

HB

421

Committees:

Resources
Co-Chair

Transportation

World Trade and
State & Federal Relations

Alaska State Legislature



During Interim: (June-Dec.)
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Juneau, AK 99801-1182
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Representative Beverly Masek

Sponsor Statement

HB421 "An Act relating to water use and appropriation."

This bill directs the Department of Natural Resources to develop a standardized procedure for processing water rights applications.

Alaska's water is a public trust resource. Our state constitution tasks our legislature with the responsibility to oversee distribution of all public trust resources. The distribution of our state's water has been statutorily delegated to the administrative branch of our state government, specifically to the Commissioner of our Department of Natural Resources.

This legislation is a response to overwhelming public testimony given at meetings conducted in the Fall of 2001. The meetings were initiated by the Department of Natural Resources in order to meet with various environmental groups in order to explain the proposed regulation changes to the water rights adjudication process. Many individuals voiced complaints that they were unsure as to the status of their own permit, or that they could not obtain information as to pending permits in a given area. Examples of water uses that have been distributed for bodies of water with pending applications for adjudication of a water right were revealed at these meetings. Directing the department to develop and implement a standardized procedure is an effort which will better serve the public interest regarding the distribution of our state's water.

This bill also directs the department to make public records, including pending applications for water rights adjudication, available on the internet.

It was agreed in many of the meetings this Fall that the posting of information on the internet was an acceptable method of public notice, and a desirable avenue for public access to records. The department was able to use their website for several well designed pages supporting the proposed regulation changes, and should be able to implement a means of similar access to other matters of public record.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSHB 421(RES)
 (H) Publish Date: 3/22/02

Revision Date/Time (Note if correction): _____ Dept. Affected: DNR
 Title: HB421: WATER USE AND APPROPRIATION BRU: _____
 Sponsor: House Resources Committee Component: _____
 Requester: House Resources Committee Component Number: _____

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						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The Department of Natural Resources received \$300K last year for the purposes of addressing the backlog of water rights adjudication applications. This appropriation has remained in the current budget proposal. The department has testified in budget subcommittee meetings this legislative session that it has not yet finished development of a program, or completed hiring for this project. The department has proposed verbally that the required positions for implementing the requirements in this bill will approximate \$80K. It is reasonable to expect that amount to be taken from the above mentioned appropriation.

Prepared by: Jennifer Yuhas, Committee Aide Phone _____

Representative Masek, Co-chair Date 3/22/02
House Resources Committee

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSHB 421(RES)
 (H) Publish Date: 3/22/02
 Dept. Affected: Natural Resources
 BRU: Minerals, Land & Water Dev
 Component: Water Development
 Component Number: 916

Revision Date/Time (Note if correction): _____
 Title: Water Use and Appropriation
 Sponsor: (H) Resources
 Requester: (H) Fin

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual	75.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	75.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	75.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	75.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: none
 Check this box (X) if funding for this bill is included in the Governor's FY2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The bill calls for providing Internet access to DNR water rights, water use reports, and temporary water use authorizations. The Internet access would provide the public with following:

- GIS map interface showing location of water rights and permits
- Ability to view specific casefile information about new rights, authorizations or permits. This would not be all documents related to the casefile, but a casefile summary.
- Ability to view DNR regional summary information about rights, authorizations and permit activity (e.g., how many water rights or temporary water use authorizations in a particular region).
- Offer ability to link to DNR well log information system.

Prepared by: Bob Loeffler, Director Phone 269-8600
 Division: Division of Mining Land and Water Date/Time 12-Mar-02
 Approved by: Pat Pourchot Date 12-Mar-02
 Agency: Natural Resources

CSHB 421(RES) FN# 2 - ANALYSIS: (continued)

- It may be possible to view individual water right certification and permits from the time that the system is developed, but historical documents (other than casefile summaries) would not be available.

As part of this on-line system, DNR will assure on-going updates are made available.

The DNR Water Unit would contract with the Information Resource Management component via RSA to deliver these services. No additional staff are needed to complete this project.

Water Rights

HB-185 / SB-139

- Late in Session (Gov. forgot to place priority)
- Dept. → ability to charge \$50 / yr for water right, & received \$300K to address backlogged water rights applications, with which it created 5.5 new positions.
- Temporary water rights received 1yr sunset, and extensions clause was removed.

Statute

- Now allows DNR Commissioner to exempt types of water appropriations (but not types of uses) from public notice.
- No checks and balances regarding this issue.

Current Regulations

- Allow for Temporary Water Use Permits without public notice.
- Do not require an application for non-substantial use.
- Define "Non-Substantial Use" as below 5K gpd.
- Do not specify criteria for application review.

Proposed Regulations

- Seem to solve public notice questions by repealing exemptions section.
- Introduces a definition for "Substantial Use" (50K gpd), and requires adjudication for this use.
- Would change requirement for public notice from "when a water rights application is received" to "when the department begins adjudicating a water rights application".
- The department would not adjudicate temporary water use permits, or what it is calling "second threshold applications". It would, however, allow the use of the water without the adjudicated right. The proposed regulations therefore create a higher degree of water use that would not be subject to public process.
- Do not specify criteria for application review.

Communications with DNR. Water Division

- Argues that public process is cost prohibitive.
- Has not "fully adjudicated a water right since 1991"
- Has only posted 3 applications for adjudication to public notice since March 2001
- Has not communicated a plan beyond "in Bob's head" for the processing of the 3K backlogged applications.
- Has never had a backlog for temporary water use permits
- Argues that creating "second threshold" of water use allows people to "use water, and not break the law", ignoring it's circumvention of public process.

(Side note: if second threshold applications do not require processing except at the department's discretion, this regulation will actually be responsible for eliminating the majority of the backlog...what else will the \$300K go toward?)

- Cannot produce or articulate the review process for applications subject to the department's discretion for adjudication.

Complaints

- Process: Farmers would like to know what the \$50 / year fee to the department will be supporting. The department has not yet answered specifically.
- Accessibility: Applicants for water rights adjudication have not felt they have been given accurate, if any, information regarding the status of their pending permit.
- Accessibility: Individuals who have inquired as to the status or specifics of pending permits have been denied access to public information.
- Inconsistency: Water rights have been adjudicated with disregard to pending applications, although the department has testified that all applications will be taken into account before a right is appropriated.
 - Yellow Eagle Mine / home owners
 - BP / FWS at Kaparuk
- Ambiguity: The department cannot produce a criteria for application review, or for it's plan to relieve the backlogged applications.
- Ambiguity: A Superior Court Judge has cited the department's practices as "ambiguous and capricious" as he has found in favor of Greenpeace without holding BP responsible for the Karparuk ice road situation.

Future / Possibilities

- Criteria and process must be drafted for water rights applications that satisfy constitutional requirements for public trust, enable use of the resource for the public good, and facilitate ease of acquiring use in a uniform manner.

(This may require that the drafting process occur outside the department.)

- Statute for eliminating public process must be refined.
- Effectiveness of current process must be evaluated specifically, and measures should be implemented.
 - Regulation Review
 - Departmental Audit
- Statutory revision
 - Possibly a DNR revision
 - Possibly revised to incorporate other departments
 - Possibly revised to institute a separate entity

JENN'S NOTES

Proposed Regulation Changes Division of Water Oct. 2001

PUBLIC NOTICE:

(CONSTITUTION)

AK Constitution Article VIII Natural Resources, Section 10. Public Notice:

"No Disposal or leases of state lands, or interests therein, shall be made without public notice and other safeguards of the public interest as may be prescribed by law."

(STATE LAW)

Alaska State Law gives the Department of Natural Resources Commissioner authority to designate types of appropriations that are exempt from public process under AS 46.15.133 Notices; objections. :

"(f) The commissioner may, by regulation, designate types of appropriations that are exempt from this section and provide for ruling on the applications. The commissioner may not exempt under this subsection appropriations for removal under AS 46.15.035, appropriations by the state for sale or sales by the state under AS 46.15.037, or removals of water under AS 46.15.035 and 46.15.037."

(REGULATION)

- Currently temporary water rights are excluded by regulation 11 AAC 93.100 Exemptions to notice.
- The department of natural resources is proposing to repeal this section and amend 11 ACC 93.080 to require that public notice be given once the department begins adjudicating a water right, rather than when an application for a water right is received. It is also proposing that the adjudication process will not begin unless the department determines the process necessary under proposed 11 ACC 93.037 where it will create a "second threshold" allowing up to 50,000 gpd from some sources in what it explains is an effort to avoid the expense of public process in it's justification for this new classification.

When the DNR public notice section of their web site was reviewed 9/21/01, only three applications could be found to have been submitted in the last 6 months. Gary Prokosh confirmed this was the case at a meeting in his conference room the department was holding to explain their proposed regulation changes to some environmental groups, and explained that the no water rights had been adjudicated to his knowledge in the last two and a half months. Bob Loeffler with the department explained that there has never been a back log for temporary water use permits, and that most of the departments time is spent here.

