IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CHUITNA CITIZENS COALITION, Appellant, vs. DAN SULLIVAN, COMMISSIONER, ALASKA DEPARTMENT OF NATURAL RESOURCES, Appellee.	)	RECEIVED FEB 26 2013 CASE NO. 3AN-11-12095CI

OPINION AND ORDER ON ADMINISTRATIVE APPEAL

I. Introduction

This case comes before the Court on appeal by Chuitna Citizens Coalition ("Chuitna") from a decision by the Commissioner of the State of Alaska Department of Natural Resources ("DNR"). The Commissioner's decision upheld the issuance by the DNR's Division of Mining, Land and Water, Water Resources Section, of a Temporary Water Use Permit ("TWUP") to PacRim Coal, LP ("PacRim"). The Commissioner found Chuitna's appeal moot due to the expiration of the TWUP, but nevertheless proceeded to find that Chuitna lacked standing to appeal and also that, in the alternative, their appeal lacked merit. Chuitna appeals all three bases for upholding the issuance of the TWUP and asks the Court to reverse the Commissioner's decision.

For the reasons stated below, the Court reverses the Commissioner's procedural denials for mootness and lack of standing, and reverses in part the

Commissioner's decision on the merits finding that the Commissisoner should have, but did not, consider Chuitna to be an appropriator of record.

II. Facts and Proceedings

Chuitna is an association of community residents from Beluga (located across Cook Inlet from Anchorage), and fishermen who rely on the Chuitna River and its watershed. Appellant's Opening Brief, at 1. Sections of land in and around the Chuitna River watershed have been targeted for strip coal mining at various times since the 1980's, and most recently in 2007 by PacRim. *Id.*, and Excerpt of Record ("Exc") 0001-0005. The Alaska Legislature in enacting the Alaska Water Use Act (the "Act"), AS 46.15, delegated to the DNR the responsibility to uphold the water use policies stated in Article 8, § 13 of the Alaska Constitution, and to "determine and adjudicate rights in the water of the state, and in its appropriation and distribution." AS 46.15.010.

Chuitna and PacRim have competing interests in the same body of water: a tributary to the Chuitna River called Middle Creek, also known as Stream 2003. Chuitna seeks to keep water in Middle Creek to ensure specified flow rates in order to preserve salmon habitat, and PacRim seeks to temporarily withdraw water from Middle Creek in order to build and operate ground water monitoring wells. The Water Use Act contemplates both uses, and sets forth procedures for obtaining those uses, which are administered and regulated by DNR.

The first sort of use---the one sought by Chuitna to ensure that a certain amount of water is kept in Middle Creek---is an instream flow reservation ("IFR") under AS 46.15.145. Exc. 0097. In order to receive State approval for an IFR

under AS 46.15.145, one must first submit an application to the Commissioner. The application process for this (and other) water rights is governed by DNR-promulgated water management regulations at 11 AAC 93.040 and 93.050. Once the application has been accepted, DNR is required to provide public notice and comment under AS 46.15.133, and proceed to adjudicate the application. If the Commissioner determines that an applicant meets the criteria contained in AS 46.15.145(c), then he or she grants the application and issues a certificate of reservation of water. AS 46.15.133(c); AS 46.15.145(c), (d). This water is then withdrawn from appropriation, and other applications to appropriate the reserved water are rejected. AS 46.15.145(d).

In June 2009, Chuitna applied for IFR permits for three discrete sections of Middle Creek, the applications being designated Land Administration System ("LAS") numbers 27340, 27436, and 27437. Exc. 0097. Chuitna applied for the IFR's along Middle Creek to protect fish habitat, and to maintain a specific flow of water necessary for salmon spawning, rearing, and growth. *Id.* The IFR applications seek to reserve 2.7 and 13.7 cubic feet per second ("cfs") of flow in Middle Creek for the months of March and April, respectively. Exc. 0101. All three applications have been accepted by DNR, with effective dates of June 3, 2009 (LAS 27340) and August 21, 2009 (LAS 27436 and LAS 27437). To date, DNR has not proceeded to provide notice under AS 46.15.133 (as required by AS 46.15.145(c)) in order to begin adjudicating the applications.[1]

[1] Chuitna has a separate lawsuit against DNR directly for declaratory and injunctive relief for its alleged failure to act on applications for the reservation of water under AS 46.15.145. *Chuitna Citizens vs. DNR*, 3AN-11-12094CI.

