine itself and from the point at which the diverted water would be returned to the natural stream channel. Even though the Division conceded that applicable regulations and permitting requirements processes

“can adequately protect the water resources in Middle Creek/Stream 2003” without a reservation, it nonetheless found that there is a need for a reservation of water in the Lower Reach. The Division also concluded that reserving water in the Lower Reach is in the public interest because it would not directly preclude development of the mine upstream but could be a “tool to ensure the least impact on the downstream Chitna River System.” In both analyses, the Division failed to grapple with the most salient fact about the Lower Reach: all of Stream 2003’s natural flow will be returned to the stream’s natural stream channel upstream of the Lower Reach, so that the Lower Reach will enjoy all of Stream 2003’s natural flow in its original location. As a result, there is neither a need for nor benefit to be gained from reserving in-stream flows in the Lower Reach because even if the mine is developed, the natural flow of Stream 2003 will not be diminished in the Lower Reach. The Division’s analysis is therefore arbitrary and lacks factual justification.

The decision also rests on an unreasonable interpretation of AS 46.15.145. The reserved water rights statute is just one part of a complex legal structure for managing Alaska’s lands and waters. This structure rests on Article VIII of the Alaska Constitution and its policy of “development of [the State’s] resources by making them available for maximum use consistent with the public interest.”<sup>1</sup> The Division must interpret AS 46.15.145 consistently with that policy and the overall regulatory landscape. In this precedent-setting adjudication, the Division interpreted AS 46.15.145 so broadly that a “need” for a reservation exists even though, as the Division conceded, other regulations can adequately protect water resources without it. In the Division’s view there is a need for a potentially mine-precluding reservation of in-stream flows anytime or anywhere a coal mine is proposed. This interpretation will invite applications for in-stream flows wherever individuals wish to block resource development, displacing the expert-driven, predictable, and objective permitting requirements of regimes like ASMCRA with a preemptive, ad hoc, data-poor approach to deciding whether or how development should proceed. It is an unreasonable interpretation of AS 46.15.145 that threatens to hinder the Trust and other major landowners in Alaska from developing their lands to benefit their fiduciaries.

## **II. There is no need for a reservation of water rights in Stream 2003.**

A reservation of water in a specific stream can be granted only if “the applicant has demonstrated that a need exists for the reservation.”<sup>2</sup> The Division concluded there was a need for the proposed reservations because of PacRim’s proposed competing use for the water and because of the “appropriateness of being pro-active to protect water

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<sup>1</sup> Alaska Const. Art. VIII, § 1.

<sup>2</sup> AS 46.15.145(c)(2).



flows in an area classified and managed for coal development.”<sup>3</sup> The Division’s analysis of the asserted need for a reservation in the Lower Reach of Stream 2003 was flawed for several reasons.

First, the Department failed to require the *applicant*, CCC, to demonstrate that a need for the reservation exists, as required by AS 46.15.145(c).<sup>4</sup> Instead, the Division developed its own untested assumptions in concluding there was a need for a reservation in the Lower Reach. The Division acknowledged the problem of adjudicating CCC’s applications for water rights without information about how the mine might affect fisheries in Stream 2003 and the Chuitna River. But the Division concluded that because the superior court had ordered it to adjudicate the application for reserved water rights, it had to develop assumptions about the development and effects of the proposed mine. That approach is incorrect because AS 46.15.145 requires the *applicant* to show that a need for the reservation exists. It does not require the Division to hypothesize facts that might support a need for the reservation.

The Division’s failure to apply AS 46.15.145’s burden of proof was especially problematic for its analysis of the need for a reservation in the Lower Reach. The Division found a need for the reservation on all reaches due to PacRim’s proposed competing use for the water.<sup>5</sup> Yet the Division acknowledged that PacRim’s proposed use did not compete with the reservation for the Lower Reach.<sup>6</sup> While hypothesizing that “the Lower Reach could be indirectly impacted by PacRim’s upstream activities,”<sup>7</sup> the Division did not identify, let alone analyze, the nature or scope of these asserted impacts. Nor did it discuss how an instream flow reservation in the Lower Reach would further the purpose for which it was requested: protecting fish habitat. An instream flow reservation protects fish habitat by ensuring that a specified quantity of water remains in the stream. Given PacRim’s proposal to return the entire flow of Stream 2003 to its original channel upstream of the Lower Reach, the need for a reservation in the Lower Reach is not apparent: there is no competing use for the water in the Lower Reach. The Division simply did not point to any evidence showing the project, as proposed, would have an impact on fish habitat in the Lower Reach or that a reservation of in-stream flows would mitigate that impact. Had the Division correctly applied AS 46.15.145(c)(2)’s evidentiary burden, it would have had to deny the application because CCC did not demonstrate any need for a reservation in the Lower Reach.

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<sup>3</sup> Decision at 24.

<sup>4</sup> See AS 46.15.145(c)(2).

<sup>5</sup> Decision at 22.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 21.

Second, the Division's assertion that there is a need for a reservation of in-stream flows in the Lower Reach contradicts its own subsequent finding that its "application requirements and permitting processes can adequately protect the water resources in Middle Creek/Stream 2003, without a reservation,"<sup>8</sup> both in the short-term and long-term. This contradiction undermines the assertion of need for a reservation in all the reaches, and it is especially glaring in regard to the Lower Reach. If the regulatory structure can adequately protect water resources in portions of the Stream from which they will be diverted, then it should be more than adequate to protect the Lower Reach, where Stream 2003's entire flow will be returned to the watercourse.

The Division's candid admission that existing regulations and permitting requirements can protect Stream 2003's water resources also illustrates why AS 46.15.145 cannot reasonably be applied to waters in land classified for coal development and subject to the protections of ASMCRA. AS 46.15.145 is just one part of a much broader, more comprehensive system for managing Alaska's lands and waters and must be interpreted in light of that framework. It does not make sense to conclude that a reservation of water rights is needed for every stream in coal country—or any land subject to development, for that matter—just because an in-stream flow reservation could be a source of protection for those waters. Existing requirements already balance the need for protections against the need for development. Alaska's framework for classifying land areas makes development a priority in some areas, conservation and habitat a priority in others.<sup>9</sup> The riparian land in this case was specifically selected for its mineral value so that the Trust could develop it as a way of funding mental health services for Alaskans. Even in areas generally classified for coal mining, ASMCRA permits the Department to make certain areas off limits to mining. And any mining that does occur is subject to ASMCRA's stringent permitting requirements, including a rule—especially relevant to this case—that water diversions for coal mining operations cannot be approved unless they will not "adversely affect the water quantity or quality of the stream under applicable state and federal water quality laws and regulations" and "any adverse effect on fish, wildlife, or other environmental resources of the stream will be minimized."<sup>10</sup> In other words, when an area is classified for coal mining and subject to ASMCRA's myriad protections—and if it does not meet the criteria to be placed off-limits to coal mining—the balance between development and conservation has already been struck. This is especially true for Trust land, which was chosen for the sole purpose of mineral development. It would be unreasonable to interpret AS 46.15.145 in a way that upsets this balance and preempts a predictable, data driven approach to minimizing environmental effects in areas that have already been designated for coal mining with an

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<sup>8</sup> Decision at 41.

<sup>9</sup> AS 38.04.065; AS 38.04.070; AS 38.05.300.

<sup>10</sup> 11 AAC 90.353.



ad hoc adjudication that (if this adjudication is any guide) will often lack the data necessary for informed decisions. AS 46.15.145 cannot reasonably be interpreted so that there is a “need” for instream flow reservations every time a mining project is proposed. It can only be reasonably interpreted so that there is a “need” for a reservation if the watercourse is subject to uses that are not governed by comprehensive permitting schemes like ASCRMA. Had the Division reasonably interpreted AS 46.15.145(c)(2)’s requirement that the applicant demonstrate a need for the reservation, it would have denied CCC’s application for a reservation in the Lower Reach.

### **III. Granting CCC a reservation of water rights in the Lower Reach of Stream 2003 is contrary to the public interest.**

The Division’s analysis of the public interest factor also suffers from a failure to consider the same key point: all the water that is diverted from Stream 2003 above the mine will be returned to the natural stream channel upstream of the Lower Reach, such that the Lower Reach will enjoy Stream 2003’s full natural flow. The Division failed to recognize that, for this reason, granting a reservation in the Lower Reach would not yield any tangible benefits for fish habitat there—the asserted purpose of the reservation.

In weighing the public interest, the Division must consider the benefits of the proposed reservations, including the personal benefit to the applicant, the potential economic benefits, and the benefits for fish and game resources.<sup>11</sup> Yet the Division did not discuss how granting a reservation in the *Lower Reach*—which under the proposed plan would enjoy natural stream flows—would yield these benefits, instead lumping all the reaches together in its analysis. That oversight tainted the Division’s weighing of the public interest. The Division reasoned that granting a reservation in the Lower Reach would not harm the public interest to the same degree as granting a reservation in the upper reaches because a reservation in the Lower Reach would not necessarily preclude the development of the proposed mine. But the Division failed to identify any benefits that would offset even this smaller harm, save for an assertion that the reservation would be a “tool to ensure the least impact downstream” which is both unexplained and undermined by its admission that its other tools are already adequate to protect Stream 2003’s water resources. The Division’s cursory analysis of the public interest in granting a reservation in the Lower Reach renders its decision arbitrary and capricious.

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<sup>11</sup> AS 46.15.080.

**IV. If the Commissioner affirms the Division's decision, he should clarify the scope of the reservation and how it will be administered.**

If the Commissioner affirms the Division's decision, he should at least clarify the terms of the reservation and the details of how it will be administered.

First, is the reservation a right to an instantaneous flow or an average monthly flow? Table 4 of the decision shows the percentage of time flows on the Lower Reach are greater or less than the mean monthly flow volume. Given the natural variability of stream flows, does the Division intend to grant CCC a right to specified flow at all times (an instantaneous flow), even though actual flow will be less than this amount a significant percentage of the time due to natural fluctuations?

Second, how will this right be monitored, if at all? 11 AAC 93.146 permits the Commissioner to place conditions on the reservation and to specify how the instream flows are to be monitored, but the Division's decision did not discuss any details in this regard. In its application, CCC disclaimed any intent to monitor stream flows.<sup>12</sup> If the reservation in the Lower Reach is affirmed, the Commissioner should specify who will monitor the flows and how and whether CCC will bear the cost of ongoing monitoring (which would be reasonable as it is the entity that enjoys the benefit of the reservation). It should be noted that Trust Lands are not state lands to which public access is generally permitted; in deciding the details of stream flow monitoring, the Commissioner should attempt to minimize the adverse effects on the Trust's private property rights and may be required to compensate the Trust for any easements that may be required across Trust land to effectuate the reservation.

Finally, should the proposed mine not be developed on the Trust's lands, the Commissioner should specify whether any monitoring obligations will continue and who will be responsible for them, and whether review of the reservation pursuant to AS 46.15.145(f) will be triggered automatically due to the disappearance of the sole proffered justification for the reservation..

**V. The Commissioner should deny the reservation requested for the Lower Reach.**

For these reasons, the Commissioner should reverse the decision of the Division and deny CCC's application for an in-stream flow reservation in the Lower Reach (LAS 27436).

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<sup>12</sup> Application for Reservation of Water LAS 27436, App. A at 14.

Sincerely,

CRAIG W. RICHARDS  
ATTORNEY GENERAL

By:



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Assistant Attorney General  
*Counsel for Alaska Mental Health Trust  
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DB/ajc



Council of  
**Alaska Producers**

**Request for appeal of water reservation decision**

October 26, 2015

Commissioner Mark Myers  
Department of Natural Resources  
550 West 7th Avenue, Suite 1400,  
Anchorage, Alaska 99501

DEPARTMENT OF  
NATURAL RESOURCES

OCT 26 2015

COMMISSIONER'S OFFICE  
ANCHORAGE

Dear Commissioner Myers,

The Council of Alaska Producers (CAP) is writing to request an appeal of the decision by the Chief of the Water Resources Section of the Department of Natural Resources (DNR) to grant a water reservation to the Chuitna Citizens Coalition (CCC) in the lower reach of Middle Creek/Stream 2003. The Council raised concerns about the CCC's water reservations applications in a letter to DNR on April 9, 2015 and also participated in the public hearing on August 21, 2015.

CAP is a non-profit trade association formed in 1992 and serves as a spokesperson for the large metal mines and major metal developmental projects in the state. Bringing together mining companies with interest in Alaska, the Council represents and informs members on legislative and regulatory issues, supports and advances the mining industry, educates members, the media, and the general public on mining related issues, and promotes economic opportunity and environmentally sound mining practices.

