SB

150

5/6

HOUSE

COMMITTEE REPORT

(9)

Date referred: 3/19/86

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	Jenkins No Rec.
Herrmann	Jenkins No Rec
Cato	Pearce
Thompson	Synd M.W. Miller No. Rec.
Wallis	Miller (NP)

Co-Chairman Shultz

Bradley
5/5/86

Original sponsor: Rules/Governor

IN THE SENATE BY THE RESOURCES COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 150 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "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."

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

* Section 1. AS 46.15.040 is amended by adding a new subsection to read:

(d) The commissioner's issuance of a permit under AS 46.15.080 or of a certificate under AS 46.15.065 or 46.15.120 does not represent a guarantee by the state to the permittee or certificate holder that water will be available for appropriation at a certain volume, quality, artesian pressure, or cost. This subsection does not, however, alter the right a permittee or certificate holder may have against a later appropriator, including a government agency.

* Sec. 2. AS 46.15.065 is amended by adding a new subsection to read:

(f) The adjudication process for a declaration filed under (a) of this section that is pending before the commissioner on the effective date of this Act continues under the procedures set out in this section until the commissioner finally determines whether the declarant is entitled to a certificate. If a certificate is issued under this section, the certificate holder may be included as a participant in an adjudication under AS 46.15.165 or 46.15.166.

* Sec. 3. AS 46.15.140 is amended to read:

Sec. 46.15.140. ABANDONMENT, FORFEITURE, AND REVERSION OF APPROPRIATIONS. (a) The commissioner may declare an appropriation to be wholly or partially abandoned and revoke or amend the certificate of appropriation as to the unused quantity of water if an appropriator, with intention to abandon, does not make beneficial use of all or a part of the [HIS] appropriated water. [AN APPROPRIATION SO FORFEITED AND ABANDONED REVERTS TO THE STATE AND THE WATER BECOMES UNAPPROPRIATED WATER.]

(b) The commissioner may declare that an appropriator has [AN APPROPRIATION TO BE] wholly or partially forfeited an appropriation, and shall revoke the certificate of appropriation in whole or in part if the [AN] appropriator voluntarily fails or neglects, without sufficient cause, to make use of all or a part of the [HIS] appropriated water for a period of five successive years. A person who has a permit to develop a use of water including but not limited to residential, agricultural, industrial, or mining use, but has not developed that property to the point of water use before permit expiration, may file a request for permit extension with the commissioner.

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

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

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

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

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

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

Sec. 46.15.165. ADMINISTRATIVE ADJUDICATIONS. (a) The commissioner may, by order, initiate an administrative adjudication to quantify and determine the priority of all water rights and claims in a drainage basin, river system, ground water aquifer system, or other identifiable and distinct hydrologic regime, including any hydrologically interrelated surface and ground water systems.

(b) In the order initiating an administrative adjudication, the commissioner shall describe the appropriate geographic and hydrologic boundaries of the adjudication area. During the adjudication, the commissioner may adjust the boundaries to ensure the efficient administration of water appropriations among users.

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

(1) serve the order on each applicant, certificate holder, or permittee listed in the department's records within the adjudication area;

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

the adjudication area;

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

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

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

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

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

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

(e) Service of the order under (c)(1) of this section is suffi-

cient if mailed by certified mail, return receipt requested, to the last known address that the applicant, certificate holder, permittee, or claimant has given to the division of the department responsible for administration of water rights. A person served under (c)(1) - (7) of this section who fails to appear in a timely manner and assert a claim as prescribed by the commissioner is estopped from subsequently asserting an objection to the adjudication of that person's water rights within the adjudication area, unless the person is entitled to a federal reserved water right and has failed to consent under (k) of this section.

(f) In an adjudication under this section, the commissioner may appoint an impartial qualified person as a master to preside over the adjudication, to hold hearings, to take testimony, to collect evidence, to propose to the commissioner an order adjudicating the validity of, quantifying, and determining the priority of all water rights, and to take other action the commissioner decides is necessary.

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

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

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

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

(2) classifying applicants, certificate holders, permittees, and claimants in groups that share similar interests, such as by

the amount of water used or the type of use, and restricting their active participation in the adjudication by appointing group representatives for the purposes of receiving notices, examining witnesses, and other adjudicatory functions;

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

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

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

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

(l) A person adversely affected by a final order of the commissioner adjudicating water rights under this section may appeal to the superior court within 30 days after the decision is mailed or delivered to the person.

(m) The commissioner may adopt regulations setting out procedures for administrative adjudications under this section.

Sec. 46.15.166. JUDICIAL ADJUDICATIONS. (a) Instead of initi-

ating an adjudication under AS 46.15.165, the commissioner may, with the concurrence of the attorney general, if a federal reserved water right has been or might be asserted by an agency of the United States on its own behalf or on behalf of a person described in AS 46.15.-165(c)(3) - (6), file on behalf of the state a complaint in superior court to initiate a judicial adjudication consistent with 43 U.S.C. 666 to quantify and determine the priority of all water rights in a drainage basin, river system, ground water aquifer system, or other identifiable and distinct hydrologic regime, including any hydrologically interrelated surface and ground water systems.

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

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

(d) In an adjudication under this section, the court may incorporate in an order or judgment final orders of the commissioner previously issued under AS 46.15.165.

(e) Proceedings under this section shall be conducted without a

jury.

Sec. 46.15.167. EFFECT OF DECISION. The final order of the commissioner under AS 46.15.165 and the final judgment of a court under AS 46.15.166 are binding on each party to the adjudication and on each person who subsequently makes an application for a water right. The court or the commissioner may retain jurisdiction for a period of time necessary to implement an adjudication order or judgment and to provide for subsequent water appropriations.

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

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

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

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

Sec. 46.15.169. FEDERAL RESERVED WATER RIGHTS. This chapter does not represent a commitment by the state to a specific federal reserved water right.

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

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

(1) remove or abate unpermitted works of appropriation,

diversion, impoundment, or withdrawal;

(2) install corrective controls or control works; and

(3) seek enforcement of the order by filing an action in the superior court.

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

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

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

(2) enter private property at all reasonable times after obtaining a search warrant from a judicial officer if the owner refuses consent to entry; and

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

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

Resolution No. 86-8

PARTICIPATION OF MILITARY RESERVATIONS IN WATER RESOURCES PLANNING IN ANCHORAGE BOWL

The Municipality of Anchorage and the Division of Land and Water Management of the Alaska Department of Natural Resources are engaged in comprehensive planning for future public water supplies in the Anchorage Bowl area. The only present and potential sources of water to meet this vital need are Ship Creek, groundwater sources (through public and private wells) and Eklutna Lake (through the Municipality's Eklutna Water Project). Fort Richardson and Elmendorf Air Force Base are significant users of water from both Ship Creek and groundwater sources. The extent of the military's need and actual use is not known, yet this information is vital if a comprehensive water management plan for the Anchorage Bowl is to be achieved.

The Alaska Water Resources Board urges the Governor to:

a. express to the Commanding Officer, Elmendorf Air Force Base and the the Commanding Officer, Fort Richardson, the State's concern that effective water planning and management for the Anchorage Bowl area cannot be achieved without the active participation of the military reservations which also rely on these water sources;

b. encourage the commanding officers to direct their respective staffs to work closely with the Alaska Department of Natural Resources in its analysis of current and projected water demands on Ship Creek and adjacent groundwater sources; and

c. direct copies of the aforementioned correspondence to the Commissioner of Natural Resources and to the Mayor of Anchorage.

Adopted this 27th day of February, 1986
ALASKA WATER RESOURCES BOARD

By: [illegible]

Cyril R. Wanamaker, Chairman

Resolution No. 86-9

ALASKA TO ADMINISTER SECTION 402 (b) NPDES PERMITS

WHEREAS: Alaska has seven classifications of water; however, with the exception of the Chena River and Nolan Creek, the most stringent water quality criterion (drinking water) applies to all waters of the State, and

WHEREAS: EPA, through its Section 402 NPDES Permit process, incorporates the State's water quality standards, and

WHEREAS: The current process of enforcement of water quality standards in the State of Alaska is a duplicative effort between EPA and the Alaska Department of Environmental Conservation, and

WHEREAS: EPA maintains its 402 permitting and enforcement office in Seattle making it difficult and expensive for both EPA and industry in Alaska, and

WHEREAS: Section 402 (b) of the Clean Water Act authorizes states to assume authority for issuing and enforcement of National Pollutant Discharge Elimination (NPDES) Permits, and

WHEREAS: 37 states in the United States have assumed the issuance and enforcement of the NPDES permits, THEREFORE

BE IT RESOLVED that the Alaska Water Resources Board requests the Alaska Department of Environmental Conservation to reinvestigate the feasibility of administering the Section 402 NPDES permits, and

BE IT FURTHER RESOLVED that the Alaska Water Resources Board requests the Alaska Department of Environmental Conservation to report its conclusion which includes staffing and fiscal requirements of this investigation to the Governor of the State, the Legislature and the Water Resources Board no later than July 1, 1986, and

BE IT FURTHER RESOLVED that copies of this resolution be sent to the Governor of the State of Alaska, the Commissioners of the Alaska Department of Natural Resources and Environmental Conservation, the Chairmen of the House and Senate Resources Committees, Senator's Stevens and Murkowski and Congressman Young.

Adopted this 27 day of February, 1986
ALASKA WATER RESOURCES BOARD

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman

Resolution No. 86-10

PLACER MINING WATER QUALITY REGULATIONS

The placer mining industry in Alaska is presently confronted with a serious and immediate threat to its existence. This industry now furnishes the economic base upon which many small Alaskan communities exist. Other larger communities have a large economic stake in the industry.

The threat to the industry originates in government regulations which, if aggressively addressed by the government, could be ameliorated to the extent that the industry could survive and advance to meet desirable standards.

The threat to the industry comes at a time when industries having sound markets and diversifying the primary economic base of the State are sorely needed.

The Alaska Water Resources Board recommends that the Governor's Office take immediate steps to achieve a level of cooperation between the various agencies of the State, and between the State and the involved Federal agencies, which will result in the continuance of a viable placer mining effort in Alaska.

Adopted this 27th day of February, 1986
ALASKA WATER RESOURCES BOARD

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman

Resolution No. 86-11

RESOLUTION OF CONFLICT IN EFFLUENT REQUIREMENTS

Federal and State water quality regulations concerning point of measurement for turbidity are inconsistent, setting up a conflict of enforcement for placer mining effluent. Placer miners may be able to comply with one set of regulations but not both.

The Alaska Water Resources Board requests you to direct the Department of Environmental Conservation to recommend a plan to eliminate the conflict. The Board respectfully requests a report on the progress on this matter at its next meeting.

Adopted this 27th day of February, 1986
ALASKA WATER RESOURCES BOARD

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman

Resolution No. 86-12

MILITARY COOPERATION REGARDING FEDERAL RESERVED WATER RIGHTS AND HAZARDOUS WASTE MANAGEMENT AND DISPOSAL

The State of Alaska has the responsibilities under state and federal law to recognize and adjudicate federal reserved water rights, and to establish procedures for the transportation and disposal of hazardous and toxic wastes. Neither of these functions can be performed in a manner which protects the health and welfare of all of the State's residents, unless the military community within Alaska also actively contributes its information and policy requirements. At the present time, this active involvement has not occurred.

The Alaska Water Resources Board urges that the Governor communicate these concerns to the commanding officers of the following military installations, and invite the active participation of their respective staffs on the joint Federal-State Reserved Rights Task Force and with the Alaska Department of Environmental Conservation, in these vital areas:

Elmendorf Air Force Base, Anchorage
Eielson Air Force Base, Fairbanks
Fort Wainwright, Fairbanks
Fort Richardson, Anchorage
Fort Greeley, Delta Junction

Adopted this 27th day of February, 1986
ALASKA WATER RESOURCES BOARD

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman

Resolution No. 86-13

PRIORITIZATION OF ALASKA'S WATER RESOURCES PROGRAMS

The Alaska Water Resources Board serves as an advisory group to the Governor on all matters relating to the use and appropriation of water in the State of Alaska. These duties, as enumerated in AS 46.15.210, include evaluating and advising the Governor on the effect and adequacy of all laws and regulations governing water rights, the multi-purpose uses of water, the prevention of pollution and the protection of fish and game, studies of the state's water supplies and plans for future requirements, and development of the state's water resources.

The Board recognizes that declining revenues will impact funding of programs statewide, and that all state agencies face the difficult task of reducing budgets, manpower and programs. The Department of Natural Resources water rights program has already been impacted by a large reduction in staff. The Alaska Water Resources Board is vitally concerned about the long term effects that reductions in programs such as this may have on wise water resources management in Alaska.

