

Offered: 3/10/86  
Referred: Rules

Original sponsor: Rules/Governor

1 IN THE SENATE BY THE JUDICIARY COMMITTEE  
2 CS FOR SENATE BILL NO. 150 (Judiciary)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FOURTEENTH LEGISLATURE - SECOND 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) The commissioner's issuance of a permit under AS 46.15.080  
15 or of a certificate under AS 46.15.065 or 46.15.120 does not represent  
16 a guarantee by the state to the permittee or certificate holder that  
17 water will be available for appropriation at a certain volume, quali-  
18 ty, artesian pressure, or cost. This subsection does not, however,  
19 alter the right a permittee or certificate holder may have against a  
20 later appropriator, including a government agency.

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

22 (f) The adjudication process for a declaration filed under (a)  
23 of this section that is pending before the commissioner on the effec-  
24 tive date of this Act continues under the procedures set out in this  
25 section until the commissioner finally determines whether the declar-  
26 ant is entitled to a certificate. If a certificate is issued under  
27 this section, the certificate holder may be included as a participant  
28 in an adjudication under AS 46.15.165 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 or amend the certificate of  
4           appropriation as to the unused quantity of water if an appropriator,  
5           with intention to abandon, does not make beneficial use of all or a  
6           part of the [HIS] appropriated water. [AN APPROPRIATION SO FORFEITED  
7           AND ABANDONED REVERTS TO THE STATE AND THE WATER BECOMES UNAPPROPRI-  
8           ATED WATER.]

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

15       \* Sec. 4. AS 46.15.140 is amended by adding new subsections to read:

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

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

25       \* Sec. 5. 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. 6. 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 ensure 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 a local government with management authority over land or water within  
25 the adjudication area;

26 (3) serve the order on any person who owns or claims land  
27 within the adjudication area if the land is held in trust by the  
28 United States for the person or if the patent, deed, or certificate to  
29 the land from the United States was issued under 25 U.S.C. 334 (Indian

1       General Allotment Act of February 8, 1887, 24 Stat. 389, as amended  
2       and supplemented), 25 U.S.C. 372 (the Allotment Act of June 25, 1910,  
3       36 Stat. 855), 43 U.S.C. 270-1, 270-2 (the Allotment Act of May 17,  
4       1906, 34 Stat. 197), any other allotment act, or the Alaska Native  
5       Townsite Act of May 25, 1926, 44 Stat. 629, and serve the order on the  
6       United States on behalf of the person;

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

12              (5) serve the order on any other person claiming a federal  
13      reserved water right within the adjudication area;

14              (6) serve the regional corporation and village corporation  
15      established under 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement  
16      Act) that has a pending land selection or has acquired ownership to  
17      land under that act that is located within the adjudication area; and

18              (7) serve the order on each mining claimant of record with  
19      the United States and the state within the adjudication area as of the  
20      date of the order initiating the administrative adjudication.

21              (d) Service of an order under (c) of this section does not  
22      constitute an admission by the state that the person served with the  
23      order has a water right.

24              (e) Service of the order under (c)(1) of this section is suffi-  
25      cient if mailed by certified mail, return receipt requested, to the  
26      last known address that the applicant, certificate holder, permittee,  
27      or claimant has given to the division of the department responsible  
28      for administration of water rights. A person served under (c)(1) -  
29      (7) of this section who fails to appear in a timely manner and assert

1 a claim as prescribed by the commissioner is estopped from subsequent-  
2 ly asserting an objection to the adjudication of that person's water  
3 rights within the adjudication area, unless the person is entitled to  
4 a federal reserved water right and has failed to consent under (k) of  
5 this section.

6 (f) In an adjudication under this section, the commissioner may  
7 appoint an impartial qualified person as a master to preside over the  
8 adjudication, to hold hearings, to take testimony, to collect evi-  
9 dence, to propose to the commissioner an order adjudicating the valid-  
10 ity of, quantifying, and determining the priority of all water rights,  
11 and to take other action the commissioner decides is necessary.

12 (g) A state agency may assert a water right on behalf of the  
13 state in the adjudication.

14 (h) A division of the department or another state agency may  
15 provide documentary and testimonial evidence, research, and scientific  
16 analysis during the adjudication. The commissioner may provide evi-  
17 dence, research, or analysis from sources outside government.

18 (i) In conducting an adjudication, the commissioner may take  
19 action necessary for the efficient and fair administration and use of  
20 the state's water including

21 (1) determining indispensable, necessary, and convenient  
22 parties to the adjudication;

23 (2) classifying applicants, certificate holders, permit-  
24 tees, and claimants in groups that share similar interests, such as by  
25 the amount of water used or the type of use, and restricting their  
26 active participation in the adjudication by appointing group represen-  
27 tatives for the purposes of receiving notices, examining witnesses,  
28 and other adjudicatory functions;

29 (3) entering interlocutory orders appropriate to a disposal

1 of all or part of the issues in the adjudication, and designating the  
2 orders as final for the purposes of an appeal to the superior court  
3 under (1) of this section; and

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

8 (j) For the purposes of asserting a water right in an adjudica-  
9 tion, a certificate issued under this chapter is prima facie evidence  
10 of the water right and its priority date.