The creation of the classification of water use applications that would qualify for "authorization" of use without necessitating an actual adjudicated water right greatly increases the number of applications that would not be subject to public process at the commissioner's discretion.

PRIORITY OF RIGHTS:

(CONSTITUTION)

AK Constitution Article VIII Section 13. WATER RIGHTS says that "Priority of appropriation shall give prior right."

(STATE LAW)

AS 46.15.165. Administrative adjudications allows - under subsection (a) - for the commissioner to "by order, initiate an administrative adjudication to quantify and determine the priority of all water rights and claims", and lists the types of sources he may do that for.

(REGULATION)

The department's proposed regulations express in ARTICLE 4. 11 ACC 93.210 TEMPORARY WATER USE. (b) that "No water right or priority is established by a temporary water use authorization."

When several scenarios were posed and the question was asked in a meeting at the Anchorage DNR office with statewide environmental groups which was teleconferenced to Juneau, Bob Loeffler also answered that no prior right would be recognized by the department for either the first or second tiers of non-substantial use authorizations. He testified that the department would maintain a policy of only recognizing an actual adjudicated right as a primary right even when a second tier authorization is bumped up to a level where the department chooses to adjudicate that use.

This seems to be in conflict with the state constitution in that the constitution guarantees a priority to the water, which was first appropriated. Appropriation may happen under the authorization of use without an adjudication being necessary. This is an established public trust principle with supporting case history.

Although the department has testified that other applicants and / or use entities will be taken into account at the time the department appropriates a water use, examples exist to the contrary.

A Superior Court judicial opinion exists supporting both these statements, as well as admonishing the department for what was found to be ambiguity and capriciousness regarding it's process for appropriation of water.

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Fact Sheet



Alaska Department of
**NATURAL
RESOURCES**

Division of Mining, Land & Water – January 2000

Administrative Service Fee

Why an annual administrative service fee?

The annual administrative service fee applies to all permit and certificate (including temporary water use permit) holders except state agencies, those domestic water users who use less than 1,500 gallons per day, those non-domestic water users who use 500 gallons per day or less, and instream flow certificate holders where the reservation is for public benefit. The annual administrative service fee will help pay for the following administrative services:

- Update and maintain water right records in a state-wide computer system for use as a management tool and public record source. This system contains data on customers, water right status, water source (well depth or water body name), type of water use, water quantity, period of water use, water right priority date, and legal description (meridian, township, range, section, quarter sections, latitude and longitude, subdivision name or survey number, tract, block, and lot). Currently, the water right database has over 23,000 records.
- Update and maintain water rights on the state's status plat system for use by the public.
- Respond to complaints from the public, state, federal and local government agencies regarding water use and misuse.
- Administratively handle complaints and appeals regarding the protection of prior water rights.
- Track permits and certificates; collect specific data, such as water use records, stream gage data, water level records, well logs, as-built plans, and specifications; and update databases for public and private use.
- Assist the Department of Law with appeals to the Superior Court on water resource management issues and water rights.
- Conduct coastal zone management reviews for consistency determinations, to assure that the appropriation and use of water is consistent with the Alaska Coastal Management Program.
- Pre-project review and assistance prior to the submittal of a water right application (examples: AJ Gold Mine, Fort Knox Gold Mine, Silver Lake Hydroelectric, Tazimina River Hydroelectric, Viewpoint Ventures Subdivision, and Boulder Springs Subdivision). Work with the developer to ensure that water rights holders are not harmed by the proposed development.
- Participate in site-specific water resource planning and review (examples: state area and management plans; federal land management plans; wildlife refuge plans; recreation plans; and groundwater task forces).
- Conduct or assist in hydrologic and water use data collection for specific areas not related to a water right request but to an area of water management concern (examples: Anchorage Hillside, Mat-Su Borough, Eagle River Valley, Chena Ridge, Auk Nu/Indian Cove, Nikiski, and Anchor Point).

The fee has become necessary as the state legislature has directed the department to find other sources of revenues to replace general funds. Program receipts are collected from the individual beneficiary of a program, and the funds collected are used to administer that program for the benefit of the water rights holders and the general public.

Why a \$50 fee for the work listed above?

The revenues generated will offset budget cuts and allow us to improve the administration and management of Alaska's water resources. It has been determined that the collection of a fee less than \$50 is not economical due to the cost of sending and receiving a bill. It is also a fact that, of the permits and certificates subject to this fee, not all of them will receive \$50 worth of work each and every year. Some of the files will require only minimal work. The fee helps pay for the administrative, management, and technical assistance by which the water right system supports the economy of Alaska and its development.

Why the exemptions to the fee?

There is no benefit to the state to impose this fee on other state agencies, nor is it in the state's best interest to impose the fee on an individual or group that has reserved water for instream flows to protect fish and wildlife and public recreation opportunities.

The exemption to the fee for domestic water use of less than 1,500 gpd is based on the fact that time spent on administrative work associated with domestic water use of less than 1,500 gpd is, on the average, a lot less than on permits and certificates issued for larger domestic uses and any non-domestic water use. Domestic water use is very stable water use – the type of water use and the location of water use rarely changes, and the source of water is normally uncontroversial due to the quantity of water required. The division purposely structured this exemption for domestic water uses such as lawn and garden, domestic livestock, greenhouses, and other water-related household amenities. The water well log data obtained from the many domestic water users is a valuable source of hydrologic information that is incorporated into a statewide database shared by state, federal, and municipal agencies, and used by the public and private sectors. The cost of this type of data collected, if it were not collected through the water right application process, would cost much more than the monies collected through an administrative service fee.

In short, the Department of Natural Resources has structured this fee to be fair to all water right appropriators of the state and has considered the economics of collecting a fee, with the above exemptions to the fee.

Where can I get more information?

More information is available in the Department of Natural Resources' fact sheets on Water Rights in Alaska, Dam Safety in Alaska, Reserving Water for Instream Use, Federal Reserved Water Rights, Glacier Ice Harvesting in Alaska, Alaska Water Resources Board, and Alaska Hydrologic Survey. Further information and application forms may be obtained from the following offices or visit our web site www.dnr.state.ak.us.

**Department of Natural Resources
Public Information Center**
550 West 7th Avenue, Suite 1250
Anchorage, AK 99501-3557
Phone: 907-269-8400
Fax: 907-269-8901

Public Information Center
3700 Airport Way
Fairbanks, AK 99709
Phone: 907-451-2705
Fax: 907-451-2706

**Division of Mining, Land & Water
Water Resources Section**
550 West 7th Avenue, Suite 900A
Anchorage, AK 99501-3577
Phone: 907-269-8503
Fax: 907-269-8947

Water Resources Section
400 Willoughby Ave., 4th Floor
Juneau, AK 99801
Phone: 907-465-3400
Fax: 907-586-2954

Fact Sheet



Alaska Department of
**NATURAL
RESOURCES**

Division of Mining, Land & Water – January 2000

Water Rights in Alaska

What are water rights?

A water right is a legal right to use surface or ground water under the Alaska Water Use Act (AS 46.15). A water right allows a specific amount of water from a specific water source to be diverted, impounded, or withdrawn for a specific use. When a water right is granted, it becomes appurtenant to the land where the water is being used for as long as the water is used. If the land is sold, the water right transfers with the land to the new owner, unless the Department of Natural Resources (DNR) approves its separation from the land. In Alaska, because water wherever it naturally occurs is a common property resource, landowners do not have automatic rights to ground water or surface water. For example, if a farmer has a creek running through his property, he will need a water right to protect his use. Using water without a permit or certificate does not give the user a legal right to use the water.

How do I obtain a water right?

To obtain water rights in Alaska, you should submit an application for water rights to the DNR office in the area of the water use. After your application is processed, you will be issued a permit to drill a well or divert the water. Once you have established the full amount of water that you use beneficially and have complied with all of the permit conditions, a certificate of appropriation will be issued. This is the legal document that establishes water rights.

What costs are involved?

An application for water rights must be accompanied by the filing fee of:

- \$50 for the use of 5,000 gallons per day (gpd) or less;
- \$100 for the use of more than 5,000 gpd but less than 30,000 gpd;
- \$200 for the use of 30,000 gpd or more but less than 100,000 gpd;
- \$300 for the use of 100,000 gpd or more but less than 500,000 gpd;
- \$500 for the use of 500,000 gpd or more but less than 1,000,000 gpd;
- \$1,000 for the use of 1,000,000 gpd or more except \$1,500 for the use of 1,000,000 gpd or more outside the hydrologic unit from which it was removed (hydrologic units are based on

the most current U.S.G.S. Hydrologic Unit Map of Alaska).

