

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 86/2

4070 SJUD SB 148 - SB 150 996

PRIOR AUDIT RECOMMENDATIONS

In a previous audit report dated April 6, 1983, we presented the Commissioner of Commerce and Economic Development with seven recommendations relating to the operation of the Division of Measurement Standards. Three of those recommendations had a total of nine sub-recommendations. The following is the current status of each:

Prior Audit Recommendation No. 1

The Department should take immediate action to improve the employee morale of the Division of Measurement Standards (DMS).

As a result of interviews with fifteen employees and a review of written communications during our prior audit, it was obvious that a serious morale problem existed within DMS. The cause of the low morale did not appear to be centered around any single issue but was due to a build up of problems within the Weights and Measures Section over the past several years.

Legislative Audit's Current Position

Prior to the final release of our previous report, the Department initiated procedures to determine the causes of the low morale and to provide for possible solutions. These efforts have continued and included:

1. Employee interviews conducted by the Department's personnel officer.
2. The Director meeting collectively and individually with employees of the Division.
3. The development of a new employee evaluation manual and procedures that define management's expectations of employees and provides for ongoing communication between the staff and management.
4. The Director's standing offer to meet with any employee to discuss problems and, if possible, provide reasonable solutions.

During our present review, we found that there continues to be a certain amount of employee dissatisfaction, however, in our opinion, the Department and Division management are making a reasonable and good-faith effort at resolving remaining problems.

Prior Audit Recommendation No. 2

DMS should avoid situations that give the appearance of a conflict of interest.

During our prior audit, we noted three situations which, at a minimum, gave the appearance of a conflict of interest to employees and other persons outside the Division.

Two of the situations involved the DMS Mobile Home Inspector and the third related to the 1981 hiring of a person convicted of price fixing in a retail gasoline business as a weights and measures inspector. This employee was asked to resign and his termination was effective April 17, 1981.

Legislative Audit's Current Position

The Division no longer administers the Mobile Home Warranty Program. On June 15, 1983, the Division entered into a Reimbursable Service Agreement (RSA) with the Department of Law wherein the Department of Law would, through its Consumer Protection Division, administer the program.

The issue of hiring a person convicted of price fixing, in the retail gasoline business as Weights and Measures Inspector I was addressed and resolved prior to the initiation of the original audit. During the current audit nothing came to our attention which would lead us to believe that DMS is not exercising care in the selection of employees.

In our opinion, these situations were isolated instances and the Division is cognizant of the need to avoid conflict of interest situations.

Prior Audit Recommendation No. 3A

DMS should ensure performance indicators in their budget requests are accurate.

The State budget documents for Fiscal Years 1983 and 1984 included forms for each agency to report its performance activities of the prior year based on predetermined measurements.

In our review of the Fiscal Year 1983 and 1984 budget documents, we found that some of the information reported by DMS for actual performance activities in Fiscal Years 1981 and 1982 was not accurate.

Legislative Audit's Current Position

Beginning with Fiscal Year 1985, the budget request format has been revised. The section devoted to agency performance

in meeting its objectives no longer identifies prior years' actual performance. Information is limited to those measurements planned for the prior year and those estimated for the budget year at various levels of funding.

DMS has continued to maintain actual performance statistics as a measure against planned performance objectives. Prior to Fiscal Year 1984, the Division's methods of compiling and reporting performance data were cumbersome.

During Fiscal Year 1984, DMS began developing methods, including data processing, for improving the system of data collection, retention, analysis and reporting. A review of Fiscal Year 1984 performance activity summaries and supporting documentation showed no significant errors.

Prior Audit Recommendation No. 3B

DMS should prepare their fiscal year budgets in accordance with their anticipated spending plans.

The DMS Fiscal Year 1982 budget requested \$96,900 for rental of State vehicles through the Department of Transportation and Public Facilities (DOTPF). Actual costs during 1982 totalled approximately \$62,000, 36% less than budgeted. DMS staff explained that this budget line item was intentionally overbudgeted and the excess funds were used to cover expenditures in other underbudgeted line items within the contractual services category for which funding was harder to secure.

Legislative Audit's Current Position

For Fiscal Year 1984, DMS budgeted \$77,900 for State vehicle rental costs which represents a \$19,000 reduction from the inflated Fiscal Year 1982 budget amount.

For Fiscal Year 1985, the DMS budget reflects a change from the "wet lease" approach, in which both a fixed rental cost and a repair and maintenance rate are paid to DOTPF, to a "dry lease" approach whereby a fixed rental cost is paid to DOTPF and DMS assumes responsibility for repair and maintenance. According to DMS, this change will result in a significant reduction in vehicle costs.

Prior Audit Recommendation No. 3C

DMS should ensure State funds are expended only for authorized purchases in accordance with the State Administrative Manual.

DMS purchased seafood in August, 1981, and September, 1982, totalling \$100 and \$548 respectively. The seafood was presented to the members of the Western Weights and Measures

Conferences. The State Administrative Manual, section 6820, prohibits expenditure of State funds for nonessential food-stuffs.

Legislative Audit's Current Position

A review of the Division's Fiscal Year 1984 expenditures showed no unauthorized purchases of seafood. The seafood presented at the most recent Western Weights and Measures Conference was purchased at the Director's personal expense.

Prior Audit Recommendation No. 3D

DMS should ensure appropriations are expended in accordance with law.

DMS received an appropriation totalling \$33,200 through Chapter 50, SLA 1980 to "purchase scale testing equipment and to provide transportation to test scales for sea processors in the Aleutian Islands and Western Alaska". Through a review of the related expenditures, we found \$8,148 was expended for travel to areas other than the Aleutian Islands or Western Alaska.

In addition, DMS received another appropriation totalling \$39,100 through Chapter 120, SLA 1980, to implement the Mobile Home Warranty Program enacted by Chapter 104, SLA 1980. We determined that \$2,875 of these funds were expended on travel unrelated to the Mobile Home Warranty Program.