The Alaska Water Resources Board requests that the Commissioners of the Departments of Natural Resources, Environmental Conservation, and Fish & Game attend the next bi-annual meeting of the Board, to be held in Anchorage on September 11 & 12, 1986, to present and discuss the water resources programs which they administer, and the process of program and budget prioritization and how this will be reflected in the preparation of these department's fiscal year 1988 water resources budgets.

Adopted this 27th day of February, 1986
ALASKA WATER RESOURCES BOARD

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman

Resolution No. 86-14

DEPARTMENT OF NATURAL RESOURCES WATER MANAGEMENT STAFFING

The Alaska Water Resources Board recognizes the need for reductions-in-force and increased organizational efficiency throughout state government. The Board further respects the efforts being made to make State government more accessible to the citizens of Alaska by moving personnel and program responsibilities to regional offices.

However, the Board wishes to express its deep concern that a one-person Water Management Section in the Central Office is not only inadequate but impractical.

The Water Resources Board has argued strongly for consistency, cooperation and communication on water related matters in DNR and throughout state government. We have also pressed for improved water management planning to help avoid problems rather than having to address crises.

By nature and direction, Regional offices are reactive, responsive, and limited in scope to day-to-day issues and matters within their specific area. It is the role of the State Water Section to assure consistency, develop pro-active positions, coordination, and long range planning.

In order to accomplish the important and appropriate work of the Central Water Office, the Alaska Water Resources Board, respectfully requests that the State Water Section have, at minimum, two people---including a support position.

Adopted this 27th day of February, 1986
ALASKA WATER RESOURCES BOARD

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman

Resolution No. 86-15

COORDINATION OF INSTREAM FLOW PROTECTION PROGRAMS

The Alaska Water Resources Board has learned that the Alaska Department of Fish and Game (ADF&G) will be initiating an Instream Flow Program funded by the Dinghall-Johnson Expansion Act, through revenue sharing disbursements. Although the ADF&G program is designed to protect sport fisheries only, there is both an opportunity and a need to coordinate the technical instream flow expertise of the Alaska Department of Natural Resources (ADNR) with the efforts of ADF&G.

It is recommended by the Alaska Water Resources Board that ADF&G and ADNR coordinate their efforts and expertise to establish:

1. criteria for determining a list of priorities of streams requiring instream flow protections; and

2. a realistic ranking of those streams that need instream flow protection based on the criteria established above.

The criteria for determining those priorities should include, as a minimum, the following considerations:

1. Current appropriation threats, and

2. Potential water appropriation conflicts, and

3. Proximity to population centers.

The Alaska Water Resources Board feels that is is not cost effective for ADF&G to duplicate, in its instream flow program, the data collection function and service of DGGS.

Therefore, the Alaska Water Resources Board recommends that ADF&G contract the services of DGGS to perform the technical data collection functions necessary to determine minimum instream flows for the protection of those sport fisheries identified and prioritized in the preceeding recommendation.

Adopted this 27th day of September, 1986
ALASKA WATER RESOURCES BOARD

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman

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March 12, 1985

Dave

Honorable Richard Shultz, Co-Chair
House Resources Committee
Alaska House of Representatives
Pouch V
Juneau, AK 99811

RE: Senate Bill No. 150 (Amendments to
Alaska Water Use Act, AS 46.15)
Our File No. 1515-1

Dear Mr. Shultz:

I am a member of the Alaska Water Resources Board, established under AS 46.15.190. I attended the semi-annual meeting of the Water Resources Board in Juneau on March 5-7, 1985. The Board met with the Senate Resources Committee on water resource matters (including SB 150) on March 8; however, I was unable to participate in that meeting because I had to return to Anchorage early.

In this letter, I would like to offer these observations concerning SB 150, and some proposed amendments. These views are my own, though they were discussed among the Water Resources Board. Some of them are, I believe, contained in a letter to you from the Board. The principal author of that letter is Mike Neimeyer, who is an attorney and a member of the Board.

I believe that the proposed amendments to the Alaska Water Use Act which are contained in SB 150 are necessary for the efficient administration of water rights in Alaska. These include federal reserved water rights which are presently

unquantified and pose the greatest unknown factor in the future allocation of water resources in Alaska. My involvement in water issues, and in the dilemma of unquantified federal reserved water rights, began during my service as an assistant attorney general for the State of Alaska in the late 1970's. I represented the State in litigating the case of Paug-Vik, Inc., Ltd. v. LeResche, 633 P.2d 1015 (Alaska 1981), which was the first Alaska case dealing with aboriginal-title and federal reserved right water claims.

In 1980, based in part upon the realization that the existing Alaska Water Use Act contained no procedures for the effective, binding adjudication of these claims in a manner which complies with the McCarran Amendment, 43 U.S.C. Sec. 666 (which grants the state jurisdiction over federal entities to determine their water rights), I drafted the precursor of Senate Bill 150. That bill has undergone significant refinement since that time, and has been modified to reflect other states' experiences in adjudicating federal reserved rights. At the present time, I believe the bill generally represents a "state of the art" procedural statute to enable the adjudication of federal water rights in state courts. I urge its adoption by the Legislature.

I do have some specific suggestions for amendments which would resolve the concerns raised by Water Board members at our recent meeting. As you know, Sections 1 through 4 of SB 150 are general, "housekeeping" measures which clarify existing portions of the Alaska Water Use Act, while Section 5 of the bill comprises the procedural measures to deal with basin-wide water adjudications, including federal reserved water rights within those basins. My proposed amendments are as follows:

Page 2, Section 46.15.140(d): This proposed amendment should be removed from the "abandonment" provision of the Water Use Act (46.15.140), and placed in AS 46.15.145, which deals with the administration of in-stream flow reservations. The proposed subparagraph (d) states,

> (d) A state agency may not abandon or forfeit a certificate of appropriation in whole or in part except after public notice.

I understand that this provision was originally intended to deal with in-stream flow reservations granted to the State under AS 46.15.145. If so, it should be moved to that section, as AS 46.15.145(g). I would recommend that the provision be

broadened to cover all in-stream flow appropriators, public and private, since their in-stream flow reservations are required to be made in the general public interest. I recommend that the provision, placed in Section 145, read as follows:

> (g) An in stream-flow certificate may not be abandoned or forfeited in whole or in part except after ~~public~~ notice to the certificate holder.

Alternatively, if it is not the intention of SB 150 to confine the abandonment by a state agency of a water certificate to in-stream flow reservations, but instead to include all types of water rights held by the State (as the amendment presently implies), the amendment should remain in its existing Section 140. However, it should be broadened to cover both the state and municipalities. The provision would then read,

> (d) A certificate of appropriation may not be abandoned in whole or in part by a state agency or a municipality except after public notice.

This change would prevent the involuntary loss of a water appropriation held in the name of the general public, as a result of the errors or omissions of individual public officials. In other words, failure to timely use a water allocation, or to file some document with the State indicating an intention to maintain a use, should not result in the loss of water rights held by the State or by a municipality in the name of all of its residents.

Based upon these considerations of the public interest, it might be best to leave the provision in Section 140(d), as broadened to cover municipal governments, and at the same time to add the suggested provision concerning in-stream flow reservations at subsection (g) of Section 145.

Page 3, Section 46.15.165(c): This section should be amended by inclusion of the following additional category of persons entitled to receive service of notice of an administrative adjudication of basin-wide water rights.

> .5) Serve the order on any other person or corporation claiming a federal reserved water right;
>
> (renumber the existing subparagraph (5) as subparagraph (6)).

Page 4, AS 46.15.165(c)(5): I recommend that to prevent the inadvertent omission of notice to Native allotment owners in a basin-wide water rights adjudication, or to prevent the later default of these claimants, that the Native regional and village corporations which own land within the basin be notified of any general water rights adjudication (regardless of whether the corporations are themselves asserting a claim to water rights). The proposed amendment would read,

> (5) serve the order on each Native regional and village corporation organized under the Alaska Native Claims Settlement Act which owns any land within the adjudication area;

The Native regional and village corporations do not have the burden of keeping a Native allottee informed of the progress of a water rights adjudication. However, they have in many cases been helpful in guaranteeing that Native allottees within their area are not overlooked, and that they receive adequate legal and practical advice to protect their interests in such matters. Therefore, it is desirable that in addition to serving the Native allottee with notice, that the Native corporation within the area also receive notice, to better insure that the allottee's interests will be protected.

Page 6, Section 46.15.166: I suggest that the "judicial adjudications" section at AS 46.15.166 be similarly amended to add a category of persons whose federal reserve right claims may be adjudicated judicially in state court, as follows:

> (a)(3) by or on behalf of any person or corporation who claims a federal reserved water right.

These two changes, will permit the adjudication of any federal reserved water right claims which may be asserted by Alaska Native corporations, or by any other entity which is not already included in the proposed legislation (and which, by statutory interpretation, would otherwise be presumed to be excluded). Without this amendment, Alaska Native corporations and others who may claim federal reserve water rights will be forced to bring separate litigation in federal court, which defeats the entire purpose of a basin-wide state-court adjudication of all water rights, including federal reserved rights. The inclusion of this category in the legislation would not be an admission by the State that Native corporations legally possess federal reserved water rights, since the disclaimer in proposed AS 46.15.169 of the bill specifically denies that

adoption of the legislation is an admission by the State that federal reserved water rights exist within the State.

Page 8, AS 46.15.168(b): I recommend that this provision be amended to require that any administrative adjudication on remand from a court be confirmed judicially, if federal reserved water rights are involved. This will complete the judicial adjudication requirements of the McCarran Amendment, 43 U.S.C. Sec. 666. Without this confirmation, a decision after administrative remand may not be binding upon the federal claimants. Therefore, I recommend that this subsection (b) be amended to read as follows:

> (b) The commissioner may accept a remand from a state or federal court of a water rights dispute, and may administratively adjudicate it under AS 46.15.165, subject to judicial confirmation of any federal rights which have been adjudicated.

I hope that my concerns with some details of SB 150 can be eliminated by adoption of the amendments I have listed in this letter. However, with or without these amendments, I believe that SB 150 is a vital piece of procedural legislation which is necessary to allow the State to take full advantage of its jurisdiction over federal water claims. When the need arises, the State will be able to react in a timely manner, without any question concerning the procedures to be applied. I urge that your committee recommend the passage of Senate Bill 150.

Sincerely yours,

Thomas E. Meacham

TEM/lsf

cc: Commissioner Esther C. Wunnicke

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

WATER RESOURCES BOARD

555 Cordova Street
Pouch 7-005
Anchorage, AK 99510
(907) 276-2653

March 14, 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,

For Cyril R. Wanamaker, Chairman
Alaska Water Resources Board

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

cc: Governor Sheffield
Senate Resources Committee

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 allotees served urder 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 allotee'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 ommissions, 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 appurtanence 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.

Meeting Summary
ALASKA WATER RESOURCES BOARD
Juneau, Alaska
March 5-8, 1985

The Alaska Water Resources Board held their spring meeting March 5-8, 1985 in Juneau at Centennial Hall.

Board members in attendance were:
David Vanderbrink, Chairman, Homer
Peg Tileston, Anchorage
Wayne Westberg, Anchorage
Tom Meacham, Anchorage
Alan (Mike) Neimeyer, Anchorage
Stan Rybachek, North Pole
Cyril (Randy) Wanamaker, Juneau

March 5, 1985

David Vanderbrink, Chairman, called the meeting to order.

Esther Wunnicke, Commissioner of the Department of Natural Resources and the Board's Executive Secretary, summarized the status of Resolutions 85-3 through 85-8 which were drafted at the October 1984 Water Board meeting:

°85-3 Village Safe Water Program: The commissioner is requesting DNR's Water Management Section to draft a Memorandum of Understanding to the Department of Environmental Conservation by April 1, 1985 requiring recipients of grants under the village safe water program to apply for water rights in accordance with AS 46.15.

°85-4 Water Board's Budget: The resolution requested that the Governor place the Board's budget in the Governor's budget and include $20,000 for travel and per diem for FY 86. The FY 86 budget request was too far advanced for this change to be considered, but the Governor may want to consider it for FY 87. The DLWM budget for FY 86 includes $12,500 for Water Resources Board and staff travel.

°85-5 Dam Safety Program Funding: The DLWM has requested $134,'00 for 20-25 dam safety inspections in the Department's FY'86 budget proposal.

°85-6 Western States Water Council Representatives: DNR has sent a memo to the governor proposing the designation of DEC and DNR commissioners and the Attorney General as Alaska's official representatives to the Council. The Governor has also been requested to present the welcoming address at the 79th quarterly meeting in Anchorage.

