

CS SB 150 (Jud) Am

Introduced: 2/12/85
Referred: Resources and Judiciary

1 IN THE SENATE

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

2 SENATE BILL NO. 150

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act making miscellaneous amendments to the Alaska
7 Water Use Act (AS 46.15); establishing procedures for
8 administrative and judicial adjudication of water
9 rights under that Act; and providing for an effective
10 date."

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

12 * Section 1. AS 46.15.040 is amended by adding a new subsection to
13 read:

14 (d) A right to appropriate water granted under this chapter may
15 not be construed against the state as a guarantee of a particular
16 water level or volume, except as provided in AS 46.15.145, as a guar-
17 antee of a particular artesian pressure or water quality, or as a
18 guarantee that water may be withdrawn or diverted at a particular
19 cost.

20 * Sec. 2. AS 46.15.065 is amended by adding a new subsection to read:

21 (f) The adjudication process for a declaration filed under (a)
22 of this section, which is pending before the commissioner on the
23 effective date of this Act, is to continue under the procedures set
24 out in this section until the commissioner finally determines whether
25 the declarant is entitled to a certificate. If a certificate is
26 issued under this section, the certificate holder may be included as a
27 participant in an adjudication under the procedures set out in AS 46.-
28 15.165 or 46.15.166.

29 * Sec. 3. AS 46.15.140 is amended to read:

1 Sec. 46.15.140. ABANDONMENT, FORFEITURE, AND REVERSION OF APPRO-
2 PRIATIONS. (a) The commissioner may declare an appropriation to be
3 wholly or partially abandoned and revoke the certificate of appropria-
4 tion in whole or in part if an appropriator, with intention to aban-
5 don, does not make beneficial use of all or a part of the [HIS] appro-
6 priated water. [AN APPROPRIATION SO FORFEITED AND ABANDONED REVERTS
7 TO THE STATE AND THE WATER BECOMES UNAPPROPRIATED WATER.]

8 (b) The commissioner may declare that an appropriator has [AN
9 APPROPRIATION TO BE] wholly or partially forfeited an appropriation,
10 and shall revoke the certificate of appropriation in whole or in part
11 if the [AN] appropriator voluntarily fails or neglects, without suffi-
12 cient cause, to make use of all or a part of the [HIS] appropriated
13 water for a period of five successive years.

14 (c) Failure to use beneficially, for five successive years, all
15 or part of the water granted in a certificate of appropriation raises
16 a rebuttable presumption that the appropriator has abandoned or for-
17 feited the right to use the unused quantity of water, and shifts to
18 the appropriator the burden to prove otherwise to the satisfaction of
19 the commissioner.

20 (d) A state agency may not abandon or forfeit a certificate of
21 appropriation in whole or in part except after public notice.

22 (e) If the commissioner revokes a certificate in whole or in
23 part, that portion of the certificate covered by the revocation re-
24 verts to the state and the water becomes unappropriated water.

25 * Sec. 4. AS 46.15.145(f) is amended to read:

26 (f) At least once each 10 years the commissioner shall review
27 each reservation under this section to determine whether the purpose
28 described in (a) of this section for which the certificate reserving
29 water was issued and the findings described in (c) of this section

1 still apply to the reservation. If the commissioner determines that
2 the purpose, or part or all of the findings, no longer apply to the
3 reservation, the commissioner [HE] may revoke or modify the certifi-
4 cate reserving the water after notice, hearing when appropriate, and a
5 written determination that the revocation or modification is in the
6 best interests of the state [IN ACCORDANCE WITH AS 46.15.140(b)].

7 * Sec. 5. AS 46.15 is amended by adding new sections to read:

8 Sec. 46.15.165. ADMINISTRATIVE ADJUDICATIONS. (a) The commis-
9 sioner may, by order, initiate an administrative adjudication to
10 quantify and determine the priority of all water rights and claims in
11 a drainage basin, river system, ground water aquifer system, or other
12 identifiable and distinct hydrologic regime, including any hydrologi-
13 cally interrelated surface and ground water systems.

14 (b) In the order initiating an administrative adjudication, the
15 commissioner shall describe the appropriate geographic and hydrologic
16 boundaries of the adjudication area. During the adjudication, the
17 commissioner may adjust the boundaries to insure the efficient admin-
18 istration of water appropriations among users.