The second sort of water use at issue in this case---the one sought by PacRim to use water to build monitoring wells required for a coal mining project---is a TWUP under AS 46.15.155. The Legislature amended the Act in 2001 to add this section, after DNR's practice of issuing TWUPs was affirmed in *State v. Greenpeace*, 96 P.3d 1056 (Alaska 2004). In so doing, the Legislature expressly stated the policy that "many construction, development, commercial, and private activities require an authorization for the temporary use of the state's water without the need to acquire a permanent right to appropriate water." § 2, ch.100, SLA 2001.

As its name implies, TWUPs are intended to be temporary. AS 46.15.155(a) ("not to exceed five consecutive years").[2] And, unlike IFR applications, a granted TWUP application does not establish a right to appropriate water, and water being used under a TWUP remains subject to appropriation. AS 46.15.155(c). TWUP applications do not undergo the same notice process as IFR applications and other appropriation applications, nor is granting a TWUP held to the statutorily enumerated criteria found in AS 46.15.080. The Commissioner is required to request comment on a TWUP application from the Departments of Fish and Game, and Environmental Conservation. AS 46.15.155(d). However, the Commissioner, in his or her discretion, may impose reasonable conditions or limits on a TWUP to protect water rights, habitat, health, or other public interests. AS 46.15.155(f). The

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[2] By regulation, the Commissioner has discretion to authorize one extension, not to exceed five years. 11 AAC 93.210(c).

Commissioner also has discretion to modify, suspend, or revoke a TWUP if he or she deems it necessary to protect water rights or the public interest. AS 46.15.155(i). DNR has established corresponding regulations for temporary water use under this chapter at 11 AAC 93.210, and 11 AAC 93.220.

In March 2010, PacRim began installing supplementary monitoring wells as part of a required SEIS review process for the Chuitna Coal Project. Exc. 0018-0023. DNR granted PacRim's applications for TWUPs for water withdrawals from five sources (TWUP A2010-11, and TWUP A2010-17). Exc. 0024-0025. At that time, PacRim had authorization to install 10 monitoring wells, but only installed four prior to the expiration of the TWUPs. *Id.*, and Exc. 0114-0115. Completing the installation of the required ground water monitoring wells led to the application by PacRim on February 10, 2011 for a TWUP to install the six remaining wells. *Id.*, and Exc. 0063-0066. DNR initiated a review of the application and granted TWUP A2011-16 to PacRim on February 18, 2011. Exc. 0067-0085. TWUP A2011-16 allowed PacRim to withdraw up to a combined total of 5,000 gallons of water per day (subject to a project maximum of 305,000 gallons) from February 18, 2011 through April 30, 2011. Exc. 0079-0080. The five sources of water authorized for withdrawals in the TWUP included the same portions of Middle Creek where Chuitna's IFR requests are pending. Exc. 0079.

Chuitna appealed the issuance of TWUP A2011-16 to the Commissioner on March 4, 2011. Exc. 0096-0099. The basis of the appeal was that by issuing the TWUP, DNR had "illegally elevat[ed] a permitted use over an applied-for water right that was submitted well before the TWUP." *Id.* Chuitna maintained

that granting the TWUP without considering their concurrent use of Middle Creek was a violation of the Act, as well as the Alaska Constitution due to the priority of appropriation afforded them based on the pending IFR application. Chuitna submitted a technical memorandum by their own hydrologist with their notice of appeal showing potential impacts on flow rates in Middle Creek due to TWUP A2011-16. Exc. 0100-0102. The Commissioner acknowledged receipt of Chuitna's appeal on March 22, 2011. Exc. 0109-0112. TWUP A2011-16 expired by its own terms on April 30, 2011. Exc. 0081.

On October 11, 2011, the Commissioner issued his decision denying Chuitna's appeal. Exc. 0114-0120. The Commissioner found the appeal to be moot because TWUP 2011-16 had expired by its own terms, but nevertheless made findings that Chuitna lacked standing to appeal, and also that, in the alternative, their appeal lacked merit. *Id.*

Chuitna filed its Notice of Appeal of the Commissioner's decision with this Court on November 10, 2011. Exc. 0121-0124. Oral arguments were held on December 19, 2012.

III. Standard of Review

Courts in Alaska apply one of four standards of review when presented with an administrative appeal:

> (1) the 'substantial evidence' test applies to questions of fact; (2) the 'reasonable basis' test applies to questions of law involving agency expertise; (3) the 'substitution of judgment' test applies to questions of law where no expertise is involved; and (4) the 'reasonable and not arbitrary' test applies to questions about agency regulations and the agency's interpretation of those regulations.

