ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE
March 10, 2014
3:33 p.m.

MEMBERS PRESENT

Senator Cathy Giessel, Chair
Senator Fred Dyson, Vice Chair
Senator Peter Micciche
Senator Lesil McGuire
Senator Anna Fairclough
Senator Hollis French

MEMBERS ABSENT

Senator Click Bishop

COMMITTEE CALENDAR

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 77(RES)
"An Act relating to the Alaska Land Act, including certain authorizations, contracts, leases, permits, or other disposals of state land, resources, property, or interests; relating to authorization for the use of state land by general permit; relating to exchange of state land; relating to procedures for certain administrative appeals and requests for reconsideration to the commissioner of natural resources; relating to the Alaska Water Use Act; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 77
SHORT TITLE: LAND USE/DISP/EXCHANGES; WATER RIGHTS
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/18/13	(H)	READ THE FIRST TIME - REFERRALS
01/18/13	(H)	RES
01/30/13	(H)	RES AT 1:00 PM BARNES 124
01/30/13	(H)	Heard & Held
01/30/13	(H)	MINUTE(RES)
02/01/13	(H)	RES AT 1:00 PM BARNES 124
02/01/13	(H)	Heard & Held
02/01/13	(H)	MINUTE(RES)
02/06/13	(H)	RES AT 1:00 PM BARNES 124

02/06/13	(H)	Heard & Held
02/06/13	(H)	MINUTE(RES)
02/08/13	(H)	RES AT 1:00 PM BARNES 124
02/08/13	(H)	Moved CSHB 77(RES) Out of Committee
02/08/13	(H)	MINUTE(RES)
02/13/13	(H)	RES RPT CS(RES) 4DP 3AM
02/13/13	(H)	DP: HAWKER, OLSON, FEIGE, SADDLER
02/13/13	(H)	AM: TUCK, SEATON, TARR
03/04/13	(H)	BEFORE HOUSE WITH AM NO 1 PENDING
03/04/13	(H)	TRANSMITTED TO (S)
03/04/13	(H)	VERSION: CSHB 77(RES)
03/11/13	(S)	READ THE FIRST TIME - REFERRALS
03/11/13	(S)	FIN
04/03/13	(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/03/13	(S)	Heard & Held
04/03/13	(S)	MINUTE(FIN)
04/03/13	(S)	FIN AT 1:30 PM SENATE FINANCE 532
04/03/13	(S)	Heard & Held
04/03/13	(S)	MINUTE(FIN)
04/04/13	(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/04/13	(S)	Heard & Held
04/04/13	(S)	MINUTE(FIN)
04/06/13	(S)	FIN AT 10:00 AM SENATE FINANCE 532
04/06/13	(S)	Heard & Held
04/06/13	(S)	MINUTE(FIN)
04/08/13	(S)	FIN RPT SCS 4DP 1DNP 1NR 1AM NEW TITLE
04/08/13	(S)	DP: KELLY, MEYER, DUNLEAVY, FAIRCLOUGH
04/08/13	(S)	DNP: OLSON
04/08/13	(S)	NR: BISHOP
04/08/13	(S)	AM: HOFFMAN
04/08/13	(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/08/13	(S)	Moved SCS CSHB 77(FIN) Out of Committee
04/08/13	(S)	MINUTE(FIN)
04/13/13	(S)	BEFORE THE SENATE IN THIRD READING
04/13/13	(S)	BILL NOT TAKEN UP 4/13 - ON 4/14 CALENDAR
04/14/13	(S)	BEFORE THE SENATE IN THIRD READING
04/14/13	(S)	RETURNED TO RLS COMMITTEE
03/10/14	(S)	RES AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

LINDSAY WILLIAMS
Staff to Senator Giessel and the Senate Resources Committee
Alaska State Legislature

Juneau, Alaska
POSITION STATEMENT: Explained the difference between the H and the previous version, Y of HB 77.

WYN MENEFEE, Chief Operations Officer
Division of Mining, Land, and Water
Department of Natural Resources (DNR)
POSITION STATEMENT: Went through analysis of HB 77.

RANDY BATES, Director
Division of Habitat
Alaska Department of Fish and Game (ADF&G)
POSITION STATEMENT: Said HB 77 does not diminish or lessen fish and game protections as it relates to fish and fish resources.

ACTION NARRATIVE

3:33:51 PM
CHAIR CATHY GIESSEL called the Senate Resources Standing Committee meeting to order at 3:33 p.m. Present at the call to order were Senators McGuire, French, Dyson, Fairclough and Chair Giessel.

HB 77-LAND USE/DISP/EXCHANGES; WATER RIGHTS

3:34:21 PM
CHAIR GIESSEL announced HB 77 to be up for consideration [SCS CSHB 77(FIN), version 28-GH1524\Y, was before the committee].

SENATOR DYSON moved to adopt 2d SCS CSHB 77(RES), version 28-GH1524\H, as the working draft. There were no objections and it was so ordered.

