



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  
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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.<sup>1</sup> 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AS 46.15.145(d) notes that the water specified in the certificate reserving water shall be withdrawn from appropriation to other applicants.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)<sup>2</sup>. 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.

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

<sup>2</sup> 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.<sup>3</sup> 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 water<sup>4</sup>. 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

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<sup>3</sup> See 11 AAC 93.146(b).

<sup>4</sup> Article 8, Section 13. Water Rights.

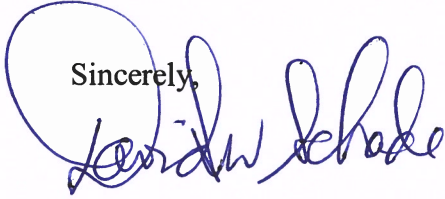
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hold a certificate, whether or not any particular certificate will be issued to a private entity will depend on the "private entity," the purpose of the requested reservation, and other merits of the application. Therefore, this is an issue that the 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,



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