

**ALASKA STATE LEGISLATURE  
HOUSE SPECIAL COMMITTEE ON FISHERIES**

July 27, 2021

10:03 a.m.

**MEMBERS PRESENT**

Representative Geran Tarr, Chair  
Representative Louise Stutes, Vice Chair (via teleconference)  
Representative Dan Ortiz (via teleconference)  
Representative Sarah Vance (via teleconference)  
Representative Kevin McCabe (via teleconference)

**MEMBERS ABSENT**

Representative Jonathan Kreiss-Tomkins  
Representative Andi Story

**COMMITTEE CALENDAR**

PRESENTATION(S): DNR WATER REGULATIONS

- HEARD

**PREVIOUS COMMITTEE ACTION**

No previous action to record

**WITNESS REGISTER**

DAVID SONG, Staff  
Representative Geran Tarr  
Alaska State Legislature  
Juneau, Alaska

**POSITION STATEMENT:** On behalf of Representative Tarr, committee chair, reviewed the proposed regulations by the Department of Natural Resources (DNR) for instream flow reservations.

ERIC FJELSTAD  
Resource Development Council  
Anchorage, Alaska

**POSITION STATEMENT:** Provided a presentation regarding the proposed regulations from the Department of Natural Resources for instream water reservations.

BOB SHAVELSON, Advocacy Director  
Cook Inletkeeper

Homer, Alaska

**POSITION STATEMENT:** Regarding the proposed regulations from the Department of Natural Resources, provided a PowerPoint presentation, titled "Instream Flow Reservations: Proposed DNR Rules Repeat Mistakes from Outside."

**ACTION NARRATIVE**

[10:03:43 AM](#)

**CHAIR GERAN TARR** called the House Special Committee on Fisheries meeting to order at 10:03 a.m. Representatives Stutes (via teleconference), Vance (via teleconference), and Tarr were present at the call to order. Representatives Ortiz (via teleconference) and McCabe (via teleconference) arrived as the meeting was in progress.

**PRESENTATION(S): DNR Water Regulations**

[10:04:08 AM](#)

CHAIR TARR announced that the only order of business would be presentations by Eric Fjelstad of the Resource Development Council and Bob Shavelson of the Cook Inletkeeper regarding the proposed regulations from the Department of Natural Resources for instream flow reservations.

[10:04:54 AM](#)

DAVID SONG, Staff, Representative Geran Tarr, Alaska State Legislature, on behalf of Representative Tarr, committee chair, reviewed the proposed regulations by the Department of Natural Resources (DNR) for instream flow reservations. He paraphrased from a document on Representative Tarr's letterhead entitled, "Summary of DNR Water Regulation Changes," which read (original punctuation provided, with some formatting changes):

The Department of Natural Resources recently announced regulatory changes regarding water management regulations, specifically Title 11 of the Alaska Administrative Code. These regulatory changes have potentially significant impacts on instream flow reservation procedures and the larger debate on water rights. The changes are summarized below:

- 1.11 AAC 93.115 (Closure of an application for a water right):**

This code was changed to remove the appeal process for water right applications that were closed at the discretion of the Commissioner.

**2. 11 AAC 93.142 (Content of application):**

This code was changed to add qualifying language to the existing code, such as saying "purported need" instead of simply stating the "need" for water reservation. It also states that applications must include "applicable" data to substantiate the "purported need." By adding this qualifying and subjective language, it gives DNR more flexibility to determine whether or not an application is valid.

**3. 11 AAC 93.146 (Issuance of a certificate of water reservation):**

This code was changed significantly to alter the recipient of the certificate of water reservation. Under the new changes, only applicants that are state or federal agencies will receive the certificate directly. Individuals or NGOs [non-governmental organizations], for instance, will not receive the certificate - instead DNR will be the certificate holder (and will be responsible for compliance).

Additionally, the certificate holder (and applicant) will have the ability to participate/initiate any administrative/judicial proceedings re: the application decision or the management of the certificate.

**4. 11 AAC 93.147 (Review of reservation of water):**

This code is changed slightly for grammatical and procedural clarity (inserting the words "original" in front of the word "purpose," and "subsequent" in front of the word "applicant").

**5. 11 AAC 93.210 (Temporary water use):**

This code is changed to say that instead of being able to extend a temporary permit for an additional 5 years, a temporary use of water can only be extended for a maximum of 5 years (including "time served").

**6. 11 AAC 93.220 (Procedure for temporary water use):**

This code is changed to specify that an application must also include the point of discharge or return flow, if there are any.

