



DNR Decision in Response to Court Order

on
**the remaining application by Chuitna Citizens Coalition, Inc. for a
Reservation of Water, Under AS 46.15, the Alaska Water Use Act
for**

Middle Creek/Stream 2003 – Lower Reach Reservation of Water; LAS 27436

From the mouth of Middle Creek/Stream 2003 (river mile 0.0) at the confluence with Chuitna River, extending upstream to approximately river mile 1.4 at the confluence of Middle Creek/Stream 2003 with tributary 200301

In 2009, Chuitna Citizens Coalition, Inc. (“CCC”) filed three applications for reservations of water (instream flow reservations) on different reaches of Middle Creek/Stream 2003. It subsequently filed and lost an administrative appeal in the superior court, challenging whether it had to file three applications or only one. In 2011, after voluntarily dismissing its supreme court appeal of that challenge, CCC sued the Alaska Department of Natural Resources (“DNR”) and asked for the court to order DNR to publish notice of and begin adjudicating its three applications as soon as possible. *Chuitna Citizens Coalition, et al. v. DNR, et al.*, Case No. 3AN-11-12094 CI. In October 2013, the court ordered DNR to begin adjudicating CCC’s applications.

Just a month later, PacRim Coal LP (“PacRim”) filed anticipated applications for water rights with the DNR Division of Mining, Land and Water (“division” or “DMLW”) in support of a coal project in the vicinity of Middle Creek/Stream 2003. In October 2015, DMLW issued a decision granting CCC’s application for a reservation on the lower reach of Middle Creek/Stream 2003 (LAS 27436), and denying its applications for reservations on the main reach (LAS 27340) and middle reach (LAS 27437) (“the 2015 Decision”). PacRim’s potentially competing applications were considered in the decision-making process on CCC’s applications that resulted in the 2015 Decision. Ten parties filed appeals to the commissioner from the 2015 Decision granting CCC’s application on the

lower reach. CCC did not submit a response to those appeals until a year later, in October 2016.¹

In May 2017, PacRim relinquished its coal leases and informed DNR that it was withdrawing all applications associated with its proposed Chuitna coal mine project, including its water rights applications. Given this change in circumstances, in December 2017, I issued a decision remanding the matter to the division for “further review and consideration,” and decided that the department would “issue a new decision regarding CCC’s application for a reservation of water on the Lower Reach of Middle Creek/Stream 2003, taking into account the changed circumstances.”

Despite the December decision, on May 10, 2018, in response to a request from CCC, the court ordered DNR and the commissioner to issue a final adjudication of CCC’s application for an instream flow reservation on the lower reach of Middle Creek/Stream 2003 by June 30, 2018.² Subsequent legal actions extended the date for a final adjudication to August 28, 2018.³ Without waiving any right to appeal the court’s authority and decision to order DNR or the commissioner to issue a decision by a particular date, or any other issues in the litigation, I am issuing this final administrative decision on CCC’s application LAS 27436.

DNR administers the State’s program for the conservation and development of most of Alaska’s natural resources, including land, water, forests, parks, oil, gas, minerals, and agriculture.⁴ The DNR commissioner is the principal executive officer of the department,

¹ No parties appealed the denials, and the 2015 Decision denying CCC’s applications for reservations on the middle and main reaches became final in 2015.

² Although the court’s May 10 Order was in the plural, and ordered DNR to issue final adjudications of CCC’s *applications*, there is only one application that has not had a final decision issued—the lower reach application. This is DNR’s decision on that application, in response to the court’s order.

³ The superior court granted a stay of its May 10 Order to allow the Alaska Supreme Court to consider DNR’s request that it review the May 10 Order. That stay was lifted on July 26, 2018, and DNR was ordered to issue its final adjudication within 30 days. Including an additional three days allowed under Civil Rule 6(c), DNR’s final adjudication is due August 28, 2018.

⁴ AS 44.37.020.

who is responsible for and required to prioritize the department's business and how the department allocates its limited budget.⁵ I took over as commissioner on July 1, 2016.

The Alaska Constitution mandates that the "legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."⁶ It also provides that "an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law."⁷ According to the constitutional mandate, the legislature enacted the Water Use Act, AS 46.15, which provides that DNR is the agency charged with managing use of the State's water, and that DNR shall determine and adjudicate rights in the water of the State, and in its appropriation and distribution.⁸ The legislature has not provided a specific timeline for DNR to issue either a decision on an application for an instream flow reservation or on an appeal from that decision. Accordingly, DNR's management of water according to the constitutional and statutory mandates necessarily involves balancing competing priorities and timelines.

