

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) am
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. A property owner who has
15 a water right, whether for residential, agricultural, industrial, or
16 mining use, but has not developed that property to the point of water
17 use, may file a notice of intention to retain that water right with
18 the commissioner.

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

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

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

29 * Sec. 5. AS 46.15.145(f) is amended to read:

1 (f) At least once each 10 years the commissioner shall review
2 each reservation under this section to determine whether the purpose
3 described in (a) of this section for which the certificate reserving
4 water was issued and the findings described in (c) of this section
5 still apply to the reservation. If the commissioner determines that
6 the purpose, or part or all of the findings, no longer apply to the
7 reservation, the commissioner [HE] may revoke or modify the certifi-
8 cate reserving the water after notice, hearing when appropriate, and a
9 written determination that the revocation or modification is in the
10 best interests of the state [IN ACCORDANCE WITH AS 46.15.140(b)].

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

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

18 (b) In the order initiating an administrative adjudication, the
19 commissioner shall describe the appropriate geographic and hydrologic
20 boundaries of the adjudication area. During the adjudication, the
21 commissioner may adjust the boundaries to ensure the efficient admin-
22 istration of water appropriations among users.

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

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

27 (2) serve the order on any agency of the federal, state, or
28 a local government with management authority over land or water within
29 the adjudication area;

1 (3) serve the order on any person who owns or claims land
2 within the adjudication area if the land is held in trust by the
3 United States for the person or if the patent, deed, or certificate to
4 the land from the United States was issued under 25 U.S.C. 334 (Indian
5 General Allotment Act of February 8, 1887, 24 Stat. 389, as amended
6 and supplemented), 25 U.S.C. 372 (the Allotment Act of June 25, 1910,
7 36 Stat. 855), 43 U.S.C. 270-1, 270-2 (the Allotment Act of May 17,
8 1906, 34 Stat. 197), any other allotment act, or the Alaska Native
9 Townsite Act of May 25, 1926, 44 Stat. 629, and serve the order on the
10 United States on behalf of the person;

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

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

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

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

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

28 (e) Service of the order under (c)(1) of this section is suffi-
29 cient if mailed by certified mail, return receipt requested, to the

1 last known address that the applicant, certificate holder, permittee,
2 or claimant has given to the division of the department responsible
3 for administration of water rights. A person served under (c)(1) -
4 (7) of this section who fails to appear in a timely manner and assert
5 a claim as prescribed by the commissioner is estopped from subsequent-
6 ly asserting an objection to the adjudication of that person's water
7 rights within the adjudication area, unless the person is entitled to
8 a federal reserved water right and has failed to consent under (k) of
9 this section.

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

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

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

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

25 (1) determining indispensable, necessary, and convenient
26 parties to the adjudication;

27 (2) classifying applicants, certificate holders, permit-
28 tees, and claimants in groups that share similar interests, such as by
29 the amount of water used or the type of use, and restricting their

1 active participation in the adjudication by appointing group represen-
2 tatives for the purposes of receiving notices, examining witnesses,
3 and other adjudicatory functions;

4 (3) entering interlocutory orders appropriate to a disposal
5 of all or part of the issues in the adjudication, and designating the
6 orders as final for the purposes of an appeal to the superior court
7 under (1) of this section; and

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

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

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

22 (l) A person adversely affected by a final order of the commis-
23 sioner adjudicating water rights under this section may appeal to the
24 superior court within 30 days after the decision is mailed or de-
25 livered to the person.

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

28 Sec. 46.15.166. JUDICIAL ADJUDICATIONS. (a) Instead of initi-
29 ating an adjudication under AS 46.15.165, the commissioner may, with

1 the concurrence of the attorney general, if a federal reserved water
2 right has been or might be asserted by an agency of the United States
3 on its own behalf or on behalf of a person described in AS 46.15.-
4 165(c)(3) - (6), file on behalf of the state a complaint in superior
5 court to initiate a judicial adjudication consistent with 43 U.S.C.
6 666 to quantify and determine the priority of all water rights in a
7 drainage basin, river system, ground water aquifer system, or other
8 identifiable and distinct hydrologic regime, including any hydrologi-
9 cally interrelated surface and ground water systems.

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

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

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

28 (e) Proceedings under this section shall be conducted without a
29 jury.

1 Sec. 46.15.167. EFFECT OF DECISION. The final order of the com-
2 missioner under AS 46.15.165 and the final judgment of a court under
3 AS 46.15.166 are binding on each party to the adjudication and on each
4 person who subsequently makes an application for a water right. The
5 court or the commissioner may retain jurisdiction for a period of time
6 necessary to implement an adjudication order or judgment and to pro-
7 vide for subsequent water appropriations.

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

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

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

17 (d) The commissioner may incorporate and apply as binding upon
18 the parties to an administrative adjudication under AS 46.15.165 any
19 court decree concerning the state hydrologic regime involved in the
20 adjudication.

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

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

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

28 (1) remove or abate unpermitted works of appropriation,
29 diversion, impoundment, or withdrawal;

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- 1 (2) install corrective controls or control works; and
2 (3) seek enforcement of the order by filing an action in
3 the superior court.

4 (b) A person who violates an order issued under AS 46.15.180 is
5 liable for all costs of removal, abatement or installation and for
6 court costs and attorney fees incurred by the state in seeking en-
7 forcement of the order.

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

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

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

16 (3) compel the production of relevant information by a
17 subpoena or subpoena duces tecum signed by the commissioner if the
18 commissioner reasonably believes the information is necessary to carry
19 out the purposes of this chapter.

20 * Sec. 8. This Act takes effect immediately in accordance with AS 01.-
21 10.070(c).