

INSTREAM

FLOW

Instream flow

Alaska State Legislature

BETTYE FAHRENKAMP, Chairman
ROBERT H. ZIEGLER, SR., Vice Chairman
DICK ELIASON
PAUL FISCHER
VIC FISCHER
BOB MULCAHY
ARLISS STURGI/LEWSKI



POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3834
(907) 465-3835

Senate

Committee on Resources

May 1, 1983

Memo

To: Billy Berrier, Director Division of Legal Services

From: Senator Bettye Fahrenkamp

Subject: Review of Instream Flow law

On April 18, the Resources Committee conducted an oversight hearing of the so-called Instream Flow law (AS 46.15.145) and pending regulations. Following the hearing the Alaska Power Authority sent the attached letter outlining a possible "loophole" in the law which might allow the federal government to avoid a state adjudication process in the case of "reserved" water rights.

I would greatly appreciate your comments and recommendations concerning the issue raised by the APA and the attached draft legislation.

Alaska State Legislature

BETTYE FAHRENKAMP, Chairman
ROBERT H. ZIEGLER, SR., Vice Chairman
DICK ELIASON
PAUL FISCHER
VIC FISCHER
BOB MULCAHY
ARLISS STURCULEWSKI



POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3834
(907) 465-3835

Senate

Committee on Resources

Memo

To: Senate Resources Committee Members
From: Senate Resources Committee Staff
Date: April 29, 1983
Subject: Follow-up to Instream Flow Oversight Hearing,
April 18, 1983

Background

The so-called instream flow law was passed in 1980 in response to concerns that:

1. The Department of the Interior might assert "unreserved" water rights to state waters through federal courts outside Alaska under a theory of law articulated by then Interior Solicitor Krulitz. (This theory was subsequently reversed by the new Administration.)
2. There were important uses of water which depended on a minimum level of water to be left in the stream, including: fish migration and spawning, recreation, navigation, and maintenance of water quality.

The law amended the existing Water Use Act to provide a procedure for reservation of instream waters which would complement the existing system for diversion or out-of-stream appropriations of water. Draft regulations implementing the law are currently being reviewed by the Department of Law.

Hearing Summary

On April 18 we heard testimony from the DNR, ADF&G, DEC, Department of Law, Alaska Miners Association, Southeast Alaska Gillnetters Association, and the Alaska Environmental Lobby on the 1980 statute establishing a system for reservation of instream flow waters and the proposed implementing regulations.

With the exception of the AMA, all supported the basic intent and operation of the instream flow law. Although the AMA testified that several of their concerns had been met in the law and the regulations, the membership supported repeal of the law.

All believed that, despite the recent reversal of the "Krulitz Decision" asserting a concept of unreserved federal water rights, it was still important to maintain a mechanism to force the federal government to pursue any claims to water through a state adjudication process as provided in the instream flow law.

Concerns about the law and the proposed regulations centered on the following:

1. That the law provided a mechanism which could be abused by agencies and individuals who could "blanket" every stream in the state with an instream flow reservation which would block future alternative uses of the waters, including public water supplies or industrial use.

Staff Analysis

At the time of passage of the law this concern focused on the presence of maps by the ADF&G outlining anadromous streams which might be used as a basis for making instream flow reservations. These maps were considered overly extensive and not based on actual spawning or migration observations. An agreement was made at the time of passage that ADF&G would revise these maps in line with actual investigation. These maps have now been revised and the AMA reports that it is generally satisfied that streams or segments of streams not supporting anadromous fish spawning or migration have been deleted.

Additionally, the regulations proposed to implement the law require that the burden of proof be placed on the applicant to demonstrate: the quantity of water needed for the particular instream use; the time of day or year needed; the methodology used for quantifying the needed water; data substantiating the need for the water. These requirements have been generally accepted as sufficient (if not onerous) to prevent "frivolous" applications for instream flow reservations.

The regulations also provide for a review of instream flow reservations at least every 10 years to ensure that the reservation is still being used and is needed. If the purpose for the original reservation is no longer needed or being met, the DNR Commissioner may revoke all

or a part of the reservation. This review could also be triggered by a subsequent application for another beneficial water use.

2. That the instream flow law does not provide for reservations for other potential uses such as hydroelectric, industrial, or public water supply uses.

Staff Analysis

This was a point of much confusion. The instream flow law must be viewed in the context of being one part of the state's water appropriation system. Alaska's Water Use Act (AS 46.15) includes the traditional water appropriation process based on western water law which permits the granting of water rights to individuals for diversion or out-of-stream water on a first-come, first-served basis. The instream flow reservation law only amended the Water Use Act to provide for an additional, complementary system for instream uses of waters.

