

HB

185

HFIN

FILE

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

May 5, 2001

SUBJECT: CSHB 185(FIN)(Work Order No.22-GH1087\S)

TO: Representative Bill Williams
Attn: Mike Tibbles

FROM: Gerald P. Luckhaupt 
Legislative Counsel

I am concerned with the amendment adopted by the House Finance Committee that appears to tie the assessment of a water conservation fee under AS 46.15.035 to maintenance of the water management program. If the fee is being assessed for this purpose I believe that the fee may be subject to challenge under the commerce clause of the United States Constitution. I believe this problem may be addressed by placing the language added by the amendment at the end of the sentence on page 4, line 12. Per Mike Tibbles direction I am enclosing a draft that accomplishes this.

GPL:lmb
01-154.lmb

Enclosure

22-GH1087AS
Luckhaupt
5/5/01

CS FOR HOUSE BILL NO. 185(FIN)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to fees for certain uses of state water, other than fees for traveling upon
2 state water, and to the accounting and appropriation of those fees; relating to
3 authorizations for the temporary use of state water; making other amendments to the
4 Alaska Water Use Act; and providing for an effective date."

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

6 * Section 1. The uncodified law of the State of Alaska is amended by adding new sections
7 to read:

8 **POLICY REGARDING STATE WATER USE FEES.** (a) It is the policy of
9 the legislature to authorize the Department of Natural Resources to assess a reasonable fee for
10 the services it provides in facilitating the use of state water; the fee should reflect the
11 reasonable direct cost of providing the service, but it is the policy of the state that the fee not
12 include

13 (1) the costs and salaries of administrative, support, or supervisory personnel
14 who are not directly engaged in providing the service;

- 1 (2) other budgeted overhead expenses, including rent and utilities;
2 (3) interagency charges that would not meet the requirements of AS 37.10.052
3 - 37.10.058 if those charges had been incurred or invoiced by the agency providing the
4 designated regulatory service;
5 (4) public consultation costs when the consultation is not required by law;
6 (5) costs related to an appeal of permit issuance by a person other than the
7 applicant for that permit;
8 (6) expenses that are not reasonably necessary to comply with the law under
9 which the service is provided; or
10 (7) travel expenses for inspecting businesses having not more than 20
11 employees.

12 (b) It is the policy of the legislature that the Department of Natural Resources not
13 apply a charge to the holder of a certificate of appropriation that is not specifically related to
14 services provided by the department, except that the department may continue to charge the
15 annual \$50 administrative service fee currently in use by the department in order to maintain
16 the water rights program for the benefit of Alaskans and current water rights holders.

17 (c) It is the policy of the legislature that the Department of Natural Resources

- 18 (1) minimize the required costs, including application fees, on individuals and
19 businesses withdrawing less than a significant amount of water;
20 (2) consider providing a partial fee reduction for water rights holders and
21 applicants who have approved irrigation management plans.

22 * Sec. 2. The uncodified law of the State of Alaska is amended by adding a new section to
23 read:

24 FINDINGS, POLICY, AND PURPOSE RELATED TO AUTHORIZATIONS FOR
25 CERTAIN TEMPORARY USES OF STATE WATER. (a) The legislature finds that

- 26 (1) many construction, development, commercial, and private activities
27 require an authorization for the temporary use of the state's water without the need to acquire
28 a permanent right to appropriate water;
29 (2) for many years, in appropriate circumstances, the Department of Natural
30 Resources has issued revocable permits for the temporary use of state water under AS 46.15;
31 and

1 (3) the legislature validates and affirms that temporary permits authorizing the
2 temporary use of state water continue to be appropriate under AS 46.15.

3 (b) It is the policy of the legislature to expressly confirm in the Department of Natural
4 Resources the authority to issue authorizations for temporary use of water subject to
5 appropriate conditions and limitations set by the Department of Natural Resources.

6 (c) The purpose of the enactment of AS 46.15.155 in sec. 6 of this Act is to

7 (1) confirm the authority of the Department of Natural Resources to issue
8 authorizations for temporary use of water; and

9 (2) affirm the validity of existing temporary permits for the use of state water
10 issued before the effective date of this Act that may have been called into question by the
11 rationale used by the court in *Greenpeace v. Alaska Department of Natural Resources*, 3AN-
12 00-3415 Civil.

13 * Sec. 3. AS 37.10.058(2) is amended to read:

14 (2) "designated regulatory service" means a regulatory service
15 provided under the following regulatory programs:

16 (A) regulation of the disposal of waste into waters of the state
17 under AS 46.03.100;

18 (B) certification of federal permits or authorizations under 33
19 U.S.C. 1341 (sec. 401, Clean Water Act); [AND]

20 (C) a coastal management consistency determination relating to
21 a permit or authorization issued under a program listed in (A) or (B) of this
22 paragraph, if the determination is made by the agency issuing the permit or
23 authorization; and

24 (D) any authorization for the use or appropriation of water
25 under AS 46.15.

