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August 19, 1977

Senator Mike Colletta
1016 W. 6th Avenue, Suite C
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Dear Mike:

Enclosed, please find a memorandum on the Water Resources Policy Study prepared by our Washington, D.C. office. President Carter has directed the Water Resources Council to carry out this study. We have tried to provide the Steering Committee with an assessment of how this study could possibly affect the state's interest regarding the D-2 land issue.

With best wishes,

Cordially,

BIRCH, HORTON, BITTNER & MONROE



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Enclosure

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MEMORANDUM

To: Legislative Steering Council

Date: August 10, 1977

Water Resource Policy Study

President Carter has directed the Water Resources Council to conduct a comprehensive assessment of federal water resource policy. Pursuant to this directive, the Council has published seven papers in which major federal water resource problems are discussed. These papers also include various, proposed options aimed at solving or alleviating these problems. The purpose of the study is to generate ideas which will "provide incentives and . . . make adjustments that will act to encourage or require conservation of water and efficiency in its use." Therefore, the Council has encouraged the public to comment upon these papers, issues, and options.

Ostensibly, the study is meant to be a broad examination of federal water resource policy. Examination of specific projects, agencies, and programs is not contemplated. On the other hand, the formulation of general policy will affect unevenly different regions, states, and programs. Thus, comments of both a specific and a general nature are necessary if the Council is to formulate an effective and fair federal water policy.

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I. EFFECT OF PROPOSED CHANGES UPON WATER
RESOURCES DEVELOPMENT ON THE (d) (2) LANDS

My purpose is to point out where a change in federal water policy, as proposed in the Council's issue papers, may affect water development on the lands withdrawn under section 17(d) (2) of the Alaska Native Claims Settlement Act or the lands that would be withdrawn under H.R. 39.

With respect to hydroelectric power, the Water Resource Policy Study options will have little or no effect if H.R. 39 becomes law because that bill would, for all intents and purposes, negate any meaningful, future hydroelectric power development in Alaska. A recent study by the Alaska Power Administration, a part of the U.S. Department of the Interior, states that if H.R. 39 is passed, the development of 93.5% of Alaska's identified hydroelectric potential would be precluded. Of those possible project sites remaining, many appear to be poor choices in terms of cost and environmental merit.

Assuming that H.R. 39 does not become law and the construction of hydroelectric facilities will be allowed on the (d) (2) lands, some proposed changes in federal water policy may have a major effect upon the planning and financing of these projects. Yet prior to describing these effects, it is necessary to understand how Alaska's hydroelectric potential corresponds to the (d) (2) lands.

Of the 14 major hydroelectric dam sites in Alaska, eight are either totally located within or have large sections of their reservoirs on (d) (2) lands. "Development of three of the 14 sites could affect proposed [(d) (2)] lands downstream. A number of the proposed projects (mainly on the Yukon) would decrease flood danger to downstream communities, while other communities upstream would have to be relocated to avoid inundation by reservoirs. Potential commercial forest lands and a number of sedimentary basins with potential for oil and gas or uranium would be affected to varying degrees, depending on the number and location of the sites developed." Federal-State Land Use Planning Commission for Alaska, "Lands of National Interest in Alaska", p. 53 (May, 1977).

Given this situation, the proposed changes in federal water policy would increase the difficulty of developing those project sites that are expected to cause substantial damage to the environment. The issue papers abound with suggestions relating to the establishment of stricter environmental standards. These suggestions include:

- (1) a conversion of all environmental impacts to dollar values to facilitate interproject comparisons;
- (2) reduction of the present emphasis upon construction projects and the increased use of environmentally superior, nonstructural measures such as flood plain management projects;
- (3) the adjustment of water prices to promote recreational or environmental objectives; and
- (4) the strengthening of NEPA requirements by affording public input at the earliest stages of project initiation.

The development of hydroelectric dam facilities may be affected by the federal government's possible choice of one of the five federal-state cost sharing options presented in the papers. Of some significance, the funding proposal for the Susitna Dam Project is not among the five proposed options. Nevertheless, these options were presented solely to spur public discussion and other financing options are not excluded at this point. Hydroelectric development on the (d)(2) lands may also be affected by changes in national water policy objectives (i.e., increased emphasis upon social equity, health, and safety) and a reformulation of federal cost benefit analysis procedures.

Although the Council has stated that its study is not intended to suggest a new or larger federal role in water resources planning, the obvious direction of the proposed changes would lead to a marked increase in federal regulation and control of water resources planning and implementation. The proposed options not only call for increased federal regulation and scrutiny of state water policies, but some would also force the states to adopt comprehensive water resource management statutes consistent with federal policy. As a practical matter, this may serve as a future impediment to state development of dam projects upon (d)(2) and state lands.

As opposed to most of the other states, Alaska has not used much of its potential water resources. Since the bulk of the problems and proposed solutions in the issue papers relate to new projects and future water resources planning, adoption of these solutions will cause future water resource development in Alaska to be regulated to a greater extent than that which has already occurred in the other states. This observation is, of course, applicable to any water development plans contemplated for the (d)(2) lands.

One problem discussed in the issue papers relates to the judicially created doctrine of federal reserved water rights. This doctrine was recently discussed by the United States Supreme Court -

"[W]hen the federal government withdraws its lands from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States requires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators . . . [This doctrine], however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."

Cappaert v. United States, 426 U.S. 128, 48 L. Ed. 2d 523, 96 S. Ct. 2062, 2069-2071 (1976).

The issue paper discusses the fact that many of the federal government's reserved water rights have not yet been quantified. As a result, an uncertainty exists between federal and non-federal use of water resources in national parks, forests, wildlife refuges and other federal enclaves. Thus, it may be necessary for the federal government to decide at an early point just how much water it intends to reserve on the (d)(2) lands. Its decision would affect hydroelectric, mining, logging, and agricultural development on these lands.

One of the issue papers discusses increased efforts towards the standards of enforcing the Federal Water Pollution Control Act. While the paper deals mainly with municipal water treatment facilities and large industrial dischargers, any development on the (d)(2) lands will certainly have to adhere to the Act as well as other strict pollution control standards.

II. DIRECT EFFECTS UPON THE STATE

Any changes in federal water resources policy will ultimately have an effect on the State of Alaska. Some of these potential changes have already been discussed. There are, however, certain options discussed in the issue papers that will have a direct impact upon Alaska's water laws, procedures, and programs. These options are:

1. The establishment of non-federal agencies to coordinate statewide water resource planning.
2. The establishment of comprehensive regional and state water plans to emphasize coordination between water quality and water quantity planning efforts.
3. Five separate federal-state water project cost sharing options with varying repayments schedules, interests rates, and initial amounts of federal funding. One of these proposals would replace the present financing system with another which would provide grants to the states for the funding of their projects.
4. Required changes in state law or the development of comprehensive water codes to provide some measure of consistency between state and federal water policy.
5. The adoption and implementation of comprehensive water resource management statutes which would provide for the adjudication, quantification and public recording of all rights to use water.

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6. The establishment of various federal-state research and/or management programs designed to promote efficiency and prevent waste in the use of water.

Comments to the proposed Department of Interior regulations relating to this study have been extended until 90 days from August 20, 1977.

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