



August 22, 2018

VIA EMAIL ONLY

(bill.walker@alaska.gov)

Governor Bill Walker
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Walker:

During our talk at a coffee shop in Homer last week, you appeared confused and unaware about an important issue about which I've written to you before, including just last month, and about which we've met in-person.

The issue involves the legal right of Alaskans to reserve water in streams to protect wild salmon. Now, as the battle over the Stand for Salmon ballot initiative heats up, and as salmon runs across the state fail to materialize, your Administration is inviting contempt proceedings from the Alaska Superior Court due to its failure to obey the law.

It has been 9 years since the Chuitna Citizens Coalition filed instream flow applications to protect wild salmon in Middle Creek in the Chuitna watershed on the west side of Cook Inlet. They submitted to DNR the required \$4500 application fee, which DNR duly accepted. They have spent tens of thousands of dollars fighting for their legal right to reserve water in a salmon stream.

Yet the Walker Administration has fought them every step of the way, wasting countless hours and squandering untold public tax dollars. Equally disturbing, during this same timeframe, your Administration has issued dozens and dozens of water rights and Temporary Water Use Permits (TWUP) to large corporations to privatize our water and take it out of our salmon streams.

I am attaching the letter I sent you last month, which lays out a more thorough timeline of events, along with a January 2018 letter to your DNR Commissioner, Andy Mack, which

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condemns his decision to overturn his staff's determination to grant a water reservation to the Chuitna Citizens Coalition.

I am also attaching a July 2017 email from the Alaska Miners Association to Commissioner Mack, which reveals the political basis for his unfounded and unprecedented decision.

As a Governor, as a lawyer and as an Alaskan, you have a legal and a moral duty to uphold the law. The Chuitna Citizens Coalition does not have the financial wherewithal to generate the political clout of the big oil, gas and mining corporations. All they can do is appeal to your sense of right and wrong.

The Alaska Superior Court has given your Administration until August 27 to make a decision. And there's only one decision that complies with the law: to grant the instream flow reservation on Middle Creek to the Chuitna Citizens Coalition to protect wild salmon.

We sincerely hope you do the right thing. For Alaskans, for the rule of law and for our wild salmon.

Yours for Cook Inlet,



Bob Shavelson
Inletkeeper

Enc. a/s
Cc: (VIA EMAIL ONLY)
Scott Kendall, Chief of Staff
Andy Mack, DNR
Heidi Hansen, DNR
Brent Goodrum, DNR
Dave Schade, DNR
Sam Cotton, ADFG

David Rogers, ADFG
Jim Balsiger, NOAA
Glenn Merrill, NOAA
Jon Kurland, NOAA
Greg Siekaniec, USFWS

Deantha Crockett

From: Deantha Crockett
Sent: Wednesday, July 26, 2017 4:15 PM
To: Mack, Andy T (DNR); Goodrum, Brent W (DNR); Heath, Sarah M (GOV)
Subject: DNR Response to Private Entity Reservation of Water Questions
Attachments: Doug Vincent-Lang Response Letter 7-19-17.pdf; Reservation of Water Standard Conditions - Eff 9-16-2015.pdf

Commissioner Mack, Director Goodrum, and Sarah:

At our June 29th meeting, we understood that Commissioner Mack shared some of our concerns about the appropriateness of assigning a property right to instream water to a private party, and that the Department's recent actions to privatize public water through in stream flow reservations may be under review. The attached letter dated July 19 to Mr. Vincent-Lang seems to contradict the information we received at that meeting. Could you please clarify the Department's position, especially in light of the discussion at our June 29th meeting?

Thank you.

Deantha Crockett
Executive Director
Alaska Miners Association
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deantha@alaskaminers.org
121 W. Fireweed Lane, Suite 120
Anchorage, AK 99503

This email has been sent from a computer made of the mined minerals we depend on for everyday life. As we communicate together, please be thankful mining makes it possible.