**7. 11 AAC 93.510 (Public notice and hearing):**

This code is completely rewritten to remove the requirement of DNR to publish proposed water reservations in the local community's newspaper. It

also removes the requirement of DNR to hold a public hearing with oral/written testimony. A public meeting (not hearing) may be held at the Commissioner's discretion, but public input must be provided through the Alaska Online Public Notice System. Only affected property owners, applicants, governmental agencies, and "appropriators of record" will be notified of DNR water management designations.

**8.11 AAC 93.970 (Definitions)**

"Appropriators of record" are redefined to be the "holders of a permit," rather than the applicants for the permit. The Division of Land and Water Management is also redefined as the Division of Mining, Land, and Water.

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CHAIR TARR noted that today's meeting was originally scheduled to have DNR staff provide the committee with an introduction. However, she said, DNR notified the committee last week that it would be unable to participate because it is at the point in the process that is considered the quiet period where DNR has received and is reviewing public comments. So, DNR was not comfortable presenting at this hearing and Mr. Song therefore provided this brief overview of the proposed changes, which is available on BASIS. She requested that committee members with questions follow up with DNR.

CHAIR TARR invited Mr. Fjelstad to begin his presentation.

[10:11:47 AM](#)

ERIC FJELSTAD, Resource Development Council (RDC), provided a presentation regarding the proposed regulations from the Department of Natural Resources (DNR) for instream water reservations (IFRs). He noted he is an attorney with Perkins Coie, a past president of RDC, and that RDC represents a variety of interests including tourism, fishing, mining, oil and gas, and Alaska Native corporations. He maintained that the instream flow regulatory scheme has been inaccurately reduced to either "support fish or you don't."

MR. FJELSTAD stated that the issue in play over the past 10 years regarding the instream flow regulatory process is that the existing process doesn't protect fish and therefore these instream flow regulations are needed, which he and most of RDC's

membership emphatically disagree with. He asserted that Alaska has a robust process for protecting fish, given it cuts across the jurisdictions of the Alaska Department of Fish and Game (ADF&G) through habitat permitting, DNR through water rights, and the Department of Environmental Conservation (DEC) through corresponding federal agencies. In large project permitting, he said, protection of fish is the number one issue, not an ancillary issue, there is no gap that needs to be filled.

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MR. FJELSTAD described instream flow reservation as a form of water rights where the water is kept in the stream system, the opposite of agriculture where water is piped from a stream and pumped onto a field. He said instream flow reservation has been reduced to using it for fish, which is the concern largely being talked about here, but it can be for any purpose. It has an impact on anyone wanting water, he stated. A right to keep that water in the stream can make it hard or impossible to get water out of the stream for a use. Use of water is not just the resource community needing water, he continued, communities all over Alaska draw water from rivers and other waterbodies for a variety of reasons including drinking water. So, a water right that says the water must stay in the waterbody has the potential to create issues, he stated, and that is part of RDC's concern.

MR. FJELSTAD said RDC has monitored the regulatory process currently underway described by Mr. Song. As well, RDC has monitored the specific instream flow reservations granted over the last decade and found that DNR routinely provides a reservation where more than 100 percent of the water has been reserved for a third or more of the year. This means more water has been reserved than is literally in the stream, but it isn't supposed to work that way. In theory, he explained, it should work such that the quantum of water necessary to protect fish is determined and that's the reservation, there is still water left so to speak. This is a big and unresolved technical problem in the process, he specified, not a legal problem. Mr. Fjelstad qualified that DNR isn't doing this intentionally, it's just hard to get this right because rain, dry periods, and other things make water levels go up and down. However, he noted, it's a real problem to a user, like a community trying to get drinking water when, through an instream flow reservation, the community is subject to a regime that says it must be in the stream and it's all the water.

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MR. FJELSTAD stated that RDC's second point and key comment is who should hold the certificate and who should enforce it. He said RDC believes water is a public asset while protection of water, and specifically fish, is a public priority. Fish protection is one of the highest charges given to the experts at ADF&G, DNR, DEC, and other agencies, he argued, and to vest that responsibility in a private party from a policy perspective is not supported by RDC and doesn't make sense. Alaska is unique in that it currently allows any person to seek, hold, and enforce a certificate. That is not a positive attribute or good policy, he opined, and it is amongst the changes that Mr. Song described. The changes would shift who can hold the certificate to public entities, and RDC believes that the State of Alaska should be holding these certificates, Mr. Fjelstad said. The State of Alaska has the people with the responsibility and expertise to protect fish, resources, and water. The State of Alaska and its political subdivisions should be holding that and enforcing it, he continued, which is one of the issues in these regulations. So, he said, RDC doesn't support the regulations as currently proposed because while DNR tried to make some progress on that it's still muddled and needs to be clarified that the state and its political subdivisions will hold and enforce the certificates.