To ensure that the public is notified of proposed water uses, you may be required to pay the cost of a legal advertisement in at least one issue of a local newspaper in the area of the proposed water use. Public notice is required if the appropriation is over 5,000 gallons per day; if it comes from an anadromous fish stream; or if the water source has a high level of competition among water users. In addition, permit and certificate (including temporary water use permit) holders are subject to an annual \$50 water right administrative service fee for any non-domestic use of more than 500 gpd. Domestic water users of less than 1,500 gallons per day are exempt from the fee.

Why should I apply for water rights?

1. If you have water rights, you have legal standing to assert those rights against conflicting water users who do not have water rights.
2. A person with water rights has priority to use water over persons who later file for water rights from the same source.
3. Anyone who diverts, impounds, or withdraws a significant amount of water for use, without a permit or certificate, is guilty of a misdemeanor (AS 46.15.180). A significant amount of water is defined by 11 AAC 93.970(14) as:
 - The use of more than 5,000 gallons of water in a single day from a single water source; or,
 - The regular daily or recurring seasonal use of more than 500 gallons of water per day for 10 days or more per year from a single water source; or
 - The non-consumptive use of more than 30,000 gallons of water per day (0.05 cubic feet per second) from a single water source; or,
 - Any water use that might adversely affect the water rights of other appropriators or the public interest.
4. By filing for water rights, you provide valuable information about water use and water availability in Alaska. Water right records are updated and maintained in a state-wide computer system. This system contains data on

customers, water right status, water source (well depth or water body name), type of water use, water quantity, period of water use, water right priority date, and legal description (meridian, township, range, section, quarter sections, latitude and longitude, subdivision name or survey number, tract, block, and lot). Currently, the water right database has over 23,000 records. This information allows state water managers to estimate present uses of water, determine how much water is available from streams and aquifers in the state, protect established water right holders, prevent over-appropriation of water sources, and manage the state's water resources.

What other water resources authorizations are available from the Department of Natural Resources?

- **Dam Safety:** A certificate of approval is required for constructing or modifying a dam that impounds 50 acre-feet of water and is a least 10 feet high, or is a least 20 feet high, or poses a threat to life and property. An application form and the fee prescribed by 11 AAC 005.10 should be filed with the Department of Natural Resources.
- **Instream Flow:** A certificate is required for maintaining a specific flow in a portion of stream or water level in a lake. An instream flow reservation can be made to protect fish and wildlife habitat, migration, and propagation; recreation and park purposes; navigation and transportation purposes; and sanitary and water quality purposes. An application form and the fee prescribed by 11 AAC 005.10 should be filed with the Department of Natural Resources.

How do I obtain authorization for short-term water use (temporary water use permit)

A temporary water use permit may be needed if the amount of water to be used is a significant amount, the use continues for less than five consecutive years, and the water to be used is not already appropriated. This permit does not establish a water right but will avoid conflicts with fisheries and existing water right holders. The application fee for a temporary water use permit is the same as for a water right.

Where can I get more information?

More information is available in the Department of Natural Resources' fact sheets on Administrative Service Fee, Dam Safety in Alaska, Reserving Water for Instream Use, Federal Reserved Water Rights, Glacier Ice Harvesting in Alaska, Alaska

Water Resources Board, and Alaska Hydrologic Survey. Further information and application forms may be obtained from the following offices or visit our web site www.dnr.state.ak.us.

**Department of Natural Resources
Public Information Center**
550 West 7th Avenue, Suite 1250
Anchorage, AK 99501-3557
Phone: 907-269-8400
Fax: 907-269-8901

Public Information Center
3700 Airport Way
Fairbanks, AK 99709
Phone: 907-451-2705
Fax: 907-451-2706

**Division of Mining, Land & Water
Water Resources Section**
550 West 7th Avenue, Suite 900A
Anchorage, AK 99501-3577
Phone: 907-269-8503
Fax: 907-269-8947

Water Resources Section
400 Willoughby Ave., 4th Floor
Juneau, AK 99801
Phone: 907-465-3400
Fax: 907-586-2954

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The Amaize-ing Rocks that
Make You Feel Like a
Million

You can search the Alaska Statutes, go to The Alaska Leg
Resource Center, or the Touch N' Go home page

Alaska Statutes.

Title 46. Water, Air, Energy, and Environmental Conservation
Chapter 15. Water Use Act

previous: Section 990. Definitions.

next: Section 10. Determination of Water Rights.

Chapter 15. Water Use Act

Section 10. Determination of Water Rights.

Section 20. Authority and Duties of the Commissioner.

Section 30. Water Reserved to the People.

Section 35. Appropriation or Removal of Water Out of Hydrologic Units to Other Hydrologic
Units; Water Conservation Fee; Reservation of Water For Fish.

Section 37. Sale of Water By the State.

Section 40. Right to Appropriate.

Section 50. Priority.

Section 60. Existing Rights.

Section 65. Determination of Existing Rights.

Section 70. [Renumbered as AS 46.15.133].

Section 80. Criteria For Issuance of Permit.

Section 90. Preference in Granting Permits.

Section 100. Terms of Permit.

Section 110. Time For Construction and Completion.

Section 120. Certificates.

Section 130. [Renumbered as AS 46.15.050].

Section 133. Notices; Objections.

Section 135. [Renumbered as AS 46.15.065].

Section 140. Abandonment, Forfeiture, and Reversion of Appropriations.

Section 145. Reservation of Water.

Section 147. [Renumbered as AS 46.15.175].

Section 150. Preferred Use.

Section 160. Transfer and Change of Appropriations.

Section 165. Administrative Adjudications.

Section 166. Judicial Adjudications.

Section 167. Effect of Decision.

Section 168. Other Actions.

Section 169. Federal Reserved Water Rights.
Section 170. Effect of Recording.
Section 175. Termination of Permit For Violation.
Section 180. Crimes.
Section 185. Appeals.
Section 190. The Water Resources Board.
Section 200. Term of Office.
Section 210. Duties of the Board.
Section 220. Board Meetings.
Section 230. Public Meetings.
Section 240. Compensation of Board Members.
Section 250. Enforcement Authority.
Section 255. Enforcement.
Section 256. Data Collection Authority.
Section 260. Definitions.
Section 270. Short Title.

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MAR 26 2001

Honorable Tony Knowles
Governor, State of Alaska
PO Box 110001
Juneau, Alaska 99802-5526

March 21, 2001

Dear Governor Knowles:

The State of Alaska has in place the best water laws in the Nations. Other western states who are burdened with old water laws are working too hard to get beyond tradition and to mimic what Alaska has accomplished. The problem in Alaska is the administration of these laws. Part of the problem is funding to properly implement the laws. Part of the problem is the organization of the Water Resource Section within the Division of Mining. Here you have the wolves managing the sheep. And part is the weak management of the Water Resource Section.

The attitude of the Division of Mining and Water Management is that they only need to process "water rights that are required by law and that are in the best interest of the State," according to Bob Loeffler. However, the water laws of the State of Alaska were intended to empower the citizens of the State by giving them legal rights to use the water and protection under law to this water against competition from junior water users. The priority date is the date of the application. "First in time, first in right." To administer the State's water resource in the manner intended, each and every water right application must be processed, and processed in the order that it was received by the Water Management Section. The Director of Mining and Water Management, Mr. Bob Loeffler, has stated that "no instream water right applications will ever be processed." This is wrong! Instream water rights are recognized in State law and are as important as industrial water rights, particularly to subsistence users. Mr. Loeffler's reasoning is understandable though. If the people of Alaska are empowered to obtain an instream water right to keep water in a river for the fish and wildlife uses, then miners would have to insure that this water is available for the senior water user and this may reduce the intensity of their project. This is where the conflict arises in the organization of the Water Management Section within the Division of Mining. Water rights are processed only if they support the creation of jobs, at the expense of the people. This is not the intent of the Alaska State water laws.

Most western states have their water management organization separate from all other Divisions. They are usually titled the Office of the Water Engineer and are independent from outside political influence to apply the laws as intended. The State of Alaska would do well by considering the merits of an independent office for managing the States water resource.

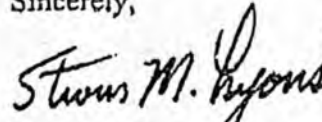
All water right applications should be processed in the order in which they are received. If they are not, then there is a question rather the senior water user has standing in court should a competing water use affect a senior water use. All water right applications should be treated equally and fairly. The DNR has recently lost two law suites (October 9, 2000 and November 2000) because of their miss management of water use applications on the North Slope.

A critical look at the success and failures of the water management program is needed. An assessment of the organization and management should be made. The State of Alaska should look at other western states and adopt strengths found in those programs, e.g. need for an

11/17/01 LETTER

independent water management organization. The State of Alaska has the best water laws in place, they only need to improve the management, implementation, and funding to accomplish the intent of the law. It is true that today there is more water than is needed in Alaska. But if the water resource is not managed well today, the State will wake up one day with a very real and costly resource problem, not unlike the power problems in California today. The water resource is a limited resource and good usable water is becoming scarce around the world.