°85-7 Water Resources Planning and Data: The Water Management Section staff is participating in DNR's land and resource planning efforts, and will be meeting with local planning staffs and zoning commissions. Contractual agreements between DNR and USGS have been reviewed for the collection and dissemination of water use data for 24 communities statewide.

° 85-8 Fritz Creek Watershed Proposal: The DLWM's Southcentral Regional Office has rejected the University's application for grazing leases in the Fritz Creek drainage, and will convey the land to the Kenai Peninsula Borough for the purposes of protecting fish and wildlife habitat and future municipal water supplies. Thirty-one appeals have been filed against DLWM's Regional Office's decision requesting habitat and watershed protection. A public hearing is scheduled in April.

Other opening business included scheduling Board member elections for Thursday, March 7.

L. A. Dutton, Chief of the DNR Water Management Section, summarized DNR's recent efforts to address water related issues. The Board expressed concern in the following areas in response to Dutton's presentation:

1) The number of residential and non-residential water rights applications received during 1984;

2) The role the state is taking towards adjudicating federal reserved water rights;

3) The number of valid appropriations which may be affected by federal reserved water rights.

Bruce Landon of the Department of Justice addressed potential conflicts arising from federal reserved water rights, and briefly outlined an approach Alaska may follow for their adjudication. Two major conflicts associated with federal reserved water rights are: 1) uncertainty in evaluating available water resources due to the presence of unquantified federal reserved rights; 2) inconsistency between state law and the purpose of federal reserved water rights. Senate Bill 150 provides the state with a mechanism for adjudicating federal reserved water rights in the state court under the procedures established by the McCarren Amendment. The steps recommended by the Department of Justice for the adjudication of federal reserved water rights are:

° Establish a mechanism where the state court can utilize the McCarren Amendment to adjudicate federal reserved water rights,

° Clarify the lines of jurisdiction,

° Determine and define the primary purpose(s) of the federal withdrawal,

° Gather the information necessary to quantify the federal reserved right.

Michael D. White, water law attorney, Denver, Colorado, opened his discussion regarding federal reserved water rights by defining a reserved right as being the amount of water necessary to meet the "minimal needs" of the reservation so that its primary purpose is not "entirely defeated".

White stated that this definition will be used by the courts as the criterion in determining the magnitude of a federal reserved right. He also stressed the value of developing a model based on water resource data and existing appropriations to evaluate the impact of reserved right claims submitted by the federal government. White made the following recommendations for facilitating the adjudication of federal reserved water rights in state court.

1) Make sure you have an adequate statutory basis with which to utilize the provisions in the McCarren Amendment.

2) Determine both personal and subject jurisdiction; and clearly define all issues.

3) Decide on a state litigation strategy.

4) Hire individual consultants rather than consulting agencies for technical assistance; and appoint a coordinator to manage all consultants.

5) Identify existing reservations, their priority dates, and their boundaries within the affected basin, and their primary purposes.

6) Develop a model that incorporates inflow of the system; all the state water rights; existing water use patterns, including depletions to the system, diversions, and return flow; and administrative assumptions.

7) Serve personal notices to all indviduals who may be affected by the adjudication; and keep private parties involved throughout the litigation.

(Complete transcripts of the presentations on federal reserved rights are available upon request.)

Paula Burgess, Regional Manager of DNR's Southeast Regional Office, briefed the Board on the Indian River basin-wide adjudication.

The original request for basin-wide adjudication was submitted in September of '83, followed by a review of DLWM's procedures and legislation proposed for adjudicating federal reserved water rights by the Attorney General's office. The Assistant Attorney General responded in March of 1984, with these findings:

1) The existing procedures for handling federal reserved water rights were inadequate;

2) The proposed legislation addressing basin-wide adjudication was sound, and should be introduced at the next legislative session;

3) Although existing policies and procedures were inadequate and legislation on basin-wide adjudication had not yet been passed, the DLWM should initiate basin-wide adjudication in state court. The Alaska Declaratory Judgement Act would provide the basis for state court adjudication of federal reserved water rights under the McCarren Amendment.

At the request of the DLWM, the DGGS and the USFWS initiated hydrologic and instream flow studies, respectively, in 1984. The DGGS completed the hydrologic investigation in January, 1985, and the USFWS instream flow study is scheduled for completion Fall, 1985.

All water users and parties to the adjudication will be notified of a public meeting pending the completion of the USFWS instream flow study.

Bill Ross, Commissioner of the Department of Environmental Conservation briefed the Water Board on DEC's role in addressing water quality problems in Anchorage as well as those resulting from placer mining statewide. Ross emphasized DEC's efforts and intentions to work with the municipalities and miners on water quality issues.

Specifically, DEC personnel will be collecting water quality samples in Anchorage and Eagle River, and will work closely with the municipalities in identifying pollution sources and planning for water and sewer needs. DEC is focusing on the water conflicts caused by placer mining, and plans to review EPA's permit effluent guideline process and revise DEC's enforcement policies. These will be presented next month at the Placer Mining Conference.

Jerry Madden of the Fisheries Rehabilitation and Enhancement Division (FRED), DF&G, briefed the Board of the progress and problems encountered in developing fish hatchery sites in Alaska. In response to the low salmon runs that occurred in the early 1970's, the Alaska State Legislature enacted legislation to promote and encourage fishery enhancement. Provisions of this legislation included:

- Private non-profit corporations could obtain permits from the State to run hatcheries.
- Regional aquaculture associations, private non-profit corporatons comprised of representatives of fisheries user groups, were allowed to raise funds for fishery enhancement projects.
- Comprehensive planning teams, comprised of members of aquaculture associations and representatives from state agencies, were established to assess fishery needs and to create fishery enhancement plans.
- A loan fund was established to assist private non-profit corporations in building hatcheries.
- Aquaculture associations were given preference rights to hatchery sites.

Under this program, 22 permits for hatcheries have been issued, 24 applications have been denied, and nine are pending. There are currently 14 hatcheries operating and having return runs.

In developing plans for hatchery sites, one common mistake that has been made by private corporations and state agencies is an inadequate evaluation of the available water resources. This problem has been exacerbated in recent years by the increased economic pressure to produce "money" fish,

such as coho, sockeye and chinook salmon, which require large amounts of water for rearing; and by political pressure to get projects on line as quickly as possible. Conflicts inherent in the state law have also produced difficulties in setting up hatcheries. Three case histories from Southeastern Alaska were discussed to illustrate these points:

- Salmon Creek Hatchery, Juneau (Northern Southeast Aquaculture Association) -- This hatchery project had to be abandoned when deals with prior appropriators to utilize some of their water fell through and adequate water supplies could not be obtained.

- Armstrong-Keta, Incorporated Hatchery, Port Armstrong (private non-profit group) -- This hatchery project developed in an environment of strong political pressure; thus there was an inadequate assessment of available water resources and the instream flow requirements of the native fish population. The native fish may suffer as a result.

- Medvedjie Hatchery, Sitka (Northern Southeast Aquaculture Association) -- A success story. Instream flow requirements were considered early in the planning process; and an extensive hydrologic data collection program was undertaken to define the virgin flow. Negotiated agreements on hatchery requirements vs instream flow needs are being arrived at cooperatively by agencies and the Association.

PUBLIC COMMENT SESSION

David Vanderbrink called the Public Comment Session to order, and invited members of the public to comment on water related issues and on the Board's activities. The following is a summary of the major points presented by the public, and is not a verbatim transcript of the testimonials received.

Ray Renshaw, President, Alaska Miner's Association, Juneau Chapter, requested the Water Board to do everything possible to address and resolve water issues affecting placer mining before the industry is wiped-out.

Del Ackels, placer miner, addressed the Board regarding proposed amendments to 18 AAC 70.020. Generally, Ackels requested review of the "acceptable" dissolved solids standards and "water supply" definitions for consistency between statutes. He also sited inconsistencies between stream classification and management. For instance, Ackels suggested that not all water be arbitrarily implied as drinkable. If water is drinkable, it should be certified and managed as such. Likewise, recreational waters should be identified and managed to accommodate recreational uses. Ackels also requested the Board use its influence to eliminate turbidity as a water quality criteria in EPA's Placer Mining Standards, and suggested that settleable solids criteria be used instead.

Phil Holdsworth, the first Commissioner of the Department of Natural Resources, pointed out that EPA is the agency enforcing water quality standards, and DEC is the agency which establishes those water quality standards. Therefore, if water quality standards are to be changed, it must be done through DEC -- not EPA.

Bob Cacy, placer miner from Circle, stated there are many arsenic and turbidity problems associated with streams in the Interior, and that all streams are set at drinking water standards, implying they are of drinking

water quality. Not only does this jeopardize public safety, but it also precludes any type of industrial use of those streams. Cacy expressed the need to change existing turbidity standards to reflect uses other than drinking water, and to identify streams having drinking water quality.

Rose Rybachek, President of the Livengood-Tolovana Mining District, said that the placer mining industry is in danger of being regulated out of existence. She urged that the State consider a basin management approach, promoting accelerated mining in certain districts and then reclaiming the mined areas and affected streams after the gold resources are extracted.

Christopher Estes, Department of Fish and Game, put in a plug for interagency cooperation on water resource data collection programs. He also stressed the importance of having the Department of Fish and Game actively involved in the Western States Water Council.

March 6, 1985

Chairman Vanderbrink called the meeting to order.

The first scheduled speaker was Bob Martin, Special Assistant to the Commissioner of DEC, who was to give opening remarks. He was unable to attend the meeting, however, due to last minute scheduling conflicts. Instead, L. A. Dutton requested that Gary Prokosch, Water Officer of the Southcentral Regional Office, give the Board an update on Southcentral Region water related operations.

Gary Prokosch briefed the Board on the activities of the Anchorage Waterways Council, a committee composed of Federal, State, local officials, and representatives of private and community organizations. The Council was formed by Mayor Knowles to address the growing water quality problems within the Anchorage Bowl. Mayor Knowles requested the Council to provide recommendations for pollution prevention and mitigation by March 31, 1985. The Council:

- Has identified and prioritized the streams within the Anchorage Bowl by current water use patterns and by susceptibility to water quality problems.
- Has recommended appropriate water quality sampling strategies.
- Is training volunteer "stream walkers" to collect water samples for water quality testing.
- Has recommended strengthening Title 21--the Municipal Planning and Zoning ordinances.
- Is advocating the designation of a Clean Water Day to promote community awareness and involvement.

Gary promised to keep the Board informed as to the final recommendations of the Council.

Randy Bayliss, Department of Environmental Conservation, discussed DEC's efforts in studying the effects of placer mining on water resources. Mr. Bayliss opened by summarizing the following:

- Proposed regulations to address the problem of two drinking water standards;

- DEC is currently involved in a turbidity review study; 3) DEC is working towards establishing an enforcement policy on priority streams;

- DEC is working on updating the Triagency application; and

- DEC will be accepting proposals for the utilization of 205J grant monies for placer mining research projects.

Also discussed were state turbidity standards which were adopted in 1972, and their impact on fish, recreation and industrial development. Bayliss stated the state's standard for placer mining is 25 NTU, which is one of the least stringent standards in the country. Reclassification of the state's waters does not promise much relief from stringent standards and may cost between $5,000-35,000 to reclassify each stream. However, the state is hoping technological improvements, placer mining demonstration grant programs, and site specific management and planning will help minimize negative impacts of mining on water resources. The EPA's proposed new effluent guidelines for placer mining are scheduled to be released in mid- April for public comment and to be finalized by April, 1986.

Don Finney, Project Manager at the Quartz Hill Project, Ketchikan, for U. S. Borax, and **John Paulsen,** Principle Engineer provided the Board with a brief history of the Quartz Hill Project and an overview of environmental studies done to date. When the mine is in full operation, it will produce 80,000 tons of ore per day and be operated 365 days per year, 24 hours a day. A work force of about 800 people will be required. These will be housed in Ketchikan. The expected lifetime of the mine is about 55 years.

There have been three major logistical hurdles in developing the deposit:

1. Power supply: Currently, the favored power option is an intertie to British Columbia hydropower projects. U. S. Borax and APA are exploring the idea of bringing in power to Quartz Hill, Ketchikan, Petersburg, Wrangell, Juneau, and perhaps Whitehorse.

2. Waste Disposal: The mining operation will produce an open pit approximately 1 1/2 mile long, 1 mile wide, and from several hundred to about 3600 feet deep. Waste rock will be disposed of in two nearby drainages. Settling ponds will be utilized to treat runoff from tailing piles and groundwater pumped from the pit. Ore will be conveyed through a four mile tunnel to a concentrator plant. Mine tailings will be disposed of either in Boca de Quadra Fjord or in Wilson Arm. Studies are ongoing to:

   - Determine the volume of tailings
   - Determine the impact of tailings disposal on biological resources
   - Run computer simulations of tailings behavior
   - Complete oceanographic surveys of the proposed disposal sites

   Reclamation of the site folowing closure of the mine will include revegetating the tailings piles and allowing the pit to fill with water forming a lake.