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MR. FJELSTAD closed his presentation by asking the question: Is there a need for instream flow reservations (IFRs)? He said the answer is probably yes. He pointed out that RDC has never been on the record saying it doesn't support these or wants to do away with the program. In the context of large project development, he said, RDC's view is that the question of protecting fish is front and center and is addressed in the process. Instream flow reservations, he maintained, don't serve a purpose there because specific permits and other programs address this question head-on.

MR. FJELSTAD stated that if project development isn't happening, there can over time be death by a thousand cuts with water resources. For example, with urban sprawl someone can take a little water out of a stream here and someone take a little water out there, and over time it adds up. The difference between that scenario and a large project, he said, is the large project process drives an outcome where the stream is looked at holistically and scrutinized over time through monitoring. He maintained that if large project permitting isn't happening,

there can be various withdrawals of water that are unaccounted for. So, he continued, in the absence of large projects, if there is a threat to a waterbody an IFR can serve a purpose if done right. If the technical analysis is good, he said, preserving a minimum amount of water in some of these streams probably is sensible, but RDC thinks it should be a limited tool limited to DNR for situations where truly needed.

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CHAIR TARR invited questions from the committee.

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REPRESENTATIVE ORTIZ pointed out that when talking about a particular stream or project and water, the water itself is intermixable with a much broader area than just the stream being talked about. He agreed Alaska probably has some good protections but stated that the result is declining fish numbers where the cause is not any specific project or development, but the net effect of everything and not doing a very good job. He asked Mr. Fjelstad whether he agrees that this is the case.

MR. FJELSTAD replied that when standing in the Kenai River one wonders where all the king salmon are. But, he continued, different conclusions are drawn in different places - Bristol Bay right now has a record run - so he doesn't agree across the board that salmon are in trouble categorically. Causes for the variations in the runs probably are myriad. He said RDC's focus is ensuring that regulatory regimes are rational, that there is cause and effect between what the regulatory regime is trying to do and the problem. For example, if it is assumed there is a challenge with salmon, taking the measures here doesn't make a lot of sense, it's an add-on that doesn't bring a lot of value, it brings a huge amount of complexity to this. Mr. Fjelstad posed a scenario in which the DNR regulations die on the vine and are not finalized. He said the statute was any person could seek an instream flow reservation, and while there is a burden of gathering the data one doesn't even have to be an Alaska resident. Someone could move to Florida and seek an IFR and become a player at that point from the standing perspective, roughly comparable to the State of Alaska itself. He said RDC believes that that is not the right policy for Alaska and that policy decisions should be vested with the State of Alaska's salmon experts. He added that RDC agrees there is concern about salmon but disagrees that this is the right mechanism to address the broader concern on what's happening with salmon.

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REPRESENTATIVE ORTIZ acknowledged that salmon receive the most attention when talking about protection of Alaska's resources. He stated that there should be concern about the broader picture, which includes salmon, and whether it is halibut, rockfish, or hooligan the situation is in a general decline. Resource development or not on rivers, he continued, is just one piece of a big picture that is going on and he is troubled that there is much talk about protecting resources, but the net result is losing the battle.

MR. FJELSTAD, in reply to Chair Tarr, said he had no further response.

CHAIR TARR noted that the current regulatory proposal is similar to legislation considered in 2013. She said the question and characterization about who should hold the certificate, such as individuals, NGOs, or out-of-state residents, seem valid. She asked whether RDC has taken a position about tribes and stated she is troubled that this may be a place where the proposal has gone too far.

MR. FJELSTAD responded that RDC's view is consistent across resources, which is that the State of Alaska should be managing its resources in all situations where it can, including the debate with the federal government about resources. He said Bristol Bay's success story is probably because it is the most actively managed fishery resource in the state. Reservation of rights and the management of fish, he continued, are intertwined in a way that cannot be disconnected, so RDC thinks the state has the resources and is accountable to the people through the political process, and that's relevant here. He said RDC believes that both holding the certificate and enforcing it should be vested in the State of Alaska.

