

Honorable Pete Kelly and Kevin Meyer
Co-Chairs, Senate Finance Committee
Alaska State Legislature

Dear Senators Kelly and Meyer,

Trout Unlimited is an organization of 140,000 conservation-minded anglers dedicated to protecting coldwater fisheries. We ensure that streams and rivers will still be there—cold, clean and fishable—for the next generation. We have helped protect over 10,000 miles of river nationwide. In Alaska, Trout Unlimited works to preserve, protect and restore wild salmon and trout populations. By using sound scientific data, strong grassroots outreach and advocacy, and hands-on involvement in conservation projects, Trout Unlimited Alaska protects some of the most pristine and prized rivers on the planet, restores those that need some help, and engages the next generation of coldwater stewards in Alaska's natural heritage.

Trout Unlimited opposes Senate Bill 26 because the bill would take Alaska backwards in the governance of our natural resources. At a time when the state should use the input of stakeholders to minimize dispute and delay over resource decisions, this bill would make it more difficult for the public—including tribes, commercial fishermen, sportsmen, and communities—to have input into state decisions regarding public resources. In excluding the public from important resource decisions, the bill also infringes Alaskans' rights to the resources of the state and to participate and receive due process in the adjudication of those rights. While this bill is called a "streamlining" bill, it will more likely lead to less-informed, unilateral decisions prone to controversy and challenge.

One of the worst components of the bill takes away the rights of people to apply for instream flow reservations. In fact, the bill goes further, seeking to retroactively extinguish the rights of persons whose applications have already been accepted, even those accepted more than 20 years ago. The change would affect not just individuals, but also the rights of organizations, Native tribes, commercial fishermen, sportsmen, and communities—all of whom currently may apply for water reservations.

Like water rights for domestic, agricultural, or industrial activities, instream flow reservations for fish or recreation are a form of water right allowing the holder a quantity of water for specific uses. An applicant for an instream flow reservation submits a detailed application establishing the need and appropriateness of the reservation. The agency reviews the application and either accepts it as filed or denies it. The acceptance conveys a priority date—the date the application was successfully filed. The applicant is then deemed an "appropriator of record." Because water is appropriated on a first-in-time basis, the priority date ensures that the appropriator of record is first in line over someone who comes later and wishes to use the water for a conflicting purpose. This first-in-time water appropriation principle is enshrined in the Alaska Constitution at Article VIII, section 13.

After an application has been accepted, appropriators of record invest tremendous resources, often hundreds of thousands of dollars, to obtain the scientific information supporting the

instream flow reservation. However, even once this information to perfect the applicant's right has been gathered, the Department of Natural Resources (DNR) rarely adjudicates instream flow applications. Generally there is no need to rush to adjudication until and unless there is a competing water right application filed. To date, Trout Unlimited understands that DNR has not adjudicated a single instream flow application not submitted by the state itself. This issue was recently addressed in superior court, because the state did not adjudicate the water rights application of a citizen group even when another entity applied for an upstream water right. In that case, the court ruled against the state and recognized that appropriators of record have a legal status and must be considered before DNR issues even a temporary water use permit that might conflict.¹

Trout Unlimited has filed, and has had accepted, more instream flow applications than any other non-agency entity in Alaska and has spent well over a million dollars to establish and defend our interests as appropriators of record. We hold twelve instream flow applications, dating back to 1993—none of which have been adjudicated. In addition to the \$1,500 application fee and significant staff time and organizational resources required to submit an application, we spend tremendous resources compiling the information to support the application. Each application requires one or more stream flow gauges and the monitoring of those gauges. In accessible spots this can cost \$30,000 per year. In inaccessible locations, each gauge can cost over \$100,000 per year. DNR prefers at least five years of data, sometimes from multiple gauges. We also pay for staff time, supplies, scientific experts, and legal fees. Based on these facts, we estimate that it has taken between one and two million dollars to support our accepted applications.