3:35:21 PM
LINDSAY WILLIAMS, staff to Senator Giessel and the Senate Resources Committee, Alaska State Legislature, Juneau, Alaska, explained the difference between version H and the previous version Y.

3:36:09 PM
She explained that on page 1, line 11, section 1, of draft H the phrase "Notwithstanding any other provision of law" was removed and replaced with a clause that removes potential conflicts with three applicable title provisions in Title 38. They are found on page 2, starting on line 17: AS 38.04, AS 38.05, and AS 38.95. Throughout section 1 the "Commissioner" was also changed to the "Department".

3:36:26 PM
Section 1 restructures general permits to be used only for activities that the department can already authorize through a permit under AS 38.05 and AS 38.95 or regulations adopted under those statutes. This eliminates leasing, easements, material sales, other sales, and other provisions of Title 38.

Page 2, line 2, in Section 1, following "significant" "and" was replaced with the word "or" so that permits may only be issued if they are unlikely to result in significant or irreparable harm to state land or resources.

Lines 3-10 on page 2 add language that spell out the requirements for public comment on proposed general permits. The comment period must not be less than 30 days. The department shall make available to the public a written decision issuing the general permit. The decision to issue a general permit is appealable under AS 44.37.011, however a decision not to issue a permit does not require a written decision and that is not appealable (page 2, lines 11-15).

3:38:25 PM
Section 2, on page 2 makes a change that is made throughout the document: following the word "Commissioner" used to be a phrase "not later than" and that is replaced with "within". This is a stylistic change that was recommended by the legislative legal team to conform to the manual of legislative drafting.

In Section 4 on page 7, line 11, following the word "may" the word "within" again, the same as before.

Section 5 on page 7, line 29, following the word "reconsideration" the word "within" replaced the words "not later than".

In Section 6 on page 8, line 6, following the words "to the court" the word "within" replaced the words "not later than".

3:39:22 PM
In Section 7 on page 8 deals with AS 38.05.035, which are the powers and duties of the director, the preference right provision applicability was narrowed to state land leases issued competitively under AS 38.05.070; in the previous version language could have been construed to pertain to oil and gas mineral leases.

On line 13, page 8, the word "valid" replaces "active", so now it reads "valid municipal entitlements". Also on line 13, changes made last year to AS 38.05.035 changed the lettering in this section; the letter (l) now reads (p).

On page 8, lines 21-24, a new sentence was added to address the preference rights. The sentence is:

> An application for a preference right under this section must be filed with the director within 120 days after notice to the lessee or the municipal entitlement land selection if the director grants a preference right.

On page 8, line 30, the word "avoided" was added after the word "be" and on line 30 through page 9, line 2, clarifies how the municipal entitlement would be affected by a granted preference right. If the preference right application is approved, the amount of land within the overall municipal entitlement under AS 29.65.10 - AS 29.65.30 should be reduced by the amount of land.

3:41:28 PM
On page 9, line 2, the funds transferred to the municipality are subject to appropriation. This relieves any concern with creating a dedicated fund.

3:41:40 PM
SENATOR MICCICHE joined the committee.

3:42:08 PM
MS. WILLIAMS stayed on page 9, line 3, and said "land selection" was added after the word "entitlement". On Page 9, lines 5-6, the definition of "building" was modified to add a size constraint of "not less than 500 sq. ft."

Section 12 on page 11, line 17, had another stylistic change dealing with leasing procedures in AS 38.05.075: following the word "made" the word "within" replaced the words "not later than".

The old Section 13, which in version Y used to be on page 11, line 16, was removed for a stylistic edit suggested by legislative legal. So, subsequent sections were renumbered accordingly.

3:43:10 PM

Section 13, on page 12, line 10, following the word "made" one will find the word "within" that replaced the words "not later than". The same change was made in section 14, in line 29.

In Section 22 on page 16, line 17, deals with AS 38.50.10: the word "to" was deleted and "that would" was inserted, a stylistic change.

On line 27 the word "within" following "AS 38.50.140", which replaced the words "not later than".

3:44:27 PM
In Section 26 on page 17, line 31, following the word "review" "within" replaced the words "not later than". Another stylistic change. Following the word "days" the word "after" replaced "from",

3:45:00 PM
In Section 34 on page 20, line 16, following "reconsideration" "to a person" was made singular; it used to say "persons".

3:45:17 PM
In Section 36 on page 21, lines 8-9, AS 15.133 dealing with notices and objection, after the word "removal" a clause was added saying "when the commissioner determines that the proposal or application is ready for a decision". Basically, the commissioner doesn't have to prepare a notice of application for sale, appropriation, or removal until the application is ready for a decision. It would be inappropriate for the commissioner to move forward with the notice until appropriate application and necessary data are available to begin the adjudication process.

Staying on page 21, line 12, after the word "that" the words "not later than" were replaced with "within".