Legislative Audit's Current Position

A review of Fiscal Year 1984 expenditures and correspondence showed the Division is cognizant of the legal limitations of expending appropriations. During the year, DMS has requested approval and/or advice on certain expenditures from the Department's Division of Administrative Services, the Office of Management and Budget, and the Division of Legislative Audit.

Prior Audit Recommendation No. 4A

DMS should update job descriptions and classifications as required by the State Personnel Rules.

We determined through a review of job descriptions and employee interviews that material changes had occurred in the duties and responsibilities of two classified positions since the formation of the Division.

A Weights and Measures Inspector IV position no longer had the supervisory authority over the inspectors. The employee's responsibilities included only administrative and budgeting duties. The Mobile Home Inspector's duties

included supervision of the weigh stations in addition to mediating mobile home warranty complaints.

We recommended that job descriptions and duties should be changed to reflect the actual duties and responsibilities of these positions to decrease the confusion and misunderstandings within the Division.

Legislative Audit's Current Position

The Weights and Measures Inspector IV position was reclassified to a Management Analyst III on November 23, 1983.

With the transfer of the Mobile Home Warranty Program to Consumer Protection in the Department of Law, DMS reclassified the Mobile Home Inspector position to a Weigh Station Operator II.

Prior Audit Recommendation No. 4B

DMS should utilize promotional eligibility lists to the extent possible.

In July, 1982, DMS assumed the responsibility of the weigh stations from the Department of Public Safety. Twenty-eight commercial vehicle inspectors were transferred from the Department of Public Safety to DMS, however, DMS did not receive a transfer of any supervisory personnel. In order to provide sufficient supervision of the weigh stations, DMS upgraded three of the commercial vehicle inspector positions from a range 12 to a range 15. The incumbents in two of the upgraded positions became supervisors while the other inspectors were not afforded the opportunity to interview for the positions.

Legislative Audit's Current Position

DMS has used the Division of Personnel's departmental eligibility lists in making promotions since our previous audit.

Prior Audit Recommendation No. 5

The Department should seek legislation to transfer the Mobile Home Warranty Program to the Consumer Protection Section of the Department of Law.

We reviewed the function of the Mobile Home Warranty Program and the activity from July, 1981 through March, 1983. Based on our review, we noted the following:

1. The Mobile Home Inspector acts as a mediator between the consumer and the dealer and/or manufacturer in order to resolve complaints.

2. During Fiscal Year 1982, DMS received 26 mobile home warranty complaints. As of March, 1983, DMS had received nine complaints in Fiscal Year 1983.
3. The Consumer Protection Section receives and investigates mobile home complaints from consumers. According to a memorandum dated March 17, 1983, from an assistant attorney general, the Consumer Protection Section had five complaints currently under investigation.

Since the Consumer Protection Section is the agency to which the public looks for resolution of consumer problems and the Mobile Home Warranty Program deals with consumer protection warranty laws, it appears that the program could be more efficiently and effectively administered by the Consumer Protection Section.

Legislative Audit's Current Position

The Mobile Home Warranty Program is presently being administered by Consumer Protection through a Reimbursable Service Agreement with DMS. For Fiscal Year 1985, the program is budgeted within Consumer Protection.

During the 1984 legislative session, Senate Bill No. 497 was introduced to amend AS 45.30 by placing the responsibility for the program in the Department of Law. The bill was not passed by the 1984 Legislature.

We recommend that the Department resubmit the proposed legislation change to the 1985 Legislature.

Prior Audit Recommendation No. 6

The Department should seek removal of DMS staff as delegates to the National Conference of States on Building Codes and Standards.

The Director and the Mobile Home Inspector are delegates to the National Conference of States on Building Codes and Standards, Incorporated (NCSBCS). During the period from May, 1981, through January, 1983, the Director attended five meetings related to NCSBCS which were held in Seattle, Denver, Boston, Atlanta, and New Orleans. The Mobile Home Inspector also attended the meetings at Seattle and New Orleans.

DMS duties and responsibilities relating to building codes and standards were greatly diminished with the repeal of the State mobile home standards in September, 1980, and the enactment of the Mobile Home Warranty Program. Furthermore, activity in the Mobile Home Warranty Program does not warrant involvement of DMS in NCSBCS.

Legislative Audit's Current Position

The Director of the Division of Measurement Standards is still the delegate of record to NCSBCS however, he has initiated action to have his name removed as a delegate. A review of the Director's Fiscal Year 1983 and 1984 travel showed that no travel involving NCSBCS business has occurred since September of 1982.

Prior Audit Recommendation No. 7A

DMS should provide sufficient documentation that office and field standards (official test devices) are verified in accordance with law.

We could not find sufficient documentation to determine if DMS was in compliance with AS 45.75.060 which requires verification of office and field standards on an annual basis.

In order to provide sufficient documentation, DMS should develop a complete inventory of all office and field standards with identifying numbers (where possible), the location of the standards, and the last date of verification.

Legislative Audit's Current Position

The Division has developed a complete inventory of field standards and laboratory standards. The field standards status report lists the standards by type, serial number, location, inventory date, last certification date and certification due date. According to Division personnel, the lists will be maintained on a current basis.

Prior Audit Recommendation No. 7B

DMS should develop procedures to ensure that weight and measure devices are inspected and tested semiannually in accordance with law.

DMS did not have sufficient documentation to determine that they were in compliance with AS 45.75.080 which requires all weights and measures in commercial use to be inspected and tested at least semiannually or more often as the Director considers necessary. We were able to review inspection dates for 110 businesses located in Southeastern Alaska. Of those 110 businesses, 43 received annual inspections, 23 received semiannual inspections, and the remaining 44 did not have sufficient information to determine the frequency of inspections.

DMS should compile an inventory of devices including location and the last date of testing. This will provide management with data to determine the extent of compliance possible

within budgetary constraints.