26 * Sec. 4. AS 46.15.020(b) is amended to read:

27 (b) The commissioner shall

28 (1) adopt procedural and substantive regulations to carry out the
29 provisions of this chapter, taking into consideration the responsibilities of the
30 Department of Environmental Conservation under AS 46.03 and the Department of
31 Fish and Game under AS 16;

1 (2) keep a public record of all applications for permits and certificates
2 and other documents filed in the commissioner's office; and shall record all permits
3 and certificates and amendments and orders affecting them and shall index them in
4 accordance with the source of the water and the name of the applicant or appropriator;

5 (3) cooperate with, assist, advise, and coordinate plans with the
6 federal, state, and local agencies, including local soil and water conservation
7 districts, in matters relating to the appropriation, use, conservation, quality, disposal,
8 or control of waters and activities related thereto;

9 (4) prescribe fees or service charges for any public service rendered
10 consistent with AS 37.10.050 - 37.10.058, except that the department may charge
11 under regulations adopted by the department an annual \$50 administrative
12 service fee to maintain the water management program and a water conservation
13 fee under AS 46.15.035;

14 (5) before February 1 of each year, prepare a report describing the
15 activities of the commissioner under AS 46.15.035 and 46.15.037; the commissioner
16 shall notify the legislature that the report is available; the report must include

17 (A) information on the number of applications and
18 appropriations for the removal of water from one hydrological unit to another
19 that were requested and that were granted and on the amounts of water
20 involved;

21 (B) information on the number and location of sales of water
22 conducted by the commissioner and on the volume of water sold;

23 (C) recommendations of the commissioner for changes in state
24 water law; and

25 (D) a description of state revenue and expenses related to
26 activities under AS 46.15.035 and 46.15.037.

27 * Sec. 5. AS 46.15.035(e)(2) is amended to read:

28 (2) "hydrologic unit" means a hydrologic subregion established by the
29 United States Department of the Interior, Geological Survey, on the "Hydrologic Unit
30 Map-1987, State of Alaska"; "hydrologic unit" includes the water of an ocean that
31 is adjacent to a hydrologic subregion of the state. [""]

1 * Sec. 6. AS 46.15 is amended by adding a new section to read:

2 **Sec. 46.15.155. Authorization for temporary use of water. (a)**

3 Notwithstanding any contrary provision of this chapter, the commissioner may
4 authorize the temporary use of a significant amount of water, as determined by the
5 department by regulation, for a period of time not to exceed five consecutive years, if
6 the water applied for has not been appropriated in accordance with this chapter.

7 (b) Notwithstanding any contrary provision of this chapter, an authorization
8 for a temporary use of less than a significant amount of water is not required under
9 this section unless the commissioner has determined by regulation that the use may
10 have an adverse effect on other water uses and that an authorization must be obtained
11 from the department.

12 (c) The issuance of an authorization for temporary use of water under this
13 section does not establish a right to appropriate water. The temporary use of water
14 under an authorization remains subject to appropriation under this chapter.

15 (d) Notwithstanding any contrary provision of this chapter, the commissioner
16 is not required to provide public notice under AS 46.15.133 of a proposed
17 authorization for temporary use of water; however, the commissioner shall request
18 comment on an application for temporary use of water from the Department of Fish
19 and Game and the Department of Environmental Conservation.

20 (e) The provisions of AS 46.15.080 do not apply to the issuance under this
21 section of an authorization for temporary use of water.

22 (f) The commissioner may impose reasonable conditions or limitations on an
23 authorization for temporary use of water to protect the water rights of other persons or
24 to protect fish and wildlife habitat, human health, or other public interests.

25 (g) Upon approval by the department, an authorization under this section may
26 be transferred to another person under the same conditions and limitations under
27 which the authorization was issued.

28 (h) A person to whom an authorization for temporary use of water was issued
29 under this section may allow another person to use the authorization, consistent with
30 the conditions and limitations of the authorization.

31 (i) The commissioner may modify, suspend, or revoke an authorization issued

1 under this section if the commissioner determines it necessary to protect the water
2 rights of other persons or the public interest.

3 * Sec. 7. AS 46.15.180(a) is amended to read:

4 (a) A person may not

5 (1) construct works for an appropriation, or divert, impound, withdraw,
6 or use a significant amount of water from any source without a permit, [OR] certificate
7 of appropriation, or authorization issued under this chapter;

8 (2) violate an order of the commissioner to cease and desist from
9 preventing any water from moving to a person having a prior right to use it;

10 (3) disobey an order of the commissioner requiring the person to take
11 steps to cause the water to move to a person having a prior right to use it;

12 (4) fail or refuse to install meters, gauges, or other measuring devices
13 or control works;

14 (5) violate an order establishing corrective controls for an area or for a
15 source of water;

16 (6) knowingly make a false or misleading statement in a declaration of
17 existing right.

18 * Sec. 8. AS 46.15.180(a) is amended to read:

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21 or use a significant amount of water from any source without a permit or [,] certificate
22 of appropriation [., OR AUTHORIZATION ISSUED UNDER THIS CHAPTER]:

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24 preventing any water from moving to a person having a prior right to use it;

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26 steps to cause the water to move to a person having a prior right to use it;

27 (4) fail or refuse to install meters, gauges, or other measuring devices
28 or control works;

29 (5) violate an order establishing corrective controls for an area or for a
30 source of water;

31 (6) knowingly make a false or misleading statement in a declaration of

1 existing right.

