THE STATE
of ALASKA
GOVERNOR SEAN PARNELL

Department of Natural Resources

Office of the Commissioner

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April 7, 2013

Senator Kevin Meyer
State Capitol Building, Room 518
Juneau, AK 99801

Dear Senator Meyer,

Thank you for the opportunity to provide the Senate Finance Committee a response to several questions that arose from yesterday morning's committee hearing on House Bill 77. Senator Hoffman requested that DNR provide a written response to NANA's March 30, 2013 letter and to the Memorandum from Rick Halford of April 5, 2013. In addition, we would like to provide the committee some information on the two pending court cases, and also some clarification on the constitutional issues, that are relevant to water reservations and HB77.

Before responding to those questions, I would like to take the opportunity to clarify some of the issues that have arisen with respect to how the Department of Natural Resources (DNR) manages Alaska's water resources. We have three principal tools that we use in managing our water resources. The first two, water rights and temporary water use permits (TWUPs), allow the public to remove water from waterbodies. These are the principal ways that Alaskans are authorized to use water, and the vast majority of our water authorizations are in these two categories. We receive hundreds of TWUP applications each year, for all manner of water uses (such as ice-bridge crossings, ice roads, ski resort snowmaking, village sewer and water projects, etc.), and these are critical to our economy and our communities. We work hard to process these so that Alaskans can have timely access to our water resources. I reiterate again, HB77 does nothing to reduce the ability of Alaskans to apply for, or obtain, either water rights or TWUPs for water removal.

HB77 only affects the third tool available, which is a water reservation. Water reservations preserve a specific quantity of water to remain in a water body, for public purposes. The water reservation process is lengthy and requires considerable data which can take from 3-5 years to collect and process. Because the reserved water is for a public use, we believe that a water reservation should be held by a public entity that is accountable to the public. We do not believe it appropriate for an industrial concern for example, an outside non-governmental organization (NGO) or even a person, to hold a reservation for the public benefit.

We are now being challenged on our ability to allow other uses of water (TWUPS and water rights) while we are adjudicating an application for a water reservation. We believe this will undermine the ability of Alaskans to use water. By putting the application process in the hands of public agencies, we believe that we will be better able to

ensure that Alaskans will have access to the water they need. In fact, we believe that HB77 will enhance Alaskan's access to water resources by removing a potential block to their use of water.

Nothing in HB77 diminishes the state's commitment to the protection of fish habitat. The Department of Fish and Game's (ADF&G) authorities are not being amended in any section of this bill, and ADF&G will continue protecting fish habitat by requiring fish habitat permits for proposed activities located within a resident fish stream or anadromous water body to ensure free fish passage and/or the proper protection of anadromous fish habitat. ADF&G will still coordinate with DNR before issuing any water authorizations, allowing DNR to put appropriate conditions and restrictions for the proper protection of fish habitat.

Moreover, DNR has demonstrated its commitment to protecting fish habitat. In the last three years, DNR has certificated 33 water reservations, over half of the reservations issued since statehood, and all but a few of these were for the protection of fish habitat. DNR continues to strive to eliminate the backlog of water reservation applications.

NANA Letter

NANA Regional Corporation, in their letter to the Governor, dated March 30, 2013, does not support or oppose the bill, but requests changes to HB77 that would continue to allow Alaska Native Corporations and Federally Recognized Tribes to apply for reservations of water. NANA also expresses concern in their letter that Section 40 of HB77 would eliminate the ability Alaska Native Corporations and other entities from reserving water rights.

I want to reiterate again that nothing in HB77 would prevent an Alaska Native Corporation, tribe, or other "person" from applying for or acquiring a water right for the use of water. We believe, in fact, that the proposed changes in HB77 would protect and further enhance the rights of all Alaskans to timely acquire water rights in an efficient way.

A Native Corporation or federally recognized tribe or other NGO will still be able to work with a public agency to gather the data necessary for submitting a thorough and supportable application for a water reservation. ADF&G has demonstrated that they are willing to work in this type of cooperation with NGOs. The only difference is that the NGO, tribe or Native Corporation would not be the applicant. Instead, ADF&G or some other governmental agency or political subdivision, such as the Northwest Arctic Borough, would be the applicant, and when a reservation certificate is issued, it would be issued to that public agency. The same data has to be collected and used to support the reservation. The same adjudication process and considerations are used to determine whether to grant the reservation.

There appears to be concern that a person would not be able to convince an agency to support an application, or to apply on their behalf. ADF&G has demonstrated their willingness to partner and to work toward the protection of fish habitat. Many of the non-governmental applicants already work closely with DNR and ADF&G to ensure that the data collection is done correctly, and all that work and effort is and will not be wasted.

NANA also expressed concern that the changes in HB77 would not result in efficiencies. Our concern is that reservations may become a tool for some to block other water uses (such as TWUPS and water rights) that are

necessary for types of development, such as the Red Dog Mine. We must look at this in the light of the recent court challenges, and the implications if the courts would rule that DNR must issue reservations before allowing any other water uses. This could substantially reduce our efficiency in issuing other beneficial uses of water while the longer water reservation process is completed. We believe such an outcome would be a significant detriment to NANA and other Native Corporations.