Lakloey, Inc. v. Univ. of Alaska, 157 P.3d 1041, 1045 (Alaska 2007) (citing Handley v. State, 838 P.2d 1231, 1233 (Alaska 1992)).

The issues of mootness and standing raised in the instant appeal are subject to the substitution of judgment test because they involve questions of law where no agency expertise is involved. *Stevens v. State, Alcoholic Beverage Control Bd.*, 257 P.3d 1154, 1156 (Alaska 2011). The issues related to the merits of the appeal decision implicate statutory and regulatory interpretation and constructions. Where Chuitna has challenged the legality of DNR's actions under statutes in which DNR has been given expertise, the reasonable basis test applies, although for issues of statutory interpretation involving no agency expertise, the Court will substitute its own judgment. *Northern Alaska Environmental Center v. State, Department of Natural Resources*, 2 P.3d 629, 633-34 (Alaska 2000). An agency's regulations are reviewed under the reasonable and not arbitrary test, while the agency's interpretation of its own regulations is reviewed under the reasonable basis standard. *Simpson v. State, Commercial Fisheries Entry Comm'n*, 948 P.2d 605, 609 (Alaska 2004).

IV. Discussion

The Commissioner denied Chuitna's appeal of the DNR's authorization of PacRim's TWUP A2011-16 on the bases of mootness, lack of standing, and lack of merit.[3]

A. Merits of the Appeal

[3] The posture of the Commissioner's decision was such that the issue of merits would properly be before this Court, regardless of its rulings on standing or mootness. Because the discussion of merits furthers an understanding of the remaining issues, they will be taken up in reverse order in this opinion.

The primary issue to resolve in determining if the Commissioner correctly found Chuitna's appeal to be without merit is whether Chuitna's pending IFR applications afford them any legal status. The Commissioner believes accepted water rights applications provide no legal status to the applicant, while Chuitna believes accepted water rights applications make the applicant an appropriator dating back to the date of the accepted application. As explained in more detail below, the Court finds water rights applicants are not "appropriators" as defined by the Act, but that they do have some status since the DNR's own regulations define water rights applicants as "appropriators of record."

The Commissioner determined that the DNR had not acted contrary to law in granting TWUP A2011-16 because Chuitna's pending IFR applications do not create water rights that are protected by the Act or Alaska Constitution, and, in addition, DNR had considered the potential impacts of the TWUP on fish and fish habitat as required under the Act.

Chuitna maintains that IFR applications such as theirs that have been accepted by the DNR and are awaiting adjudication makes the applicant a prior appropriator, giving the applicant "first in time" water rights.[4] Chuitna relies on the following statutory language, "[a] right to appropriate water shall be obtained by first making application to the commissioner for a permit to appropriate." AS 46.15.040(b).

[4] "First in time" is an important concept in Alaska water law because "[p]riority of appropriation shall give prior right." Alaska Constitution, Art. 8, Sec. 13, *and* AS 46.15.050(a) ("[p]riority of appropriation gives prior right"). Being a prior appropriator of water makes it more difficult for subsequent users to obtain a right to use the same water. *See, e.g.,* AS 46.15.080(a)(1).

The Commissioner's position is that applications that have not been through the process proscribed by statute, which includes notice and comment, determination, and the issuance of either a permit and/or certificate, do not give rise to any legal status associated with being called an "appropriator" or "appropriation." The Commissioner found that Chuitna's pending application for a reservation of water under AS 46.15.145 did not give Chuitna a water right since, by definition, the water subject to their application has not yet been appropriated.

The Act defines "appropriate" as "to divert, impound, or withdraw a quantity of water from a source of water, for a beneficial use or to reserve water under AS 46.15.145." AS 46.15.260(1). Similarly, "appropriation" means "the diversion, impounding, or withdrawal of a quantity of water from a source of water for a beneficial use or the reservation of water under AS 46.15.145." AS 46.15.260(2). Chuitna has applied for a reservation of water under AS 46.15.145 and, according to the preceding definition, a "reservation of water" (not the application) is an "appropriation." Under AS 46.15.145(d), water is not "withdrawn from appropriation" until "after the issuance of a certificate." A certificate cannot lawfully be issued according to AS 46.15.145(b) before the notice and comment period set forth in AS 46.15.133 occurs.

Substituting its own judgment in interpreting these statutory provisions, this Court agrees that an IFR applicant does not have a vested appropriative

right under the Act.[5] However, as explained below, based on DNR's own regulations, this Court concludes that IFR applicants are afforded some legal status that must be considered when reviewing TWUPs.

