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STATE OF ALASKA THE LEGISLATURE

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS to base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	5/7/85	1:30 pm
" "	5/11/85	1:00 pm
" "	1/29/86	1:30 pm
" "	1/30/86	1:30 pm

HOUSE 8-19

ALASKA HOUSE OF REPRESENTATIVES
HOUSE SB 1407 JOURNAL RECD

100 SESSION 14TH LEG

3/14/86 12: 9 PM

	28	YEAS	11	NAYS	1	EXC	0	ABS		
Y										
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Y										
D										
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Y										

* VOTED FOR
* CHANGED VOTE

HOUSE
COMMITTEE REPORT

1/31
Rube

(7)

Date referred: 4/17/85

FURTHER REFERRALS:

(Waived from HESS 4/17)

DATE: 1/30/86

The JUDICIARY Committee has considered CSSB 140(HESS)am

"An Act relating to the rights of the terminally ill; and providing for an effective date."

and recommends:

- do pass
- do not pass
- do pass with attached amendment(s)
- no recommendation
- replace with HCS CSSB 140 (JUDICIARY) same title
- new title

and recommends No recommendation

further referral to the _____ Committee

- and attaches:
- letter of intent
 - first fiscal note
 - new fiscal note
 - zero fiscal note

SIGNING DO PASS:

[Signature]

Robin L. Taylor

SIGNING OTHER RECOMMENDATIONS:

[Signature] - NO REC

[Signature] - NO REC

[Signature] Do pass if amended concerning 1- Nutrition + hydration 2 well-being

[Signature] no rec

[Signature] No Rec

[Signature]
Chairman

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Offered: 2/5/86
 Referred: Rules

Original sponsors: Eliason, Ziegler,
 V.Fischer, et al

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 HOUSE CS FOR CS FOR SENATE BILL NO. 140 (Judiciary) am H

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the rights of the terminally ill;
 7 and providing for an effective date."

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

9 * Section 1. AS 18 is amended by adding a new chapter to read:

10 CHAPTER 12. RIGHTS OF TERMINALLY ILL.

11 Sec. 18.12.010. DECLARATION RELATING TO USE OF LIFE-SUSTAINING
 12 PROCEDURES. (a) A competent person who is at least 18 years old may
 13 execute a declaration at any time directing that life-sustaining
 14 procedures be withheld or withdrawn from that person; but the declara-
 15 tion is given operative effect only if the declarant's condition is
 16 determined to be terminal and the declarant is not able to make treat-
 17 ment decisions. The declaration shall be signed by the declarant, or
 18 another at the declarant's direction, and in either case shall be
 19 witnessed by two persons or a person qualified to take acknowledge-
 20 ments under AS 09.63.010. Any person generally competent to be a
 21 witness may act as a witness to the declaration. A person may not
 22 charge a fee for preparing a declaration.

23 (b) It is the responsibility of the declarant to provide a copy
 24 of the declaration to the declarant's physician.

25 (c) A declaration may, but need not, be in the following form:

26 DECLARATION

27 If I should have an incurable or irreversible condition that will
 28 cause my death within a relatively short time, it is my desire that my
 29 life not be prolonged by administration of life-sustaining procedures.

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1 If my condition is terminal and I am unable to participate in de-
 2 cisions regarding my medical treatment, I direct my attending phy-
 3 sician to withhold or withdraw procedures that merely prolong the
 4 dying process and are not necessary to my comfort or to alleviate
 5 pain.

6 I [] do [] do not desire that nutrition or hydration be
 7 provided by gastric tube or intravenously if necessary.

8 Signed this _____ day of _____, _____.

9 Signature _____

10 Place _____

11 The declarant is known to me and voluntarily signed or
 12 voluntarily directed another to sign this document in my presence.

13 Witness _____

14 Address _____

15 Witness _____

16 Address _____

17 State of _____

18 _____ Judicial District

19 The foregoing instrument was acknowledged before me this (date) by
 20 (name of person who acknowledged).

21 _____
 22 Signature of Person Taking
 23 Acknowledgement

24 _____
 25 Title or Rank

26 _____
 27 Serial Number, if any

28 THIS DECLARATION MUST BE EITHER WITNESSED BY TWO PERSONS OR
 29 ACKNOWLEDGED BY A PERSON QUALIFIED TO TAKE ACKNOWLEDGEMENTS UNDER

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1 AS 09.63.010.

2 (d) A physician or health care provider may presume, in the
3 absence of actual notice to the contrary, that the declaration com-
4 plies with this chapter and is valid.

5 Sec. 18.12.020. REVOCATION OF DECLARATION. (a) A declaration
6 may be revoked at any time and in any manner by which the declarant is
7 able to communicate an intent to revoke, without regard to mental or
8 physical condition. A revocation is only effective as to the attend-
9 ing physician or any health care provider acting under the guidance of
10 that physician upon communication to the physician or health care
11 provider by the declarant or by another to whom the revocation was
12 communicated.

13 (b) The attending physician or health care provider shall make
14 the revocation a part of the declarant's medical record.

15 Sec. 18.12.030. RECORDING DETERMINATION OF TERMINAL CONDITION
16 AND CONTENTS OF DECLARATION. When an attending physician who has been
17 provided a copy of a declaration determines that the declarant is in a
18 terminal condition, the physician shall record that determination and
19 the contents of the declaration in the declarant's medical record.

20 Sec. 18.12.040. TREATMENT OF QUALIFIED PATIENTS. (a) A qual-
21 ified patient has the right to make decisions regarding use of life-
22 sustaining procedures as long as the patient is able to do so. If a
23 qualified patient is not able to make these decisions, the declaration
24 governs decisions regarding use of life-sustaining procedures.

25 (b) This chapter does not prohibit the application of any med-
26 ical procedure or intervention, including the provision of nutrition
27 and hydration, considered necessary to provide comfort care or alle-
28 viation of pain. The declaration may provide that the declarant does
29 not want nutrition or hydration administered intravenously or by

1 gastric tube.

2 (c) The declaration of a qualified patient known to the attend-
3 ing physician to be pregnant has no effect as long as it is possible
4 that the fetus could develop to the point of live birth with continued
5 application of life-sustaining procedures.

6 Sec. 18.12.050. TRANSFER OF PATIENTS. (a) An attending physi-
7 cian who is unwilling to comply with the requirements of AS 18.12.030
8 or who is unwilling to comply with the declaration of a qualified
9 patient under AS 18.12.040 shall withdraw as attending physician but
10 the withdrawal is effective only when the services of another attend-
11 ing physician have been obtained.

12 (b) If the policies of a health care facility preclude compli-
13 ance with the declaration of a qualified patient under this chapter,
14 that facility shall take all reasonable steps to notify the patient
15 or, if the patient is not able to make treatment decisions, the
16 patient's guardian, of the facility's policy and shall take all
17 reasonable steps to effect the transfer of the patient to the
18 patient's home or to a facility where the provisions of this chapter
19 can be carried out.

20 Sec. 18.12.060. IMMUNITIES. (a) In the absence of actual
21 notice of the revocation of a declaration, the following, while acting
22 in accordance with the requirements of this chapter, are not subject
23 to civil or criminal liability or guilty of unprofessional conduct:

24 (1) a physician who causes the withholding or withdrawal of
25 life-sustaining procedures from a qualified patient;

26 (2) a person who participates in the withholding or with-
27 drawal of life-sustaining procedures under the direction or with the
28 authorization of a physician;

29 (3) the health care facility in which the withholding or

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1 withdrawal occurs.

2 (b) A physician, a health care professional, or a health care
3 facility is not subject to civil or criminal liability for actions
4 under this chapter that are in accord with reasonable medical stan-
5 dards.

6 Sec. 18.12.070. PENALTIES. (a) An attending physician who
7 fails to comply with the declaration of a qualified patient or to make
8 the necessary arrangements to effect a transfer under AS 18.12.050 has
9 no right to compensation for medical services provided to a qualified
10 patient after withdrawal should have been effective or after transfer
11 should have occurred and may be civilly liable to the qualified
12 patient and to the heirs of the qualified patient.

13 (b) A person who wilfully conceals, cancels, defaces, obliterated,
14 or damages the declaration of another without the declarant's
15 consent or who falsifies or forges a revocation of the declaration of
16 another may be civilly liable to the qualified patient and to the
17 heirs of the qualified patient.

18 Sec. 18.12.080. GENERAL PROVISIONS. (a) Death resulting from
19 the withholding or withdrawal of life-sustaining procedures under a
20 declaration and in accordance with this chapter does not, for any
21 purpose, constitute a suicide or homicide.

22 (b) The making of a declaration under AS 18.12.010 does not
23 affect in any manner the sale, procurement, or issuance of a policy of
24 life insurance, nor does it modify the terms of an existing policy of
25 life insurance. A policy of life insurance is not legally impaired or
26 invalidated in any manner by the withholding or withdrawal of life-
27 sustaining procedures from an insured qualified patient, notwithstand-
28 ing any term of the policy to the contrary.

29 (c) A physician, health care facility, or other health care

1 provider, and a health care service plan, insurer issuing disability
 2 insurance, self-insured employee welfare benefit plan, or nonprofit
 3 hospital plan, may not require a person to execute a declaration as a
 4 condition for being insured for, or receiving, health care services.

5 (d) This chapter creates no presumption concerning the intention
 6 of an individual who has not executed a declaration with respect to
 7 the use, withholding, or withdrawal of life-sustaining procedures in
 8 the event of a terminal condition.

9 (e) Nothing in this chapter increases or decreases the right of
 10 a patient to make decisions regarding use of life-sustaining proce-
 11 dures as long as the patient is able to do so, or impairs or super-
 12 cedes any right or responsibility that a person has to effect the
 13 withholding or withdrawal of medical care in a lawful manner. In that
 14 respect, the provisions of this chapter are cumulative.

15 (f) This chapter does not condone, authorize, or approve mercy
 16 killing or euthanasia.

17 Sec. 18.12.090. RECOGNITION OF DECLARATIONS EXECUTED IN OTHER
 18 STATES. A declaration executed in another state or a territory or
 19 possession of the United States in compliance with the law of that
 20 jurisdiction is effective for purposes of this chapter.

21 Sec. 18.12.100. DEFINITIONS. In this chapter

22 (1) "attending physician" means the physician selected by,
 23 or assigned to, the patient who has primary responsibility for the
 24 treatment and care of the patient;

25 (2) "declaration" means a document executed in accordance
 26 with the requirements of AS 18.12.010;

27 (3) "health care provider" means a person who is licensed,
 28 certified, or otherwise authorized by the law of this state to admin-
 29 ister health care in the ordinary course of business or practice of a

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1 profession;

2 (4) "life-sustaining procedure" means a medical procedure
3 or intervention that, when administered to a qualified patient, will
4 serve only to prolong the dying process;

5 (5) "physician" means a person licensed to practice medi-
6 cine in this state or an officer in the regular medical service of the
7 armed services of the United States or the United States Public Health
8 Service while in the discharge of their official duties, or while
9 volunteering services without pay or other remuneration to a hospital,
10 clinic, medical office, or other medical facility in the state;

11 (6) "qualified patient" means a patient who has executed a
12 declaration in accordance with this chapter and who has been deter-
13 mined by the attending physician to be in a terminal condition;

14 (7) "terminal condition" means a progressive incurable or
15 irreversible condition that, without the administration of life-sus-
16 taining procedures, will, in the opinion of two physicians, when
17 available, who have personally examined the patient, one of whom must
18 be the attending physician, result in death within a relatively short
19 time.

20 * Sec. 2. This Act takes effect immediately in accordance with AS 01.-
21 10.070(c).

HCS CSSB 140(Jud) am H
AMENDMENTS ADOPTED 3/12/86

NUMBER:

- 12 Page 1, line 17, following "decisions." delete all material through "declaration." on line 21.
- 12 Page 1, line 17, after "decisions." insert:
"The declaration shall be signed by the declarant, or another at the declarant's direction, and in either case shall be witnessed by two persons or a person qualified to take acknowledgements under AS 09.63.010. Any person generally competent to be a witness may act as a witness to the declaration."
- 16 Page 1, line 23, after "to" delete the rest of the sentence.
- 16 Page 1, line 23, after "to" insert "provide a copy of the declaration to the declarant's physician."
- 13 Page 2, following line 7, insert:
"I [] do [] do not desire that nutrition or hydration be provided by gastric tube or intravenously if necessary."
- 12 Page 2, lines 11 - 17, delete all material and insert:
"The declarant is known to me and voluntarily signed or voluntarily directed another to sign this document in my presence.

Witness _____

Address _____

Witness _____

Address _____

State of _____

_____ Judicial District

The foregoing instrument was acknowledged before me this date) by (name of person who acknowledged).

Signature of Person Taking Acknowledgement

Title or Rank

Serial Number, if any

THIS DECLARATION MUST BE EITHER WITNESSED BY TWO PERSONS OR ACKNOWLEDGED BY A PERSON QUALIFIED TO TAKE ACKNOWLEDGEMENTS UNDER AS 09.63.010."

NUMBER

- 16 Page 3, line 4, delete "notified of the existence and contents" and insert:"provided a copy"
- 13 Page 3, line 16, after "pain." insert:
"The declaration may provide that the declarant does not want nutrition or hydration administered intravenously or by gastric tube."
- 4 Page 3, line 18, delete "probable" and insert "possible"
- 11 Page 3, line 29, after "facility" insert:"shall take all reasonable steps to notify the patient or, if the patient is not able to make treatment decisions, the patient's guardian, of the facility's policy and"
- 11 Page 4, line 1, after "patient" insert:"to the patient's home or"
- 11 Page 4, line 1, delete "in which" and insert:"where"
- 15 Page 4, line 20, after "AS 18.12.050" insert:"has no right to compensation for medical services provided to a qualified patient after withdrawal should have been effective or after transfer should have occurred and"
- 13 Page 6, line 14, after "process;" through line 15, delete all material.
- 10 Page 6, line 27, after "of" insert: "two physicians who have personally examined the patient, one of whom must be"
- 17 Page 6, line 27, after "physicians" insert: ",when available,"

*passed out
4/29/86*

Original sponsors: Eliason, Ziegler,
V. Fischer, et al

1 IN THE SENATE BY THE JUDICIARY COMMITTEE

2 HOUSE CS FOR CS FOR SENATE BILL NO. 140 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

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7 and providing for an effective date."

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11 Sec. 18.12.010. DECLARATION RELATING TO USE OF LIFE-SUSTAINING
12 PROCEDURES. (a) A competent person who is at least 18 years old may
13 execute a declaration at any time directing that life-sustaining
14 procedures be withheld or withdrawn from that person; but the declara-
15 tion is given operative effect only if the declarant's condition is
16 determined to be terminal and the declarant is not able to make treat-
17 ment decisions. The declarant shall subscribe to the declaration in
18 the presence of a judge or magistrate. The judge or magistrate shall
19 inquire on the record whether the declarant understands the importance
20 and effect of the declaration. A judicial officer may not charge a
21 fee for witnessing a declaration. A person may not charge a fee for
22 preparing a declaration.

23 (b) It is the responsibility of the declarant to notify the
24 declarant's physician of the declaration. A physician or other health
25 care provider who is provided a copy of the declaration shall make it
26 a part of the declarant's medical records.

27 (c) A declaration may, but need not, be in the following form:

28 DECLARATION

29 If I should have an incurable or irreversible condition that will

1 cause my death within a relatively short time, it is my desire that my
2 life not be prolonged by administration of life-sustaining procedures.
3 If my condition is terminal and I am unable to participate in de-
4 cisions regarding my medical treatment, I direct my attending phy-
5 sician to withhold or withdraw procedures that merely prolong the
6 dying process and are not necessary to my comfort or to alleviate
7 pain.

8 Signed this _____ day of _____, _____.

9 Signature _____

10 Place _____

11 Subscribed and sworn to or affirmed before me

12 at _____ on _____.

13 (Date)

14 _____
15 Signature of Officer

16 _____
17 Title of Officer

18 (d) A physician or health care provider may presume, in the
19 absence of actual notice to the contrary, that the declaration com-
20 plies with this chapter and is valid.

21 Sec. 18.12.020. REVOCATION OF DECLARATION. (a) A declaration
22 may be revoked at any time and in any manner by which the declarant is
23 able to communicate an intent to revoke, without regard to mental or
24 physical condition. A revocation is only effective as to the attend-
25 ing physician or any health care provider acting under the guidance of
26 that physician upon communication to the physician or health care
27 provider by the declarant or by another to whom the revocation was
28 communicated.

29 (b) The attending physician or health care provider shall make

1 the revocation a part of the declarant's medical record.

2 Sec. 18.12.030. RECORDING DETERMINATION OF TERMINAL CONDITION
3 AND CONTENTS OF DECLARATION. When an attending physician who has been
4 notified of the existence and contents of a declaration determines
5 that the declarant is in a terminal condition, the physician shall
6 record that determination and the contents of the declaration in the
7 declarant's medical record.

8 Sec. 18.12.040. TREATMENT OF QUALIFIED PATIENTS. (a) A qual-
9 ified patient has the right to make decisions regarding use of life-
10 sustaining procedures as long as the patient is able to do so. If a
11 qualified patient is not able to make these decisions, the declaration
12 governs decisions regarding use of life-sustaining procedures.

13 (b) This chapter does not prohibit the application of any med-
14 ical procedure or intervention, including the provision of nutrition
15 and hydration, considered necessary to provide comfort care or alle-
16 viation of pain.

17 (c) The declaration of a qualified patient known to the attend-
18 ing physician to be pregnant has no effect as long as it is probable
19 that the fetus could develop to the point of live birth with continued
20 application of life-sustaining procedures.

21 Sec. 18.12.050. TRANSFER OF PATIENTS. (a) An attending physi-
22 cian who is unwilling to comply with the requirements of AS 18.12.030
23 or who is unwilling to comply with the declaration of a qualified
24 patient under AS 18.12.040 shall withdraw as attending physician but
25 the withdrawal is effective only when the services of another attend-
26 ing physician have been obtained.

27 (b) If the policies of a health care facility preclude compli-
28 ance with the declaration of a qualified patient under this chapter,
29 that facility shall take all reasonable steps to effect the transfer

1 of the patient to a facility in which the provisions of this chapter
2 can be carried out.

3 Sec. 18.12.060. IMMUNITIES. (a) In the absence of actual
4 notice of the revocation of a declaration, the following, while acting
5 in accordance with the requirements of this chapter, are not subject
6 to civil or criminal liability or guilty of unprofessional conduct:

7 (1) a physician who causes the withholding or withdrawal of
8 life-sustaining procedures from a qualified patient;

9 (2) a person who participates in the withholding or with-
10 drawal of life-sustaining procedures under the direction or with the
11 authorization of a physician;

12 (3) the health care facility in which the withholding or
13 withdrawal occurs.

14 (b) A physician, a health care professional, or a health care
15 facility is not subject to civil or criminal liability for actions
16 under this chapter that are in accord with reasonable medical stan-
17 dards.

18 Sec. 18.12.070. PENALTIES. (a) An attending physician who
19 fails to comply with the declaration of a qualified patient or to make
20 the necessary arrangements to effect a transfer under AS 18.12.050 may
21 be civilly liable to the qualified patient and to the heirs of the
22 qualified patient.

23 (b) A person who wilfully conceals, cancels, defaces, obliter-
24 ates, or damages the declaration of another without the declarant's
25 consent or who falsifies or forges a revocation of the declaration of
26 another may be civilly liable to the qualified patient and to the
27 heirs of the qualified patient.

28 Sec. 18.12.080. GENERAL PROVISIONS. (a) Death resulting from
29 the withholding or withdrawal of life-sustaining procedures under a

1 declaration and in accordance with this chapter does not, for any
2 purpose, constitute a suicide or homicide.

3 (b) The making of a declaration under AS 18.12.010 does not
4 affect in any manner the sale, procurement, or issuance of a policy of
5 life insurance, nor does it modify the terms of an existing policy of
6 life insurance. A policy of life insurance is not legally impaired or
7 invalidated in any manner by the withholding or withdrawal of life-
8 sustaining procedures from an insured qualified patient, notwithstand-
9 ing any term of the policy to the contrary.

10 (c) A physician, health care facility, or other health care
11 provider, and a health care service plan, insurer issuing disability
12 insurance, self-insured employee welfare benefit plan, or nonprofit
13 hospital plan, may not require a person to execute a declaration as a
14 condition for being insured for, or receiving, health care services.

15 (d) This chapter creates no presumption concerning the intention
16 of an individual who has not executed a declaration with respect to
17 the use, withholding, or withdrawal of life-sustaining procedures in
18 the event of a terminal condition.

19 (e) Nothing in this chapter increases or decreases the right of
20 a patient to make decisions regarding use of life-sustaining proce-
21 dures as long as the patient is able to do so, or impairs or super-
22 cedes any right or responsibility that a person has to effect the
23 withholding or withdrawal of medical care in a lawful manner. In that
24 respect, the provisions of this chapter are cumulative.

25 (f) This chapter does not condone, authorize, or approve mercy
26 killing or euthanasia.

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28 STATES. A declaration executed in another state or a territory or
29 possession of the United States in compliance with the law of that

1 jurisdiction is effective for purposes of this chapter.

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4 or assigned to, the patient who has primary responsibility for the
5 treatment and care of the patient;

6 (2) "declaration" means a document executed in accordance
7 with the requirements of AS 18.12.010;

8 (3) "health care provider" means a person who is licensed,
9 certified, or otherwise authorized by the law of this state to admin-
10 ister health care in the ordinary course of business or practice of a
11 profession;

12 (4) "life-sustaining procedure" means a medical procedure
13 or intervention that, when administered to a qualified patient, will
14 serve only to prolong the dying process; "life-sustaining procedure"
15 does not include nutrition or hydration;

16 (5) "physician" means a person licensed to practice medi-
17 cine in this state or an officer in the regular medical service of the
18 armed services of the United States or the United States Public Health
19 Service while in the discharge of their official duties, or while
20 volunteering services without pay or other remuneration to a hospital,
21 clinic, medical office, or other medical facility in the state;

22 (6) "qualified patient" means a patient who has executed a
23 declaration in accordance with this chapter and who has been deter-
24 mined by the attending physician to be in a terminal condition;

25 (7) "terminal condition" means a progressive incurable or
26 irreversible condition that, without the administration of life-sus-
27 taining procedures, will, in the opinion of the attending physician,
28 result in death within a relatively short time.

29 * Sec. 2. This Act takes effect immediately in accordance with
HCS CSSB 140(Jud)

AS 01.10.070(c).

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Original sponsors: Eliason, Ziegler,
V.Fischer, et al

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 HOUSE CS FOR CS FOR SENATE BILL NO. 140 (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 relating to the rights of the terminally ill;
7 and providing for an effective date."

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

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13 execute a declaration at any time directing that life-sustaining
14 procedures be withheld or withdrawn from that person; but the declara-
15 tion is given operative effect only if the declarant's condition is
16 determined to be terminal and the declarant is not able to make treat-
17 ment decisions. The declaration shall be signed by the declarant, or
18 another at the declarant's direction, and in either case shall be
19 witnessed by two persons or signed in the presence of a notary public.
20 Any person generally competent to be a witness or a notary public may
21 act as a witness to the declaration except a person or notary public
22 who is

23 (1) related to the declarant by blood or marriage;

24 (2) entitled to a portion of the estate of the declarant
25 under a will of the declarant or a codicil to the will then existing
26 or, at the time of the declaration, by operation of law then existing;

27 (3) a claimant against a portion of the estate of the
28 declarant at the time of the declarant's death at the time of the
29 execution of the declaration;

1 (4) directly financially responsible for the declarant's
2 medical care;

3 (5) an employee of a health care facility providing
4 services to the declarant at the time of execution of the declaration.