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CHAIR TARR summarized that Mr. Fjelstad spoke to technical challenges and who should hold and enforce the certificate. She asked whether she is correct that at this time RDC has submitted comments which state that RDC doesn't support the current draft regulations because it is still muddled about who should hold and enforce the certificate.

MR. FJELSTAD confirmed the summary about the two points but cautioned about over-simplifying. He stated that RDC supports directionally what DNR is trying to do but doesn't agree with the end point where DNR has come out on this, so RDC's comments urge that DNR do some more work.

CHAIR TARR thanked Mr. Fjelstad. She invited Mr. Shavelson to begin his presentation.

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BOB SHAVELSON, Advocacy Director, Cook Inletkeeper, regarding the proposed regulations from the Department of Natural Resources (DNR), provided a PowerPoint presentation, titled "Instream Flow Reservations: Proposed DNR Rules Repeat Mistakes from Outside." He noted that Cook Inletkeeper is a nonprofit organization and said he has been looking at salmon habitat protection and water management issues for the past 27 years. He displayed the second slide, titled "Topics for Today," and stated that Alaska prides itself on being different, yet DNR's proposal for Alaska will be repeating the same mistakes in fisheries resource management as were made in Washington, Oregon, and California. He said he will focus on one issue within these rule changes, which is the stripping away of the rights of Alaska residents and Native tribes to keep water in fish streams. He added that he will also describe a fix for keeping a certain amount of water in the streams.

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MR. SHAVELSON continued to the third slide, titled "Background," and explained that as a western state Alaska operates under the Prior Appropriation Doctrine of first in time, first in right, meaning the first entity to have a water right has a superior right to use that water over anyone who comes after them. He further explained that there are two types of water rights. The first type is an out-of-stream diversion or appropriation for "beneficial use" of the water or a temporary water use authorization, which is a lesser water right but still an authorization from the state to use the water for a limited time. The second type is an instream flow reservation (IFR), which is what is being talked about here. This is where water can be kept in a stream and under this statute it is for protecting fish, recreational uses, and aesthetic values. Under Alaska's current rules, he pointed out, anyone may apply for and hold a certificate to take water out of a stream or to keep water in a stream.

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MR. SHAVELSON proceeded to the fourth slide, titled "DNR Proposal," and specified that the DNR proposal would strip away the rights of Alaskans to hold certificates for instream flow reservations. Alaskans could still incur the substantial time and cost to apply for the certificate, but they could not hold the certificate, he said, DNR would be the holder of that water right. He compared this proposal with the current DNR rules that will continue to allow outside corporations to hold water rights to take water out of a salmon stream, yet Alaskans couldn't hold the certificate to keep water in a stream. That is the crux of the issue here, he stated.

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MR. SHAVELSON displayed the fifth slide, titled "Government Knows Best," and argued that this proposal takes a government-knows-best attitude by stripping away the rights of Alaska residents and tribes to protect their fish while empowering state and federal agencies and bureaucrats to exclusively hold these instream flow rights. This is a failed approach in the Lower 48, he stated.

MR. SHAVELSON moved to the sixth slide, titled "Why the Changes?" He said DNR has refused to explain to Alaskans why it's pursuing these significant changes, although some lip service was given about DNR wanting some statutory consistency, but that makes no sense. Also, he opined, DNR's refusal to come before the committee today to talk about such significant changes is alarming because there is no such thing as a quiet period after an agency has taken public comment on rules. He added that these are the same positions that have been heard for many years from the Resource Development Council (RDC), the Alaska Oil and Gas Association (AOGA), and the Alaska Miners Association (AMA).

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REPRESENTATIVE VANCE asked how Mr. Shavelson knew ahead of time that DNR wouldn't be testifying given the committee was only informed today that DNR would be unable to join the meeting.

MR. SHAVELSON offered his belief that DNR pulled back several days ago.

REPRESENTATIVE VANCE asked how Mr. Shavelson learned about that.

CHAIR TARR stated that DNR was heard from on either Wednesday or Thursday of last week and she shared that during a conversation about the scheduling and flow of presentations for today. She apologized if it came as a surprise to Representative Vance.

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REPRESENTATIVE VANCE said it seems inappropriate to use this against DNR in the slide show when it wasn't communicated to committee members and the public; DNR has no recourse at this point to explain why it was unable to attend. She told Mr. Shavelson that she is listening to his concerns but said it would be best to leave out this rhetoric.

CHAIR TARR apologized for inadvertently not removing DNR from the BASIS [schedule]. She related that DNR requested she share with the committee that the agency is in the quiet period. She recommended that people follow up with DNR directly and noted her disappointment about the late date of cancellation.