The Commissioner is required adopt regulations to carry out the provisions of the Act. AS 46.15.020(b)(1). The Commissioner's regulations relating to water management in general and the Act in particular are contained in Title 11, Chapter 93 of the Alaska Administrative Code ("11 AAC 93"). The Commissioner has defined the phrase "appropriators of record" in the regulations. 11 AAC 93.970 (25) provides: "'appropriators of record' means *applicants for*, and permittees and certificate holders of, water rights," (emphasis added). Thus, while pending applicants may not be prior appropriators with vested water rights under the statute because they have not been granted a permit or issued a certificate, they are by regulation an "appropriator of record." Based on the plain language of this regulation then, the Court rules that an interpretation that fails to include applicants for water rights in the meaning of "appropriators of record" is without a basis in reason.

Most notably for purposes of this discussion, the expression "appropriators of record" is used in the regulations at 11 AAC 93.210, addressing temporary water use.[6] Subsection (b) of 11 AAC 93.210 states:

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[5] Because the statute itself resolves the issue of whether Chuitna is a prior appropriator, it is not necessary to reach the issue of whether the determination violated the Alaska Constitution. *See Tulkisarmute Native Comm. Council v. Heinze*, 898 P.2d 935, 952, n.29 (Alaska 1995).

[6] The phrase is also found at 11 AAC 93.035, which deals with the requirement to apply for the use of a significant amount of water. 11 AAC 93.035 reinforces the statutory requirements to make application for water uses, and sets forth the amounts of water that are considered "significant." Subsection (c) continues as follows:

> A water right or priority is not established by a temporary water use authorization issued under 11 AAC 93.220. Authorized temporary water use is subject to amendment, modification, or revocation by the department if the department determines that amendment, modification, or revocation is necessary to supply water to lawful *appropriators of record* or to protect the public interest.

Emphasis added. This suggests that the DNR must be cognizant of other water rights --- including pending applications for water rights --- when dealing with TWUPs.

The regulations are consistent with the statutory language contained in AS 46.15.155(f) and 46.15.155(i), which places discretion to determine whether to modify TWUPs firmly with the DNR Commissioner. The regulations and statute are silent as to what degree of inquiry or review the Commissioner must make in weighing competing or potentially competing water uses, and the Court will not make any such determinations here.

Finally, Chuitna contends that DNR did not adequately undertake its duty under AS 46.15.155(f) to protect fish and wildlife habitat because it relied on a

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> A person using less than the amount of water described in (b) of this section acquires no water right or priority unless an application is filed and a permit or certificate is issued under 11 AAC 93.035 – 11 AAC 93.140. The use of water without a permit or certificate is subject to appropriation by others, and the use of water without a water right is subject to curtailment in order to supply water to lawful *appropriators of record* or to protect the public interest.

Emphasis added. As both the statute and regulation instruct, TWUPs do not establish a water right. AS 46.15.155(c); 11 AAC 93.210(b). Therefore, this regulation indicates that water being used pursuant to a TWUP is subject to curtailment in order to make sure that enough water will be available for those pending applications for water rights.

mere two-sentence email from the Alaska Department of Fish and Game ("ADF&G") in issuing TWUP A2011-16. Exc. 0058. The statute requires the Commissioner to request comments on TWUP applications from ADF&G. AS 46.15.155(d). The record shows that the Commissioner fulfilled this duty and that ADF&G gave a response. Exc. 0015-0017, 0057-0062. It is not the purview of this Court to comment on the sufficiency of the response, although the Court does note that the response references a technical document contained in the record called Generally Consistent Determination ("GCD")-8. Exc. 0010-0013. This is an area of DNR's expertise, and the Commissioner's reliance on GCD-8 is not unreasonable.

Nevertheless, because Chuitna's applications for IFRs under AS 46.15.145 had been accepted by the DNR, this Court finds Chuitna to be an appropriator of record under the regulations promulgated pursuant to the authority of the Act. This Court finds that the authorization for TWUP A2011-16 did not consider the amounts of water applied for by Chuitna.[7] This Court further finds that the Commissioner made no meaningful determination about the quantity of water available in Middle Creek in the decision denying Chuitna's appeal of TWUP A2011-16.[8] Accordingly, this Court concludes that the Commissioner interpretation of DNR's regulations was unreasonable.