Legislative Audit's Current Position

Beginning with the Anchorage area, the Division is in the process of developing a route system for the inspection and testing of devices. Inventory schedules using the data processing equipment are being prepared which will list location of the commercial device, type, serial number, date of previous inspection and date of previous approval, date of current inspection and date of current approval. The inventory lists should provide a positive response to the problem of testing devices semiannually in heavily populated areas. In addition, legislation was introduced during the 1984 session of the Legislature which would eliminate semiannual inspections in favor of annual inspections (Senate Bill No. 491).

The Fiscal Year 1985 budget for DMS approved by the Legislature and the Governor reflects a significant reduction in the inspection activity of the Division. In light of this reduction, the proposed statutory change appears justified.

Prior Audit Recommendation No. 7C

DMS should develop a uniform method for compilation of weights and measures verification activity data.

An inspector, in order to verify a weight or measure device, performs an inspection which is an evaluation of the physical characteristics of the device, and a test which is the actual test for accuracy through the use of standards, e.g. test weights. We noted inconsistencies in the methods used by inspectors to count the number of devices, and inspections and tests of those devices.

In addition to the inconsistencies in accounting for activities, we noted that monthly activity information is not organized in a manner to facilitate managerial use of data for planning and budgeting purposes.

Legislative Audit's Current Position

Monthly statistics are compiled from test reports submitted by the inspectors. Since the system is manual, it is relatively cumbersome and error prone. DMS is working towards a uniform method of compiling verification data. DMS should continue to work for a more efficient system of data compilation.

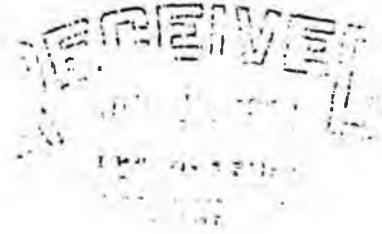
BILL SHEFFIELD, GOVERNOR

**DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT**

POUCH D
JUNEAU, ALASKA 99811
PHONE: 465-2500

OFFICE OF THE COMMISSIONER

July 9, 1984



Mr. Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit
The Legislature
Pouch W
Juneau, Alaska 99801

Dear Mr. Wilkerson:

I have received your follow-up report on the Department of Commerce and Economic Development, Division of Measurement Standards dated June 4, 1984 and have no disagreement with the recommendations in the report. As stated, all recommendations have been addressed and corrective measures taken by the division.

Thank you and your staff for your efforts in performing this follow-up audit.

Sincerely,

Richard A. Lyon
Commissioner

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RECORDS CERTIFICATION



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James O. Smith
Signature of Camera Operator

11/7/89
Date

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Alaska State Legislature

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BETTYE FAHRENKAMP, Vice Chairman
JACK COGHILL
DICK ELIASON
VIC FISCHER
RICK HALFORD
FRED ZHAROFF



POUCH V
JUNEAU, ALASKA 99811
(907) 465-4907

Senate Committee on Resources

M E M O R A N D U M

January 21, 1986

TO; All Members
Senate Resources Committee

FROM; Staff *[Signature]*
Senate Resources Committee

RE; SB 150 "An Act making miscellaneous amendments to the Alaska Water Use Act (AS 46.15); establishing procedures for administrative and judicial adjudication of water rights under that Act; and providing for an effective date."

SB 150 establishes procedures for the administrative adjudication of water rights in Alaska and makes miscellaneous amendments to the Alaska Water Use Act (AS 46.15).

Section 1 adds a disclaimer to the Water Use Act asserting that a right to appropriate water is not a state guarantee of a particular water quality, volume or pressure, or that water may be withdrawn at a particular cost.

Section 2 adds a new subsection setting out procedures for handling water right declarations existing before 1966.

Section 3 clarifies the existing abandonment and forfeiture provisions.

Section 4 clarifies how the commissioner may terminate an instream flow reservation.

Section 5 allows the Commissioner to initiate an administrative adjudication to quantify and determine the priority of all water rights and claims in a particular hydrologic basin.

Section 6 clarifies the enforcement authority of the Department of Natural Resources.

This bill was heard last session. During the interim the Department of Natural Resources chaired the Federal Reserve Water Rights Work Group, and based on those meetings has suggested several amendments which are included in the proposed committee substitute. In addition, amendments are included from the Alaska Water Resources Board and from Tom Meacham, a member of the Alaska Water Resources Board, whose amendments were concurred in by the Commissioner of Natural Resources.

Enclosures:

Feb. 12, 85	Transmittal letter from Governor
Jan. 31, 85	Fiscal Note
Mar. 04, 84	Resolution from Alaska Water Resources Board
Mar. 14, 85	Letter of support from AWRB with amendments
Mar. 12, 85	Letter from Thomas Meacham with amendments
Mar. 19, 85	Letter from DNR supporting Meacham letter
Apr. 03, 85	Letter from DNR explaining fiscal note
Apr. 10, 85	Letter from Tom Meacham supporting SB 150
Apr. 12, 85	Letter from Rose Rybachek opposing sect. 1-4
Oct. 09, 85	Letter from DNR with further data
Jan. 09, 86	Letter from DNR with amendments
	Excerpt from Western Energy Newsletter
	DNR Fact Sheet - Water Rights in Alaska
	DNR Fact Sheet - Federal Reserve Water Rights
	DNR Fact Sheet - Reserving Water for Instream Use



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

2/12/85

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the adjudication of water rights and making miscellaneous amendments to the Alaska Water Use Act (AS 46.15). The bill comes as a result of the Alaska Water Resources Board resolution 84-5, dated March 14, 1984, recommending the adoption of specific statutory procedures for the administrative and judicial adjudication of water rights, particularly federal reserved water rights.

