



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Natural Resources

Division of Mining, Land and Water

550 W. 7th, Suite 1260
Anchorage, Alaska 99501
Main: 907-269-8400

February 7, 2013

The Honorable Eric Feige, Co-Chair
The Honorable Dan Saddler, Co-Chair
House Resources Committee
State Capitol
Juneau, AK 99801

Dear Representatives Feige and Saddler and members of the House Resources Committee:

During the January 30 and February 1 House Resources hearings on HB 77, the following questions were raised. Please find below the responses from the Division of Mining, Land and Water (DMLW) along with the original questions were asked in bold. All references to the bill are based upon version 28-GH1524\A.

Q: With regard to Section 7, do the proposed changes affect the ability of DNR to accept cash payments in full?

When selling land, every purchaser must sign a declaration of intent to purchase at point of auction or lottery. This declaration states that they will follow through with a few steps so DNR can complete the sale; however, this is not an enforceable contract. If a person pays off their parcel, they technically do not enter into a contract. Therefore, this statute does not prevent someone from paying in full. It also does not prevent a partial payment because the statute refers to the "remainder of the purchase price". The statute obviously envisions that one can pay a portion up front. What becomes less clear in the current statutes is that people can at any time during the life of the contract pay off the remainder. The language in existing contracts state that there is no penalty for early or extra payments or full pay off at any time.

Q: What is a preference right?

A preference right regarding leasing in AS 38.05.102 is a non-competitive opportunity to purchase or issue a long-term lease for land if the state determines it is in its best interest. There are other non-competitive preference rights for other purposes under AS 38.05.35. All preference rights come with qualifications that must be met in order to be granted the preference.

Q: Is a water right revocable after certification because the entity is not using it?

Normally a water right cannot be revoked once DMLW has certificated the water right. In certain circumstances, DMLW can revoke a water right in certain cases where the entity holding the

water right no longer has site control. For example, there may be a case where someone holds a long term lease and has obtained a water right. When the lease expires and no other authorization (such as a lease renewal or purchase) continues for the site, the water right can be revoked. Also, under AS 46.15.140, if an appropriator does not use all or part of the appropriated water for a period of five years, the department may declare a partial or total abandonment of the water right and revoke or amend the certificate of appropriation. For reservations of water, under AS 46.15.145(e) a certificate of reservation may be revoked or modified if the purpose for which the certificate was issued or the findings made no longer apply.

Q: Does a water reservation have a higher priority right than a water right, especially in the situation where the water levels drop due to drought or other factors?

To clarify, a water reservation is a type of water right that protects specific instream water uses that are outlined in AS 46.16.145(a) [Section 40 of the bill]. The priority of either an instream or out-of-stream water right is determined by the date the application was filed. Once either type of water right is perfected, either by completing the appropriation for an out-of-stream use or by receiving a certificate of reservation for the instream use, the priority date relates back to the date the application was filed. If an instream reservation application is filed prior to an out-of-stream application and then perfected, it would have priority over the later filed application. Conversely, if the out-of-stream application is filed first and then perfected, it will have priority over the instream reservation.

Scenario 1 - A water reservation is established, and subsequently other water rights are granted for the remaining water.

If there is a drop in water levels, the instream reservation would have priority and the other water right holder would have to reduce water use if there was insufficient water for both.

Scenario 2 - A water right exists and a water reservation is later requested for more than the remaining water in the water body.

The instream reservation would only be issued for the remaining water available beyond that water already granted to the original water right, even if the instream reservation application supports the need to reserve more water than that granted initially. In a shortage, the initial water right would have priority because it was filed first and subsequently perfected.

Q: Has a TWUA (Temporary Water Use Authorization) been trumped by a later water right, i.e., we had to cancel the TWUA because a water right was filed that pre-empted the TWUA use?

DMLW can't think of a specific example where a temporary water use authorization has been revoked due to a later-issued permit to appropriate water or a water right (certificate of appropriation or certificate of reservation). However, DMLW has denied a TWUA for issuance for a source because the source was fully allocated by a Water Right Certificate issued on the North Slope.

Because a temporary water use authorization does not have a priority date, a temporary water use authorization will be trumped by a later issued permit to appropriate water or water right (certificate of appropriation or certificate of reservation). Furthermore, the mere filing of a water

right application does not establish a water right and it would only be necessary to revoke the previously issued temporary water use authorization if there was insufficient water for both the newly issued permit or certificate for the water right and the existing temporary water use authorization.

Q: Can DMLW later reduce a water right if conditions change?

DMLW generally can't reduce a certificate of appropriation once it has been issued, but there is a provision that a person cannot use more than the available water. A reservation of water may be revoked or modified if the purpose of the reservation or the findings made no longer applies. See AS 46.15.145(f). An appropriation may also be declared wholly or partially abandoned for non-use under AS 46.15.140, if it is shown that the appropriator intended to abandon the right. An exception to this would be if the certificate of appropriation holder voluntarily relinquishes a portion of the certificated water right. This would be known as a partial relinquishment. Also see AS 46.15.040(d), which basically states that issuance of a permit to appropriate water or a certificate of appropriation does not represent a guarantee by the state that water will be available for appropriation at a certain volume, quality, artesian pressure, or cost.

Q: Isn't there some sort of authority for the state to require the placement of easements along water bodies while DNR is approving subdivision plats under the Unorganized Borough platting authority or some other law?

AS 38.05.128 provides for "to and along" easements along water bodies; however, this provision only applies in areas where the state owns the land. We have not found any other provision that addresses the statement that there is some sort of provision for the state to place easements along waters when we take any action on privately owned lands.

Q: May individuals petition other agencies to create an instream flow reservation, and does the agency have an obligation to consider such a petition?

The bill does not create the right for a person to petition an agency. The bill also does not create any affirmative duty for any agency to consider an individual petition requesting that they apply for a water reservation. However, in Section 44, the commissioner of the Department of Natural Resources may refer applications to other state agencies for an independent evaluation and consideration of submission of a similar application.

Sincerely,



Wyn Menefee
Chief Operations Officer, Division of Mining, Land and Water