3:46:21 PM
Old Section 42 in the Y version was found on page 22, line 11, and this section contained changes to AS 46.15.145(a) that removed the word "person" from eligible applicants. In Version H this section was removed and the statute reads as it does today, leaving in the word "person". So, subsequent sections were renumbered accordingly.

In Section 40 on page 22 dealing with AS 46.15.145, reservation of water, items were added that the commissioner must consider

in determining the proposed reservation is in the public interest under (4) beginning with:
(a) on line 23 the commissioner must consider the benefit to the applicant;
(b) the effect of the economic activity;
(c) the effect on fish and game resources and public recreation opportunities;
(d) the effect on public health;
(e) the effect of loss of alternate uses of water;
(f) harm to another person;
-and moving onto page 23, (f) and (g) say the effect upon access to navigable or public water.

She explained that this language was pulled directly from AS 46.15.080: criteria for issuance of a permit. It's also found in the regulations for the department under "reservation of water." This just puts it right into statute. And the following subsections were numbered accordingly.

3:48:20 PM
In Section 42 on page 23 several subsections were added to AS 46.15.145 explaining the treatment of applications. Beginning on line 15, (g) directs the commissioner to issue any approved certificates for water reservations applied for by a person to the appropriate state agency to ensure that a public entity holds the reservation for a public resource; (h) grants the commissioner discretion in determining when and in what order to process water reservation applications. It clarifies that the order through which the application must process does not affect the priority of the appropriation. In subsection (i), only the applicant for a water reservation or an agency that holds the reservation may appeal the subsequent administrative decision under AS 46.15.145(f), and that appeal right may not be transferred or assigned. "They" on line 27 clarifies how much data must be submitted before the commissioner can issue a certificate of reservation. It specifies that not less than five years of non-proprietary public domain hydrologic data must be collected by or for the applicant to support the application. Subsequent sections were then renumbered accordingly.

3:49:43 PM
In Section 44, on page 24, line 7, a new section was added to read: "An applicant under this chapter does not have a property right in the application." Basically, the application itself does not constitute a right. The right can only be attributed once a certificate has been issued by the commissioner. This does not apply to the property right granted through a

traditional water right for beneficial use upon certification. Since this is a new section, subsequent sections were renumbered accordingly.

Section 45 also on page 24 is new and adds "federally recognized tribe" on lines 11-12 to the definition of a "person." While DNR currently interprets federally recognized tribes to be included in this definition, this very clearly spells it out. Subsequent sections were also renumbered.

Section 48, which used to be Section 47, has transition language for pending applications for reservations of water. Section 48 was changed to require that all applications filed before the effective date of this act will be processed using the provisions of this act.

It used to read:

> The Department of Natural Resources shall return any applications and fees for applications pending as the effective date of Section 42 of this act to persons no longer authorized to reserve water under Section 42 of this act.

She said that Section 48 also clarifies that the transition language pertains to applications filed under AS 46.15.145.

New Section 51 was added; this used to be Section 50. It adds provisions of this act take effect immediately including changes to AS 46.15. She said that completes the changes.

3:52:07 PM
WYN MENEFEE, Chief Operations Officer, Division of Mining, Land, and Water, Department of Natural Resources (DNR), presented a power point that explained some of the changes to HB 77. He said they have had a lot of meetings since hearing this bill last year and had incorporated language to address the concerns they heard. He would first cover all the different parts of the bill lumping the provisions of the sectional analysis together where they make sense.

3:54:21 PM
He started with general permits in Section 1 for which they heard concerns about the "notwithstanding" clause, because it was felt that general permits might be used for much more than they were intended to be used for. So, that was removed and replaced with language saying if it conflicts with Title 38.04,

Title 38.05 or Title 38.95, the only places there might be a conflict. Secondly, the department can only use the general permit where they can already authorize permits under AS 38.05 or AS 38.95. This really brings the scope of what a general permit can do down to a very few things. They will write a decision on an application and give the public 30 days' notice. The decision is appealable and they made that clear along with the fact that subsequent actions that people perform under a general permit aren't individually appealable. General permits don't include things like easements, oil and gas mineral leasing, coal leasing, material sales or other disposals of state land.

3:56:08 PM
They also changed language so that you can't get a general permit if it causes "significant or irreparable harm" by adding "or irreparable harm."

CHAIR GIESSEL said she had been asked the definition of "unlikely" and what timeframe he was looking at for "irreparable harm."

MR. MENEFEE answered unlikely to result in significant or irreparable harm refers to actions in the foreseeable future.

CHAIR GIESSEL asked for an example of a general permit that he thought would cause irreparable harm.

MR. MENEFEE answered if it would cause irreparable harm, they wouldn't give the general permit. They can still permit applications through a miscellaneous land use permit and put provisions in about how they can fix something that happened: for instance, if they gave a permit for someone to bring equipment across some area and they knew it was going to cause some impact, but it was going to be repaired. However, for a general permit the applicant would have to show that it's not going to cause significant or irreparable harm.