A federal reserved water right is one created by implication when the federal government withdraws land for a specific purpose, such as for a national forest, Indian reservation, or national monument. The United States Supreme Court first recognized federal reserved water rights in Winters v. United States, 207 U.S. 564 (1908), an Indian reservation case. Since that time, court cases have extended the doctrine to many other types of federal withdrawals. Since a federal reserved water right is created by implication, no specific quantity of water and no priority date for the water right is established until the court does so by decree. To facilitate the ascertainment of the existence of a federal reserved water right, its quantity, and its priority date, Congress passed the McCarran Amendment, 43 U.S.C. sec. 666, allowing water adjudication suits to be brought against the federal government in state courts. The statute requires the adjudication of all rights within a hydrologic basin where a federal reserved water right may exist. This has created lawsuits involving literally thousands of defendants in some of the western states, where there are many appropriators and not enough water. The complexity and expense of such litigation has prompted many western states to enact specific adjudication legislation to facilitate the determination of water rights. The attached bill accord-

ingly draws from the experience of other states and their adjudication statutory schemes.

Section 1 of the bill amends AS 46.15.040 to add a disclaimer to the Water Use Act, asserting that a right to appropriate water which the state grants is not a state guarantee of a particular water quality, volume, or pressure, or that water may be withdrawn at a particular cost. Appropriators in adjudications in other western states have raised this "guarantee" argument. While courts that have reached the issue have rejected the argument, nonetheless it would serve the expeditious resolution of water disputes in Alaska if the lack of guarantee were specified in the Water Use Act.

Section 2 of the bill adds a new subsection to AS 46.15.065, the current statute setting out the procedures for handling individual declarations of water rights existing before July 1, 1966. Under AS 46.15.065(b)(1), the commissioner of natural resources set the deadline for filing those declarations, and approximately 15 are pending. This new subsection makes clear the relationship between the procedures for handling those declarations and the proposed procedures (AS 46.15.165 and 46.15.166 in the bill) for handling basinwide water rights adjudications.

Section 3 of the bill amends AS 46.15.140 to clarify the existing abandonment and forfeiture provisions and to create a rebuttable presumption that if an appropriator does not beneficially use the water covered under a certificate for a period of five successive years, it is the appropriator's obligation to prove to the commissioner that the appropriation has not been abandoned.

Section 4 of the bill clarifies how the commissioner may terminate an in-stream flow reservation.

Section 5 contains the body of the adjudication provisions. It first creates a new AS 46.15.165, which would allow the commissioner of the Department of Natural Resources to initiate an administrative adjudication to quantify and determine the priority of all water rights and claims in a particular hydrologic basin. Under AS 46.15.165, the commissioner would give notice to all relevant appropriators and landowners, including governmental agencies. When the hydrologic basin includes land or water held in trust by the United States for Alaska Natives, such as the Annette Island Reserve, notice would also be sent to relevant authorities in order to protect the Natives' interests, if any, in a federal reserved

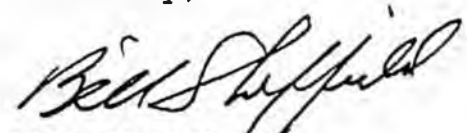
water right. A person or entity claiming a federal reserved water right who is served with notice, but who fails to consent to an administrative adjudication, would be excluded as a participant. Under AS 46.15.165 the commissioner would have authority to adopt procedural regulations and to appoint a master to preside over the adjudication; to hold hearings; to take testimony; to collect evidence; and to make recommendations to the commissioner. Any final determination of water rights the commissioner makes would be subject to an administrative appeal to superior court. Section 5 also creates a new AS 46.15.166 providing that when a federal reserved water right may be involved, and the claimant refuses to consent to an administrative adjudication, the commissioner could initiate the adjudication in superior court, consistent with the McCarran Amendment, 43 U.S.C. sec. 666. In that instance, the bill gives the superior court authority to appoint a designee of the commissioner as a master to perform the same functions a master would in an administrative adjudication, but under the court's supervision.

While the design of the adjudication bill is to provide a procedure for the adjudication of both non-federal and federal reserved water rights, a new AS 46.15.169 makes clear that nothing in the Alaska Water Use Act is to be construed as an admission against the State of Alaska that a federal reserved water right exists in any particular context.

Section 6 of the bill adds a new AS 46.15.255 and 46.15.256, to clarify the Department of Natural Resources' authority to take action to remove unsafe, as well as unpermitted, works of appropriation if the appropriator refuses to do so, and to inspect records of an appropriator pertinent to the permitted or certificated use of water under the Water Use Act.

Given the experience of states other than Alaska in adjudicating water rights and the large number of federal reservations in Alaska, a sound statutory system for adjudication is imperative. Therefore, I urge your prompt action on this bill.

Sincerely,



Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB150
Title: Water Use Act

FISCAL DETAIL

Agency Affected: Natural Resources
Program Category Affected: NRMEC

Sponsor: _____
Requestor: _____
Date of Request: _____

BRU, Program or Subprogram(s) Affected: Land and Water Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

No fiscal impact.

Prepared By: Ned Farquhar
Division: Commissioner's Office

Phone: 465-2400
Date: January 31, 1985

Approved by Commissioner: [Signature]
Agency: Natural Resources

Date: January 31, 1985

Distribution (by Agency preparing fiscal note):

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

7/1/84

Resolution No. 84-5

FEDERAL RESERVE WATER RIGHTS —
BASIN-WIDE ADJUDICATION

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

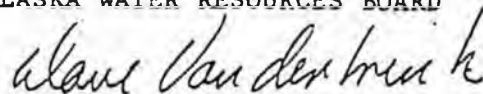
Of the 367.7 million acres in Alaska, federal reserve water rights exist on almost 60 percent of the land mass or over 215 million acres. From a miniscule 2.5 million acres of military land, to 50 and 75 million acres of land for national parks and fish and wildlife refuges respectively, federal reserve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

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

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

ADOPTED this 14th day of March, 1984

ALASKA WATER RESOURCES BOARD



David Vanderbrink, Chairman

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

MAR 1 9 1985

WATER RESOURCES BOARD

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

March 14, 1985

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

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

Dear Senator Sturgulewski:

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

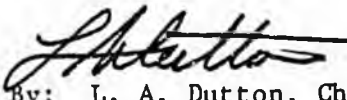
I would like to emphasize that this Board supports SB 150 provided the enclosed suggested changes are incorporated in the proposed legislation.