July 3, 2018

VIA EMAIL ONLY

(bill.walker@alaska.gov)

Governor Bill Walker
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Walker:

In 2009, a group of Alaskans filed an application under state law to keep water in a fish stream to protect wild salmon on the west side of Cook Inlet.

Today—nine years later—your DNR Commissioner Andy Mack and the state stand in violation of a court order requiring DNR to make a decision on the application.

We are writing today because our oceans and streams are at a tipping point. Huge factory trawlers continue to discard massive amounts of salmon and halibut by-catch. Hatcheries are pushing billions of additional fish into the North Pacific food chain. And climate change is heating up our coastal streams above Clean Water Act standards and creating “warm blobs” in our ocean.

In short, we are repeating the very same mistakes which lead to the demise of wild salmon runs across the globe.

There are some issues we can control more easily than others, and reserving water in wild salmon streams is one of the most doable. But the same oil, gas and mining interests opposed to salmon habitat protection are fighting to stop everyday Alaskans from securing instream flow rights.

The irony here is of course thick: these same corporate “persons” routinely secure rights to take water out of our fish streams. Yet they use their considerable wealth and influence to stop ordinary people from keeping water in a stream to protect wild salmon.

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On the recommendation of your Transition Team, you embraced a “fish first” policy, and we’re writing today to urge you to abide by your own policy.

As Governor, you and your Executive Branch agencies have broad authorities to protect the stream flows and habitat our wild salmon need to thrive. To date, you have chosen not to do so.

We are writing now to urge you in the strongest possible terms to direct your DNR Commissioner to follow the law, obey the order of the State Superior Court, and issue a decision based on the facts of the case and the law surrounding it.

Otherwise, it would be unfortunate for a court to issue a contempt citation for the state’s failure to protect fish habitat at a time when salmon runs across the state are struggling.

Thank you for your attention to this important issue, and please do not hesitate to contact me with any questions at 907.299.3277 or bob@inletkeeper.org

Yours for Cook Inlet,



Bob Shavelson
Inletkeeper

P.S. Thank you for your recent letter asking the Army Corps to halt its permitting process for the proposed Pebble mine. If you are serious about protecting Bristol Bay fisheries and the economies, families and cultures they support, we urge you to use your available authority to deny the fish habitat permit(s) the mine needs to operate.

P.P.S. Attached please find a letter we wrote to Commissioner Mack in January 2018.

Enc. a/s

Cc: (VIA EMAIL ONLY)

Andy Mack, DNR
Heidi Hansen, DNR
Brent Goodrum, DNR
Dave Schade, DNR
Sam Cotton, ADFG

David Rogers, ADFG
Jim Balsiger, NOAA
Glenn Merrill, NOAA
Jon Kurland, NOAA
Greg Siekaniec, USFWS



VIA EMAIL ONLY

(andy.mack@alaska.gov)

January 18, 2018

Andy Mack, Commissioner
Alaska Department of Natural Resources
550 West 7th Ave., Suite 1400
Anchorage, AK 99501

Re: Instream Flows & Wild Salmon Protection in Alaska

Dear Mr. Mack:

I am writing on behalf of the Chuitna Citizens Coalition (Chuitna Citizens) because we have serious concerns you are working to strip Alaskans of their legal right to keep water in our streams to protect wild salmon.

This week the Alaska Superior Court once again ruled against DNR in its quest to stop the Chuitna Citizens from reserving water in a wild salmon stream on the west side of Cook Inlet. This is but the latest in a long string of decisions where the State of Alaska has fought to delay and deny its own residents their legal right to protect our salmon resources for current and future generations.

On June 3, 2009, DNR accepted Chuitna Citizens' application to reserve water in Middle Creek, a wild salmon stream in the Chuitna watershed on the west side of Cook Inlet. After several years of unreasonable delay, Chuitna Citizens was forced to sue DNR to comply with the law. Finally, after a court order - more than 6 years after Chuitna Citizens filed its application - DNR issued a decision granting Chuitna Citizens an instream flow reservation on Middle Creek in October 2015.