Due to cuts since fiscal year 2015, DNR's total unrestricted general fund budget has been cut more than 25%, and it has lost 205 personnel positions—over 18% of its employees.⁹ Yet DNR must continue to fulfill its constitutional and statutory obligations to manage the State's natural resources, of which water is only one part.

There currently are a total of 442 applications for instream flow reservations pending with DNR. The oldest application is an Alaska Department of Fish and Game ("ADF&G") application that was accepted in 1988, and there are nine applications that have had division-level decisions issued that are on administrative review. Since August 2009, DNR has received 166 new applications for reservations of water and has issued 143 certificates of reservation, resulting in a net increase in pending applications. There are countless other matters pending decisions both in the commissioner's office and in all

⁵ AS 44.37.010.

⁶ Alaska Const., art. VIII, sec. 2.

⁷ Alaska Const., art. VIII, sec. 13.

⁸ AS 46.15.010; 44.37.020.

⁹ As a division, DMLW's unrestricted general fund budget was cut almost 65%, and it suffered a net loss of eleven positions (it lost 14 positions, but had 3 new IT positions added).

eleven of the DNR divisions and offices. At this time there are approximately 132 appeals or requests for reconsideration to the commissioner pending from DNR decisions.

When CCC filed its application for an instream flow reservation on the lower reach in 2009, it was assigned a provisional priority date for that application, meaning that if it eventually was issued a certificate of reservation based on that application, the certificate would have a seniority priority date of 2009, regardless of when the certificate was issued. AS 46.15.050(b). At present, there are no previously issued water rights, nor any other competing applications for water rights, on Middle Creek/Stream 2003. In other words, the water in the stream, which CCC seeks to keep in the stream, is in the stream.

Under these circumstances, issuing a final decision on CCC's one remaining application for an instream flow reservation has not been and is not an urgent priority for DNR. Rather, since becoming commissioner, I have spent my limited time and DNR's limited resources on matters that have an immediate effect on the rights of Alaskan citizens or on the resources of the State or the State's income. Prioritizing CCC's one remaining application, where the flow is not at risk and the applicant's interests are protected, and taking time and resources away from other matters that I have determined are more important and a higher priority, does not serve the best interests of the State.¹⁰ Nevertheless, at CCC's insistence, the court has ordered DNR to issue a decision on CCC's application, and DNR is required to comply with that order or risk being held in contempt of court. Accordingly, for the reasons stated herein, I hereby deny CCC's application because, based on the current status of this matter and my current knowledge of it, I cannot make the affirmative findings necessary to grant it.

Under Article VIII of the Alaska Constitution and AS 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. Alaska Statute 46.15.030 and AS 46.15.145 provide for the reservation of instream flows in rivers and water levels in lakes. 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. AS 46.15.145(c) provides:

¹⁰ In fact, it does not necessarily serve the best interests of CCC, either. CCC's applications, so long as they were pending adjudication, would have retained their provisional priority date, senior to water rights applications filed thereafter, up until such time as the applications were adjudicated in DNR's normal course of business. However, at the time CCC's applications are adjudicated and denied, it loses its priority date and thereafter will have to re-file a complete application in order to obtain a new priority date, which would be as of the date such new application is accepted.

The commissioner shall issue a certificate reserving the water applied for under this section if the commissioner finds that,

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

Because I cannot at this time affirmatively find either that there is a need for the reservation or that the proposed reservation is in the public interest, I must deny the application. I cannot make the necessary findings in part because I have not fully analyzed the assertion of “need” or the public interest in this proposed reservation, nor have I completely resolved issues of public policy concerning instream flow reservations on which I have been deliberating. I have not completed these things because, as discussed above, finally adjudicating CCC’s application on the lower reach has not been an urgent matter requiring a DNR decision.

Putting it into perspective with other DNR business, CCC’s application is to reserve a particular flow in a creek on which there currently are no competing uses of the water sought. The water is in the stream and there are no current proposed water uses that threaten the resources. There would be no immediate practical benefit to CCC or the resources it seeks to protect by the issuance of a certificate of reservation. While issuance of a certificate would solidify CCC’s senior priority date, CCC’s provisional seniority status also would have been protected so long as its applications were pending adjudication with DNR. Under those circumstances, it was prudent for DNR to maintain CCC’s application in pending status, and not to prioritize the appeals from the 2015 Decision. Accordingly, I have not committed my limited time or DNR’s limited resources to review and analyze the matter in detail and, as set forth herein, I am unable to make the affirmative findings necessary to grant the application.