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

Thank you for your kind consideration of these recommendations.

Sincerely,

For
Cyril R. Wanamaker, Chairman
Alaska Water Resources Board



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

cc: Governor Sheffield
Senate Resources Committee

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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March 12, 1985

Honorable Arliss Sturgulewski, Chair
Senate Resources Committee
Pouch V
Juneau, AK 99811

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

Dear Ms. Sturgulewski:

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

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

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

Page Two
March 12, 1985

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

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

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

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

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

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

Page Three
March 12, 1985

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

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

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

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

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

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

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

(5) Serve the order on any other person or corporation claiming a federal reserved water right;

(renumber the existing subparagraph (5) as subparagraph (6)).

Page Four
March 12, 1985

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

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

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

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

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

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

Page Five
March 12, 1985

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

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

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

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

Sincerely yours,



Thomas E. Meacham

TEM/lstf

cc: Commissioner Esther C. Wunnicke

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

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

March 19, 1985

Honorable Arliss Sturgulewski, Chair
Senate Resources Committee
Pouch V
Juneau, AK 99811

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


Dear Senator Sturgulewski:

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

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

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

Sincerely,


Esther C. Wunnicke
Commissioner

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

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

APR 04 1985

BILL SHEFFIELD, GOVERNOR

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

April 3, 1985

The Honorable Arliss Sturgulewski
Chair, Senate Resources Committee
Pouch V
Juneau, AK 99811

Dear Senator Sturgulewski:

During your committee's meeting on March 8 for the Water Resources Board, and the hearing on SB 150, you asked if the committee wanted to consider this bill without a fiscal note because adoption would require funding for data collection and enforcement. We failed to address this in our previous correspondence on this bill.

The reason a fiscal note was not included with the bill when introduced was that, even though we are facing a period of declining revenue and the real likelihood of reduced budgets, it was important to have this proposed legislation enacted. We are concerned that the State could soon be forced into federal reserved water rights adjudication and without having judicial procedure established by law, the State could be at a great disadvantage. We hope to be able to complete the Indian River (Sitka) basinwide adjudication within the limits of our regular operating budget.

Considering the possible future application of this bill, we recognize that the cost of administrative and judicial basinwide adjudications for water rights will be expensive and our intention is to create separate budget projects for these adjudications in our annual budget requests. In this way, except for preliminary research and project planning, administrative and judicial basinwide adjudications will be subject to available funds specifically appropriated by the legislature for each separate project. The funds, when requested, will cover basin boundary determination, hydrology reports, data collection, information research, service of notice, special masters fees, attorneys fees, court costs, etc., -- all within DNR (DGGS and DLWM), the Department of law, and the Judicial Branch. Using this approach, funding for a particular project will expire when the project has been completed.

April 3, 1985

If the State does not enact this legislation and prepare itself to deal with federal reserved water rights, we will run grave risks of:


1. Having our water rights appropriation system come to a standstill in different areas around the State because we have failed to quantify the federal reserved rights through the adjudicative process (no other alternative is available to the State -- McCarren Amendment, 43 U.S.C. 666).
2. Losing state court jurisdiction over the adjudication of federal reserved water rights through the federal agencies filing in federal court.

Referring to the second of these two reasons, federal agency filings in federal court could be a real possibility within a very few years (2-5) if federal agencies are successful in obtaining funds to quantify their reserved rights. We know, for instance, that the Bureau of Land Management, the Fish and Wildlife Service, and possibly the Forest Service are actively seeking funds at this time. If the State does not take the initiative in developing a process for adjudicating federal reserved water rights, e.g., SB 150, it is unlikely that the federal courts will remand these cases to state court as they have done in other states.

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

Please let me know if there is additional information I might furnish you.

Sincerely,


Esther C. Wunnicke
Commissioner

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

*If you would
like to discuss this
further, please give me
a call. E.*

APR 12 1985

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April 10, 1985

Honorable Esther C. Wurnicke,
Commissioner, Alaska Department of Natural Resources
Pouch M
Juneau, AK 99811

RE: Proposed Amendments to Alaska Water Use Act (SB 150)
Our File No. 1515-1

Dear Commissioner Wurnicke:

Thank you for sending me a copy of your April 3, 1985 letter to Senator Sturgulewski regarding Senate Bill 150. Apparently Senator Sturgulewski had asked some questions regarding the absence of a fiscal note for SB 150 at the March 8 meeting of the Senate Resources Committee, with the Water Board in attendance. (I had to leave Juneau a day early, and regret that I was unable to attend that meeting).

Your letter explains very well the disadvantages to the State if it is not ready with an enacted statutory procedure for adjudicating federal reserved water rights. Of the two disadvantages you stated, I believe that the loss of clear state-court jurisdiction for federal agencies and individuals who assert federal reserved water rights is the most disadvantageous to the State. Your letter explained that if SB 150 is adopted, administrative or judicial adjudications of water basins would be done through the creation of a separate budget project for each adjudication as it became necessary. Using this approach, the Department of Natural Resources, in conjunction with the Department of Law, could determine which water basins in Alaska were of such a priority (such as Ship Creek in the Anchorage area) as to require commencement of a basin-wide adjudication. As you know, there are only a handful of basins in the State which might require a basin-wide adjudication in the foreseeable future; in other words, this will not be an everyday occurrence, and would only happen when the State decides that there is a real possibility that the existing water demands exceeded the known supply.

Page Two
April 10, 1985

One circumstance which was not mentioned in your letter, and which I believe is an important reason to enact SB 150, is that enactment of the bill will put the State in the "driver's seat" concerning state-court basin adjudications. In addition to offering a reasonable (and even advantageous) alternative to basin-wide litigation in federal court, SB 150 would give strong indication that any basin to be adjudicated will be one which is high on the priority list of the Departments of Natural Resources and Law -- and not merely any water basin which an individual may wish to have adjudicated, whether or not the circumstances in that basin deserves the expenditure of money and effort which a basin-wide adjudication entails.