Predictably, industry trade groups, including the Alaska Miners Association and the Resource Development Council, appealed the decision. Then, nothing. For two more years, DNR sat on the appeals—forcing more expensive and time-consuming litigation—and denying Alaskans their legal right to reserve water in our wild salmon streams.

Then, on December 4, 2017, you finally issued a decision, and by all accounts, it turned common sense and fairness upside down. In one of the most twisted and illogical decisions I have ever read, you ruled that because PacRim Coal no longer planned to develop its massive coal strip mine in the Chuitna watershed, such changed circumstances necessitated an entirely new decision.

But as any objective observer knows, removing the gravest threat to a salmon stream has absolutely no bearing on reserving adequate water flows to protect salmon. To the contrary, the

“changed circumstances” marked by PacRim’s departure should have led you to affirm DNR’s previous decision to grant the instream flow reservation.

Except there was one problem: the Alaska Miners Association and other corporate interests don’t like the idea of Alaskans having legal rights to protect their salmon. This position is of course filled with irony because DNR routinely grants mining, oil and gas corporations water rights to take large volumes of water out of our salmon streams.¹ And as a basic policy matter, it makes little sense to allow Outside corporations to have the legal right to take water out of our salmon streams if everyday Alaskans do not have similar rights simply to keep water in our streams to protect wild fish.

So, instead of obeying the law, we are concerned you are now working simply to change it. We recognize the political influence of the trade groups and the corporations as an election looms, yet we find it hard to believe the Walker Administration would continue to fight Alaskans who simply want to protect their wild salmon.

Thank you for your attention to this important matter. Attached please find a letter from your own agency which lays out the constitutional, statutory and regulatory case for instream flow reservations held by everyday-Alaskans.²

Please feel free to contact me if you would like to have a serious conversation about instream flows at 907.299.3277 or bob@inletkeeper.org

Yours for Cook Inlet,



Bob Shavelson
Inletkeeper

Enc. a/s

Cc: (Via EMAIL ONLY)
Governor Bill Walker
Lt. Governor Byron Mallot
Jahna Lindemuth, Alaska Attorney General
Larry Hartig, ADEC
Sam Cotton, ADFG
Brent Goodrum, DNR

¹ To compound the irony, it was actually the mining industry who helped push the Alaska Legislature to include “person[s]” in the 1980 amendments to the Water Use Law, because the placer miners wanted instream flow reservations to ensure they had enough water to dilute the effluent from mining operations to meet water quality standards. See Mary Lu Harle, Alaska Dep’t of Natural Res., *Private Appropriation of Instream Flows in Alaska*, Instream Flow Protection in the Western United States: A Practical Symposium at 16–17 (Mar. 31 – Apr. 1, 1988).

² Letter from David Schade, Section Chief, DNR Division of Mining, Land & Water, Water Resources Section, to Doug Vincent Lang (July 19, 2017).



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Natural Resources

DIVISION OF MINING, LAND & WATER
Water Resources Section

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July 19, 2017

Mr. Doug Vincent-Lang,
5951 Olympia Circle
Anchorage AK 99507

Dear Mr. Vincent-Lang,

This letter is in response to your questions to the Attorney General, “*regarding the appropriateness and legal basis for issuing in-stream reservations (a state resource) to private entities.*” Your inquiry has two parts. I will first address the legal basis for a reservation of water.

In 1984, the Alaska Legislature enacted additions to the Alaska Water Use Act (Act), Alaska Statute Title 46, Chapter 15, which codified the “reservation of water” concept.¹ AS 46.15.145(a) states that an application may be submitted to the commissioner to reserve sufficient water for the purposes of:

- (1) protection of fish and wildlife habitat, migration and propagation;
- (2) recreation and park purposes;
- (3) navigation and transportation purposes; and
- (4) sanitary and water quality purposes.

AS 46.15.145(d) notes that the water specified in the certificate reserving water shall be withdrawn from appropriation to other applicants.