Sincerely,



Steven M. Lyons
18411 Kittiwake Cir
Anchorage, Alaska 99516



cc: Commissioner Pat Pourchot, DNR
Representative Beverly Masek, Co-chair Resource Committee
Representative Drew Scalzi, Co-chair Resource Committee
Senator Loren Leman, Chair Natural Resource Committee

Resource Development Council
(907) 276-0700

Alaska Oil & Gas Association
(907) 272-1481

February 1, 2002

Representative Beverly Masek
Co-Chair, House Resources Committee
State Capital
Juneau, Alaska 99801-1182

Re: Temporary Water Use Permits

Dear Representative Masek:

Thank you for taking the time to meet with representatives from the Resource Development Council (RDC) and the Alaska Oil & Gas Association (AOGA) last Friday. We share your interest in making the state's water program operate efficiently, and we appreciate the work you and your staff have invested in this issue over the last several months.

As we indicated on Friday, our principal interest is the manner in which the Legislature may handle temporary water use permits (TWUPs). At the same time, we recognize you have concerns related to the process for issuing and adjudicating water rights. In an effort to move these issues forward, we propose the following actions.

RDC and AOGA strongly support a permanent repeal of the sunset clause that applies to TWUPs embodied in certain sections of Chapter 100, SLA 2001. Specifically, Section 9, Chapter 100, SLA 2001, should be repealed and Section 14, Chapter 100, SLA 2001 should be amended to read, "Section 4 [SECTIONS 4 AND 8-10] of this act takes [TAKE] effect July 1, 2002." The issues associated with TWUPs are distinct from those of the broader water rights program and therefore should be handled in separate legislation.

Unlike a formally adjudicated water right, a TWUP authorization is not a disposal of state property, but rather a revocable permit. Furthermore, TWUP authorizations neither imply nor grant a priority for a future water right. Much has been made of a footnote in Judge Murphy's October 15, 2001 decision in *Greenpeace v. State of Alaska Division of Land Mining & Water*. This footnote, while addressing TWUPs, is not legally binding. Moreover, DNR has appealed this case and others related to the water program.

RDC/AOGA letter to Representative Masek
Re: Temporary Water Use Permits
Page 2

Legislation addressing DNR's points on appeal during the appeal process may significantly reduce the State's prospects for success. The Legislature should act if and when the courts issue a final decision with adverse impacts to DNR's water program.

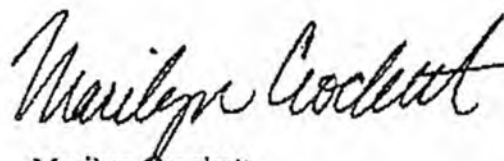
In addition to the TWUPs legislation outlined above, we are committed to joining you and your staff in evaluating the need for separate legislation to make the state's process for handling water rights applications more efficient. If a need is identified, RDC and AOGA are available to assist in crafting the proper language. Water rights are an important statewide issue and a wide array of stakeholders should be involved in designing the proper legislative framework for the program.

It is critical that the sunset provision on TWUPs be repealed. Without a permanent repeal, development activities statewide will be placed in jeopardy. We look forward to meeting with you and your staff on Tuesday, February 5, 2002 to discuss this issue further. In the meantime, please do not hesitate to contact either of us with any questions. Again thank you for your attention to this matter — we look forward to helping formulate a positive solution.

Sincerely,



Tadd Owens
Executive Director
Resource Development Council



Marilyn Crockett
Assistant Executive Director
Alaska Oil & Gas Association

LEGAL SERVICES

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

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Mail Stop 3101

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

MEMORANDUM

February 20, 2002

SUBJECT: Various Questions and Concerns
(HB 421 (Work Order No. 22-LS1334J))

TO: Representative Beverly Masek
Attn: Jennifer

FROM: Gerald P. Luckhaupt *DEPLY*
Legal Counsel

FEB 20 2002

You have asked the following questions:¹

1. Does there appear to be a constitutional requirement for the state to allow for public process at the time it disposes of any public trust resource including water?
2. Does the current departmental process meet this requirement?
3. What bearing does the Kuparuk River case involving Greenpeace that was decided October 5, 2001, have for the state regarding its water distribution program?

The state's duties under Art. VIII, Constitution of the State of Alaska, are comparable "to a trust-like relationship in which the state holds natural resources such as fish, wildlife, and water in 'trust' for the benefit of all Alaskans." *Brooks v. Wright*, 971 P.2d 1025 (Alaska 1999). And the Alaska Supreme Court has described the purpose of this public trust doctrine as

not to grant the legislature ultimate authority over natural resource management, but rather to prevent the state from giving out 'exclusive grants or special privilege as was so frequently the case in ancient royal tradition.'

Brooks, supra

Specifically, Art. VIII, provides with regard to water:

¹ This request requires a substantial period of time and research in order to do it justice. Frankly, I have been unable to devote the period of time that it deserves in order to provide a timely response.

SECTION 2. General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

SECTION 3. COMMON USE. Whenever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

SECTION 13. WATER RIGHTS. All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

SECTION 14. Access to Navigable Waters. Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

SECTION 16. Protection of Rights. No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.

SECTION 17. Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

In addition, Art. VIII, § 10, provides:

No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

This provision does not mention water (or even wildlife or fish for that matter). That water is not mentioned does not mean that this public notice and public interest provision (or the concept embodied in this provision) has no application outside of land disposals.²

² It is my opinion that some level of public notice requirement necessarily arises from the existence of the public trust like doctrine of Art. VIII. How else would the public be able

Representative Beverly Masek
February 20, 2002
Page 3

The absence of water from this provision merely reflects the fact that water (like wildlife and fish) may not be leased or disposed of by the state. Water may only be used and not owned.

Ancient traditions in property rights have never recognized that a private right and title can be acquired by a private person to wildlife in their natural state or to water in general. The title remained with the sovereign, and in the American system of government with its concept of popular sovereignty this title is reserved to the people or the state on behalf of the people. The expression 'for common use' implies that these resources are not to be subject to exclusive grants or special privilege as was so frequently the case in ancient royal tradition. Rather rights to use are secured by the general laws of the state. In all English and American legal systems ownership of water cannot be asserted, rights acquire only to the use of water. Once wildlife is captured and removed from their natural state possessory right accrues to the captor, provided that the wildlife was captured in conformity with provisions of law.

Alaska Constitutional Convention Papers, Folder 210, paper prepared by Committee on Resources entitled 'Terms'

Owsichek v. Guide Licensing & Control Board, 763 P.2d 488 (Alaska 1988). In *Owsichek* the court held that the state could not grant an exclusive guiding license for an area without violating the common use provisions of the Constitution of the State of Alaska.

A review of the history of wildlife law will therefore shed further light on the central issue in this case. The Supreme Court traced the history of wildlife law from its roots in ancient Rome through its English common law development and transfer to this country in *Geer v. Connecticut*, 161 U.S. 519, 522-29, 40 L. Ed. 793, 794-97, 16 S. Ct. 600 (1896). In that case, the Court affirmed the defendant's conviction, upholding a state statute forbidding transportation of certain game birds killed in Connecticut across state lines. The Court noted that in England, the right to hunt and fish '[was] vested in the King alone and from him derived to such of his subjects as [had] received the grants of a chase, a park, a free warren, or free fishery.' *Id.* at 527, 40 L. Ed. at 796 (quoting 2 W. Blackstone, Commentaries *410). As a recent authority explains:

to know that the state is actually managing the land in a manner that is consistent with the public good?

Stripped of its many formalities, the essential core of English wildlife law on the eve of the American Revolution was the complete authority of the King and Parliament to determine what rights others might have with respect to the taking of wildlife.

M. Bean, *The Evolution of National Wildlife Law* 12 (rev. ed. 1983). The *Geer* court asserted that this authority to regulate taking of wildlife passed to the states upon separation from England. 161 U.S. at 528, 40 L. Ed. at 796. However, unlike the authority vested in the King, the authority of the states, with their guarantees of democratic government, was not plenary.

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

Id. at 529, 40 L. Ed. at 797 . . . The Court held that the state's 'ownership' of wildlife, in trust for the people, authorized the statute at issue in that case. *Id.*

The framers of the common use clause probably relied heavily on *Geer*. The following statement from the constitutional papers, as quoted above, closely tracks the reasoning of *Geer*:

The title remained with the sovereign, and in the American system of government with its concept of popular sovereignty this title is reserved to the people or the state on behalf of the people. The expression 'for common use' implies that these resources are not to be subject to exclusive grants or special privilege as was so frequently the case in ancient royal tradition.

Alaska Constitutional Convention Papers, Folder 210, paper prepared by Committee on Resources entitled 'Terms.'

Thus, common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people.

Owsichek, supra.