The Council has grave concerns about the negative consequences of the decision to grant a water reservation in the lower reach of Middle Creek/Stream 2003. The State of Alaska has a constitutional mandate to manage our water for the maximum benefit of Alaska's people. It is fundamental that the State should never delegate authority to a private party to manage these resources, because agencies are accountable to the public and elected officials, but private citizens are accountable to no one.

Private citizens can use reservations for the inappropriate objective of stopping or severely hindering a project, rather than the legitimate objective of protecting fish and wildlife habitat. Not only does this increase operational risk for the PacRim Coal project, it sets an extremely negative precedent that could be used to disrupt other community and resource development projects in Alaska.

In addition to these far reaching, negative consequences, the decision itself is critically flawed. Current statute and regulation require that the applicant must demonstrate --and DNR must

find--that a "need" exists for the reservation. The applicant failed to do this and DNR's analysis of the "need" relies on unsupported conclusions about hypothetical impacts where no water from Stream 2003 reaches the Chuit River. This ignores the fact that PacRim Coal would return all the water it diverts from Stream 2003 in the mine area back into Stream 2003 below the mine area.

Furthermore, DNR should have determined that there is not a "need" for a reservation under circumstances where there is a major permitting process underway or reasonably foreseeable. To do otherwise suggests that the State and Federal agencies that are required to consider these issues in the permitting process cannot be trusted to do their jobs.

Commissioner, you have an opportunity to defend the rigor and stability of the existing permitting system, maintain authority for resource management and send a positive message to the investment community. We urge you to overturn the decision to grant this water reservation to the CCC and undertake a thorough examination of the potential consequences of privately held water reservations. Finally, DNR should establish a clear policy that it will not grant reservations to private parties under circumstances where permitting for a major project is underway or reasonably foreseeable.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Matthias", with a stylized flourish at the end.

Karen Matthias  
Managing Consultant

## Alaska Oil and Gas Association

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October 26, 2015

Commissioner Mark Myers  
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Via e-mail to [dnr.appeals@alaska.gov](mailto:dnr.appeals@alaska.gov)

**Re: Appeal of DNR Water Resources Section decision to grant Reservation of Water for Stream 2003/Middle Creek – Lower Reach (LAS 27436)**

Dear Commissioner Myers:

The Alaska Oil and Gas Association (AOGA) writes to appeal the October 7, 2015 decision by the State of Alaska Department of Natural Resources (DNR), Water Resources Section, which granted a reservation of water for Stream 2003/Middle Creek – Lower Reach (LAS 27436). This letter does not constitute an appeal of the decisions that denied the applications for reservations at the Middle and Main Reach (LAS 27437 and LAS 27340, respectively).

AOGA is a professional trade association whose members account for the majority of oil and gas exploration, development, production, transportation, and refining activities onshore and offshore in Alaska. AOGA greatly appreciates the DNR's efforts to fairly and prudently adjudicate In-Flow Reservation ("reservation") applications. AOGA believes that the state of Alaska, rather than outside interest groups, is in the best position to properly manage our environmental resources. More importantly, AOGA believes abandoning that responsibility and duty is in violation of Alaskans best interest. It will also surely encourage more of this type of "gamesmanship" in the future, which will further erode state sovereignty at a time where Alaska already struggles to control its own

destiny. In that vein, AOGA appeals DNR's decision granting a reservation at the Lower Reach of Middle Creek. Failure to remedy that decision will only serve to undermine faith in the process and discourage future investment.<sup>1</sup>

Ultimately, AOGA's appeal is predicated on the following arguments: (1) the decision represents an impermissible delegation of regulatory authority; (2) the original application fails to meet the threshold requirement; (3) the decision will serve as precedent for outside interest groups to corrupt Alaska's regulatory process; and (4) the decision will discourage investment in current and prospective projects.

## **I. DNR Cannot Abandon Regulatory Supremacy**

There will always be a friction between those who want to shield the entirety of Alaska from natural resource development and those who want to consider development scenarios throughout Alaska. It is that fundamental conflict that serves to properly define the scope of what is at stake given DNR's decision in this matter. It is the DNR's responsibility to fairly and objectively balance competing interests in making decisions that meet the best interests of Alaskans. Invariably, when faithful to this process, the DNR's decision will represent a fitting and appropriate compromise between competing philosophies. Thus, AOGA finds it unsettling that the DNR would consider compromising this process by allowing one adversary to effectively serve as the ultimate arbiter. Anecdotally, the DNR's decision to grant authority to Chuitna Citizens Coalition (CCC) is tantamount to a criminal judge allowing a criminal defendant or victim to determine what sentence and sanction is appropriate. The conflict of interest is overt and overwhelming. Hyperbole aside, DNR's decision to award a reservation to CCC represents the first time the agency has willingly transferred its authority to a private citizen or organization. Perhaps more disconcerting, the CCC does not have any property right or other interest in the area in question. Finally, to further drive home the fear of divesting the Alaskan people of their autonomy through the DNR, the key leadership of the CCC resides thousands of miles away, in Arizona.

It is not only the optics of this decision that are vexing to AOGA. The DNR has granted to the CCC a right to maintain a level of water in the stream that amounts to a greater volume than the entirety of stream possesses for at least four months every year. In other words, CCC now has absolute and unfettered discretion to halt any and all upstream activities a third of every year. Instead of ensuring a balance between responsible economic development and environmental protection, the DNR, with this decision, has completely and inexcusably removed itself from the process. Moving forward, the CCC can, and surely will, simply and repeatedly initiate legal claims demanding that all

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<sup>1</sup> Please note that the arguments contained within this appeal echo the sentiment expressed in AOGA's prior comments, dated April 9, 2015, as well as in AOGA's testimony at DNR's Objection Hearing held August 21.



AOGA Appeal of DNR Water Resources Section Decision (LAS 27436)  
October 26, 2015

temporary water use permits and junior water rights holders upstream stop withdrawing water. And given that the Courts are not tasked with making policy decisions, and are ill equipped to analyze the environmental considerations, AOGA is convinced that the CCC will likely prevail each and every time. In that scenario, no one will be considering the best interests of Alaskans and no one will be considering whether environmental and economic interests can co-exist, because the Court will only be tasked with enforcing a property right. Surely, this cannot be a reasonable approach to resource management in Alaska.

AOGA encourages the DNR to establish a clear and sensible policy prohibiting private parties from compromising what are effectively permitting decisions, because the permitting process is a responsibility that the DNR cannot and should not delegate.

## **II. Applicant Fails to Meet Threshold “Need” Requirement**

To grant a reservation, the applicant must demonstrate, and the DNR must find, that a “need exists for the reservation. This is an unequivocal mandate articulated by statute and regulation. Although “need” is open to subjective definitions, it is not a nominal prerequisite in an application. Rather, it represents a substantive requirement that the DNR must utilize to describe the policy direction on the circumstances under which it will consider reservations from private parties. However, in this case, the DNR choose to view the “need” requirement as a hollow and token factor of its analysis.

First and foremost, the DNR failed to hold the applicant to its burden. Instead, the DNR willingly and unnecessarily developed an artificial and hypothetical “need” by which it could grant the application. In doing so, the DNR gave weight to any theoretical negative consequences that might result from development, but failed to consider any likely mitigation efforts that development would surely entail. The entirety of the DNR’s analysis in this matter can only be described as arbitrary and capricious.

In addition to the DNR’s unwillingness to demand that the applicant meet the threshold burden, the DNR also failed to consider the permitting process itself. AOGA believes that it is premature and imprudent to determine that a “need” exists before a lengthy and thorough permitting process even begins. Therefore, AOGA respectfully requests the DNR refrain from granting reservations to private parties or citizens under circumstances where permitting for a development project is underway or foreseeable. In this matter, the DNR should have found that the applicant failed to satisfy the “need” requirement and resisted engaging in hypothetical to justify moving forward with the application.

### **III. Decision Represents an Invitation for Further Frustration of Purpose**

As alluded to above, the DNR's decision to award a water reservation to the CCC represents an unreasonable precedent that invites opposition groups to effectively regulate resource development projects. Moving forward, the DNR need look no further than the variety of applications awaiting adjudication for evidence. From the North Slope to the panhandle, interest groups will be quoting the DNR's analysis in this matter in future applications. And given that the DNR offered little resistance to this approach, it will be difficult to treat each and every application it gets consistently. It will be expensive and lengthy, serving only to delay development projects that are truly in the best interest of Alaskans.

Finally, imagine if this scenario was reversed, and the DNR granted a reservation right to an individual or organization that would advocate commercial development no matter the environmental costs. It is unlikely that the DNR would feel comfortable abrogating its responsibilities. Nevertheless, that is what this decision represents: An open invitation to private interest groups to manipulate and corrupt a process that will only result in a litany of negative externalities for Alaska.

### **IV. Decision Discourages Investment in Alaska**

Although the DNR states that it does not want to pre-empt the permitting process, it is plainly and unquestionably doing precisely that. The DNR's entire approach in this matter is of grave concern to AOGA and industry in Alaska. There may be no more crucial factor in prospective development than fidelity of process. Even if that process is timely and expensive, if the regulatory structure is repeatable and predictable, development projects will still be sanctioned by the private sector. "Certainty" is the watchword that governs investment choices, and the DNR's decision only serves to create greater uncertainty in Alaska. The fact that an organization like AOGA, with no particular interest in mining projects, is concerned about the DNR's approach, should serve as notice for exactly how discouraging this decision is to potential investment.

Alaska is at an economic crossroads, in the midst of a state fiscal crisis, and imperiled by globally low commodity prices and limited financial capital. AOGA believes it is vital that the DNR not exacerbate these problems by creating a less attractive investment climate, which the uncertainty borne from this decision will surely do.

### **V. Conclusion**

For the reasons provided above, AOGA submits that there are a variety of valid and compelling reasons for the DNR to reverse its decision to grant a reservation of water at

AOGA Appeal of DNR Water Resources Section Decision (LAS 27436)  
October 26, 2015

the Lower Reach of Stream 2003, and to uphold the decision to deny the applications for reservations at the Middle and Main Reaches of the stream. Thank you again for your consideration of AOGA's appeal and please direct any questions or concerns you might have to Joshua Kindred at (907) 222-9604 or [kindred@aoga.org](mailto:kindred@aoga.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Kindred', with a stylized, looping flourish at the end.

Joshua M. Kindred  
Environmental Counsel

October 26, 2015

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**VIA MAIL AND EMAIL  
DNR.APPEALS@ALASKA.GOV**

**DEPARTMENT OF  
NATURAL RESOURCES**

**OCT 26 2015**

Mark Myers  
Commissioner  
Alaska Department of Natural Resources  
550 W. 7th Avenue, Suite 1400  
Anchorage, Alaska 99501

**COMMISSIONER'S OFFICE  
ANCHORAGE**

**Re: Appeal of Reservation for Stream 2003/Middle Creek-Lower Reach  
(LAS 27436)**

Dear Commissioner Myers:

We represent PacRim Coal, LP ("PRC" or "PacRim") with respect to three applications filed by the Chuitna Citizens Coalition ("CCC") to reserve water (hereinafter "reservations" or "HFRs") in designated portions of Stream 2003/Middle Creek. CCC's applications were assigned case file numbers LAS 27340, 27436 & 27437, respectively. On October 6, 2015, the Alaska Department of Natural Resources ("DNR"), Division of Mining, Land and Water, Water Resources Section, issued a decision granting a reservation of water to CCC to the Lower Reach of Stream 2003 (LAS 27436) and denying applications LAS 27340 and 27437. PRC provided comments on CCC's application for a reservation of water (LAS 27436) and is, therefore, authorized to appeal DNR's decision to grant the reservation pursuant to 11 AAC 02.010(c).

By way of this letter, PRC appeals DNR's decision to grant a reservation of water to CCC for the Lower Reach of Stream 2003 (LAS 27436). The decision should be reversed because:

- CCC did not demonstrate that a need exists for a reservation. Rather, DNR made certain improper assumptions and justifications to compensate for CCC's inability to demonstrate a need for the reservation, which lead to a flawed analysis by DNR.
- DNR used an approach to determine stream flow that lacked transparency, that has no correlation to the level of water necessary to protect fish and fish habitat, and which could require PacRim to maintain stream levels below the mine area that generally do not naturally exist in the Lower Reach of Stream 2003.

- DNR's public interest analysis was flawed because it did not evaluate fisheries information for the Lower Reach and failed to address the potential impact of the reservation on upstream users such as the proposed Chuitna Mine.
- DNR's decision establishes a troubling precedent that transforms private citizens into regulators of natural resources projects. This is poor public policy and will create permitting uncertainty and deter investment in Alaska.