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[7] The last page of the TWUP authorization includes the paragraph, "Pursuant to 11 AAC 93.210(b), authorized temporary water use is subject to amendment, modification, or revocation by the Department of Natural Resources if the Department of Natural Resources determines that amendment, modification, or revocation is necessary to supply water to lawful appropriators of record or to protect the public interest." Exc. 0084.

[8] The Commissioner's decision on appeal states that Chuitna's "asserted potential impacts on the flow rate of Stream 2003 are based on conjecture." Exc. 0118. The decision points out that

B. Standing

As with the merits of the appeal, the Commissioner affirmatively found that Chuitna's lacked standing to appeal the issuance of TWUP A2011-16. Exc. 0114. As stated in the Commissioner's Decision:

> Administrative appeals to DNR are governed by AS 44.37.011 and DNR's appeal regulations in 11 AAC 02. AS 44.37.011(b) states in relevant part, "If a person is aggrieved by a decision of the Department of Natural Resources not made by the commissioner . . . the person may appeal to the commissioner." AS 44.37.011(e) authorized DNR to adopt regulations to "implement and interpret" this statute. 11 AAC 02.010(a) states in part, "This chapter sets out the administrative review procedure available to a person affected by a decision of the department." 11 AAC 02.010(e) states in relevant part, "An eligible person affected by a decision of the department . . . may appeal the decision to the commissioner." Therefore, Alaska law requires that an appellant must be "aggrieved by" or "affected by" the DNR decision they are appealing in order to have standing to appeal that decision to the DNR Commissioner.

Exc. at 0116.

The Commissioner found that Chuitna failed to meet the "aggrieved by" or "affected by" standards because no showing was made that Chuitna or any of its members were actual users of the water subject to TWUP A2011-16. *Id.* In addition, the Commissioner determined that Chuitna had provided "no

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A2011-16 authorized PacRim to "withdraw up to a combined total of 5,000 gallons of water per day . . . from unnamed pond
(designated as WD#2), East Fork Middle Creek (aka Stream 2003), Middle Creek (aka Stream 2003), unnamed pond (designated as WD#5) and Lone Creek." Exc. 0115-0116. The decision does not point out the amount of water applied for from Middle Creek by Chuitna in LAS 27340, 27436, and 27437 (Chuitna's pending IFR's). The Commissioner writes that Chuitna "presumes that PacRim will withdraw water from Stream 2003 when TWUP authorized withdrawals from five sources, only two of which are Stream 2003 (Middle Creek and East Fork Creek)." Exc. 0119. This may be so, but the decision gives no affirmative indication that a quantitative analysis of concurrent water uses, or the possible effects of a temporary water use on a potential future use, was even considered.

information to show that Chuitna Citizens' pending instream flow applications for Stream 2003 are adversely affected" by issuing the TWUP. *Id.* Because Chuitna's application is "pending," the Commissioner found that Chuitna's appeal only asserted a "potential impact" that the temporary permit might have on Chuitna's application, if Chuitna's application were granted. *Id.*, at 0116-0117.

In response, Chuitna argues that its assertions in its March 4, 2011 letter of appeal should have been sufficient to establish standing under the law and regulations cited by the Commissioner, let alone the expansive view of standing provided by the Alaska Supreme Court.[9] If the bare assertions contained in the appeal letter itself were not sufficient to establish standing, Chuitna contends that it should have been permitted to cure the defect because Chuitna was entitled to due process, as in *State v. Greenpeace*, 96 P.3d at 1063.

The Commissioner's position is that the standing issued being raised at this time is moot because the Commissioner alternatively denied Chuitna's appeal on its merits. Chuitna articulates a need for certainty in how to approach administrative appeals to this particular State agency.[10] The Commissioner suggests that finding Chuitna has standing to appeal an issuance of a TWUP will be the same as ruling on the merits of Chuitna's disputed claim that they are a prior appropriator. Whether or not a pending IFR applicant is a prior appropriator

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[9] Chuitna cites to *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976); *Ruckle v. Anchorage School District*, 85 P.3d 1030, 1040-41 (Alaska 2004); and, *Keller v. French*, 205 P.3d 299, 203 (Alaska 2009).

[10] They comment, "DNR has developed a practice of denying standing in administrative appeals, and then deciding the merits anyway. Because DNR administrative appeals apply the same liberal standing requirements as Alaska Courts, these denials based on standing are causing parties unnecessary expense and confusion." Appellant's Reply Brief, at 16.

is not the same as whether a pending IFR applicant has standing to appeal the grant of a TWUP.