3:58:31 PM
SENATOR FRENCH said Section 1 motivated maybe thousands of Alaskans to come out against this bill. He went to a meeting on it in Anchorage on a cold December night and there was standing room only - probably 250 people. He wondered whether the department would gain more by just jettisoning the general permits and moving on to the other reforms that the bill offers.

MR. MENEFEE answered that he believed this was a good provision, because it's an efficiency measure. The way the changes constrain it so that it wouldn't be used for authorizing large projects; it's not what people were saying it would do. It's for very small things. However, if the department gets repetitive requests for the same type of thing that they always say "yes" to and put these parameters around that authorization, that's a very good candidate for doing a general permit. It saves both the applicant and the department time and money. General permits are used very commonly by many different agencies, but it wasn't clarified in DNR statutes.

SENATOR FRENCH asked what he is gaining from this versus the existing system. It might be helpful to give an example of a situation.

MR. MENEFEE said for instance, a general permit could be used for a situation they had on a river with hundreds of mooring buoys, all that need permitting. Every single person would be required to come in and get a permit, do an application, go through the process of the public notice, and pay for it. The department already decided that if you have a Corps permit for that marine buoy and you've shown that it is already in place, they would permit it under certain conditions. The people who met the conditions would pay for the permit and be done quickly. In one year hundreds of buoys were permitted saving both money and time for the department and the applicants, while protecting the environment and authorizing lawful activities.

4:02:19 PM
SENATOR MICCICHE said a lot of people don't understand how codifying general permits works, and because of that they want to jettison it. People are still concerned because the original language in HB 77 didn't have sideboards; they don't realize those issue have been fixed in under AS 38.05 or AS 38.95 and the "notwithstanding" language has been removed, which gives the authority back to the ADF&G to work with DNR on using their Title 16 codes to make sure that criteria is met. He thanked him for the changes saying it's important to make Alaskans more aware of the substantive changes in Section 1.

SENATOR MICCICHE asked if this bill could be used as a general permit for a major dam in Cook Inlet or a major resource development project for Chuitna or Pebble Mine. People are under the impression that the department would just issue a general permit for some of these major developments. The way he understands this is that those sideboards don't allow those

major activities, including oil and gas exploration and production to occur, using a general permit.

MR. MENEFEE answered that was correct. He added that a very large project might have a very small portion that might actually fit within a general permit. For instance, a stream crossing that was under a general permit and the large project needed to cross that stream. If that big project fit within the parameter of that little portion it might work, but in general, he would say, "no."

SENATOR MICCICHE said hundreds of folks' concerns about section 1 were heard and captured in code.

4:05:32 PM
MR. MENEFEE said in his view that section returned protections to Alaskans that they feared went away with the "notwithstanding" language in Section 1. It is important that people understand that and that it was captured in code.

He moved to the land lease and sale provisions on slide 4 that included Sections 3, 8, 9, 10, and 21. These are just clarifications about the division's land leasing and sale provisions. Essentially they are raising the threshold from 5,000 acres to 10,000 acres when getting the commissioner's approval when disposing of state land. Prices have gone up since the time the statutes were originally put in place, and they clarified in Section 8 that you can purchase for contract (something they already do). Then they talked about lotteries and public auctions being allowed on-line as well as out-cry.

4:06:54 PM
Slide 5 covered extensions and renewals on land and aquatic leases. Sections 11, 15, and 16 are about renewing or extending leases. Generally, HB 361 that passed a couple of years ago said you can renew leases that are done under AS 38.05.070 for someone in good standing and they don't exceed the term of the original lease. Aquatic farming was left out of that, because it had a certain renewal statement already in its language, but it doesn't match up with the other part. So, they are just making it consistent with what already passed.

The other part is an extension for a lease where there is a request to purchase or to renew the lease, or someone is substantially changing their operation. They may ask for that at the very end of their lease and there wasn't any provision to keep that lease active while that request was being adjudicated.

So, the two-year extension gives them the capability of going through that decision process while they are legitimately authorized to be out there with that lease. Then the decision is made to approve it or not.

SENATOR MICCICHE thanked him for that clarification; this is one of those things that Alaskans are unaware of that is so important to fishermen and shellfish farmers. It adds to and makes lives of many hardworking Alaskans better.

4:08:45 PM
MR. MENEFEE moved to preference rights on certain land leases (situations where you have a municipal entitlement land selections that overlay on top of a lease). A provision giving a preference right for people who had leases was inserted during Senate Finance. The change clarified that language is talking about land leases that were offered competitively through AS 38.05.070 as the intention was never to include oil and gas leases or mineral leases. In a municipal entitlement situation if an individual has the lease, if that land were to be transferred over to the borough or city that lease would have to be honored. However, this gives them the option to purchase at the point of the selection. So the department will notify that lessee when that selection comes over the top of their lease and give them 120 days to tell them whether they would like to purchase it, and then the department will run through a process to see if they meet all the criteria to purchase that land. Those criteria are: that they have been operating for at least 10 years under a lease, that 25 percent of their income for the previous 10 years comes from that land, and that they've put a building on there that is at least 500 sq. ft. Then if they decide they meet all the criteria, when they dispose of it, they have to do it for fair market value. And the value, because the municipality selected it most likely for the purposes of revenue, will be for the borough subject to appropriation by the legislature.