3. Water Supply: The water requirement for the mine when it is in full operation will be 30,000 gpd. Some of this water can be recycled, reducing the demand to 17,000 gpd. Several water supply options are being investigated. Currently the favored options include construction of a water supply reservoir on Tunnel Creek and supplementing this with a well field on Wilson River.

An instream flow study has been conducted by the U.S. Fish and Wildlife service under the auspices of the U.S. Forest Service to determine the impact of the well field (infiltration gallery) on salmon incubation in Wilson River. A report summarizing the results of U.S. Borax's water supply studies will be available in April. The Board requested that copies of the report be provided to them through L. A. Dutton.

Ned Farquhar, Special Assistant to the Commissioner of the Department of Natural Resources, spoke for Neil Johannsen on HB 93, the proposed Recreational Rivers Bill. Passage of the Bill will enable special management of rivers having high recreational values by creating a statewide recreational river system. The intent of the Bill is to retain specified rivers and their corridors in public ownership so they can be managed primarily for the protection and maintenance of fish and wildlife habitat and recreational values. Other compatible consumptive resource uses such as timber harvesting, sand and gravel extraction, and provisional access are also allowed under HB 93 -- providing such consumptive uses are compatible with the intent to protect fish and wildlife, water resources, and recreational values.

HB 93 is currently being revised to accommodate objections from the Matanuska-Susitna Borough regarding the inclusion of priority rivers as part of the state park system. In response, Governor Sheffield has agreed to dedicate the rivers under the management authority of the Division of Land and Water Management. Under the proposed special management system, the following policies will apply.

- No land disposals or future mineral entry will be allowed within the designated river corridors; (Note: Directional drilling may be permitted from outside the river corridors.)

- The state must quantify and apply for minimum instream flow reservations necessary to maintain the management intent of the designated rivers.

The original bill includes specific management proposals identified through the Susitna Area Plan:

- Legislative designation of the following rivers to be managed as part of the Recreation River System:

  Lake Creek
  Little Susitna
  Talachulitna
  Talkeetna
  Moose Creek
  Kroto Creek

- The proposed legislative designation includes a mile wide corridor along the identified streams which encompasses a total of 220,000 acres of state owned land.

- The Matanuska-Susitna Borough has agreed to dedicate Borough owned lands lying within the specified corridors to management similar to that outlined in HB 93.

Liz Baron, Natural Resources Officer, Division of Land and Water Management, presented the Water Management Section's approach to developing a comprehensive water management program which encourages the consideration of water resources in land use planning and decision making processes.

The approach outlined calls for improving inter-agency coordination, and focusing existing water inventories and planning efforts to better assist state and local governments in water resource planning and management decisions.

The proposed comprehensive water management program consists of three parts:

1) Data collection - prioritizing and coordinating federal/state water resource inventories to provide state and local governments with information necessary for wise resource management decisions;

2) Data integration - organizing and managing collected data in a format which is readily available for analysis and integration into the decision making processes;

3) Planning Processes - participating in planning efforts to ensure consideration of water resources in land planning and water management decisions.

Liz summarized how each phase can be implemented through Water Management's participation in existing state, federal, and local government programs. Such an approach directly addresses the Board's Resolution 85-7 which requests the Water Management Section to:

1) Develop a program to establish regular contact with planning staffs and planning and zoning commissions of Alaskan cities.

2) "Sell" its water data system and structure special studies so that they will be most timely and useful to the local decision makers.

Bill Long and Larry Dearborn, Division of Geological and Geophysical Surveys, gave a joint presentation. Bill started by pointing out that a reoccurring theme in the presentation to the Board during this meeting has been the need for data. He then gave the Board an update on the status of the Aware Plan. He attributes the cost effectiveness of DGGS programs to:

- Use of computer modeling,
- Use of state-of-the-art data pod technology,
- Cost sharing with Federal agencies,
- Efficiency and effectiveness of DGGS personnel.

He suggested that the Board should pass a resolution to the Governor emphasizing the importance of water management and data collection and urging that funding for these programs not be cut.

Larry Dearborn then gave the Board an update on the investigation of salt water intrusion at Auke Bay. Cooperative investigations with the U.S.G.S. were started in 1979, and two areas of salt water intrusion were identified. On the basis of these studies, DNR's Southeast Regional Office (SERO) began limiting the number of water rights permits issued in the troubled areas. In 1983, Auke Bay developers challenged SERO's authority to limit permits saying they didn't have sufficient data to support taking that stand. At SERO's request, DGGS started an update of the Auke Bay studies. Their objectives were to:

- Add to the data base,
- Determine well locations accurately,
- Visit key wells and run water quality tests,
- Collect water level data from wells throughout the area,
- Interpret the data to determine how much saltwater intrusion has taken place, where it's taken place, and where to expect future problems.

On the basis of these studies, DGGS has been able to make recommendations to DNR water managers concerning the potential for salt water intrusion with continued water extraction in the area. These studies are ongoing.

Larry then provided the Board with a summary of one specific study in the area--Indian Cove. The water table in the area has experienced approximately 100 feet of decline since settlement. DGGS has concluded that its bedrock aquifer is highly susceptible to salt water intrusion.

March 7, 1985

WORK SESSION

Resolutions: The Board drafted and passed the following resolutions:

- 85-09 - EPA National Placer Mining Standards
- 85-10 - Clean Water Act Field Laboratory
- 85-11 - Administration of Water Appropriation Permits and Instream Flow Application
- 85-12 - Recreational Rivers Bill: HB 93
- 85-13 - Water Management Staffing
- 85-14 - Dam Safety: SB 95
- 85-15 - Alaska Water Resources Board Funding

Letters: The Water Resources Board prepared two letters -- one proposing amendments to SB 150, and one requesting that the Office of the Governor urge the active involvement of the Alaska Departments of Natural Resources, Environmental Conservation, Law, and Fish and Game in the Western States Water Council.

Elections: Dave Vanderbrink's term as Chairman expired, and Randy Wanamaker was unanimously elected as Chairman, and Dave Vanderbrink as Vice Chairman.

Bylaws: The existing bylaws were adopted with an amendment of Paragraph 3 which now stipulates that a reasonable attempt must be made to reach each Board member when a meeting of the Board is to be held by means of telecommunications.

MEETING WITH GOVERNOR SHEFFIELD

Governor Sheffield met with the Board and discussed three issues: 1) Western States Water Council representation; 2) EPA placer mining standards; and 3) stream reclassification. Dave Vanderbrink opened the meeting by stating the importance of Alaska's continued involvement with the Western States Water Council, and requested a permanent representative be appointed to attend meetings. Tom Meacham raised the issue of the inconsistency between the EPA placer mining standards currently being developed and existing state placer mining regulations. The Board expressed the need for all concerned state agencies to review and prepare a unified response to EPA regarding the proposed placer mining regulations. The closing issue discussed was stream reclassification of those streams classified as drinking water quality. Several Board members expressed a concern that natural resource development may be pre-empted due to the minimum quality standards. Sheffield acknowledged the Board's concerns by siting an ongoing study which is evaluating water quality standards; and sited water availability with regard to land disposals and community expansion as a water management issue also needing attention.

March 8, 1985

SENATE RESOURCES COMMITTEE MEETING

Arliss Sturgulewski, Chairwoman of the Senate Resources Committee, called the meeting to order. **Esther Wunnicke,** Commissioner of the Department of Natural Resources, introduced **Randy Wanamaker,** Chairman of the Alaska Water Resources Board, who presented a brief summary of the issues addressed at the March Water Board Meeting. Arliss Sturgulewski requested copies of the resolutions drafted by the Water Resources Board; and asked the Board to respond to SB 95. Wanamaker indicated that DNR will propose regulations intended to minimize the potential impacts of SB 95 on mining operations. **Bettye Fahrenkamp,** Vice Chairwoman of the Senate Resources Committee, expressed concern over state vs federal jurisdiction over dam safety regulations; and if DNR could handle the work load of dam safety inspection under current budget cuts. **Peg Tileston,** Water Resources Board member, explained SB 95 provides legislature authorization of the existing dam safety program which is presently funded. **Larry Dutton,** Section Chief, Water Management Section, DNR, emphasized the cost savings incurred by DNR prioritizing and conducting dam safety inspections as compared to average inspection costs of dams nationwide. (DNR spends approximately $7,000, on the average, for each dam inspection vs $10,000/dam average inspection costs for other states.)

Randy Wanamaker and **Stan Rybachek,** Water Resources Board member, briefly addressed water policy and the effects on placer mining. Mr. Wanamaker suggested stream reclassification may help resolve mining and water quality conflicts by establishing water quality standards which accommodates acceptable levels of mining activity. Mr. Rybachek referenced the upcoming Seventh Annual Conference on Alaskan Placer Mining to be held March 27-30, 1985, in Fairbanks which may address revision of the state's water quality

standards. **Peg Tileston** testified to the Resources Committee that EPA is "rule making" for national placer mining standards which will affect Alaska more than any other state. Ms. Tileston sited a recent Water Board Resolution which calls for a unified, multi-agency response to EPA proposed standards. **Senator Sturgulewski** stated her staff will submit a resolution to the Resources Committee regarding EPA proposed standards. Ms. Tileston indicated the regulations are scheduled to be available for review mid April, and public comment will be solicited April 25th. **Senator Coghill** suggested there be a public hearing prior to April 25th.

Senator Sturgulewski requested comment from the Water Resources Board regarding the proposed Recreational Rivers Bill. **Dave Vanderbrink,** Water Board Vice Chairman, stated the clause addressing control of firearms and public safety is vague and may be subject to abuse; but Resolution 85-12 adopted by the Water Resources Board supports HB 93 which establishes a system of state recreational rivers. Mr. Vanderbrink also testified in support of Alaska's membership and participation in the Western States Water Council. Esther Wunnicke announced that Alaska is hosting the next Western States Water Council in Anchorage, July 18-19; and requested members of the Committee to participate.

Note: For purposes of clarity, the summary discussion below regarding SB 150 amendments to the Alaska Water Use Act (AS 46.15) is organized by issue.

SB 150

Issue 1 - Cost of Implementation:

Sen. Sturgulewski: Although there's a zero fiscal note associated with SB 150, its adoption will require funding for data collection and enforcement. Do we want this?

Ned Farquhar, Special Assistant to the Commissioner of the Department of Natural Resuorces: SB 150 is a mechanism which would not be used much; and when adjudication is necessary, a cost savings from litigation in a state court vs federal will be realized.

Issue 2 - Authority of Determining Water Rights Abandonment - Sec. 3:

Sen. Fahrenkamp: Sec. 3 may grant DNR's Commissioner too much authority in determining abandonment of water rights.

Ned Farquhar: This authority enables reduction of water appropriations when necessary, at the administrative level.

Issue 3 - Revocation of Water Permits

Sen. Fahrenkamp: Need to assure water right holders have time to use (develop) water rights. Need to modify the bill so it can not revoke an individual's water rights as a result of project or permitting delay.

Dutton: The 4th line reads, ". . . with the intention to abandon." This means, if the individual intends to use the water, but economic or permitting circumstances have precluded its use, the water right will not be revoked. But, if the appropriator is not using water, DNR must have a mechanism to revoke.

Farquhar: DNR will work with Fahrenkamp's staff to insure that delays occurring which are out of the appropriator's control will not result in a loss of appropriation.

Issue 4 - DNR's Authority to Remove Unsafe/Unpermitted Works of Apprioriation, Section (b)

Sen. Sturgulewski: Sec. (b) provides DNR with enforcement responsibility. Why was such a broad approach taken re: DNR's authority; does DNR need this much? We need clarification.

Dutton: DNR needs authority to remove unsafe and unpermitted structures to ensure public safety. "We will research."

Issue 5 - Intent of Providing Water Rights - Section 1

Sen. Fahrenkamp: Is Section 1 of SB 150 necessary if the state cannot guarantee water quality or quantity in its appropriation process?

Ned Farquhar: The state isn't knowingly over appropriating water rights in areas of proven water shortge. The state is obligated to issue rights, but ...

Sen. Halford: What protection does the user have if state over appropriates his water source?

Dutton: Issuance of water rights grants the appropriator the right to defend his water right from junior appropriators based on a priority date. The state cannot guarantee the quantity or quality of water due to insufficient data.

Issue 6 - Alaska Water Resources Board Proposed SB 150 Amendments

Mike Neimeyer, Water Resources Board member, testified to the Committee regarding proposed amendments to SB 150. Generally, the Water Board supports the intent of SB 150, but has drafted specific amendments addressing notice requirements and water appropriation abandonment. (Please refer to the enclosed memo written to Arliss Sturgulewski, March 1985, for specific amendments.)