This letter provides the bases upon which the decision is challenged, the identification of disputed issues of material fact, and our request for a hearing.

### **CONSTITUTIONAL, STATUTORY, AND REGULATORY AUTHORITIES**

Under Article VIII, Section 3 of the Alaska Constitution and Alaska Statute 46.15.030, water occurring in a natural state, except mineral and medicinal waters, is reserved to the people for common use and is subject to appropriation and beneficial use. The Alaska Water Use Act, AS 46.15, and Title 11, Chapter 93 of the Alaska Administrative Code, contain the statutes and regulations, respectively, under which DNR manages the State's public water resources. Alaska Statutes 46.15.030 and 46.15.145 further provide that a person may apply to the commissioner to reserve sufficient water to maintain a specified instream flow or level of water at a specified point on a stream or body of water, or in a specified part of a stream, throughout a year or for specified times, for certain purposes.

DNR commissioner shall issue a water reservation certificate if the commissioner finds that an application fulfills all of the following requirements:

- (A) The rights of prior appropriators will not be affected by the reservation;
- (B) The applicant has demonstrated that a need exists for the reservation;
- (C) There is unappropriated water in the stream or body of water sufficient for the reservation; and
- (D) The proposed reservation is in the public interest.

AS 46.15.145(c); 11 AAC 93.146(a).

An eligible person affected by a decision of the department that the Commissioner did not sign or cosign may appeal the decision to the Commissioner within 20 calendar days after issuance of the decision. 11 AAC 02.010 (e), 11 AAC 02.040. The requirements for an appeal are found in 11 AAC 02.030.

## BACKGROUND

PRC has been pursuing the Chuitna coal export project for more than 50 years, investing millions of dollars in obtaining necessary permits and in defending the permits in litigation. Initial exploratory drilling was undertaken in the late 1960s and most major permits were obtained in the late 1980s, including a record of decision (“ROD”) reached by DNR to issue the coal mining permit and the completion of an Environmental Impact Statement (EIS) by the U.S. Environmental Protection Agency, U.S. Army Corps of Engineers and DNR. The project was idled from the mid-1990s until the mid-2000s due to continuing Alaska Mental Health Trust litigation and depressed market conditions. The project resumed permitting activities in late 2005 and is currently under another major review process that will include a Supplemental Environmental Impact Statement involving federal and state agencies and widespread public involvement. That process, once complete, could lead to the issuance of permits and authorizations for the project in 2017.

CCC was formed in 2007 specifically to stop the Chuitna coal project.<sup>1</sup> CCC previously used a federal and Alaska state coal mining statutory procedure to petition DNR to deem the entire Chuit River watershed “unsuitable” for coal mining. DNR rejected that effort in 2013, reconfirming that the Chuitna area is suitable for coal mining and affirming that the area can be reclaimed using established coal mining techniques. In addition, CCC pursued the three water reservations, one below the mine area and portions of two others in the mine area, that led to DNR’s decision that is the subject of this appeal.

In its “Findings of Fact, Conclusions of Law, and Decisions” dated October 6, 2015, DNR analyzed the four factors required under AS 46.15.145(c) to issue a water reservation certificate. However, PRC believes that DNR did not comply with applicable statutory and regulatory requirements in (i) evaluating whether there is a demonstrated need for the reservation, and (ii) conducting the public interest analysis. For these and other reasons discussed in this letter, the Commissioner should reverse the decision to grant a water reservation to CCC in the Lower Reach of Stream 2003.

### **I. THE APPLICANT DID NOT DEMONSTRATE A NEED FOR THE RESERVATION IN THE LOWER REACH OF STREAM 2003.**

DNR approved the water reservation application for the Lower Reach of Stream 2003 without CCC demonstrating a “need” for the reservation as required by statute, regulation and the application form itself. As discussed further in Section I.B. below, this failure led to a flawed need analysis by DNR in the decision document.

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<sup>1</sup> See <http://chuitna.org/about/> (last accessed October 25, 2015).

The requirement to demonstrate a need for a reservation is a significant, substantive obligation that is in addition to and separate from the purpose of the proposed water reservation. The relevant statutory provision from the Water Use Act provides that a reservation can only be issued if:

[T]he commissioner finds that . . . the applicant has demonstrated that a need exists for the reservation.<sup>2</sup>

DNR's regulations expand on the statutory requirement as follows:

11 AAC 93.142. Content of application

(a) An application for a reservation of water must be made to the department on a form provided by the department. The form must be completed in accordance with the instructions furnished by the department to the applicant.

(b) Each application must

(3) explain what need exists for the proposed reservation, including reasons why the reservation is being requested;<sup>3</sup>

**A. CCC's Application Identified the Purpose, But Not the Need for the Proposed Reservation of Flow and Failed to Furnish Information in the Application Required to Demonstrate the Need for the Proposed Reservation of Water.**

The form<sup>4</sup> first requires the applicant to "[i]dentify the purpose(s) of the proposed reservation of water by checking the appropriate box(es)." Under the section entitled "Water Use," an applicant must "identify the purpose(s) of the proposed reservation of water by checking the appropriate box(es)." CCC checked the first box: "Protection of fish and wildlife habitat, migration, and propagation" and added "See Pages 48-70, Attachment A-Appendix 1". Further information on the Water Use section is actually found in Attachment A Pages 6-9 in a section appropriately titled "Water Use". CCC's section on Water Use contains a subsection on Pages 8 and 9 entitled "Other Values" in which the applicant states:

This requested reservation of water is intended to protect habitat to sustain fish production within this reach and therefore within the

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<sup>2</sup> AS 46.15.145(c)(2).

<sup>3</sup> 11 AAC 93.142(b)(3) (emphasis added).

<sup>4</sup> DNR's application form is attached as Exhibit A.



Chuitna watershed and benefit all Alaskans. Water of sufficient quantity is needed to sustain production of valuable fisheries.<sup>5</sup>

This quoted language was submitted to supplement CCC's "purpose" statement.

The form separately requires that the applicant identify and explain the need for the proposed reservation. In the section entitled "Methodology and Monitoring", an applicant must, among other things:

Attach and submit with this application documentation or reports showing facts to support the following: (a) the need for the proposed reservation of water, including reasons why the reservation is being requested.

CCC never did this. CCC submitted a 122-page water reservation application for the Lower Reach of Stream 2003. Under the section entitled "Methodology and Monitoring," CCC responded "See Pages. 4-124 Attachment A. Appendices 1-5." Further information is found in Attachment A in a section beginning on page 10 appropriately titled "Methodology and Monitoring." CCC's section on Methodology and Monitoring contains various subsections. Notably, it does not contain information relevant to a demonstration of "need for the proposed reservation" required under subsection (a) of the application form.

CCC's application is completely devoid of documentation or reports showing facts that would support the need for a water reservation. Rather than identifying and explaining the *need* for the proposed water reservation, CCC repeatedly focused on the *purpose* of the application and, thus, failed to meet the requirements of the application.

CCC clearly identifies sufficient quantities of water as the *purpose* for the proposed water reservation. It is a self-evident proposition that sufficient quantities of water are necessary to sustain the production of valuable fisheries, which is the *purpose* for flow reservations.<sup>6</sup> However, the identification of a purpose for a reservation is different than the obligation of the applicant to demonstrate a need for a reservation in the application. The Legislature clearly intended for the need demonstration to be a high bar; otherwise, it would not have required DNR to "find" that the applicant "demonstrated" the need for the proposed reservation.

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<sup>5</sup> Pages 8-9 of the CCC application are attached as Exhibit B.

<sup>6</sup> The statute identifies purposes which a reservation may be sought, including protection of fish habitat. AS 46.15.145(a)(1) (a reservation may be sought for "protection of fish and wildlife habitat, migration, and propagation ...").

Moreover, CCC does not “explain” why the need exists for the reservation nor does it provide “reasons why the reservation is being requested.”<sup>7</sup> A need focuses on why a reservation is necessary to carry out the purpose. The demonstration of need must show, at a minimum, why the flow rate of the specific waterbody is threatened by an action or circumstances.

In its application, CCC does not assert that a need for the reservation exists to protect the Lower Reach from potential impacts from any source, let alone the Chuitna Coal Mine.<sup>8</sup> As DNR acknowledged in the decision, PRC is planning to maintain seasonal flows in Stream 2003 below the mine area.<sup>9</sup> Since the Lower Reach is about 4 miles downstream of the proposed mine area, flow rates in the Lower Reach will not be affected by the Chuitna Coal Mine. No need exists.

By failing to demonstrate a need, CCC’s application was defective on its face. DNR should have denied the application on the basis that CCC failed to meet the statutory and regulatory requirements to demonstrate a need for the reservation. Instead, DNR attempted to remedy this deficiency by devising two speculative, incomplete “hypothetical” scenarios. As discussed below, neither of the two “what if” scenarios have any basis in reality.

**B. DNR Inappropriately Manufactured a Need for CCC based on a Flawed Analysis.**

As noted above, an application for a reservation requires the identification of a purpose and separately, a demonstration of a need. CCC supplies a purpose but no need. On its face, this deficient application should have been denied. But instead, DNR defines a need for CCC based on two speculative scenarios. However, even this DNR-generated need based on future threat is flawed because it fails to assume that PRC is proposing to maintain seasonally adjusted flows in Stream 2003 below the mine area. We address each of these flawed scenarios below.

The first hypothetical is focused on potential threats to the Chuit River. However, CCC has not sought a reservation for the Chuit River.<sup>10</sup> And, in fact, PRC is proposing to maintain seasonally adjusted flows in Stream 2003 below the mine area which is about 4 miles above the Lower Reach and 6 miles above the Chuit River. That means the Chuitna coal project (as proposed) would have no impact on the Chuit River. But in a search for a need, DNR assumes that Stream 2003 will be devoid of water<sup>11</sup> and analyzes the impacts of that scenario on the Chuit River.

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<sup>7</sup> See 11 AAC 93.142(b)(3).

<sup>8</sup> In fact, and as noted by DNR, CCC argued *against* a need when CCC and Cook Inlet Keeper made arguments that the mine will not go forward.

<sup>9</sup> See DNR decision at page 24, footnote 33.

<sup>10</sup> The main stem Chuit is the focus of the Alaska Department of Fish & Game (“ADF&G”) reservation application which DNR noted will be adjudicated at a later time.

<sup>11</sup> DNR does not even attempt to speculate where all of this “diverted but not returned” water from Stream 2003 would go, if not back into Stream 2003.

This hypothetical does not exist today, would not exist if the Chuitna Mine were fully permitted and developed<sup>12</sup> and, as a result, is inherently arbitrary.<sup>13</sup>

The second hypothetical is focused on the potential future threat to the entire Stream 2003 system. Specifically, DNR found that if the Chuitna Project moves forward, "there is impact to the Middle Creek/Stream 2003 system." This decision is inherently arbitrary because DNR's focus on the entire stream "system" does not distinguish between the mine area stretches of Stream 2003 and the Lower Reach in concluding there could be impacts to the Lower Reach of Stream 2003. Specifically, DNR combines the analysis for the Lower Reach with the analysis for the portion of Stream 2003 in the mine area (where clearly there will be impacts to the Stream). This "bootstrapping" is inappropriate because DNR is required to make a finding that there is a need demonstrated by the applicant for the specific section of Stream of 2003 designated in the application.<sup>14</sup> DNR cannot point to the mine area and then summarily conclude that the entire Stream 2003 "system" will be impacted by the mine and hence, there is a need for a reservation in the Lower Reach.

*Per 11 AAC 02.030(a)(9), the following material facts are disputed by PRC:*

- 1. Whether CCC's application demonstrates a need for a reservation in the Lower Reach of Stream 2003 and provides a corresponding explanation and reasons for the need.*
- 2. Whether DNR made appropriate findings, as required by statute, that CCC demonstrated a need for the reservation.*
- 3. Whether DNR's analysis of a scenario where Stream 2003 returns no water to Chuit has been proposed by PRC, or is otherwise likely to occur.*
- 4. Whether DNR's need analysis on pages 21-25 of the Decision provides appropriate justification to grant a reservation for the Lower Reach of Stream 2003.*

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<sup>12</sup> The scenario DNR created would not exist in the real world. DNR fails to consider that any permit for a mine upstream of the Lower Reach of Stream 2003 would require that seasonally adjusted flows below the mine area will be maintained in accordance with PacRim's plans. Instead, DNR arbitrarily created a hypothetical mine where none of the water from the Stream 2003 system reached the Chuit River, in order to create a perceived threat to flow rates in the entire stream system.