4:11:06 PM
He said the preliminary written findings section had not changed since last year (slide 7). The issue was that they already do preliminary decisions in a two-step process: you give folks a preliminary decision and let them comment on it and then you make changes if necessary and write the final decision. Existing statutes didn't actually clarify that process, so all the changes in Sections 3, 17, 18, and 19 were essentially to clarify that they "may" do that.

In addition, in Section 19, they clarified that they wanted to give more public notice than what was required and that was in lease hold location orders - not just mineral closing orders, but opening orders and other location orders.

4:12:19 PM
Nothing has changed on land exchanges on slide 8 since last year, but they are very important, especially with the mixed ownership with municipal entitlements. As land becomes more complex, there are more needs to do land exchanges. Currently, it is almost impossible to do general land exchanges - not under Title 29, the municipal entitlement side of things, but just on general land exchanges.

4:13:32 PM
MR. MENEFEE clarified that they changed "aggrieved by" in appealing to "substantially and adversely affected". However, that is seen throughout their statutes, so therefore multiple sections had to be adjusted to reflect that. Sections 4, 5, 6, all have that change. He said it doesn't change the intent of the existing statutes. Sections 12, 13, 14 are the same.

4:14:55 PM
CHAIR GIESSEL asked if a request for reconsideration in Section 14 is reduced.

MR. MENEFEE explained that the other ones say 20 days for appeal and this one had said 30 days, and they are just trying to make it consistent with all the other ones.

SENATOR FRENCH asked if the reduction was in last year's bill.

MR. MENEFEE answered yes. He said the general appeal statute now says that a person to be eligible to appeal has to be aggrieved by something. They found multiple people appealing by just saying they don't like something, but not explaining why. So, they clarified that the department wants something in writing that says how they are substantially and adversely affected. Secondly, they added a provision that would allow them to say if they go out for notice for 30 days (a provision that is already in for disposals of state land) and tell the people in order to appeal this you have to meaningfully participate by submitting comments during the process. The whole reason is that they have found numerous times when people bring up a point at the end of the process when the decision has been made and then someone appeals. But it's late in the game and a delay. They would

rather see that up front, because they want to address the public's concerns.

AS 44.37.011 is the appeal standard for all their decisions except for water that is a little different in the sense that it says "adversely affected" which goes a little bit further in saying that an appeal decision that someone who is adversely affected makes has to show that there is either a physical or financial detriment to them, the idea being that water is pervasive through all types of projects throughout Alaska. People need water to do their business. Water is so important to keep things moving that if someone appeals a water authorization they have to show substantively how they are affected.

4:18:39 PM
MR. MENEFEE explained that DNR issues three types of authorizations under the Water Use Act:
1. Temporary use authorizations, which are an authorization to use water - temporary, revocable and never perfects to a water right
2. Two different types of water rights: the type that you are beneficially using for your purpose (traditional water right), the idea being that you are either taking water out of the water body for your beneficial use or you are using the water in the water body for your beneficial use, like a turbine.
3. Now there is another type of water right, which is called a "reservation of water" and that leaves the water in the water body.

4:20:09 PM
He said the water reservations section got a lot of attention in last year's bill that removed a person's ability to apply for a water reservation, and the reason was because they had started to see what might be a tactic for people to use a water reservation as a tool to delay projects. But they heard very loud and clear from the public that was not a good idea. The change in this year's version puts persons back in; anyone can apply for a water reservation (including federally recognized tribes that are defined as a person), but they put a few sideboards on that to make sure it's not used as a tool for a delay. For instance, the commissioner has the discretion to determine the order of adjudication, and they clarified when submitting a water reservation application a person has to submit five years of hydrologic data that has been in the public domain or collected for them - the idea being that they don't just copy and paste something that they found somewhere. They also made sure that the applicant that applies for a water

reservation has the ability to appeal the decision on that, which is important for persons, because of the one substantive change they made that said if a person applies rather than granting the water reservation to that person it's granted to the appropriate state agency. Last year they clarified that they wanted to make sure that a public water reservation for a public resource is held by a public agency. This does that without denying people the ability to apply. However, the applicant that originally applied will still have the ability to appeal that and secondly, if they ever make a change on that water reservation - reducing the amount or restructuring the reach that it applies to - even though they were the applicant but not holding the water reservation, they still have a right to appeal that.

4:23:27 PM
They also added decision criteria to be used in making their decision for water reservation into statute. They had those before, but people didn't see it. It is in Section 40 of the bill on page 22, starting on line 12.