AS 46.15.145(a) specifies that:

[t]he state, an agency or a political subdivision of the state, an agency of the United States or *a person* (emphasis added) may apply to the commissioner to reserve sufficient water to maintain a specified instream flow or level of water”

The word “person” is defined in AS 46.15.260(7)². The statute clearly gives any specified applicant with the ability to provide the required information (and otherwise satisfy the application requirements) the right to “apply to” the commissioner for a reservation of water.

¹ See AS 46.15.145(a)-(f).

² AS 46.15.260 Definitions (7) “person” includes an individual, partnership, association, public or private corporation, state agency, political subdivision of the state, and the United States;

Further, Alaska Department of Natural Resources (DNR, Department) regulations state that, if granted, the certificate of reservation will be issued to the applicant.³ 11 AAC 93.145 gives process direction to DNR on how to adjudicate each application and requires written findings of fact and conclusions of law, including justification of any special conditions to which an issued certificate of reservation is subject.

Both the statutory language and the regulatory language have gone through the appropriate legislative or regulatory promulgation processes. Therefore, DNR is confident in the sound legal basis for granting reservation of water certificates.

The second part of your statement question was regarding the “appropriateness” of issuing reservation of water certificates to “private entities”. First, the Alaska Constitution establishes the prior appropriation doctrine for the appropriation and use of public water⁴. Thus, the right to appropriation of water (water rights) and the use the public water resource is a constitutional right. Second, “appropriateness” is not a variable defined in the law that DNR factors into its deliberations regarding a reservation of water application. Third, as stated above, AS 46.15.145 allows reservations of water to be applied for by a “person.” Fourth, a reservation of water is a water right which keeps the water (the public resource) in the stream or lake it was granted for.

While a private party can be the certificate holder, the “use” of the water continues by the public and one of “leaving” the water in the stream or lake for one of the four statutory purposes. The right of the certificate holder is one of an “interested party”; with the right to monitor and provide notification to DNR regarding activities which could impact the reservation, and then to request and participate in DNR’s review process as outlined in 11 AAC 93.147. However, DNR retains its authority as the regulator of the use of the reserved water.

The Water Resources Section (Section) of DNR’s Division of Mining, Land and Water, as the office delegated by the commissioner to make these decisions, includes a series of standard conditions on reservations of water. The current list includes condition #3 which clearly states that a reservation of water certificate does not grant (to the certificate holder) any inherent water management duties or authorities held by the Department. A copy of our current standard conditions is attached.

In conclusion, we hope that this explanation provides a clearer understanding of the solid legal foundation that has been established by the Alaska Constitution, Alaska state law and regulation, and the Department regarding the issuance of reservation of water certificates. As to the “appropriateness” of allowing private entities to hold a certificate, I think that is ultimately a question of policy. To the extent that current policy and law supports allowing private entities to

³ See 11 AAC 93.146(b).

⁴ Article 8, Section 13. Water Rights.

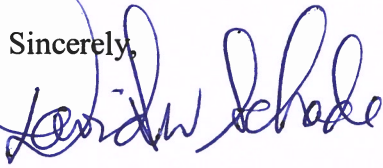
Mr. Doug Vincent-Lange

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hold a certificate, whether or not any particular certificate will be issued to a private entity will depend on the "private entity," the purpose of the requested reservation, and other merits of the application. Therefore, this is an issue that the Section will consider as part of the application review process. The Department does not otherwise have any problem with any specified applicant applying for a reservation, and will process all properly completed applications that are accepted.

Sincerely,

A handwritten signature in blue ink, appearing to read "David W. Schade". The signature is written in a cursive style with a large, looping initial "D".

David W. Schade, MPA
Section Chief

CC: Attorney General Jahna Lindemuth
ADNR Commissioner Andrew T. Mack
ADEC Commissioner Larry Hartig
ADF&G Commissioner Sam Cotton

Enclosure: Standard Reservation of Water Conditions Document