Industrial uses (e.g., placer mining), hydroelectric dams and reservoirs and public water supplies are all considered diversion or out-of-stream uses under Alaska's water law. As such, appropriations for water rights for these uses would continue to be made under the traditional water appropriation procedures outlined in AS 46.15. Appropriation or reservation of water under either out-of-stream or instream procedures would be subject to any previous appropriations or reservations under either system.

However, unlike the out-of-stream system, instream reservations are not mutually exclusive or strictly additive. For example, the same minimum cfs (cubic feet per second) of water reserved for salmon spawning on a segment of stream could be reserved for recreational canoeing. Any water above the minimum flow to be left in the stream would, of course, be available for further appropriations or reservations.

3. That reservations of water can be applied for and granted to individuals or private groups.

Staff Analysis

The instream flow law states that a "person" can apply for an instream flow reservation in addition to state, federal or local agencies. The regulations also provide

for individuals or groups to apply for instream reservations and to receive certificates of reservations.

The question which has arisen in the Attorney General's office is two-fold:

- a. Should individuals physically receive a document granting an instream flow reservation or should such a reservation be "held" by the state?; and,
- b. If such a certificate were issued to an individual, would that represent a property right similar to a traditional water "appropriation" or represent a different type of symbolic "right"? The Alaska Constitution protects the former right and revocation or modification of such a right would require due process and just compensation procedures as in condemnation. The latter could presumably be revoked or modified at the discretion of the DNR Commissioner after statutory and regulatory procedures were followed.

Since the time of the hearing, the AG's office has concluded an examination of the legislative history of the instream flow law. From tapes of the House Resources Committee considerations, they have tentatively concluded that it was the Committee's intent that instream reservations would be physically issued to individuals. However, it was not clear whether certificates of "reservation" were to be treated like an "appropriation" as that term is used in statute and the Constitution.

As drafted currently, the regulations presumably do not treat a certificate of reservations as a property-right appropriation.

4. That a "loophole" in state law exists which might prevent the state from forcing the federal government to go through the state on some water right adjudications.

Staff Analysis

Attached is a letter from the Alaska Power Authority which summarizes the situation of "reserved" federal water rights for such federal reserved areas as national parks and wildlife refuges. Federal legislation apparently permits adjudication of such water rights in state courts if they are part of a basin-wide adjudication. Alaska statutes currently do not provide for basin-wide adjudication. APA has attached possible legislation

drafted by the Department of Law which would address this "loophole".

SUMMARY

There appear to be only two substantive ambiguities or omissions in the current instream flow law which have been brought to light: 1) It is not clear whether the legislature intended for a property-right type appropriation to be vested with a private-party applicant for instream flow waters; and, 2) There may exist a loophole in statute whereby the federal government might not be forced to use state water adjudication procedures in the case of "reserved" federal water rights (as opposed to the concept of "unreserved" water rights asserted by a former Interior Solicitor).

If the legislature takes no further action on the instream flow law, it is reasonable to expect that, based on the testimony of the DNR and Department of Law, the regulations will enable a "person" to apply for and receive a certificate of reservation for instream flow waters. However, this certificate would not be treated like an "appropriation" under the diversion or out-of-stream water rights system. Rather, the DNR could modify or revoke the certificate without compensation or due process type protections offered under the Constitution for regular property rights.

If the Committee feels that such instream flow reservations should be treated differently, or that clarification to support the proposed regulations and avoid possible litigation is needed, additional statutory changes are necessary and staff could seek draft language.

At this time we have no further information on the "reserved" water rights "loophole" outlined by the APA. Staff will ask the Division of Legal Services, the Department of Law, and contact the appropriate federal departments for more information on this. If it appears changes in state law are necessary or desirable, recommendations will be circulated to the Committee.

To paraphrase the DNR testifier, there may be other bears out there in the woods, but we won't know until we go out into them and gain experience with the new program.

pp:jm
enclosure

ALASKA POWER AUTHORITY

334 WEST 5th AVENUE - ANCHORAGE, ALASKA 99501

Phone: (907) 277-7641
(907) 276-0061

APR 25 1983

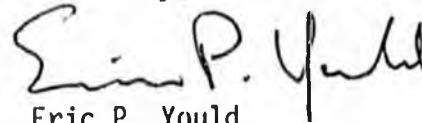
April 21, 1983

The Honorable Bettye Fahrenkamp
State Capitol
Capitol, Room 125
Pouch V
Juneau, Alaska 99811

Dear Senator Fahrenkamp:

In reference to your letter of April 7, 1983, in which you requested my participation in discussions on the Alaska Water Use Act, I was not able to attend because of a conflicting Board meeting. I have had the opportunity to review the Law and Proposed Regulations and submit the attached testimony for the record. I apologize for not being able to attend the meeting but would be pleased to participate at a later date should other hearings be scheduled.