2 * Sec. 9. AS 46.15.155 is repealed.

3 * Sec. 10. Section 2 of this Act is repealed.

4 * Sec. 11. The uncodified law of the State of Alaska is amended by adding a new section to
5 read:

6 VALIDITY OF EXISTING TEMPORARY PERMITS ISSUED BEFORE THE
7 EFFECTIVE DATE OF THIS ACT. (a) A temporary permit issued before the effective date
8 of this Act by the Department of Natural Resources under AS 46.15 authorizing the temporary
9 use of water is valid and remains in effect, notwithstanding that public notice was not
10 provided under AS 46.15.133 or the criteria set out in AS 46.15.080 were not applied before
11 the temporary permit was issued.

12 (b) A temporary permit described in (a) of this section shall be considered to be an
13 authorization for temporary use of water under AS 46.15.155, enacted by sec. 6 of this Act, as
14 if AS 46.15.155 had been in effect at the time the temporary permit was issued. A temporary
15 permit described in this subsection is subject to the terms and conditions set out in the
16 temporary permit and is subject to the requirements of AS 46.15.155, enacted by sec. 6 of this
17 Act.

18 * Sec. 12. The uncodified law of the State of Alaska is amended by adding a new section to
19 read:

20 TRANSITION: REGULATIONS. (a) Under AS 44.62.125(b)(6), the regulations
21 attorney may change the term "temporary water use permit" in regulations of the Department
22 of Natural Resources concerning water use to "authorization for temporary use of water" as
23 consistent with this Act.

24 (b) To the extent that the regulations are not inconsistent with this Act, regulations
25 related to water management adopted by the Department of Natural Resources under
26 AS 46.15 and in effect on the effective date of this Act remain in effect until amended or
27 repealed and may be administered and enforced by the Department of Natural Resources.

28 * Sec. 13. Sections 1 - 3, 5 - 7, 11, and 12 of this Act take effect immediately under
29 AS 01.10.070(c).

30 * Sec. 14. Sections 4 and 8 - 10 of this Act take effect July 1, 2002.

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May 5, 2001

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Legislative Counsel

I am concerned with the amendment adopted by the House Finance Committee that appears to tie the assessment of a water conservation fee under AS 46.15.035 to maintenance of the water management program. If the fee is being assessed for this purpose I believe that the fee may be subject to challenge under the commerce clause of the United States Constitution. I believe this problem may be addressed by placing the language added by the amendment at the end of the sentence on page 4, line 12. Per Mike Tibbles direction I am enclosing a draft that accomplishes this.

GPL:lmb
01-154.lmb

Enclosure

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: CSHB185(RES)
Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Natural Resources
Title: State Water Use BRU: Minerals, Land & Water
Component: Water Development
Sponsor: (H) RLS by Request of Governor
Requester: (H) FIN Component Number: 916

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services		275.0	275.0	275.0	275.0	170.2
Travel		7.0	7.0	7.0	7.0	5.0
Contractual		15.0	15.0	15.0	15.0	7.0
Supplies		3.0	3.0	3.0	3.0	2.0
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	300.0	300.0	300.0	300.0	184.2

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (Fees)	0.0	84.2	184.2	184.2	184.2	184.2
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		215.8	115.8	115.8	115.8	
1005 GF/Program Receipts	(135.8)	(135.8)	(135.8)	(135.8)	(135.8)	(135.8)
1037 GF/Mental Health						
1156 Receipt-Supported Services	135.8	220.0	320.0	320.0	320.0	320.0
TOTAL	0.0	300.0	300.0	300.0	300.0	184.2

Estimate of any current year (FY2001) cost: none

Check this box (X) if funding for this bill is included in the Governor's FY2002 budget proposal:

POSITIONS

Full-time		5	5	5	5	2.5
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The fundamental issue facing the Water Development component is the fact that there is no longer enough staff to conduct the program required by statute. The problem is exacerbated by a court ruling that requires procedures for temporary water use permits that have historically not been conducted and that significantly increase staff time required to process these permits. The consequence of this problem is that the Department of Natural Resources has a backlog of over 600 applications for water rights and over 3,000 total actions (including permit extensions, transfers, etc.). Thus, many industries and citizens are frustrated by their inability to receive authorization to proceed with their projects, or to gain the security of a water right. [cont.]

Prepared by: Bob Loeffler, Director Phone (907) 269-8625
Division: Mining, Land and Water Date/Time 01-May-01
Approved by: Pat Pourchot Date 01-May-01
Agency: Natural Resources

For distribution information, call the Governor's Legislative Office

ANALYSIS: (continued)

Fee-Supported Services.

This bill would provide for a method of funding the water management program. It would require the water management program to use the application-fee methodology provided in AS 37.10.050 - 37.10.058. This methodology was pioneered by the legislature last year in HB 361, commonly known as the "DEC fees bill."