In Washington State, I understand, the procedures for basin-wide adjudication in state court have been developed ad hoc, and may not be part of a well-considered procedural framework. As a result, regardless of the priorities of Washington's Department of Natural Resources concerning water management, any individual water appropriator may initiate a basin-wide adjudication in a Washington state court. The result is that the natural resources and legal efforts of the State are directed toward researching and defending basin-wide "brush fires" which pale in significance to the more pressing water allocation problems which face the State. Once begun, however, a basin-wide adjudication must be followed to a conclusion because the State and private appropriators may be disadvantaged if they do not participate fully.

Senate Bill 150 would avoid this result by giving the Commissioner (and no one else) the authority to initiate a basin-wide administrative or judicial adjudication under the procedures contained in the bill. Any person attempting to start an adjudication of basin-wide rights outside these procedures would, by definition not be initiating a legitimate, competent basin-wide adjudication.

I have taken the liberty of sending a copy of this letter to Senator Sturgulewski, to indicate this additional reason to support enactment of SB 150.

Sincerely yours,



Thomas E. Meacham
(Member, Alaska Water Resources
Board)

TEM/lstf

Page Three
April 10, 1985

cc: Michael J. Frank, Esq.
Thomas J. Hawkins, Esq.
Mr. Lawrence A. Dutton
Members, Water Resources Board
Honorable Arliss Sturgulewski



APR 19 1985

LIVENGOOD/TOLOVANA MINING DISTRICT

P. O. BOX 73069 - FAIRBANKS, ALASKA 99705

April 12, 1985

Senator Arliss Sturgulewski
Pouch V
Juneau, Ak 99811

Dear Arliss:

I have received copies of several letters to you regarding SB 150. I agree with most of the comments made regarding the wisdom in passing legislation dealing with federal reserved water rights. I believe the questions regarding the fiscal note, as well as other areas of the section dealing with federal reserved water rights have been sufficiently answered to move that section of the bill.

However, I still have the same concerns with section 1-4 of SB 150 as I previously had. This is the so-called housekeeping portion. This section would deprive Alaskans of rights granted to them under the Constitution as well as current water rights law. This portion of the bill still carries a major fiscal note. If the Department of Natural Resources covers the fiscal note internally, then there must be a portion of the duties they are currently budgeted to perform that will not get done...or else they are currently over-budgeted (which I find strange to believe). This portion of the bill should be deleted.

Is there any possibility that you Committee could delete the section dealing with the housekeeping measures (sections 1-4), and pass the portion only dealing with federal reserved water rights? If that is a possibility, I would strongly urge that you do so.

If I can be of any type of assistance to you, please don't hesitate to call.

Keep up the good work.

Sincerely yours,

Rose Rybachek, President

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LAND AND WATER MANAGEMENT

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

October 9, 1985

The Honorable Arliss Sturgulewski
1957 Sheldon Jackson
Anchorage, AK 99508

Re: Senate Bill 150

Dear Senator Sturgulewski:

Enclosed are four articles and our new Fact Sheet discussing federal reserved water rights. Senate Bill 150, dealing with federal reserved water rights, was introduced during the past legislative session. A copy of the bill is enclosed for your reference. SB 150 was not passed out of the Senate Resources Committee. None-the-less, we think it is a crucial piece of water legislation for Alaska because it would establish judicial procedures to adjudicate federal reserved water rights. We will encourage the legislature to give this issue a high priority next year.

Currently, the Water Use Act, AS 46.15, has no procedures for basin-wide adjudication of state administered water rights or claimed federal reserved water rights. The proposed bill would provide a state superior court procedure for efficiently adjudicating federal reserved water rights through the use of existing state agencies expertise. The bill also sets up an administrative basin-wide adjudication procedure for state administered water rights when a controversy exists between appropriators, such as the scarcity of water within a river basin or ground water aquifer.

A federal reserved water right is one created either expressly or by implication when the federal government withdraws land for a specific purpose. The U.S. Supreme Court first recognized federal reserved water rights in Winters v. United States, 207 U.S. 564 (1908), an Indian reservation case. Since that time court cases have extended the doctrine to national forests, parks, refuges, and monuments. Since federal reserved water rights are most often created by implication, no specific quantity of water and no priority date for the water right is established until the court does so by decree. Congress passed the McCarren Amendment, 43 U.S.C. §666, to allow water adjudication suits to be brought against the federal government in state courts to determine the quantity and priority date of federal reserved water rights.

While allowing state court adjudication of federal reserved water quantities and priority dates, the McCarren amendment also requires the adjudication of all rights within a hydrologic basin where a federal reserved water right may exist. This has created lawsuits involving literally thousands of defendants in some of the western states, where there are many appropriators and not enough water. The complexity and expense of such litigation has prompted many western states to enact legislation establishing procedures for determining federal reserved water rights. Our proposed bill draws from the experiences of other states and their statutory schemes.

Federal land reservations make up almost 49 percent, or more than 178 million acres of Alaska's total land mass of 367.7 million acres, and may carry federal reserved water rights.

While competition for water resources in the locale of many of Alaska federal reservations is limited, we have recently encountered instances where a procedure for adjudication would improve opportunities for state economic development. Applications for additional hatchery water in Sitka were shelved pending study of federal rights to Indian River water. Of more immediate consequence are National Park Service requests for Nuka River appropriations which could reduce Bradley Lake power production potential. These situations will continue to pop up and require a resolution mechanism.