Sincerely,



Eric P. Yould
Executive Director

cc: Commissioner Richard Lyon, Chairman, w/a
All Board of Directors Members, w/a

Testimony of Eric P. Yould

Executive Director

Alaska Power Authority

Regarding the Alaska Instream Flow Law and Pending Regulations

Before the Senate Committee on Resources

April 18, 1983

MY TESTIMONY TODAY WILL CONCENTRATE ON THE ALASKA POWER AUTHORITY'S VIEW OF THE LEGISLATION ENACTED BY THE LEGISLATURE IN 1980 AND DNR REGULATIONS THAT ARE NOW PENDING TO IMPLEMENT THE LAW. FOR YOUR BACKGROUND THERE WAS SOME DISCUSSION OF THIS BILL AS PART OF A PACKAGE OF ENERGY RESOURCES LEGISLATION UNDER CONSIDERATION IN 1980 AND AT THAT TIME I HAD THE OPPORTUNITY TO DISCUSS THE LEGISLATION WITH DEPARTMENT OF NATURAL RESOURCES STAFF AND TO SIT IN IN SOME OF THE COMMITTEE HEARINGS AS THE BILL WAS CONSIDERED.

FROM THE MATERIALS PROVIDED WITH SENATOR FAHRENKAMP'S INVITATION OF APRIL 7, 1983, IT APPEARS THAT YOU HAVE SOME QUESTIONS ABOUT THE CONTINUING NEED FOR SUCH A LAW, SINCE THE U.S. ATTORNEY GENERAL, WILLIAM FRENCH SMITH, HAS REVISED AN OPINION ON FEDERAL WATER RIGHTS ORIGINALLY AUTHORED BY INTERIOR SOLICITOR KRULITZ DURING THE CARTER ADMINISTRATION. MY SHORT ANSWER TO SUCH A QUESTION IS YES FOR TWO REASONS:

- 1) THE OPINION OF U. S. ATTORNEY GENERAL SMITH IS JUST AS SUBJECT TO REVISION BY SUCCEEDING ADMINISTRATIONS AS WAS THE EARLIER KRULITZ OPINION. IN THE ABSENCE OF STATE ADMINISTRATIVE PROCEDURES TO GOVERN INSTREAM USES OF WATER WE WOULD FIND OURSELVES SUBJECT TO ADJUDICATION OF "NON-RESERVED" FEDERAL WATER RIGHTS IN FEDERAL COURTS WHERE STATE CONTROL WOULD BE MINIMAL.

- 2) EVEN IF ATTORNEY GENERAL SMITH'S REVISIONS STAY INTACT IN THE

FUTURE, FEDERAL AGENCIES STILL RETAIN BROAD MANAGEMENT AUTHORITIES FOR LANDS AND WATERS UNDER THEIR JURISDICTION. WHERE STATE PROCEDURES EXIST FOR MANAGING ITS WATER RESOURCES, THEN THE FEDERAL AGENCIES WOULD STILL BE OBLIGATED TO COMPLY WITH STATE LAW. THE LAW AND ITS REGULATIONS CREATE A CLEAN PROCESS FOR HANDLING ANY SUCH CLAIMS FOR INSTREAM WATER NEEDS AND I FEEL MORE COMFORTABLE IF THE FEDS MUST PLAY BY OUR STATE'S RULES.