<sup>13</sup> The DNR itself complained mightily when EPA undertook this same approach in its watershed assessment. Like EPA's evaluation of a hypothetical copper mine in the Pebble area, the DNR in this case analyzed a hypothetical mine that does not return any of the diverted water to Stream 2003. The analysis of flawed "what if" scenarios -- rather than the analysis of actual proposals advanced by project proponents -- does the public a tremendous disservice and lends support to a perception that permitting in Alaska is unpredictable and fraught with arbitrariness.

<sup>14</sup> See AS 46.15.145(a)(1).

5. *Whether DNR's need analysis for Stream 2003 adequately distinguishes between the three stretches of Stream 2003.*

*PRC requests a hearing on these issues.*

## **II. DNR ARBITRARILY GRANTED FLOWS THAT ARE NOT NATURALLY PRESENT 35-40% OF THE TIME.**

DNR granted flows for the Lower Reach of Stream 2003 that are naturally absent more than 1/3 of the time. Table 3C of the decision has a column titled "% duration" which indicates the estimated timeframe when the granted flows are present.<sup>15</sup> By DNR's own calculation, the natural stream conditions will be unable to satisfy the reservation 35-40% of the time. If sustained, this reservation would exist downstream of the proposed Chuitna coal mine. The reservation is virtually guaranteed to generate disputes between the holder of the reservation, DNR, and upstream users such as PRC. It is inherently arbitrary for DNR to grant flows at a level, knowing that the level of water does not naturally exist in the Lower Reach 1/3 of each month of an average year without evaluating the foreseeable conflicts and providing mechanisms to ensure the reservation is based in reality and would not be abused by its holder.

The reservation would have real world and significant ramifications for the Chuitna project, if the mine is developed. First, PRC is confident that CCC will blame any shortfall of water in the Lower Reach on the Chuitna Mine. Second, PRC and other upstream users may have a need for temporary water use permits ("TWUPs") for activities such as exploration drilling. If the water in the Lower River is oversubscribed, DNR may find it difficult or impossible to issue TWUPs to upstream users during any period in which streamflow will natural be less than the reservation amount. Again, the "shortage" of water is a fiction. There is only a "shortage" in the sense DNR is granting a reservation of water at levels that are artificially too high and which do not exist 35-40% of the time in the natural world.

DNR's decision is flawed, and the Commissioner should deny the application on the basis that the flows requested by CCC (which were even higher than the flows granted by DNR) were arbitrarily chosen and would not accommodate competing uses of the water.

*Per 11 AAC 02.030(a)(9), the following material facts are disputed by PRC:*

1. *Whether DNR has established appropriate flow levels for the Lower Reach when these flows do not naturally exist 35-40% of the time.*
2. *Whether DNR appropriately evaluated the impact of the granted flows on actual and potential upstream users, including the proposed Chuitna Mine.*

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<sup>15</sup> See DNR Decision at page 26, Table 3c.

*PRC requests a hearing on these issues and requests the opportunity to provide expert testimony at the hearing.*

**III. CCC FAILED TO DEMONSTRATE THAT THE REQUESTED AMOUNT OF FLOW IS NECESSARY TO PROTECT THE RESOURCES AT ISSUE IN THE LOWER REACH.**

11 AAC 93.141(a)(1) requires the applicant to demonstrate:

a level of water necessary to maintain suitable habitat conditions for the various life stages of fish, other aquatic organisms...and their habitat including water quality depth, velocity, and temperature, substrate, or streamside vegetation...<sup>16</sup>

11 AAC 93.142(b)(8) requires an applicant to:

identify physical, biological water chemistry, and socio-economic data substantiating the need for and the quantity of water requested for the proposed reservation.<sup>17</sup>

CCC's application failed to provide both. These regulatory obligations recognize that flow rates must be linked to the protection of specific stream habitat features, such as spawning gravels/spawning reaches, rearing habitat, fish passage, and fish cover. These habitat uses may be different at different times of the year, requiring differing minimum flows. The requirement that the applicant provide information to justify required flow rates needed to sustain habitat conditions is completely lacking in the application for the Lower Reach of Stream 2003 and in the corresponding decision by DNR.

To make a decision, DNR must have a clear understanding of the appropriate flow level to support the purpose of the proposed reservation. From there, DNR must determine whether any reserved flow is needed to address the applicant's purpose. This critical foundational data was not supplied in the application nor was any such information reviewed by DNR.

A legitimate question for a requested reservation is whether less (or more) water would achieve an appropriate level of protection. DNR cannot make a non-arbitrary decision without a clear understanding of the level of (i) flow required to protect a given resource or stream feature, and (ii) the level of flow expected to occur naturally in the stream.

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<sup>16</sup> 11 AAC 93.141(a)(1).

<sup>17</sup> 11 AAC 93.142(b)(8).

The application was deficient as to both issues. PRC's comment on CCC's proposed reservations of water read<sup>18</sup> in summary:

CCC indicates that the requested flow for each month was chosen based on fish presence, the highest Tennant habitat category, and evaluation of flow exceedance data (*i.e.*, flow duration). However, the applications did not describe the exact methods, percentages of flow, show data calculations, or explain how these variables were qualitatively or quantitatively applied to determine the requested instream flow for each month. The three IFR Applications do not provide adequate documentation references, or justify how the requested flows were determined.

The PRC comment letter identified other significant flaws in the applications. For example, CCC's *requested* stream flows do not occur naturally in the stream 90% of the time. The comment letter also pointed out the lack of scientific support in requesting minimum flows that rarely occur naturally.

*Per 11 AAC 02.030(a)(9), the following material facts are disputed by PRC:*

- 1. Whether DNR appropriately disclosed the scientific justification and methodology used to support the reservation granted for the Lower Reach of Stream 2003.*

*PRC requests a hearing on this issue and requests the opportunity to provide expert testimony at the hearing.*

#### **IV. DNR ERRED WHEN IT GRANTED A RESERVATION NOT SUPPORTED BY THE APPLICATION**

##### **A. DNR Inappropriately Granted a Flow Reservation that was Not Requested or Supported in the Application or Record.**

DNR did not grant CCC's requested flows. Rather, DNR chose different flows. DNR suggests that the agency worked with CCC and its consultants to come to agreement on a flow reservation quantity. The decision relies on Table 4 that shows percent of time flows in the Lower Reach exceed a certain stream flow each month. It then indicates that the data in the table "support the amount of water that the applicant and its experts agreed with DNR were appropriate to be reserved as outlined in Kim Sager's December 31, 2014 memorandum."<sup>19</sup>

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<sup>18</sup> Attachment D to PRC's April 9, 2015 comment letter is attached as Exhibit C.

<sup>19</sup> See DNR Decision at page 29, Table 4.

Table 4 is an analysis of stream flow duration. It does not include any relationship to stream flow levels necessary to maintain certain characteristics of fish habitat by season in the Lower Reach. Instead, it refers the reader to the December 31, 2014 Kim Sager memorandum to find the reason that “the applicant and its experts agreed with DNR” on the appropriate flows to reserve- a quantification not requested in CCC’s application or supported anywhere in the decision record. In fact, the Sager memorandum does not relate flows to any level of fish habitat protection in the Lower Reach. A justification of the recommended levels is not even presented in the memorandum. The words “fish” or “fish habitat” do not appear anywhere, much less a description of different types of habitat in the Lower Reach.

DNR has provided no data or information to support the alternative reserve flows that it granted CCC. DNR has cast aside the application requirements, instead basing its determination on an apparent negotiation with the applicant, completely outside the required public process and that were never proposed for public comment. For this reason, the flow rates chosen by DNR are arbitrary because they do not provide justification as to the stream conditions in the Lower Reach that the reservations purport to protect.

#### **B. DNR Arbitrarily Selected the Chosen Flows.**

DNR failed to adhere to proper procedures and information requirements when it assigned alternative flow quantities to CCC’s application. It is impossible to understand from the decision how the alternative flows that were “mutually” agreed upon between CCC and DNR provide a given level of fish habitat protection in the Lower Reach. The level of stream flow in a reservation requires a site-specific application to a particular stream reach and on-site verification which was not performed or provided by CCC for DNR to evaluate.

CCC asked DNR to use a form of the Tennant Method to calculate the appropriate reservation of water. CCC buttressed its request for use of the Tennant Method with four publications, a 1995 Supreme Court Decision, and the 30-year-old State of Alaska Instream Flow Handbook.

PRC’s comments on the application demonstrated that CCC selectively and inaccurately used this literature to support its use of the method.<sup>20</sup> CCC did not dispute PRC’s contention that CCC mischaracterized the literature. Instead, it submitted two letters that reviewed PRC’s objections to the method. However, these letters actually support PRC’s contention that the Tennant Method was inappropriately applied. Considering the arguments in PRC’s public comments on the Tennant Method, and the support given by CCC’s submission, there is no question that the Tennant Method is inappropriate for a decision of this magnitude, and further, it should not be used without on-site validation.

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<sup>20</sup> Pages 7-9 from the April 9, 2015 PRC comment letter are attached as Exhibit D.



The Tennant Method is seductively simple and easy to apply. One need only select a narrative level of protection for any stream anywhere, and then calculate the percentage of the annual average flow needed to maintain that protection. DNR did not calculate the reservation of water in average annual flow using the Tennant Method, but on average monthly flow, on a basis which is not defined in the literature. DNR does not explain what criteria it used to select the reservation flow rates. Because DNR applied percentages of duration on a monthly basis, it did not apply the Tennant Method, as requested by CCC. As noted above, neither CCC nor DNR justify how the monthly duration percentages used relate to specific habitat type or life stage of fish in the Lower Reach.

PRC's comments on the CCC application demonstrated the need for on-site validation of any methodology. As the comments indicated, never in Alaska has an instream flow methodology been validated on a stream of this size (small). And never has DNR approved a reservation of water for a stream of this size. It appears that the applicant has never even visited the site. CCC cannot know whether its recommended methodology is appropriate for the Lower Reach of Stream 2003. We do not believe that any reputable scientist would conclude that an important instream flow allocation decision should be made without on-site validation. CCC did not conduct on-site validation. While we understand that DNR conducted a quick fly-over, to our knowledge DNR never took agency scientists to the Lower Reach of Stream 2003 to determine whether whatever unexplained methodology it is using for the reservation is relevant and appropriate for the Lower Reach of Stream 2003.

In the entire DNR decision, there is a single reference to a method for determining stream flow. That method (footnote 31 on page 24) is for a presumptive minimum flow; that is, a flow number that can be applied in the absence of site-specific studies. If DNR wishes to establish a presumptive flow that is applicable in Alaska, it must promulgate regulations to that end. However, in this case, DNR must follow existing regulations, and to set a flow value, it must balance the values of that stream with water needs. To do this work in a non-arbitrary way, DNR must require on-site studies to determine the fisheries values, and it must require on-site studies to determine the stream flow necessary to protect those particular fishery uses. Any other decision is scientifically unsupportable and arbitrary.

*Per 11 AAC 02.030(a)(9), the following material facts are disputed by PRC:*

- 1. Whether the form of the Tennant Method used by DNR to support the reservations for the Lower Reach of Stream was appropriate in the context of a major natural resources project involving hundreds of millions of dollars in capital.*
- 2. Whether DNR appropriately disclosed the scientific justification and methodology used to support the reservation granted for the Lower Reach of Stream 2003.*

3. *Whether it was appropriate for DNR to apply percentages of duration on a monthly basis rather than on an annual basis.*
4. *Whether the methodology used by DNR to establish the reservations should have been verified on-the-ground.*

*PRC requests a hearing on these issues and requests the opportunity to provide expert testimony at the hearing.*

**V. DNR'S PUBLIC INTEREST DETERMINATION WAS FLAWED BECAUSE IT DID NOT ANALYZE THE IMPACT OF THE RESERVATION ON THE PROPOSED CHUITNA MINE AND FAILED TO ANALYZE FISHERIES DATA FOR THE LOWER REACH.**

DNR determined that granting a reservation of water for the Lower Reach of Stream 2003 was in the public interest. However, DNR's approach in making the decision was flawed because DNR failed to consider information that is crucial to the balance of the public interest factors.

- First, as noted in Section II above, the proposed reservation would require water in the Lower Reach that does not naturally exist 35-40 % of the time. This could be a major problem for the Chuitna Mine as a potential upstream user of water from Stream 2003. DNR's public interest analysis is flawed because it completely failed to address this material fact and, worse, it suggested that the reservation would not impact the mine at all (DNR stated that the reservation is "outside the mine site.")<sup>21</sup>
- Second, DNR's decision does not describe the fishery resources to be protected in the Lower Reach of Stream of 2003. DNR could not (and did not) properly evaluate the fisheries for this area because CCC did not provide the requisite information to DNR. Given that the purpose of CCC's request reservation is to protect fish and fish habitat, it is inexcusable for DNR to simply assume that the Lower Reach of Stream 2003 is valuable for fish.