The statute contemplates that authorized TWUPs may be modified, suspended, or revoked. AS 46.15.155(i). This section gives the Commissioner discretion to review TWUPs if he or she "determines it necessary to protect the water rights of other persons or the public interest." *Id.* The plain language of the statute suggests that this discretionary review arises when TWUPs have already been granted.[11]

The Commissioner's own regulation of this statutory section provides some support for this view as well. 11 AAC 93.210(b) reads:

> A water right or priority is not established by a temporary water use authorization under 11 AAC 93.220. *Authorized* temporary water use is subject to amendment, modification, or revocation by the department if the department determines that amendment, modification, or revocation is necessary to supply water to lawful appropriators of record or to protect the public interest.

(Emphasis added). The regulation suggests that if Chuitna is either an appropriator of record, or protecting the public interest, then DNR must make a determination about the adequacy of the water supply. Since the regulations define "appropriators of record" as "*applicants for*, and permittees and certificate holders of, water rights," it would be reasonable to conclude that persons or entities with agency-accepted, pending IFR applications would be appropriators

[11] This makes some sense because DNR is not required to provide public notice of TWUP applications. AS 46.15.155(d).

of record under these regulatory provisions. 11 AAC 93.970(25) (emphasis added); *see also*, Section IV (A), supra.

Because Chuitna's status as an appropriator of record (bolstered by its assertions of economic and environmental injury) should have been sufficient to invoke standing to appeal the issuance of the TWUP on the merits alone, the Commissioner's determination on standing is reversed.

C. Mootness

In his October 11, 2011, decision on Chuitna's appeal, the Commissioner states, "The TWUP A2011-16 permit you appealed on March 10, 2011, was effective from February 18, 2011 through April 30, 2011. Since the permit has now expired, this appeal is moot." Exc. 0114. Chuitna argues that this determination was erroneous, and that the public interest exception to the mootness doctrine should apply. The Commissioner argues that the statement was merely factual and not a basis for denying Chuitna's appeal, and therefore, any ruling by this Court on the mootness argument would be advisory.

It is true that TWUP A2011-16 had expired by its own terms by the time the Commissioner issued his ruling on Chuitna's appeal. Of course, the permit was being actively utilized at the time Chuitna provided the Commissioner with its notice of appeal on March 4, 2011. Exc. 0096. The decision of whether or not to review a moot question is left to the discretion of the court. *Tulkisarmute Native Comm. Council v. Heinze*, 898 P.2d 935, 940, n.7 (Alaska 1995). Although courts generally refrain from deciding issues that are moot, they will often determine whether a public interest exception exists to the mootness doctrine.

Id. As the Alaska Supreme Court explained in *Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985):

> The public interest exception involves the consideration of three main factors: 1) whether the disputed issues are capable of repetition, 2), whether the mootness doctrine, if applies, may repeatedly circumvent review of the issues and, 3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine.

It appears that each prong of the test outlined above is satisfied. DNR has issued multiple TWUPs to PacRim for their coal mine project in Beluga, and the project is still ongoing. Thus, it is conceivable that TWUP's affecting Middle Creek will continue to be issued. Regarding the second prong, technical mootness could lead to circumvention of TWUPs. The Alaska Supreme Court has previously recognized this possibility in specific regard to TWUPs. *See State v. Greenpeace, Inc.*, 96 P.3d at 1063. The TWUP at issue in this case was only in effect for two and a half months. DNR's acknowledgement of Chuitna's appeal on March 22, 2011, came only 38 days before the TWUP expired on April 30, 2011. Exc. 0109-0112. The Decision on Appeal was issued October 11, 2011, nearly six months after the expiration of the TWUP. Given these timelines, technical mootness is almost certain. Lastly, because water is a key natural resource, recognized accordingly by the Alaska Constitution, the third prong of the public interest exception to mootness is implicated.

Accordingly, because Chuitna's appeal of the Commissioner's issuance of TWUP A2011-16 falls into the public exception doctrine to mootness, this ruling is reversed.

D. Conclusion

Based upon the above, the Court reverses the Commissioner's decisions on the issues of mootness and standing, and reverses in part the Commissioner's decisions regarding the merits, finding that the Commissioner should have, but did not, consider Chuitna to be an appropriator of record.

Dated this 25th day of February 2013, at Anchorage Alaska.

/Mark Rindner

Hon . Mark Rindner
Superior Court Judge

I certify that on February 25, 2013 a copy of the above was mailed to:
V. Brown AGO-Baker

Administrative Assistant