

From: Deantha Crockett <Deantha@AlaskaMiners.org>
Sent: Monday, October 26, 2015 9:49 AM
To: DNR, Appeals (DNR sponsored)
Subject: AMA appeal to DNR decision for Chuitna IFR
Attachments: AMA appeal to DNR decision on CCC IFR.pdf; ATT00001.htm

Hello,

Attached is a letter to Commissioner Mark Myers outlining AMA's wish to appeal the Water Resources Section decision to grant a water reservation at the Lower Reach of Stream 2003/Middle Creek (LAS 27436).

Thank you,

Deantha Crockett
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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 7th 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", written over a light blue horizontal line.

Deantha Crockett
Executive Director