The fees methodology would allow DNR to set application fees for a temporary water use authorization or a water right at a price up to the estimated average reasonable direct cost incurred. These application fees, in addition to the existing general fund amount, would provide a secure funding source for program. That is, applicants would pay for the reasonable direct cost, and remaining indirect costs would remain the responsibility of the general fund. If applications increased, fees and therefore funds to the program would increase. If applications decreased, the opposite would occur.

The Department estimates that the new fees would be approximately double the existing fees for most water right applications. For some of the more complex types of applications, fees would increase further.

The additional funds would allow DNR to adjudicate a typical, new temporary water use authorization within 15 days, and a typical water right application within 60 days. It would also allow DNR to eliminate the backlog of over 600 water right applications and over 3,000 total actions within 5 years. The Department estimates that it will require \$300K in additional funds to accomplish these performance measures. Of this amount, approximately \$125K would be dedicated to eliminating the backlog of applications and other actions within 5 years. After five years, the funds used to eliminate the backlog would no longer be needed.

The effect of the fees would not be immediate. The establishment of a application-fee system that reflects the reasonable direct cost of providing the service will require up to two years to promulgate regulations, set up a revenue and billing system, and update the water right files. For this reason, this fiscal note includes the additional \$300K in general funds for the first year, FY 02 while regulations are being developed and implemented (it also transfers existing general fund program receipts to receipt-supported services). In the second year, \$215.8 included general funds with the balance in receipt supported services. In the years three through five, the fee program is fully operational. In that year, the department estimates that it will need only \$115.8 in new general funds, all of which would be used to eliminate the backlog. After year five, we project the water rights backlog to be eliminated, the fee program to remain fully operational, and no additional general funds would be required.

This program is consistent with the philosophy that, "Those who benefit from the service should pay for it."

To compliment the water use fee, DNR is currently writing regulations that will allow it to more efficiently process water right applications.

22-GH1087/P
Luckhaupt
5/4/01

Williams

CS FOR HOUSE BILL NO. 185(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

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**Offered:
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14 services provided by the department, except that the department may continue to charge the

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7 (2) violate an order of the commissioner to cease and desist from
8 preventing any water from moving to a person having a prior right to use it;

9 (3) disobey an order of the commissioner requiring the person to take
10 steps to cause the water to move to a person having a prior right to use it;

11 (4) fail or refuse to install meters, gauges, or other measuring devices
12 or control works;

13 (5) violate an order establishing corrective controls for an area or for a
14 source of water;

15 (6) knowingly make a false or misleading statement in a declaration of
16 existing right.

17 * Sec. 8. AS 46.15.180(a) is amended to read:

18 (a) A person may not

19 (1) construct works for an appropriation, or divert, impound, withdraw,
20 or use a significant amount of water from any source without a permit or [,] certificate
21 of appropriation [, OR AUTHORIZATION ISSUED UNDER THIS CHAPTER];

22 (2) violate an order of the commissioner to cease and desist from
23 preventing any water from moving to a person having a prior right to use it;

24 (3) disobey an order of the commissioner requiring the person to take
25 steps to cause the water to move to a person having a prior right to use it;

26 (4) fail or refuse to install meters, gauges, or other measuring devices
27 or control works;

28 (5) violate an order establishing corrective controls for an area or for a
29 source of water;

30 (6) knowingly make a false or misleading statement in a declaration of
31 existing right.

WORK DRAFT

WORK DRAFT

22-GH1087P

1 * **Sec. 9.** AS 46.15.155 is repealed.

2 * **Sec. 10.** Section 2 of this Act is repealed.

3 * **Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to
4 read:

5 **VALIDITY OF EXISTING TEMPORARY PERMITS ISSUED BEFORE THE**
6 **EFFECTIVE DATE OF THIS ACT.** (a) A temporary permit issued before the effective date
7 of this Act by the Department of Natural Resources under AS 46.15 authorizing the temporary
8 use of water is valid and remains in effect, notwithstanding that public notice was not
9 provided under AS 46.15.133 or the criteria set out in AS 46.15.080 were not applied before
10 the temporary permit was issued.

11 (b) A temporary permit described in (a) of this section shall be considered to be an
12 authorization for temporary use of water under AS 46.15.155, enacted by sec. 6 of this Act, as
13 if AS 46.15.155 had been in effect at the time the temporary permit was issued. A temporary
14 permit described in this subsection is subject to the terms and conditions set out in the
15 temporary permit and is subject to the requirements of AS 46.15.155, enacted by sec. 6 of this
16 Act.

17 * **Sec. 12.** The uncodified law of the State of Alaska is amended by adding a new section to
18 read:

19 **TRANSITION: REGULATIONS.** (a) Under AS 44.62.125(b)(6), the regulations
20 attorney may change the term "temporary water use permit" in regulations of the Department
21 of Natural Resources concerning water use to "authorization for temporary use of water" as
22 consistent with this Act.

23 (b) To the extent that the regulations are not inconsistent with this Act, regulations
24 related to water management adopted by the Department of Natural Resources under
25 AS 46.15 and in effect on the effective date of this Act remain in effect until amended or
26 repealed and may be administered and enforced by the Department of Natural Resources.