Issue 7 - Placer Mining: Proposed SB 150 Amendments

Rose Rybachek, President of the Livengood-Tolovana Mining District, briefly presented amendments to Sections 2 and 5; and indicated the need for procedure for the court to validate adjudications under Article 8. Details of the proposed amendments will be worked on by Senator Sturgulewski's staff and Ms. Rybachek.

The Senate Resources Committee meeting closed with testimony from **Phil Holdsworth** and **Stan Rybachek** clarifying SB 150 regarding the following points: 1) Section 1 addresses subsurface water, not open flow water; 2) SB 150 calls for establishing a mechanism whereby federal reserved water rights may be adjudicated in state court; and does not deal with resolving non-federal appropriation conflicts between senior and junior appropriators.

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LAND AND WATER MANAGEMENT

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

December 20, 1985

The Honorable Arliss Sturgulewski
Alaska State Senate
2957 Sheldon Jackson Street
Anchorage, AK 99508

Re: CSSB 95, Dam Safety

Dear Senator Sturgulewski:

? JAN 22

Recently we had the opportunity to discuss CSSB 95 and SB 150 with Senator Halford. Below we have addressed his concerns with the Resource Committee Substitute for SB 95. Due to our desire to completely respond to Senator Halford's concerns with SB 150, we will be sending you a similar letter on SB 150 in the near future when we have all the necessary information.

We propose the following changes in CSSB 95:

Section 46.17.040 - Delete the subsection (b) in its entirety and renumber (c) to (b) and (d) to (c). The concern which prompted subsection (b) will be covered in the revised definition of a "dam," Section 46.17.900(3).

Section 46.17.050 - Delete the second sentence in its entirety and substitute "The commissioner may inspect a dam or reservoir more frequently than every five years to protect public safety."

Section 46.17.060 - Delete the first sentence in its entirety and substitute:

> In taking an action under this chapter, the commissioner, after giving two weeks written notice and being refused the right of entry, may seek a search warrant to allow inspection of the dam or reservoir. The commissioner, after being refused inspection of drawings, operational records, or other information concerning a dam or reservoir may seek an administrative subpoena compelling production of the drawings, operational records or other information.

Leave the last sentence unchanged.

Section 46.17.120 - Senator Halford expressed concern that while this section appeared to provide ample protection for the state, it doesn't leave much recourse for a dam owner to seek remedy in the courts in the event a negligent action or inaction on the part of the state causes the dam owner to suffer unnecessary or unreasonable damages.

In researching Senator Halford's concern regarding the state being held liable for some of its actions in dam safety work, we contacted James Doody, Chief, Division of the Safety of Dams, State of California. The language in this section was essentially taken from the United States Committee on Large Dams Model State Dam Safety Law, which was taken from the California Dam Safety Law. Mr. Doody stated that by virtue of the type of work dam safety is, such language and sovereign immunity is necessary to avoid inviting legal actions against the state. Further, such language is required to protect dam safety employees from personal liability.

One must recognize that the state is acting in the interest of the public placed at risk below a dam. The public may not be deriving any beiefit from the dam, and on the contrary, a hazard exists by virtue of their being placed at risk. The only reason the state would ever take control of a dam or order the owner to breach a dam would be that an imminent danger existed to the public. The imminent danger would be the fault of the owner, either through action or inaction. Suggesting that the burden be shifted to the state in the case of imminent danger relieves the owner of his due responsibility and will cause any agency or state employee to be reluctant to take drastic action for the greater public good. One cannot reasonably expect the state be treated as an individual under law when it is acting in its best judgment to protect the public from a hazard (the presence of a dam) created by a dam owner for the owner's benefit.

We share Senator Halford's concern with this section, and if the section can be worded in some way that provides essential protection to the state and its employees and at the same time provides reasonable protection for dam owners from negligent state actions, the bill would be greatly improved. Possibly you will want to have the Department of Law or Legislature's attorneys review this section to see if other wording is practical.

Section 46.17.120 should remain unchanged, unless acceptable alternative wording can be developed.

Section 46.17.900(3) - Delete the sentence in its entirety and substitute:

> dam means any artificial barrier and appurtenant works which may impound or divert water and (A) that has or will have an impounding capacity at maximum water storage elevation of 50 acre-feet and is at least 10 feet in height measured from the lowest point at either toe of the dam to the crest of the dam or (B) that is at least 20 feet in height measured from the lowest point at either toe of the dam to the crest of the dam or (C) that the commissioner has made a positive determination that the dam poses a threat to lives and property.

Senator Halford's comments were very useful, and with the exception of Section 46.17.120 we have incorporated them in the new language we have suggested. Due to the critical need for this legislation, we urge your continued support of this important public safety measure.

Comments on SB 150 will be forwarded to you when our information is complete.

Sincerely,

Tom Hawkins
Director

cc: Senator Faiks
Senator Sackett
Senator Rodey
Senator Halford
Commissioner Wunnicke

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

POUCH M
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PHONE: 907-465-2400

OFFICE OF THE COMMISSIONER

March 19, 1985

Honorable Richard Shultz, Co-Chair
House Resources Committee
Alaska House of Representatives
Pouch V
Juneau, AK 99811

Re: SB 150, Thomas E. Meacham's March 12, 1985 letter

Dear Representative Shultz:

The Department of Natural Resources fully endorses all of the suggestions in the subject letter without exception.

Referring to Section 3 of SB 150 and the proposed amendment to AS 46.15.140(d) on Pg. 2, Mr. Meacham offered alternative wording (see Pg. 3 of his letter). This particular subsection was discussed at some length at the recent Water Resources Board meeting. It was felt that the original intent of this section was to prevent state agencies from abandoning instream-flow reservations and thus the Board recommended that the subsection, in its present form, should be deleted from Section 46.15.140(d) and to be reinserted as Section 46.15.145(g). We now realize that, while our original intent with this subsection was to protect the public interest in instream flow reservations, many other forms of agency and municipal appropriations, e.g., public water supply, provide a direct public benefit. Therefore, we now agree that Mr. Meacham's alternative proposal to leave the subsection in 46.15.140(d) and covering municipal governments through use of the wording or similar wording to that in Mr. Meacham's suggestion is the better way to deal with this section and will best serve the public interest.

We believe the other amendments to the bill proposed by Mr. Meacham in his letter are excellent and their incorporation will greatly improve this proposed legislation.

Sincerely,

Esther C. Wunnicke

Esther C. Wunnicke
Commissioner

cc: Tom Meacham
Tom Hawkins
Mike Frank
L. A. Dutton
Water Resources Board

10-J9 LH

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

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JUNEAU, ALASKA 99811
PHONE: 907 465-2400

JAN 13 1986

January 9, 1986

The Honorable Arliss Sturgulewski
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Re: SB 150, Basin Wide Adjudication of Water Rights

Dear Senator Sturgulewski:

Recently we had the opportunity to discuss Senate Bill 150 with Senator Halford and state and federal agency representatives that participate in the Federal Reserved Water Rights Work Group chaired by DNR. Based on these discussions, we are proposing the following amendments to SB 150 to address concerns of Senator Halford and the resource management agencies:

Section 46.15.140

Amendment: Subsection (a) of proposed AS 46.15.140 should be rewritten as follows: "The commissioner may declare an appropriation to be wholly or partially abandoned and revoke or amend the certificate of appropriation as to the unused quantity of water if an appropriator, with intention to abandon, does not make beneficial use of all or a part of the appropriated water."

Rationale: This change makes it clearer that, if necessary, part of an appropriation may be revoked for non-use, and the certificate amended to allow continued use of the quantity of water that is still being used.

Proposed by: Senator Rick Halford

0-J9 LH

Amendment: Delete "a certificate of," and substitute "an" in subsection (d) of AS 46.15.140.

Rationale: This change will delete the reference to "certificate of appropriation" and refer only to an appropriation, which by definition [AS 46.15.260(2)] includes reservations of water for instream uses among appropriative water rights. Since instream flow and other reservations are issued with a "Certificate of Reservation," this amendment eliminates an ambiguity which could be interpreted to preclude application of this section to a reservation of water for instream use.

Proposed by: Federal Reserved Water Rights (FRWR) Work Group

Amendment: Move proposed subsection (d) of AS 46.15.140 to become a new subsection (g) of AS 46.15.145. Re-letter subsection "e" as "d".

Rationale: It was agreed that subsection (d) would be more appropriately moved to become a new subsection (g) of AS 46.15.145. The point of this new subsection is to insure that a state agency does not walk away from a reservation of water for instream use without public notice. Through the public notice, potential water users are made aware that water is now available for consumptive beneficial uses. In addition, the members of the public interested in preserving a reservation of water for instream use would have an opportunity to comment in advance.

Proposed by: Senator Rick Halford

Section 46.15.165

Amendment: Add a new subsection (d) "Service of an order under subsection (c) is not an admission by the State of Alaska that the person served with the order has a water right." Reletter the following subsections.

Rationale: This will make it clear that the State's notice to any person of an administrative adjudication is not a representation that the person holds a water right.

Proposed by: FRWR Work Group

Amendment: In Section 46.15.165(e), delete the sentence "The master may be an employee of the state" and substitute "Employment by a federal, state, or local governmental agency does not disqualify a person from being appointed a master under this subsection if in the opinion of the commissioner the person is otherwise impartial and qualified to act as a master."

Rationale: This broadens the pool of possible masters, and helps ensure that any master the commissioner appoints is both impartial and qualified.

Proposed by: FRWR Work Group

Amendment: Move the following sentence, "Any state agency may assert a water right on behalf of the state in the adjudication," from Section 46.15.165(f) to a new subsection (e) and reletter the following subsections.

Rationale: This sentence appears to be out of place and is clearer and more logically placed as a new subsection (e).

Proposed by: FRWR Work Group

Amendment: In subsection (i), change the word "shall" to the word "may."

Rationale: Allows the Commissioner discretion to take this action.

Proposed by: FRWR Work Group

Section 46.15.166

Amendment: In Section 46.15.166(c), delete the word "initially." Delete the phrase "a designee of the Commissioner as" and substitute the phrase "an impartial qualified person as."

Rationale: "Initially" is an unnecessary word. Changing the phrase allows the court to appoint a person of its choice as master, rather than being limited by the Commissioner, and requires that the appointed master be impartial.

Proposed by: FRWR Work Group

Amendment: Also in subsection (c), delete the sentence "the master may be an employee of the state" and substitute "Employment by a federal, state, or local governmental agency does not disqualify a person from being appointed a master under this subsection if in the opinion of the court the person is otherwise impartial and qualified to act as master."

Rationale: This broadens the pool of possible masters, and requires that any master is both impartial and qualified.

Proposed by: FRWR Work Group

Section 46.15.168

Amendment: In Section 46.15.168(c), delete the words "with a private person or the federal government."

Rationale: That arbitration is entered into with a person is understood and "person" is already defined in AS 46.15.260(8) and includes private persons and the federal government; therefore, these words are redundent and unncessary.

Proposed by: FRWR Work Group

Amendment: In subsection (d) of Section 46.15.168, delete the word "federal."

Rationale: This will broaden the phrase to include both federal and state court decrees.

Proposed by: FRWR Work Group

Section 46.15.169

Amendment: Rewrite this section as follows: "Nothing in AS 46.15 represents a commitment by the State of Alaska to any specific federal reserved water right."

Rationale: Federal agencies have commented that the wording in proposed Section 46.15.169 suggests that the State of Alaska believes that federal reserved water rights do not exist. The new proposed language clarifies the meaning that the state has made no commitment to any federal reserved water rights for any specific federal land reservations.

Proposed by: FRWR Work Group

Section 46.15.256

Amendment: In Section 46.15.256(3), change "an" to "a", delete "administrative", and after the word "subpoena" add "or subpoena duces tecum."

Rationale: This will make the language concerning subpoenas consistent with other state agencies' statutes.

Proposed by: Assistant Attorney General Mike Frank

Senator Halford's comments along with those of the state and federal resource agencies are very useful and we support these proposed changes. Due to the critical need for this legislation, we urge your continued support for this bill.