In order to effectuate this duty and to manage these common resources for all people, I question whether the state may wholly eliminate public notice when authorizing what may be substantial diversions of water. As the Alaska Supreme Court held in *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725 (Alaska 2000), the requirement for public notice under Art. VIII, § 10 of the Constitution of the State of Alaska overrides any attempt to exempt the state from the reach of that section with regard to resources of the state that may be alienated from state ownership. In the same vein, I remain less than convinced that the state may exempt uses of a public trust resource that is not subject to alienation merely because the state decides that it may be easier and that the use is temporary, however that might be defined. I question whether AS 46.15.155 comports with the public trust provisions of Art. VIII. To me the easier way to approach this issue would involve providing at least some minimal form of public notice prior to the authorization of the use and combine that with some additional legislative guidance regarding whether the use is in the public interest.³ This approach ensures that the public is aware that a public trust resource, subject to management for the public good, may be being diminished or affected in some way.⁴

The Kuparuk Case.⁵ Essentially, what occurred in this case is that the court found that the state failed to provide Greenpeace with the process it was due when DNR only allowed Greenpeace 24 hours notice of the lifting of a stay. The court also warned DNR that it may not authorize uses of water without making what the court termed constitutionally mandated determinations relating to appropriation and beneficial use (which apparently the court felt DNR had not done in the present case). The state obviously disagrees with the ruling of the court. While I am not fully convinced that the court's opinion shows that the court truly understood the issues presented, it remains that the state lost and I would be inclined to provide an alternate method to authorize these important temporary uses of water by providing some form of public notice (to meet

³ If some emergency prevents any prior notice then I believe the constitution would allow the development of a clearly defined procedure that would allow the state to allow the use to occur.

⁴ Further, this method would provide notice to holders of other senior water rights that might be adversely affected by the authorization for temporary use of water. Even though AS 46.15.155(f) provides that the commissioner of natural resources may impose conditions on the temporary use of water to ensure that other users are not affected adversely, what if the commissioner fails to accurately divine all the potential effects that the temporary use could have on other users? It would seem that the other users should have some minimal notice so that they might scrutinize the temporary use or at least take some precautions to ensure that their senior use is adequately protected.



⁵ *Greenpeace v. State*, 3AN-00-3648 CI, Third Judicial District.

Representative Beverly Masek
February 20, 2002
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public trust responsibilities) and an easier method for the commissioner of natural resources to find that these uses are beneficial and in the public interest.⁶

GPL:lmb
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⁶ I would recommend a method where the legislature states that a proposed use is beneficial and in the public interest if certain criteria are met.

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Fairbanks Daily News-Miner

Water use bill draws wide concern


February 23, 2002

By SEAN COCKERHAM News-Miner Juneau Bureau

JUNEAU--Legislation pushed by Delta Junction farmers drew intense fire on Friday from conservationists and state officials.

Critics objected that the bill would remove state oversight from nearly all large-scale use of water, including water from North Slope lakes and streams used to build ice roads for oil development.

"This would then eliminate the protection that the review process has for Alaska's fisheries and wildlife," Alaska Division of Mining, Land and Water Director Bob Loeffler testified.

 Other parts of the bill would give farmers a priority use of water, eliminate the fee for maintaining water permits, and require that if the state does not make a decision on a temporary water use application within 30 days then a permit is granted by default.

The bill, which was heard and held in the House Resources Committee, is sponsored by Valdez Republican Rep. John Harris.

His district includes Delta Junction and his aide Pete Fellman, a Delta Junction dairy farmer, said the bill is meant as a vehicle to spur discussion on how to fix an inefficient system.

There has been a host of questions raised in the Interior since legislation passed last year that increased fees and prompted the state to pay closer attention to water issues, Fellman said.

"(The bill) is really an effort on our part to address some of these questions and find out how the Division of Mining, Land and Water is going to serve the people in the state of Alaska," Fellman told the House Resources Committee.

Loeffler said the bill would define a "significant amount of water" as the use of a million or more gallons a day for 100 consecutive days.

"This would essentially eliminate the need for anyone to get a permit anywhere," Loeffler testified.

 That would include oil companies building ice roads on the North Slope, testified Jan Konigsberg of the Alaska Public Waters Coalition.

"It would exclude almost all ice road permits and other temporary uses of water, thereby removing the permits from any kind of scrutiny at all," Konigsberg said.

Fellman, in an interview after the hearing, conceded the million gallon number is high but he said it is designed as a starting point for discussion. A problem is that the state does not have a set definition of what "a significant amount of water" is, Fellman said.

Another controversial part of the bill is the automatic granting of a temporary water use permit if the state does not make a decision on an application within 30 days.

"This would eliminate our ability to give public notice (on the permits), when in fact public use is justified," he said.

Fellman said the provision is the result of real problems like a person who applied for a permit in May and did not receive it until around October when the season was over.

He does not trust the state's assertion that such permits are being issued in a timely manner or the promises that speed will improve. "I think the system needs to be streamlined," Fellman said.

The bill would also make agriculture the second highest priority use of water, after domestic use. This would ensure that farmers will have access to water for irrigation, Fellman said.

"It seems a little bold, I understand, but agriculture is the foundation of all economy," he said.

He said farmers borrow a great deal of money to put in an irrigation system and want a guarantee the state will not cut off the supply, he said.

He cited a farmer in Point Mackenzie who could not get a temporary water permit.

Fellman was backed by testimony from three people via teleconference from Delta Junction, who said support is needed to help Alaska become more independent as its own food source.

"Farmers do bear some tremendous costs in gearing up for their operations," testified Phil Kaspari. "Farming is a long-range investment and not having any security as to whether or not they will be able to use water from year to year makes for some difficult decision-making."

But Fairbanks Republican Rep. Hugh Fate was worried the agricultural priority could conflict with mining. "You wouldn't want to stop a mine the size of Fort Knox for 3 or 4 acres of barley," he said.

Fellman said he was open to discussion with Fate on the matter. "I would be absolutely open to improving the language," he said.

The bill also seeks to drop the \$50 annual state fee for maintenance of water permits.

"If you have a permit already filed, and it is already in the system and there is no change, why do you have to have a yearly fee to maintain that file?" he asked.

Loeffler, of the Alaska Division of Mining, Land, and Water, said removing the fee would cost the division \$130,000 and it would have to ask legislators to foot the bill through the state general fund.

Explanation: The intent of subsection (a) is to specify that a person must apply either for water rights or for a temporary water use authorization if the proposed use of water is more than the amounts mentioned here.

(b) Any person using less than the amount of water described in (a) of this section acquires no water right or priority unless an application is filed and a permit or certificate is issued in accordance with 11 AAC 93.035 - 11 AAC 93.140. Water used without a permit or certificate is subject to appropriation by others, and the use of water without a water right is subject to curtailment in order to supply water to lawful appropriators of record or to protect the public interest. (Eff. 1/1/2001, Register)

Explanation: The policy in subsection (b) comes from the existing 11 AAC 93.920(a), which the department plans to repeal.

Authority: AS 46.15.010 AS 46.15.020 AS 46.15.080

*Wendy Anderson
Dir. Bds*

11 AAC 93.037. SIGNIFICANT AMOUNT OF WATER. (a) Any water use for which 11 AAC 93.035 requires an application is a significant amount of water unless the department otherwise notifies the user, in writing, consistent with (b) of this section.

(b) The department's notification that a water use is not a significant amount of water will be given only if:

(1) the use is less than 5,000 gpd from a surface source listed in the Department of Fish and Game's *Catalog of Waters Important for Spawning, Rearing, and Migration of Anadromous Fishes*;

(2) the use is less than 50,000 gpd from a ground water source, or from a surface water source not listed in the Department of Fish and Game's

◆ The Alaska Flyfishers Association ◆ Southeast Alaska
Conservation Council ◆ American Rivers ◆ Trustees for Alaska ◆
Trout Unlimited ◆ Northern Alaska Environmental Center ◆
SMART (Scientific Management of Alaska's Resource Treasures)
◆ Alaska Conservation Alliance ◆ Thomas Meacham, Esq. ◆

October 22, 2001

Mr. Gary Prokosch
Chief, Water Resources Section
Department of Natural Resources
550 West 7th Avenue, Suite 900A
Anchorage, Alaska 99501

**RE: Comments on the Proposed Department of Natural Resources, Division
of Mining, Land and Water Regulations, 11 AAC 93.020 - .970.**

Dear Mr. Prokosch:

Thank you for the opportunity to comment on the proposed changes to the above-cited regulations. The stated objective of these proposed regulations is to allow the Department of Natural Resources (DNR) to focus its limited staff on those water rights applications deemed by DNR to be significant. However, the process that the regulations outline is far from ideal, and the regulations have the potential to exacerbate conflicts between users, foster lawsuits, and to negatively impact state resources.