5 (b) It is the responsibility of the declarant to notify the
6 declarant's physician of the declaration. A physician or other health
7 care provider who is provided a copy of the declaration shall make it
8 a part of the declarant's medical records.

9 (c) A declaration may, but need not, be in the following form:

10 DECLARATION

11 If I should have an incurable or irreversible condition that will
12 cause my death within a relatively short time, it is my desire that my
13 life not be prolonged by administration of life-sustaining procedures.
14 If my condition is terminal and I am unable to participate in de-
15 cisions regarding my medical treatment, I direct my attending phy-
16 sician to withhold or withdraw procedures that merely prolong the
17 dying process and are not necessary to my comfort or to alleviate
18 pain.

19 Signed this _____ day of _____, _____.

20 Signature _____

21 City, Borough and State of Residence _____

22 The declarant is known to me and voluntarily signed this document
23 in my presence.

24 Witness _____

25 Address _____

26 Witness _____

27 Address _____

28 (d) A physician or health care provider may presume, in the
29 absence of actual notice to the contrary, that the declaration

1 complies with this chapter and is valid.

2 Sec. 18.12.020. REVOCATION OF DECLARATION. (a) A declaration
3 may be revoked at any time and in any manner by which the declarant is
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6 ing physician or any health care provider acting under the guidance of
7 that physician upon communication to the physician or health care
8 provider by the declarant or by another to whom the revocation was
9 communicated.

10 (b) The attending physician or health care provider shall make
11 the revocation a part of the declarant's medical record.

12 Sec. 18.12.030. RECORDING DETERMINATION OF TERMINAL CONDITION
13 AND CONTENTS OF DECLARATION. When an attending physician who has been
14 notified of the existence and contents of a declaration determines
15 that the declarant is in a terminal condition, the physician shall
16 record that determination and the contents of the declaration in the
17 declarant's medical record.

18 Sec. 18.12.040. TREATMENT OF QUALIFIED PATIENTS. (a) A qual-
19 ified patient has the right to make decisions regarding use of life-
20 sustaining procedures as long as the patient is able to do so. If a
21 qualified patient is not able to make these decisions, the declaration
22 governs decisions regarding use of life-sustaining procedures.

23 (b) This chapter does not prohibit the application of any med-
24 ical procedure or intervention, including the provision of nutrition
25 and hydration, considered necessary to provide comfort care or alle-
26 viation of pain.

27 (c) The declaration of a qualified patient known to the attend-
28 ing physician to be pregnant has no effect.

29 Sec. 18.12.050. TRANSFER OF PATIENTS. (a) An attending

1 physician who is unwilling to comply with the requirements of
2 AS 18.12.030 or who is unwilling to comply with the declaration of a
3 qualified patient under AS 18.12.040 shall withdraw as attending
4 physician but the withdrawal is effective only when the services of
5 another attending physician have been obtained.

6 (b) If the policies of a health care facility preclude compli-
7 ance with the declaration of a qualified patient under this chapter,
8 that facility shall take all reasonable steps to effect the transfer
9 of the patient to a facility in which the provisions of this chapter
10 can be carried out.

11 Sec. 18.12.060. IMMUNITIES. (a) In the absence of actual
12 notice of the revocation of a declaration, the following, while acting
13 in accordance with the requirements of this chapter, are not subject
14 to civil or criminal liability or guilty of unprofessional conduct:

15 (1) a physician who causes the withholding or withdrawal of
16 life-sustaining procedures from a qualified patient;

17 (2) a person who participates in the withholding or with-
18 drawal of life-sustaining procedures under the direction or with the
19 authorization of a physician;

20 (3) the health care facility in which the withholding or
21 withdrawal occurs.

22 (b) A physician, a health care professional, or a health care
23 facility is not subject to civil or criminal liability for actions
24 under this chapter that are in accord with reasonable medical stan-
25 dards.

26 Sec. 18.12.070. PENALTIES. (a) An attending physician who
27 fails to comply with the declaration of a qualified patient or to make
28 the necessary arrangements to effect a transfer under AS 18.12.050 may
29 be civilly liable to the qualified patient and to the heirs of the

1 qualified patient.

2 (b) A person who wilfully conceals, cancels, defaces, obliterated,
3 ates, or damages the declaration of another without the declarant's
4 consent or who falsifies or forges a revocation of the declaration of
5 another may be civilly liable to the qualified patient and to the
6 heirs of the qualified patient.

7 Sec. 18.12.080. GENERAL PROVISIONS. (a) Death resulting from
8 the withholding or withdrawal of life-sustaining procedures under a
9 declaration and in accordance with this chapter does not, for any
10 purpose, constitute a suicide or homicide.

11 (b) The making of a declaration under AS 18.12.010 does not
12 affect in any manner the sale, procurement, or issuance of a policy of
13 life insurance, nor does it modify the terms of an existing policy of
14 life insurance. A policy of life insurance is not legally impaired or
15 invalidated in any manner by the withholding or withdrawal of life-
16 sustaining procedures from an insured qualified patient, notwithstand-
17 ing any term of the policy to the contrary.

18 (c) A physician, health care facility, or other health care
19 provider, and a health care service plan, insurer issuing disability
20 insurance, self-insured employee welfare benefit plan, or nonprofit
21 hospital plan, may not require a person to execute a declaration as a
22 condition for being insured for, or receiving, health care services.

23 (d) This chapter creates no presumption concerning the intention
24 of an individual who has not executed a declaration with respect to
25 the use, withholding, or withdrawal of life-sustaining procedures in
26 the event of a terminal condition.

27 (e) Nothing in this chapter increases or decreases the right of
28 a patient to make decisions regarding use of life-sustaining proce-
29 dures as long as the patient is able to do so, or impairs or

1 supercedes any right or responsibility that a person has to effect the
2 withholding or withdrawal of medical care in a lawful manner. In that
3 respect, the provisions of this chapter are cumulative.

4 (f) This chapter does not condone, authorize, or approve mercy
5 killing or euthanasia.

6 Sec. 18.12.090. RECOGNITION OF DECLARATIONS EXECUTED IN OTHER
7 STATES. A declaration executed in another state or a territory or
8 possession of the United States is effective for purposes of this
9 chapter if the declaration was executed in manner consistent with
10 AS 18.12.010.

11 Sec. 18.12.100. DEFINITIONS. In this chapter

12 (1) "attending physician" means the physician selected by,
13 or assigned to, the patient who has primary responsibility for the
14 treatment and care of the patient;

15 (2) "declaration" means a document executed in accordance
16 with the requirements of AS 18.12.010;

17 (3) "health care provider" means a person who is licensed,
18 certified, or otherwise authorized by the law of this state to admin-
19 ister health care in the ordinary course of business or practice of a
20 profession;

21 (4) "life-sustaining procedure" means a medical procedure
22 or intervention that, when administered to a qualified patient, will
23 serve only to prolong the dying process; "life-sustaining procedure"
24 does not include nutrition or hydration;

25 (5) "physician" means a person licensed to practice medi-
26 cine in this state or an officer in the regular medical service of the
27 armed services of the United States or the United States Public Health
28 Service while in the discharge of their official duties, or while
29 volunteering services without pay or other remuneration to a hospital,

1 clinic, medical office, or other medical facility in the state;

2 (6) "qualified patient" means a patient who has executed a
3 declaration in accordance with this chapter and who has been deter-
4 mined by the attending physician to be in a terminal condition;

5 (7) "terminal condition" means a progressive incurable or
6 irreversible condition that, without the administration of life-sus-
7 taining procedures, will, in the opinion of the attending physician,
8 result in death within a relatively short time.

9 * Sec. 2. This Act takes effect immediately in accordance with AS 01.-
10 10.070(c).

passed at 5/10/85

Original sponsors: Eliason, Ziegler,
V.Fischer, et al

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IN THE SENATE

BY THE JUDICIARY COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 140 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the rights of the terminally ill;
and providing for an effective date."

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

* Section 1. AS 18 is amended by adding a new chapter to read:

CHAPTER 12. RIGHTS OF TERMINALLY ILL.

Sec. 18.12.010. DECLARATION RELATING TO USE OF LIFE-SUSTAINING PROCEDURES. (a) A competent person who is at least 18 years old may execute a declaration at any time directing that life-sustaining procedures be withheld or withdrawn from that person; but the declaration is given operative effect only if the declarant's condition is determined to be terminal and the declarant is not able to make treatment decisions. The declaration shall be signed by the declarant, or another at the declarant's direction, and in either case shall be witnessed by two persons. Any person generally competent to be a witness may act as a witness to the declaration. A physician or health care provider may presume, in the absence of actual notice to the contrary, that the declaration complies with this chapter and is valid.

(b) It is the responsibility of the declarant to notify the declarant's physician of the declaration. A physician or other health care provider who is provided a copy of the declaration shall make it a part of the declarant's medical records.

(c) A declaration may, but need not, be in the following form:

DECLARATION

1
2 If I should have an incurable or irreversible condition that will
3 cause my death within a relatively short time, it is my desire that my
4 life not be prolonged by administration of life-sustaining procedures.
5 If my condition is terminal and I am unable to participate in de-
6 cisions regarding my medical treatment, I direct my attending phy-
7 sician to withhold or withdraw procedures that merely prolong the
8 dying process and are not necessary to my comfort or to alleviate
9 pain.

10 I [] do [] do not desire that nutrition or hydration be
11 provided by gastric tube or intravenously if necessary.

12 Signed this _____ day of _____, _____.

13 Signature _____

14 City, Borough and State of Residence _____

15 The declarant is known to me and voluntarily signed this document
16 in my presence.

17 Witness _____

18 Address _____

19 Witness _____

20 Address _____

21 Sec. 18.12.020. REVOCATION OF DECLARATION. (a) A declaration
22 may be revoked at any time and in any manner by which the declarant is
23 able to communicate an intent to revoke, without regard to mental or
24 physical condition. A revocation is only effective as to the attend-
25 ing physician or any health care provider acting under the guidance of
26 that physician upon communication to the physician or health care
27 provider by the declarant or by another to whom the revocation was
28 communicated.

29 (b) The attending physician or health care provider shall make
the revocation a part of the declarant's medical record.

1 Sec. 18.12.030. RECORDING DETERMINATION OF TERMINAL CONDITION
2 AND CONTENTS OF DECLARATION. When an attending physician who has been
3 notified of the existence and contents of a declaration determines
4 that the declarant is in a terminal condition, the physician shall
5 record that determination and the contents of the declaration in the
6 declarant's medical record.

7 Sec. 18.12.040. TREATMENT OF QUALIFIED PATIENTS. (a) A qual-
8 ified patient has the right to make decisions regarding use of life-
9 sustaining procedures as long as the patient is able to do so. If a
10 qualified patient is not able to make these decisions, the declaration
11 governs decisions regarding use of life-sustaining procedures.

12 (b) This chapter does not prohibit the application of any med-
13 ical procedure or intervention, including the provision of nutrition
14 and hydration, considered necessary to provide comfort care or alle-
15 viation of pain. The declaration may provide that the declarant does
16 not want nutrition or hydration administered intravenously or by
17 gastric tube.

18 Sec. 18.12.050. TRANSFER OF PATIENTS. (a) An attending phys-
19 cian who is unwilling to comply with the requirements of AS 18.12.030
20 or who is unwilling to comply with the declaration of a qualified
21 patient under AS 18.12.040 shall withdraw as attending physician but
22 the withdrawal is effective only when the services of another attend-
23 ing physician have been obtained.

24 (b) If the policies of a health care facility preclude
25 compliance with the declaration of a qualified patient under this
26 chapter, that facility shall take all reasonable steps to effect the
27 transfer of the patient to a facility in which the provisions of this
28 chapter can be carried out.

29 Sec. 18.12.060. IMMUNITIES. (a) In the absence of actual

1 notice of the revocation of a declaration, the following, while acting
2 in accordance with the requirements of this chapter, are not subject
3 to civil or criminal liability or guilty of unprofessional conduct:

4 (1) a physician who causes the withholding or withdrawal of
5 life-sustaining procedures from a qualified patient;

6 (2) a person who participates in the withholding or with-
7 drawal of life-sustaining procedures under the direction or with the
8 authorization of a physician;

9 (3) the health care facility in which the withholding or
10 withdrawal occurs.

11 (b) A physician, a health care professional, or a health care
12 facility is not subject to civil or criminal liability for actions
13 under this chapter that are in accord with reasonable medical stan-
14 dards.

15 Sec. 18.12.070. PENALTIES. (a) An attending physician who
16 fails to comply with the declaration of a qualified patient or to make
17 the necessary arrangements to effect a transfer under AS 18.12.050 may
18 be civilly liable to the qualified patient and to the heirs of the
19 qualified patient.

20 (b) A person who wilfully conceals, cancels, defaces, obliterated,
21 or damages the declaration of another without the declarant's
22 consent or who falsifies or forges a revocation of the declaration of
23 another may be civilly liable to the qualified patient and to the
24 heirs of the qualified patient.

25 Sec. 18.12.080. GENERAL PROVISIONS. (a) Death resulting from
26 the withholding or withdrawal of life-sustaining procedures under a
27 declaration and in accordance with this chapter does not, for any
28 purpose, constitute a suicide or homicide.

29 (b) The making of a declaration under AS 18.12.010 does not

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affect in any manner the sale, procurement, or issuance of a policy of
life insurance, nor does it modify the terms of an existing policy of
life insurance. A policy of life insurance is not legally impaired or
invalidated in any manner by the withholding or withdrawal of life-
sustaining procedures from an insured qualified patient, notwithstand-
ing any term of the policy to the contrary.

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(c) A physician, health care facility, or other health care
provider, and a health care service plan, insurer issuing disability
insurance, self-insured employee welfare benefit plan, or nonprofit
hospital plan, may not require a person to execute a declaration as a
condition for being insured for, or receiving, health care services.

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(d) This chapter creates no presumption concerning the intention
of an individual who has not executed a declaration with respect to
the use, withholding, or withdrawal of life-sustaining procedures in
the event of a terminal condition.

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(e) Nothing in this chapter increases or decreases the right of
a patient to make decisions regarding use of life-sustaining proce-
dures as long as the patient is able to do so, or impairs or super-
cedes any right or responsibility that a person has to effect the
withholding or withdrawal of medical care in a lawful manner. In that
respect, the provisions of this chapter are cumulative.

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(f) This chapter does not condone, authorize, or approve mercy
killing or euthanasia.

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Sec. 18.12.090. RECOGNITION OF DECLARATIONS EXECUTED IN OTHER
STATES. A declaration executed in another state or a territory or
possession of the United States in compliance with the law of that
jurisdiction is effective for purposes of this chapter.

29
Sec. 18.12.100. DEFINITIONS. In this chapter

(1) "attending physician" means the physician selected by,

1 or assigned to, the patient who has primary responsibility for the
2 treatment and care of the patient;

3 (2) "declaration" means a document executed in accordance
4 with the requirements of AS 18.12.010;

5 (3) "health care provider" means a person who is licensed,
6 certified, or otherwise authorized by the law of this state to admin-
7 ister health care in the ordinary course of business or practice of a
8 profession;

9 (4) "life-sustaining procedure" means a medical procedure
10 or intervention that, when administered to a qualified patient, will
11 serve only to prolong the dying process;

12 (5) "physician" means a person licensed to practice medi-
13 cine in this state or an officer in the regular medical service of the
14 armed services of the United States or the United States Public Health
15 Service while in the discharge of their official duties, or while
16 volunteering services without pay or other remuneration to a hospital,
17 clinic, medical office, or other medical facility in the state;

18 (6) "qualified patient" means a patient who has executed a
19 declaration in accordance with this chapter and who has been deter-
20 mined by the attending physician to be in a terminal condition;

21 (7) "terminal condition" means a progressive incurable or
22 irreversible condition that, without the administration of life-sus-
23 taining procedures, will, in the opinion of the attending physician,
24 result in death within a relatively short time.

25 * Sec. 2. This Act takes effect immediately in accordance with AS 01.-
26 10.070(c).
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Original sponsors: Clocksin, Goll
and Marrou

Clocksin

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IN THE HOUSE

BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. ¹⁴⁰~~269~~ (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the rights of the terminally ill;
and providing for an effective date."

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

* Section 1. AS 18 is amended by adding a new chapter to read:

CHAPTER 12. RIGHTS OF TERMINALLY ILL.

Sec. 18.12.010. DECLARATION RELATING TO USE OF LIFE-SUSTAINING PROCEDURES. (a) A competent person who is at least 18 years old may execute a declaration at any time directing that life-sustaining procedures be withheld or withdrawn from that person; but the declaration is given operative effect only if the declarant's condition is determined to be terminal and the declarant is not able to make treatment decisions. The declaration shall be signed by the declarant, or another at the declarant's direction, and in either case shall be witnessed by two persons. Any person generally competent to be a witness may act as a witness to the declaration. A physician or health care provider may presume, in the absence of actual notice to the contrary, that the declaration complies with this chapter and is valid.

(b) It is the responsibility of the declarant to notify the declarant's physician of the declaration. A physician or other health care provider who is provided a copy of the declaration shall make it a part of the declarant's medical records.

(c) A declaration may, but need not, be in the following form:

DECLARATION

1
2 If I should have an incurable or irreversible condition that will
3 cause my death within a relatively short time, it is my desire that my
4 life not be prolonged by administration of life-sustaining procedures.
5 If my condition is terminal and I am unable to participate in de-
6 cisions regarding my medical treatment, I direct my attending phy-
7 sician to withhold or withdraw procedures that merely prolong the
8 dying process and are not necessary to my comfort or to alleviate
9 pain.

10 I [] do [] do not desire that nutrition or hydration be
11 provided by gastric tube or intravenously if necessary.

12 Signed this _____ day of _____, _____.

13 Signature _____

14 City, Borough and State of Residence _____

15 The declarant is known to me and voluntarily signed this document
16 in my presence.

17 Witness _____

18 Address _____

19 Witness _____

20 Address _____

21 Sec. 18.12.020. REVOCATION OF DECLARATION. (a) A declaration
22 may be revoked at any time and in any manner by which the declarant is
23 able to communicate an intent to revoke, without regard to mental or
24 physical condition. A revocation is only effective as to the attend-
25 ing physician or any health care provider acting under the guidance of
26 that physician upon communication to the physician or health care
27 provider by the declarant or by another to whom the revocation was
28 communicated.

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the revocation a part of the declarant's medical record.

1 Sec. 18.12.030. RECORDING DETERMINATION OF TERMINAL CONDITION
2 AND CONTENTS OF DECLARATION. When an attending physician who has been
3 notified of the existence and contents of a declaration determines
4 that the declarant is in a terminal condition, the physician shall
5 record that determination and the contents of the declaration in the
6 declarant's medical record.

7 Sec. 18.12.040. TREATMENT OF QUALIFIED PATIENTS. (a) A qual-
8 ified patient has the right to make decisions regarding use of life-
9 sustaining procedures as long as the patient is able to do so. If a
10 qualified patient is not able to make these decisions, the declaration
11 governs decisions regarding use of life-sustaining procedures.

12 (b) This chapter does not prohibit the application of any med-
13 ical procedure or intervention, including the provision of nutrition
14 and hydration, considered necessary to provide comfort care or alle-
15 viation of pain. The declaration may provide that the declarant does
16 not want nutrition or hydration administered intravenously or by
17 gastric tube.

18 (c) Unless the declaration provides otherwise, the declaration
19 of a qualified patient known to the attending physician to be pregnant
20 is given no effect as long as it is probable that the fetus could
21 develop to the point of live birth with continued application of
22 life-sustaining procedures.

23 Sec. 18.12.050. TRANSFER OF PATIENTS. (a) An attending physi-
24 cian who is unwilling to comply with the requirements of AS 18.12.030
25 or who is unwilling to comply with the declaration of a qualified
26 patient under AS 18.12.040 shall withdraw as attending physician but
27 the withdrawal is effective only when the services of another attend-
28 ing physician have been obtained.

29 (b) If the policies of a health care facility preclude

1 compliance with the declaration of a qualified patient under this
2 chapter, that facility shall take all reasonable steps to effect the
3 transfer of the patient to a facility in which the provisions of this
4 chapter can be carried out.

5 Sec. 18.12.060. IMMUNITIES. (a) In the absence of actual
6 notice of the revocation of a declaration, the following, while acting
7 in accordance with the requirements of this chapter, are not subject
8 to civil or criminal liability or guilty of unprofessional conduct:

9 (1) a physician who causes the withholding or withdrawal of
10 life-sustaining procedures from a qualified patient;

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12 drawal of life-sustaining procedures under the direction or with the
13 authorization of a physician;

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15 withdrawal occurs.

16 (b) A physician, a health care professional, or a health care
17 facility is not subject to civil or criminal liability for actions
18 under this chapter that are in accord with reasonable medical stan-
19 dards.

20 Sec. 18.12.070. PENALTIES. (a) An attending physician who
21 fails to comply with the declaration of a qualified patient or to make
22 the necessary arrangements to effect a transfer under AS 18.12.050 may
23 be civilly liable to the qualified patient and to the heirs of the
24 qualified patient.

25 (b) A person who wilfully conceals, cancels, defaces, obliter-
26 ates, or damages the declaration of another without the declarant's
27 consent or who falsifies or forges a revocation of the declaration of
28 another may be civilly liable to the qualified patient and to the
29 heirs of the qualified patient.

1 Sec. 18.12.080. GENERAL PROVISIONS. (a) Death resulting from
2 the withholding or withdrawal of life-sustaining procedures under a
3 declaration and in accordance with this chapter does not, for any
4 purpose, constitute a suicide or homicide.

5 (b) The making of a declaration under AS 18.12.010 does not
6 affect in any manner the sale, procurement, or issuance of a policy of
7 life insurance, nor does it modify the terms of an existing policy of
8 life insurance. A policy of life insurance is not legally impaired or
9 invalidated in any manner by the withholding or withdrawal of life-
10 sustaining procedures from an insured qualified patient, notwithstand-
11 ing any term of the policy to the contrary.

12 (c) A physician, health care facility, or other health care
13 provider, and a health care service plan, insurer issuing disability
14 insurance, self-insured employee welfare benefit plan, or nonprofit
15 hospital plan, may not require a person to execute a declaration as a
16 condition for being insured for, or receiving, health care services.

17 (d) This chapter creates no presumption concerning the intention
18 of an individual who has not executed a declaration with respect to
19 the use, withholding, or withdrawal of life-sustaining procedures in
20 the event of a terminal condition.

21 (e) Nothing in this chapter increases or decreases the right of
22 a patient to make decisions regarding use of life-sustaining proce-
23 dures as long as the patient is able to do so, or impairs or super-
24 cedes any right or responsibility that a person has to effect the
25 withholding or withdrawal of medical care in a lawful manner. In that
26 respect, the provisions of this chapter are cumulative.

27 (f) This chapter does not condone, authorize, or approve mercy
28 killing or euthanasia.

29 Sec. 18.12.090. RECOGNITION OF DECLARATIONS EXECUTED IN OTHER

1 STATES. A declaration executed in another state or a territory or
2 possession of the United States in compliance with the law of that
3 jurisdiction is effective for purposes of this chapter.