REPRESENTATIVE VANCE stated she has questions for DNR but noted the legislature has no authority to amend these regulations. She said it is in the hands of the public to submit comments, questions, and concerns about the proposal.

MR. SHAVELSON concurred that these are regulatory changes but pointed out that the legislature can amend statute. He said the regulations are implementing the Alaska Water Use Act, Title 46. He suggested that that's where the focus should be; if the executive branch agencies refuse to come before the legislature to explain these things, the legislature must recognize how serious these issues are and act on it.

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MR. SHAVELSON continued his presentation. He turned to the seventh slide, titled "Zero Fiscal Note," and stated that what is being talked about here is the political will and desire for DNR to move forward in a constructive way with instream flows. Under the proposed rules, he noted, an entity coming forward with an instream flow application would incur the time and cost to apply, but DNR would hold the certificate for the instream flow reservation which would entail more work for DNR. Yet, he argued, DNR put a zero fiscal note on this rule which indicates that DNR isn't taking this very seriously. He turned to the eighth slide, titled "Alaska Values?" He read the quote depicted on the slide: "Don't tell me what you value, show me

your budget, and I'll tell you what you value." The zero fiscal note, Mr. Shavelson said, tells him there isn't much interest in moving forward with instream flows from this development agency.

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MR. SHAVELSON spoke to the ninth slide, titled "Unfair." He argued it is unfair that a private outside corporation can still take water out of a waterbody, but an Alaska resident or Native tribe cannot hold the right to keep water in a waterbody. Similarly situated people and groups are treated differently under DNR's proposal, he continued, and this creates a bias.

MR. SHAVELSON proceeded to the tenth slide, titled "Mixed Messages." Corporations want the whole pie, he asserted, they want private certificates to hold the right to take public water out of the stream, but they don't want anyone to be able to keep water in that stream. He noted that the Alaska Chamber of Commerce, the Alaska Oil and Gas Association, and the Resource Development Council all submitted the same words in their comments on 4/2/[21]: "Private parties must not have control over public water." This is exactly what is had with an out-of-stream diversion, he stated, it is taking a public resource and putting it into private hands.

MR. SHAVELSON showed the eleventh slide, titled "Constitutional Questions." He maintained there are substantial constitutional questions. He read from the Alaska Constitution, Article VIII, Section 3. Common Use, which states: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." He said it doesn't seem like common use if one party can take it for one purpose and another party can't use it for another. He held that this really stands out in Article VIII, Section 17. Uniform Application, which states: "Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

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MR. SHAVELSON moved to the twelfth slide, titled "DNR Conflict of Interest," and noted that there can be monetary, political, or policy conflicts. He noted that DNR is the state's lead resource development agency and related that during his 27 years of doing this work he has never seen DNR deny a permit for a large oil and gas or mining project; development is presumed and

always moves forward. Therefore, he asserted, it doesn't make sense for DNR to be the de facto agency to hold instream flow reservations because it doesn't have the political will to support fish protection through instream flow reservations.

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MR. SHAVELSON addressed the thirteenth slide, titled "Current System Failures." He argued that there is an inherent bias in the current system where the agencies favor the out-of-stream diversions because the agencies process appropriations or temporary water use authorizations all the time, while instream flow applications are backlogged. He took issue with Mr. Fjelstad's statement that Alaska has a robust permitting regime that protects fish. This isn't true, he said, an example being that on 2/21/[21] ADF&G Commissioner Doug Vincent-Lang told the House Resources Standing Committee that the state would "never" allow a fish stream to be dewatered, yet DNR is currently processing water right applications for the Donlin Mine that would allow the dewatering of fish streams. There is no political will to protect fish and wildlife and the people and communities they support, he opined, and that's why a statutory change makes sense.

MR. SHAVELSON reviewed the fourteenth slide, titled "Temperature Data." He related that Cook Inletkeeper pioneered the work of looking at stream temperatures in recognition that salmon and other resident fish are cold water fish and warming temperatures were creating stress in fish. For the past 20 years Cook Inletkeeper has kept data loggers around Cook Inlet, he said, and the results are alarming. Temperatures routinely exceed the levels that the Department of Environmental Conservation (DEC) says are safe for fish in the state's water quality standards.