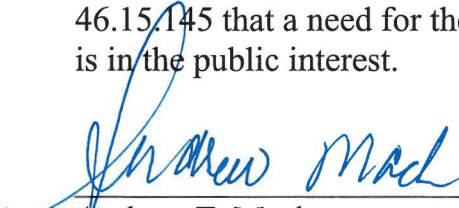
Nevertheless, I do know that at present DNR does not have full and complete information on the potential loss of alternate uses of water that might be made in the future, which I consider to be an extremely important factor in determining whether or not the proposed reservation is in the public interest. *See* AS 45.16.145(c); 46.15.080(b), and 11 AAC 93.145(d). In reaching the 2015 Decision, DMLW was required to make certain assumptions about the then-proposed project and potentially competing water uses because it did not have the full information that would become available through the

regulatory process. Now that the proposed project has been withdrawn, there is even less information available. But given the land status, it is still reasonable to assume that there will be another project and competing use proposed within a reasonable time, potentially in connection with coal development, even though we cannot know exactly what such a project might look like. It is also reasonable to assume, however, that any future proposed coal project may require de-watering of or use of the streambed within the lower reach (something that the PacRim proposed project did not require), and that a reservation on that water could preclude a project from moving forward or have significant adverse effects on such a proposed project. It is not in the public interest to grant a reservation that could completely preclude or significantly hinder a future potential use without full information on the potential use and options, especially where resources can be protected through DNR's other permitting and regulatory processes if an actual threat to such resources arises. In this regard, I also find it significant that in response to DNR's original request for agency comments on CCC's applications, the ADF&G, the state agency responsible for managing Alaska's fish resources, expressed the belief that a decision on CCC's applications would be premature in light of the lack of complete information. It declined to update its comments after the withdrawal of PacRim's proposed project.

I also know that any proposed mining project that might compete for use of water from Middle Creek/Stream 2003 likely will be developed on mental health trust land. The Alaska Mental Health Trust Authority ("AMHTA") is the landowner in the vicinity of Middle Creek/Stream 2003, it was the lessor for PacRim's project, and it manages its land in the area for coal development. Given the State's trust obligations under the Alaska Mental Health Enabling Act of 1956, I must give significant consideration to the AMHTA's assertions that issuing a reservation which potentially could preclude or significantly hinder development of a mine would cause a loss of revenue to the trust up to \$300,000,000, seriously affecting its ability to provide for the 72,000 mental health beneficiaries around the state. Such potential harm to the mental health trust and its beneficiaries weighs against issuance of a reservation, especially without full information and where the fish resources can otherwise be protected.

Committing my limited time and DNR's limited resources on further analyzing CCC's remaining application for an instream flow reservation at this time, where the flow is not at risk, and taking that time and those resources away from other DNR matters that I have determined are more important and a higher priority, does not serve the best interests of the State. Nevertheless, I am required to comply with the court's order, entered at CCC's insistence, for DNR to issue a final decision, or else risk being held in contempt of court. Because of such order, I hereby deny CCC's remaining application for a reservation of water on the lower reach of Middle Creek/Stream 2003 (LAS 27436) because, for the

reasons stated above, I cannot at this time make the affirmative findings required by AS 46.15.145 that a need for the proposed reservation exists or that the proposed reservation is in the public interest.



Andrew T. Mack
Commissioner



Date

APPEAL RIGHTS

A decision of the Department of Natural Resources that is signed by the commissioner normally is subject to a reconsideration period under 11 AAC 02, and a request for reconsideration normally is a prerequisite for an eligible person to appeal to superior court. Under the circumstances of this case, including the judicial orders entered in *Chuitna Citizens Coalition, et al. v. DNR, et al.*, Case No. 3AN-11-12094 CI ordering DNR to issue a final adjudication in this matter by August 28, 2018, I find that the public interest requires that I waive my right to reconsider this decision on my own initiative and that I further waive any requirement that an eligible person must request reconsideration of this decision before appealing to superior court. *See* 11 AAC 02.070.

Accordingly, this is a final administrative order and decision for purposes of an appeal to Superior Court. An eligible person may appeal this decision to Superior Court within 30 days in accordance with the rules of the court, and to the extent permitted by applicable law. This final decision takes effect immediately.