4 Sec. 18.12.100. DEFINITIONS. In this chapter

5 (1) "attending physician" means the physician selected by,
6 or assigned to, the patient who has primary responsibility for the
7 treatment and care of the patient;

8 (2) "declaration" means a document executed in accordance
9 with the requirements of AS 18.12.010;

10 (3) "health care provider" means a person who is licensed,
11 certified, or otherwise authorized by the law of this state to admin-
12 ister health care in the ordinary course of business or practice of a
13 profession;

14 (4) "life-sustaining procedure" means a medical procedure
15 or intervention that, when administered to a qualified patient, will
16 serve only to prolong dying, including the administration of nutrition
17 or hydration intravenously or by gastric tube, antibiotics, drug
18 therapy for cancer, oxygen, mechanical ventilation, cardiac monitor-
19 ing, pacing and resuscitation, heart sustaining medication, renal
20 dialysis, and surgery; nutrition or hydration intravenously or by
21 gastric tube may be used if allowed under the declaration as provided
22 in AS 18.12.010(c);

23 (5) "physician" means a person licensed to practice medi-
24 cine in this state or an officer in the regular medical service of the
25 armed services of the United States or the United States Public Health
26 Service while in the discharge of their official duties, or while
27 volunteering services without pay or other remuneration to a hospital,
28 clinic, medical office, or other medical facility in the state;

29 (6) "qualified patient" means a patient who has executed a

1 declaration in accordance with this chapter and who has been deter-
2 mined by the attending physician to be in a terminal condition;

3 (7) "terminal condition" means a progressive incurable or
4 irreversible condition that, without the administration of life-sus-
5 taining procedures, will, in the opinion of the attending physician,
6 result in death within a relatively short time.

7 * Sec. 2. This Act takes effect immediately in accordance with AS 01.-
8 10.070(c).
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The Honorable M. Nick Miller
Pouch 7
Juneau, Ak 99801

April 15, 1985

APR 25 1985

Dear Sir,
House Bill #269, The Rights
of the Terminally Ill is presently
before your committee.

I am concerned about
several aspects of this bill.
1) If we legislate a "right" for
'competent persons 18 years old',
what happens to the 'rights'
of the minor child, the emotionally
or mentally ill adult, or the
mentally retarded adult? In the
opinion of many people, a right
should not have to be claimed
by signing a declaration, but
instead should be available
to all persons whenever needed.
2) No definition has been given



to competent. This allows for subjective application of this law based on an interruption by the judiciary branch of government.

3) This bill does not require a declaration to be signed, thereby allowing for the status quo to exist. My physician informed me that the wishes of the family are honored without a signed declaration.

4) Senator Claiborne's office told me twice there is no real need for the legislation, its purpose is to provide comfort to those who wish to make a declaration.

5) The Society for the Right-to-Die, formerly the Euthanasia Society of America, supports this bill. Their goal is to get legislation on the books that can be changed 5, 10, or 20 years from now to allow for active euthanasia of the elderly, handicapped, mentally retarded & perhaps groups of people who think differently than they. That really disturbs me.

I would like to see the
bill completely withdrawn.

If the Legislature feels a
need to state "The Rights" of the
terminally ill, may I suggest a
State Bill of Rights in which the
Right to die without life sus-
taining systems can be a part.

Please make this letter
a part of the permanent
Record or provide copies for
your Committee members.

Respectfully submitted,
Betty Bengtson

9409 Patricia Pl.
Juneau, Ak 99801



COMMITTEE REPORT

HOUSE

FURTHER:

(7)

4/17/85

(Waived from HESS on 4/17)

Date: 5-10-85

Superseded by committee report dated 1/30/86

The Committee on JUDICIARY has had CSSB 140 (HESS) am

"An Act relating to the rights of the terminally ill; and providing for an effective date."

under consideration and recommends:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for CS SB 140 (JUD) same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation Zero Fiscal Note Attached
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

Max Gumbert
Cheryl Taylor
Dr. Cochran

MEMBERS HAVING
OTHER RECOMMENDATIONS

Mr. Hill - NO REC

Mr. Hill

CHAIRMAN

Pettyjohn

Utermohle

A M E N D M E N T

#5

Offered in the HOUSE

By Pettyjohn

TO: HCS CSSB 140(Jud)

Page 3, following line 17 insert:

"(c) The declaration of a qualified patient known to the attending physician to be pregnant has no effect."

A M E N D M E N T

#1

Offered in the HOUSE

By Martin

TO: CSSB 140 (HESS) am

Page 2, after line 17, insert a new subsection to read:

"(d) The declaration takes effect immediately and expires five years from the date of execution."

Page 4, lines 17 - 19:

Delete all material and reletter the following subsections.

Page 6, line 17, following "process", insert:

"but does not include

(A) the alleviation of pain by administering medication or by performing a medical procedure;

(B) the provision of nutrition and hydration;

(C) the provision of comfort care"

Berrier

A M E N D M E N T

#2

Offered in the HOUSE

By Marti

TO: CSSB 140(HESS) am

Page 3, lines 14 - 17, delete all material and insert:

"The declaration of a qualified patient known to the attending physician to be pregnant may not be given effect."

A M E N D M E N T

#1

Offered in the HOUSE

By Pettyjohn
Taylor

TO: HCS CSSB 140(Jud)

Page 1, lines 17 - 20, delete all material after "decisions." and insert:

"The declarant shall subscribe to the declaration in the presence of a judge or magistrate. The judge or magistrate shall inquire on the record whether the declarant understands the importance and effect of the declaration. A judicial officer may not charge a fee for witnessing a declaration. A person may not charge a fee for preparing a declaration. A physician or"

Page 2, lines 14 - 19, delete all material and insert:

"Subscribed and sworn to or affirmed before me

at _____ on _____

(Date)

Signature of Officer

Title of Officer"

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: RSR 140
 Title: An Act Relating to the Rights of the Terminally Ill
 Sponsor: Eliason, Ziegler, Fischer
 Requestor: _____
 Date of Request: 1/31/86

FISCAL DETAIL

Agency Affected: Alaska Court System
 BRU: Trial Courts
 Components: _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

See attached narrative

Prepared by: Robert G. Fisher Phone: 264-8215
 Division: Alaska Court System Date: 2/3/86

Approved by Commissioner: Arthur H. Snowden, II *A. H. Snowden* Date: 2/3/86
 Agency: Alaska Court System

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Alaska Court System

House CS for CS for Senate Bill No. 140 (Judiciary)

Fiscal Impact

The act of witnessing declarations is not part of the case adjudication process, and therefore is beyond the scope of regular judicial duties. However, the proposed requirement that judicial officers witness these declarations and make inquiries of declarants on the record means that scheduling and filing systems must be developed. Thus, clerical as well as judicial resources would be impacted.

The number of declarants who would be coming before the court is unknown at this time. If this legislation is enacted, the court system will report to the legislature with additional fiscal information based upon the actual impact.

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : RSCSSB 140
 Title : An Act Relating to the Rights of the Terminally Ill
 Sponsor : Elison, Ziegler, Fischer
 Requestor : _____
 Date of Request : 1/31/86

FISCAL DETAIL

Agency Affected : Alaska Court System
 BRU : Trial Courts
 Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

See attached narrative

Prepared by : Robert G. Fisher Phone : 264-8215
 Division : Alaska Court System Date : 2/3/86

Approved by Commissioner : Arthur H. Snowden, II *A. Epley*
 Agency : Alaska Court System *dot* Date : 2/3/86

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: CSSB 140 (HESS)
Title: Rights of terminally ill

Sponsor: Senate HESS
Requestor: _____
Date of Request: 3/20/85

FISCAL DETAIL

Agency Affected: Health & Social Services
Program Category Affected: Public Health

BRU, Program or Subprogram(s) Affected: State Health Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES	0	0	0	0	0	0
200 TRAVEL	0	0	0	0	0	0
300 CONTRACTUAL	0	0	0	0	0	0
400 SUPPLIES	0	0	0	0	0	0
500 EQUIPMENT	0	0	0	0	0	0
600 LAND & STRUCTURES	0	0	0	0	0	0
700 GRANTS, CLAIMS	0	0	0	0	0	0
800 MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: Attach a separate page if necessary

Prepared By: Robert I. Fraser, M.J. ^{RIF/DIJ} Phone: 465-3090
Division: Public Health Date: _____

Approved by Commissioner: Joe R. Pugh Date: 3/26/85 JCC
Agency: Dept. of Health & Social Services

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget

Alaska Court System

House CS for CS for Senate Bill No. 140 (Judiciary)

Fiscal Impact

The act of witnessing declarations is not part of the case adjudication process, and therefore is beyond the scope of regular judicial duties. However, the proposed requirement that judicial officers witness these declarations and make inquiries of declarants on the record means that scheduling and filing systems must be developed. Thus, clerical as well as judicial resources would be impacted.

The number of declarants who would be coming before the court is unknown at this time. If this legislation is enacted, the court system will report to the legislature with additional fiscal information based upon the actual impact.

POSITION PAPER

CS FOR SENATE BILL NO. 140 (HESS)

For "An Act relating to the rights of the terminally ill."

The right of a competent individual to decide whether life-sustaining procedures should be used in the face of a terminal illness or injury has received increasing attention in recent years as medical technology has advanced and individual cases have received media attention.

This bill provides a process through which a competent adult can participate in decisions regarding his or her care when afflicted with a terminal condition. "Terminal condition" is an incurable or irreversible condition that, without the administration of life-sustaining procedures, will result in death in a relatively short time. The bill permits a competent adult to execute a declaration directing the withholding or withdrawal of life-sustaining measures. The declaration comes into effect only (1) if a terminal condition is determined to exist and (2) if the affected person is incapable at that time of making treatment decisions.

According to the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, 13 states and the District of Columbia have adopted so-called natural death legislation. The proposed legislation appears to be generally similar to the major provisions in other states.

The Department of Health and Social Services supports intent of this bill. It is assumed the Department of Law is reviewing it for adequacy of legal safeguards for declarants and for health care providers.

Recommended by: Robert I. Fraser for
Robert I. Fraser, M.D.
Director
Division of Public Health

Date: 3/26/85

Approved by: John R. Pugh
John R. Pugh
Commissioner
Department of Health &
Social Services

Date: 3/26/85



APR 1 1985

ALASKA STATE LEGISLATIVE COMMITTEE

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Fairbanks, AK 99701
(907) 456-6035

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Seward, AK 99664
(907) 224-3080

March 27, 1985

Chairman M. Mike Miller
House Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative Miller:

RE: HB 269

At its meeting in Juneau March 7-8, 1985, the AARP State Legislative Committee voted to endorse the living will legislation, HB 269.

On behalf of our 16,000 members in Alaska, we urge passage of HB 269 this session. We feel it is important that this legislation become part of Alaska's statutes to clarify living will requests and to provide appropriate legal authority for doctors, medical care providers, family members, and the individuals who choose to use a living will.

We would point out that the legislation itself does not require financial support from the state; it basically places in statute appropriate recognition of living wills for those who choose to have them. Where living wills are used, the savings in medical costs can be a significant amount to insurance providers, medical care providers and individuals, as well as to the State of Alaska.

We urge your support of and passage of HB 269 this session.

Sincerely yours,

Mrs. Jane Windsor, Chairman



OLDER PERSONS ACTION GROUP, Inc.

(907) 276-1059 • 325 E. Third Avenue • P.O. Box 102240 • Anchorage, AK 99510

February 13, 1986

The Honorable Ben Grussendorf
Speaker, House of Representatives
P.O. Box V, M.S. 3100
Juneau, Alaska 99811

Dear Representative Grussendorf:

Older Persons Action Group strongly supports passage of House CS for CS for Senate Bill No. 140 concerning rights of the terminally ill. However, OPAG believes the following changes should be made.

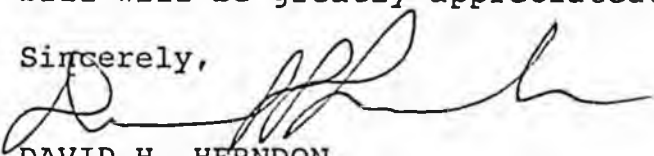
1. Page 1. The three sentences beginning on line 17 and ending on line 21 should be deleted and wording similar to the following substituted: A declaration will be witnessed by two adults, one of whom shall be a qualified Notary Public. It is our opinion that requiring judicial involvement in effecting a declaration would make this action exceedingly difficult in many rural areas and would preclude many from exercising this right.

2. Page 3. On lines 14 and 15, delete the two words, "nutrition and". Generally, if a patient is at the point of not being able to make decisions, we are usually talking about forced feeding which usually means a nasogastric tube, intravenous invasion, or some other invasive procedure. Such procedures in themselves detract from "comfort." Further, we fail to understand where forced feeding will substantially contribute to "comfort care or alleviation of pain." For those exceptional cases where nutrition would be appropriate, the wording on lines 13 and 14 still permits such. Of course, OPAG recognizes these comments are by "nonprofessionals" and are presumed to be considered in such context.

3. Page 3. Following the sentence ending on line 26, add wording similar to the following: The patient's medical record will reflect the attempts of the attending physician to transfer the patient to another qualified provider. This addition would discourage a physician who doesn't honor a declaration from passing over or only superficially attempting to transfer responsibility for the patient.

Your attention to these comments and active support of this bill will be greatly appreciated.

Sincerely,



DAVID H. HERNDON
Executive Director

DHH:bbc
cc: All Representatives



DIOCESE OF JUNEAU

OFFICE OF THE BISHOP

419 SOUTH STREET
JUNEAU ALASKA 99801
TELEPHONE 907/588-2227

February 23, 1986

Members of the Alaska Senate
and Members of the Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Senators & Representatives:

The purpose of this letter is to share with you some thoughts relative to Senate Bill 140, HCS-CS. Basically I am not comfortable with this kind of legislation. I have a sense that the good intended can be achieved without the involvement of legal processes or governmental agencies. At the same time the potential for opening the door to abuses is rife. This could be anything from coercion or deception of individuals induced to draw up a declaration regarding the use of life-sustaining measures, to legislation itself becoming a subtle step in the direction of positive euthanasia.

The decision to withdraw life-sustaining procedures from persons who are terminally ill and incapable of making a decision for themselves is undeniably both difficult and painful, especially for loved ones. With the continued advance in medical technology this decision is new and will probably come even more in the future a decision families and others will face. While the purpose of the proposed legislation is to provide individuals an opportunity of making the decision for themselves ahead of time by "a declaration relating to the use of life-sustaining procedures" and thereby relieve others from having to make such a determination, I question the wisdom and appropriateness of involving the State in an aspect of human life that is so personal and individual. It would seem so much more fitting for family members to express their wishes to one another in an intimate setting outside the structures and strictures of legal declarations.

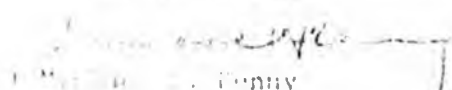
Be that as it may, if you in your own experience and study deem such legislation necessary then I believe there are a number of serious issues that call for further clarification or strengthening.

1. The definition of terminal illness is both inadequate and dangerous. "Death within a relatively short time" is entirely too vague and is precisely the kind of terminology that could lead to abuses.

2. Section 18.12.040, b, dealing with medical procedures or intervention, "including the provision of nutrition and hydration, considered necessary to provide comfort care or alleviation of pain," should by all means be retained. If anything, the point at issue could be put in even stronger terms stating that a declaration could not prohibit nutrition, hydration or comfort and pain relieving medication. If hydration, for example, were removed, the patient might die from dehydration (a painful death), rather than the terminal illness itself.
3. In Section 18.12.040, the phrase "probable that the fetus could develop etcetera" suffers also from a vagueness that is open to too much freedom of interpretation. In view of the definitive time involved in a pregnancy (nine months), would it not be better to hold the declaration in obedience until the fetus had come to term or miscarriage had certainly occurred?
4. Section 18.12.090 requires the State of Alaska and local physicians and medical facilities to comply with the local definitions and determinations of any other state, wherever they are broad or restrictive these might be. In effect citizens of Alaska would be put in the position of having to comply with regulations over which they have no control.

In conclusion, I must state my opinion that the proposed legislation is at best in need of considerable analysis and more careful and precise terminology. However, it would be a far wiser course not to attempt such legislation in the first place.

Very truly yours,


William G. Patten
Bishop of Anchorage

Living will bill faces tough vote

JUNEAU—Only hours away from a vote by the House of Representatives, the "Living Will" bill — which passed the Senate last session — faces its toughest opposition in the legislature since introduction four years ago.

The living will is a document that legally recognizes the right of a competent adult with a terminal illness to declare that all life-sustaining procedures be withheld or withdrawn.

Some 35 states and the District of Columbia have enacted living will laws.

At *Senior Voice* press time, Alaska's lawmakers were being "bombardeed" with letters and calls from members of right-to-life organizations who oppose what they call the "legalization of euthanasia."

On the other side of the argument, supporters of the Senate-passed living will measure, SB 140, — including the Older Alaskans Commission, Older Persons Action Group, and American Association of Retired Persons — called upon seniors state-

wide to contact legislators to express their opinions on the bill.

"Admittedly, this is a difficult issue," said John Dapevich of Sitka, legislative chair of American Association of Retired Persons.

"I am personally supportive of right-to-life," Dapevich said. "But I'm also in favor of choice, too."

"Terminally ill patients should have a choice to decide what treatment they want."

The opposition by right-to-life groups was only the latest in a series of problems that have faced the living will measure.

Earlier last month, the House Judiciary Committee made several amendments to SB 140 that would "seriously impede the ability of senior citizens to express . . . (their) basic right," according to Peggy Burgin, chair of the Older Alaskans Commission.

"We are concerned that the requirement for a judge or magistrate to witness the declaration (to withdraw life-sustaining pro-

page nineteen please

Living will faces crucial vote

from page one

cedures) will restrict the ability of the terminally ill to enact a declaration, (and) have unnecessary fiscal impacts," Burgin said in a letter to legislators.

Most supporters of the original Senate-passed version of the bill shared Burgin's dismay with the Judiciary Committee's amended version — HCS CSSB 140.

"It is our opinion that requiring judicial involvement in effecting a declaration would make this action exceedingly difficult in many rural areas and would preclude many from exercising this right," said David Herndon, executive director of Older Persons Action Group.

A second amendment to the bill concerning nutrition and hydration drew living will supporters' complaints, too.

Burgin stated that "the elimination of a citizen's ability to indicate a desire for nutrition or hydration by gastric tube or

intravenously may render the bill useless.

"We certainly recognize that there are those who would not consider the use of gastric or intravenous support as an heroic effort," Burgin said.

"However, there are also those who would. A decision of this type must be based on the individual's wishes according to the nature of their illness."

Despite objections to the recent committee amendments, senior leaders expressed their basic support for the bill.

"We want to see this legislation passed," said Dapevich.

Senate sponsor of the bill, Sen. Dick Eliason (R-Sitka), joined the chorus of dismay over the House amendments to the bill.

Eliason "felt the amendments really complicated the procedure and made it extremely difficult to activate the will,"

said Sheila Peterson, Eliason legislative aide.

"All along he just wanted to make the living will as clear and clear-cut as possible. I'm very disappointed with the amendments," Peterson added.

"If it's not changed, I seriously doubt whether the Senate will pass the bill when it is turned for a concurrence vote," she noted. "The Senate may prefer their own original version to this House version."

Nancy Groszek, legislative aide to Rep. Don Clock (D-Anchorage), the original sponsor of the living will measure, said further changes to the House version may be made.

"What's critical now is support for the bill from seniors," Groszek said. "If seniors want to see the bill enacted, it's important that they contact legislators now. There may not be another opportunity for this

side in advance whether you want to be kept alive by artificial, extraordinary means when your illness is terminal and you are no longer able to make coherent decisions.

This type of legislation isn't unique or new. Thirty-five other states have passed similar "living will" laws. Alaskan seniors have asked for this legislation every year since 1980.

COMMENTS

SB 140 passed the Senate last year and made it all the way to the House floor this session before serious opposition appeared. Now, lawmakers are being besieged with messages from those who call the bill "legalized euthanasia."

Come on, folks. We're not talking about killing people. We're talking about *your* rights to determine how *you* will die when there is no hope of remaining alive without machines. We're talking about letting a life come to its natural, dignified end without tubes, respirators and I.V.'s.

If you care about the living will, tell your legislator and do it now. The vote could come up the first week of March or even before.

You can send a free public opinion message by calling the Legislative Information Office nearest you. Ask them to send the message to all 40 representatives.

Closing the age gap

Old folks and school kids. Incompatible: Incomprehensible to each other? Not necessarily.

Yet, when languages differ, when old ways of living and doing are forgotten, or when youthful enthusiasm is ignored or misunderstood, it's easy for the gap between generations to widen, for each generation to live in isolation from the other.

A new \$20,000 grant program for rural school districts promises to bridge some of the gaps that exist and, perhaps, prevent a few in the future.

SEE PFEIFER 274-9577

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WANT HELP with the legislature or state agencies? Contact Senator Vic Fischer, P.O. Box V, Juneau, AK 99811 or call 465-4954 (collect ok).

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This is a small sampling of what is available through the office of the Older Workers Specialist at the Older Persons Action Group, 276-1059.

Wanted

Dry cleaning establishment needs counter person who likes to work with people. Must be able to work Saturday.

Someone to care for 5-year-old son holidays and non-school days. Prefer "grandmother" type. Could furnish transportation.

Opinion

JUNEAU EMPIRE

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Bill provides compassion for terminally ill

A bill now before the Legislature would guarantee adults the right to decide for themselves, while capable of deciding, whether life-sustaining measures should be used to prolong life when death is imminent.

Under the proposal, an adult at any time—whether ill or not—could sign a form saying:

“If I should have an incurable or irreversible condition that will cause my death within a relatively short time, it is my desire that my life not be prolonged by administration of life-sustaining procedures.”

“If my condition is terminal and I am unable to participate in decisions regarding my medical treatment, I direct my attending physician to withhold or withdraw procedures that merely prolong the dying process and are not necessary to my comfort or to alleviate pain.”

The bill forces no one to sign such a declaration and does not affect those who choose not to sign one. It also allows a person to revoke a declaration at any time, as long as he or she can make decisions and communicate them.

The bill does not, and specifically states it does not, “condone, authorize or approve mercy killing or euthanasia.”

What the bill provides is compassion and the right to choose for one’s self while the choice can still be made. It would apply only in those cases where there is no hope for recovery.

How much emotional pain would have been eased if a signed declaration had been available to some families and physicians. How many people would prefer—and should have the right to prefer—to make the decision for themselves, and for their families, and for those caring for them.

It’s hard to imagine a more essentially personal question than whether one’s life, and what one defines as living, should be extended by artificial means when all hope is gone. Given advances in medical technology, the question now arises more frequently, but when does an individual have the chance to provide the answer?

Sen. Dick Eliason (R-Sitka) is chief sponsor of the bill in the Senate. A companion measure was recently introduced in the House. The proposal has received support from hospice officials, who work with terminally ill patients and their families, and the Alaska State Hospital Association, in addition to numerous individuals.

Laws similar to Eliason’s proposal have already been enacted in 23 states, including California, Oregon, Washington and Idaho.

For the sake of compassion and individual choice, Alaska should add itself to the list.

the budget review

airplane tie-down leases less than once a month, to cut down on billing costs. Miller was also asked for a breakdown on his hiring of security staff and the costs.