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

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

Section 5 contains the body of the proposed basin-wide adjudication provisions. It creates a new AS 46.15.165, which would allow the Commissioner of Natural Resources to initiate an administrative adjudication to quantify and determine the priority of all water rights and claims in a particular hydrologic basin. Section 5 also creates a new AS 46.15.166 providing that when a federal reserved water right may be involved, and the claimant refuses to consent to an administrative

adjudication, the commissioner could initiate the adjudication in superior court consistent with the McCarren Amendment. In that instance the proposed bill gives the Superior Court authority to appoint a designee of the commissioner as a master to perform the same functions a master would have in an administrative adjudication, but under the court's supervision. While the design of the adjudication bill is to provide a procedure for the adjudication of both state granted and claimed federal reserved water rights, a new AS 46.15.169 makes clear that nothing in the Alaska Water Use Act is to be construed as an admission against the State of Alaska that a federal reserved water right exists in any particular context.

Section 6 of the bill adds a new AS 46.15.255 and AS 46.15.256, to clarify the Department of Natural Resources' authority to take action to remove unsafe or unpermitted works of appropriation such as dams or diversions where the appropriator refuses to do so, and to inspect records of an appropriator pertinent to water use under the Act.

Legislation for basin-wide adjudication was first submitted to the Legislature in 1981, but it received little attention. SB 150 was prepared by the Attorney General's Office after extensive review of that initial bill and other western states' laws dealing with federal reserved water rights adjudication. The drafts of this bill were reviewed by the Departments of Fish and Game and Environmental Conservation, members of the Alaska Water Resources Board, the U.S. Forest Service, the Western States Water Council, and the states of Idaho and Wyoming. During the past legislative session, there was one hearing by the Senate Resources Committee on SB 150 and we received a number of written comments. While some questions were raised about several housekeeping amendments included in the bill, the major portion dealing with administrative and judicial basin-wide adjudication was supported by the Alaska Water Resources Board as well as by individual Board members and by the Livengood/Tolovana Mining District.

The first of the enclosed articles, "The Winters of Our Discontent: Federal Reserved Water Rights in the Western States", presents background on the doctrine of prior appropriation and the development of the Winters Doctrine of Federal Reserved Rights. This article is relevant to Alaska because our system of allocating water is the doctrine of prior appropriation. The article presents an analysis of reconciling the prior appropriation doctrine and the Winters Doctrine. The second paper, "Introduction to Reserved Water Rights" by Ralph W. Johnson, discusses the origin of the reservation doctrine and decisions held in some of the major federal reserved water rights cases. These court cases are important to Alaska because federal reserved water rights are a judicial creation and Alaska will be bound by decisions made in courts outside our state.

Page Four

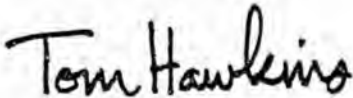
The final two articles, "Reserved Instream Flows in the National Forests: Round Two", and "The New Rules for National Forest Water" address federal reserved water rights on national forests. These articles are pertinent to Alaska because of the two national forests in Alaska, the Tongass and the Chugach, which are the two largest in the country. These reserved water rights will eventually be adjudicated.

A unique feature affecting federal reserve water rights in Alaska is that so much of Alaska's water resources are undeveloped and unappropriated. Thus, unlike the other western states, federal agencies in Alaska may encounter little competition for their water needs. For this reason, we may find that the courts in Alaska may be more lenient in adjudicating federal reserved water rights for the amounts claimed by the federal government. The state's challenge will be to persuade the courts to apply the same standards in Alaska that have been applied outside—granting the minimum amount of water needed for the primary purposes of the land reservation. This is important to ensure that developable water resources are available for the continued growth and development our state.

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

I hope you find these articles enlightening. Please contact us if we may provide more information to you on these subjects.

Sincerely,



Tom Hawkins
Director

Enclosures

cc: Esther C. Wunnicke
Mike Frank
Laura Davis

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

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

OFFICE OF THE COMMISSIONER

JAN 13 1986

January 9, 1986

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

Re: SB 150, Basin Wide Adjudication of Water Rights

Dear Senator Sturgulewski:

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

Section 46.15.140

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

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

Proposed by: Senator Rick Halford

Senator Sturgulewski
January 9, 1986
Page 2

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

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

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

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

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

Proposed by: Senator Rick Halford

Section 46.15.165

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

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

Proposed by: FRWR Work Group

Senator Sturgulewski
January 9, 1986
Page 3

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

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

Proposed by: FRWR Work Group

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

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

Proposed by: FRWR Work Group

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

Rationale: Allows the Commissioner discretion to take this action.

Proposed by: FRWR Work Group

Section 46.15.166

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

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

Proposed by: FRWR Work Group

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

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

Proposed by: FRWR Work Group

Section 46.15.168

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

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

Proposed by: FRWR Work Group

Senator Sturgulewski
January 9, 1986
Page 5

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

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

Proposed by: FRWR Work Group

Section 46.15.169

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

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

Proposed by: FRWR Work Group

Section 46.15.256

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

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

Proposed by: Assistant Attorney General Mike Frank

Senator Sturgulewski
January 9, 1986
Page 6

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

Sincerely,

Esther C. Wunnicke
Commissioner

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

that even if SFC funding is rescinded in the Interior bill, the President is likely to veto the bill because it exceeds the FY-86 budget target. ("Wall Street Journal," Dec. 6; "Inside Energy/with Federal Lands," Dec. 2)

Synthetic Fuels Notes...

On November 19, The Synthetic Fuels Corp. took a series of actions to resolve the status of all projects pending before the SFC. In its consideration of the remaining Third General Solicitation projects in the West, the SFC Board of Directors set a December 13 deadline for the Paraho-Ute project in Utah to submit additional information on a proposed scaled-down project producing 4,500 barrels of shale oil per day. The board received a briefing on the status of the Seep Ridge project (Utah) and directed the staff to resolve all outstanding issues with regard to the project by the next board meeting. The board was also briefed on two proposals for down-sizing the Cathedral Bluffs oil shale project in Colorado. For western projects in the SFC's Fourth General Solicitation, the board directed that negotiations on key financial terms be completed for the Utah Methanol project by January 31, 1986. Finally, for projects in the Corporation's Tar Sands Solicitation, the staff reported that the PR Springs and Sunnyside projects in Utah appear to meet the qualification criteria of the solicitation and are relatively equal when compared against the solicitation's ranking criteria.