SENATOR MCGUIRE commented that Alaskans have the equal goals of developing its natural resources while being fierce environmentalists and there is a tendency to use examples of over-zealous litigants, but they also need to use the flips side which is the over-zealous corporations that come in from Outside and want to take the resource as quickly as they can and leave behind almost nothing. So, she was equally concerned about there no longer being a priority status and relying on a commissioner's un-corruptibility to make water reservation decisions for the benefit of Alaskans. She was more worried about them than the individual Alaskan. She wanted it on the record that it's so important to think about the future streams and how they feed into other places and the foreseeability of that in looking at large general permits for a large mine or dam.

SENATOR MCGUIRE said she was still deeply concerned about this bill and the idea of one general permit with one opportunity to testify and you don't get another shot at it when all the other uses come back.

4:28:11 PM
MR. MENEFEE said he appreciated her comments and that there were two things mixed in with what she said: reservations and general permits, but they are not the same. She was correct that these

are weighty decisions, but the criteria are there to protect the fish and game habitat for foreseeable uses.

Her reference was to "big" general permits, but they are now constrained to small projects. The big things are done by leases and other larger authorizations; general permits don't affect them anymore. Language has been clarified so that it can't affect larger projects like that.

4:29:20 PM
SENATOR MICCICHE added that he also appreciated her comments, but they were in reference to the original language, which concerned everyone, but he didn't think it was the intent originally of the department for it to be that open. He appreciated the sideboards and how they defined a general permit for smaller projects.

He said coming back to water reservations, they don't typically repeat code as in this case, but what is very important is that everyone remains focused on how the commissioner determines what is in the public interest before water is reserved. The criteria clarify what kinds of things are considered.

CHAIR GIESSEL invited Alaska Department of Fish and Game's Randy Bates to the table to clarify their role in this kind of permitting.

4:30:59 PM
RANDY BATES, Director, Division of Habitat, Alaska Department of Fish and Game (ADF&G), said HB 77 [version Y] does not diminish or lessen fish and game protections as it relates to fish and fish resources. The division retains separate, independent authority under Title 16 to provide those protections for fish and habitat. The Division of Habitat is the primary agency that permits activities for the ADF&G and they have two primary functions: one is to issue fish habitat permits for activities that occur within resident fish streams and anadromus water bodies and to permit activities that occur in specially designated legislative areas around the state.

SENATOR MCGUIRE asked if ADF&G currently has the ability under the definition of a "person" to apply for one of these water reservations if they believe that one of these areas is important to Alaska's fish habitat.

MR. BATES answered yes; they are the recipient and the applicant of record of all the above and will continue to apply for those

reservations and work with DNR. They are considered a "person" under the definition.

SENATOR MCGUIRE asked on page 22, line 27, the findings (already a part of regulation) that the commissioner must consider in determining the public interest, item (c) requires that the commissioner look at the effect on fish and game resources and she wondered whether that involves a requirement that the DNR commissioner consult with the ADF&G, specifically the Habitat Division. The reason she asks is because a commissioner might have a background in biology and fish habitat and some may not. What would that particular commissioner's analysis look like? She hoped it required a specific conversation with ADF&G.

MR. MENEFEE answered that although it doesn't say the DNR has to consult with them, the understanding has always been that ADF&G is the expert on the fish and game and their habitat; DNR folks are not. Therefore, they absolutely depend on ADF&G; every single application goes through ADF&G consultation to tell them whether it's true when an applicant says a certain reach of the river needs to be protected for fish habitat.

4:35:18 PM
SENATOR MICCICHE said he knew it was not the intent of the department, but the "notwithstanding" language was concerning in the general permits originally. And the intent was to continue regulating under Title 16, however legally they could have been trumped in the court of law, but that has been clarified.

He said the 12 important rivers are the rivers that grow 90-95 percent of the salmon in the state not counting the tributaries, and the state holds the reservation on six of those rivers: the Stikine, the Taku, the Copper, the Kenai, the Karluk, and the Nushigak. So, they have done some studying of necessary in-stream water flows in these primary streams.

4:36:29 PM
MR. MENEFEE responded that he was pretty sure ADF&G was the primary on those, but he couldn't guarantee every single one (BLM might have been issued some).

4:37:05 PM
MR. MENEFEE said he hadn't covered a couple things yet on reservations and one is that transition language states in section 48 that all the pending applications they have for water reservations will be done under the provisions of this act.

SENATOR FRENCH asked if he meant under the new act or the law as it stands now.

MR. MENEFEE replied the new act.

SENATOR FRENCH pointed out that if he had an application that had been waiting in line for some time, the rules he had been working under are now new with respect to this act.

MR. MENEFEE responded that the issue is that the new provisions will prevail; you don't lose any priority or date of application. You don't lose the fact that you applied and did all this work to gather data. The only difference is that under the old provision technically he could have issued a reservation to a person and they would not be able to now, because the provision says it has to be issued to the appropriate state agency. So, if they adjudicated an application from a person, they will issue it to an appropriate state agency.