Baxter questioned Miller about such details as janitors wearing radios, leaning behind ticket counters and buying gas for airport vehicles.

Two other assembly members asked Miller to investigate providing luggage carts for the new baggage claim area.

Capital transit:

"We don't want to be too aggressive going out there to increase our ridership," the public works director told the assembly about the city bus system.

When asked "why not," by assembly member Bruce Botelho, Johnson said the city does not want to oversell the system.

"We don't want to be out there providing service the public doesn't need," he said.

Johnson was asked by several



Assemblyman Fred Baxter

assembly members about specific steps the city has taken or plans to take to increase public awareness of the bus system.

decides to hire city appoints fish panel

GH
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Monday night.
question of hiring
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cts," Assembly

member Rosalee Walker said.

Deputy Mayor Jamie Parsons said with state school funding in doubt, Juneau schools could be facing a \$750,000 shortfall in this year's budget.

The assembly agreed to hire a lobbyist on a 6-2 vote, with assembly members Bruce Botelho and Fred Baxter voting against the motion.

In other action Monday, the assembly appointed a nine-member fisheries advisory board and a five-member technical board. The technical board, said Parsons, will be non-voting, but will provide assistance to the advisory panel.

Appointed to the advisory board were Larry Cotter, Michael Grummett, Ladd Macaulay, Warren Wiley, S. Gregory Fisk, Sandro Lane, Geron Bruce, David R. Bowhay and Max Lewis.

Acting as a non-voting chairman of the group will be Al Borrego, from the University of Alaska-Juneau.

The group also approved, 6-2, a resolution supporting a state bill that would create a system of marine parks.

Voting against the resolution were assembly members George Davidson and Baxter.

Davidson said he opposed the resolution because he believes enough land is already in public use and there isn't enough known about how marine parks could affect development of resources.

The assembly also had a quick discussion on the time likely to be necessary to hire a new city attorney. The current attorney, Lee Sharp, resigned last week, effective in early June.

The assembly agreed to try to hire Sharp's replacement for the \$60,000 job by May 20.

te on longevity bill

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The stair-stepping approach calls for increasing the age requirement by one year every year, beginning in 1991. Under that plan, the longevity bonus would be phased out by the year 2030. Currently, all one-year residents age 65 or older are eligible for the \$250 per month checks.

What shape the new longevity bonus program will take should be determined in a conference committee, a body composed of representatives from both houses, Ray predicts.

"With all the House proposals floating around, and the Senate backing the annuity plan, I'm sure this will end up in conference committee," he said. "And, I'm not opposed to that as long as we get the best legal and responsible program."

According to Ray, his annuity bill, that allows residents to place their yearly Permanent Fund dividend checks into a retirement account, is similar to the stair-stepping approach.

"Under the annuity bill, the longevity bonus part of the payments is gradually phased out, like the stair-step idea, but unlike that, we continue to take care of elderly Alaskans," Ray said.

The annuity proposal requires state funding for several decades, but once accounts are established, they will be

S B

150

CSSB 150(Jud)am

The Speaker waived the Judiciary Committee referral on COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 150 (Judiciary) amended (making miscellaneous amendments to the Alaska Water Use Act (AS 46.15); establishing procedures for administrative and judicial adjudication of water rights under that Act; effective date) at the request of the Chairman.

CSSB 150(Jud)am was sent to the Rules Committee for placement on the calendar.

SECOND READING OF SENATE BILL
(continued)

HCS CSSB 367(L&C)amH

HCS CSSB 367(L&C)amH was again before the House.

Representative Boucher placed a call of the House.

The call was satisfied.

Amendment No. 6 by Pignalberi:

Page 10, after line 20, insert a new bill section to read:

** Sec. 10. AS 38 is amended by adding a new chapter to read:

CHAPTER 45. RESIDENT EMPLOYMENT
PREFERENCE UNDER STATE LEASES.

ARTICLE 1. HIRING PREFERENCE.

Sec. 38.45.010. STATE POLICY. It is the policy of the state to develop its natural resources to provide the maximum benefit to the people of the state as required by the Constitution of the State of Alaska. These benefits include employment opportunities in natural resource development projects for residents qualified for the employment, as well as receipt of state revenue from the development.

Sec. 38.45.020. LEGISLATIVE FINDINGS. The legislature finds:

(1) the findings made in AS 36.10.005 continue to accurately describe the social, economic, and employment situation in the state;

5/6

HOUSE
COMMITTEE REPORT

(9)

Date referred: 3/19/36

FURTHER REFERRALS: JUDICIARY

DATE: 5/5/86

The RESOURCES Committee has considered CSSB 150 (Jud) am

"An Act making miscellaneous amendments to the Alaska Water Use Act (AS 46.15); establishing procedures for administrative and judicial adjudication of water rights under that Act; and providing for an effective date."

and recommends:

- do pass
- do not pass
- do pass with attached amendment(s)
- no recommendation
- replace with HCS CSSB 150 (RES) same title
- new title

and recommends DO PASS

further referral to the _____ Committee

- and attaches:
- letter of intent
 - first fiscal note
 - new fiscal note
 - zero fiscal note

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Shultz [Signature]

Herrmann [Signature]

Cato [Signature]

Thompson [Signature]

Wallis [Signature]

[Signature] No Rec.

Jenkins
[Signature] No Rec.

Pearce
[Signature]

Synd
M.W. Miller No. Rec.
Miller (NP)

Co-Chairman

Shultz

BILL SHEFFIELD, GOVERNOR

STATE OF ALASKA
WATER RESOURCES BOARD

POUCH 7-005
ANCHORAGE, ALASKA 99510-7005
PHONE (907) 561-2020

May 9, 1986

Representative M. Mike Miller
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Miller:

RE: SB 150

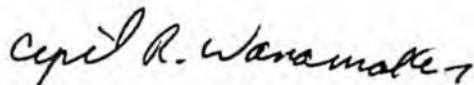
SB 150 is proposed legislation to amend the Alaska Water Use Act and it may be sent to the floor for a vote near the end of this legislative session. SB 150 provides for the adjudication, by the State, of federal reserved water rights and for various housekeeping amendments sought by the Department of Natural Resources.

The Alaska Water Resources Board supports SB 150 unanimously and urges you to vote in favor of this legislation. This bill has also received the support of the Joint Federal/State Working Group on Federal Reserved Water Rights.

The Water Resources Board members represent not only the diverse geographic areas of Alaska but environmental, mining, timber, fisheries and Native Corporation interests as well. It is rare to achieve the degree of consensus that this bill enjoys.

The Board has had three years of involvement in developing this bill and it was close to passage in 1985 when the Subsistence issue delayed it. It would be a serious setback to the State's efforts to adjudicate federal water rights if a delay were to occur again.

Respectfully,



Cyril R. Wanamaker, Chairman



Cyril R. Wanamaker, Chairman
ALASKA WATER RESOURCES BOARD
BOX 2234
JUNEAU, ALASKA 99803

907 586 1512

MAY 7, 1986

Honorable Mike Miller, Chairman
House Judiciary Committee
Alaska State Legislature
Pouch V (ms3100)
Juneau, Alaska 99811

RE: SB 150

Dear Representative Miller:

SB 150 is proposed legislation that would amend the Alaska Water Use Act. The amendments would provide for the adjudication of federal reserved water rights and miscellaneous housekeeping amendments sought by the Alaska Department of Natural Resources. This legislation is currently in the Judiciary Committee.

The Alaska Water Resources Board supports the bill and urges its passage by the House Judiciary Committee without amendment or preferably that the Committee waive the bill and send it to the floor for a vote. The Water Resources Board is unanimous in its support of this bill and the bill has also received the support of the Joint Federal/State Working Group on Federal Reserved Water Rights.

The Board has a long history of involvement in the development of this bill. It was close to passage last session when concern over the subsistence issues delayed it. In view of the wide support for this bill it would be a serious setback if this delay were to occur again.

If I can answer any questions for you or the Judiciary Committee in regards to SB 150 please call on me.

Respectfully,

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman
Alaska Water Resources Board

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

POUCH M
JUNEAU, ALASKA 99811
PHONE: 907-485-2400

May 6, 1986

The Honorable M. Mike Miller
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Miller:

We are pleased that Senate Bill 150 passed the House Resources Committee on May 5, 1986 and is now referred to your Judiciary Committee. We wish to offer the following comments as background information and explain why we feel this legislation is important to Alaska and urge your earliest consideration of the measure. You have previously received this information and it is included now for the benefit of other committee members. The bill contains housekeeping amendments to the Alaska Water Use Act, AS 46.15, and most importantly, procedures for administrative and judicial basinwide adjudication of water rights. This is crucial water resources legislation for Alaska because it would establish procedures to adjudicate federal reserved water rights.

Currently, the Water Use Act does not have procedures for basinwide adjudication of state administered water rights or claimed federal reserved water rights. The bill establishes an administrative basinwide adjudication procedure for state water rights when a controversy exists between appropriators, such as the scarcity of water within a river basin or ground water aquifer, and for claimed federal reserved water rights when the federal government consents to an administrative adjudication. The bill also provides a state Superior Court procedure for efficiently adjudicating federal reserved water rights in instances where the federal government may not consent to an administrative adjudication.

A federal reserved water right is one created either expressly or by implication when the federal government withdraws land for a specific purpose. The U.S. Supreme Court first recognized federal reserved water rights in Winters v. United States in 1908. Since that time, court

May 6, 1986

cases have extended the doctrine to national forests, parks, refuges, and monuments. Since federal reserved water rights are most often created by implication, no specific quantity of water and no priority date for the water right is established until the court does so by decree. Congress passed the McCarran Amendment to allow water adjudication suits to be brought against the federal government in state courts. While allowing state court adjudication of federal reserved water quantities and priority dates, the McCarran amendment also requires the adjudication of all rights within a hydrologic basin where a federal reserved water right may exist.

Federal land reservations make up almost 49 percent of Alaska's total land mass of 367.7 million acres, and may carry federal reserved water rights. While competition for water resources in the locale of many Alaska federal reservations is limited, we have recently encountered instances where a procedure for adjudication would enhance opportunities for state economic development. Applications for additional hatchery water in Sitka were shelved pending study of federal rights to Indian River water. Of more immediate consequence are National Park Service requests for Nuka River appropriations which could reduce Bradley Lake power production potential. These situations will continue to arise and require a resolution mechanism.

We summarize the bill briefly as follows: Section 1 of SB 150 adds a disclaimer to the Water Use Act that a right to appropriate water which the state grants is not a guarantee of a particular water quality, volume, or pressure, or that water may be withdrawn at a particular cost. This is needed because the state cannot always guarantee the quantity or quality of water due to insufficient hydrologic data in our state.

Section 2 provides for continued adjudication of declarations filed under the existing rights section (AS 46.15.065). If a certificate is issued under this section, the holder may be included in a basinwide adjudication.

Sections 3 and 4 of the proposed bill amend AS 46.15.140 to clarify the existing abandonment and forfeiture provisions. It creates a rebuttable presumption so that an appropriator who does not beneficially use water granted by a certificate for five successive years, bears the obligation to prove to the commissioner that the appropriation has not been abandoned. Section 5 of the bill clarifies how the commissioner may terminate an instream flow reservation.

May 6, 1986

Section 6 contains the body of the proposed basinwide adjudication provisions. It would allow the Commissioner of Natural Resources to initiate an administrative adjudication to quantify and determine the priority of all water rights and claims, including federal reserved water rights when the federal government consents, in a particular hydrologic basin. Section 6 provides that when a federal reserved water right may be involved, and the claimant refuses to consent to an administrative adjudication, the commissioner could initiate the adjudication in Superior Court consistent with the McCarran Amendment. In that instance, the proposed bill gives the Superior Court authority to appoint a master to perform the same functions a master would have in an administrative adjudication, but under the court's supervision. While the design of the adjudication bill is to provide a procedure for the adjudication of both state issued water rights and claimed federal reserved water rights, AS 46.15.169 makes clear that nothing in the Alaska Water Use Act is to be construed as an admission against the State of Alaska that a federal reserved water right exists in any particular context.

Section 7 of the bill adds provisions to clarify the Department of Natural Resources' authority to take action to remove unsafe or unpermitted works of appropriation such as dams or diversions where the appropriator refuses to do so, and to inspect records of an appropriator pertinent to water use under the act.

Legislation for basinwide adjudication was first submitted to the Legislature in 1982. SB 150 was prepared by the Attorney General's Office after extensive review of that original bill and other western states' laws dealing with federal reserved water rights adjudication. This bill is the best of the basinwide adjudication legislation of the western states. We have worked closely with the Departments of Fish and Game and Environmental Conservation, members of the Alaska Water Resources Board, federal agencies represented on our state's Federal Reserved Water Rights Work Group, and the Western States Water Council in preparing this legislation.

Enclosed with this letter is background material on the bill and some general information about federal reserved water rights. The following attachments are included:

- Attachment 1: SB 150 as amended by the House Resources Committee;
- Attachment 2: Copies of testimony given to the Senate Resources Committee;

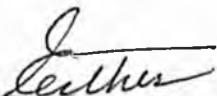
May 6, 1986

- Attachment 3: Resolutions and letters from the Alaska Water Resources Board concerning the bill;
- Attachment 4: "The Winters of Our Discontent: Federal Reserved Water Rights in the Western States," presenting background on the doctrine of prior appropriation (Alaska's system of allocating water) and the development of the Winters Doctrine of federal reserved water rights;
- Attachment 5: "Introduction to Reserved Water Rights," discussing the origin of the reservation doctrine and decisions held in some of the major federal reserved water rights cases;
- Attachment 6: Fact Sheets on Water Rights and Federal Reserved Water Rights.

In summary, under the state's system of allocating water rights based on prior appropriations, there is no way that dealing with federal reserved water rights can be avoided. Adjudication of water rights in areas where federal reserved water rights exist or are claimed by the federal government becomes difficult and sometimes impossible due to the uncertainty of not knowing how much water will be available for other appropriators once the federal reserved water rights are adjudicated. We will either adjudicate administratively, through state courts, or in federal court - these are the choices as we see them. Adjudication using the procedures provided by enactment of SB 150 is the most efficient and least expensive alternative.

We hope you find this information useful. Please contact me if we can provide you with further information.

Sincerely,


Esther C. Wunnicke
Commissioner

Enclosures

The Honorable M. Mike Miller -5-

May 6, 1986

cc: Representative Sund
Representative Gruenberg
Representative Taylor
Representative Clocksin
Representative Pettyjohn
Representative Phillips
Tom Hawkins, Division of Land
and Water Management
Mike Frank, Attorney General's Office

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 15 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 ev-
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;

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).

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

POUCH M
JUNEAU, ALASKA 99811
PHONE: 907-485-2400

April 28, 1986

The Honorable Dick Shultz
The Honorable Adelheid Herrmann
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representatives Shultz and Herrmann:

I am writing to urge your committee's consideration of SB 150 which makes amendments to Alaska's Water Use Act, and to provide a proposed amendment. This legislation provides a mechanism for comprehensive adjudication of all water rights in a predefined basin (basinwide adjudication). I supplied background information to committee members in my April 9, 1986 letter.

One point of particular concern in the bill is the floor amendment No.1 adopted in the Senate. I endorsed the amendment in concept as I understood it would protect water rights permittees from losing their permits because a proposed water use was not developed during the permit time period. As adopted, however, the amendment may not achieve that original purpose, but rather cause confusion about the system of perfecting water rights under Alaska's Water Use Act.

Alaska is a prior appropriation state, as mandated by the Alaska Constitution, Article VIII, Section 13. The Water Use Act, AS 46.15, sets up a three step system for obtaining water rights, following the procedures of the other western states who also have the prior appropriation system of water rights. The first step occurs when a potential water user files an application for water rights with the department. After public and interagency notice, a permit to appropriate water may be issued. The permit authorizes the applicant to complete step two by constructing the means to use water, such as drilling a well or installing diversion pipes from a stream, and begin beneficial use of the water. The final step occurs when the water use has been developed and beneficial use of water established. At that time a certificate of appropriation is issued to certify the final water right.

Hon. Rep. Shultz
Hon. Rep. Herrmann

-2-

April 28, 1986

We certainly understand and agree with the Senate's concern to allow water rights permittees adequate time to develop their water use. As amended, however, AS 46.15.140(b) may allow speculators to apply for water rights to put water to beneficial use without any intention to do so, knowing they would have an indefinite period of time by filing a "notice of intention" to either hold water until it becomes more valuable, or to block the development of water by some other user with current intentions to beneficially use the water.

I have enclosed a suggested amendment to Section 3 of the bill for your consideration. The amendment is intended to make certain that a permittee may file for and obtain an extension in time to perfect the beneficial water use, rather than allowing an appropriator to hold right to water which is not beneficially used.

Your consideration of this amendment is appreciated. Please let me know if there is additional information I might provide.

Sincerely,



Esther C. Wunnicke
Commissioner

Enclosure

cc: Representative Cato
Representative Jenkins
Representative M.W. Miller
Representative Pearce
Representative Sund
Representative Thompson
Representative Wallis

Senator Bennett
Senator Fahrenkamp
Senator Sturgulewski
Senator Kerttula
Senator Coghill

Tom Hawkins
Mike Frank
Alaska Water Board Members

DEPARTMENT OF NATURAL RESOURCES

April 28, 1986

Suggested Amendment to SB 150

Amend the last sentence of Sec. 46.15.140(b) to read as follows:

A person [PROPERTY OWNER] who has a permit to develop a use of water [WATER RIGHT], including but not limited to, [WHETHER FOR] residential, agricultural, industrial, or mining use, but has not developed that property to the point of water use prior to the permit expiration, may file a request for permit extension [NOTICE OF INTENTION TO RETAIN THAT WATER RIGHT] with the commissioner.

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

POUCH M
JUNEAU, ALASKA 99811
PHONE: 967-465-2400

April 9, 1986

The Honorable Adelheid Herrmann
The Honorable Richard Shultz
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representatives:

Senate Bill 150 has just been referred to the House Resources Committee, and we wish to offer the following comments as background information and to explain why we feel this legislation is important to Alaska. The bill contains housekeeping amendments to the Alaska Water Use Act, AS 46.15, and procedures for administrative and judicial basinwide adjudication of water rights. This is crucial water resources legislation for Alaska because it would establish procedures to adjudicate federal reserved water rights.

Currently, the Water Use Act does not have procedures for basinwide adjudication of state administered water rights or claimed federal reserved water rights. The bill establishes an administrative basinwide adjudication procedure for state water rights when a controversy exists between appropriators, such as the scarcity of water within a river basin or ground water aquifer, and for claimed federal reserved water rights when the federal government consents to an administrative adjudication. The bill also provides a state Superior Court procedure for efficiently adjudicating federal reserved water rights in instances where the federal government may not consent to an administrative adjudication.

A federal reserved water right is one created either expressly or by implication when the federal government withdraws land for a specific purpose. The U.S. Supreme Court first recognized federal reserved water rights in Winters v. United States in 1908. Since that time court cases have extended the doctrine to national forests, parks, refuges, and monuments. Since federal reserved water rights are most often created by implication, no specific quantity of water and no priority date for the water right is established until the court does so by decree. Congress passed the McCarran Amendment to allow water adjudication suits to be brought against the federal government in state courts. While allowing state court adjudication of

federal reserved water quantities and priority dates, the McCarran amendment also requires the adjudication of all rights within a hydrologic basin where a federal reserved water right may exist.

Federal land reservations make up almost 49 percent of Alaska's total land mass of 367.7 million acres, and may carry federal reserved water rights. While competition for water resources in the locale of many Alaska federal reservations is limited, we have recently encountered instances where a procedure for adjudication would enhance opportunities for state economic development. Applications for additional hatchery water in Sitka were shelved pending study of federal rights to Indian River water. Of more immediate consequence are National Park Service requests for Nuka River appropriations which could reduce Bradley Lake power production potential. These situations will continue to arise and require a resolution mechanism.

We summarize the bill briefly as follows: Section 1 of SB 150 adds a disclaimer to the Water Use Act that a right to appropriate water which the state grants is not a guarantee of a particular water quality, volume, or pressure, or that water may be withdrawn at a particular cost. This is needed because the state cannot always guarantee the quantity or quality of water due to insufficient hydrologic data in our state.

Sections 2 and 3 of the proposed bill amend AS 46.15.140 to clarify the existing abandonment and forfeiture provisions. It creates a rebuttable presumption so that an appropriator who does not beneficially use water granted by a certificate for five successive years, bears the obligation to prove to the commissioner that the appropriation has not been abandoned. Section 4 of the bill clarifies how the commissioner may terminate an instream flow reservation.

Section 5 contains the body of the proposed basinwide adjudication provisions. It would allow the Commissioner of Natural Resources to initiate an administrative adjudication to quantify and determine the priority of all water rights and claims, including federal reserved water rights when federal government consents, in a particular hydrologic basin. Section 5 provides that when a federal reserved water right may be involved, and the claimant refuses to consent to an administrative adjudication, the commissioner could initiate the adjudication in Superior Court consistent with the McCarran Amendment. In that instance, the proposed bill gives the Superior Court authority to appoint a master to perform the same functions a master would have in an administrative adjudication, but under the court's supervision. While the design of the adjudication bill is to provide a procedure for the adjudication of both state issued water rights and claimed federal reserved water rights, AS 46.15.169 makes clear that nothing in the Alaska Water Use Act is to be construed as an admission against the State of Alaska that a federal reserved water right exists in any particular context.

Section 6 of the bill adds provisions to clarify the Department of Natural Resources' authority to take action to remove unsafe or unpermitted works of appropriation such as dams or diversions where the appropriator refuses to do so, and to inspect records of an appropriator pertinent to water use under the Act.

April 9, 1986

Legislation for basinwide adjudication was first submitted to the Legislature in 1982. SB 150 was prepared by the Attorney General's Office after extensive review of that original bill and other western states' laws dealing with federal reserved water rights adjudication. This bill is the best of the basinwide adjudication legislation of the western states. We have worked closely with the departments of Fish and Game and Environmental Conservation, members of the Alaska Water Resources Board, federal agencies represented on our state's Federal Reserved Water Rights Work Group, and the Western States Water Council in preparing this legislation.

Enclosed with this letter is background material on the bill and some general information about federal reserved water rights. The following attachments are included:

- Attachment 1: SB 150 as passed by the Alaska Senate;
- Attachment 2: Copies of testimony given to the Senate Resources Committee;
- Attachment 3: Resolutions and letters from the Alaska Water Resources Board concerning the bill;
- Attachment 4: "The Winters of Our Discontent: Federal Reserved Water Rights in the Western States", presenting background on the doctrine of prior appropriation (Alaska's system of allocating water) and the development of the Winters Doctrine of federal reserved water rights;
- Attachment 5: "Introduction to Reserved Water Rights", discussing the origin of the reservation doctrine and decisions held in some of the major federal reserved water rights cases;
- Attachment 6: Fact Sheets on Water Rights and Federal Reserved Water Rights.

In summary, under the state's system of allocating water rights based on prior appropriation, there is no way that dealing with federal reserved water rights can be avoided. Adjudication of water rights in areas where federal reserved water rights exist or are claimed by the federal government becomes difficult and sometimes impossible due to the uncertainty of not knowing how much water will be available for other appropriators once the federal reserved water rights are adjudicated. We will either adjudicate administratively, through state courts, or in federal court - these are the choices as we see them. Adjudication using the procedures provided by enactment of SB 150 is the most efficient and least expensive alternative.