Sincerely,

Esther C. Wunnicke

Esther C. Wunnicke
Commissioner

cc: Senator Jan Faiks
Senator Jim Sackett
Senator Pat Rodey
Senator Rick Halford
House Resources Committee
Molly McCammon
Jim Ayers

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 states[2] 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

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[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-

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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 date[15] 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

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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. 639, 646 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 -516 (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. § 37-92-305(1) (1973); *see also* Ellis, *Water Rights: What They Are and How They Are Created,* 13 ROCKY MTN. MIN. 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

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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

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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

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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. 564 (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 rights[53] and joined the United States as a defendant under the McCarran Amendment.[54]

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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 detemine 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-

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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

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[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, 508 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 the

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]

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borders. *See* Winston, *Reborn Federalism in Western Water Law: The* New Melones Dam *Decison*, 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 created 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, e.g.*, 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 on 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 to "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

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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* litigaton, 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. . . .
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> . . . .
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> . . . The record demonstrates that it was the understanding of the parties and Master Rifkind's intention that the calculation of practicably irrigable acreage be final. That was our understanding as well . . . .
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> . . . 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. . . .
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> . . . .
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> . . . [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 act[92] 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

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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 Amendment[94] 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

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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. . . .
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> . . . [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 ot 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 acompanying 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

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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 93-94.

111 Trelease, *supra* note 76, at 756; 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 mortage 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.

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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" 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 administrative[132] and legislative[133] 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

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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.

Alaska Department of
NATURAL
RESOURCES

ESTHER WUNNICKE,
COMMISSIONER

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

Alaska Department of
NATURAL
RESOURCES

ESTHER WUNNICKE,
COMMISSIONER

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

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

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

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

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.

10-J9LH

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 rights 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

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 sentense 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: 907-465-2400

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.

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.

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

Sincerely,

Esther C. Wunnicke

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

BILL SHEFFIELD, GOVERNOR

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. Unites 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 E. Wanamaker
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 Hunnicke 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 3-2000
JUNEAU, ALASKA 99802
PHONE: 907 , 465-4100

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,

Don W. Collinsworth
Commissioner

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

Resolution No. 84-5

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 K. Wanamaker, Chairman

March 14, 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:CML: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 allotees 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 allotee'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 appurtanence 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.

INTRODUCTION TO RESERVED WATER RIGHTS

Ralph W. Johnson

Natural Resources Law Center

University of Colorado School of Law

June 11-13, 1984

INTRODUCTION TO RESERVED WATER RIGHTS

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Natural Resources Law Center
University of Colorado School of Law

June 11-13, 1984

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 WESTRN 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 used 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 Unites 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 unnappropriated 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 buildsprojects 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 Sec. 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 guage. 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 recog ize 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 Elliott, "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.

FINIS

BILL SHEFFIELD, GOVERNOR

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. Unites 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 E. Wanamaker
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 Numnicke 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 3-2000
JUNEAU, ALASKA 99802
PHONE: 907 . 465-4100

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,

Don W. Collinsworth
Commissioner

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

Alaska Department of
NATURAL RESOURCES

ESTHER WUNNICKE,
COMMISSIONER

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

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

Alaska Department of
NATURAL
RESOURCES

ESTHER WUNNICKE,
COMMISSIONER

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

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 states[2] 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

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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-

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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 date[15] 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

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[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. 639, 646 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 -516 (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. § 37-92-305(1) (1973); *see also* Ellis, *Water Rights: What They Are and How They Are Created*, 13 ROCKY MTN. MIN. 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

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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

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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

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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. 564 (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 [illegible] subsequently filed suit in Colorado state court seeking adjudication of the same rights[53] and joined the United States as a defendant under the McCarran Amendment.[54]

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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 detemine 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-

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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

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[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, 508 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]

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borders. *See* Winston, *Reborn Federalism in Western Water Law: The* New Melones Dam *Decison*, 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 created 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, e.g.*, 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 on 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 to "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

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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* litigaton, 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. . . .
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> . . . .
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> . . . The record demonstrates that it was the understanding of the parties and Master Rifkind'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. . . .
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> . . . .
>
> . . . [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 act[92] 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

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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 Amendment[94] 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

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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 ot 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 acompanying 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

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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 93-94.

111 Trelease, *supra* note 76, at 756; 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 mortage 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.

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116 United States v. District Court in and for the County of Eagle, 169 Colo. 555, [illegible] 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

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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 administrative[132] and legislative[133] 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

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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.

BILL SHEFFIELD, GOVERNOR

WATER RESOURCES BOARD

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March 28, 1986

Governor Bill Sheffield
Box A
Juneau, Alaska 99811

Dear Governor Sheffield:

The Water Resources Board is pleased to present you with the following eight resolutions, unanimously adopted at its last meeting held February 26-27, 1986, in Juneau. In particular, I want to draw your attention to Resolution 86-13. In light of declining state revenues and necessary budget tightening, the Board would like to discuss prioritization of the State's water resources programs with the Commissioners of the Departments of Natural Resources, Environmental Conservation, and Fish and Game at its next meeting.

Resolution 86-8 Participation of Military Reservations in Water Resources Planning in Anchorage Bowl
Resolution 86-9 Alaska to Administer Section 402(b) NPDES Permits
Resolution 86-10 Placer Mining Water Quality Regulations
Resolution 86-11 Resolution of Conflict in Effluent Requirements
Resolution 86-12 Military Cooperation Regarding Federal Reserved Water Rights and Hazardous Waste Management and Disposal
Resolution 86-13 Prioritization of Alaska's Water Resources Programs
Resolution 86-14 Department of Natural Resources Water Management Staffing
Resolution 86-15 Coordination of Instream Flow Protection Programs

Copies of the resolutions have been distributed as shown on the enclosed distribution list. A summary of the minutes of the meeting is also enclosed.

Our next meeting has been tentatively scheduled for September 11-12, 1986, in Anchorage.

Sincerely,

Cyril R. Wanamaker
Chairman

by: L. A. Dutton
Chief, Water Management Section
Department of Natural Resources

Enclosures

cc: Esther C. Wunnicke
Bill Ross
Donald W. Collinsworth
Senator Arliss Sturgulewski
Representative Adelheid Herrmann
Representative Richard Shultz
The Honorable Ted Stevens
The Honorable Frank Murkowski
The Honorable Donald E. Young

Distribution List
Water Resources Board Resolutions

Resolution 86-8
Esther C. Wunnicke
Mayor Tony Knowles
Lieutenant General David L. Nickols, Elmendorf AFB
Major General Gerald Bethke, Fort Richardson

Resolution 86-9
Esther C. Wunnicke
Bill Ross
Senator Arliss Sturgulewski
Representative Adelheid Herrmanr.
Representative Richard Shultz
The Honorable Ted Stevens
The Honorable Frank Murkowski
The Honorable Donald E. Young

Resolution 86-10
Esther C. Wunnicke
Bill Ross
Donald W. Collinsworth

Resolution 86-11
Bill Ross

Resolution 86-12
Bill Ross
Lieutenant General David L. Nickols, Elmendorf AFB
Major General Gerald Bethke, Fort Richardson
Colonel Wallace Cox, Fort Wainwright
Colonel Philip Nuber, Eielson AFB
Colonel Richard Quinn, Fort Greeley

Resolution 86-13
Esther C. Wunnicke
Bill Ross
Donald W. Collinsworth

Resolution 86-14
Esther C. Wunnicke

Resolution 86-15
Esther C. Wunnicke
Donald W. Collinsworth

Meeting Summary
ALASKA WATER RESOURCES BOARD
Juneau, Alaska
February 26-27, 1986

Board members in attendance:

Cyril (Randy) Wanamaker, Chairman, Juneau
David Vanderbrink, Vice Chairman, Homer
Peg Tileston, Anchorage
Wayne Westburg, Anchorage
Tom Meacham, Anchorage
Alan (Mike) Niemeyer, Anchorage
Stan Rybachek, North Pole

February 26, 1986

Randy Wanamaker, Chairman, called the meeting to order.

Esther C. Wunnicke, Commissioner, Department of Natural Resources and the Board's Executive Secretary, opened her remarks with a brief report on the budgetary impacts that the State's falling oil revenues will have on Division of Land and Water Management (DLWM) programs in FY'87. Under the Governor's proposed budget, funding for water rights adjudication will remain unchanged, the dam safety program will lose one position, and the Water Resources Development Project, which funds most of the Water Management Central Office, will be reduced substantially, with the elimination of five full time and one part time positions. Functions that will remain in the Central Office include staff support for the Water Board and statewide guidance and coordination on federal reserved water rights. Other Central Office functions will be transferred to the Regional Offices or be assumed by a new Policy and Procedures Unit. Funding for the Water Resources Section of the Division of Geological and Geophysical Surveys (DGGS) will remain at nearly the same level as this year's authorized budget. The Commissioner then reported that, by instituting "belt tightening" measures, DLWM has been able to make up a $400,000 personnel services shortfall in the FY'86 budget.

Commissioner Wunnicke next reported on the status of the Board's resolutions, adopted at the September, 1985 meeting:

- **Resolution No. 86-1: EPA National Placer Mining Standards**
  (Discussion deferred to Commissioner Ross, DEC)

- **Resolution No. 86-2: Re-affirmation of Administrative Order No. 67**
  This order directs all state agencies to require compliance with the Water Use Act when awarding funding, letting contracts, or providing assistance on water development projects. Governor Sheffield has re-issued this order as Administrative Order No. 83.

°**Resolution No. 86-3: South Anchorage Groundwater Decline**
DNR has continued to monitor the goundwater situation in the middle and lower levels of Anchorage's Hillside area.

°**Resolution No. 86-4: Department of Natural Resources Fees for Water Rights Applications**
This resolution urged the Governor to waive the $50 filing fee for single family domestic water rights applications. In light of the budgetary situation, the decision was made not to waive these fees.

°**Resolution No. 86-5: Federal Reserved Water Rights Adjudication**
This resolution supported passage of SB 150. The bill has received support from federal and state agencies and from the Water Resources Board. As a result, the bill has been passed out of the Senate Resources Committee.

°**Resolution 86-6: Advisement of Legislative Action**
DNR has made every effort to ensure that the Board is kept abreast of proposed legislation relating to water resources.

°**Resolution 86-7: Filing Fee Advertisement**
DNR ads urging that people file for their water rights, plus ads run by Senator Faiks and Representatives Boucher, Rieger, and Collins were quite effective. The Department received roughly 5,450 new applications in the two months before the new filing fees went into effect, and is now exploring ways of dealing with this backlog in a timely manner.

The Commissioner closed by stressing that she believed that the funding cuts proposed in the Governor's budget will still allow vital public services to continue.

QUESTIONS AND COMMENTS:

Peg Tileston expressed concern that the emphasis on "regionalization" within DNR will encourage reactive departmental responses to parochial issues rather than a consistent statewide policy. **A:** The Central Office will be retaining a position to provide oversight on water issues. Consistent policy direction will also come from the director of DLWM as well as from the commissioner.

Tom Meacham expressed concern that Central Office oversight on instream flow and federal reserve water rights issues will be lost during the budget cuts. **A:** The position that is being retained in the Central Office will perform these functions.

Tom Hawkins, Director, Division of Land and Water Management, opened his remarks with a status report of water resource related bills now pending before the legislature:

- **CSSB 95 - Dam Safety**
  This bill gives the Department a comprehensive dam safety program with clear authority to regulate non-federal dams. The bill was passed out of Senate Resources and is before the Senate Finance Committee.

- **CSSB 150 - Basin-wide Adjudication**
  This bill establishes procedures for conducting basin-wide adjudications of water rights administratively and in state court. A committee substitute acceptable to DNR has been passed out of Senate Resources.

- **HB 627 - Amendment to the Water Use Act**
  This bill was introduced February 17 by Representative Miller of North Pole. DNR is concerned that the bill would limit DNR's ability to require all water users to file for water rights in critical management areas, and that "domestic" water use must be defined so it cannot be expanded to include subdivision water supplies.

- **CSHB 93 - Recreational Rivers**
  This bill establishes a system of recreational rivers. The bill is in the House Finance Committee.

- **SB 334 - Hatcher Pass Public Use Area**
  This bill provides management guidelines for the Hatcher Pass Public Use Area and is in Senate Resources.

- **CS for HJR 14 - Navigability**
  This bill requests that further classification of federal Wild and Scenic Rivers in Alaska be suspended pending the outcome of litigation on navigability issues. The bill is in the House Rules Committee.

Director Hawkins discussed the Bradley Lake Hydroelectric Project and the status of ongoing negotiations between the State and the National Park Service (NPS) concerning the allocation of flows at the Nuka Glacier between the Nuka and Bradley rivers. DLWM is also encountering problems with the National Park Service concerning a NPS regulation (36 C.F.R. Sec. 9.8) which states that plans of operation for placer mining will not be approved unless the applicant has a perfected water right with a priority date prior to establishment of the park. NPS has advised DLWM that they are revising the regulations.

Director Hawkins expanded on Commissioner Wunnicke's discussion concerning the impacts that the Governor's FY'86 budget proposals will have on water management programs within DLWM. The Director assured the Board that the

new backlog of water rights casefiles can be dealt with by the Northern and the Southeastern Regional Offices with existing staff; however, DLWM may have to request funding for several temporary positions at the Southcentral Regional Office to cope with their backlog.