**A. Overview of Public Interest Determination Factors.**

A public interest determination must describe the interests to be considered and balanced by DNR. The governing statute<sup>22</sup> provides eight criteria for DNR to consider:

- 1) the benefit to the applicant resulting from the proposed appropriation:

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<sup>21</sup> See DNR Decision at page 43.

<sup>22</sup> AS 46.15.080(b).

- 2) the effect of the economic activity resulting from the proposed appropriation;
- 3) the effect on fish and game resources and on public recreational opportunities;
- 4) the effect on public health;
- 5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
- 6) harm to other persons resulting from the proposed appropriation;
- 7) the intent and ability of the applicant to complete the appropriation; and
- 8) the effect upon access to navigable or public water.

**A. The Public Interest Analysis Did Not Evaluate the Impact of the Reservation on the Operations of the Proposed Chuitna Mine.**

DNR's public interest determination was flawed because DNR failed to analyze the impact of the reservation on the operations of the proposed Chuitna Mine. The reservation would give CCC legal standing to argue that the granted amount of water should be maintained in the Lower Reach. However, as discussed in PRC's comments on the application and as summarized in Section II of this letter, there are times when the granted level of flow will not naturally be present 40% of the time. The Chuitna Mine would be an upstream user of the water, and PRC has serious concerns regarding the impact of the reservation on mining operations.

This is not a hypothetical concern because DNR's analysis indicates that there will, in fact, be times of shortage upwards of 40% of the time. In such cases, CCC would likely place the blame for shortage on the Chuitna Mine, even if the shortage is due to drought or natural variation in the stream. DNR's public interest analysis is flawed because it failed to even acknowledge -- let alone evaluate -- the potential impact of the reservations on the operations of the Chuitna Mine (and any other upstream users of water). This is crucial information and material to the overall balancing of the public interest factors, particularly subsection (6) which requires DNR to address the "harm to others resulting from the proposed appropriation."<sup>23</sup>

**B. The Public Interest Analysis is Flawed Because it Failed to Evaluate Fisheries for the Lower Reach of Stream 2003.**

CCC submitted an application with DNR for the stated purpose of protecting fish and fish habitat in the Lower Reach of Stream 2003. By granting the reservation to CCC, any upstream use in

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<sup>23</sup> AS 46.15.080(b)(6).

Stream 2003 including PRC, the adjacent landowner, the Alaska Mental Health Trust, its permittees, and possibly upstream landowners and lessees will presumably be limited as to the amount of water they may withdraw to maintain the water reservation in the Lower Reach of Stream 2003. DNR cannot grant the reservation without fully understanding the fisheries resources and habitat that would be protected by the reservation in the Lower Reach.<sup>24</sup> To do so, DNR must balance the fish resources in the Lower Reach against potential future use of that water by others.

The decision describes Stream 2003 in general area, geologic setting, the location of each reach, the climate, stream flow data including adequacy. Nowhere in the description of the Lower Reach of Stream 2003 does it describe the fish resources or habitat that exist in this specific section of Stream 2003. It is not possible to read the decision and know the importance of the Lower Reach for spawning or rearing salmon because CCC did not provide the requisite information for DNR to evaluate.

This is a material omission in the public interest analysis because DNR must know the size, nature, and value of the fisheries resource that would be protected through a reservation. Presumably, DNR's decision would be different for a reach of river where a single salmon spawned than for one that supported thousands of salmon. The DNR decision (page 34) provides that 246–1,789 Coho salmon return to Stream 2003 as a whole. 20% of the coho smolt production comes from Stream 2003 as a whole. Therefore, during the particular months of adult returns and smolt out-migration, we know how many fish are migrating through the Lower Reach. But, the decision fails to evaluate how many coho salmon spawn in the Lower Reach. Is it one fish? 100% of the run? Similarly, the decision fails to evaluate what percent of the salmon run rears in the Lower Reach? Is it one smolt? Of all of them?<sup>25</sup> The habitat use of the stream is critical to determining what minimum flow is required to maintain that function (i.e. passage vs. rearing vs. spawning).

DNR must disclose and evaluate this critical fisheries information to undertake an appropriate, legally compliant public interest determination for the Lower Stretch of Stream 2003.

*Per 11 AAC 02.030(a)(9), the following material facts are disputed by PRC:*

- 1. Whether DNR appropriately disclosed and evaluated the impact of the reservation on the operations of the Chuitna Mine, should it be developed.*

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<sup>24</sup> DNR is obligated under the statutory public interest factors to consider “the effect on fish and game resources.” AS 46.15.080-(b)(3).

<sup>25</sup> DNR's socioeconomic analysis is similarly flawed because it is reliant on flawed fisheries information. DNR's socioeconomic evaluation on page 33–34 focuses on the value of all of Stream 2003. Despite regulatory requirements to specify biological and socioeconomic values for the specific area of a reservation of water, DNR granted a reservation without evaluating the socioeconomic value of the Lower Reach by itself.

2. *Whether DNR appropriately disclosed and evaluated biological and socioeconomic value of the fisheries resources for the Lower Reach of Stream 2003.*

*PRC requests a hearing on these issues and requests the opportunity to provide expert testimony at the hearing.*

**VI. THE DECISION ESTABLISHES AN ANTI-DEVELOPMENT POLICY FOR NATURAL RESOURCES PROJECTS.**

DNR's decision is being lauded by opponents of responsible resource development as precedential and the "next big thing" to stop major natural resources projects. No other state in the United States allows a regulatory agency to transfer a core function – protection of fish and fish habitat – to private citizens. The fact that DNR would do so ahead of the permitting process is simply astounding.<sup>26</sup>

- This period of low commodity prices and decreasing investment is the wrong time for the State of Alaska to create additional permitting uncertainty.
- This decision will contribute to the perception that Alaska's permitting process is unstable and runs counter to DNR's often-stated position that it has a rational, sound permit process.

To grant a reservation, the applicant must demonstrate – and DNR must find – that a "need" exists for the reservation. DNR should use the need criterion to establish policy direction on when it will consider reservations from private parties. Specifically, DNR should determine that there is not a need for a reservation under circumstances where there is a major permitting process underway or reasonably foreseeable. This approach establishes sound policy because:

- State and Federal agencies will address maintenance of flow in Middle Creek below the mine area in the permitting process. These agencies are charged by law with protecting fish and fish habitat. They evaluate these same issues and make appropriate decisions on behalf of public interests rather than private interest. The work of the scientific experts working on behalf of the public should not be pre-empted.

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<sup>26</sup> In several places, the decision places blame on the court (which ordered DNR to process the applications). But, it was DNR—not the court—who made the decision to grant a reservation at this time. DNR should not have turned a bad decision (making an early determination) into two bad decisions (granting a reservation and doing so ahead of the permitting schedule). Instead of granting the reservation at this very early stage, DNR should have denied it because CCC did not demonstrate a need for the reservation.

- Citizens have a right to participate in the permitting process at many stages, and can raise these very same issue at that point, including making demands on DNR, ADF&G or other agencies to establish reservations.
- DNR has legal authority to determine that there is no need for a reservation when a major permitting process is underway or reasonable foreseeable. Most critically, this approach will establish the bright line certainty that is needed for the regulated community.

In closing, we believe the Commissioner should establish a clear policy that DNR will not grant reservations to private parties under circumstances where permitting for a major project is underway or reasonably foreseeable.

## VII. ADDITIONAL CONSIDERATIONS

PRC strongly believes that the Commissioner should reverse the decision of DNR staff and deny the reservation for the Lower Reach of Stream 2003. CCC has not met its burden to demonstrate a need for the reservation. Moreover, the application suffers from material technical flaws, and the public interest and policy issues tilt strongly in favor of not granting a reservation under these circumstances. If the Commissioner determines that a reservation is appropriate for the Lower Reach, then we believe it is imperative to remand the Lower Reach decision back to DNR to address the many deficiencies identified in this appeal. However, if the Commissioner determines that a reservation should be upheld at this point, it must be modified and conditioned to ensure that its terms are clear, that it preserves a role for DNR in oversight, and that it minimizes the opportunities for frivolous legal proceedings.

In press statements made following the decision, DNR acknowledged that granting the reservation is precedent-setting. A significant outstanding question is the role of DNR in managing the reservation. DNR stated in the press that this decision does not grant CCC anything more than standing in any administrative proceeding. Here is the text from the KTUU story on October 7, 2015:

*But David Schade, chief of DNR's water resources section, noted that although the state granted the Chuitna Citizens Coalition a water reservation, DNR still manages the water. The decision simply grants the citizens' group standing in any administrative proceedings, according to Schade. "There is no grant of control," he said.*

PRC believes that DNR's intent to manage the reservation must be clearly spelled out in the granting of the reservation. DNR has authority to condition the reservation. According to Alaska regulations, reservations of water and the certificates can be granted with conditions.

(d) "The commissioner's decision to grant, conditionally grant, or deny an application for a reservation of water will be summarized by written findings of fact and conclusions of law, including justification of any special conditions to which the reservation is subject. In determining whether the proposed appropriation is in the public interest, the commissioner will consider the criteria set out in AS 46.15.080(b).<sup>27</sup>

Another regulation provides:

(d) The certificate of reservation will state any additional terms or conditions the commissioner considers necessary to protect the prior valid rights of other appropriators and the public interest...<sup>28</sup>

PRC requests that the Commissioner modify the underlying decision to specify conditions for DNR management of the reservation should DNR reject this appeal. Items that should be included in such conditions on a certificate include:

- **Reserving Power and Authority to DNR and ADF&G for Mitigation.** The certificate should clearly state that it does not convey a superior water right with respect to a stream flow modification or water withdrawal approved by the DNR, after consultation with the Department of Fish and Game, to benefit fish habitat or fish populations, including a stream flow or withdrawal for the purposes of a project's fish habitat mitigation. The certificate should state that necessary adjustments to the requested flows will be made as appropriate by DNR to accommodate such mitigation uses of water from Stream 2003.
- **Specifying the administrative process that must be followed by the certificate holder.** The certificate should clearly state that the holder of this reservation of water must first request that DNR take action if it believes that the reservation of flow granted under the reservation of water have been significantly impacted. The certificate should address the following points:
  - If terms of the reservation are not being met, and an upstream water withdrawal with an inferior right is causing a significant and non-temporary effect on the stream flow granted under the reservation, the holder of the reservation may request that DNR take appropriate action regarding the person effectuating the water withdrawal. The certificate holder must first identify in writing, at a minimum, the level, date, duration, location and proximate cause of the impacts

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<sup>27</sup> 11 AAC 93.145(d) (emphasis added).

<sup>28</sup> 11 AAC 93.146(d) (emphasis added).



with material facts that supports the request. DNR may request additional information which in its sole discretion DNR believes is necessary to evaluate the request. Certificate holder shall have 30 days in which to respond to the request. Failure to timely respond will be deemed a denial of the request. The certificate holder alone has the right to make the aforementioned request.

- DNR will make a decision on the request within 45 days following receipt of the request or the receipt of any additional information requested by DNR.
- If DNR determines that the rights under the reservation of water are not being met and that a water withdrawal with an inferior right is causing a significant effect on the stream flow granted under the reservation, DNR will determine an appropriate course of action.
- If the certificate holder disagrees with DNR's decision, it may appeal or request reconsideration of DNR's decision, as appropriate, under 11 AAC 02.
- **Clarifying the Flow Reservation is based on a mean monthly average.** As granted in the Decision, it is unclear if the flow reservation would be applied on an instantaneous, mean daily, or true mean monthly average. The basis of the flow reservation was reviewed under the mean monthly average basis. If granted in anything less than this (i.e., if granted on the basis of mean daily flow or instantaneous flow), there is insufficient water in the natural stream over 1/3 of the time. This must be clarified. Otherwise, DNR will face complaints and claims of insufficient water, even though the low flow could simply be the result of the normal fluctuation of natural conditions.
- **Provision for Low Flow periods.** The reservation also needs to be conditioned to account for natural annual variation in flows. In addition to the concerns over instantaneous or daily flow levels, natural conditions (i.e., droughts or low precipitation levels) will drive flow levels down below even the mean. DNR must provide a way to account for natural variations in flows.
- **Legal Access to the Site.** The water reservation is located entirely on lands owned by the Mental Health Trust Authority. This area is a tributary to the Chuit River and is non-navigable. The land owner's rights to control access to its property should not (and cannot) be dictated by the DNR Water Resources Section. As such, the reservation must clarify and should explicitly state it does not provide any specific or associated legal right to access the property. The securing of any such right is the obligation of the certificate holder.