27 * **Sec. 13.** Sections 1 - 3, 5 - 7, 11, and 12 of this Act take effect immediately under
28 AS 01.10.070(c).

29 * **Sec. 14.** Sections 4 and 8 - 10 of this Act take effect July 1, 2002.

Department of Natural Resources

Briefing Paper on CSHB 185

Water Use Bill

04/20/2001

The Problem

Not Enough Money to Run the System

- Funding has decreased from a staff of 39 in the early 1980s to 4 people today.
- There has been a 53% reduction in general funds a 67% reduction in staff in the past 10 years.

A Backlog:

- Between 600 and 700 applications
- 3,000 total actions including transfers, amendments, and permit extensions.

Consequences of the Backlog:

- DNR processes state interest applications right away, but...
- Most public and industries have 2-3 year delay before getting permit to withdraw water!
- Some people will *never* receive a water right they applied for.
- Industries and people who operate without up-to-date permits are vulnerable to lawsuits.
- Environment not protected.

The Solution

Part 1: Streamline the System. We cannot pretend that we will have the funds to operate the system, as it existed in the early 1980s. DNR is proposing regulations to streamline 65% of the caseload and concentrate staff on larger water flows and where there is potential for a problem.

Part 2: \$300,000 in House and Senate Operating Budgets. Even a streamlined system cannot be run, statewide, with four people. An increment of \$300,000 has passed the House and Senate Operating Budgets

Part 3: Long-term Income Source (This Bill). This bill provides that DNR may charge the reasonable direct cost of providing a service, plus maintain the current \$50 annual fee to fund the program. It places strict limitations on what DNR can charge to assure the public that DNR will not raise fees unreasonably.

Summary of the Two Purposes of the Bill

Fee Limitations. The bill places water use authorizations as one of the fees to which last year's "fee bill" applies. This limits DNR ability to charge for water use applications to the reasonable direct cost of providing the service. The "fee law" pioneered by the legislature last year provides that the agency may not charge for administrative support, overhead, other work not required by law, costs of an appeal, etc.

However, the fiscal note assumes that DNR will make up future cost by raising fees to the limit allowed by that law. DNR expects to approximately double most fees.

Temporary Water Use Authorizations. Procedures for issuing temporary water use authorizations were called into question by the judge's ruling in Greenpeace v. DNR this winter. Because the temporary water use program is created in regulation with implied rather than explicit statutory authorization, there is significant room for judicial re-interpretation of the program. The second part of the bill explicitly authorizes the temporary water use program.

INUPIAT COMMUNITY of the ARCTIC SLOPE
an IRA Regional Tribal Government

P.O. Box 934 • Barrow, Alaska 99723
Ph: (907)852-4227 1-888-788-4227 Fax: (907) 852-4246



May 04, 2001

TO: STATE OF ALASKA
House Finance Committee Members

FR: Bill Tegoseak, Interim Executive Director *BT*

RE: Comments on Committee Substitute for House Bill No 185 (RES).

MY NAME IS BILL TEGOSEAK. I AM THE INTERIM EXECUTIVE DIRECTOR FOR THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE, A FEDERALLY RECOGNIZED REGIONAL TRIBAL GOVERNMENT INCLUSIVE OF ALL EIGHT VILLAGE TRIBAL GOVERNMENTS IN THE NORTH SLOPE. I AM A 57 YEAR RESIDENT OF THE NORTH SLOPE AND A VIETNAM WAR VETERAN.

LAST WEEK I TELEFAXED MY COMMENTS TO THE HOUSE RESOURCE COMMITTEE AND THE SENATE FINANCE COMMITTEE EXPRESSING OPPOSITION TO THIS PROPOSED BILL. ALL MEMBERS OF THIS COMMITTEE WILL BE RECEIVING A COPY OF THOSE COMMENTS IN ITS ENTIRETY THIS EVENING.

TWO DAYS AGO, DURING A SENATE FINANCE COMMITTEE HEARING ON THE COMPANION BILL TO THE HOUSE VERSION, BOB LOEFFLER FROM DNR CALLED MY CALCULATION THAT DNR HAD AUTHORIZED WATER USE IN THE NORTH SLOPE FOR INDUSTRIAL DEVELOPMENT IN THE BILLIONS OF GALLONS. HE MADE IT VERY PLAIN TO THE SENATE FINANCE COMMITTEE THAT MY CALCULATIONS AND PROJECTIONS OF BILLIONS OF GALLONS OF TEMPORARY WATER USE AUTHORIZED BY DNR WERE INCORRECT AND OVER-EXAGGERATED. IN REBUTTAL TO THAT, ALL COMMITTEE MEMBERS ARE PROVIDED A COPY OF TEMPORARY WATER USE PERMIT (TWUP A2001-11), SIGNED BY BOB LOEFFLER. ON JANUARY 04, 2001, AUTHORIZING OIL INDUSTRY THE USE OF AN EQUIVALENT OF 27,701,500,000 GALLONS OF WATER IN THE NORTH SLOPE WITHOUT A PUBLIC COMMENT PROCESS. IF THE PUBLIC COMMENT PROCESS IN LOCATIONS SUCH AS ANCHORAGE AND FAIRBANKS WERE CIRCUMVENTED, SOME, OR ALL OF YOU, PLUS YOUR COLLEAGUES IN JUNEAU WOULD PROBABLY BE LOOKING FOR A DIFFERENT LINE OF WORK.