I. General Comments

A. The Proposed Regulations are Drastic and Unnecessary given DNR's recent Staffing Changes

DNR has offered these amendments to its regulations as a result of staffing problems and a backlog of water right applications. DNR states "the proposed changes to the water regulations are intended to streamline DNR's water management process" and will "decrease workload." [Letter from Bob Loeffler to Interested Alaskans, 8/20/01.] DNR also indicates that due to the recent legislative changes, the DNR water staff will more than double (from 4 to 9 positions). Given this significant increase in staff, it is unclear why some of the proposed "streamlining" measures – especially those that will fundamentally alter accepted water law practices in Alaska – are necessary. DNR may wish to assess whether or not the increased staffing will allow it to address its backlog under the existing regulations, before instituting such sweeping changes in the

regulations. Since the staffing problems have now been remedied, it is expected that the current regulations (with some minor housekeeping modifications) will be satisfactory. Creating an entirely new permitting system (without precedents from other jurisdictions), particularly at a time of significant DNR staffing changes, may create unexpected and negative impacts to administration of the state's water resources.

B. The Proposed Regulations Introduce Untested Procedures in the Complex Area of Water Law.

DNR's proposed permitting system is unlike any other western state's water law, and does not appear to be consistent with the Alaska Constitution or the Alaska Water Use Act (AS 46.15.010, *et seq.*). DNR stated that it has not consulted with water law specialists to determine whether the proposed changes may generate legal problems. [Comments of Bob Loeffler, October 2, 2001.] Since Alaska's current water law has been deemed a model water appropriation scheme, and was created after consultation with some of the best water law experts in the nation, it would best serve the public if DNR consulted with water experts prior to instituting this new, untested system.

The new system creates a four-tiered water management scheme for Alaska:

Tier 1

The first tier is for "de minimus" water use, and individuals are not required to apply for a permit to use minor amounts of water, and acquire no water right or priority from such use. Such provisions are typical in many states. This was formerly the "insignificant amount" or "de minimus" water use threshold under Alaska law. 11 AAC 93.970(14).

Tier 2

The (new) second tier allows a person to use water, after application, if DNR deems the water use to be "non-significant." Non-significant is defined as less than 5,000 gallons/day from an anadromous stream, or less than 50,000 gallons/day from a non-anadromous stream or groundwater source. No permit or water right is issued. Nevertheless, the person submits an application, and obtains DNR approval to use water in a "non-significance" letter determination. The applicant receives a "conditional priority date," apparently established by the date DNR receives the application.

DNR, in issuing the "non-significance" determination, *does not* consider the "public interest" factors defined in AS 46.15.080. DNR states "[T]he applicant will not gain water rights until an adjudication takes place" [Loeffler, 8/20/01 Letter, p. 2] yet the user acquires a *potential* water right, that may ripen into a permanent right to appropriate (certificate) after five years of beneficial use, should DNR decide to later adjudicate the use. DNR states that if there is no conflict in the water source, it may never adjudicate (i. e., issue a permit or a certificate of appropriation) the Tier 2 user. There is no public notice of this "non-permit."

If there is a conflict with other water users, or if the applicant wishes to pay for adjudication, DNR will adjudicate, and issue or deny a permit, after public notice.

Tier 3

The (new) third tier allows a person to apply to use a "significant amount of water," defined as greater than 5,000 gallons/day from an anadromous stream, or greater than 50,000 gallons/day from a non-anadromous stream or groundwater source. DNR states that it will "adjudicate" the water right (issue a permit) after "full agency scrutiny" [Notice of Proposed Changes, p. 1] at the time of application. There is public notice of this permit, prior to DNR's action.

Tier 4

The fourth tier is the certificate of appropriation, which is a right to use water in perpetuity. DNR considers this a "ministerial" function, after the water use has been established under a Tier 3 permit for five years. DNR currently issues no notice of this certificate, although a recent case questioned this DNR practice.

This four-tier system could create significant problems for DNR and for any water user that expends time and resources to perfect the beneficial use in reliance on the Tier 2 DNR authorization. By allowing users to use water indefinitely, with no permit and without analysis of "beneficial use" by DNR, the quasi-right may suddenly be diminished in times of shortage, by unknown prior appropriators. The right may never be adjudicated unless other Tier 2 appropriators of the same source seek adjudication, or there are subsequent Tier 3 users.

The history of water use conflicts in Alaska reveals that many conflicts have involved single family domestic and other small (or "non-significant") water users. Conflicts have included those in the North Kenai area, South Anchorage, Auke Nu/Indian Cove in Juneau, and Eagle River, just to name a few. Under these proposed regulations, small water users would be deemed insignificant and would not be adjudicated until a conflict arose. Thus, future similar situations involving unadjudicated small water users would lead to even more complex water management problems.

Further, this scheme appears to focus on the "user," not the impacts to the water source. For example, it allows multiple Tier 2 users of the same anadromous stream water source to use amounts of water that would be considered "significant" (or Tier 3) if a single user sought to use the combined Tier 2 users' amount of water from the stream. The multiple users are individually deemed Tier 2 "non-significant", because DNR reviews the water use in a piecemeal applicant-by-applicant fashion, rather than looking cumulatively at the "whole stream" water use. While the proposed Tier 2 scheme does have a "preliminary determination" by DNR that there will be no effect on "other users" [11 AAC 93.037(b)(4)] there is no mandatory DNR analysis of the effect on public resources.

DNR should submit this new regulatory scheme to qualified experts to ascertain whether it is consistent with Alaska's water law and Constitution, and whether legislative

changes are needed to implement this significant restructuring of Alaska's established water law.

C. The Proposed Regulations Eliminate Most of the "Public Interest" Criteria set forth in AS 46.15.080

The proposed regulations eliminate the "public interest criteria" the Legislature mandated be evaluated before permit issuance under AS 46.15.080, and substitutes the "non-significance" criteria for permitting analysis for Tier 2 water users. The "non-significance" criteria eliminate such necessary considerations as public health, navigation, beneficial use, means of diversion, and intent and ability of applicant to complete the appropriation. *See* AS 46.14.080. The only public interest evaluations are related to fisheries [anadromous streams addressed in 11 AAC 93.037(b)1 and 2] and whether the appropriation will affect "other water users." *See* 11 AAC 93.037b)(4). This is not the equivalent of the AS 46.15.080 "public interest" determination. In this regard, Tier 2 and Tier 3 users from the same source are treated differently: a Tier 3 user must have a "public interest" determination and a Tier 2 user does not, although each is, in effect, co-equal in terms of ability to apply their water rights. This may violate the provisions of Article VIII, sec. 17 of the Alaska Constitution (the "uniform application" clause).

D. The Proposed Regulations Create Uncertainty for Valid Water Users Seeking Permanent Appropriations

Under DNR's proposed regulations, the "significant" Tier 3 user, after obtaining a permit and filing the five-year statement of beneficial use could, in many instances, not be issued a certificate because of prior Tier 2 "non-significant users" that have "conditional priority dates" predating the Tier 3 user.

This creates a high degree of uncertainty for all water users. DNR claimed at its public meetings that "that is how the system works in actuality now." However, because of the currently existing public notice provisions, and because DNR must currently affirmatively act to issue a permit (considering all public interest criteria before issuing a permit), applicants are "screened" at the outset to ensure that public resources are being put to beneficial use, consistent with public interest criteria, and are treated equally. The issuance of a "non-significance letter" to Tier 2 users will give the non-permitted applicant an automatic priority date superior to the permitted Tier 3 applicant, who has complied with all of the statutory criteria. This is confusing and could create innumerable conflicts between Tier 2 ("non-significant") and Tier 3 ("significant") users.

II. Comments on Specific Sections

11 AAC 93.035. REQUIREMENT TO APPLY FOR THE USE OF WATER

This section results in a redefinition of the current regulation defining "significant amount" in 11 AAC 93.970(14). The existing definition of "significant amount" includes "any water use that might adversely affect the water rights of other appropriators or the public interest." 11 AAC 93.970(14). "Public interest" is "determined by the criteria set out in AS 46.15.080."

Yet the proposed new definition eliminates the key components in the existing definition of significant amount, the concept of "public interest" and the subsequent application of AS 46.15.080.

There is no justification for eliminating this important aspect of the definition. Given the Alaska courts' recent attention to the "public interest" in the state's water resources, the elimination of this aspect of the definition may be unconstitutional.

11 AAC 93.037, SIGNIFICANT AMOUNT OF WATER

This section places the burden on the self-professed already overworked and backlogged staff to notify persons that they are not using a significant amount of water. This seems like a roundabout way to administer water resources: instead of spending staff time administering those applications that are significant, under these regulations the staff will now spend time notifying people that their water use is not significant. DNR staff must make the "non-significance" determination within 45 days. There is no consequence for DNR's failure to issue the "non-significance" notice, therefore if a water use applicant receives no notice, he/she is left in the position of having a "significant" water use, even though it may actually meet the 11 AAC 93.037(a) and (b) definitions of "non-significance."