19 (c) Upon initiation of the adjudication, the commissioner shall

20 (1) serve the order on each applicant, certificate holder,
21 or permittee listed in the department's records within the adjudica-
22 tion area;

23 (2) serve the order on any agency of the federal, state, or
24 local government with management authority over land or water within
25 the adjudication area;

26 (3) serve the order on any person who owns land within the
27 adjudication area if the land is held in trust by the United States or
28 if the patent or deed to the land contains a restriction on alienation
29 imposed under 25 U.S.C. sec. 334 (Indian General Allotment Act of

1 February 8, 1887, 24 Stat. 389, as amended and supplemented), 25
2 U.S.C. sec. 372 (the Allotment Act of June 25, 1910, 36 Stat. 855), or
3 43 U.S.C. secs. 270-1, 270-2 (the Allotment Act of May 17, 1906, 34
4 Stat. 197), and on the United States on behalf of any such person;

5 (4) serve the order on the United States and the appropri-
6 ate governing body of the Annette Island Reserve established by 25
7 U.S.C. sec. 495 (the Act of March 3, 1891, 26 Stat. 1101) if the land
8 or water of the reserve, or hydrologically interconnected water, is
9 within the adjudication area; and

10 (5) publish the order once each week during four consecu-
11 tive weeks in a newspaper of general circulation in the adjudication
12 area.

13 (d) Service of the order under (c)(1) of this section is suffi-
14 cient if mailed by certified mail, return receipt requested, to the
15 last known address that the applicant, certificate holder, or
16 permittee has given to the division of the department responsible for
17 administration of water rights. A person served under (c)(1) -- (4)
18 of this section who fails to appear in a timely manner and assert a
19 claim as prescribed by the commissioner is estopped from subsequently
20 asserting any objection to the adjudication of that person's water
21 rights within the adjudication area, unless the person is entitled to
22 a federal reserved water right and has failed to consent under (i) of
23 this section.

24 (e) In an adjudication under this section, the commissioner may
25 appoint an impartial qualified person as a master to preside over the
26 adjudication; to hold hearings; to take testimony; to collect evi-
27 dence; to propose to the commissioner an order adjudicating the valid-
28 ity of, quantifying, and determining the priority of all water rights;
29 and to take other action the commissioner decides is necessary. The

1 master may be an employee of the state.

2 (f) Any division of the department, or other departments, may
3 provide support during the adjudication, in the form of documentary
4 and testimonial evidence; research; and scientific analysis. If
5 funding permits, the commissioner may obtain similar support from
6 sources outside government. Any state agency may assert a water right
7 on behalf of the state in the adjudication.

8 (g) In managing an adjudication, the commissioner may take such
9 action as is necessary for the efficient and fair administration and
10 use of the state's water, including but not limited to

11 (1) determining indispensable, necessary, and convenient
12 parties to the adjudication;

13 (2) classifying applicants, certificate holders, per-
14 mittees, and claimants in groups that share similar interests, such as
15 by the amount of water used or the type of use, and restricting their
16 active participation in the adjudication by appointing group represen-
17 tatives for the purposes of receiving notices, examining witnesses,
18 and other adjudicatory functions;

19 (3) entering such interlocutory orders as may be appropri-
20 ate to dispose of all or part of the issues in the adjudication, and
21 designating these orders as final ones for the purposes of any appeal
22 to superior court under (j) of this section; and

23 (4) allocating to a participant any extra costs that the
24 state has incurred in conducting the adjudication because the partici-
25 pant has in bad faith asserted a claim to water wholly without merit
26 or has unreasonably delayed the proceeding.

27 (h) For the purposes of asserting a water right in an adjudica-
28 tion, a certificate issued under this chapter is prima facie evidence
29 of the water right and its priority date.

1 (i) If the commissioner has initiated the adjudication, and the
2 federal government or a private person who has been served under
3 (c)(2) -- (4) of this section asserts a federal reserved water right
4 but fails to consent in writing to the adjudication, then the commis-
5 sioner shall exclude the federal government or that person, respec-
6 tively, as participants in the adjudication. The commissioner may
7 negotiate the terms of the written consent.

8 (j) A person adversely affected by a final order of the commis-
9 sioner adjudicating water rights under this section may appeal to the
10 superior court within 30 days after the decision is mailed or de-
11 livered to the person.

12 (k) The commissioner may adopt regulations setting out proce-
13 dures for administrative adjudications under this section.