BOB LOEFFLER STATED TWO DAYS AGO, AS WELL, THAT THERE IS NO NEED FOR TRIBAL CONSULTATION ON THIS BILL. THIS IS AN EXAMPLE OF EXTREME CULTURAL INCOMPETENCE ON HIS PART AND COMPLETELY ATTEMPTS TO, AGAIN, CIRCUMVENT RHW MOST RECENTLY SIGNED

MILLENNIUM AGREEMENT BETWEEN THE GREAT STATE OF ALASKA AND THE PROUD INDIGENOUS TRIBES OF THIS GREAT LAND.

LASTLY, BOB LOEFFLER STATED THAT THE NORTH SLOPE WATER POLICY SIGNED BY COMMISSIONER ROBERT E. LERESCHE ON MAY 23, 1979 HAD BEEN REVOKED. IN A LETTER ADDRESSED TO ME BY DNR CHIEF OF WATER RESOURCES, GARY PROKOSCH, DATED DECEMBER 22, 2000 HE STATES THAT THE POLICY IS VERY MUCH OUTDATED AND UNDER REVIEW BY DNR FOR REVISION. THERE IS NO EVIDENCE OF REVOCATION...REVOCATION SHOULD HAVE INCLUDED A PUBLIC COMMENT PROCESS. I URGE THIS COMMITTEE TO HOLD THIS BILL INDEFINITELY UNTIL SUCH TIME AS A PROPER REVIEW IS CONDUCTED TO ENSURE THAT A DEMOCRATIC PROCESS IS ALIVE AND WELL IN OUR GREAT STATE. THANK YOU.

Encl: Copy, State of Alaska (DNR) TWUP a2001-11
Copy Tegoseak comments to Senate Finance Committee (same sent to House Resource Committee)

Alaska Department of Natural Resources
Division of Mining, Land and Water

(NPRA BP
Trailblazer)

AS 46.15.080 Finding and Determination

Temporary Water Use Authorizations
TWUP A2001-11

143,420,000 gallons of water per year (440 acre feet per year) from 90 Lakes
for ice road and ice pad construction

Water Rights of Record: There are no water rights of record to any of the 90 lakes covered by this application for temporary water use.

AS 46.15.080. Criteria for issuance of permit.

(a) The Commissioner shall issue a permit if the commissioner finds that

(1) rights of a prior appropriator will not be unduly affected;

There are no prior appropriators of record. We find that the rights of a prior appropriator will not be unduly affected.

(2) the proposed means of diversion or construction are adequate;

The applicant proposes to withdraw water from ninety-two lake. The water intake structure is an approved design by ADF&G. Water has been taken from lakes such as these for over 20 years by similar methods and design and has proven to be adequate.

We find the proposed means of diversion and construction to be adequate.

(3) the proposed use of water is beneficial;

The proposed use of water is for oil field related activities, including ice road/pad construction/maintenance, camp supply, and drilling. This type of water use is consistent with the definition of a beneficial use as defined in the Water Use Act under AS 46.15.260(3). Water use for these purposes has been authorized since the 1970s.

We find the proposed use of water beneficial.

(4) the proposed appropriation is in the public interest. The water used under a temporary water use authorization is not considered to be appropriated.

(b) In determining : e public interest, the commissioner shall consider

(1) the benefit to the applicant resulting from the proposed appropriation;

We find the temporary water withdrawal will be a positive benefit to the applicant.

(2) the effect of the economic activity resulting from the proposed appropriation;

The Trailblazer project contributes to the regional economy through taxes and jobs, to the overall state economy as a primary revenue source, and to the United States by reducing the nation's dependency on imported oil. The ACMP coastal Consistency Determination AK 0010-02OG also addresses this issue.

We find there will be a positive economic benefit resulting from the proposed temporary water withdrawal, and will not hinder other economic activity that may be proposed.

(3) the effect on fish and game resources and on public recreational opportunities;

The following materials were considered as supporting evidence:

- ADF&G Memo dated December 15, 2000 in casefile
- ADF&G habitat permits for the 92 lakes
- ADF&G report on Fish Utilization of Lakes in Eastern NPR-A - 1999 Final Data Report January 2000
- ADF&G report Lake Sampled for Fish In and Near the Colville River Delta, Alaska 1979-1998, Final Report December 1998
- ACMP Final consistency determination AK 0010-02OG
- Hydrologist report dated December 15, 2000 in casefile.

The project area does not provide significant recreation opportunities. The taking of water from the lakes in no way hinders the hunting, fishing or recreation opportunities of those areas. The water is mainly taken during the winter month when little or no recreation activity takes place, and water in the lakes is replenished during spring breakup. The ACMP coastal Consistency Determination AK 0010-02OG also addresses this issue.

We find that there will be no significant effect on fish and game resources and on public recreational opportunities.