MR. SHAVELSON continued to the fifteenth slide, titled "Heat Creates Stress." He pointed out that heat stress makes salmon more vulnerable to pollution, predation, and disease, and increases mortality events. For example, he reported, fish were having heart attacks in the Kuskokwim River because they were so hot and the river's oxygen level was low. He stressed that as Alaska continues to warm, it is even more imperative to keep enough water in the streams to give Alaska's fish a chance.

MR. SHAVELSON displayed the sixteenth slide, titled "Alaska Fish Need Cold Water." He stated that instream flow reservations are one of the most important tools to help Alaska wild fish populations roll with the punches of ever-warming Alaska. He

pointed out that Bristol Bay is a success story because of that area's intact systems and relatively cold water, while Southcentral and Southeast Alaska haven't been so fortunate and are seeing the intersection between development and fisheries declines. Bristol Bay, he added, is a shining example for keeping a holistic management regime for fisheries, including instream flows.

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MR. SHAVELSON spoke to the seventeenth slide, titled "What Can We Do?" He said the system is currently broken - instream flow reservations are not being processed and are backlogged, while out-of-stream diversions are prioritized. He stated that it isn't going to work if Alaska has a development-at-all-costs regime, which has been the case in the Lower 48.

MR. SHAVELSON proceeded to the eighteenth slide, titled "A Simple Solution." He said the solution is automatic instream flow reservations - the requirement that all that all out-of-stream appropriations leave behind enough water to protect fish. This solution is common sense, more efficient, and saves time and money, he stated. This kind of statutory change is needed, he advised, because it will not be seen through the current rulemaking at DNR. This would be the legislature making simple, common-sense changes to the Alaska Water Use Act, he said.

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MR. SHAVELSON turned to the nineteenth slide, titled "Repeating Mistakes." He urged committee members to read King of Fish, a book by Professor David R. Montgomery of the University of Washington. He related that the book documents the loss of salmon from Europe, New England, and the Pacific Northwest. The author's research found that it wasn't simple negligence that led to the demise of these once prolific salmon runs across the globe, it was willful negligence where people knew what they were doing was wrong but did it anyway. "That's where we're at right now," he opined. "We're at a crossroads, we know that if we strip away the right to keep water in our streams, we're going to be going down the very same path that they did in the Lower 48 and that's not going to be successful for salmon or the communities they support."

MR. SHAVELSON concluded his presentation with the twentieth slide, titled "Public Input Needed." He said it's vitally important for the legislature to hear from the public through

more hearings to understand this issue because it is a threshold issue for the future of Alaska's wild salmon populations. He urged that the legislature encourage DNR to delay the rule making and to go forward with legislation if needed. He displayed the twenty-first slide and offered to take questions.

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CHAIR TARR noted that the Alaska Miners Association (AMA) was invited to provide a presentation before the committee but declined; as well, AMA was asked to share comments, but none were received. She further noted that there was outreach to tribes and others for information and feedback. Any comments received from the public can be found online in BASIS, she said.

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REPRESENTATIVE ORTIZ thanked both presenters.

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REPRESENTATIVE MCCABE recalled hearing or reading somewhere that DNR doesn't reserve some of the water all the time, it reserves more than all the water at least a third of the time in any year. He questioned how the state can reserve more water than is naturally in the stream and said it appears to come down to a competition between resources. Alaska needs to find a neutral ground for all the resources, he opined, there can't be battles all the time over scarce resources, a path forward needs to be found. He requested Mr. Shavelson's ideas.

MR. SHAVELSON replied that those are the technical issues referred to by Mr. Fjelstad and DNR would be the entity able to answer. He stated that in a management system with a prior appropriation regime, waterbodies are frequently over appropriated, an example being the Colorado River. There are many vagaries in water flow, he explained, there isn't perfect information, and it's hard to quantify. He pointed to the simplicity of having the requirement that when someone wants to use water there must be enough water left for the fish.

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REPRESENTATIVE MCCABE offered his belief that for four months of the year DNR is reserving more water for fish than the stream carries and opined that there needs to be a commonsense approach. He posed a scenario of a private person holding the

property rights to all the water in a stream and asked whether there can be a court case. He said those kinds of questions need to be resolved.

