

HB

118

THE FOLLOWING DOCUMENT(S) MAY NOT FILM
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ORIGINAL.

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF FOREST, LAND AND WATER MANAGEMENT

333 EAST AVENUE
ANCHORAGE, ALASKA 99501

February 19, 1980

J.P. Tanager, President
Alaska Miners Association
P.O. Box 1211
Juneau, AK 99802

Dear Mr. Tanager:

On January 27, 1980, I met with you to briefly discuss HB 118 "An act relating to maintenance of stream flows and levels of water." At that time we discussed differences between this bill and a related bill considered by the 1977 Legislature.

While HB 118 would streamline a presently cumbersome state permitting and stipulation process for addressing stream flows for fisheries and navigation concerns, events at the federal level over the past year have increased the urgency for such legislation in Alaska as a matter of protecting state's rights. This urgency is related to a June 1979 Solicitor's Opinion regarding federal water rights of Department of Interior agencies. While the opinion clarified Interior's stance on reserved water rights for reserved Interior lands such as parks, monuments and wildlife refuges, it developed a heretofore unknown concept of non-reserved federal water rights. This concept is without previous judicial or statutory precedent in federal courts or congressional legislation.

To exercise the non-reserved rights, the federal government would first apply to the state under appropriate state water laws. For uses involving a diversion or withdrawal this is not a problem in Alaska since we can handle such claims under existing state law. In fact, since I talked with you we have received 30 water right applications from the U.S. Forest Service for water supplies for campground and recreational facilities in the Chugach National Forest. We can handle such applications in an identical manner as we would handle water rights for industrial facilities. However, we are concerned where we cannot handle requests from the federal government for adjudication of rights for non-consumptive instream flow purposes for fisheries and navigation concerns. In such cases where a use is not recognized under state law the Secretary and Solicitor have stated that the agency would go to federal court to have the right established or decreed. Such an action would remove the federal government from state water law and jurisdiction where we must consider multiple purposes of state waters. Furthermore, such actions would be brought in federal court outside the State of Alaska, thereby making it difficult

I. P. Tangea, President

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February 19, 1980

and expansive to interface through the legal staff of the Department of Law, technical staff of the Department of Natural Resources and legal or technical staff of water users that may be adversely affected.

We feel we have an administrative option through enactment of HR 118 to bring the federal government under state administrative procedures and require their needs and claims to be considered on an equal basis with other public and private water users. We are interested in any comments the Alaska Miners Association may have on this issue and hope we may work together toward enactment of this legislation.

As promised during our January discussion I am providing the following documents for additional background:

- 1) Press release and opinion entitled "Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management" of June 1979.
- 2) "Response to the Solicitor's Opinion on Federal Water Rights" by the Western States Water Council, October 25, 1979.
- 3) DNR staff report regarding December 1979 meeting between Andrus and Western Governors on the Solicitor's Opinion in Salt Lake City.

Under separate cover you should already have received a November 1979 DNR open-file report entitled Federal Lands in Alaska and Their Reserved Water Rights: Discussions, Policies, and a Partial Inventory.

I hope to discuss this issue with you in the near future. If you have any comments or questions please do not hesitate to contact me at 907-279-5577.

Sincerely,

Robert V. Petrus, Chief
Water Management

Mr. [unclear] [unclear]
[unclear] [unclear]

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THE PRECEDING DOCUMENT(S) MAY NOT FILM
LEGIBLY BECAUSE OF POOR QUALITY OF THE
ORIGINAL.

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CSHB 118 No. 1
Title "An Act relating to rivers, lakes, streams and other bodies of water
Requested by _____ in the state; and providing for an effective date."

II. FISCAL DETAIL
Agency Affected Department of Fish and Game
Program Category Affected Natural Resources Management & Environmental Conservation
BRU, Program, or Subprogram(s) Affected Habitat Enhancement
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 80 | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 |
|--------------------------|-------|-------|-------|-------|-------|-------|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC. | | | | | | |
| 800 MISCELLANEOUS | | 125.0 | -0- | | | |
| TOTAL | | 125.0 | -0- | | | |

FUNDING (Thousands of Dollars)

| | FY 80 | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 |
|-----------------------------|-------|-------|-------|-------|-------|-------|
| GENERAL FUND | | 125.0 | -0- | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Fund Source) | | | | | | |

POSITIONS

| | FY 80 | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 |
|-----------|-------|-------|-------|-------|-------|-------|
| FULL TIME | | | | | | |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Oral Freeman

Oral Freeman, Vice Chairman
House Finance Committee
May 1, 1980

IV. DATE _____ PREPARED BY _____
AGENCY _____
OR: Legislative Finance AGENCY FISCAL
Budget and Management FUNDING
Prime Sponsor (First Legislator Named)

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CSHB 118 No. 1
Title "An Act relating to rivers, lakes, streams and other bodies of water
Requested by _____ in the state; and providing for an effective date."