The Western States Water Council held their last meeting in San Antonio, Texas. The focus of the meeting was groundwater issues.

Bill Ross, Commissioner, Department of Environmental Conservation, opened his remarks with a discussion of DEC's FY'86 budget. Federal cuts due to the Gramm-Rudman Act and the possible elimination of 205(J) grants will produce a decrease in federal monies; however, the Governor's FY'86 proposed budget for DEC provides for increases in funding:

- To monitor growing surface water quality problems in Anchorage,
- To step up permitting activities for new construction,
- To implement a regulatory program for hazardous waste disposal problems associated with industrial areas on the Kenai Penninsula, and
- To continue research efforts on placer mining effluent problems.

Commissioner Ross next provided the Board with an update on Water Board resolutions:

- **Resolution No. 86-1: EPA National Placer Mining Standards**
  Governor Sheffield has provided for review of the proposed EPA placer mining standards by a wide variety of state agencies, and has directed the Office of the Governor to prepare a coordinated state response.

- **Resolution No. 86-2: Reaffirmation of Administrative Order No. 67**
  DEC standard procedure is to assist and encourage communities seeking grant monies to apply for water rights. Since the last Board meeting, 6 out of 6 communities have applied for water rights.

The Commissioner reported that the PEO (polyethylene oxide) flocculation study, jointly sponsored by DEC, University of Alaska, EPA, and the Bureau of Mines, is scheduled for this summer. Results of the study should be ready in November, 1986.

The Commissioner informed the Board that comments are due on the proposed EPA placer mining standards in mid-March. EPA will be revising the standards in the fall of 1986 to incorporate comments received and the results of the PEO flocculation study and Placer Mining Grant studies that will be performed this summer. The standards are due to be finalized in October, 1987. DEC's comments expressed concern that the subcategories selected to guide effluent standards fail to fully take into account site specific variables. Also, the draft standards fail to encourage water conservation or classification prior to sluicing.

The Commissioner next discussed DEC's hazardous waste management programs:

- °DEC is currently preparing regulations that will allow it to assume the management of hazardous waste from the federal government through the provisions of the Resource Conservation and Recovery Act (RCRA). The DEC program is scheduled to go into effect in July 1987.

- °The Spring Clean-up and Technical Assistance Program, which provides free disposal of small quantities of hazardous wastes, now limits eligibility to those with 200 pounds or less of waste material.

- °DEC has a waste disposal study underway to determine what types and how much hazardous waste is being generated within the state.

- °DEC, working closely with DNR, is in the process of identifying sites within Alaska suitable for hazardous waste disposal, and has prepared draft regulations to guide the site selection process.

- °Regulations affecting the transportation of hazardous wastes and the notification of communities are being prepared.

- °DEC is investigating existing disposal sites through federal Superfund grants to determine the extent and magnitude of danger from hazardous wastes posed by these sites. The military is also investigating and cleaning up some of their disposal sites and are coordinating their efforts with DEC. Pending legislation, HB 470 and SB 375, would set up a fund to perform remedial work on existing sites and to provide authorization and funding to clean up hazardous waste spills.

The Commissioner next briefly discussed the Underground Injection Program. The Alaska Oil and Gas Conservation Commission (AOGCC) has primacy over Class II wells (i.e., secondary recovery and waste injection wells). They are currently preparing regulations that will enable them to take over permitting for these wells from EPA. DEC handles permitting for annular reinjection of wastewater from drilling muds.

DEC is currently amending its water quality regulations (18 AAC 70) to bring its program into compliance with new federal regulations which require that use attainability studies be performed as a prerequisite for stream reclassification. DEC currently has no funding, however, to perform any use attainability studies.

DEC is reviewing its internal procedures and regulations for on site disposal and water and wastewater system review to streamline its permitting process.

DEC, in cooperation with DNR, has obtained a federal grant to develop a Groundwater Protection Strategy. Program steps include:

- °Inventorying existing water quality data,
- °Inventorying known and potential groundwater pollution,
- °Assessing the adequacy of the existing regulatory framework, and
- °Developing a groundwater protection strategy.

QUESTIONS AND COMMENTS:

Tom Meacham asked if DEC was looking at the economic analysis that EPA used to establish their placer mining effluent guidelines? **A:** DEC has not concentrated on responding to the economic analysis, but feels that EPA has received adequate input from other sources.

Wayne Westburg asked if DEC was going to pursue reclassificaion of streams? **A:** Regardless of reclassification efforts, the placer mining industry will, as a minimum, have to meet the effluent guideline standards.

Stan Rybachek asked if EPA will be adopting the state's water quality standards? **A:** EPA must look at the state's water quality standards when issuing permits.

Wayne Westburg commented that if a miner can't even comply with the effluent guidelines, then reclassification of stream to industrial standards is pointless. **A:** The miner must comply with the effluent guidelines, as a minimum. However, depending on the classification of the stream, stricter controls could be imposed during the permitting process.

Tom Meacham wanted to know the status of the federal study to determine whether drilling muds should be classified as a hazardous waste? **A:** The EPA is currently in litigation for their failure to perform this study. A schedule for the study will be set by the courts.

Dave Vanderbrink expressed concern that places like Homer and Juneau may not be able to comply with the draft hazardous waste siting regulations. **A:** Commissioner Ross said he welcomed all input.

Stan Rybachek asked if settling ponds using the PEO flocculants could be classified as hazardous wastes? **A:** No, PEO is an FDA approved substance.

Stan Rybachek also expressed concern with the adequacy of the EPA lab in Corvallis, Oregon to meet the requirements of section 104(E) of the Clean Water Act. **A:** The location of the lab shouldn't be a problem. Some of the work is subcontracted to University of Alaska-Fairbanks.

Wayne Westberg asked if the placer mining industry is going to have to live with drinking water standards? **A:** DEC's budget does not allow them to do any use attainability studies; however, under federal rules, DEC has to perform these studies prior to any reclassification of streams.

Tom Meacham expressed concern that some Anchorage homeowners are unable to get their septic systems recertified due to changing well-septic spacing requirements. **A:** The Municipality of Anchorage was, for several years, delegated the responsibility to certify septic systems and, on occasion, certified or granted waivers to some inadequate systems. DEC is unwilling to compromise its standards in recertifying these systems.

Wayne Westberg stressed that no relationship has been established between failing septic systems and surface water pollution in Anchorage, nor have any water wells been shown to have been contaminated by failing septic systems.

Peg Tileston asked if DEC had any input on selecting the water and sewer systems included in SB 335? **A:** These decisions are made by the legislature. DEC provides technical analysis of proposed systems on request from the governor or legislators.

Wayne Westburg asked if a water rights permit is now a DEC requirement before a certificate of construction and operation for a new water system will be issued? **A:** The commissioner said he will look into it.

Charles Sloan, Hydrologist, U.S.G.S., addressed the Board on the technical aspects of the joint DEC-DNR Groundwater Protection Strategy. The program is funded through section 106 of the Clean Water Act. Tasks identified to be done by DGGS are:

- °Inventory of groundwater related organizations,
- °Determine the availability, accessibility and useability of groundwater quality data, and
- °Determine the known extent of groundwater pollution in Alaska.

Bill Barnwell, Deputy State Geologist, DNR Division of Geological and Geophysical Surveys (DGGS), provided the Board with a brief update on the AWARE plan and discussed the necessity of technical geological and hydrologic input on decisions concerning hazardous waste disposal. DGGS's new responsibilities concerning water quality issues and the AWUDS Program mean that they will have to reprioritize their existing programs and be "spread a little thinner."

QUESTIONS AND COMMENTS:

Peg Tileston asked how much interaction and cooperation DEC has with the military on hazardous waste issues? **A:** Not very much. The Air Force has been in contact with DEC concerning some of their plans for hazardous waste cleanup. **Bill Leitch,** DEC, commented that historically DEC has had difficulty in getting information from the military on spills occurring within military reservations.

Christy Miller, Department of Community and Regional Affairs (DCRA) addressed the Board on floodplain management in Alaska. The National Flood

Insurance Program is a federal program designed to provide low cost flood insurance, and to encourage flood plain management through zoning restrictions. Communities found to lie within flood prone areas are required to join the program to be eligible for disaster relief, and to join, those communities have to establish mandatory land use planning requirements. There are currently 20 cities and boroughs in Alaska participating in the program. One problem that the program has caused is that if a flood prone community can't or won't participate in the Flood Insurance Program, its citizens cannot get home loans financed.

DCRA provides technical assistance to communities in meeting the minimum federal requirements for elegibility in the Flood Insurance Program, provides advice to lending institutions to determine if Flood Insurance is required prior to closing on loans, and serves as a mediator between the communities and the federal government or lending institutions.

The State of Alaska has no existing floodplain management program per se.

QUESTIONS AND COMMENTS:

Peg Tileston asked if the intent of the program is to help people rebuild in the same floodplain or to discourage construction within the floodplain? **A:** The program has the effect of doing both.

PUBLIC COMMENT SESSION

Bruce Geraghty, Executive Director, Miners Advocacy Council and Vice President of the Livengood/Tolovana Mining District, stressed the importance of reclassifying Alaskan streams and having the state take over the NPDES permitting process from EPA to help relieve placer miners of unreasonable and duplicative bureaucratic water quality requirements. Thirty-seven states so far have taken over this permitting process.

QUESTIONS AND COMMENTS:

Mike Niemeyer asked if streams were reclassified as industrial, could placer miners meet those standards? **A:** Not the 25 NTU standard. They may be able to meet the settleable solids standards. The advantage of reclassification is that an industrial classification will allow more flexibility in water quality management of placer mining on a case by case basis.

Tom Meacham commented that Texas and Massachusetts were probably able to assume the NPDES permitting program easily from EPA because those states have very few federal lands.

Dave Vanderbrink asked if the reason DEC won't look farther at reclassification is because the cost of doing a use attainability study is prohibitive? **A:** Other states have been able to perform several use attainability studies within one year, so why can't DEC?

Rose Rybachek, President of the Alaska Miners Association, provided the Board with some literature about the economic contribution of placer mining to Alaska, and several Placer Miners Association position papers on land planning and classification and coastal zone management. Ms. Rybachek then gave the Board an update on the efforts to have the Tolovana/Livengood mining district reclassified. The petition was denied. The district asked for a judicial review. In 1983, EPA enacted the regulations requiring use attainability studies. In 1985, the judge decided that DEC had not followed the proper procedures, and ordered DEC to do the following before March, 1986:

- °Prepare regulations for performing use attainability studies,
- °Conduct a use attainability study on the Tolovana River, and
- °Hold a public hearing regarding reclassification of the Tolovana River.

DEC is modifying their regulations and will be holding a public hearing in July 1986. The use attainability study has not yet been performed.

Wayne Westberg asked how much money do the placer miners have tied up in lawsuits. **A:** If a placer miner defends himself against a suit brought by EPA or DEC, it could cost up to a quarter of a million dollars. If you settle out of court, fines can range from $14,000 to $40,000. About $120,000 has been paid in the water quality litigation against DEC. The Sierra Club-BLM suit will cost $150,000 to get to the injunction stage.

Roger Burggraf, Chairman of the Fairbanks Branch of the Alaska Miners Association, emphasized that DEC and EPA water quality standards for placer mining discharge cannot be met with existing technology. Enforcement has been concentrated on politically active miners. Millions of dollars have been spent by government to study the effects of placer mining on the environment, but very little has been spent on researching new technology that will enable placer miners to meet water quality standards.

He recommended that:

- °The State should take over processing of the NPDES permits from EPA. Thirty-seven states have already done it.
- °DEC and EPA should "get their act together" and be consistent in their requirements and enforcement.
- °The State should fund studies to help miners develop technology to meet the water quality standards.
- °The State needs to aggressively pursue reclassification of streams.
- °The State should get involved in the BLM lawsuit.

QUESTIONS AND COMMENTS:

Peg Tileston asked what those miners who are able to meet the 0.2 ml/l standard for settleable solids were doing differently from those who couldn't? **A:** Site specific factors made the difference. No one can meet the turbidity standards.

Tom **Meacham** asked for clarification of the scope of the BLM lawsuit to affect miners who are not on BLM lands? **A:** About 10 percent of Alaskan miners would not be affected by this suit in some way.

Stan Rybachek asked if placer miners were going to comment on the EPA effluent guidelines? **A:** The miners are studying the supporting documents and will be responding to EPA.