11 (k) If the commissioner has initiated the adjudication and the  
12 federal government or a private person who has been served under  
13 (c)(2) - (4) of this section asserts a federal reserved water right  
14 but fails to consent in writing to the adjudication, then the commis-  
15 sioner may exclude the federal government or the person, respectively,  
16 as participants in the adjudication. The commissioner may negotiate  
17 the terms of the written consent.

18 (1) A person adversely affected by a final order of the commis-  
19 sioner adjudicating water rights under this section may appeal to the  
20 superior court within 30 days after the decision is mailed or de-  
21 livered to the person.

22 (m) The commissioner may adopt regulations setting out proce-  
23 dures for administrative adjudications under this section.

24 Sec. 46.15.166. JUDICIAL ADJUDICATIONS. (a) Instead of initi-  
25 ating an adjudication under AS 46.15.165, the commissioner may, with  
26 the concurrence of the attorney general, if a federal reserved water  
27 right has been or might be asserted by an agency of the United States  
28 on its own behalf or on behalf of a person described in AS 46.15.-  
29 165(c)(3) - (6), file on behalf of the state a complaint in superior

1 court to initiate a judicial adjudication consistent with 43 U.S.C.  
2 666 to quantify and determine the priority of all water rights in a  
3 drainage basin, river system, ground water aquifer system, or other  
4 identifiable and distinct hydrologic regime, including any hydrologi-  
5 cally interrelated surface and ground water systems.

6 (b) The venue for an action filed under (a) of this section  
7 shall be established by rule of the supreme court under AS 22.10.030.

8 (c) In a complaint brought under (a) of this section, the court  
9 may appoint an impartial, qualified person as a master to hold hear-  
10 ings, take testimony, collect evidence, and make recommendations to  
11 the court regarding the scope and content of a proposed judicial  
12 decree that would finally adjudicate the validity of water rights,  
13 quantify them, and determine priorities among the water right appro-  
14 priations in the adjudication area. Employment by a federal, state,  
15 or local government agency does not disqualify an individual from  
16 appointment as master under this subsection if the court determines  
17 that the individual is otherwise impartial and qualified to act as  
18 master. The master may, with the court's permission, take action that  
19 the commissioner would be authorized to take in an administrative  
20 adjudication under AS 46.15.165.

21 (d) In an adjudication under this section, the court may incor-  
22 porate in an order or judgment final orders of the commissioner previ-  
23 ously issued under AS 46.15.165.

24 (e) Proceedings under this section shall be conducted without a  
25 jury.

26 Sec. 46.15.167. EFFECT OF DECISION. The final order of the  
27 commissioner under AS 46.15.165 and the final judgment of a court  
28 under AS 46.15.166 are binding on each party to the adjudication and  
29 on each person who subsequently makes an application for a water

1 right. The court or the commissioner may retain jurisdiction for a  
2 period of time necessary to implement an adjudication order or judg-  
3 ment and to provide for subsequent water appropriations.

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

8 (b) The commissioner may accept a remand from a state or federal  
9 court of a water rights dispute and may administratively adjudicate  
10 the dispute under AS 46.15.165.

11 (c) The commissioner may enter into arbitration to resolve a  
12 water rights dispute.

13 (d) The commissioner may incorporate and apply as binding upon  
14 the parties to an administrative adjudication under AS 46.15.165 any  
15 court decree concerning the state hydrologic regime involved in the  
16 adjudication.

17 Sec. 46.15.169. FEDERAL RESERVED WATER RIGHTS. This chapter  
18 does not represent a commitment by the state to a specific federal re-  
19 served water right.

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

21 Sec. 46.15.255. ENFORCEMENT. (a) In addition to a penalty  
22 imposed under AS 46.15.180 for violation of an order issued under this  
23 chapter, the commissioner may

24 (1) remove or abate unpermitted works of appropriation,  
25 diversion, impoundment, or withdrawal;

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

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

29 (b) A person who violates an order issued under AS 46.15.180 is

1        liable for all costs of removal, abatement or installation and for  
2        court costs and attorney fees incurred by the state in seeking en-  
3        forcement of the order.

4                Sec. 46.15.256. DATA COLLECTION AUTHORITY. To carry out the  
5        provisions of this chapter, the commissioner may

6                (1) inspect books, records, meters, gauges, well logs,  
7        works of appropriation, diversion, impoundment, withdrawal, or control  
8        and other relevant information or physical condition;

9                (2) enter private property at all reasonable times after  
10       obtaining a search warrant from a judicial officer if the owner re-  
11       fuses consent to entry; and

12               (3) compel the production of relevant information by a  
13       subpoena or subpoena duces tecum signed by the commissioner if the  
14       commissioner reasonably believes the information is necessary to carry  
15       out the purposes of this chapter.

16       \* Sec. 8. This Act takes effect immediately in accordance with AS 01.-  
17       10.070(c).