II. FISCAL DETAIL
Agency Affected Department of Natural Resources
Program Category Affected Management of Forest, Land & Water Use Management
BRU, Program, or Subprogram(s) Affected Water Management; Water Use Management
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 80 | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 |
|--------------------------|-------|-------|-------|-------|-------|-------|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC. | | | | | | |
| 800 MISCELLANEOUS | | 125.0 | -0- | | | |
| TOTAL | | 125.0 | -0- | | | |

FUNDING (Thousands of Dollars)

| | FY 80 | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 |
|-----------------------------|-------|-------|-------|-------|-------|-------|
| GENERAL FUND | | 125.0 | -0- | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Fund Source) | | | | | | |

POSITIONS

| | FY 80 | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 |
|-----------|-------|-------|-------|-------|-------|-------|
| FULL TIME | | | | | | |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Oral Freeman

Oral Freeman, Vice Chairman
House Finance Committee
May 1, 1980

IV. DATE _____ PREPARED BY _____
AGENCY _____
OR: Legislative Finance AGENCY FISCAL
Budget and Management FUNDING
Prime Sponsor (First Legislator Named)

*Passed Out Unchanged
by House Resources*

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill Resolution No. CSHB 118
 Title An Act Relating to the Maintenance of Stream Flows and Levels of Water
 Requested by Fish and Game Date April 11, 1980

II. FISCAL DET. II

Agency Affected Department of Fish and Game
 Program Category Affected Natural Resource Management and Environmental Conservation
 BRU, Program, or Subprogram(s) Affected Habitat Protection BRU
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 80 | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 |
|-------------------------|------------|--------------|--------------|------------|------------|------------|
| 100 PERSONAL SERVICES | -0- | 107.8 | 121.0 | -0- | -0- | -0- |
| 200 TRAVEL | -0- | 11.0 | 13.4 | -0- | -0- | -0- |
| 300 CONTRACTUAL | -0- | 60.4 | 66.4 | -0- | -0- | -0- |
| 400 COMMODITIES | -0- | 5.0 | 5.5 | -0- | -0- | -0- |
| 500 EQUIPMENT | -0- | 3.3 | -0- | -0- | -0- | -0- |
| 600 LAND & STRUCTURES | -0- | -0- | -0- | -0- | -0- | -0- |
| 700 GRANTS, CLAIMS, ETC | -0- | -0- | -0- | -0- | -0- | -0- |
| TOTAL | -0- | 187.5 | 206.3 | -0- | -0- | -0- |

FUNDING (Thousands of Dollars)

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Fund Source) | | | | | | |

POSITIONS

| | | | | | |
|-----------|--|---|---|--|--|
| FULL TIME | | 1 | 1 | | |
| PART TIME | | 4 | 4 | | |
| TEMPORARY | | 0 | 0 | | |

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

An amendment to HB 118, now incorporated as CSHB118, would require the Department of Fish and Game to specify by July 31, 1982, the "various rivers, lakes and streams or parts of them that are important for the spawning, rearing, or migration of anadromous fish." The expenditures presented in this fiscal note are in response to that amendment. Funds represented herein would allow the Department to inventory the anadromous streams of the State, provide for public review and comment on the inventory in accordance with the provisions of the Alaska Administrative Procedures Act, and present the findings of the inventory and public review process in documents which are readily available to the public. (continued)

IV. DATE April 11, 1980

PREPARED BY Richard Logan

AGENCY Fish and Game

PHONE 465-4105

Original: Legislative Finance
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

III. ANALYSIS (Continued)

Line 100 expenditures under this fiscal note would provide for the employment of one permanent full-time Habitat Biologist III (Range 18), three permanent seasonal Fisheries Biologist II positions (Range 16), and one permanent seasonal Clerk Typist III position (Range 8). An inventory of the type being required will necessitate considerable travel to allow for on-the-ground accumulation and verification of information on fish occurrence. This travel will occur by way of commercial transportation (Line 200 expenditures) and charter of aircraft service from private industry (Line 300 expenditures). Per diem costs associated with travel and field activities is covered under Line 200. Line 300 expenditures also cover such fixed costs as rental and typewriter leasing and maintenance, and further provide for costs associated with printing and duplication of reports, advertising for public hearing or meetings, and telephone services. Cartographic and office supplies and purchase of publications associated with Alaskan fish science are costs considered in Line 400 expenditures. Line 500 funds will be put toward purchase of chairs, desks, tables, file cabinets and drafting equipment.