Bob Aumiller, Miners Advocacy Council, reported that they have approached the Alaska Department of Fish and Game (DF&G) with the proposal that if they are allowed to mine out a stream, they will put aside 2 percent of their profits to be used for mitigation and recovery of that stream. They were refused. DF&G maintains that Title 16 will not allow this sort of approach. Mr. Aumiller also reported that enforcement actions are focused on politically active miners and that EPA has used a SWAT team approach to enforcement.

QUESTIONS AND COMMENTS:

Mike Neimeyer commented that EPA's economic analysis of placer mining in their supporting documentation for the placer mining effluent standards seemed, in his experience, to be completely unrealistic. **A:** Yes, EPA's economic analysis is not realistic for most mines in Alaska.

February 27, 1986

Jean Michou, General Manager, and **Stephanie Koeniger,** both of the Anchorage Water and Wastewater Utility (AWWU), gave the Board a report on AWWU's Water Master Plan Update and a discussion of how the Hillside groundwater situation fits into the larger problem of supplying adequate water for all of Anchorage. The Water Master Plan sets a schedule through the year 2020 for construction of improvements and additions to AWWU's water supply system. Some of the planned improvements include:

- °Completion of the Eklutna Water Project and the construction of mains to serve communities north of Anchorage.
- °Construction of a new 48-inch main from Eklutna to South Anchorage and Muldoon.
- °Construction of a five million gallon reservoir in Russian Jack Park.
- °Improving the delivery system to the Turnagain and Downtown areas.
- °Construction of a 24-inch main along Jewel Lake.
- °Construction of a 24-inch line along Lake Otis to a new reservoir at the proposed Turnagain View School site in South Anchorage.
- °Construction of a 16-inch line with booster pumps to serve the Potter Creek area.
- °Construction of new reservoirs at Hanshew Junior High School and at Kincaid Park.
- °Building new lines along 92nd, West Dimond, Raspberry, and Huffman Roads.

The cost of the improvements scheduled to be constructed between 1986 and 1991 is $40.6 million. An additional $73 million will be required to construct the long-term improvements scheduled for 1991 to 2020.

QUESTIONS AND COMMENTS:

Peg Tileston asked where conservation of water fits into the AWWU Master Plan? **A:** AWWU's policy has always been to encourage water conservation. AWWU is considering a recommendation to change the building code to require water efficient fixtures and meters in new construction.

Tom Meacham asked if some of the wells serving AWWU systems in the Lower Hillside area are physically outside of the service boundaries? **A:** No.

Wayne Westburg stressed that the wells that have failed on the Hillside were probably inadequate in the first place, and that all of those have been improved by deepening. Not enough data exists to substantiate the idea that the Hillside is experiencing a groundwater crisis.

Mike Neimeyer asked how much water is lost out of deteriorated AWWU water lines? **A:** The AWWU water system is fairly new and in good condition. There were leakage problems with some of the community systems that AWWU has taken over, but they have been corrected.

Mike Niemeyer asked what relationship the city has with the military reservation? How much water are they using? **A:** That's a very good question. The military takes their water from Ship Creek and maintains the Ship Creek Dam. There is no military involvement with the Eklutna Project.

Tom Meacham asked if AWWU plans to increase pumping out of its Hillside wells? **A:** AWWU could increase pumping on the Hillside to serve areas with failed private wells and those new developments which ask to be served.

Randy Wanamaker asked if AWWU has a program to study groundwater recharge? **A:** Groundwater recharge was tried on the Hillside in Campbell Tract in the early 1970's and ran into trouble with lawsuits for flooded basements.

Wayne Westburg pointed out that the military has been very uncommunicative and uncooperative in divulging their water use. He also stressed the value of water rights and encouraged AWWU to not abandon wells that have established water rights. **A:** AWWU does not lightly abandon wells with water rights.

Dave Vanderbrink commented that the well density on the Hillside would make putting in a sewer system difficult. **A:** AWWU has encountered situations where they could not service areas because well-sewer separation distances could not be met.

Wayne Westburg pointed out that using a community sewer system in areas with on-site wells results in dewatering the area.

Gary Prokosch, Department of Natural Resources, provided the Board with an update on the Hillside situation from the DNR perspective. With the new influx of water rights applications from the Hillside area, the percentage of Hillside residents with existing or pending water rights has increased from 18 percent to 43 percent in one year. The new applications are a source of new data. The USGS has been monitoring the golf course well for six months, and the Alaska Zoo has started to meter its water use. This new information will also fill data gaps on water use on the Hillside. Currently, however, DNR has insufficient information to create a critical water management area on the Hillside.

Wayne Westburg asked what DNR is going to do about water rights for the golf course well? **A:** DNR is requesting that a pump test be performed so that the influence of the well on prior appropriators can be determined. The golf course is also investigating diverting water from Campbell Creek to use for irrigation.

Stan Rybachek asked about the status of the application for dewatering the Tri-con mine? **Mary Lu Harle**, Department of Natural Resources, reported that the project is on hold for economic reasons. A pump test has been performed by DGGS determine the impact on prior appropriators.

Don Shira, Alaska Power Authority (APA), discussed small scale hydropower development in Alaska. APA is currently studying or has recently completed studies of 11 small scale hydropower sites. Some of the problems in developing small scale hydropower sites are:

- °Lack of hydrologic data,
- °Lack of good hydropower sites near population centers, and
- °Difficulty in obtaining financing.

There is a real lack of transmission grids in Alaska. Several southeastern projects are not working at peak levels because energy demand has been less than anticipated. Also, British Columbia has large amounts of excess hydropower. With the development of a Southeastern power grid, this unused capacity could be put to use. Underwater direct current transmission could be used in Southeastern to avoid environmental problems associated with overhead transmission lines. HJR 55 was introduced this session to encourage development of a Southeast intertie. The advantages to constructing a Southeast intertie are:

- °Power can be transferred from areas of surplus to areas of energy deficit.
- °Allows communities to share facilities, thus reducing total costs.
- °Provides access to low cost Canadian power.
- °Provides power to the Quartz Hill Project.
- °Allows development of most economical hydropower sites regardless of the site's proximity to population centers.
- °Provides energy to small Southeastern communities currently dependent on oil fired generation.

Peg Tileston asked what an intertie between British Columbia and Southeastern would cost? **A:** The cost of an intertie from Whitehorse to Prince Rupert was estimated at $250 million 1982. Present day costs would probably be $400 million.

Tom Meacham asked if federal reserve water rights have caused problems in developing hydropower sites? **A:** Other than Bradley Lake, no.

Dick Logan, Director, Division of Sport Fisheries, Department of Fish and Game (DF&G), briefed the Board on the new DF&G Instream Flow Program. The Instream Flow Program will utilize staff expertise developed during the Susitna studies. The program will be funded by Dingell-Johnson federal funds.

DF&G plans to:

- °Start applying for instream flow reservations on those streams that currently have adequate hydrologic and biologic data.
- °Supply DNR with data they have requested on previously filed instream flow applications (i.e., Terror Lake).
- °Apply knowledge gained in the Susitna studies to a large number of Alaskan streams.
- °Participate in the joint federal-state federal reserve rights work group.
- °If HB 93 (Recreational Rivers Bill) is passed, within two years file instream flow reservations on streams designated as Recreational Rivers.
- °Participate on various management teams, such as the Kenai River Management team.
- °Prioritize stream systems throughout the state for instream flow work.
- °Encourage the installation of USGS gage stations on critical streams to ensure that baseline hydrologic data is available to the instream flow program.
- °Refine hydrologic models to reflect Alaskan conditions.
- °File for an instream flow reservation on Rabbit Creek near Anchorage.

QUESTIONS AND COMMENTS:

Tom Meacham encouraged DF&G to pursue an instream flow reservation in Potter Marsh. He also asked if DF&G had coordinated any of its plans for instream flow work with any of the native associations? **A:** DF&G will make its expertise available to anyone interested in instream flows.

Mike Neimeyer asked if there is a threat to the fisheries in Bristol Bay that necessitates instream flow reservations? **A:** DF&G is looking to the future in Bristol Bay.

Dave Vanderbrink asked for clarification on DF&G's plans for the Kenai River? **A:** DF&G, working cooperatively with the U.S. fish and Wildlife Service, will begin instream flow data collection on Kenai River tributaries. DF&G is also collecting data on key riparian habitats along the Kenai River itself.

Randy Wanamaker asked if any streams in Southeastern Alaska have been targeted for instream flow work? **A:** An ungaged basin flow modelling program has been tentatively scheduled for Southeast.

Mike Neimeyer expressed concern with DF&G's plan to file for instream flow reservations only on those streams which currently have adequate hydrologic data, rather than streams which actually need instream flow reservations. **Peg Tileston** provided clarification on the point that the Dinghall-Johnson monies are not only for instream flow reservations, but also to study the effect of pollution, habitat loss, over-fishing, etc. on sport fish populations. Thus, the studies proposed by DF&G for the Bristol Bay area were appropriate.

Bruce Baker, Department of Fish and Game, informed the Board that DF&G has a list of prioritized streams that need an instream flow study. The list was compiled in 1984 and is currently being revised. Criteria used to identify priority streams include:

- °Areas of current or anticipated conflicts involving water use
- °Availability of information from previous instream flow assessments
- °Availability of flow records,
- °Fisheries resources,
- °Wildlife resources,
- °Stream morphology, and
- °Extent of public recreational use.

Dave Vanderbrink asked if DF&G has plans to study any placer mining areas as part of its instream flow program? **A:** Placer mining has not been singled out as a criteria for study; however, some of the streams selected probably overlap placer mining areas.

Peg Tileston asked what kind of coordination occurs between DNR and DF&G on the various management plans? **A:** Habitat Division provides information on instream flows to DNR through DF&G's departmental comments.

Rick Reed, Department of Fish and Game, brought the Board up to date with the status of permitting the Green's Creek and the Quartz Hill projects. The 1984 DEIS on the Quartz Hill Project proposed a primary water source on Tunnel Creek with a well field on the Wilson River as a secondary source. An instream flow study on the Wilson River was performed by the U.S. Fish and Wildlife Service to determine the impact of a well field. It was found that the water withdrawals during low flow periods could severely impact the fisheries on Wilson River. Since that study, a pool near the mouth of Blossom River was identified as a possible alternate water source, and is being studied. The revised DEIS is coming out in the summer of 1986. Instream flow studies are also being performed by Noranda for the Green's Creek project.

QUESTIONS AND COMMENTS:

Randy Wanamaker asked about the effect of discharging tailing from the Green's Creek project directly into Hawk Inlet rather than into Chatham Straits? **A:** The effects of discharge into Hawk Inlet are being studied by Noranda. If they can demonstrate there will be little or no effect on the marine biota in the Inlet, then this discharge scheme will be permitted.

Fletcher Shives, Environmental Protection Agency (EPA), provided the Board with additional information on the Green's Creek and Quartz Hill projects. Studies on tailings discharge into Hawk Inlet indicate that the tidal surge in the narrow portion of the Inlet is very effective for mixing and dispersing tailings. EPA has issued permits to the Green's Creek project for the housing and construction portions of the project. A tailings monitoring program has been developed with DEC.

The Quartz Hill Project is still being evaluated. EPA concerns include:

- °Maintaining air and water quality,
- °Spill prevention and containment, and
- °Reporting and handling of hazardous wastes.

The revised draft DEIS will be available for public comment in April or May, 1986.

QUESTIONS AND COMMENTS:

Wayne Westburg asked if U.S. Borax still feels that the Wilson River well field is their preferred alternative water source? **A: John Paulsen,** U.S. Borax, informed the Board that the flow characteristics in the Wilson River make it a much more stable water source than some of the alternatives U.S. Borax has considered. The Blossom River pool is an alternative, but has not received adequate study as yet. Salt water intrusion will be a problem with the Blossom River pool.

Randy Wanamaker expressed concern that the tailings piles at the Greens Creek project will leach arsenic into the environment. **A:** An intensive monitoring program for tailings effluent has been devised. If deleterious effects are found, corrections to mine operations will be made.

Randy Wanamaker asked about the permitting status on both projects? **A:** The Greens Creek Project is in final stages of preparing the draft NPDES permit for a public notice and comment period. The Quartz Hill Project will receive its NPDES permit when the EIS is finalized.

Fletcher Shives pointed out that tailings from the Greens Creek Project will be disposed of in tailings dams on Zinc Creek. To compensate for the loss of habitat in Zinc Creek, Noranda will remove natural physical barriers on Greens Creek which currently prevent upstream migration of anadromous fish.

Mike Neimeyer asked about the advantages and disadvantages to the stae in assuming the NPDES permitting process from EPA? **A: Fletcher Shives** said that it would relieve the placer miners of one layer of governmental interference, but DEC is so overburdened now, it would not be able to administer the program well. The federal government currently has a grant program to states taking over this function; however, federal budget cuts may eliminate those funds.