(4) the effect on public health;

After public and agency notice there has been no evidence presented or concerns expressed regarding the removal of water from the proposed sources on the public health.

The following materials were also considered:

- ADF&G Memo dated December 15, 2000 in casefile
- ADF&G reports
- ADF&G comments
- ADEC 401 Certification
- ACMP Final Consistency Determination AK 0010-02OG

We find there will be no effects on public health.

(5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;

After public and agency notice there has been no evidence presented or concerns expressed regarding the removal of water from the proposed sources and its effect of loss for alternate uses. The file contains no evidence of a direct predicted, planned or projected use of water in this area that would be precluded by this proposed temporary withdrawal of water. Water issued under a temporary water use authorization is not appropriated and does not preclude the use of water by others for their use. The file demonstrates that the proposed lake sources of water can supply water for these proposed uses, and more if the need arises.

We find that there will be no effect on or loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation.

(6) harm to other persons resulting from the proposed appropriation;

After public and agency notice there has been no evidence of a likelihood of harm to other persons resulting from the proposed temporary water withdrawals.

We find there will be no undue harm to other persons resulting from the proposed temporary water withdrawal.

(7) the intent and ability of the applicant to complete the appropriation;

The applicant has the intent and ability to complete the temporary water withdrawal as demonstrated in the time and effort in their design and construction of the project to date. The ability of the applicant is not a question; BP has shown the ability to bring projects on-line in the development of its oil and gas projects.

We find the applicant has the intent and ability to complete the temporary water withdrawal.

(8) the effect upon access to navigable or public water.

After public and agency notice, the file contains no evidence of adverse effect on access to public or navigable water. The withdrawal of water from the proposed sources will not hinder access to navigable or public water. The ACMP coastal Consistency Determination AK 0010-02OG also addresses this issue.

We find there will be no effect on access to navigable or public water.

Conclusion and Decision

ADNR and ADF&G personnel (along with EPA, DEC, JPCO, etc.) are constantly in the field monitoring, inspecting, and enforcing industry activities. They are present before, during, and after ice road construction.

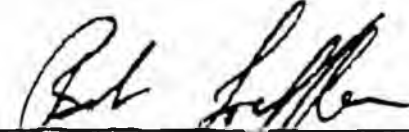
Ice road and ice pad construction has been a standard practice on the North Slope and in other areas of the state for more than 20 years. In this time period no evidence has been presented that ice road and ice pad construction and the withdrawal of water for ice road and ice pad construction has had an undue effect on the public interest. No evidence has been presented to show the rights of a prior appropriator or the public interest will be harmed by the withdrawal of water from the 82 lakes.

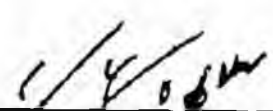
The total water use proposed for North Slope oil exploration and development from all authorized or proposed water sources (actual water use is less) is approximately 85,000 AF/Y. This represents 0.27% of the total water available on the North Slope in any given year. This leaves 99.73% of the water on the North Slope untouched. Also noteworthy is the fact that the majority of the water (0.27%) is used for ice road and ice pad construction, which eventually distributes the water on the tundra near the water sources and is once again available to the hydrologic unit during spring breakup. Accordingly, the most significant impact on the water resources is the effect on the water levels within the lakes, where only 15% of the water under the ice can be used. We conclude that this impact is at most, minimal as the water is replenished each spring during break-up. The total quantity of water in these lakes, not counting the 30 lakes to be used for ice aggregate, is about 3.12 billion gallons of water. The available water, 15% of the water under 7 feet of ice, in these lakes proposed for use is 488,550,000 gallons. The total quantity authorized to be withdrawn under the temporary water use permit is 143,420,000 gallons per year or .046% of the total water and only 31% of the available water.

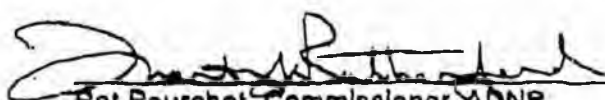
The subject files have been reviewed. A final ACMP Consistency Determination has been issued. We find that the rights of prior appropriators will not be unduly affected by the proposed temporary water withdrawal, the proposed means of diversion and construction are adequate, the proposed use of water is beneficial, and the proposed temporary water withdrawal is in the public interest. It is our decision that Temporary Water Use Permits TWUP A2001-11 shall be issued, effective the date of this decision to allow for the immediate use of water for the purposes intended.

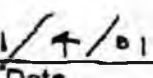
This is a final administrative order and decision of the department for purposes of an appeal to Superior Court. A person adversely affected by this final order and decision may (1) appeal to Superior Court within 30 days in accordance with the rules of the court, and to the extent permitted by applicable law, or (2) first request reconsideration of this decision, in accordance with AS 44.37.011 and 11 AAC 02.020, to Pat Pourchot, Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501-3501. Any such request for reconsideration must be received at that address, or received by being faxed to 1-907-289-8918, within 20 calendar days after the date of "delivery" of this decision, as defined by 11 AAC

02.040(c) and (d). Failure of the commissioner to act on a request for reconsideration within 30 days after delivery of this decision is a denial of reconsideration and is also a final administrative order and decision for purposes of an appeal to Superior Court. It may then be appealed to Superior Court within a further 30 days in accordance with the rules of the court, and to the extent permitted by applicable law. A copy of 11 AAC 02 may be obtained from any regional information office of the Department of Natural Resources.