I MUST ALSO EMPHASIZE THAT THERE ARE OTHER BENEFITS UNDER THE LAW, UNRELATED TO ANY FEDERAL-STATE ISSUES. FOREMOST IS ONE PROVIDING MORE OBJECTIVITY IN WATER MANAGEMENT DECISIONS THAT AFFECT DEVELOPERS SUCH AS THE POWER AUTHORITY. DURING FEASIBILITY STUDIES, DESIGN, LICENSING AND CONSTRUCTION OF PROJECTS THE POWER AUTHORITY ACTIVITIES ARE SUBJECT TO NUMEROUS PERMITS AND STIPULATIONS. SOME OF THESE PERMITS AND STIPULATIONS DIRECTLY ADDRESS WATER FLOW RELEASES. WE NORMALLY CONDUCT EXTENSIVE HYDROLOGIC, TEMPERATURE, BIOLOGICAL, AND OPERATIONS STUDIES TO

DEVELOP THE DATA TO HELP MAKE INFORMED DECISIONS ON SUCH ISSUES. HOWEVER, THERE HAVE BEEN OCCASIONS WHERE STIPULATIONS HAVE BEEN PROPOSED, OR ATTACHED, TO PROJECT OPERATING CONDITIONS WHICH MAY BE MORE A REFLECTION OF AN AGENCY STAFFER'S " GUT FEELING " AND ARE IN CONFLICT WITH OTHER INTERPRETATIONS OF THE DATA AT HAND.

IN THIS REGARD, THE LEGISLATION AND PROPOSED REGULATIONS COULD HELP SOLVE SOME OF THESE CONFLICTS BY REQUIRING THOSE WISHING TO RESERVE WATER FOR INSTREAM USES TO PROVIDE THE NECESSARY DATA FOR THE ADMINISTERING AGENCY (DNR) TO MAKE AN OBJECTIVE DECISION ON THE MERITS OF ANY COMPETING INSTREAM OR OUT-OF-STREAM USES. IN ESSENCE, THE "SHOE IS PUT ON THE OTHER FOOT" TO JUSTIFY WHY CERTAIN RESERVATIONS OR STIPULATIONS MAY BE NECESSARY AND THE DEVELOPER HAS THE OPPORTUNITY TO RESPOND BEFORE THE ADJUDICATING AGENCY.

WHEN THE LEGISLATURE AMENDED THE BILL TO ALLOW "A PERSON" TO APPLY FOR AN INSTREAM RESERVATION WE WERE, AT FIRST, CONCERNED THAT THIS COULD

LEAD TO SOME FRIVOLOUS APPLICATIONS. HOWEVER, A REVIEW OF THE PROPOSED REGULATIONS SHOW THAT DNR HAS DEVELOPED STRINGENT CRITERIA FOR THE CONTENT OF SUCH AN APPLICATION SUCH THAT ONLY SERIOUS APPLICATIONS SHOULD SURVIVE THE EVALUATION PROCESS. SHOULD A PROPOSED RESERVATION APPEAR TO ADVERSELY AFFECT OTHER USES OF THE WATER, THE OPPORTUNITY EXISTS TO PROVIDE A REBUTTAL IN AN OPEN PUBLIC PROCESS BEFORE DNR. AS I INDICATED BEFORE, SUCH AN OPPORTUNITY IS SOMETIMES LACKING WHEN ONE NEEDS A PERMIT TO PROCEED IN A TIMELY MANNER.

ONE AREA OF WATER MANAGEMENT WHERE THE STATE IS STILL EXPOSED TO UNCERTAINTY IS THE SUBJECT OF FEDERAL " RESERVED " WATER RIGHTS THAT PERTAIN TO FEDERAL RESERVATIONS FOR PARKS, MONUMENTS, WILDLIFE REFUGES AND MILITARY PURPOSES. CONGRESS HAS PROVIDED ITS CONSENT - THROUGH THE MCCARREN AMENDMENT- FOR SUCH WATER RIGHTS TO BE ADJUDICATED AND QUANTIFIED IN STATE COURTS AS LONG AS THEY ARE ADJUDICATED AS PART OF A BASIN-WIDE ADJUDICATION. THE ALASKA STATE WATER STATUTES DO NOT PRESENTLY ENABLE SUCH A PROCEDURE AND THEREFORE WE WILL CONTINUE TO FACE

SOME UNCERTAINTY IN OUR ABILITY TO USE WATERS WHICH MAY FLOW THROUGH A FEDERAL RESERVE. THE DEPARTMENT OF LAW ONCE DRAFTED A PROPOSED BILL TO DEAL WITH THIS SITUATION AND IT IS ATTACHED TO MY TESTIMONY. PERHAPS IT WOULD BE PRUDENT FOR THE COMMITTEE RECEIVE INPUT FROM OTHERS AND CONSIDER SUCH LEGISLATION, THE LEGISLATION COULD CLOSE A LOOPHOLE AS FAR AS OUR STATE'S ABILITY TO REQUIRE THE FEDERAL GOVERNMENT TO SUBJECT FEDERAL WATER CLAIMS TO STATE REVIEW AND SCRUTINY.