## VIII. CONCLUSION

The decision by the DNR Water Resources Section to grant a reservation of water for the Lower Reach of Stream 2003 is, as explained above, flawed in a myriad of ways. First, DNR accepted an application from CCC that was missing critical information -- required by statute, regulation and the required application form -- demonstrating the need for the proposed reservation for the Lower Reach of Stream 2003. Second, DNR erred first by inappropriately finding a need for CCC and further, by doing so with flawed analyses. Third, DNR did not provide justification or linkage between the flow numbers and the resources that these flows would protect. Fourth, DNR's public interest analysis was flawed because it failed to evaluate critical information fisheries and the potential impact of the reservation on upstream users. Last, DNR's decision establishes a troubling precedent that transforms private citizens into regulators of natural resources projects; this is poor public policy and will create permitting uncertainty and deter investment in Alaska.

For these reasons, PRC respectfully requests the Commissioner to deny the requested reservation for the Lower Reach of Stream 2003.

\* \* \* \*

The undersigned will be the principle point of contact for this appeal. We ask that you please provide a courtesy copy of all communications relating to the appeal to:

Dan Graham  
[dan@pacrimcoal.com](mailto:dan@pacrimcoal.com)  
Joe Lucas  
[joe@pacrimcoal.com](mailto:joe@pacrimcoal.com)  
PacRim Coal, LP  
1007 West Third Avenue, Suite 304  
Anchorage, AK 99501

Thank you for your anticipated careful review of the points raised in this appeal.

Very truly yours,

  
Eric B. Fjelstad

DIVISION OF MINING, LAND AND WATER  
WATER RESOURCES SECTION

[www.dnr.state.ak.us/mlw/water/index.htm](http://www.dnr.state.ak.us/mlw/water/index.htm)



Anchorage Office 550 West 7 <sup>th</sup> Avenue, Suite 1020 Anchorage, AK 99501-3562 (907) 269-8588 Fax: (907) 269-8947		<b>For ADNR Use Only</b> Date/Time Stamp
<b>For ADNR Use Only</b> LAS #	<b>For ADNR Use Only</b> CID #	<b>For ADNR Use Only</b> Receipt Type      WR

## APPLICATION FOR RESERVATION OF WATER

### INSTRUCTIONS

1. Complete one application per stream segment or water body (incomplete applications will not be accepted).
2. Attach legible map(s) indicating all sections from the beginning to the end of stream segment or for all parts of the lake or water body.
3. Submit non-refundable fee of \$1,500.
4. Attach extra pages for each section, as needed.

### APPLICANT INFORMATION

Organization Name (if applicable)		Agent or Consultant Name (if applicable)	
Individual Applicant Name (if applicable)		Individual Co-applicant Name (if applicable)	
Mailing Address	City	State	Zip Code
Daytime Phone Number		Alternate Phone Number (optional)	
Fax Number (optional)		E-Mail Address (optional)	

### LOCATION OF PROPOSED RESERVATION OF WATER

#### Geographic Name of Waterbody

Meridian	Township	Range	Section	Quarter Sections	
				¼	¼
				¼	¼

Describe the location of the point or points defining the boundary of the proposed reservation of water by river mile index, river mile, geographical or cultural landmark, etc., on the stream or water body.

Attach a US Geological Survey map at 1:63,360 scale, or 1:250,000 scale if 1:63,360 scale is unavailable for the area, clearly identifying the following for the proposed reservation of water:

1. Sections, townships, range and meridians
2. The stream or water body in which the reservation of water is proposed
3. Specific point or points defining the boundary of the proposed reservation of water
4. Permanent, temporary or planned locations of water measurement devices (such as gaging stations, weirs, staff gages)
5. Permanent, temporary or planned bench marks

#### WATER USE

Identify the purpose(s) of the proposed reservation of water by checking the appropriate box(es).

- ☐ Protection of fish and wildlife habitat, migration, and propagation
- ☐ Recreation and park purposes
- ☐ Navigation and transportation purposes
- ☐ Sanitary and water quality purposes

Describe in detail the purpose(s) of the proposed reservation, including, when appropriate, species and life stage, type of recreation, vehicle, or water quality parameter, or other relevant information.

Is the water currently being used for the purpose(s) applied for?

☐ Yes

☐ No If no, when will use for this purpose begin? Specify approximate date \_\_\_\_\_

#### WATER QUANTITY

Water requested to be reserved – **Check one**

- ☐ To maintain a specific instream flow rate, measured in cubic feet per second
- ☐ To maintain a specific amount of surface water, measured in cubic feet or acre feet
- ☐ To maintain a specific surface water elevation, measured in relation to a permanent benchmark

Quantify the specific amount of water requested to be reserved. Identify and quantify, as appropriate, flow rates, quantities, surface water elevations, depths, etc., as they relate to the requested time periods of the year during which the reservation is proposed. Include any flow release schedules from projects upstream of the proposed reservation that would be necessary.

#### **METHODOLOGY AND MONITORING**

Attach and submit with this application documentation or reports showing facts to support the following:

- (a) The need for the proposed reservation of water, including reasons why the reservation is being requested.
- (b) Identify and describe the methodology, data, and data analysis used to substantiate the need for and the quantity of water requested for the proposed reservation of water, including:
  1. Name and description of method used
  2. Who conducted the study and analysis
  3. Schedule of when data collection and analysis occurred
  4. Type(s) of instrument(s) used to collect and analyze data
  5. Description of data and how the data were collected, including when applicable, (A) selection of stream reach, study site and transect selection, (B) flow, survey, elevation, and depth measurements, (C) pertinent physical, biological, water chemistry and socio-economic data
  6. Description of how data were analyzed, and
  7. Maps, photos, aerial photos, calculations, and any other documents supporting this application

If there are provisions for monitoring this proposed reservation of water, include the following:

- (a) Description of monitoring equipment (such as gaging stations, staff gages, weirs)
- (b) Location of monitoring equipment
- (c) Provisions for payment for monitoring
- (d) Reporting system

11 AAC 93.142 sets out the required information on the application for a reservation of water. 11 AAC 93.143 authorizes the commissioner to decide what additional information needed to process an application for a reservation of water. This information is made a part of the state public water records and becomes public information under AS 40.25.110 and 40.25.120. Public information is open to inspection by you or any member of the public. A person who is the subject of the information may challenge its accuracy or completeness under AS 44.99.310, by giving a written description of the challenged information, the changes needed to correct it, and a name and address where the person can be reached. False statements made in an application for a benefit are punishable under AS 11.56.210.

#### **SIGNATURE**

The information presented in this application is true and correct to the best of my knowledge.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Title (if applicable)

#### **Fee required by regulation 11 AAC 05.010(a)(8)**

- **\$1,500** for up to 40 hours of staff time

Make checks payable to "Department of Natural Resources."

### Wildlife

Known wildlife resources specifically identified within the Chuitna River watershed (Chuitna River and its tributaries) include moose, bear, beaver, other furbearers, and birds. **Pg. 69-74, Att. A-Appendix 2.**

### Socioeconomics

The socioeconomic values of fish and wildlife to the Alaska's economy and the well-being of its residents are great. Fish bearing waters of the Chuitna River watershed support important commercial, sport, and subsistence fisheries. **Pg. 46-68, Att. A-Appendix 1; Pg. 69-74, Att. A-Appendix 2; Pg. 75-83, Att. A-Appendix 3.**

Literature reviews indicate salmon and other fish species present in Lower Reach-Middle Creek (Stream 2003) contribute to sport, commercial, and subsistence fishing in the area. **Pg. 24, Fig. 3; Pg. 75-83, Att. A-Appendix 3.**

As noted above, fish habitat and production in Lower Reach-Middle Creek (Stream 2003) contribute to the overall production of fish in the Chuitna River watershed. There is no reach and site specific socioeconomic information available for this reservation reach versus generalized Chuitna River watershed and related Susitna River watershed/Cook Inlet regional information. However, it can be inferred fish production in this system contributes to socioeconomic values for this region. **Pg. 75-83, Att. A-Appendix 3.**

Most publically available economic studies represent the years prior to the recent Chinook return declines for commercial and recreational socioeconomic information for this region. **Pg. 75-83, Att. A-Appendix 3.**

### Other Values

Lower Reach-Middle Creek (Stream 2003) is located within the Kenai Peninsula Fish Habitat Partnership (KPFHP) and Western Native Trout Initiative Fish Habitat Partnership (WNTI). Fish Habitat Partnership geographic areas. These are two of 19 nationally recognized Fish Habitat Partnerships established under the National Fish Habitat Action Plan (NFHAP) by the Association of Fish and Wildlife Agencies, the U.S.

Department of Interior and the U.S. Department of Commerce in 2006 (AFWA 2006) and National Fish Habitat Board (2012).

A representative of the Alaska Department of Fish and Game (ADF&G) chairs the National Fish Habitat Board (Board). The Board oversees and facilitates voluntary implementation of conservation (protection, restoration and enhancement) actions under the National Fish Habitat Action Plan performed by Fish Habitat Partnerships (FHPs). Among the actions promoted and supported by the Board are filing for reservations of water to sustain fish production and fish habitat. This application represents an example of a voluntary conservation action promoted by the Board.

This requested reservation of water is intended to protect habitat to sustain fish production within this reach and therefore within the Chuitna River watershed and benefit all Alaskans. Water of sufficient quantity is needed to sustain production of valuable fisheries.

#### **WATER QUANTITY:**

Requested instantaneous flows in cubic feet per second (cfs) for Lower Reach-Middle Creek (Stream 2003) to be reserved follow (Table 1):

Month	Requested Flow (cfs)
January	11
February	8.5
March	11
April	36
May	72
June	30
July	10
August	21
September	36
October	36
November	23
December	14

**Table 1.** Reservation of Water (ROW) Flows Requested for Lower Reach-Middle Creek (Stream 2003).

Re: PRC Comment Letter  
Instream Flow Reservation Applications  
LAS 27430, LAS 27436, and LAS 27437

**Attachment D**  
**The Instream Flow Applications are Technically Flawed**

**1. The applications requested flows are inconsistent and unexplained.** The method to estimate flows for the IFR Applications used by the applicants did not apply the original Tennant Method of estimating fair, good, or optimum flows from a percentage of the Average Annual Flow (QAA) for the a station. They further did not adequately explain, justify, or show how their requested flows were determined for each month.

Each of the three separate applications requested instream flow reservations by month using the Average Monthly Flow (QAM) based on inadequate gage station data. CCC indicates that the requested flow for each month was chosen based on fish presence, the highest Tennant habitat category, and evaluation of flow exceedance data (i.e. flow duration). However, the applications did not describe the exact methods, percentages of flow, show data calculations, or explain how these variables were qualitatively or quantitatively applied to determine the requested instream flow for each month. The three IFR Applications do not provide adequate documentation, references, or justify how the requested flows were determined.

The Table below shows the actual percentages of the reservation of water requested for each station (reach) versus the QAM, respectively. A comparison of the Percent of QAM in these tables demonstrates that CCC did not consistently apply or justify their method for the flow request, either between stations, or between months. The language in each application is identical. But the results are different. For example, the requested flow reservation for the month of April is 67% of the QAM for Main Reach (Station 128), 61% for the Middle Reach (Station 141), and 83% for Lower Reach (Station 180). These irregular percentages of QAM are consistent across all months. Note that the applicants requested a flow of 109% of the QAM in March for the Middle Reach (Station 141), while requesting a flow reservation of 83% and 89% of the QAM for the Main and Lower Reaches, respectively. The table highlights the apparent haphazard inconsistency that was applied by CCC in determining their flow reservation requests. More detailed information is contained in the Tetra Tech report in Attachment B.



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Instream Flow Reservation Applications  
LAS 27430, LAS 27436, and LAS 27437

**4. CCC selectively and inaccurately uses academic literature to support its use of the Tennant Method.** CCC's use of the literature mischaracterizes the studies and omits important caveats.

To buttress their use of the Tennant Method, the Cook Inlet Keeper cites four publications by Estes (1984, with Osborn 1986, with Reiser 1989, and 1998), Annear et al (2004), a 1995 Alaska Supreme Court Decision, and the 30-year old State of Alaska Instream Flow Handbook (DNR 1985). In general, CCC mischaracterizes these studies and omits important caveats.

**Estes, 1984.** Mr. Estes thesis is important because it evaluates the Tennant Method for an Alaska stream: specifically Willow Creek which flows into the Susitna River from Hatcher Pass. Estes' master's thesis in 1984 recognizes the value of the Tennant Method but concludes that understanding the actual trade-offs requires field verification at the site. For example, he indicates that one cannot know whether reserving 60% of average annual flow during the summer months is actually "outstanding" or whether 30% of winter flow is "excellent" without field verification. Put another way, reserving any amount of water is good, but understanding the relationship between what is being reserved and the "narrative" value (in Tennant's terms) requires field verification. Specifically, Estes concludes: "Without actually conducting a field investigation, it is not possible to translate the true value of Tennant's ratings to the specific resources it is being applied." He goes on to say, that the method can be valid "if calibrated to the site or area studied." He also recommends biological parameters be included.