Maintenance of Stream Flows and Levels of Water

HB 118

1. Currently, there is no provision in law which will guarantee a perpetual supply of naturally occurring (instream) water for broad public purposes, including the maintenance and propagation of fish and wildlife, recreation, navigation, and sanitary/water quality uses.
2. It is important to understand the relationship of current administrative procedures to the new opportunities afforded by HB 118. Under current procedures, as far as they relate to fish and wildlife management, the Department of Fish and Game is required by statute to comment on all water right applications made to the Department of Natural Resources. In so doing, ADF&G identifies its concerns with the application insofar as it might affect the maintenance of sustained yields of fish and wildlife. To this end, ADF&G either recommends approval of the application without modification, recommends approval contingent upon the incorporation of specified conditions in the water right, or recommends denial of the application. DNR then uses these comments as one of eight factors in determining whether a permit should be issued.

The current procedure allows the opportunity to administratively accommodate fish and wildlife needs; a "reservation" is not possible, but appropriations can be made with fish and wildlife concerns in mind. However, there is no long-term guarantee of fish and wildlife protection.

3. The decision-making process involved in reviewing a request for a water appropriation is not changed by HB 118. The public purposes listed in #1 do not represent an infringement on the "beneficial use" foundation of the Alaska Water Use Act. That is, all uses previously eligible for a water right are still eligible, with no additions to the list of beneficial uses and no priority established other than what is currently in law. In making a decision regarding the issuance of a water right for an instream appropriation, then, the decision-making criteria already in law are still applicable. This involves a weighing of a number of existing statutory considerations by the Department of Natural Resources.
4. HB 118 does not establish use of water for fish and wildlife, and the other public purposes listed in #1, as a superior beneficial use. Therefore, existing procedures for the procurement of water rights by the public are not preempted and a right to water use for fish and wildlife and other uses must be secured on a case-by-case, competitive and "first come" basis in accordance with existing water law.

A previous bill gave priority right to fish and wildlife, recreation, navigation and sanitary/water quality uses. This was primary cause for the Legislature to oppose previous versions of the bill.

5. As a corollary to #2, the instream flow bill would not provide for an automatic blanket appropriation to the public purposes listed in #1. Rather, it is explicit in the bill that appropriate detail will be used in defining needs, and requests for appropriation will be as site and needs specific as reasonable. The following is quoted from the bill:

"The state or any political subdivision or agency of the state may apply to the commissioner to reserve sufficient water to maintain a specified instream flow or level of water at a specified point on a stream or body of water, or in a specified stretch of stream, throughout the year or for specified times of the year" (emphasis added)

6. The right to make a request for an instream water appropriation for the public purposes listed in #1 is given to local governments, state agencies and other political subdivisions of the State. There is much concern that just the State can reserve flows and that others may wish to claim the same right, or that local perspectives on fish and wildlife, recreation, navigation, and sanitary/water quality will be ignored. Clearly, the State is not alone in the ability to reserve flows under the provisions of HB 118.
7. There may be some concern that the additive effect of several instream appropriations by several political subdivisions for the several public purposes may result in a situation wherein there exists no more water in a stream available for other uses.

This is not the case. Each appropriation cannot be considered an additive amount to another. Rather, the limiting factor is the largest appropriation required. For example, if one party wishes to reserve 3cfs, another 4cfs, another 6cfs and a final 8cfs, it is not correct to say that 21 cfs (i.e., the addition) will be reserved. It is true that each could be issued a right to each of its requests. However, only a maximum of 8cfs of actual water will be reserved because that amount is sufficient to cover all interests.

8. The instream flow bill would be beneficial to the State because it would bring the federal government under the procedural control of the State in instances of federal application for instream, nonreserved federal water rights. And, in so doing it would also represent a fiscal savings to the State by avoiding court settlement of appropriation issues. See attached letter from Brent Petrie to J. P. Tangen.
9. HB 118 is fully compatible with recommendations on instream flow legislation made by Mr. Frank Trelease, the framer of the Alaska Water Use Act. Mr. Trelease was contracted by DNR in 1976 to review the Water Use Act, its implementation and its adequacy in meeting state needs in light of the passage of years. One of the recommendations resulting from that review was for the enactment of an instream flow bill; the present HB 118 being substantially similar to the bill he proposed.

10. The reservation of water for the public purposes listed in #1 will result in incidental benefit to other types of activities. For example, some power generation plants are run by water driven turbines. Assurances that a perpetual supply of water will be available instream will allow this type of activity to continue. As another example, placer mining by suction dredge techniques requires, for economic efficiency, that water be in the stream channel. Absent that, expensive, heavy equipment would need to be employed to move the sediments. This in turn would have a greater impact on habitat resources than would suction dredge operations. An instream flow bill would prove beneficial to both suction dredge operators and habitat quality.