4:38:36 PM
CHAIR GIESSEL said he just said it would be held by a state agency and she thought municipalities could also hold one; it wouldn't have to be just a state agency.

MR. MENEFEE replied that he would check, but section 42 says "appropriate state agency."

SENATOR MICCICHE asked how many individual persons or groups have been successful in adjudicating a water reservation.

MR. MENEFEE responded that they had issued no reservations to persons to this date.

SENATOR MICCICHE said he wanted to clarify that folks are not technically losing ground - they have the same ability to apply - the only difference is that "an appropriate state agency" will possess the water reservation.

SENATOR MICCICHE said he saw what he thought of as another improvement in the bill in that the change does not require the department to review a water reservation every 10 years, so a water reservation will likely not have pressure to be removed. They'll likely not even look at those rivers unless there is a pending project or other use of that water.

MR. MENEFEE said he stated that very well. The situation is that before they were required to look at the water reservation every

10 years and reevaluate even if all the facts were the same and it still warranted a reservation. At this point, that's a lot of work, so this is just saying they can look at a reservation, but they don't need to.

SENATOR FRENCH asked how many private reservations are pending and for how long.

4:41:28 PM
MR. MENEFEE answered that right now they have received 202 applications and 181 have information that is complete enough for them to make the adjudication. They have issued certificates for 89 and at least 25 of them since last year. Six were closed, because the applicant withdrew or for some other reason.

SENATOR FRENCH said he thought a few minutes ago he said there had been no private reservations accomplished under state law.

MR. MENEFEE said he may have misunderstood the question, because he had given the information for all reservations, not just private ones.

SENATOR FRENCH said he meant private ones.

MR. MENEFEE said that right now they have 35 applications from private entities and of those 35, they have issued zero permits.

SENATOR FRENCH asked how long they have been pending and how many are complete.

MR. MENEFEE answered the oldest one was from 1992 and the majority of them came in past 2007; the vast majority came after 2009. They are not necessarily complete applications; he didn't know how many were complete.

4:43:43 PM
SENATOR FRENCH asked if one had completed an application for a private water reservation should be some reasonable amount of time in which the department should act on it.

MR. MENEFEE answered the reasonable amount of time is in the eye of the beholder, but they have a backlog of 202 applications and they can't get them all done within a year. So, inevitably they are going to have to prioritize the most important ones with ADF&G, because a vast majority of the applications are done for fish and game habitat.

SENATOR FRENCH commented that if they are not good applications and not in the public interest, then deny them, and move on to the next one. It seems like a weird joke to have this application process on the books that never results in the awarding of a reservation.

MR. MENEFEE answered a person's application doesn't necessarily mean it's the highest priority. It's not a joke; they have been actively doing reservations, but they take a lot of time and are based on science that requires a lot of research. And if you look at history the process is going a lot faster now.

4:46:36 PM
SENATOR DYSON asked what happens when reservation permits have all been given and something happens in a natural habitat. For instance, in the sub-Arctic, virtually all rivers in the flat country meander and sometimes get a long ways out of what the river bed was when the permit was issued. Some places on Lake George, in his area, a glacier comes down and dams up a lake and sometimes it takes seasons to break through or there are landslides (which the Eklutna people have had to deal with) - things happening that are out of anyone's control - or dumping sewage into the water.

MR. MENEFEE said when a river changes course the water reservation is going to stay with the reach of the river (a natural meander. An avulsion is when a complete new river emerges, a rare situation when a rockslide that blocks a river. A provision in AS 46.15.145(f) says if something has fundamentally changed, you might have to reevaluate this instead of doing the 10-year review. He related an example where someone dumped hydrochloric acid into the water and killed everything in that river body. Then the question they will consult with ADF&G on is if there is still habitat to protect; is the purpose still there that warranted the reservation in the first place?

SENATOR MCGUIRE said language on page 24, lines 1-6, talks about the tremendous amount of power given to the commissioner. It says:

> Notwithstanding any contrary provision of this chapter, the commissioner may authorize the temporary use of a significant amount of water as determined by the department by regulation for a period of time not to exceed five consecutive years in each authorization. If the water applied for has not been appropriated in accordance with this chapter, the

commissioner may issue one or more new temporary water use authorizations for the same project.

She said there could be no limit to the extensions the commissioner could grant as determined by regulation, so the legislature has no authority. Each one of them can last up to five consecutive years. At least one or more could be issued for each project. She didn't see a limit on gallons either. She asked how big the state's exposure is on these temporary water permits and what would prevent an applicant from just going that route if a commissioner were particularly favorable to that project and the public generally wasn't.