**Estes and Osborn, 1986.** Similar caveats are written into Estes and Osborn (1986), which is taken from the Mr. Estes 1984 master's thesis. One caveat in particular is worth noting, because it quotes Tennant himself as cautioning against applying his method without on-site field work. "The method is simple to apply. Thus, it has the potential for inadvertant misuse because it does not account for specific species/life phase habitat requirements. Also, the QAA alone does not describe short- or long-term changes in flow rates, seasonal variability, or channel geometry. Accordingly *Tennant cautions that site evaluations should be conducted to determine if the percentages of QAA assigned to classifications require modification (emphasis added).*"

**Estes and Reiser, 1989.** This publication is not a review of instream flow methods. Rather, it presents "two nonstatistical surveys (completed in 1981 and 1986) that solicited information from state and federal agencies concerning instream flow issues and practices in North America."<sup>1</sup>

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<sup>1</sup> The authors sent out 202 questionnaires. 49.5% responded representing 46 states and 12 Canadian provinces. According to the publication, they asked what instream flow technique was used in the jurisdiction. States could indicate more than one technique. By far the most common method was incremental habitat method (a more complex but more reliable instream flow evaluation method). 32 of the 46 states indicated the IFIM method. Eleven mentioned the Tennant Method, but only one, North Dakota, mentioned only the Tennant Method. Since one cannot tell whether the Tennant method was relied upon in non-reconnaissance situations or situations where the water was significantly contested, this publication is not relevant to the question of whether the method is appropriate for Tributary 2003 stream reaches.

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**Estes 1998.** The fourth Estes publication is a DF&G annual report on the instream flow analyses performed by DF&G 17 years ago. In 1998, DF&G did use the Tennant Method. They used it on four long-studied, extremely productive fish streams. Three in Bristol Bay and on Kodiak Island (The Kvichak River, Newhalen River, Wood River in Bristol Bay, and Karluk River on Kodiak Island). What CCC omitted, however, is that DF&G no longer uses the Tennant Method. Attachment C provides a list of the most recent 60 instream flow adjudications in which ADF&G was the applicant. None use the Tennant Method. All use the flow-duration method.

**Annear et al (2004).** The fifth publication cited by CCC is a book describing and comparing most instream flow evaluation techniques in use. With respect to the Tennant Method, it concludes "This is a standard-setting method. It assumes a relation to biology that should be validated in the region where it is being applied. The method can be acceptable for use in systems where there is little or no hydrologic and biologic data, and little or no competition for water. *It is a tool for planning and reconnaissance level flow determination. When complex flow trade-offs are required, more detailed, site-specific studies using other methods should be conducted to analyze habitat trade-offs with different flows (emphasis added).*" This conclusion is not an endorsement of using the Tennant Method for Chuitna Tributary 2003.

**Alaska Supreme Court (1995).** CCC claims that the Supreme Court of Alaska accepted the Tennant method as a "valid instream flow analytical procedure." In fact, the court did not. The lawsuit was about whether DNR could validly extend placer mining permits or needed to require the applicant to submit a new permit. The issue involved with extending the permits was about water use. The plaintiff's expert used the Tennant Method to comment to DNR that 50% of the water was needed for "excellent fish habitat." The court recognized that the plaintiff's concern had "merit" and determined that DNR did not diligently answer that concern. But recognizing that an expert has a valid concern that must be addressed is a far cry from recognizing the validity of the Tennant Method. And certainly it is unrelated to the concern about whether the Tennant Method must be field verified, whether it is valid for Tributary 2003, and whether it is valid 20 years in the future after significantly more research has been accomplished on the issue.

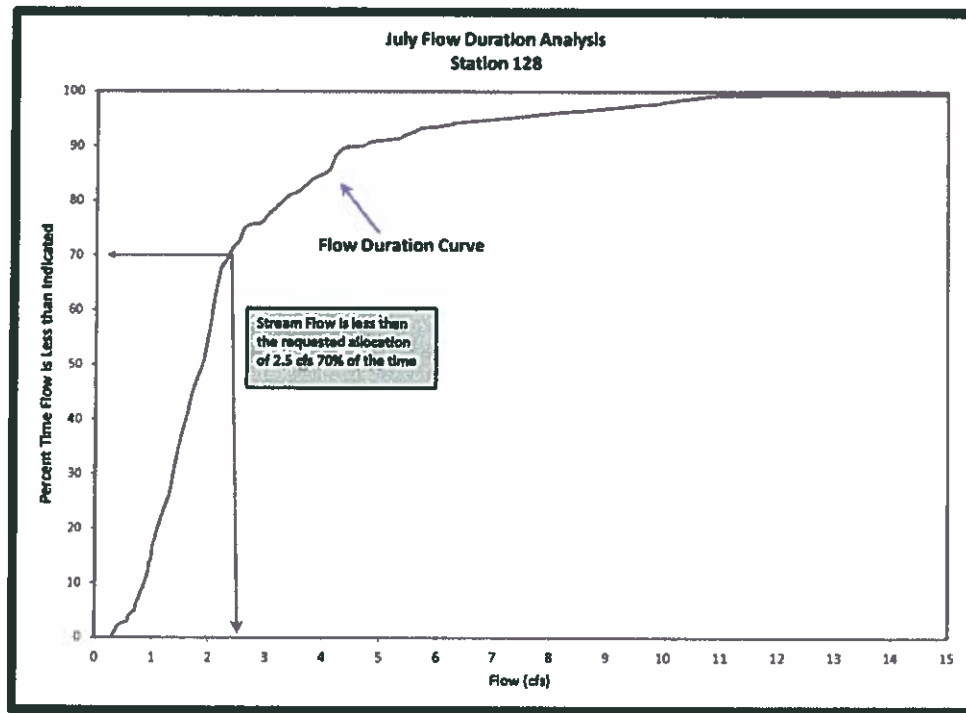
**State of Alaska Instream Flow Handbook. (DNR 1995).** Finally, Cook Inlet Keeper cites the 30-year-old State of Alaska Instream Flow. It is a short, simple pamphlet designed for the general public not knowledgeable about hydrology or instream flow techniques. Citing this superficial publication, while ignoring the significant scientific knowledge has been gained in the last 30 years and the fact that ADF&G and DNR have not adjudicated an instream flow application using the Tennant Method since 2010, has little value. In addition, this publication has its own superficial caveats, "Discharge-related methods are attractive because of their simplicity; however, they should be used with caution. Most discharge-related methods were developed after close observation of streamflow and fish habitat conditions in regions in the Lower 48, but Alaska conditions differ from those in other states or regions... Therefore, discharge-related methods developed in the Lower 48 may have to be adapted for Alaskan conditions."

**Conclusion.** By omitting important caveats and mischaracterizing some information, the CCC application distorts conclusions of the academic literature with respect to the issues in question. In fact, rather than support use of the Tennant Method for the conditions in Tributary 2003, the

Re: PRC Comment Letter  
Instream Flow Reservation Applications  
LAS 27430, LAS 27436, and LAS 27437

literature cited by CCC supports the notion that the must be verified by site investigations before it can be reliably used. Further, the notion that it has been recognized as valid by the State of Alaska is dependent on the mischaracterization of a Supreme Court decision and on a handbook from 30 years ago.

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The interpretation of this figure is that for their Main Reach instream flow request for July, CCC requested a flow that does not exist in the stream 70% of the time. Overall the instream flow requests exceed actual stream flow between 61% and 90% of the time for the months that Tetra Tech evaluated. For November (Middle Reach), CCC has requested to maintain a flow that is more than what exists naturally in the stream 90% of the time.

Put another way, CCC is claiming that in order to maintain adequate habitat for the fish in the Middle Reach in November, it is necessary to maintain water in the stream that is currently not there 90% of the time.

Considering that their lowest request exceeded streamflow 61% of the time, the application is claiming that in order to maintain acceptable stream habitat, it is generally necessary to reserve water that does not exist most of the time. These requests defy science. Requests to reserve water that rarely exists is scientifically unsupported and a reason to reject the applications.

**3. CCC did not provide accurate verifiable data to show that the reaches in question were not gaining reaches.** In three letters on December 6, 2013 and in a meeting on February 21, 2014, DNR required CCC to show that the proposed reaches do not include a losing stretch where the flows drop below the measured flows on which an application is based. Specifically, DNR wrote "there are no gages within the proposed reach that are downstream of the measuring gage upon which you rely. Please provide a complete gain/loss study for the proposed reach or other reliable evidence that the proposed reach is gaining throughout its length and does not experience a losing stretch where flows drop below the measured flows upon which your

Re: PRC Comment Letter  
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application is based. CCC failed to supply the information required by DNR and used flawed evidence in its reply.

In response to the request for a complete study, CCC provided Google Earth photographs showing open leads during the winter. CCC is correct in the fact that a significant number of open leads during the winter would indicate higher-temperature groundwater entering the stream — a gaining reach. However, the photos used by CCC were taken during a typical time for break-up. Open leads during break-up lack the same meaning.

Tetra Tech examines four years of available data from Gage Stations 140 and 141 for the month of April (Attachment B). The analysis shows that on average spring breakup is beginning by the middle of April. The photos used by CCC were taken on April 15, 2011 — squarely within the time of break-up calculated by Tetra Tech. Further, weather data from the nearest weather station (Kenai Airport) show that warmer than average temperatures were exhibited for the entire month in 2011 and the high temperature on April 15, 2011 was 53° F. This comparison is relevant. McVehil-Monnet (2009) noted in the site climatology report that, during mine site meteorological investigations, the average temperature between the Kenai station and the mine site data was the same and thus serves as a reliable proxy. A conclusion regarding gaining and losing stream reaches cannot be made using an aerial photograph from one day during breakup in April in 2011.

CCC also compared the stream flow at upstream and downstream gages to conclude that the larger flow at the downstream gage indicated a gaining reach. Unfortunately, they made the comparison without knowledge of the contribution of the intervening tributaries. Without knowing the flow at intervening tributaries one cannot know whether the larger flow at the downstream gage was because of incoming groundwater or because of the flow of incoming tributaries.

In short, there are established methodologies for determining whether a reach is gaining or losing. These are summarized in Attachment B. However, all of the methodologies require field work at the site. CCC had an opportunity to complete the field work to provide the information required by DNR. They failed to do so. In the absence of that information, DNR must reject or suspend the application pending the successful conclusion of the required field work. We cannot see how DNR can accept CCC's analysis as a valid response to DNR's data request. DNR should not approve the applications without a verifiable field study demonstrating the reach is a gaining or losing reach.

**4. Hydrologic Data for the Middle Reach does not meet DNR standards.** DNR has consistently required a minimum of 5 years of hydrologic data to adjudicate an instream flow right. In the past, DNR has allowed an applicant fill in a year or so by generating a synthetic record if they could show a correlation with a good gage record in the region. For Middle Reach, the gap is too large, and CCC has not shown the correlation. Thus, the applications fall short of DNR standards and practice for adjudicating instream flow reservation applications. This standard is especially important where the applicant chooses an instream flow methodology that is entirely dependent on a hydrologic calculation. All instream flow evaluation methodologies rely largely on hydrology. But methods such as wetted perimeter calculations, PHABSM, IFIR,

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# RESOURCE DEVELOPMENT COUNCIL

Growing Alaska Through Responsible Resource Development

October 26, 2015

Commissioner Mark Myers  
Alaska Department of Natural Resources  
550 West 7<sup>th</sup> Avenue, Suite 1400  
Anchorage, AK 99501

Via email to [dnr.appeals@alaska.gov](mailto:dnr.appeals@alaska.gov)

Re: Instream Flow Reservation of Water for Stream 2003/Middle Creek – Lower Reach  
(LAS 27436)

Dear Commissioner Myers:

The Resource Development Council for Alaska, Inc. (RDC) is writing to request your reconsideration and denial of the Department of Natural Resource's (DNR) decision to grant the Instream Flow Reservation (IFR) of Water for Stream 2003/Middle Creek – Lower Reach (LAS 27436) to Chuitna Citizens Coalition, a private party.

RDC is a statewide business association comprised of individuals and companies from Alaska's oil and gas, mining, forest products, tourism and fisheries 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.

RDC has consistently opposed the designation of public resources to private individuals, such as water rights designations. It is not in the public interest, and creates further uncertainty in the permitting process. Moreover, the State of Alaska (State) has never before granted an IFR to an individual or private party. The determination to grant the application undermines DNR's authority and delegates responsibility to private individuals.