IN SUMMARY, THE INSTREAM FLOW LEGISLATION AND PENDING REGULATIONS PROVIDE A PROCESS FOR BETTER RESOLVING WATER MANAGEMENT USES BY REQUIRING PRESENTATION AND INTERPRETATION OF DATA THROUGH AN OPEN PROCESS WHERE THE TECHNICAL AND ECONOMICAL MERITS OF THE PROPOSALS CAN BE OBJECTIVELY CONSIDERED.

I THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY AND FOR YOUR ATTENTION.

A BILL

For an Act entitled: "An act amending the Alaska Water Use Act at AS 46.15 to provide for enforcement of orders of the commissioner issued under that Act, to establish a procedure to enable judicial determination of basin-wide water rights adjudications, and providing for an effective date."

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

* Section 1. AS 46.15 is amended by addition of the following new section 46.15.165:

Sec. 46.15.165. BASIN-WIDE ADJUDICATIONS. (a) The commissioner may initiate the adjudication and quantification of all existing or claimed water rights in a water basin, river system, or other discrete hydrologic area. Notice of such action shall be mailed by certified mail to each existing appropriator or claimant of record with the department, and shall be published once each week for four consecutive weeks in a newspaper of general circulation in the vicinity of the area affected. The adjudication and quantification of all existing or claimed water rights shall proceed to a final administrative decision in accordance with the Administrative Procedures Act (AS 44.62) unless federal reserved or appropriated water rights or claims are asserted by the United States, by any of its component agencies, or by any person whose title to the land affected contains a restriction upon alienation imposed by the United States.

1 (b) If a federal right or claim referred to in (a) above is
2 asserted in any administrative proceeding under this section, the
3 commissioner shall thereafter proceed by way of an original action in
4 the superior court seeking a general adjudication and quantification of
5 all water rights, federal and non-federal, in the water basin, river
6 system, or hydrologic area affected. All water right holders and
7 claimants in the area affected, including any person or entity asserting
8 a federal right or claim, shall be joined in the action, pursuant to the
9 provisions of this section and 43 United States Code section 666. The
10 superior court shall proceed by way of a trial de novo, and may appoint
11 the commissioner or his designee as a special master to compile evi-
12 dence and take testimony, and to thereafter make recommendations to
13 the court regarding the issuance of a judicial decree finally adjudi-
14 cating and quantifying all existing water rights and claims in the area
15 which is a subject of the action. For these purposes, relevant records
16 and files which the department has compiled or obtained in its admini-
17 stration of this title and which pertain to the area affected shall be
18 admitted into evidence before the special master and the court, to-
19 gether with any other relevant documentation introduced during the
20 course of the proceedings.

21 (c) A final decree entered by the superior court pursuant to this
22 section shall have the effect of adjudicating, quantifying, and quiet-
23 ing all existing rights or claims to the water in the water basin,
24 river system, or other discrete hydrologic area which was the subject
25 of the adjudication, and shall be conclusive as to the facts stated
26 therein.

27 * Sec. 2. AS 46.15.250(a) is amended as follows:

28 Sec. 46.15.250. ENFORCEMENT AUTHORITY AND PROCEDURE. (a) The
29 following persons are peace officers of the state who [AND THEY] shall
30
31

enforce this chapter:

(1) a state employee authorized by the commissioner;

(2) a police officer of the state. (§ 1 ch 50 SLA 1966)

* Sec. 3. AS 46.15 is amended by addition of the following paragraph (b):

(b) In addition to any penalty which may be imposed pursuant to section 180 of this title for violation for any order issued under authority of this title, the department, after notice to the violator and opportunity for hearing (except in emergency situations in which case no hearing shall be required), may

(1) remove or abate unpermitted works of appropriation, diversion, impoundment or withdrawal, or may install corrective controls or control works after the violator's failure to do so pursuant to order. The violator shall be liable in a civil action for all costs of removal, abatement, or installation of corrective controls or control works, and all claims against the state by third parties for damages suffered as a result of such unpermitted works or unconstructed controls, including court costs and attorney fees;

(2) seek enforcement of any other order of the commissioner by appropriate civil action in the superior court.

(c) In order to carry out the provisions of this title, the department shall have the authority to inspect books, records, meters, gauges, well logs, works of appropriation, diversion, impoundment, withdrawal or control, and any other relevant information or physical condition, to enter onto private property at all reasonable times for such purposes, and to compel production of relevant information by administrative subpoena or other appropriate administrative order.