



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
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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.

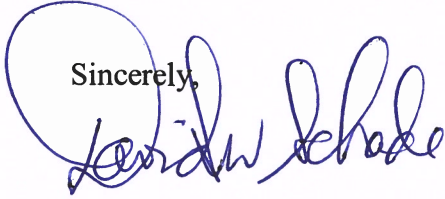
Mr. Doug Vincent-Lange

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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 and is positioned below the word "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