14 Sec. 46.15.166. JUDICIAL ADJUDICATIONS. (a) Instead of initi-
15 ating an adjudication under AS 46.15.165, the commissioner may, with
16 the concurrence of the attorney general, file on behalf of the state a
17 complaint in superior court to initiate a judicial adjudication con-
18 sistent with 43 U.S.C. sec. 666 to quantify and determine the priority
19 of all water rights in a drainage basin, river system, ground water
20 aquifer system, or other identifiable and distinct hydrologic regime,
21 including any hydrologically interrelated surface and ground water
22 systems. The commissioner may initiate an adjudication under this
23 section only if a federal reserved water right has been or might be
24 asserted

25 (1) by the United States or any of its component agencies;

26 (2) by or on behalf of a person whose patent or deed to
27 land contains a restriction on alienation imposed by a federal statute
28 cited in AS 46.15.165(c)(3) or (4), or whose land is held in trust by
29 the United States.

1 (b) Venue is proper if a complaint under this section is filed
2 in a judicial district in which all or a part of the hydrologic regime
3 is located.

4 (c) In an action brought under (a) of this section, the court
5 may initially appoint a designee of the commissioner as a master to
6 hold hearings, take testimony, collect evidence, and make recommenda-
7 tions to the court regarding the scope and content of a proposed
8 judicial decree that would finally adjudicate the validity of water
9 rights, quantify them, and determine priorities among the water right
10 appropriations in the adjudication area. The master may be an employ-
11 ee of the state. In managing the action, the master may, with the
12 court's permission, take such action as the commissioner would be
13 authorized to take in an administrative adjudication under AS 46.15.-
14 165.

15 (d) In an adjudication under this section, the court may incor-
16 porate in any order or judgment any final orders of the commissioner
17 previously issued under AS 46.15.165.

18 (e) Proceedings under this section are conducted without a jury.

19 Sec. 46.15.167. EFFECT OF DECISION. A final order of the com-
20 missioner under AS 46.15.165, or a final judgment of a court under
21 AS 46.15.166, is binding on all parties to the adjudication and on all
22 persons who subsequently make an application for a water right. The
23 court or the commissioner may retain continuing jurisdiction for the
24 periods of time necessary to implement any adjudication order or
25 judgment and to provide for any subsequent water appropriations.

26 Sec. 46.15.168. OTHER ACTIONS. (a) The state may timely inter-
27 vene as a party in a superior court action potentially involving a
28 determination of the validity, quantity, use, reservation, or priority
29 of water rights.

1 (b) The commissioner may accept a remand from a state or federal
2 court of a water rights dispute, and may administratively adjudicate
3 it under AS 46.15.165.

4 (c) The commissioner may enter into arbitration with a private
5 person or the federal government to resolve a water rights issue.

6 (d) The commissioner may incorporate and apply as binding upon
7 the parties to an administrative adjudication under AS 46.15.165 any
8 federal court decree concerning the state hydrologic regime involved
9 in the adjudication.

10 Sec. 46.15.169. FEDERAL RESERVED WATER RIGHTS. Nothing in
11 AS 46.15 is an admission by the State of Alaska that a federal re-
12 served water right exists in the state.

13 * Sec. 6. AS 46.15 is amended by adding new sections to read:

14 Sec. 46.15.255. ENFORCEMENT. (a) In addition to a penalty that
15 may be imposed under AS 46.15.180 for violation of an order issued
16 under AS 46.15, the department may

17 (1) remove or abate unpermitted works of appropriation,
18 diversion, impoundment, or withdrawal;

19 (2) install corrective controls or control works; and

20 (3) seek enforcement of the order by filing an action in
21 the superior court.

22 (b) A person who violates an order issued under AS 46.15.180 is
23 liable for all costs of removal, abatement or installation, and for
24 any related court costs and attorney fees incurred by the state in
25 seeking enforcement of the order.

26 Sec. 46.15.256. DATA COLLECTION AUTHORITY. To carry out the
27 provisions of this chapter, the department may

28 (1) inspect books; records; meters; gauges; well logs;
29 works of appropriation, diversion, impoundment, withdrawal, or

1 control; and any other relevant information or physical condition;

2 (2) enter private property at all reasonable times, after
3 first obtaining a search warrant from an appropriate judicial officer
4 if the owner refuses consent to entry; and

5 (3) compel the production of relevant information by an
6 administrative subpoena signed by the commissioner if the commissioner
7 reasonably believes the information is necessary to carry out the
8 purposes of this chapter.

9 * Sec. 7. This Act takes effect immediately in accordance with AS 01.-
10 10.070(c).

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