The Honorable Adelheid Herrmann
The Honorable Richard Shultz

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April 9, 1986

We hope you find this information useful. Please contact me if we can provide you with further information.

Sincerely,


Esther C. Wunnicke
Commissioner

Enclosures

cc: Representative Bette Cato
Representative Roger Jenkins
Representative M. Mike Miller
Representative Mike W. Miller
Representative Drue Pearce
Representative John Sund
Representative Dave Thompson
Representative F. Kay Wallis
Tom Hawkins, Land & Water Mgmt., DNR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

POUCH M
JUNEAU, ALASKA 99811
PHONE: 907-465-2400

Senate Bill 150

Testimony/Senate Resource Committee

Department of Natural Resources

Senator Sturgelewski, Members of the Committee:

Senate Bill 150, dealing with federal reserved water rights, was introduced during the past legislative session. This committee held a hearing on the bill in March of last year. We think it is crucial piece of water resources legislation for Alaska because it would establish procedures to adjudicate federal reserved water rights.

Currently, the Water Use Act, AS 46.15, does not have procedures for basin-wide adjudication of state administered water rights or claimed federal reserved water rights. The proposed bill would provide a state superior court procedure for efficiently adjudicating federal reserved water rights through the use of existing state agency expertise. The bill also sets up an administrative basin-wide adjudication procedure for state administered water rights when a controversy exists between appropriators, such as the scarcity of water within a river basin or ground water aquifer.

A federal reserved water right is one created either expressly or by implication when the federal government withdraws land for a specific purpose. The U.S. Supreme Court first recognized federal reserved water rights in Winters v. United States, in 1908. Since that time court cases have extended the doctrine to national forests, parks, refuges, and monuments. Since federal reserved water rights are most often created by implication, no specific quantity of water and no priority date for the water right is established until a court does so by decree. Congress passed the McCarren Amendment, to allow water adjudication suits to be brought against the federal government in state court to determine the quantity and priority date of these implied water rights. While allowing state court adjudication of federal reserved water quantities and priority dates, the McCarren amendment also requires a comprehensive adjudication of all rights within a hydrologic basin where a federal reserved water right may exist.

Federal land reservations make up almost 49 percent of Alaska's total land mass, and may have federal reserved water rights. While competition for water resources in the locale of many of Alaska's federal reservations is limited, we have recently encountered instances where a procedure for adjudication would improve opportunities for state economic development. Applications for additional hatchery water in Sitka were shelved pending study of federal rights to Indian River water. Of more immediate consequence are National Park Service requests for Nuka River appropriations which could reduce Bradley Lake power

production potential. These situations will continue to arise and require a resolution mechanism.

Legislation for basin-wide adjudication was first submitted to the Legislature in 1981. SB 150 was prepared by the Attorney General's Office after extensive review of that initial bill and other western states' laws dealing with federal reserved water rights adjudication. This bill is the best of the basin-wide adjudication legislation of the western states. Drafts of this bill were reviewed by the Departments of Fish and Game and Environmental Conservation, members of the Alaska Water Resources Board, the Western States Water Council, and the states of Idaho and Wyoming. During the past legislative session, there was one hearing by the Senate Resources Committee on SB 150 and we received a number of written comments. This fall we have worked with Senator Halford and the state and federal resource management agencies that participate on the Federal Reserved Water Rights Work Group, chaired by DNR. The committee substitute before you incorporates the changes suggested during this review.

A unique feature affecting federal reserve water rights in Alaska is that so much of Alaska's water resources are undeveloped and unappropriated. Thus, unlike the other western states, federal agencies in Alaska may encounter little competition for their water needs. For this reason, we may find that the courts in Alaska may be more lenient in adjudicating federal reserved water rights for the amounts claimed by the federal government. The

state's challenge will be to persuade the courts to apply the same standards in Alaska that have been applied outside--granting the minimum amount of water needed for the primary purposes of the land reservation. This is important to ensure that developable water resources are available for the continued growth and development of our state.

In summary, under the State's system of allocating water rights based on prior appropriation, there is no way that dealing with federal reserved water rights can be avoided. We will either adjudicate administratively, through the state courts, or in federal court -- these are the choices as we see them. Adjudication using the administrative and state court procedures that would be provided by enactment of SB 150 is the most efficient as well as the least expensive alternative.

Cyril R. Manamaker
P.O. Box 2234
Juneau, Alaska 99803

Alaska Water Resources Board

January 22, 1986

Honorable Arliss Sturgulewski
Chairman, Senate Resources Committee
Pouch V
Juneau, Alaska 99811

RE: Committee Substitute for SB 150

Dear Senator Sturgulewski:

The Committee Substitute (Bradley/01/20/86) for SB 150 has been proposed as an act to make miscellaneous amendments to the Alaska Water Use Act (AS 46.15), to establish procedures for the administrative and judicial adjudication of water rights under the act and to provide for an effective date. The substitute bill appears to meet the concerns identified by the Alaska Water Resources Board, the administrative needs of the Alaska Department of Natural Resources (as identified to you in a letter from Commissioner Munnicke dated January 9, 1986) and to provide the means to properly adjudicate any Federal Reserved Water Rights that may be asserted.

The Alaska Water Resources Board has had a long period of involvement with the development of SB 150 the predecessor to the Committee Substitute. Although the Board as a whole has not had an opportunity to review and comment on the Committee Substitute a member has had input into the substitute bill and previous Board suggestions have been incorporated as well. I think it meets the concerns of the Board and the needs of the State in its present form.

The Board will meet in Juneau from February 26th through the 28th and additional comments may come from the Board after that meeting. I am sure that new revisions or amendments to this substitute or SB 150 will prompt additional Board comments or recommendations.

As the Chairman of the Alaska Water Resources Board I support the Committee Substitute. I recommend that it be passed this legislative session in its present form.

Respectfully,

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman
Alaska Water Resources Board

cc: All Board members

To: Senate Resources Committee
Butrovich Room
205 Capitol Building
Juneau, Alaska

Re: Senate Bill 150

Senator Sturgulewski and Committee Members:

My name is Ann Puffer. I am the Regional Hydrologist for the USDA, Forest Service, Alaska Region. My comments reflect the position of Federal Land Management Agencies in Alaska (USDA - Forest Service; USDI - Bureau of Land Management, Park Service, and Fish and Wildlife Service).

Today you have before you a bill which proposes to establish procedures for adjudicating water rights under the Alaska Water Use Act. The current legislation has been thoroughly reviewed and agreed to by the recently formed State/Federal Water Rights Work Group. Of particular interest to the Federal government are the administrative procedures for general basin-wide adjudication. This landmark procedure will be a significant step forward to avoid costly and time consuming court battles currently occurring in other Western states such as Colorado and Wyoming. It provides a format of mutual benefit to all parties concerned to achieve a negotiated settlement of water rights within a defined basin. More significantly, it establishes a setting for conducting adjudications outside the more traditional antagonistic courtroom situation.

The members of the State/Federal Work Group feel this legislation provides an important tool for water resource management in the State. We, therefore, encourage this committee to recommend Senate Bill 150 to the general legislature for passage.

Thank you for your time.

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF FISH AND GAME
OFFICE OF THE COMMISSIONER

P.O. BOX 32200
JUNEAU, ALASKA 99802
PHONE: 587-4654100

January 23, 1986

The Honorable Arliss Sturgulewski
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Senator Sturgulewski:

The Department of Fish and Game supports the January 20 version of Senate Bill 150, which will allow the state to adjudicate Federal Reserved Water Rights.

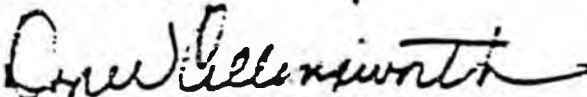
The adjudication process permits the state to ensure that proper consideration is given to reserving adequate water supplies for fish and wildlife when Federal Reserved Water Rights allocations are determined administratively or through the state court system.

As you may know, we have been working with the State/Federal Federal Reserved Water Rights Work Group to incorporate our input into this legislation.

We believe there is a critical need for this legislation and we urge you to support it.

If you have any questions pertaining to our comments, please do not hesitate to contact me.

Sincerely,



Lon W. Collinsworth
Commissioner

cc: Commissioner E. Wunnicke, ADNR
Chairman C. Wanamaker, Alaska Water Board

FEDERAL RESERVE WATER RIGHTS —
BASIN-WIDE ADJUDICATION

The federal government is vested with reserved water rights on numerous federal land withdrawals in Alaska. Federal legislation establishing the reserves specifies the purposes of the reserved water rights and the enacting date establishes their priority date. These water rights include both diversionary and instream uses.

Of the 367.7 million acres in Alaska, federal reserve water rights exist on almost 60 percent of the land mass or over 215 million acres. From a miniscule 2.5 million acres of military land, to 50 and 75 million acres of land for national parks and fish and wildlife refuges respectively, federal reserve water rights issues and problems have the potential to be large as well as complex.

In order for DNR to adequately manage the state's water and adjudicate water rights, it will ultimately be desirable to integrate federal reserved water rights with state adjudicated water rights. The federal government has indicated it will await requests from the states before initiating quantification of federal reserved water rights. Adjudication of claimed federal reserved water rights must be undertaken pursuant to the requirements of the McCarran Amendment (43 USC 666(a)) which requires that the adjudication be basin-wide and judicially determined. The Water Use Act, AS 46.15 does not specifically provide for basinwide court adjudication for federal reserved water rights.

THE ALASKA WATER RESOURCES BOARD, therefore, urges that the Commissioner of the Department of Natural Resources propose legislation for basin-wide adjudication. Current statutes and regulations may be adequate to initiate a basinwide adjudication of federal reserved rights using a declaratory judgement suit in Superior Court. However, more explicit statutes are needed to establish the Superior Court's duties and responsibilities and to set the limits of the Court's authority. This type of case has not previously occurred in Alaska. In addition, the Department of Natural Resources should review existing provisions of the Water Use Act and propose any needed amendments to improve and update the Act.

ADOPTED this 14th day of March, 1984

ALASKA WATER RESOURCES BOARD

David Vanderbrink

David Vanderbrink, Chairman

Resolution No. 86-5

Federal Reserved Water Rights Adjudication

The Alaska Water Resources Board fully recognizes the need for an administrative method of adjudicating Federal Reserved Water Rights.

In the past, this Board has supported legislation which would implement an administrative procedure.

This support was given in the 1985 legislative session to SB 150. SB 150 would have provided the desired administrative adjudication process. It is this Board's understanding that the bill was not passed as a result of proposed general housekeeping revisions of the Alaska Water Use Act.

The ALASKA WATER RESOURCES BOARD supports legislation in the 1986 legislative session which would give Alaska an administrative process to adjudicate Federal Reserved Water Rights. Because of the problems associated with attaching the general housekeeping revisions to the adjudication bill, it is this Board's recommendation that the general revisions identified in SB 150 be removed from future legislation providing for administratively adjudicated Federal Water Rights.

Adopted this 13th day of September, 1985
ALASKA WATER RESOURCES BOARD

Cyril E. Wanamaker

Cyril E. Wanamaker, Chairman

March 10, 1985

The Honorable Arliss Sturgulewski
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Re: The Alaska Water Resources Board's Comments on SB 150

Dear Senator Sturgulewski:

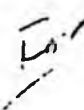
Attached are comments regarding SB 150 prepared by the Alaska Water Resources Board during its March 4-8 Board meetings.

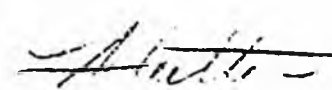
I would like to emphasize that this Board supports SB 150 provided the enclosed suggested changes are incorporated in the proposed legislation.

The Board as a unanimous body supports the adoption of a systematic water adjudication process. If the bill, as amended herein, is not adopted in this legislation, the Alaska Water Resources Board will do everything within its power to see that legislation addressing this issue is introduced in the next session.

Thank you for your kind consideration of these recommendations.

Sincerely,

 Cyril R. Wanamaker, Chairman
Alaska Water Resources Board


By: L. A. Dutton, Chief
Water Management Section

cc: Governor Sheffield
Senate Resources Committee

CRW:CNL:ref

Alaska Water Resources Board
Recommendations for changes to
SB 150 "An Act making miscellaneous
amendments to the Alaska Water Use Act."

Although the following proposed changes to SB 150 may not be procedurally correct, the Alaska Water Resources Board requests that the Senate Resources Committee review the substantive changes requested in this document.

The State of Alaska is in need of a workable and systematic water adjudication system. This Board therefore supports the basic principles espoused in SB 150. We do, however, have some reservations about the present draft as it relates to notice requirements and water appropriation abandonment. The Board makes the following recommendations:

- I. Delete Section 46.15.140(d) and replace it with Section 46.15.145(g) which would read:

"A state agency may not abandon or forfeit an instream flow certificate in whole or in part except after public notice."

- II. Add a new subsection to AS 46.15.165 to read:

"AS 46.15.165(c)(c) serve The Alaska Native Village and Regional Corporation whose lands fall within the adjudication area."

- III. Add a new sub-section to AS 46.15.166 to read:

"AS 46.15.166(a)(3) by any person or party asserting a federal reserve water right."

Although these are the only recommended changes of the Board, we would like to point out one section of SB 150 that may have the potential to create future problems. This section is AS 46.15.165(d) as it applies to native allottees served under AS 46.15.165(c)(3).

This board recognizes that one of the primary purposes of SB 150 is to create an adjudication system which satisfies the requirements of the McCarren Amendment 43 U.S.C. Sec. 666, thereby providing for state adjudication of federal reserve water rights. Federal agencies have the resources and responsibility to assert and defend their reserved water rights. This state should not be responsible for a federal agency's failure to assert its rights.

The Bureau of Indian Affairs (BIA), as trustee, has the primary responsibility of protecting a native allottee's property interests in a native allotment. It has been suggested, however, that because of any number of reasons, such as the vast number of allotments in the state, other BIA priorities, the failure of the BIA representatives to properly judge the significance of a water adjudication to the allotment holder, inadvertent omissions, etc., federal reserve water rights which may be a legitimate property interest of the allottee may be forfeited due to BIA failure to assert water right as required in this subsection.

If a pattern of forfeitures of federal reserve water rights on native allotments does emerge as a result of this subsection, it is this Board's recommendation that the state's position should be flexible enough to assure that the necessary amendments will be made to protect any legitimate rights of the native allottees.

We wish to make it clear, however, that this Board does not take the position that the state is responsible for asserting a federal reserve water right for a native allottee. Furthermore, we are not suggesting that the state is responsible for affecting any repairs that are necessary to correct an injury created by a federal agency's failure to perform its responsibilities.

The point that we wish to make is that native allottees are state residents. Any federal reserve water rights that they may be entitled to as an appurtenance to their real property, acquired pursuant to the Native Allotment Act, is a valuable and necessary property interest. Forfeiture of real property interests should not be taken lightly. The forfeiture of a legitimate property interest for a failure to respond to service in a timely manner as required by this subsection is a drastic action and should not, therefore, be taken lightly.

Although we are not suggesting any changes to this subsection at this time, we do wish to demonstrate to the Senate Resources Committee that this subsection may have serious consequences to an identifiable group of longtime Alaska residents and not just to the myriad federal agencies which manage numerous and vast federally withdrawn lands.

THE *WINTERS* OF OUR DISCONTENT: FEDERAL RESERVED WATER RIGHTS IN THE WESTERN STATES

INTRODUCTION

Water is the life-blood of the American West. Like other people, westerners need water for basic human sustenance and for a variety of other purposes. But unlike most other Americans, westerners must fill their needs from an extremely limited supply of water.¹ As a result, westerners face a problem that may seem incomprehensible to nonwesterners who live in areas with abundant water supplies: they must decide how to allocate the limited quantity of available water among all the users and uses.

To deal with this problem, the western states² developed the doctrine of prior appropriation as a basic scheme for allocating the available surface water among various users.³ This prior appropriation system, based on continued beneficial use of appropriated water and strict quantification of the rights of users,⁴ insists that water may not be wasted or go unused. In the land-rich and water-poor West, any other system would probably be wasteful and inefficient.⁵

Through application of the prior appropriation doctrine, the western states seek to apportion their limited water resources in a fair and

¹ The United States Water Resources Council's Second National Water Assessment graphically illustrates the critical water shortage in the western states. For example, in 1975, the Rio Grande water resources region showed 78% present streamflow depletion from all demands, and the Lower Colorado region showed 82% depletion. 2 WATER RESOURCES COUNCIL, *THE NATION'S WATER RESOURCES: 1975-2000* (pt. 4), at 48 (1978). The Water Resources Council projects that 91% of the surface water in the Rio Grande region will be in use by 1985. More dramatically, the council predicts that the surface water supply in the Lower Colorado region will be overdrawn by 26% in 1985. The council summarized its concern over western water supply:

Competing offstream uses of water for energy, agricultural, domestic, and industrial needs coupled with associated environmental and instream flow uses have resulted in basinwide and local problems throughout the United States The problem of inadequate surface-water supply is or will be severe by the year 2000 in 17 [water resources] subregions located mainly in the Midwest and Southwest.

¹ WATER RESOURCES COUNCIL, *THE NATION'S WATER RESOURCES: 1975-2000*, at 56 (1978). For additional discussion of the water shortage in the western states, see generally NATIONAL WATER COMMISSION, *WATER POLICIES FOR THE FUTURE* (1973).

² The "western" states referred to in this Note are: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

³ See *infra* note 11 and accompanying text.

⁴ See *infra* notes 11-18 and accompanying text.

⁵ See *infra* note 14 and accompanying text.

rational way. The prior appropriation doctrine conflicts, however, with the doctrine of federal reserved water rights, which the United States Supreme Court announced in *Winters v. United States*.⁶ The *Winters* doctrine provides that in reserving public land for a federal enclave such as an Indian reservation, national forest, or military reservation, the federal government also implicitly reserves a sufficient quantity of water to carry out the purpose of the reservation of land.⁷ Federal reserved rights exist independently of beneficial use or quantification; they are therefore fundamentally different in character from rights established by prior appropriation.

From 1908 through the 1970s, the Supreme Court expanded the scope of the *Winters* doctrine of federal reserved rights, thereby aggravating the inherent conflict between appropriative rights and reserved rights.⁸ More recently, however, the Court has attempted to ease the conflict by narrowly defining the *Winters* doctrine's scope.⁹ Both reserved rights and prior appropriation serve important purposes, and therefore both doctrines, and their conflict, will persist.¹⁰ By strictly defining federal reserved rights to make them mesh as smoothly as possible with the water law systems of the various states, the Court's well-directed efforts to harmonize the two doctrines can ease the tension between the *Winters* doctrine and the prior appropriation doctrine.

I

BACKGROUND

A. Water Rights in the Western States: The Doctrine of Prior Appropriation

The doctrine of prior appropriation provides the basic framework for the statutory water use schemes of the western states.¹¹ A complete understanding of the conflict between the federal reserved rights doc-

⁶ 207 U.S. 564 (1908).

⁷ See *infra* notes 23-25 and accompanying text.

⁸ See *infra* notes 20-57 and accompanying text.

⁹ See *infra* notes 58-96 and accompanying text.

¹⁰ See *infra* note 122 and accompanying text.

¹¹ The western states can be divided into two doctrinal categories: the Colorado doctrine states and the California doctrine states. The nine Colorado doctrine states (Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) recognize only appropriative rights to surface water. 5 R. CLARK, WATERS AND WATER RIGHTS § 405, at 50 (1972). The nine California doctrine states (California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington) recognize some riparian rights as well as appropriative rights to surface water. *Id.* § 420, at 232.

The statutory water law systems in the West vary considerably from state to state. A detailed examination of these different systems is beyond the scope of this Note. For a thorough comparative discussion, see *id.* §§ 400-33.

For a basic discussion of the riparian system, see 7 R. CLARK, WATERS AND WATER RIGHTS § 610, at 28 (1976).

trine and prior appropriation necessitates some acquaintance with the workings of prior appropriation systems.

The foundation of the prior appropriation doctrine is its requirement of beneficial use.¹² A user acquires an appropriative right by putting the water he claims to some beneficial use. Moreover, he loses his right if he does not continue to use his appropriated water beneficially.¹³ In this respect, the appropriative rights system differs strikingly from the English common law riparian system generally employed in the eastern states. Riparian rights accrue to an owner of land adjoining a stream merely by virtue of his property ownership and thus exist independently of any use at all.¹⁴

Prior appropriation works by strict chronological priority. A senior appropriator, whose priority date¹⁵ is earlier in time, may take his entire entitlement of water before a junior holder may take any water at all. In this priority system, junior holders bear the entire brunt of any shortage.¹⁶

All appropriative rights are determined by means of an *in rem* proceeding called a water adjudication,¹⁷ which determines the priority

¹² Mining, irrigation, industrial power production, and sanitary and municipal uses are generally recognized as "beneficial." Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 653, 640 n.21.

Because appropriative rights accrue by virtue of beneficial use, they need not be appurtenant to land. *Id.* Ownership of land adjoining a stream is not considered a basis for an appropriative right. *Id.* Water obtained by appropriation may generally be used at any place, regardless of its distance from the stream, so long as the use is beneficial. *Id.*

All of the western states except Montana and Colorado impose the additional statutory requirement that the appropriator must obtain a permit from the proper state administrator before he may acquire an appropriative right. See, e.g., WYO. STAT. §§ 41-4-501 to -510 (1977). For an extended discussion of these permit schemes, see 5 R. CLARK, *supra* note 11, § 409, at 99-107.

¹³ 5 R. CLARK, *supra* note 11, §§ 413.1, 429.2.

¹⁴ The riparian system would be inappropriate as the *primary* means of allocating available water resources in the West because riparian rights do not depend on beneficial use of the water, and the West can ill afford the luxury of owned but unused stream flow. Riparian law evolved in England, where water is plentiful. The English (and the Americans living in the water-rich East) had no incentive to develop a more thrifty and efficient water use scheme. See McGowen, *The Development of Political Institutions on the Public Domain*, 11 WYO. L.J. 1, 14 (1956).

¹⁵ The priority date of a holder's right is usually the date on which the holder initially diverted the water. Although such an appropriation is not technically "complete" until the appropriator actually puts the water to some beneficial use, the relation back doctrine provides that if he completes the appropriation with due diligence, the appropriator's priority date is the date of the initial act of diversion. See, e.g., COLO. REV. STAT. § 37-92-302 (1973); see also Ellis, *Water Rights: What They Are and How They Are Created*, 13 ROCKY MOUNT. L. INST. 451, 458-59 (1967); Comment, *Determining Priority of Federal Reserved Rights*, 48 COLO. L. REV. 547, 551 (1977).

¹⁶ Ranquist, *supra* note 12, at 646 n.21.