Given DNR's past inability to meet its administrative obligations, this could create substantial problems for water users whose use is truly non-significant. The water user will not be able to construct the works, and begin use of the water to perfect an appropriation, despite the fact that such use would be allowed under current law. Conversely, an applicant may, in fact, be seeking a permit for a significant use of water, but the applicant may argue that DNR's failure to render a decision within 45 days constitutes a *de facto* determination of non-significance.

Moreover, the definition of non-significance [subsection (b)(1-3)] is contrary to the current regulations, as discussed above. Finally, the "non-significance" determination may be in effect for the entire water use period, regardless of changing hydrologic circumstances or climatic conditions that may make the water use significant. There is no provision for a review of "non-significance" decisions by DNR upon request or at its own initiative.

Additionally, the proposed approach should be rejected for the following reasons:

(b)(1): The gallon limitation in this subsection (less than 5,000 gallons/day from an anadromous stream is deemed non-significant) does not recognize the potential sensitivity of anadromous streams that may be damaged by withdrawals of far less than

5,000 gallons/day, depending upon the season, the fish species, the method of withdrawal, and the instream flow needs. If a stream has a pending instream flow application, there should be no "minimum" below which the withdrawal is deemed non-significant. There is no requirement that the applicant provide hydrologic information about the timing of withdrawal, so that DNR will be able to assess whether, at times of low flow (i.e. winter) the stream can sustain a withdrawal of 5,000 gallons/day.

[Note: While it is recognized that the current regulations at 11 AAC 93.100 allow a similar exemption, the changes proposed by DNR eliminate the existing regulations' provision that a local, state or federal agency and DNR can allow notice/comment on this type of application to protect the public interest.]

In addition, there should be an automatic "significance" determination for water uses on waterbodies that are "known or suspected to be degraded, polluted or threatened." [See Alaska's Clean Water Actions (ACWA) publications].

(b)(2): This subsection lacks any reasoned analysis of whether withdrawals of 50,000 gallons/day from a non-anadromous stream or aquifer will result in non-significant impacts. Again, DNR should require the applicant to provide hydrologic analysis of the stream or aquifer that justifies any claim that this amount is "non-significant."

(b)(3): This subsection would benefit from a better definition of what "in combination with any other application" means. It is unclear whether an applicant that has filed an application for withdrawals from two different streams (or different tributaries of the same stream), that together exceed 5,000 gallons per day, will be required to be deemed "significant."

It is also unclear whether, for example, an applicant who withdraws 4,900 gallons per day from multiple streams, which contribute to the sustainability of a fishery in a particular watershed, can be deemed "non-significant." Again, seasonal assessments of water availability and diversion methods are important variables that DNR should address prior to deeming a use non-significant.

(b)(4): This subsection allows DNR to make the "non-significance" determination, with no public notice (only agency notice), and without consideration of the public interest. The only consideration is whether it is "likely to have an adverse effect on other water users." While this language may be intended to be the functional equivalent of a "public interest" determination, the use of different language creates a doubt as to what standard should be applied.

(d): There is no limit on the amount of water that can be withdrawn under a "temporary water use permit." This may violate the Alaska Constitution, Article VIII, §§1,2,3,4,10,13,14,16, 17, and AS 46.15.080.

11 AAC 93.039. AGENCY NOTICE

Since neither ADF&G nor DEC received funding to carry out the functions set forth in this section, DNR's reliance on these agencies to perform the new analysis is, in effect, an unfunded mandate to those agencies. As Mr. Loeffler stated during the public

meetings, DEC does not routinely review these permits, and ADF&G does review temporary and other water use permits, but not in all cases (i.e. ADF&G does not routinely review applications for non-anadromous streams).

There is no criteria for the types of permits for which the agencies can "decline to be notified." 11 AAC 93.039(a)(1). Because the public will not receive notice under DNR's revised regulations, the public will be totally dependent upon agencies for analysis of water permits. Thus, the categories or specific "agency declines" decisions should be published, and an opportunity for the public to comment should be allowed. The public relies on the agencies for expertise and/or review of the permits, but if the agency cannot provide that expertise, then the public should be allowed to participate.

Under subsection (c), the word "may" should be replaced by "shall." There should be a requirement that DNR notify the local government, tribal governments, federal land managers of state waters and the local coastal district of all applications for water use which may affect the people or resources of that government or geographic region, allowing a 15 day comment period. This is necessary because coastal districts receive deference in the interpretation and application of their coastal programs, which must be consulted before water use is permitted. In non-coastal areas, the local governments and tribal governments should be notified. (See Governor's Administrative Order 186; and the Millennium Agreement.) The trend in most western water states is to increasingly rely upon local knowledge and expertise about stream and water body characteristics and carrying capacities. DNR would eliminate this important source of expertise by failing to provide required notice to these local entities.

11 AAC 93.040 (14), HYDROLOGIC DATA

DNR should identify, in the regulation or by separate Departmental publication, the types of hydrologic methods it allows to satisfy this requirement. Otherwise, the applicant may expend significant time and money using a method not approved by the Department. Further, given the potential for extreme seasonal variations in flow rate, DNR should require mean monthly flow data.

11 AAC 93.070, DEPARTMENTAL INVESTIGATIONS

The word "may" should be changed to "shall." Without a requirement for investigation, potential use conflicts could easily go unnoticed by DNR.

11 AAC 93.080, PUBLIC NOTICE

It is unclear who will pay for the public notice (the regulation states only that the Department "will prepare" the notice; there is no requirement that the applicant ensure that it is published in the newspaper or pay for the newspaper publication). While AS 46.15.133 states that the applicant will pay, the regulations should also so state.

DNR is proposing to require public notice only when it "begins adjudicating a

water right application.” This means that users of non-significant amounts of water will be able to use water, perhaps indefinitely, with no public notice. DNR’s explanation confirms that “some applications may not be adjudicated for many years (if ever)” and states that no notice will be required, absent adjudication. This may be a violation of Article VIII, section 10, of the Alaska Constitution. Public notice of every water use application should be given.

The provision of subsection (2), posting on the Alaska Online Public Notice System, is a significant improvement. This should be applied whenever a water use application is received and deemed complete by DNR, rather than when the application is adjudicated. The regulation should state that the Online Public Notice should be placed on the first day of the public notice in AS 46.15.133. The proposed language states that the notice will be placed online “during” the comment period. Unless it is online on the first day of newspaper notice, those who rely on online notice may not have sufficient time to comment.

The regulation should include public notice when DNR proposes to issue a certificate of appropriation.

11 AAC 93.100. EXEMPTIONS TO NOTICE (REPEALED)

As stated in the discussion above (under 11 AAC 93.037) this current section (proposed for repeal) contains provisions much more protective of the public’s interest in water than the proposed 11 AAC 93.037. It is recommended that this provision be retained, or that only the *limited* exceptions to public notice be incorporated into 11 AAC 93.037.

11 AAC 93.115. CLOSURE OF AN APPLICATION FOR A WATER RIGHT

(b) This section is a trap for the unwary non-significant water user. DNR proposes to establish the new Tier 2 system of “non-significant” (non-permitted) use, presumably to make the administration of water rights easier for DNR and the applicant. However, under this section, the unwitting applicant who forgets to provide the statement of beneficial use can be immediately terminated from the water right he has spent 5 years perfecting, just for his failure to file a single piece of paper. This section will undoubtedly generate litigation, and appears to violate the “priority of use equals priority of right” concept of Art. VIII, Sec. 13 of the Alaska Constitution.

If DNR does not notify the applicant that (1) his beneficial use statement is due, or (2) DNR intends to terminate his use, then the applicant (who has had no communication from DNR for five years) may suddenly lose his priority date and significant investment. Since under the current law, DNR considers it a “ministerial” duty to issue a certificate after 5 years of beneficial use, it is difficult to see how DNR can automatically terminate the “non-significant” water user for failing to file the beneficial use statement on a specific date. At a minimum, some notice and grace period should be provided.

11 AAC 93.120, ISSUANCE OF A PERMIT TO APPROPRIATE WATER

The regulations are vague as to what triggers a "priority date," and that term appears to grant different rights depending on the type or tier of the application. This lack of clarity could mean that two users that apply simultaneously will have different priority dates, depending upon what tier they apply under and DNR's backlog at the time of the application. Both "significant" and "non-significant" users should have a priority date of the date each application is received by DNR, and this concept needs to be explicitly stated. This is especially confusing when read with the language in proposed 11 AAC 93.035(b) ("unless an application is filed *and* a permit or certificate is issued") (emphasis added).

In addition, under this section the "significant" user has a potential for an extension and is not required to file statements of beneficial use, but the "non significant" user (as proposed under 11 AAC 93.115) can be automatically terminated for failing to file the beneficial use statement. This inconsistency should be remedied.

New Section (i)

This section allows water use to continue, despite DNR's failure to carry out its responsibilities to administer water resources. In no other permitting situation does a failure of a state agency to act result in a permit extension. It is unclear why, with twice as much staff, DNR is now building this step into the regulations.