Supporters of this bill have wrongly suggested that there would be no harm in removing the rights of people to water reservations, because no applications from a person have been adjudicated. That explanation is at best disingenuous. The 35 instream flow reservation applications accepted from non-governmental entities are un-adjudicated primarily because DNR has declined to adjudicate them. That does not change the fact that the appropriators of record like Trout Unlimited have invested millions of dollars perfecting their rights and taken actions in reliance on the acceptance of their water rights application.

By repealing citizens' rights to secure instream flow reservations, Alaska would be acting contrary to the trend in other western states. Arizona and Nevada already allow citizens to apply for these rights. Eight other states allow people to obtain general water rights and then transfer those to instream flow reservations,² and the trend is toward greater protection for instream flows. Of course, Alaska is unique. We possess more pristine water resources than any other state and we have a constitution recognizing their value, but these qualities call for more, not less, protection of instream flows. Alaska's statutes providing instream flow reservations reflect constitutional provisions that reserve fish and waters for the common use of all Alaskans, subject appropriations of water to the general reservation of fish and wildlife, and require that those rights be uniformly applied.³

¹ See *Chuitna Citizens Coalition v. Sullivan*, 3AN-11-12095CI (Alaska Superior Court Feb. 25,

² The eight states are California, Colorado, Montana, New Mexico, Oregon, Texas, Washington, and Wyoming.

³ Alaska Constitution, Article VIII, sections 3, 13, and 17.

Requiring instream flow reservations to be filed by federal or state entities poses a severe limitation on applicants.. Tellingly, although supporters of this bill have suggested that the state might collaborate to take over the existing applications, the fiscal note for this bill is zero, even though the cost of perfecting a single application can be as much as half a million dollars. The state can't have it both ways—if it will take over applications, the fiscal note should reflect that. Further, state collaboration to take over existing applications is only valuable if the state also adopts the priority date of the original filing.

Instream flow reservations are only one of many avenues for public participation that could be rolled back by Senate Bill 26. The bill also changes the definitions of who can take part in internal DNR appeals and requests for reconsideration. Trout Unlimited opposes such measures because they could make it more difficult for the agency to receive input from stakeholders or have a chance to address problems at the agency level, with agency expertise, and avoid litigation. If the state refuses to allow participation in internal appeals, the only remaining forum for disputes is the courts. Ironically, the impact would likely be more delay by pushing agency disputes to litigation. Even if a given dispute did not progress to court, this bill's changes could result in more disputes and conflict at the agency level, where this bill could create threshold questions about public input and the appropriateness of the parties—questions that would be disputed before the agency could ever address the merits of the issue before it.

Further, the bill's changes about who can appeal internally are not clear and threaten inconsistent application and extensive agency resources to interpret. For example, section 39 would allow appeals only by someone suffering “physical or financial detriment to the person's interests.” This novel legal standard is undefined, creating substantial uncertainty. For example, it is not at all clear what it means to have a physical detriment to an interest. Further, DNR will be at pains to establish when an act upstream is traceable to a given “physical” impact downstream. The uncertainty created by this new standard risks excluding legitimate stakeholders from the process and will cause more controversy and more litigation.

Those impacts are magnified in the bill's changes suggesting that preliminary best interest findings, and the ability of the public to comment on them, are discretionary. Failure to allow public comment means problems are not identified early, and stakeholders have little opportunity to see their needs addressed. As with much of this bill, the impact of removing public input will be more disputes and less-informed permitting decisions.

For the above reasons, Trout Unlimited opposes Senate Bill 26. Although aimed at streamlining permitting decisions, the bill introduces significant new sources of controversy and excludes stakeholders from important steps in what should be a transparent process addressing the interests of all concerned Alaskans. The bill also threatens Alaskans' rights to protect the resources of the state and to participate and receive due process in the adjudication of those rights. We urge the legislature not to pass this bill.