4:52:05 PM
MR. MENEFEE answered that a temporary water use authorization is temporary and it's revocable and never perfects into a water right. Keep that in mind. Secondly, revocable means they can stop that authorization at a moment's notice. But what keeps it from just being renewed is there is no renewal of a temporary use water authorization. It is saying that first of all it does not exceed five years; however, it also clarifies that at the end of that five-year period (which happens), if a project doesn't quite get done in those five years - it's a seven-year project - they can come back at the end of those five years and say they need two, three, or five more years of a water use authorization. The division must start from scratch, reevaluate it, and they are still required to go to ADF&G on a temporary water use authorization and consult with them to protect the fish habitat and then they make a decision based upon other water rights that are out there and such, and then issue a certain amount of water for the project. He explained that these types of water use authorizations are used by DOTPF and for things like the GVEA wind tower project and ice roads on the North Slope, and for things throughout Alaska for development projects and small projects.

SENATOR MCGUIRE said she was not comfortable with that particular language. He had worked with Senator Micciche to come up with some very clear language on page 22 about the kinds of things that have to be considered, but then this "notwithstanding" provision on page 24 guts it and gives the discretion back to the commissioner and not to exceed five years, but it can be one or more times again. She just didn't see protection for the public there. There has to be some limitation.

MR. MENEFEE clarified that that "notwithstanding" provision was in existing law. They are just clarifying that they can do it more than once to the same location. He said they still have all the protections to evaluate that.

SENATOR MCGUIRE stated that he was adding the fact that they can issue one or more new temporary use authorizations for the same project, which in her opinion takes away any incentive whatsoever to go through the regular process, because a commissioner could just continue to extend that process.

CHAIR GIESSEL asked if a ski resort that is making snow every winter has a temporary water use permit, and he mentioned a road project that could go past five years - ice roads, municipal sewer and water projects, as well. These are common every day private citizens who need a temporary water use permit. Is that correct?

4:58:13 PM
MR. MENEFEE said she was correct in the fact that all sorts of individuals that are companies use these, but the key point is when someone applies, because of the way the statutes are written, if they want it in perpetuity they need a water right to assure they will always have that. Everyone in the future will be bumped. A temporary use permit doesn't bump anybody. So, for instance, if a ski company needs water for snow on the mountain, they probably will probably go for a water right, because they don't want someone coming along a week later and applying for a water right and then taking away their business because they can't get water.

CHAIR GIESSEL said a lot of folks in her district have a water right in terms of a private well.

4:59:36 PM
SENATOR MICCICHE said the section they are referring to on page 22 has nothing to do with the section on page 24. Page 22 is a water reservation; page 24 is a temporary water use permit. It is just a clarification of rights people already have today. And being in industries that uses both, he agreed that someone who is going to invest substantially in a project is not going to ask for a temporary water use permit.

In his view, the line that is added "may issue one or more new temporary water use authorizations for the same project" is not something they couldn't do before. It's just being clarified. Some folks want to be notified when a new temporary water use

permit is issued for the same project, but it's likely going to be for a short time, just slightly longer than that initial five years. In terms of investments and risk, you could get a brand new commissioner in the middle of your temporary water use permit and you've made a substantial investment and he could revoke it tomorrow.

5:01:28 PM
MR. MENEFEE went over the Water Use Act changes on slide 15. In Section 35 they made sure that people that are moving small quantities of water from one hydrologic unit to another are not violating the law - for carrying a water bottle across a hydrologic unit, for instance.

Section 36 just says that they are going to prepare a public notice on a proposal of sale of water once the commissioner determines that the application is ready for a decision. He explained that they get a lot of applications that are incomplete and they will not go out to notice on them until they are ready.

MR. MENEFEE said they removed a certified mail issue that wasn't necessary. The temporary water reservation in Section 44 was clarified to mean that an application does not vest a property right in an individual; it's actually the issuing of a permit or certification that does that.

5:02:55 PM
Chikuminuk Lake was added last year, which is allowing a feasibility study for a hydro project at Woodtikchik State Park and talks about making it consist with the management plan just to do the feasibility study. They also added a definition and clarification of state land, because of the way it was stated: shorelands and tidelands.

In Section 28, if someone wants to do a subdivision of their property in an unorganized borough (DNR manages that), and it doesn't have any easements or anything that would affect the public - they just want to divide it in half - they would have to go through all this public notice which nobody ever comments on, nobody ever says they have a problem, because it's just a person's own property they are doing something with. It's just more cost and delay. So, they have changed the public notice requirement in those situations.

5:04:16 PM

Section 46 has the repeal provisions that were needed in order to insert the new sections, transition language, and the change in the effective date for the Water Use Act.

SENATOR MICCICHE said a huge proportion of pending applications are federal applications for wilderness water ways that will not have a competing use, perhaps ever or for generations, and why is there not a category that says these were adjudicated as not having a likely competing use, re-apply if, or you'll having a standing someday if there is a competing use to get to a reasonable amount of the applications that you actually have on the books that you will act on.

MR. MENEFEE said there is no statutory provision to make that call. However, they can always represent that backlog in two different ways, but they don't have a way to ignore and reject it for those reasons.

[HB 77 was held in committee.]

5:07:17 PM
CHAIR GIESSEL adjourned the Senate Resources Standing Committee meeting at 5:07 p.m.