MR. FJELSTAD agreed with Mr. Shavelson that the technical points are a DNR issue, a resource question. He said IFRs are being finalized without really understanding the particulars of a given stream, and the net effect is allocation of more water than is in the stream, which is a problem. Regarding his statement that RDC supports water being instream, he clarified that the context was that there is a specific situation here, and this is key to RDC's position on this. He said RDC thinks that the large permit process itself brings a holistic approach to protecting fish habitat and water, and that process may or may not generate an IFR in the context for that process. But that's not his point, Mr. Fjelstad noted, his point is that in the absence of that process there are impacts on fish and water because there is no large permitting process happening, it takes place one diversion at a time over years. Arguably, there is a place for instream flows in those circumstances because of the absence of a permitting process that pulls it all together, but that would be a very limited use of this. He said RDC doesn't support the concept that Mr. Shavelson raised of having in statute or regulation a universal instream flow that applies to every stream across the board. But, he said, there may be a use for specific technically sound IFRs for situations where there isn't development and this large-scale permitting process.

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CHAIR TARR asked whether Mr. Shavelson has any comments on the question about the private property rights.

MR. SHAVELSON responded no, but said he is curious about RDC's policy rationale behind not supporting a solution that requires keeping enough water in streams to protect fish.

CHAIR TARR said she will try to come back to that after Representative McCabe asks his next question.

[11:03:45 AM](#)

REPRESENTATIVE MCCABE said his understanding is that IFRs are property rights. He posed a scenario in which he has an IFR in a stream and asked whether he could shut down the stream, bill someone for using the water, or take someone to court. He opined that this seems like it is creating big government and

pitting agencies against each other. He surmised that ADF&G already regulates a certain amount of the fish in a stream and said this seems to be adding fuel to the fish-war fire.

MR. FJELSTAD answered that a group of lawyers would probably have an all-day debate on what is the nature of that IFR right. He noted that generally in western water law, a water right to take water out of a stream is a form of property right. Keeping water in a stream through an IFR is some form of right, he said, and the particulars would engender a long debate about what is the nature of it. It can be a bridge through this process as DNR contemplates regulation changes. It is different than a permit, a license, or something, it puts the holder of that in a special place and that is one of the concerns. These issues play off against each other, he added; the technical challenges are one reason why RDC believes this should be vested in the state. These technical problems need to be worked out and working them out with the state agencies that are charged by statute with overseeing these issues is the sensible way to do that. It is hard to work something out with someone who may be fundamentally opposed to working things out, he stated.

[11:06:19 AM](#)

CHAIR TARR invited Mr. Shavelson to respond to Representative McCabe's questions.

MR. SHAVELSON answered that he agrees with Mr. Fjelstad that it is not well-defined as to what that property right looks like for an instream flow. The same argument could be made for an out-of-stream appropriation right, he stated. For example, how would it play out if Exxon holds a water right for an ice road and the state says it needs that water for something else? In any case the government is always going to have an overriding public interest, he continued. There are a variety of ways that the government, through regulation or law, can come back in and protect the public interest.

[11:07:50 AM](#)

REPRESENTATIVE MCCABE noted that IFRs are private property rights that delegate to an individual the ability to control all land use upstream. He asked whether a conservation group could acquire an IFR, and would the state be able to take it back. He recalled Mr. Shavelson mentioning that the state would always be able to take it back, such as with an ice road.

MR. SHAVELSON responded that in any realistic vision of water management in Alaska these kinds of lockups are not going to be seen. Whether looking at them hypothetically or realistically, he added, they would play out on both the out-of-stream appropriation side and the instream appropriation side. He said he doesn't think Alaska will see corporations locking up all the water by taking it out of a stream and he doesn't think Alaska will see anybody locking it up by keeping it all in the stream.

REPRESENTATIVE MCCABE recounted reading an article while in high school that said water was going to become a bigger issue in the world than fuel and electricity. He said he thinks it has come to that.

CHAIR TARR concurred. She related that she participated in a panel discussion on water issues at a Pacific Northwest Economic Region conference and said Alaska is in a much better position regarding the things being dealt with. She remarked that it seems there is an opportunity here to address some of these challenges and not repeat the mistakes of the past. She offered her understanding that Mr. Shavelson supports Alaskans and tribes being able to apply for instream flow reservations, but noted that the current setup would allow, for example, non-Alaskans or out of state NGOs. She asked Mr. Shavelson whether that is a place where the state might want to limit those applications to Alaskans and tribes to moderate the current situation and the concern had by others.

MR. SHAVELSON replied that he has heard these concerns before but hasn't seen them play out, which is why the hypotheticals can be distracting. He said the goal here is Alaskans managing Alaska's resources. The system is broken, he stated, and the simple solution is to automatically keep enough water in Alaska's streams to protect fish whenever looking at an out-of-stream diversion.