The National Council of State Legislators, staff assistants to the House Interim Committee on small hydroelectric projects, is on record as supporting amendment of HB 118 to include reservation of water options for power generation facilities, too. This would be a perfectly acceptable amendment.

11. The concept of a reservation of water for instream use--for the general public welfare--has foundation in the Alaska Constitution:

"Wherever occurring in the natural state, fish, wildlife and water are reserved to the people for common use." (Article VIII, Section 3) (emphasis added)

"Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed and maintained on the sustained yield principle, subject to preferences among beneficial uses." (Article VIII, Section 4)

"The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters for the maximum benefit of its people." (Article VIII, Section 2) (emphasis added)



Official Business

Alaska State Legislature

Senate

Committee on Resources

May 16, 1980

Pouch V
State Capitol
Juneau, Alaska 99811

TO: Senate Resource Committee Members
FROM: Jens Zehbe, Staff Member
REGARDING: CSHB 118

This bill amends the Alaska Fish and Game Statutes relating to the protection of fish and game. The commissioner shall specify the rivers, lakes and streams that are important for the rearing of anadromous fish. The present statute deals only with their spawning and migrating areas.

The present statutes require a person or government agency to submit complete plans on any proposed construction as they relate to the protection of fish and game. This bill would empower the commissioner to reject the proposed plans if they are insufficient in protecting fish and game. There is also a hearing procedure instituted for the rejected applicant.

Title 46, Appropriation and Use of Water is amended by adding reservation of instream flows and levels of water as a beneficial use.

A new section is added entitled Reservation of Water. It specifies that the state, a political subdivision of the state, an agency of the United States or a person may apply for the right to reserve sufficient water to maintain a specified instream water flow or level of water in a part of the stream at all or specified times of the year. In applying, the applicant must meet certain criteria which are:

- 1) Protection of fish and wildlife habitat, migration and propagation.
- 2) A need for recreation and park purposes.
- 3) A need for navigation and transportation purposes.
- 4) A need for sanitary and water quality purposes.

The commissioner will issue a certificate reserving the water if:

- 1) It does not affect prior water reservation agreements.
- 2) Applicant has demonstrated a need for the reservation.
- 3) There is enough unappropriated water in the stream for the reservation.
- 4) The commissioner shall review each reservation every 10 years and may modify or revoke the reservation.

See attached fiscal note.

HJR 68 The Resources Committee has had HOUSE JOINT RESOLUTION NO. 68 (relating to the Alaska Power Authority and the incurring of revenue bond indebtedness of the Alaska Power Authority for the Golden Valley Electric Association waste heat power generation project near Fairbanks) under consideration and a majority of the committee recommends it be replaced with COMMITTEE SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 68:

Relating to the Alaska Power Authority and the incurring of revenue bond indebtedness of the Alaska Power Authority for the Golden Valley Electric Association waste heat power generation project near Fairbanks and the Black Bear Lake hydroelectric project on Prince of Wales Island.

and that it do pass. Concurring: Miles (Co-Chairman), Osterback (Co-Chairman), Carney, Cotten, Fuller and Zharoff. Not concurring: Chatterton has no recommendation.

HJR 68 was referred to the Finance Committee.

HJR 81 The Resources Committee has had HOUSE JOINT RESOLUTION NO. 81 (relating to decontrol of the price of oil produced from Upper Cook Inlet fields) under consideration and a majority of the committee recommends it be replaced with COMMITTEE SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 81 (same title) and that it do pass. Concurring: Miles (Co-Chairman), Osterback (Co-Chairman), Chatterton, Carney, Cotten, Fuller and Zharoff.

HJR 81 was referred to the Rules Committee for placement on the calendar.

HB 118 The Finance Committee has had HOUSE BILL NO. 118 (relating to the maintenance of stream flows and levels of water) under consideration and a majority of the committee recommends it be replaced with the Resources COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 118:

"An Act relating to rivers, lakes, streams and other bodies of water in the state; and providing for an effective date."

~~SB~~
~~#8~~

Need Fiscal Note -

Provides for various groups to apply for the right to water.
Redefines water right

- Beneficial Uses
- 1) Fish & Wildlife protection
 - 2) Water Quality, Dissimilate Waste
 - 3) Transportation purposes
 - 4) Recreation activities

Bill allow person to apply for legal right to get above

House added to anadromous fish streams

Gordon
Smith
243-3107
3137
U