## **RDC Urges Reconsideration of the Decision that Creates Further Uncertainty in Permitting Process**

One of RDC's primary concerns is that approval of the IFRs would undermine existing regulatory processes and set a dangerous precedent for community and resource development projects across Alaska. Investment in Alaska should not be jeopardized by pre-emptive actions to stop community and responsible resource development.

Although DNR has indicated that it does not intend to pre-empt the permitting process, RDC reiterates concerns that anti-development groups will use this action as a new tool to stop projects, or at a minimum, introduce significant uncertainty and delay, chilling Alaska's business climate.

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In the decision record, DNR states, “there may be significant harm to many people if other development industries are damaged by even a perception that a pre-emption of the permitting process can be gained by the use of a reservation of water,” further validating RDC’s concerns. In addition, the statement contradicts the granting of the IFR to a private party.

In a letter dated April 9, 2015, RDC wrote, “Every project, no matter the size or location, should have an opportunity to go through the existing, extensive permitting processes. In the case of mining, there are more than 60 major permits and many more from local, state, and federal agencies that must be successfully obtained. The process will determine the best use of water and will address and consider mitigation, such as re-routing water away from project areas until reclamation can be done. The process will not permit one industry or resource to advance at the expense of another.”

Furthermore, RDC requested “DNR to consider all uses of water in the IFR application process. Granting, or even evaluating, an IFR without considering competing water right applications is not in the public interest. Without evaluating both, DNR cannot truly weigh and balance the economic and public interest of the competing applications, nor mitigation measures.

### **RDC Opposes Delegation of Critical Public Resources to Private Citizens**

RDC is concerned DNR has delegated critical public resources to private citizens. DNR is essentially giving away its authority, which is inconsistent with DNR’s obligations under the Alaska Constitution (Article VIII, Section 3), the public trust doctrine, and the public expectation that resources intended to benefit the people of Alaska, such as water to maintain fish habitat, should be managed by the representatives of the people – their agencies.

In addition, the nearby proposed mine project is on Alaska Mental Health Trust Authority (Trust) lands. The Trust acquired these lands specifically for the development of the coal and the royalties it will provide to the Trust. The Trust has a mandate to maximize revenues from the one million acres of land it was granted throughout the state.

The State of Alaska depends on the responsible development of natural resources on its lands to diversify and support its economy (Article VIII of the Alaska Constitution). It is not in the public interest, nor is it appropriate, for DNR to delegate authority of public resources to private citizens.

Additionally, the decision to grant the IFR to private citizens will likely cause confusion and interfere with management of all activities upstream of the Lower Reach that have any need for water. Specifically, RDC is concerned the grantees have been granted a legal right to the streamflow that does not naturally exist approximately one-third of the time. Thus, one-third of the time, the owner of reservation of water in the Lower Reach will be able, at *their* discretion, to go directly to court and demand that all junior water rights and temporary water use authorizations upstream of the Lower Reach cease, without a requirement to notify DNR. Delegating management of a watershed to a private party is just wrong. These resources should be held by state agencies that represent the people of Alaska, not private parties.

DNR itself explains ([dnr.alaska.gov/mlw/water/instream.cfm](http://dnr.alaska.gov/mlw/water/instream.cfm)), “If you have an instream water right, you have priority use of that water over people who file later for water rights. You can have legal standing in case of conflicting uses of water by people without water rights.” This further validates RDC’s concerns of confusion and interference.

**Conclusion**

RDC urges DNR to reconsider and deny the decision to issue approval of IFR of Water for Stream 2003/Middle Creek – Lower Reach (LAS 27436) to a private party. This decision potentially undermines the permitting process and ultimately sets a dangerous precedent for future projects across Alaska's resource sectors, including oil and gas and community development. Additionally, RDC requests DNR clarify the process in which IFRs are to be managed and who IFRs can be issued to, and only then should existing and new applications be evaluated. Further, if DNR does not reconsider and deny the IFR, anti-development groups will use this action as a new tool to stop projects, or at a minimum, introduce significant uncertainty and delay, further chilling Alaska's business climate.

Thank you in advance for your consideration of our comments.

Sincerely,



Marleanna Hall  
Executive Director



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**Borell Consulting Services LLC**  
6420 Rockridge Drive  
Anchorage, AK 99516  
907-230-7580

October 26, 2015

Honorable Mark Myers  
Commissioner  
Department of Natural Resources  
550 W 7<sup>th</sup> Ave, Suite 1400  
Anchorage, AK 99501-3554

Re: Appeal of Chuitna Water Reservation Decision, LAS Case File 27436

Dear Commissioner Myers,

I am hereby appealing the decision that awarded a water reservation for the lower reach of Middle Creek (Stream 2003) to the Chuitna Citizens Coalition, a private entity.

Basis for challenging this appeal:

1. It is not appropriate, wise or legal to grant a water reservation unless the applicant has demonstrated the need for such reservation. In this instance the applicant has not demonstrated the need for the reservation.
2. A robust permitting process is in place to address potential needs and conflicts and this process should be followed. If it is not followed in this case, the DNR will undermine its authority and justification to require that the process be followed in future cases.
3. At some point in the future, this loose application of the statute and regulations will likely result in infringements on private and Native-owned private lands.
4. Granting water reservations without following the proper process (i.e. not requiring that the applicant provide a demonstration of need) sets an extremely bad precedent. Such a grant may seem inconsequential at this time but will greatly increase conflicts in the future and greatly complicate the management of state lands and waters by the DNR.
5. The applicable statute and regulations have been established through a legal public process and the DNR does not have the authority to disregard the clear requirement that the applicant must demonstrate the need.

Thank you for considering my concerns.

Sincerely,



Steven C. Borell, P.E.  
Principal

Cc: Ed Fogels  
Brent Goodrum

Howard J. Grey  
1927 W. 13<sup>th</sup> Avenue  
Anchorage, Alaska 99501  
Email [h\\_l\\_grey@hotmail.com](mailto:h_l_grey@hotmail.com)

October 26, 2015

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Commissioner Mark Myers  
State of Alaska  
Department of Natural Resources  
550 W. 7<sup>th</sup> Avenue Suite 1400  
Anchorage, Alaska 99501

Subject: Appeal of DNR Water Resources Section decision granting a reservation of water for Stream 2003/Middle Creek Lower Reach (LAS 27436)

Dear Commissioner Myers;

Please consider this my request for appeal to that portion of the Water Resource Section decision pertaining to the Lower Reach of Middle Creek. I am in agreement with the decisions conclusions on those portions of the creek identified as Upper and Middle Reaches.

First of all we should consider whether or not the applicant is qualified to administer water resources management duties required for the proposed conveyance. Do they have professional personnel on staff with water management experience? Do they have personnel with experience in proper sampling and analysis of water quality and flow analysis? Do they employ personnel with backgrounds in fisheries biology or management? Have they provided a detailed plan showing how they plan to manage the proposed conveyance? All of these activities are presently handled by State Agencies with the decades of experience needed to properly protect this resource.

Secondly we should look at the surrounding ownership to determine if such a conveyance will affect the upland owner's future use and enjoyment of the area or will they be stymied by the proposed segregation. According to the decision the Boroughs land use ideas center around hunting and fishing activities. However the lands in this area are held by the Mental Health Trust with a duty to provide for revenues to their worthwhile programs. Transferring water management to a private entity could jeopardize future development plans and income streams for The Trust.

Last we should consider whether or not the proposed conveyance is in the best interest of the public. Resource management is currently administered by three well qualified agencies the departments of Natural Resources, Fish and Game and Environmental Conservation. Together these agencies have the personnel, experience and statutory authority to address all the issues needed to properly manage the resources in this area. The agencies also have established procedures, forms and timelines for public interaction.

In closing I would urge you not approve the proposed Lower Reach appropriation.

Thank you for the opportunity to comment on this issue.

Sincerely,



Howard J. Grey

**PSPA**  
**PACIFIC SEAFOOD PROCESSORS ASSOCIATION**  
*Est. 1914*

October 26, 2015

Commissioner Mark Myers  
Alaska Department of Natural Resources  
550 West 7<sup>th</sup> Avenue  
Suite 1400  
Anchorage, AK 99501

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*Via email to [dnr.appeals@alaska.gov](mailto:dnr.appeals@alaska.gov)*

Re: Instream Flow Reservation of Water for Stream 2003/Middle Creek – Lower Reach (LAS 27436)

Dear Commissioner Myers:

I am writing to express the Pacific Seafood Processors Association's (PSPA) objection to and appeal of the Department of Natural Resources' (DNR) decision to grant the Instream Flow Reservation (IFR) of Water for Stream 2003/Middle Creek – Lower Reach (LAS 27436). PSPA is a trade association representing nine (9) seafood companies who collectively own and operate 26 seafood processing plants in Alaska. Collectively our members participate in all of Alaska's commercial fisheries and are therefore critically dependent on continued sustainable management of those fisheries and the habitat upon which they depend.

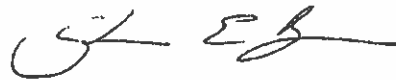
Water is a public resource and PSPA believes it is in the public's best interest that reservations be held by public entities that are formally accountable to the public. We believe the public interest, through the formal public processes, is best served by balancing the trade-offs of public interests such as conservation impacts, economic benefits, and opportunity costs. Historically, the issuance of instream flow reservations to the Alaska Dept. of Natural Resources (DNR), the Alaska Department of Fish & Game (ADF&G), and the Bureau of Land Management (BLM) is appropriate, in our view. These agencies have the scientific and management expertise required to administer public water resources.

Allowing this decision to stand is not in line with the public's interest, and will serve to encourage a flood of applications throughout the state from Alaskan and non-Alaskan entities with diverse interests. Additionally, these applications will add to the Department's workload, straining limited staff resources and threatening the rigor and timeliness of the Department's core permitting processes.

With regard to our industry, the abundance and quality of water is critical in all areas where we operate, both for use by fish in rivers, streams, and lakes, and for use by our processing plants. Control of that public resource properly resides within the public domain of the Commissioner and water reservation holding entities **that are** accountable to the public and who do operate in an open, transparent, and public process. To do otherwise, puts the fish stocks we depend on, the employment of our workforce, the economies of coastal communities, the operations of our plants, and the value of our investments at great risk.

For these reasons we respectfully request you reconsider your decision.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. E. Reed', with a stylized flourish at the end.

Glenn E. Reed, President



October 26, 2015

Mr. Mark Myers  
Commissioner  
Alaska Department of Natural Resources  
550 West 7th Avenue, Suite 1070  
Anchorage, AK 99501

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COMMISSIONER'S OFFICE  
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Via email to [dnr.appeals@alaska.gov](mailto:dnr.appeals@alaska.gov)

Re: Instream Flow Reservation of Water for Stream 2003/Middle Creek – Lower Reach (LAS 27436)

Dear Commissioner Myers:

The Alaska Chamber is writing to request you reconsider and deny the Department of Natural Resource's (DNR) decision to grant the Instream Flow Reservation (IFR) of Water for Stream 2003/Middle Creek – Lower Reach (LAS 27436) to Chuitna Citizens Coalition, a private party.

The Chamber is an organization dedicated to improving the business environment in Alaska. The Chamber represents hundreds of businesses from Ketchikan to Barrow that share a common goal: to make Alaska a viable and competitive place to do business. The Chamber supports efficient regulation, fiscal responsibility, and efforts taken to improve or protect the business environment in Alaska.

The Chamber advocates for responsible natural resource development by improving efficiencies of the permitting process and gaining access to resources. By granting this instream flow reservation, DNR is abdicating its statutory responsibility, not to the whole of Alaska's citizens, but to specific individuals, some not even residing in our state. This is a decision that assaults the very foundation of the State's regulatory process. It pulls resource management from the public interest and concentrates that authority in the hands and interests of individuals.

This striking, precedent-setting reservation is in direct conflict with the department's published mission to "develop, conserve and maximize the use of Alaska's natural resources consistent with the public interest." It is DNR's responsibility to apply the rigorous and lawful processes, established through legislation and defined in statute, to manage natural resources on behalf of the Alaska public. To neglect that responsibility by abdicating the department's authority is wrong.



The Chamber supports DNR in the pursuit of rigorous, reasonable regulatory processes, and urges you to reconsider and deny the decision to issue approval of IFR of Water for Stream 2003/Middle Creek – Lower Reach (LAS 27436) to a private party.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Rachael Petro', written over a faint, larger version of the same signature.

Rachael Petro  
President/CEO

cc: Mr. Ed Fogels, Deputy Commissioner, Department of Natural Resources