[11:11:43 AM](#)

CHAIR TARR invited Mr. Fjelstad to provide closing comments or respond to questions.

MR. FJELSTAD responded to Mr. Shavelson's comment. He said RDC's viewpoint is that the technical process is broken. Every IFR has resulted in an over-allocation of water, meaning it's a counter for more water in the stream than is there in actuality. However, he continued, the process isn't broken in the context of permitting that happens for major developments; a robust

process accounts for fish, water, and habitat, it's all pulled together in that process. That process works and is working on an ongoing basis, he maintained.

[11:12:57 AM](#)

CHAIR TARR noted DNR would be the certificate holder and recalled Mr. Shavelson's statement about conflict of interest. She posed a scenario in which this proposal goes forward, but with ADF&G being the certificate holder. She asked whether such a scenario would change Mr. Shavelson's perspective or address the conflict of interest.

MR. SHAVELSON answered that ADF&G has a different mandate and would look at this through a different lens. He said the technical problems mentioned by Mr. Fjelstad would still need to be addressed and added that the slate needs to be wiped clean to recognize the long history of out-of-stream diversions getting up-to-date prioritization while the instream flows with ADF&G at the lead are lagging considerably. This is about political will, he reiterated, so this brings him back to his [proposed] solution of just leaving enough water in Alaska's streams and waterbodies for fish if water is going to be taken out of them.

CHAIR TARR related that in looking at a list of applications on the docket there were some circumstances where there wasn't an active out-stream flow application so there wasn't a project necessarily that was applying for that. She recalled that Trout Unlimited and other groups had interest in the Bristol Bay area and said that is one of the reasons she asked the question about limitations to Alaskans or Alaska entities. Given that Mr. Shavelson's [proposed] solution is to have those things corresponding to each other, she asked whether, absent that, instream flow reservations would not happen.

MR. SHAVELSON noted that Trout Unlimited has offices in Alaska and has many local members, so he doesn't know that it could be characterized as an outside interest. He said people in groups that care about the resource are trying to be proactive here, but the agencies are saying that they're going to wait until there is an actual conflict, which flies in the face of this idea of having a holistic management regime where "we don't always have to ... have our hair on fire before we take action." He stated that [Cook Inletkeeper] is willing to come to the table and have the discussion and say, "Let's just assume we're going to protect our fish and anytime somebody wants to take the water out we just leave enough to protect those fish."

CHAIR TARR clarified that in mentioning Trout Unlimited she was thinking about groups that have a national presence in addition to an Alaska presence.

MR. SHAVELSON pointed out that Canadian and other outside corporations not residing in Alaska are routinely seen taking water out of Alaska's streams with out-of-stream diversions.

CHAIR TARR responded that she hadn't contextualized it that way, so this gives her a new way to evaluate it.

[11:17:06 AM](#)

REPRESENTATIVE VANCE commented that the presentations helped in understanding the bigger picture, but technical questions need to be asked of DNR to further understand this. She encouraged the public to continue asking questions and submitting comments.

[11:17:41 AM](#)

REPRESENTATIVE ORTIZ noted that throughout today's presentation Mr. Shavelson has said one of the simplest solutions is to "leave enough water in the streams to protect the fish." He inquired as to whether this is a commonly known standard and whether it would be easy to determine how much water would need to be in a stream to protect fish.

MR. SHAVELSON replied that there are vagaries in the natural systems and those complexities require data collection. He said many things need to be taken into consideration, such as rainfall, precipitation, snowmelt, and groundwater influx. Every stream is going to be different at the point of diversion or where the water is being kept in the stream, so it requires research, but it can be quantified.

[11:19:20 AM](#)

REPRESENTATIVE MCCABE thanked the presenters and expressed his appreciation for hearing all sides of the issue so that members can make intelligent decisions.

[11:19:38 AM](#)

CHAIR TARR invited Mr. Shavelson to provide closing comments.

MR. SHAVELSON encouraged committee members to consider the vast number of opposing comments from Alaska tribes and Alaskans who regarding DNR's [proposed] rule changes. That will give members a strong sense of how Alaskans feel about the issue, he said, and will hopefully help drive additional legislative scrutiny.

[11:20:13 AM](#)

CHAIR TARR stated that people were very interested in having a hearing on this issue during the legislative session, but time didn't allow for that to happen. She offered her appreciation to committee members for attending today's presentation. She said she is open to suggestions from members as to any follow-up meetings or action that members want to take.

[11:22:07 AM](#)

#### **ADJOURNMENT**

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 11:22 a.m.