If DNR fails to act within the time period required, then the permittee should be able to proceed to court for a judicial determination of water rights, and DNR should be required to pay the court costs for the action. Further, section (i) is inconsistent with section (f), which states that there may be no extension longer than 10 years.

11 AAC 93.140, WATER WELLS

This regulation change is acceptable.

11 AAC 93.210, TEMPORARY WATER USE

This section allows temporary water use of significant amounts of water for five years, with no analysis of the public interest factors in AS 46.15.080. This section is likely to be unconstitutional, particularly since there is no limit to the amount of water that may be used, no prior notice to the public, and no consideration of constitutionally mandated public trust-type principles. Although DNR justifies this provision by stating that this does not create a "property right" [see "explanation," p. 11], that argument is misinformed. No water use or appropriation creates a property right under Alaska law. Under Alaska law, the only "right" created is a usufructory right: the right of enjoying a thing, the property of which is vested in another. The water of the state is vested in the people of the state and may be appropriated (used) in accordance with the Constitution, under the appropriation scheme. Further, the five-year permit period is questionable,

given the coterminous period for a full water right. A temporary water use permit should be limited in duration to no more than 1 year, or some other period that is rationally related to the public need for a "temporary" use of water, rather than a lawful appropriation, a concept which has been recognized in the Alaska Water Use Act since 1966, and in the western states' water laws for more than a century.

11 AAC 93.220, SIMPLIFIED PROCEDURE FOR TEMPORARY WATER USE

Same comments as above. While these procedures allow notice to ADF&G and DEC, there is no public notice, nor notice to local government, tribal governments, federal land managers of state waters or coastal management councils. Since, for example, DNR gives away 22 billion gallons of water each winter to the oil industry on the North Slope alone [Gary Prokosch, "North Slope Water Use and Hydrology," March 9, 2000], there must be a recognition that, at a minimum, those people who live in the region and depend upon that water and related resources for subsistence should receive notice and opportunity to comment on the permits. Further, DNR has a legal obligation to make copies of each written determination for granting or denying a temporary permit available to any member of the public upon request.

11 AAC 93.290, COMMISSIONER'S ORDERS

No comment on this section.

11 AAC 93.530, EFFECT OF ORDER

No comment on this section

11 AAC 93.920, EXEMPTIONS

Please see discussion of 11 AAC 93.035.

11 AAC 93.930, PROCEDURE FOR THE TRANSFER AND CHANGE OF APPROPRIATIONS

This section provides public notice of changes in permits to appropriate and certificates of appropriation. The notice to agencies and the Online Public Notice is a positive step. It is recommended that DNR expand this notice to all those who commented on the underlying permit or certificate. The exemption for changes or transfers of uses less than 5,000 gallons/day should be analyzed on the basis of impacts to the resource, not on a strict gallon limit. Further, there are unresolved questions in this section: Does this include applicants without a permit or certificate who have been determined to be not significant? Does "water right holders of record" include those with unadjudicated water right applications? Such a lack of clarity should be remedied.

III. Conclusions and Concerns

The proposed regulations provide DNR with too much discretion in determining whether or not to adjudicate small water use applications. If the regulations go forward, standards are needed to clearly identify how and why DNR will make the determination of whether or not to adjudicate an application.

There are no provisions regarding how to handle conflicts among water users, especially where there are pending applications, including instream-flow applications. For example, how will harm to unadjudicated applicants be handled? How will harm from unadjudicated applicants to water rights holders be handled? The regulations should be clear that when conflicts occur for a given water source, that applications will be adjudicated and enforced in order of priority date, including those applications for instream reservations. Any water use or water reservation priority date should be clearly stated as the date the application is received by DNR.

All water right adjudications should include a written public interest determination based on the public interest criteria listed in AS 46.15.080. This will make clear for the public record the information and reasoning used by DNR and other agencies in making decisions. Public notice should be given upon receipt of an application in each tier and for their temporary permits.

While the proposed regulations do not include changes to the instream water right regulations, DNR should make clear that instream water right applications are "significant" applications and water uses, and will therefore be adjudicated on an equal basis with all other water right applications.

Thank you for the opportunity to comment.
Sincerely,

Jenna App
Trustees for Alaska

On behalf of:

Les Gara
The Alaska Flyfishers Association

Buck Lindekugel
Southeast Alaska Conservation Council

Steve Rothert
American Rivers

Jan Konigsberg
Trout Unlimited

Arthur Hussey
Northern Alaska Environmental Center

Keith Bayha
SMART (Scientific Management of Alaska's Resource Treasures)

Sue Schrader
Alaska Conservation Alliance

Thomas E. Meacham, Esq.

Review of Water Rights Issues in Alaska

I. Water Is A Pubic Resource To Be Held In Public Trust.

A. Public Trust Doctrine

1. Originally Roman Law.
2. States that certain resources are to be managed to the maximum benefit of the populous.
3. Has been adopted by many civilizations, and defined specifically for each.
4. Has been nationally accepted since the creation of the United States, and has an extensive supporting case history.

B. The Alaska State Constitution addresses this expressly in Article VIII, Natural Resources.

1. Section 2 charges the state with the responsibility to make use of the states water "to the maximum benefit of it's people".
2. Section 3 guarantees the common use of water be reserved for the people.
3. Section 6 guarantees that the states water is public domain.
4. Section 10 requires public notice of water disposal.
5. Section 13 again guarantees that water is reserved for public use and guarantees prior right to priority of appropriation - regardless of it's form.
6. Section 14 guarantees access to navigable waters by the people
7. Section 16 protects the public from being involuntarily divested of their right to use the states waters
8. Section 17 requires the uniform application of regulations for the disposal of water.

C. The people are demanding that the state uphold this responsibility through lawsuits.

II. The Largest Issues Facing State At This Time Are Costly Lawsuits.

A. Access Cases

1. **Katie John**
 - a. It's not about subsistence fishing.
 - b. Federal control of our navigable waters will extend to all facets of water use.
2. **Gulkana Issues**
 - a. Native corporation restricted access on the river as it contested the river was non navigable, and therefore fell under the authority of their property rights
 - b. Landmark case used in other access areas to validate the states responsibility to the people regarding the public trust of water

B. Use Cases

1. **Greenpeace v. State of Alaska Div. of Land Water & Mining**
 - a. Judge Murhpy ruled last week that the public process was in fact violated by DNR's issuance of temporary water permits, and admonished the department for what he found to be ambiguous and inconsistent practices. He also warned the department that this could have been avoided, and that he expects the department to henceforth comply with statutory and constitutional requirements.
 - b. The oil companies were not held responsible.
 - c. The problem was identified as a lack of organization, and disregard for due process at the level of our states water division practices.
2. **Yellow Eagle Mine - Fairbanks**
 - a. The mine struck an aquifer depleting the user supply to local homes.
 - b. The department acted quickly once faced with an emergency, however, confusion could have been avoided among the affected property owners had a standardized process been in place prior to the incident.
 - c. Yellow Eagle Mine acted with extreme generosity by treating all claimants equally regardless of their adjudication status, thus saving the state an inordinate sum of money. (thank you YEM)

III. Costly Lawsuits Are Avoidable

A. Prevention is the best medicine

1. Providing for the peoples needs by adequately satisfying their constitutional rights through the departmental process is one way to discourage the need for judicial intervention.
 - a. The department's primary responsibility is to serve the public interest.
 - b. Orderly compliance to statutory and constitutional authority by the department is necessary.
 1. Confusion regarding processes is a breeding ground for the request for judicial intervention.
 2. Following a standardized process promotes public trust, and assists the judicial branch in it's selection of valid claims to be heard.
2. The **Katie John case** is too far gone for prevention, but we have the chance now in other areas of water rights issues.

B. It may be time to swallow the bitter pill of reconstruction.

1. Our current structure is in a state of dilapidation, and was virtually condemned by a superior court judge last Friday.
 - a. The department has argued that the public process is too costly
 - b. Circumventing public process has proven to be a significant cost to the state in time, money, and resources, as well as public service.
2. Although Alaskans are pioneers, and we know that flat roofs don't do well in our environment, others have the blue-print's that we could be using to **build a fortified program.**
 - a. Other states may have issues that differ from those in Alaska, and some states may have problems with their adjudication process that are similar those faced by our state
 - b. We should also give credit to some states that are either implementing or designing modifications to the process that attempt to alleviate the cumbersome process, while satisfying the states responsibility to provide for the people.
3. Throwing money at the situation can only do so much for the structure. Someone will need to put forth **real labor.**
 - a. I believe that it is feasible to build a better foundation for Alaska's process for water rights adjudication that will serve the public interest in a timely fashion
 - b. I believe that we have the human resources to do so in a way that meets the needs of those who have a need for water use, and comply with our constitutional duty to the public at the same time