¹⁷ The western states are again split into two groups. The Colorado system, employed only by Colorado and Montana, leaves the entire process of adjudication to the courts. An appropriative claimant files a petition in state court, and all other owners or claimants are served with notice as required by statute. See, e.g., COLO. REV. STAT. § 37-92-302 (1973).

rights of the appropriators participating in the hearing as against the entire world. A water adjudication strictly quantifies a holder's rights and limits his entitlement to his original appropriation, unless he either claims further amounts of unappropriated water or purchases the rights of another appropriator.¹⁸

Principles of strict quantification and rigid control underlie the prior appropriation systems employed by the western states. Federal reserved water rights, on the other hand, are usually awarded without quantification and may exist independent of any use. Thus, when federal reserved rights are imposed upon these appropriative water use schemes, fundamental incongruities appear.¹⁹

B. The Development of the *Winters* Doctrine of Federal Reserved Rights

1. *Expansion of the Reserved Rights Doctrine: From Winters to Cappaert*

From 1908 through the 1970s, the United States Supreme Court steadily expanded the scope of the *Winters* doctrine of federal reserved water rights.²⁰ By nature, federal reserved rights differ fundamentally from appropriative rights established under state law.²¹ The Court's expansive application of the reserved rights doctrine during this period aggravated this inherent conflict between the two types of water rights.²²

The Supreme Court first announced the doctrine of federal reserved water rights in the 1908 case of *Winters v. United States*.²³ In 1888, one year before Congress admitted Montana to the Union, it established by treaty the Fort Belknap Indian Reservation in the Montana Territory. *Winters* and others sought to dam the Milk River, which flows

Supp. 1983). Each participant is responsible for producing his own evidence at trial to protect or establish his water right. Ellis, *supra* note 15, at 462.

The other states, which employ permit systems, see *supra* note 12, use the New Mexico system of adjudication. This system also involves the courts, but the state engineer's office makes an initial determination of fact as to the rights of the parties. See, e.g., ARIZ. REV. STAT. ANN. § 45-257 (Supp. 1983). This determination is then subject to challenge by the parties at the adjudication. Ellis, *supra* note 15, at 462.

¹⁸ Only a small amount of unappropriated water remains in the West. Many streams are overappropriated, which means that the aggregate quantity of all the water rights claimed from the stream exceeds the actual stream flow. See *supra* note 1 and accompanying text; Comment, *supra* note 15, at 551 n.26. Junior holders unable to draw water must wait until stream flow increases or until senior holders relinquish their rights. See *id.* at 551-52 & n.26.

¹⁹ See *infra* notes 102-15 and accompanying text.

²⁰ See *infra* notes 23-57 and accompanying text.

²¹ See *infra* notes 102-15 and accompanying text.

²² See *infra* notes 116-20 and accompanying text.

²³ 207 U.S. 564 (1908).

through the Fort Belknap reservation.²⁴ The Court recognized the conflicting inferences arising from the treaty's silence as to the Indians' water rights; nonetheless, the Court held that the treaty had *implicitly* reserved a sufficient quantity of water for the Indians to irrigate their land.²⁵

In *Federal Power Commission v. Oregon (Pelton Dam)*,²⁶ to the astonishment of western water lawyers,²⁷ the Court indicated that the *Winters* doctrine might extend to non-Indian federal lands.²⁸ In *Pelton Dam*, the Federal Power Commission issued a license to the Northwest Power Supply Company, allowing it to build the Pelton Dam on the Deschutes River in Oregon. One terminus of the dam was to be on federal Indian land, and the other terminus was to be on federal non-Indian land.²⁹ The state of Oregon argued that under the Desert Land Act of 1877,³⁰ which requires the federal government to obtain water rights for federal lands in accordance with state law,³¹ the state must give its consent before the dam could be built.³² The Court distinguished between *public* lands, which belong to the federal government because no one has yet claimed them, and *reserved* lands, which the federal government has withdrawn from the public realm and which are no longer subject to private appropriation or disposal.³³ The Court then held that the Desert Land Act of 1877 applied only to *public* lands, and not to *reserved* lands.³⁴ Therefore, the sponsors of the Pelton Dam project did not need the permission of the state of Oregon to build the dam.³⁵ The Court

²⁴ *Id.* at 565.

²⁵ *Id.* at 576-77. The Court declared that "[t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. . . . That the Government did reserve them we have decided, and for a use which would be necessarily continued through years." *Id.* at 577 (citations omitted). The Court also held that Montana's subsequent admission to the Union had no effect on the treaty's implicit reservation of water. *Id.*

²⁶ 349 U.S. 435 (1955).

²⁷ See, e.g., Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DEN. L.J. 473 (1977). Professor Trelease was a practicing water lawyer when the Court decided *Pelton Dam* and his comments indicate the general chaos caused by the decision:

At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law.

This case was a real bombshell, and it certainly lit a fire under western water lawyers. . . . [A] number of western state water officials and others raised a chorus of protest at this reversal of what they had always thought to be the law.

Id. at 475-77 (footnotes omitted).

²⁸ *Pelton Dam*, 349 U.S. at 448.

²⁹ *Id.* at 437-38.

³⁰ 43 U.S.C. §§ 321-39 (1976).

³¹ *Pelton Dam*, 349 U.S. at 448.

³² *Id.* at 446-47.

³³ *Id.* at 443-44.

³⁴ *Id.* at 446-48.

³⁵ *Id.* at 452.

thus implied that federal reserved lands, both Indian and non-Indian, are not subject to state water law.³⁶

The Court explicitly extended the *Winters* doctrine to non-Indian federal reservations in *Arizona v. California (Arizona I)*.³⁷ *Arizona I* began as a dispute among several western states over each state's share of the waters of the Colorado River.³⁸ The United States intervened to protect its claims to water for five Indian reservations and several wildlife refuges, recreational areas, and national forests.³⁹ Writing for the Court, Justice Black declared that the federal government, through Congress and the executive,⁴⁰ had implicitly reserved a sufficient quantity of water to accommodate the purposes of the Indian reservations and the non-Indian federal lands.⁴¹ Thus, the Court not only reaffirmed the viability of the reserved rights doctrine, but also expanded the doctrine's scope by applying it to non-Indian federal lands.

In *Arizona I*, the Court also questioned whether the special master appointed to the case correctly determined the quantity of water that the government intended to reserve for the federal enclaves.⁴² In earlier reserved rights cases, the Court had not closely examined what quantity of water was necessary to satisfy the purposes of the reservations, perhaps because those purposes were clearly limited. Furthermore, in examining the purposes of the reservation, the Court seemed to stress the present purposes.⁴³ In *Arizona I*, however, the Court noted that the water set aside for the Indian reservations "was intended to satisfy the *future* as well as the present needs of the Indian Reservations and . . . that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."⁴⁴ The Court's language could mean that the "purpose" of a federal reservation might be expanded; thus, the

³⁶ *Id.* at 448. The Court noted that:

The lands before us in this case are not "public lands" but "reservations." Even without [the] express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands. . . . [I]t is enough . . . to recognize that these Acts do not apply to this license, which relates only to the use of waters on *reservations* of the United States.

Id. (emphasis added).

³⁷ 373 U.S. 546 (1963).

³⁸ *Id.* at 550-51 (the states involved were Arizona, California, Nevada, New Mexico, and Utah).

³⁹ *Id.* at 551 n.3, 595.

⁴⁰ *Id.* at 598. The Court had not previously had occasion to decide whether the executive could create a *Winters* right.

⁴¹ *Id.* at 600-01.

⁴² *Id.*

⁴³ *See, e.g.*, *United States v. Powers*, 305 U.S. 527 (1939) (Indians and their successors in interest needed water for irrigation of limited acreage); *Winters v. United States*, 207 U.S. 514 (1908).

⁴⁴ *Arizona I*, 373 U.S. at 600 (emphasis added).

quantity of the water guaranteed by the *Winters* right might also be increased.

The Court next addressed the reserved rights doctrine in the case of *United States v. District Court in and for the County of Eagle (Eagle County)*.⁴⁵ In that case, the Court first showed concern with the federal-state tensions generated by judicial recognition of *Winters* rights. At issue was the scope of the McCarran Amendment,⁴⁶ which provides for a limited waiver of the United States' sovereign immunity in water rights adjudication.⁴⁷ The amendment allows the United States to be joined as a party defendant in state water adjudications, but in *Eagle County*, the government contended that this waiver of sovereign immunity applied only to water rights acquired under state law and not to reserved water rights.⁴⁸ Writing for a unanimous Court, Justice Douglas stated that the McCarran Amendment was an "all-inclusive statute" which made no exception for reserved rights and that the waiver of sovereign immunity therefore applied to federal reserved rights as well as nonreserved rights.⁴⁹ This case made the United States amenable to suit in state water adjudications and thus marked the Court's first step toward allowing the states to determine federal reserved water rights.

The Court again addressed the question of jurisdiction over reserved rights in *Colorado River Water Conservation District v. United States (Colorado River)*.⁵⁰ The United States filed suit in federal district court in Colorado seeking a declaration of all reserved rights held by the federal government, in its own right and as a fiduciary for certain Indian tribes, in the San Juan River Basin.⁵¹ The government named as defendants private irrigators who presumably would claim appropriative rights to the same water.⁵² Several Colorado water conservation districts then intervened as defendants. One defendant subsequently filed suit in Colorado state court seeking adjudication of the same rights⁵³ and joined the United States as a defendant under the McCarran Amendment.⁵⁴

⁴⁵ 401 U.S. 520 (1971).

⁴⁶ 43 U.S.C. § 666 (1976) (also known as the McCarran Water Rights Suits Act).

⁴⁷ The McCarran Amendment, 43 U.S.C. § 666 (1976), provides in part:

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

See also *infra* note 96.

⁴⁸ *Eagle County*, 406 U.S. at 523-24.

⁴⁹ *Id.* at 524.

⁵⁰ 424 U.S. 800 (1976).

⁵¹ *Id.* at 805.

⁵² *Id.*

⁵³ *Id.* at 806.

⁵⁴ *Id.*

The water conservation districts then moved to dismiss the federal action, arguing that the McCarran Amendment vested the state courts with exclusive jurisdiction to determine the reserved rights of the United States.⁵⁵

The Supreme Court held that the McCarran Amendment merely created *concurrent* jurisdiction in the state courts to determine federal water rights and did not divest the federal courts of jurisdiction.⁵⁶ Nevertheless, the Court held that dismissal of the federal proceeding was proper. The Court reasoned that if the state has a comprehensive system for water rights adjudication, federal water rights are more appropriately determined in state court for reasons of judicial efficiency and expertise.⁵⁷ The *Colorado River* doctrine thus creates a presumption that when both federal and state actions are pending for adjudication of federal reserved water rights, the federal action should be dismissed.⁵⁸

Later in the same Term, the Court decided *Cappaert v. United States*.⁵⁹ The dispute in *Cappaert* centered on a pool of water, located fifty feet down inside a huge cavern that the President had reserved in 1952 as the Devil's Hole National Monument.⁶⁰ This pool was fed by groundwater and was the only known habitat of a rare species of desert fish known as the Devil's Hole pupfish.⁶¹ In 1968, the Cappaerts, owners of a nearby ranch, began pumping groundwater from the same aquifer that fed the pool.⁶² As a result of the Cappaerts' extensive pumping, the water level in the pool dropped, endangering the pupfish.⁶³ The United States filed suit seeking an injunction to limit the Cappaerts' pumping to an amount that would save the pupfish from extinction.⁶⁴ The Supreme Court unanimously decided for the pupfish and affirmed the modified injunction.⁶⁵

Two aspects of Chief Justice Burger's opinion in *Cappaert* are noteworthy. First, although the Court's narrow holding sustained a *Winters* right, the opinion announced a "minimal need" standard for determin-

⁵⁵ *Id.*

⁵⁶ *Id.* at 807-09.

⁵⁷ *Id.* The Court noted that "[t]he clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system." *Id.* at 819. The Court further recognized "the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Id.*

⁵⁸ *Id.* at 818-20.

⁵⁹ 426 U.S. 128 (1976).

⁶⁰ *Id.* at 131 & n.1.

⁶¹ *Id.* at 132.

⁶² *Id.* at 133.

⁶³ *Id.* at 133-34.

⁶⁴ *Id.* at 135.

⁶⁵ The district court permanently enjoined Cappaert from lowering the water level of the pool below 3.0 feet, but the court of appeals modified the injunction to allow the Cappaerts to pump as long as the water level did not drop below 3.3 feet. *Id.* at 137 n.3, 138.

ing the quantity of water reserved by the federal government.⁶⁶ Second, the Court had a clear opportunity to extend the *Winters* doctrine to groundwater but refused to do so.⁶⁷ The *Cappaert* case thus marked a turning point in the Court's reserved rights jurisprudence.

2. *Narrowing the Scope of the Winters Doctrine: Reserved Rights after Cappaert*

In 1978, the Supreme Court decided *United States v. New Mexico (Mimbres)*.⁶⁸ At issue was the Rio Mimbres, which originates in the

⁶⁶ *Id.* at 141. Chief Justice Burger noted that:

The implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more . . . Devil's Hole was reserved "for the preservation of the unusual features of the scenic, scientific, and educational interest." . . . The pool need only be preserved . . . to the extent necessary to preserve its scientific interest . . . Thus . . . the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool. . . . The District Court thus tailored its injunction, very appropriately, to *minimal need* . . .

Id. (emphasis added) (citation omitted) (quoting the presidential proclamation that established the national monument).

⁶⁷ The Ninth Circuit had explicitly held below that the *Winters* doctrine applied to groundwater as well as to surface water. *United States v. Cappaert*, 567 F.2d 313, 317 (9th Cir. 1974), *aff'd*, 426 U.S. 128 (1976).

The Supreme Court essentially evaded this issue by dealing with it ambiguously:

No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater . . . Here, however, the water in the pool is surface water. The federal water rights were being depleted because . . . the "[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle" . . . [S]ince the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the *diversion* is of surface or ground water.

426 U.S. at 142-43 (emphasis added) (citations and footnote omitted).

⁶⁸ 438 U.S. 696 (1978). On the same day, Justice Rehnquist, the author of the *Mimbres* majority opinion, also announced the opinion of the Court in *California v. United States (New Melones Dam)*, 438 U.S. 645 (1978). In *New Melones Dam*, the United States applied to the state of California for permits to appropriate water for the New Melones Dam, a new reclamation project on the Stanislaus River. *Id.* at 651-52. California issued the permits but limited the amount of water that the project could impound. *Id.* at 652-53. The federal government then sought a declaratory judgment in federal district court to allow the United States to impound all of the previously unappropriated water it needed for the project without obtaining state permission. *Id.* at 647. The district court held that, as a matter of comity, the federal government should seek a permit from California, but that California should unconditionally grant the permit if sufficient unappropriated water existed. *Id.* The Ninth Circuit affirmed but held that § 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383 (1976), compelled the federal government to seek state approval before making the appropriation. *Id.*

Although *New Melones Dam* did not deal directly with the doctrine of federal reserved rights, it did shed some light on the relationship between the western states and the federal government in the area of water law. The Supreme Court held that § 8 of the Reclamation Act of 1902 requires the United States to acquire its appropriative rights to water for projects in accordance with state law, even if the state imposes conditions upon the water's use. *Id.* at 665-75. This holding gave the states great control over federal reclamation projects, illustrating the Court's newfound concern for the states' interest in controlling the water within their

Gila National Forest in New Mexico and flows through private land before "disappearing in a desert sink just north of the Mexican border."⁶⁹ The state of New Mexico initiated a general adjudication of water rights in the Rio Mimbres.⁷⁰ The United States was joined as a party because it claimed *Winters* rights to the Rio Mimbres for use in the Gila National Forest.⁷¹ Justice Rehnquist, writing for a majority of five justices, affirmed the "minimal need" standard set forth in *Cappaert*⁷² and scrutinized the government's proposed uses for the water.⁷³ Contrary to its decision in *Arizona I*,⁷⁴ the Court held that national forests exist for only two purposes: to preserve a supply of timber and to protect and maintain adequate water flow.⁷⁵ Therefore, the government's reservation of water from the Rio Mimbres could not exceed the amount necessary to accomplish these two purposes. The general tenor of the *Mimbres* opinion is quite unsympathetic to the government's *Winters* rights claims.⁷⁶

borders. See Winston, *Reborn Federalism in Western Water Law: The New Melones Dam Decision*, 30 HASTINGS L.J. 1645, 1672-73 (1979).

⁶⁹ *Mimbres*, 438 U.S. at 697.

⁷⁰ *Id.* at 697 & n.1.

⁷¹ *Id.* at 697-98. The United States was joined pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1976), 438 U.S. at 697 n.1; see *supra* note 47 and accompanying text.

⁷² 438 U.S. at 699-700; see *supra* note 66 and accompanying text.

⁷³ 438 U.S. at 698-718.

⁷⁴ The Court in *Arizona I* expressly adopted the special master's conclusion that the national forests are reserved for five purposes. *Arizona v. California*, 373 U.S. 546, 595 (1963). The special master found that the national forests exist for: "(1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public." Note, *United States v. New Mexico: The Beginning of a Trend Toward Favoring State Water Rights over Federal Water Rights*, 9 N.M.L. REV. 361, 364 (1979) (quoting Special Master Report at 96, *Arizona v. California*, 373 U.S. 546 (1963)).

⁷⁵ *Mimbres*, 438 U.S. at 705-13. The United States Forest Service's enabling act, the Organic Administration Act of 1897, 16 U.S.C. §§ 473-78, 479-82, 551 (1982), provides in part: "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber . . ." *Id.* § 475. In *Mimbres* the government argued that the Act established national forests for three purposes: to preserve a supply of timber, to protect water flow, and additionally to improve and protect the forest in general. 438 U.S. at 707 n.14. This third objective would be accomplished by reserving "minimum instream flows for aesthetic, recreational, and fish-preservation purposes." *Id.* at 705. The Court, construing the Act narrowly, however, recognized only the first two purposes: "Forests [will] be reserved only 'to improve and protect the forest within the boundaries,' or, in other words, for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber." *Id.* at 707 n.14 (emphasis in original) (quoting 16 U.S.C. § 475 (1982)). The Court's restrictive reading of the Act is certainly plausible, but persuasive arguments can be made from the legislative history of the Act in support of the government's reading. See Note, *Water Rights and National Forests—Narrowing the Implied Reservation Doctrine*, *United States v. New Mexico*, 40 OHIO ST. L.J. 729, 743-47 (1979); Note, *Reserved Water Rights in National Forests After United States v. New Mexico*, 1979 UTAH L. REV. 609, 617-24.

⁷⁶ Professor Trelease's comments on the *Mimbres* case are illustrative:

[The Court] emphasized that the quantities allowed would be limited . . . "only that amount of water necessary to fulfill the purpose of the reservation . . ."

In 1983, the Supreme Court had three occasions to address the reserved rights doctrine. In *Arizona v. California (Arizona II)*,⁷⁷ five Indian tribes represented by the United States petitioned for an increase in the quantity of water guaranteed by their *Winters* rights. The petitioners contended that the quantity of their rights did not conform to the Court's 1963 decree in *Arizona I*.⁷⁸ That decree measured the Indians' reserved rights by the amount of water necessary to irrigate all of the "practicably irrigable acreage" on the reservations.⁷⁹ In *Arizona II*, the tribes contended that the special master's report in *Arizona I* underestimated this acreage.⁸⁰ The Court invoked principles of res judicata to bar the Indians from reopening the 1963 decree, citing a strong public interest in finality.⁸¹

In *Nevada v. United States (Truckee-Carson)*,⁸² the Court again held

no more"; it held that reserved rights exist not for "secondary" or "supplemental" purposes, but only for those that qualified as "direct." "Necessary" was amplified to "essential"; the test applied was whether, if water were not provided, "the purposes of the reservation would be entirely defeated."

This was a substantial victory for the water users of the West.

Trelease, *Uneasy Federalism—State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 759 (1980) (footnotes omitted) (quoting from the *Cappaert* and *Mimbres* opinions).

⁷⁷ 103 S. Ct. 1382 (1983). *Arizona II* is a continuation of *Arizona I*, 373 U.S. 546 (1963). See *supra* notes 37-44 and accompanying text.

⁷⁸ *Arizona II*, 103 S. Ct. at 1385.

⁷⁹ In the original action, the Court, endorsing the master's conclusion, held that the federal government had implicitly reserved enough water to allow the Indians to irrigate all of the "practicably irrigable acreage" on the reservations. *Arizona I*, 373 U.S. at 600-01.

⁸⁰ The Indian tribes claimed that certain irrigable lands had been "omitted" from the master's calculations. *Arizona II*, 103 S. Ct. at 1391. The United States contended that these omissions had occurred inadvertently due to "the complexity of the case." *Id.* at 1391 n.6. The states claimed, however, that the omission was a deliberate "tactical decision made to portray the irrigable acreage standard as a reasonable basis for calculating the reservations' water needs." *Id.*

⁸¹ Res judicata was technically inapplicable because *Arizona II* was a continuation of the *Arizona I* litigation, rather than a separate action. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* 680 (4th ed. 1983); see also *RESTATEMENT (SECOND) OF JUDGMENTS* §§ 17(1), 18(1) (1980). The Court found, however, that the principles of finality behind the doctrine of res judicata compelled its holding in *Arizona II*, 103 S. Ct. at 1392-95. The Court said:

Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. . . .

. . . The record demonstrates that it was the understanding of the parties and Master Riskind's intention that the calculation of practicably irrigable acreage be final. That was our understanding as well. . . .

. . . Our long history of resolving disputes over boundaries and water rights reveals a simple fact: This Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made. . . .

. . . [W]e have determined that the principles of res judicata advise against reopening the calculation of the amount of practicably irrigable acreage. . . .

Id. (citations and footnotes omitted).

⁸² 103 S. Ct. 2906 (1983).

that a *Winters* right, once quantified, cannot be increased. In 1913, the United States instituted an action to adjudicate the reserved rights of the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project. These rights were finally quantified in a 1944 consent decree.⁸³ The United States sued again in 1973 to obtain additional rights for both federal enclaves.⁸⁴ Justice Rehnquist, speaking for a unanimous Court, invoked *res judicata* to bar relitigation of the United States' reserved rights.⁸⁵

The Court's most recent decision in the area of federal reserved rights, *Arizona v. San Carlos Apache Tribe of Arizona (San Carlos Apache)*,⁸⁶ is essentially a sequel to *Colorado River*.⁸⁷ Several water rights claimants initiated general water adjudications in Arizona state courts in the mid-1970s.⁸⁸ The United States, on behalf of itself and various Indian tribes, was joined as a defendant.⁸⁹ Later, some of the Indian tribes whose rights were implicated in the state proceedings removed the state court actions to federal court and sought declaratory and injunctive relief to block further adjudication of their reserved rights in state court.⁹⁰ The federal district court, relying on *Colorado River*, remanded the removed actions back to state court and dismissed the other federal actions without prejudice.⁹¹ The tribes appealed from these dismissals and the Ninth Circuit reversed, holding that the Arizona statehood enabling act⁹² deprived Arizona state courts of jurisdiction over the Indians' water claims.⁹³

The Supreme Court held that despite the statehood enabling act's provision that the federal government reserved exclusive jurisdiction

⁸³ *Id.* at 2909-10.

⁸⁴ *Id.*

⁸⁵ *Id.* at 2925. The Ninth Circuit held below that the Tribe and the Project were neither parties nor coparties to the original action: "They were non-parties who were represented simultaneously by the same government attorneys." *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1309 (9th Cir. 1981). The court of appeals reasoned that the Tribe and the Project were not adverse parties bound by the first action because "[a]s a general matter, a judgment does not conclude parties who were not adversaries under the pleadings." *Id.* The Ninth Circuit further cautioned that "[i]n representative litigation we should be especially careful not to infer adversity between interests represented by a single litigant." *Id.* Therefore, the court reasoned, the earlier litigation did not conclude the dispute in the later action between the Tribe and the Project. *Id.* at 1309-11.