Rick Halford Memorandum

In his April 5, 2013 memorandum, Rick Halford points out that in the justification documentation for Mineral Closing Order 393, which closed 64 streams in the Bristol Bay region to mineral entry, DNR acknowledges that mining within these active stream channels could "jeopardize the commercial, sport, and subsistence harvest of salmon and the overall economic and sociocultural structural structure of the Bristol Bay region." Mr. Halford continues, "The suggestion that the water reservations are a threat to mining operation fails to acknowledge that the mineral claimant does not have the rights to the waters or minerals underneath these streams because the Department closed these streams and a 100-foot buffer on either side to mineral entry many years ago."

I must point out that a mineral closing order does not prevent the appropriation of water. The mineral closing order only closes the subsurface mineral estate to mineral entry, and prevents the staking of mining claims. Mining claims only provide for the exclusive right to the locatable minerals. Someone can still apply for a water reservation on a water body that is on a mineral closing order. What we are trying to address in HB77 is the possibility that someone could file such a reservation, and challenge us to prohibit any other use of that water while we are adjudicating that reservation application.

We certainly acknowledge that these streams are closed to mineral entry, that these streams are important fish habitat, and are important to the Bristol Bay region and the state. Nothing in HB77 changes this, nor does it diminish whatsoever our ability to protect these waters.

Mr. Halford also makes the point that none of the reservation applications we have received have "stopped anything." While that is true, we are seeing challenges based on prior water reservation applications that could significantly impact our ability to issue authorizations.

Court Cases and Challenges

The Chuitna Citizens Coalition filed two challenges in Anchorage Superior Court – an administrative appeal and an original action – challenging DNR's issuance of TWUPs under AS 46.15.155 and processing of applications for water reservations (referred to as in-stream flow reservations, or IFRs, in the court documents) under AS 46.15.145.

In the administrative appeal, Chuitna Citizens argued that DNR could not issue a TWUP for temporary water use by PacRim Coal, LLC, because Chuitna Citizens had "appropriated" the water under AS 46.25.155(a) by applying to reserve it under AS 46.15.145. The court agreed with DNR that Chuitna Citizens had not appropriated the water because they have filed a reservation application, but have not received a certificate of reservation under AS 46.15.145. The Court agreed with DNR that "an IFR applicant does not have a vested appropriative right under the Act". The court found, however, that one of DNR's regulations, 11 AAC 93.210, requires DNR to consider a

reservation application before issuing a TWUP on the same stream and that DNR had failed to do so. The Court said that the regulation "suggests that DNR must be cognizant of other water rights—including pending applications for water rights – when dealing with TWUPs." The decision was based on a regulation, not statutory or constitutional grounds. I have attached a copy of the decision. DNR recently moved for reconsideration of this decision and the issue is currently pending before the court.

In the original action, also in Anchorage Superior Court, Chuitna Citizens asks the court to declare that DNR has a duty to adjudicate a pending reservation application before issuing any TWUP for the same water body, and to order DNR to adjudicate Chuitna Citizens' reservation application before issuing any further TWUPs. We believe such a determination would have a detrimental and significant impact on the ability of Alaskans to access and use their water resources throughout the state in a timely and efficient way.

This case remains pending in the court. I have attached a copy of the state's motion for the committee's reference.

Constitutionality

Since there was confusion about the constitutionality of this bill, I want to offer this clarification. Department of Law has advised DNR that Section 40 of this bill does not violate the Constitution. The Legislature does not have a Constitutional duty to provide instream reservations of water to individuals. In fact, the statutory provision doing so has only been in existence since 1980.

Article VIII, Section 3 of the Alaska Constitution declares that "[w]henever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use." The legislature implements this "Common Use Clause" through multiple statutes setting rules for the harvesting of fish and game and access to and use of water.

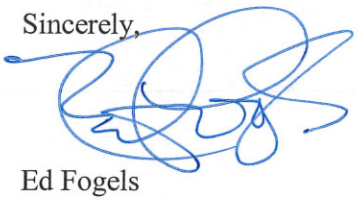
Article VIII, Section 13 of the state constitution addresses water rights, declaring that (except for mineral and medicinal waters) surface and subsurface waters are subject to appropriation, subject to preferences among beneficial users (as determined by the legislature), "and to the general reservation of fish and wildlife." During the Alaska Constitutional Convention deliberations in December, 1955, the section commentary by the Committee on Resources explained the intent that appropriations of water "are subject to the general reservation of fish and wildlife provided in Section 3 *so that reservoirs shall not exclude fish and wildlife remaining in natural states from coming under the provision of their general reservation to the people."* Constitutional Convention, Appendix V, p. 64 (emphasis added). Therefore, the language "and to the general reservation of fish and wildlife" -- the last phrase of Article VIII, Section 13 -- was intended to ensure that if water is appropriated and impounded in a reservoir, fish and wildlife using that water will remain a public resource under the Common Use Clause, rather than becoming the private property of the water right holder who appropriated the water. The language was not intended to create a constitutional requirement or right for in-stream reservations of water.

Conclusion

I would like to emphasize that the changes proposed in HB77 do not diminish whatsoever a person's right to apply for water rights or temporary water use authorizations for the extraction or use of water. The proposed limitation of who can apply for water reservations will not diminish the protection of fish habitat, but rather would

ensure that these reservations made in the interest of the public good are held by public agencies accountable to the public. These changes will provide ways for DNR to ensure projects are permitted in a timely, predictable and efficient manner while safeguarding the environment.

Sincerely,



Ed Fogels
Deputy Commissioner