Bob Loeffler, Director, DMLW


Date 1/4/01


Pat Pourchot, Commissioner, ADNR


Date 1/4/01

note
conversion
acre feet to
gallons

— acre feet x
325900 =
gallons

85,000 acre feet/
year =
27,701,500,000
gallons

INUPIAT COMMUNITY of the ARCTIC SLOPE

an IRA Regional Tribal Government



P.O. Box 934 • Barrow, Alaska 99723
 Ph: (907)852-4227 1-888-788-4227 Fax: (907) 852-4246

Senator Dave Donley, Co-chair of Senate Finance
 Fax: (907) 465-6595

Senator Pete Kelley, Co-chair of Senate Finance
 Fax: (907) 465-5241

Senator Lyman Hoffman, District T
 Fax: (907) 465-4523

Senator Donald Olson, District S
 Fax: (907) 465-4821

Senator Gary Wilkin, District O
 Fax: (907) 465-4714

Senator Jerry Ward, District E
 Fax: (907) 465-3766

Senator Alan Austerman, District C
 Fax: (907) 465-4956

Senator Lyda Green, District N
 Fax: (907) 465-3805

Senator Loren Leman, District G
 Fax (907) 465-3810

Honorable Senators:

The Inupiat community of the Arctic Slope (ICAS) is a federally recognized Indian Tribe of the Inupiat established under the Indian Reorganization Act of 1934, as amended in 1936. ICAS has significant concerns about SB 139 (and its companion HB 185), particularly as it relates to the issuance of "temporary water use permits." This bill represents the continuation of the current Department of Natural Resources (DNR) illegal practice of giving billions of gallons of North Slope water resources away, with no public notice, not tribal consultation, no scientific analysis and no access to traditional knowledge about the water bodies from which the water is being taken.

A major concern about this bill is that the criteria in AS 46.15.080 (for assessing water use impacts to fish, wildlife, public health and other values) are specifically not applied to temporary water use permits. In addition, we are concerned that SB 139 will exempt all such permits from public notice.

DNR's current practice, and this bill, are contrary to the Water Management Policy for State Lands Between the Colville and Canning Rivers, ("North Slope Water Management Policy") initially drafted by DNR in 1976 (revised 1979) and agreed upon by the North Slope Borough representatives. This policy was the result of extensive work by DNR, the oil industry, the North Slope Borough, DEC and ADF&G.

In the North Slope Water Management Policy DNR committed to "extend to the North Slope Borough an opportunity to review all permit applications for water use within the North Slope Borough." DNR also committed that the temporary water use permits would be limited to "less than a three-year duration." Finally, DNR committed that "The State will discourage the taking of water between the period of November 1 to spring breakup from areas known to overwinter fish.

Over the years, DNR has unilaterally abrogated these commitments, and now seeks to ratify its breach of those commitments, through SB 139. This legislation would continue DNR's current practice of issuing temporary water use permits for periods which are frequently extended to ten years, and beyond. Contrary to the North Slope Water Management Policy, DNR currently allows water withdrawal in winter from anadromous streams and lakes. Most of the 27 billion gallons of North Slope fresh water permitted by DNR to be used each year for ice road construction and offshore oil development is withdrawn in winter without adequate information regarding in-stream flow needs for subsistence species. DNR does not consult the North Slope Borough or tribal governments to its issuance of these permits. The result of this practice is the non-public, unregulated use of our limited natural resources that threatens tribal sovereignty and the subsistence rights of the Inupiat people.

In an effort to gain support for this legislation, DNR has stated that the Department of Fish and Game and Environmental Conservation will be allowed to comment on temporary water permits. However, neither DNR, ADF&G nor DEC have staff or resources on the North Slope to evaluate the impacts to water quality, to fish and to other subsistence resources on the North Slope to evaluate the impacts to water quality, to fish and to other subsistence resources for the significant number of "temporary" permits that DNR currently issues. Given the recent changes in climate, affecting all parts of the North Slope, reliance on outdated data is not sufficient to protect our subsistence resources. We need an assessment by the state of the water body from which water is to be withdrawn, each year, prior to the allowance of these "temporary permits." Nor is the DNR assurance that such permits are "revocable" sufficient to protect the subsistence resources. In order to revoke the permit, there will have to be analysis of the adverse impacts to the stream or lake after-the-fact, when the damage to subsistence resources is already done. No State agency has any ongoing monitoring program to assess the impacts of the temporary permits on these water sources or subsistence resources.

We urge you to defeat SB 139, and to encourage DNR to keep its commitments in the North Slope Water Management Policy. If there are to be changes to that policy, they are best accomplished by having the stakeholders who are impacted by the policy at the table. Thank you for your consideration of these views.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill Tego".

BILL TEGOSEAK
Interim Executive Director

Cc: North Slope borough