The Supreme Court disagreed: "We hold that . . . the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the [first] suit." *Truckee-Carson*, 103 S. Ct. at 2925.

⁸⁶ 103 S. Ct. 3201 (1983).

⁸⁷ See *supra* notes 50-58 and accompanying text.

⁸⁸ *San Carlos Apache*, 103 S. Ct. at 3209.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Act of June 20, 1910, ch. 310, 36 Stat. 557, 569 (1910).

⁹³ *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (9th Cir. 1982), *rev'd*, 103 S. Ct. 3201 (1983); see *San Carlos Apache*, 103 S. Ct. at 3209.

over Indian lands in Arizona, the McCarran Amendment⁹⁴ gave the state courts jurisdiction in comprehensive water rights adjudications.⁹⁵ The Court also reiterated the *Colorado River* doctrine, which established state courts as the preferred fora for water adjudications involving federal reserved rights.⁹⁶

II

ANALYSIS: RECONCILING THE PRIOR APPROPRIATION DOCTRINE AND THE *WINTERS* DOCTRINE

The western states developed the prior appropriation doctrine to apportion their limited surface water supplies fairly and efficiently among competing users.⁹⁷ The prior appropriation system depends upon quantification and strict control of the rights of all users.⁹⁸ In contrast, the *Winters* doctrine awards water rights of uncertain dimension, thus injecting a large measure of uncertainty into the western states' water use schemes.⁹⁹ The courts can minimize the tension between the *Winters* doctrine and prior appropriation by treating federal reserved rights in the same manner as ordinary appropriative rights.¹⁰⁰

A. The Inherent Conflict Between Prior Appropriation and the *Winters* Doctrine

An ordinary appropriative right, once obtained, occupies a place in the state water system based on its relative seniority.¹⁰¹ A *Winters* right, however, does not fit so neatly into the state water systems. A federal reserved right differs in three important ways from an ordinary water

⁹⁴ 43 U.S.C. § 666 (1976); see *supra* note 47.

⁹⁵ 103 S. Ct. at 3212. The Court stated that "we are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment." *Id.* (footnotes omitted).

⁹⁶ *Id.* at 3212-16. The Court summarized the policy behind the *Colorado River* doctrine and applied it to the instant case:

The McCarran Amendment, as interpreted in *Colorado River*, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications. . . .

. . . [A]ssuming that the state adjudications are adequate to quantify the rights at issue in the federal suits, and taking into account . . . the expertise and administrative machinery available at the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, we must conclude that the District Courts were correct in deferring to the state proceedings.

Id. at 3214-15 (footnotes omitted); see also *supra* note 57 and accompanying text.

⁹⁷ See *supra* notes 11-19 and accompanying text.

⁹⁸ See *id.*

⁹⁹ See *infra* notes 101-21 and accompanying text.

¹⁰⁰ See *infra* notes 122-35 and accompanying text.

¹⁰¹ See Trelease, *supra* note 27, at 474.

right established under the prior appropriation doctrine.¹⁰²

First, the creation and maintenance of a *Winters* right does not depend on any use, beneficial or otherwise.¹⁰³ The reserved right may lie dormant for many years, set aside for some future use.¹⁰⁴ The priority of such a reserved right dates from the establishment of the federal reservation.¹⁰⁵ Junior holders of water rights may use this federally reserved water during "dormant" periods, but the federal government may exercise its reserved right and preempt these junior users at any time.¹⁰⁶ In contrast, holders of ordinary appropriative rights must maintain a beneficial use of their water or lose their rights.¹⁰⁷

Second, a *Winters* right generally is not quantified.¹⁰⁸ To determine the quantity of a reserved right, a court must examine the purposes of the reservation of land set aside by Congress.¹⁰⁹ Until quantified in an adjudication, the size of a *Winters* right remains completely uncertain.¹¹⁰ Nevertheless, the right exists, with its priority dating from the establishment of the reservation of land.¹¹¹ Ordinary appropriative rights, however, are not legally recognized *until* they are quantified and adjudicated.¹¹²

Third, a federal reserved right need not be recorded.¹¹³ In the reserved rights cases, the Supreme Court has consistently recognized unrecorded federal reserved rights.¹¹⁴ Claimants of ordinary appropriative rights, by contrast, will lose their rights if they do not fix them in a water adjudication.¹¹⁵

Because of the striking differences between federal reserved rights and appropriative rights, the continuing coexistence of the two poses serious questions. The tension between federal reserved rights, which

¹⁰² *Id.*

¹⁰³ *Id.*; see also Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111, 1113 (1978).

¹⁰⁴ See Trelease, *supra* note 27, at 474.

¹⁰⁵ Trelease, *supra* note 76, at 756; see Comment, *supra* note 15, at 560; Comment, *Federal Reserved Rights in Water: The Problem of Quantification*, 9 TEX. TECH L. REV. 89, 93 (1977) ("[M]ost reservations were created around the turn of the century and have that time as a priority date.").

¹⁰⁶ Trelease, *supra* note 76, at 756.

¹⁰⁷ See *supra* notes 12-13 and accompanying text.

¹⁰⁸ Trelease, *supra* note 27, at 474.

¹⁰⁹ See, e.g., *Cappaert v. United States*, 426 U.S. 128, 141 (1976) ("The implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purposes of the reservation, no more.").

¹¹⁰ Comment, *supra* note 105, at 23-94.

¹¹¹ Trelease, *supra* note 76, at 776; Comment, *supra* note 15, at 560; Comment, *supra* note 105, at 93.

¹¹² See *supra* notes 17-18 and accompanying text.

¹¹³ Trelease, *supra* note 27, at 474.

¹¹⁴ See, e.g., *Arizona v. California*, 373 U.S. 546, 598-600 (1963); *United States v. Powers*, 305 U.S. 527, 532-33 (1939); *Winters v. United States*, 207 U.S. 564, 577 (1908).

¹¹⁵ See *supra* notes 17-18 and accompanying text; see also Comment, *supra* note 15, at 551.

exist "in a state of uncorrelated mystery,"¹¹⁶ and appropriative rights, which are strictly quantified and controlled, is all too clear. *Winters* rights threaten the West in two ways: because they are not based on use, *Winters* rights allow water to go unused; because they are uncertain, they interfere with public and private decisions. The resulting uneasiness and frustration that western water users feel has led to melodramatic descriptions of the *Winters* doctrine as "a first mortgage of undetermined and indeterminable magnitude"¹¹⁷ and as a "'sword of Damocles' hanging over 'every title to water rights to every stream which touches a federal reservation.'"¹¹⁸ The reserved rights doctrine has not yet caused western appropriative water users any substantial harm.¹¹⁹ Nevertheless, future assertion of reserved rights may cause serious problems in the West, as more users compete for less available water.¹²⁰

The Supreme Court, demonstrating some sensitivity to the states' concerns over reserved rights, has begun to circumscribe the scope of the *Winters* doctrine. The Court's new decisions make federal reserved rights mesh more smoothly with the states' prior appropriation water law systems.¹²¹ These efforts have eased the tension between *Winters* rights and appropriative rights.

B. Reconciliation of Prior Appropriation and the *Winters* Doctrine in Western Water Law

Both the *Winters* doctrine and the doctrine of prior appropriation serve important functions in the West: federal reservations of land would be useless without sufficient water to fulfill their purposes, and prior appropriation has developed as a matter of necessity to provide for prudent and beneficial use of the West's most vital and scarce resource. Surely neither system is likely simply to vanish, thereby eliminating the conflict. Furthermore, the likelihood that Congress will enact comprehensive legislation to effect a reconciliation is small.¹²² Thus, a judicial compromise seems to be the only possible solution. The Court's efforts to make *Winters* rights inoffensive to western states' prior appropriation schemes have been a significant step in the right direction.

¹¹⁶ *United States v. District Court in and for the County of Eagle*, 169 Colo. 555, 580, 458 P.2d 760, 772 (1969), *aff'd*, 401 U.S. 520 (1971).

¹¹⁷ Address by Northcutt Ely to the National Water Commission (Nov. 6, 1969), *quoted in* Trelease, *supra* note 27, at 475.

¹¹⁸ *Id.*

¹¹⁹ See Trelease, *supra* note 27, at 474-75, 491-92.

¹²⁰ See *supra* note 1.

¹²¹ See *supra* notes 45-49, 56-96 and accompanying text.

¹²² Numerous bills have been proposed since 1955, but Congress has passed none of them. See Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966); Trelease, *supra* note 27, at 475.

Federal reserved rights and appropriative rights conflict in three major areas: use,¹²³ quantification,¹²⁴ and adjudication and recordation.¹²⁵ By molding reserved rights to make them resemble ordinary appropriative rights as closely as possible, the Court can protect both the interests of the United States in supplying its reservations and the states' interest in controlling their water supplies.

The federal reserved rights doctrine and the prior appropriation doctrine clash most strikingly in the area of use.¹²⁶ Appropriative rights terminate if the appropriated water is no longer put to a continuous beneficial use. Appropriative rights, therefore, are concrete and ensure that water not go unused. *Winters* rights, however, exist independently of any use, present or future, beneficial or otherwise. In reserving land for a particular purpose, Congress may have contemplated the reservation of the water required to carry out that purpose. Therefore, the courts should limit *Winters* rights to the amounts of water required by the government or the Indians to carry out the *present* purposes of the reservation. Since the *Arizona I* case,¹²⁷ in which the Supreme Court last expressly stated that the quantity of a *Winters* reservation may accommodate future as well as present uses, the Court has limited this expansive interpretation of reserved rights by strictly construing the purposes of the federal reservations.¹²⁸ The Court's next step may be to limit reserved rights to those needed for immediate beneficial uses in the federal enclaves while eliminating *Winters* rights reserved for future purposes.

The prior appropriation doctrine and the *Winters* doctrine must be reconciled not only on the issue of use, but also on the issue of quantification. At present, the controlling standard for quantifying *Winters* rights is that of "minimal need" put forth in *Cappaert*.¹²⁹ This standard requires the examination of the purpose of the reservation whose "minimal need" must be met. Again, a court need determine only the present water needs of the federal enclave. The courts should eliminate such forward-looking standards as the "practicably irrigable acreage" measure employed by the Supreme Court in *Arizona I*, because they generate uncertainty and therefore hinder decisionmaking. In addition to avoiding forward-looking standards, courts should follow the Supreme

¹²³ See *supra* notes 103-07 and accompanying text.

¹²⁴ See *supra* notes 108-12 and accompanying text.

¹²⁵ See *supra* notes 113-15 and accompanying text.

¹²⁶ See *supra* notes 103-07 and accompanying text.

¹²⁷ *Arizona v. California*, 373 U.S. 546 (1963).

¹²⁸ See *United States v. New Mexico*, 438 U.S. 696, 705-13 (1978) (The Court noted that Congress intended to reserve water for "domestic, mining, milling, or irrigation purposes" but not for recreational purposes (quoting 16 U.S.C. § 481 (1976))).

¹²⁹ See *supra* note 66.

Court's lead in *Arizona II*¹³⁰ and *Truckee-Carson*,¹³¹ and invoke principles of strict finality to deny reopening the issue of quantification of *Winters* rights.

The final step is to decide how best to subject legitimate reserved rights to the states' systems of adjudication and recordation. Although various administrative¹³² and legislative¹³³ schemes have been suggested, the Court's instincts, in delegating this responsibility to the state courts through the *Colorado River*¹³⁴ doctrine and the *Eagle County*¹³⁵ interpretation of the McCarran Amendment, are correct. The best way to integrate reserved rights into the states' prior appropriation systems is to determine these reserved rights in the state systems. By means of water adjudications, reserved rights can be recorded and defined in the same manner as ordinary appropriative rights.

CONCLUSION

The doctrine of federal reserved water rights has the potential to greatly disrupt the prior appropriation systems of the western states. The Supreme Court, after allowing a steady expansion of the *Winters* doctrine up through the 1970s, has since shown increased solicitude for the rights of the states to determine how best to allocate their scarce waters. By strictly defining *Winters* rights, the Court has made the federal government's presence as a western water user much less disruptive. By continuing this trend and further circumscribing the scope of the reserved rights doctrine, the Court perhaps can largely eliminate this source of federal-state tension in the western states.

Todd A. Fisher

¹³⁰ 103 S. Ct. 1382 (1983).

¹³¹ 103 S. Ct. 2906 (1983).

¹³² See, e.g., Ranquist, *supra* note 12, at 710-24.

¹³³ See, e.g., U.S. Dep't of Justice, A Proposed Bill for the Inventorying and Quantification of the Reserved, Appropriative and Other Rights to the Use of Water by the United States (June 20, 1974 draft); see also Little, *Administration of Federal Non-Indian Water Rights*, 27B ROCKY MTN. MIN. L. INST. 1709, 1772-79 (1982) (discussing adjudication alternatives).

¹³⁴ 424 U.S. 800 (1976); see also *supra* notes 55, 58 and 96 and accompanying text.

¹³⁵ 401 U.S. 520 (1971); see also *supra* notes 47-49 and accompanying text.

INTRODUCTION TO RESERVED WATER RIGHTS

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INTRODUCTION.

This paper will discuss the origin and development of the reservation doctrine, describe the various legislative attempts to limit or abolish the doctrine, and discuss its current status and implementation. The paper will concentrate on the NonIndian aspects of the doctrine.

The reservation doctrine inspires anger, fear, disdain, and occasionally eloquence:

Corker.

It is the product of a fabricated legislative history. It is a perversion and a fabrication." Corker, A REAL LIVE PROBLEM OR TWO FOR THE WANING ENERGIES OF FRANK J. TRELEASE, 54 Den. L. J. 499, 500 (1977).

Trelease.

"Cyprinodon diabolis, The Devil's Hole pupfish is alive and well and living in a striated marble palace in Nevada, located within a small addition to the Death Valley National Monument created for his benefit in 1952.". The reserved rights doctrine "is very like the Devil's Hole pupfish in many ways. It too is an evolutionary sport. It too lives in Devil's hole. It too has friends in high places within the federal bureaucracy and judicial system." Trelease, FEDERAL RESERVED WATER RIGHTS SINCE PLLRC, 54 Den. L. J. 473 (1977).

Goldberg.

Described the relationship between western water law, including the reservation doctrine, and federalism as a "concoction of Byzantine politics and legalistic archaeology." Goldberg, INTERPOSITION--WILD WEST WATER STYLE, 17 Stan. L. Rev. 1, 36 (1964).

Commenting on westerner's criticism of the doctrine, and of federal bureaucracy generally, he said: "This sort of fulmination is well within the tradition that permits the

Westerner to "blast at an all-consuming federal encroachment in words more blistering than all the winds that blow from Spokane to San Antonio" in unconcerned disregard of the historical fact "that from start to finish he was [federally] subsidized from his brogans to his sombrero. . .".
Goldberg, id. at 1.

Ely.

The reservation doctrine is a "first mortgage of undetermined and indeterminable magnitude," is a "sword of damocles" hanging over private water rights. Ely. Address to National Water Commission, Nov. 6, 1969. Reported in 54 Den. L. J. at 475 (1977).

Hanks.

The impact of the reservation doctrine could be "staggering indeed": "In 16 western states, the BIA administers 52,307,036 acres; a total of 138,595,360 are included in national forests, which are reserved areas, in the reclamation states. Approximately 85% of the entire state of Nevada is owned by the US. Of the 60 million acres of federal land in Nevada, 12 million acres are reserved lands. In Arizona, approximately 73 percent of all land is owned by the federal government." Hanks, PEACE WEST OF THE 98TH MERIDIAN--A SOLUTION TO FEDERAL-STATE CONFLICTS OVER WESTERN WATERS, 23 Rutgers L. Rev. 33,43 (1968).

Johnson.

Commenting on US v. New Mexico: "If you think that you can think about a thing (that thing being the purposes for which water was reserved under the Forest Service Organic Act in 1897) and that thing is inextricably attached to something else (the something else being the Reserved Rights Doctrine) without thinking of the thing to which it is attached to (which, of course, is the Reserved Rights Doctrine, which you can't think about because it didn't exist in 1897) then you have a legal mind. Or at least you may be qualified to sit on the Supreme Court!" Inst. for Nat. Res. Law Teachers, Boulder Colo., May 28, 1981. Adapted from saying by Thomas Reed Powell.

THE ORIGIN OF THE RESERVATION DOCTRINE

Disagreement on the date of origin of the doctrine.

The earliest cited case on the doctrine is United States v. Rio Grande Irrigation Co. 174 US 690 (1899), where the court said, per dicta, "[A] state cannot by its legislation destroy the

right of the United States, as owner of the land bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the government property." *Id.* at 703.

In Winters v. United States, 207 US 564 (1908) the Court recognized reserved rights in an Indian Tribe even though nothing had been said in the Agreement with the Indians about water. The Court relied on Rio Grande for the proposition that "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."

Samuel Weil, in his treatise WATER RIGHTS IN THE WESTERN STATES (Bancroft-Whitney, 1911), says there are "divergent theories regarding the law of waters . . . on military and Indian reservations. . . ."

But the general tendency of the Federal courts in dealing with water on or ~~near~~ by military or Indian reservations is to . . . tacitly assume that the creation of the reservation impliedly repealed the act of 1866 as to waters thereon; and to restore the proprietary rights of the United States, . . . not limited to the amount of water in actual use at any specific time."

"Military and Indian reservations are in exclusive government occupancy, wherein they may possibly differ from the forest and other reserved areas, which are intended to be open to the people." (Sec. 207).

The state's rights argument. This position argues that three acts, the Act of 1866, 1870, and 1877, constituted waivers of federal reserved rights claims. This argument seemed to be confirmed in California Oregon Power Co. v. Portland Beaver Cement Co., 295 US 142 (1935) where the court said:

[The Desert Land Act] effected a severance of all water on the public domain, not theretofore appropriated, from the land itself. . . Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories. . . ." 295 US at 162.

FPC v. Oregon, 349 US 435 (1955), alerted western lawyers to the possibility that the reserved rights doctrine might apply to NonIndian reserves, although no actual allocation of water was made in the case. The Court denied Oregon's claim of ownership of a nonnavigable stream, saying that the three above acts did not constitute a severance of waters as to federally "withdrawn" lands, and then held that a federally licensed project could go forward over state objections.

Arizona v. California, 373 US 546 (1963), firmly held that the reservation doctrine applied to NonIndian, reserved public lands, and the court allocated water to such reserved lands, 41,839 acre-feet per year for the Havasu Lake National Wildlife Refuge, and 28,000 acre-feet per year for the Imperial National Wildlife Refuge, both with 1941 priorities.

EXPECTATIONS DASHED

The western water establishment cried "unfair" after FPC v. Oregon and Arizona v. California, arguing that these cases destroyed legitimate expectations of prior appropriators. Trelease, debunking the claim that the doctrine originated with Rio Grande in 1899, and Winters in 1908, argued:

"I was there. I took a course in water law in 1938 and got an A in it. I then went to work for L. Ward Bannister, one of the negotiators of the Colorado River Compact and lecturer in water law at Denver University and Harvard University. I helped to bring his notes up to date. I listened in on discourses he had with Ralph Carr, Jean Breitenstein, John Reed, and other "irrigation lawyers" of the old school. I started to teach water law in 1946, and I was General Counsel for the Missouri River Basin Survey Commission in 1952. At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law." Trelease, FEDERAL RESERVED WATER RIGHTS SINCE PLLRC, 54 Den. L. J. 473 (1977).

WESTERN WATER RIGHTS SETTLEMENT BILLS

Starting in 1955 and for the next 15 years, over 50 bills were introduced in Congress to reverse the effects of the reservation doctrine.

Four principal objections were raised to the doctrine.

- (1) The federal government, rather than the states, decides how the water is to be used.
- (2) The federal government does not follow state filing procedures, impairing the completeness of the state's water records. No centralized federal record system exists for reserved water rights.
- (3) Reserved rights are unquantified, creating uncertainty and making long range planning impossible.
- (4) Prior appropriators under state law can lose their rights to preexisting, unquantified, unrecorded,

undiscoverable federal reserved rights.

THE FIRST BILLS

The first bills were introduced by Senator Barrett. Their central theme was that "All unappropriated water in the 17 western states is declared to be free for appropriation under state law" (See Corker, WATER RIGHTS AND FEDERALISM, 45 Cal. L. Rev. 604,606 (1957)) and to require the United States to comply with state appropriation laws rather than claiming waters under the reservation doctrine.

LATER BILLS

Most of the bills introduced over the ensuing years dealt not only with the reserved rights issue, but also with the compensation question under the navigation servitude. In general they proposed that compensation be required for the loss of private property rights under the reservation doctrine and the navigation servitude, that the federal government be required to comply with state water law when it builds projects under the Reclamation Act of 1902, and that FPC licensees be required to comply with state law when they build projects under the Federal Power Act of 1920.

Various compromises were developed, under Senator Kuchel of California and others. None of these bills ultimately passed. See, Hanks, PEACE WEST OF THE 98TH MERIDIAN--A SOLUTION TO FEDERAL-STATE CONFLICTS OVER WESTERN WATERS" 23 Rutgers L. Rev. 33 (1968).

REPORT OF THE PUBLIC LAND LAW REVIEW COMMISSION. (One Third of the Nation's Land, 1970) 147-149. For commentary, see Trelease, WATER RESOURCES ON THE PUBLIC LANDS: PLLRC'S SOLUTION TO THE RESERVATION DOCTRINE, 6 Land and Water Law Review 89 (1970); Muys, COMMENTS ON "FEDERAL RESERVED WATER RIGHTS", 54 Den. L. J. 493 (1977).

The Commission recommended:

- (1) Require federal agencies to give notice of their projected water requirements for the next 40 years;
- (2) Establish administrative or judicial review of the reasonableness of the quantities claimed by the federal agencies;
- (3) For reservations created in the future, require express statement of intent to reserve water, and the quantity reserved;

(4) Require compensation for the taking of water rights vested prior to the 1963 decision in Arizona v. California.

NATIONAL WATER COMMISSION REPORT (Water Policies for the Future, 1973) pp. 467-468.

The Commission took a different approach from the PLLRC. It recommended:

(1) Require federal agencies to give notice of their projected water requirements for the next 40 years.

As to existing uses by federal agencies, the agencies would be entitled to priority as of the date of the original reservation of the federal lands.

Future uses would receive a priority date as of the date of initiation of actual use.

Compensation would be required where existing private water uses were displaced by new federal agency uses.

REASONS FOR THE FAILURE OF PROPOSED SETTLEMENT LEGISLATION

(1) Eastern suspicion of western avarice.

"The Wild West water version of interposition . . .: not only should the [western] states have the right to do as they please, but they should be able to do it with federal property, and at federal expense." Goldberg, 17 Stan. L. Rev. 1, 3 (1964).

(2) Rising influence of the environmental movement. Reserved rights tend to protect instream flows, forests, wildlife, and environmental interests.

(3) Splits in western water politics in the 1960s, e.g., over the proposed diversion of Columbia River water to the Southwest, and over the continuation of the 160 acre limitation.

(4) Enactment of Section 111 Rivers and Harbors Act, 1970, 33 USC Sec. 595a, reversing United States v. Rands, 389 US 121 (1967), and United States v. Twin City Power Co., 350 US 222 (1956) and providing that when condemnation occurs, compensation must be paid to riparians on navigable waters for the "highest and best use" of their uplands, unburdened by the navigation servitude. This excised one of the major problems addressed by proposed settlement legislation.

(5) The Supreme Court's interpretation of the McCarran Amendment, 66 Stat. 560, 43 USC Sec. 666 to constitute waiver of sovereign immunity for suits in federal or state courts to adjudicate, and quantify, federal reserved water rights. Colorado River Water Conservation Dist. v. United States, 424 US 800 (1976), United States v. District Court for Eagle County, 401 US 520 (1971).

(6) The fact that no one could be found whose vested water right had been destroyed by the exercise of a federal reserved right.

The PLLRC reported that "The federal lands are the source of most of the water in the 11 coterminous western states, providing approximately 61% of the total natural runoff occurring in the region. Most of this runoff comes from land withdrawn or reserved for specific purposes. Forest Service and National Park Service reservations contribute about 88 % and 8 %, respectively, of the runoff from public lands and more than 59 % of the total yield from all lands of those states." ONE THIRD OF THE NATION'S LAND, Final Report of the PLLRC, p. 141, 1970.

The PLLRC reported, however, that "Although most of the current concern relates to the doctrine's potential future impact, such potential impacts could be major". Id. at 144.

In 1964 Nicolas B. Katzenbach, Deputy Attorney General for the US said that

"for all the outcry. . . not one state, not one county, not one municipality, not one irrigation district, not one corporation, not one individual has come forward to plead and prove that the United States. . . has destroyed any private right." Hearings on S. 1275 Before the Subcommittee on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 88th Cong. 2nd. Sess. (1964). Trelease reported that "Twenty-two years after Pelton Dam this is still true." Trelease, 54 Den. L. J. at p. 492 (1977).

Corker, commenting on the "de minimus" quantity of reserved rights as to NonIndian lands, noted that

"It is the quantity beneath the accuracy of a stream gauge. It is what a bird, a butterfly, a deer, or a backpacker drinks from a stream without need of permission. [This statement was made prior to US v. New Mexico; not even these minimal drinkers would now be protected]. The rest of the water flows from the National Forests and the National Parks subject to the law of gravity." Corker, 54 Den. L. J. 499 (1977).

Professor Corker, after extensive research on a report for the

PLLRC, finally found an "injured" person. Mrs. Glenn sued under the Tort Claims Act for loss of a 1930 irrigation appropriation to a recreation area in a National Forest established in 1897. Her suit was dismissed on stipulated facts. Apparently sufficient water was made available for both Mrs. Glenn and the Forest Service. See *Glenn v. United States*, Civil No. C-153-61 (D. Utah March 16, 1963) discussed in *DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS*, by Wheatley, Corker, Stetson, and Reed. Clearinghouse for Federal Scientific and Technical Information of the Dept. of Com., PB 188 065 & 188 066. See also, Corker, *LET THERE NO NAGGING DOUBTS: NOR SHALL PRIVATE PROPERTY, INCLUDING WATER RIGHTS, BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION*, 6 Land & Water L. R. 109 (1970)

THE DEVIL'S HOLE PUPFISH

While this case is cited for the implied reservation doctrine, it really belongs in the express reservation category. In *Cappaert v. United States*, 426 US 128 (1976) the court enjoined an irrigator's groundwater pumping which was lowering the level of water in Devil's Hole, and endangering the spawning grounds of the tiny pupfish. A 1952 Presidential Proclamation had expressly reserved this water for the pupfish. The court adopted a rule of "minimal need" to effectuate the reservation's purposes, saying it applied to both express and implied reservations.

The use of this reserved water did not interfere with an "existing" private appropriation right. The creation of the federal reservation clearly pre-dated the planned private use, and the water-related purpose of the reservation was clearly expressed.

THE GILA NATIONAL FOREST

In *United States v. New Mexico*, 238 US 696 (1978), the Court upheld federal reserved rights for National Forest lands. The United States claimed reserved rights for minimum instream flows, and for recreational, stockwatering, and fish purposes. But the Court said it would recognize only "primary" purposes under the National Forest Organic Act of 1897, 16 USC Secs. 473-478, 479-82, 551 (1976). These purposes did not include recreation, aesthetics, wildlife-preservation, or cattle grazing which the court called "secondary purposes". They only include securing favorable conditions of water flows, and furnishing a continuous supply of timber for the people.

A second issue in *New Mexico* was whether the Multiple Use Sustained Yield Act of 1960, P.L. 86-517, 74 Stat. 215,

codified as amended at 16 USC Secs 528-531 (1976), reserved additional waters. The Court held not, saying that although Congress intended the forests to be administered for broader purposes after 1960, Congress did not intend to reserve water for secondary, MUSYA purposes.

Some 16 or 17 Articles and Notes appeared on the New Mexico case. See, e.g. "Water Rights and National Forests--Narrowing the Implied Reservation Doctrine: United States v. New Mexico, 40 Ohio State Law Journal 728 (1979); Boles, Jr. and Ellicott, "United States v. New Mexico and the Course of Federal Reserved Water Rights, 51 Colo. L. Rev. 209 (1980); Fairfax & Tarlock, No Water for the Woods: A Critical Analysis Of United States v. New Mexico, 15 Ida. L. Rev. 509 (1979).

UNITED STATES v. CITY AND COUNTY OF DENVER, 656 P. 2d 1 (Colo. 1982). (Not appealed) This case is the most extensive implementation of the reservation doctrine to date and deserves careful attention.

In this complex state-court adjudication the United States submitted claims for reserved water rights covering seven national forests, three national monuments, one national park, over 1500 public waterholes and springs, two mineral hot springs, and the public domain administered by the Bureau of Land Management. The case involved thousands of claims for state law appropriation rights. 169 parties objected to the US claims, represented by at least 70 different attorneys. A Water Court decree was appealed to the Colorado Supreme Court. That court held:

NATIONAL FORESTS

Instream flows for recreational, scenic, and wildlife purposes. The United States claimed instream flow rights for watershed and timber protection, and wanted to use this water for recreational, scenic, and wildlife protection.

HELD: Instream flow claim rejected. The US failed to demonstrate that this water was needed for national forest purposes of watershed protection and timber production.

Does MUSYA expand reservation purposes? The United States claimed that MUSYA (1960) expanded the purposes for which water could be reserved under the 1897 Act.

HELD: MUSYA did not expand these purposes. While conceding the Supreme Court's statement in New Mexico was dicta, the Colorado Court said that the dicta was controlling. Congress was aware of the Reserved Rights Doctrine when it passed MUSYA, but did not choose to reserve additional water explicitly.

DINOSAUR NATIONAL MONUMENT

Reservations for Monuments. The US claimed reserved instream flows in the Yampa River for recreational boating (river rafting) within the Monument. This have seriously impaired junior appropriators upstream on the Yampa. This National Monument was created under 16 USC Sec. 431 (1976) by presidential proclamation to preserve public lands of outstanding historic and scientific interest. President Wilson created it in 1915 to preserve an "extraordinary deposit of Dinosaurian and other gigantic reptilian remains".

HELD: Recreational boating is not one of the purposes for

which water can be reserved under the National Monument Act.

Monument transferred to Park. This Monument was placed under the supervision of the National Park Service in 1938 and the US argued that its "purposes" were thus expanded to include National Park purposes.

HELD: The transfer was done for administrative convenience and did not change the purposes for which water could be reserved. The area is still a Monument, being administered by the National Park Service.

Instream flows for scientifically important species. The US claimed instream flows might be necessary for fish habitats of endangered species of historic and scientific interest.

HELD: Claim upheld. REMANDED for determination of quantity needed for these purposes. The US must quantify its claim within 6 months.

ROCKY MOUNTAIN NATIONAL PARK

National Forest transferred to Park status. This Park was created from a national forest. The land was transferred to the Park in 1915, and again in 1930.

HELD: For reservation purposes that are common to both national forests and national parks (watershed protection and timber production), the priority date is the initial national forest reservation.

National Parks also have broader purposes, inter alia, conserving scenery, historic and scientific objects, and wildlife. See National Park Service Act of 1916, 16 USC Sec. 1 (1976). The priority date for the reserved rights for these broader purposes is the date the land was made into a Park. Decrees were awarded for minimum flows and lake levels for conservation of scenic, natural and historic objects and for recreational and aesthetic purposes.

PUBLIC SPRINGS AND WATERHOLES

Reservation by Interior Dept. regulation. The federal government claimed reserved water rights for the entire yield of numerous waterholes and springs, whether tributary or nontributary, located on lands withdrawn by a 1926 executive order titled "Public Water Reserve No. 107".

HELD: The Executive Order was issued under authority of

the Stock Raising Homestead Act of 1916, 43 USC Sec. 300 (1976). While the Exec. Order did not state an intention to reserve water and withdraw it from appropriation under state law, Department of Interior regulations did state such intention, and that is adequate to create a reserved right.

Anti-monopolization purpose for reservation. The Dept. of Interior REGULATIONS reserved water to "prevent the monopolization of vast land areas in the arid states by providing a source of drinking water for animal and human consumption".

HELD: These regulations reserved only sufficient water to carry out this anti-monopolization purpose, and no more. The springs and water holes contain more water than is minimally essential for this purpose. The government has 4 years to quantify its minimal needs to effectuate this purpose.

Tributary springs. The reservation applies to both tributary and nontributary springs; the reservation documents made no distinction between these two types of sources.

MINERAL HOT SPRINGS

Reservation for leasing purposes. The federal government claimed reserved water rights to hot springs for leasing purposes pursuant to the Pickett Act (43 USC Sec. 141 (1976)).

HELD: Reserved rights upheld.

Reservation for geothermal power production. The federal government claimed reserved water rights to hot springs for geothermal power production, under the Pickett Act, and under the Geothermal Steam Act of 1970, 30 USC Sec. 1001, et seq. (1976).

HELD: No reserved rights. The Geothermal Act is principally a leasing Act. No express or implied intent can be found in either Act to reserve water for power generation.

Federal licensees and contractors exercising reserved right. The federal government claimed that permittees, licensees, and concessionaires could exercise the federal reserved right, and that it was not necessary for the federal government to itself exercise these rights.

HELD: Licensees etc. can exercise the federal reserved right.

TWO OTHER ISSUES were expressly not decided by the court:

(1) whether reserved rights are limited to waters on, under, or touching the reserved lands;

(2) Whether the reserved right can be transferred to a use not within the original purposes of the reservation. These issues were not properly before the court.

RESERVED WATERS ON BLM LANDS

In Sierra Club v. Watt, 659 F.2d 203 (D.C.Cir.1981) the Court denied the Sierra Club's claim that FLPMA had reserved waters on BLM lands for "scenic, scientific, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values", ruling that FLPMA merely set forth "purposes, goals and authority for uses of the public domain," and did not reserve any water.

THEORETICAL BASIS FOR THE RESERVATION DOCTRINE

This topic is considered last in this outline, or almost so, because it is a peculiar concern of academics, rather than the courts. The Courts have been concerned with results, letting theoretical bases take the hindmost. Nonetheless two theories hold some sway. Supporters of each theory claim judicial support:

(1) The federal government owns waters on lands that have been withdrawn, and therefore can do with those waters as it pleases, without regard to state law. See Hanks, FEDERAL-STATE RIGHTS AND RELATIONS, in 2 WATERS AND WATER RIGHTS Sec. 102.1, at 38-40 (R. Clark ed. Supp 1978).

(2) The reservation doctrine is explained by the supremacy clause, coupled with some incidental constitutional power (e.g. commerce power) exercised on the reserved land. See F. Trelease, FEDERAL-STATE RELATIONS IN WATER LAW 138-47 (National Water Commission Legal Study No. 5, 1971).

FEDERAL NON-RESERVED WATER RIGHTS

The argument about the existence of these oddities, and what they look like, has preoccupied a number of federal lawyers and academics. To date the courts have not been concerned with them.

If one cuts through the extensive verbiage on the subject, one thing seems clear. If Congress wants to claim waters for some federal government use, then it has the power to do so, assuming it acts under the Supremacy clause in conjunction with some other empowering clause, e.g., commerce or property. Of course if the federal use damages or destroys vested private water rights, the the owners of those rights, must be compensated. In view of past congressional history (e.g., the Acts of 1866, 1877), and Supreme Court cases (e.g., US v. New Mexico) the Congressional intention to claim such waters will have to be clearly expressed. But, that the power exists is not really be debatable.

Debate can, of course, occur about whether the Congressional intent is clear enough to pass judicial muster. That debate, especially as it concerns the Federal Land Policy and Management Act of 1976, 43 USC Sec. 1701 et seq. (FLPMA) has waxed extensively in the federal legal establishment since 1979. See:

Krulitz view: Such rights probably exist under FLPMA, and other statutes, and, indeed, are not all that hard to find. FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE, FISH AND WILDLIFE SERVICE, BUREAU OF RECLAMATION, AND BUREAU OF LAND MANAGEMENT, 88 Interior Dec. 553 (1979).

Martz view: Such rights probably don't exist, and certainly not unless clearly mandated by Congress; FLPMA is too fuzzy to be the basis of such rights. MEMORANDUM OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR, 88 Interior Dec. 253 (1981).

Coldiron view: "There is no 'federal non-reserved water right.'" NON-RESERVED WATER RIGHTS--UNITED STATES COMPLIANCE WITH STATE LAW, 88 Interior Dec. 1055 (1981).

Olson view (Office of Legal Counsel): Such rights might well exist, but only where congress explicitly or clearly provides for them! U.S. Dept. of Justice, Office of Leg. Counsel, "Federal Non-Reserved" Water Rights (June 16, 1982).

WHAT IS THE DIFFERENCE BETWEEN RESERVED RIGHTS AND NON-RESERVED RIGHTS?

Coggins and Wilkinson suggest that non-reserved rights arise when Congress delegates to a federal agency authority to administratively claim the waters of a particular stream or lake, for a particular location and purpose, e.g., a campsite. These rights have a priority from the date "the public was given notice, probably through rulemaking." G.C. Coggins, C. F. Wilkinson, FEDERAL PUBLIC LAND AND RESOURCES LAW, 1983 Supp. p. 70.



Fact Sheet: WATER RIGHTS IN ALASKA

SEPTEMBER 1985

WHAT ARE WATER RIGHTS?

A water right is a property right for the use of surface and subsurface waters by the public as provided by the Alaska Water Use Act (Alaska Statutes 46.15). This water right allows specified amounts of water from particular water sources to be diverted, impounded and withdrawn for specified uses. When a water right is granted, it becomes attached to the land where the water is being used for as long as you use it. If the land is sold, the water right goes with the land to the new owner, unless it is separated from the land with the approval of the Department of Natural Resources.

HOW DO I OBTAIN WATER RIGHTS?

To obtain water rights in Alaska you submit an Application for Water Rights to the Alaska Division of Land and Water Management. You are issued a permit to develop a water source and construct the means to use the water. Once you prove you are beneficially using the water, a certificate of appropriation is then issued. This is a legal document which conveys water rights once the water is being used. In Alaska, there are no automatic rights to ground water because of ownership of overlying land and there are no rights to surface waters because of ownership of adjoining or surrounding land. Use of water without a permit or certificate does not give the user defensible legal rights to the water, no matter how long the water use continues.

WHAT COSTS ARE INVOLVED?

To insure that the public is notified of the proposed water use, you are required to pay the cost of legal advertisement in at least one issue of a local newspaper in the vicinity of the proposed appropriation. However, if the proposed use will not exceed 1,000 gallons of water per day in a single-family domestic household there is no requirement to publish an advertisement. If there are more potential users than the source of water can supply, the Department may require legal advertisement of all types of water rights applicants.

WHY SHOULD I APPLY FOR WATER RIGHTS?

1. If you have established water rights, you have a legal standing to assert those rights against conflicting uses of water with people who do not have water rights.

2. A person with established water rights has priority to the use of water over persons who later file for water rights from the same water source.
3. Anyone who constructs works for the taking of water (an appropriation), or uses a significant amount of water without a permit or certificate of appropriation is guilty of a misdemeanor. (Alaska Statutes 46.15.180)

A significant amount of water as defined by regulation [Alaska Administrative Code 11 AAC 93.970(14)] is the:

- use of 5,000 or more gallons of water in a day from a single source, or;
 - the regular daily or recurring seasonal use of 500 or more gallons of water per day for 10 days or more per year from a single source, or;
 - any water use that may affect the water rights of other users or the public interest.
4. By filing for water rights, you provide valuable information about water use and consumption in Alaska. This is essential in estimating the present uses of water, predicting future withdrawals, protecting the rights of prior appropriators, and providing for proper management for this important resource.

WHAT OTHER WATER RESOURCES PERMITS MIGHT BE NEEDED FROM THE DEPARTMENT OF NATURAL RESOURCES?

A certificate of approval is required if you want to construct or modify a dam of 10 feet or more in height, or if the storage capacity exceeds 50 acre-feet. A separate application form along with a sliding filing fee applies for various size dams as set forth in the regulations (11 AAC 93.200).

An application for reservation of water may be filed to maintain a specified flow or level of water in a water body at a specified point for specified times. By statute, an instream flow reservation can be made to ensure sufficient water is maintained for protection of fish and wildlife, recreation and park purposes, navigation or transportation purposes, and sanitary and water quality purposes.



HOW DO I OBTAIN AUTHORIZATION FOR SHORT-TERM WATER USE?

Temporary authorization may be required for significant short-term water uses such as construction projects. This authorization does not establish a water right but may help avoid problems with fisheries or existing water right holders. Applications should be made in the form of a letter request to the Department with an associated map showing the location of the water take point and location and amount of water use.

Further information about water rights and copies of the application forms may be obtained from one of the following offices. Applications for water rights must be submitted to a Division of Land and Water Management regional office.

DEPARTMENT OF NATURAL RESOURCES DIVISION OF LAND AND WATER MANAGEMENT

SOUTHEASTERN REGIONAL OFFICE

400 Willoughby Avenue
Suite 400
Juneau, Alaska 99801
465-3400

NORTHERN REGIONAL OFFICE

4420 Airport Way
Fairbanks, Alaska 99701
479-2243

SOUTHCENTRAL REGIONAL OFFICE

Frontier Building
3601 C Street, 10th Floor
Pouch 7-005
Anchorage, Alaska 99510
762-2277

Mat-Su Area Office

Central Plaza, Suite 202
Pouch 874008
Wasilla, Alaska 99687
376-4595

DIVISION OF FORESTRY

HAINES AREA OFFICE

Room 6, Gateway Building
Main Street
Post Office Box 263
Haines, Alaska 99827
766-2120

KETCHIKAN AREA OFFICE

318 NBA Building
Post Office Box 5220
Ketchikan, Alaska 99901
225-3070

PETERSBURG AREA OFFICE

Petersburg State Office Building
215 Sing Lee Alley
Box 1580
Petersburg, Alaska 99833
722-3236

DELTA AREA OFFICE

Mile 267.5 Richardson Highway
Post Office Box 1149
Delta Junction, Alaska 99737
895-4225

TOK AREA OFFICE

Mile 124.1 Glenn Highway
Post Office Box 10
Tok, Alaska 99780
883-5134

SOUTHWEST (McGRATH) AREA OFFICE

McGrath Airport
Box 130
McGrath, Alaska 99627
524-3010

KENAI PENINSULA AREA OFFICE

Mile 92.5 Sterling Highway
S.R.2, Box 107
Soldotna, Alaska 99669
262-7559

COPPER RIVER AREA OFFICE

Mile 110 Richardson Highway
Post Office Box 185
Glennallen, Alaska 99588
822-5534



Fact Sheet: FEDERAL RESERVED WATER RIGHTS

JULY, 1985

WHAT ARE FEDERAL RESERVED WATER RIGHTS?

- Federal reserved water rights are created when federal lands are withdrawn from entry (by Congress or other lawful means) for federal use.
- Federal reserved water rights:
 - apply to both instream and out-of-stream use
 - may be created without actual diversion or beneficial use
 - are not lost by non-use
 - priority dates are established as the date the land is withdrawn for the primary purpose(s)
 - are created for the minimal amount of water reasonably necessary to satisfy both existing and reasonable foreseeable future uses of water for the primary purpose(s) for which the land is withdrawn
- Water rights for secondary purposes must be obtained under state law, AS 46.15.

WHY ARE FEDERAL RESERVED WATER RIGHTS IMPORTANT TO YOU?

- Water users in areas where there are federal land withdrawals should file for water rights with DNR in order to protect their use of water. If a basin wide adjudication is started for your river basin, you can then be assured of being included in the adjudication.
- Holders of water rights with priority dates established before the withdrawal of federal lands within a basin will have water rights senior to the federal government. Water users filing for water rights after the withdrawal of federal lands within a specific basin will have water rights with priority dates later than those of the federal government.

HOW ARE FEDERAL RESERVED WATER RIGHTS ADJUDICATED?

- Federal reserved water rights are a judicial creation. The United States Supreme Court first recognized federal reserved water rights in

Winters v. United States, 207 U.S. 564 (1908), an Indian reservation case. Since that time, court cases have extended the Winters Doctrine to other types of federal land withdrawals.

- Federal law, the McCarren Amendment (43 U.S.C. 666), allows judicial adjudication of federal reserved water rights in state court.
- The McCarren Amendment requires that state court adjudications include all water rights in a river basin, including all claimed federal reserved water rights and state administered water rights.

WHY ARE WE CONCERNED ABOUT FEDERAL RESERVED WATER RIGHTS?

- Because federal reserved water rights are unquantified, DNR does not know how much water is needed or used for the primary purposes of federal land withdrawals in Alaska. Because the unappropriated water available from a water source and the amount of water reserved by a federal withdrawal is unknown, water resources cannot be effectively managed.
- Alaska's growing population and development pressures have caused water supply and water rights conflicts in several areas of unquantified federal reserved water rights. Examples include Sitka's Indian River and Anchorage's Ship Creek.
- For DNR to effectively manage and allocate the state's water and adjudicate water rights, it is necessary to have the federal reserved water rights in Alaska inventoried and quantified by the appropriate federal land management agencies in cooperation with the State of Alaska. The state can then integrate federal reserved water rights with state administratively adjudicated water rights and manage water sources with greater certainty.



HOW MUCH LAND IN ALASKA HAS FEDERAL RESERVED WATER RIGHTS?

- Of the 367.7 million acres in Alaska, almost 49 percent, or more than 178 million acres are reserved federal lands which may have federal reserved water rights:

These federal lands are made up of:

- Military land - 2.5 million acres
- National Forests - 23.2 million acres
- BLM lands - 26.1 million acres
- National Parks - 51 million acres
- Fish and Wildlife Refuges - 76 million acres

For more information about federal reserved water rights and application forms for water rights, please call, write, or come to one of the following Offices:

DEPARTMENT OF NATURAL RESOURCES DIVISION OF LAND AND WATER MANAGEMENT

SOUTHEASTERN REGIONAL OFFICE
400 Willoughby Avenue
Suite 400
Juneau, Alaska 99801
465-3400

NORTHERN REGIONAL OFFICE
4420 Airport Way
Fairbanks, Alaska 99701
479-2243

SOUTHCENTRAL REGIONAL OFFICE
Frontier Building
3601 C Street, 10th Floor
Pouch 7-005
Anchorage, Alaska 99510
561-2020

Mat-Su Area Office
Century Plaza, Suite 202
Pouch 874008
Wasilla, Alaska 99510
376-4595

DIVISION OF FORESTRY

HAINES AREA OFFICE
Room 6, Gateway Building
Main Street
Post Office Box 263
Haines, Alaska 99827
766-2120

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