Occidental Oil Shale Inc. has now filed two funding proposals with the SFC for "down-sized" developments. Both proposals call for using Occidentals modified in-situ method of retorting shale. ("Rocky Mountain News," Dec. 6)

The Great Plains coal gasification plant is in danger of slipping into the red soon as a result of a second pipeline refusing to pay the contract price for the gas. Tennessee Gas Pipeline Co. recently joined Natural Gas Pipeline Co. in refusing to pay the higher price. In light of the former sponsors' actions, DOE officials last week presented Energy Secretary John Herrington with options for continuing operation of the plant, an official said. None of the options call for shutting down the plant soon, the official added. That will not be done as long as litigation over the validity of the gas contracts ensues, he said. ANG Coal Gasification Co. which runs the plant for DOE, is exploring ways of diversifying the coal gasification operation to increase its revenues. ANG is studying two options: developing and marketing additional byproducts and/or reconfiguring the plant to produce other liquid products. ("Inside Energy/with Federal Lands," Nov. 25)

PUBLIC LANDS

Judge Supports Federal Reserve Water Rights in Wilderness Areas

A U.S. District Court judge in Colorado has ruled that "federal reserve water rights do exist" in 24 wilderness areas in Colorado that are in national forests. Under the ruling, potential water projects to divert water to cities could not be built upstream from a wilderness area since that would rob wilderness areas of water and would deprive this and future generations of Americans "the enduring resources of the wilderness," Judge John L. Kane, Jr. wrote. The Sierra Club had filed suit asking that the federal government be forced to assert water rights for wilderness areas in Colorado Water Court. District Court Judge John Kane agreed with the Sierra Club that when Congress passed the 1964 Wilderness Act, it intended to create a federal reserve water right to protect the pristine nature of lands designated as wilderness areas.

In his decision, Judge Kane said that federal officials were not required by law to file for water rights, though they could have done so to protect the rights. But he noted he was dismayed at the U.S. Forest Service's "benign neglect of this issue of federal reserved water rights" and he called for federal officials to present a plan to "comply with their statutory duty to protect wilderness water resources" to him by April 1.

The lawsuit was opposed by the state, the city of Denver, the Colorado Water Congress, a state association of farm, industrial and municipal water users, and the Mountain States Legal Foundation. It appears likely the judge's decision will be appealed. Gregg Hobbs, attorney for the Water Congress said, that since the decision is the first of its kind, "we ought to see what the appellate courts think about the law." He labeled the decision far-reaching and added "Congress is going to have to look at its implications in designating additional wilderness in Colorado. The wilderness areas could interfere with future development that might be needed in the state."

Sen. William Armstrong (R-CO) said that he and other western congressmen intend to stall the designation of any new western wilderness areas unless they can overturn through legislation the judge's ruling. Armstrong said he is confident that no more Colorado wilderness areas will be created as long as the ruling stands. Sen. Malcolm Wallop (R-WY), chairman of the Senate committee with jurisdiction over wilderness areas has said that he intends to hold up wilderness designation for more than 20 million acres of western lands under study by the Bureau of Land Management until the water rights issue is settled. Other congressmen, however, called for negotiations between environmentalists and water providers to resolve the matter. ("Denver Post," Nov. 27; "Rocky Mountain News," Dec. 6)

Public Lands Notes...

A federal court in Washington, D.C. temporarily enjoined the Department of the Interior from carrying out activities to open up over 170 million acres of federal lands, mostly in the West, to mining and mineral exploration and other development. Environmental groups had sued the Interior Department over its proposed activities, saying that required land use plans had not been prepared for the lands. ("Wall Street Journal," Dec. 5)

CONSERVATION AND RENEWABLE RESOURCES

Renewable Resources Notes..

Planning has begun for the American Solar Energy Society's 11th National **Passive Solar Conference** to be held this summer. The conference will be held on June 8 through 14, 1986 in Boulder, CO. ASES has issued a call for papers and is especially interested in papers dealing with the government role in solar energy development. People interested in submitting a paper should submit an abstract to the ASES office before January 15. For more information contact the ASES office at (303) 443-3130 or call Pamm McFadden at (303) 443-4308.

With momentum still behind them, the Solar Energy Industries Association is attempting to get favorable clarification in the Committee report on the Ways and Means tax reform package. Recently the committee voted to extend the solar tax credits at reduced rates over a three year period. SEIA wants to make it clear that the extension includes photovoltaics. Moreover, it wants the report to



Fact Sheet:

WATER RIGHTS IN ALASKA

SEPTEMBER 1985

WHAT ARE WATER RIGHTS?

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

HOW DO I OBTAIN WATER RIGHTS?

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

WHAT COSTS ARE INVOLVED?

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

WHY SHOULD I APPLY FOR WATER RIGHTS?

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

2. A person with established water rights has priority to the use of water over persons who later file for water rights from the same water source.

3. Anyone who constructs works for the taking of water (an appropriation), or uses a significant amount of water without a permit or certificate of appropriation is guilty of a misdemeanor. (Alaska Statutes 46.15.180)

A significant amount of water as defined by regulation [Alaska Administrative Code 11 AAC 93.970(.4)] is the:

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

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

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

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



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

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

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

DEPARTMENT OF NATURAL RESOURCES DIVISION OF LAND AND WATER MANAGEMENT

SOUTHEASTERN REGIONAL OFFICE
400 Willoughby Avenue
Suite 400
Juneau, Alaska 99801
465-3400

NORTHERN REGIONAL OFFICE
4420 Airport Way
Fairbanks, Alaska 99701
479-2243

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

Mat-Su Area Office
Central Plaza, Suite 202
Pouch 874008
Wasilla, Alaska 99687
376-4595

DIVISION OF FORESTRY

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

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

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

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

TOK AREA OFFICE
Mile 12.1 Glenn Highway
Post Office Box 10
Tok, Alaska 99780
883-5134

SOUTHWEST (McGRATH) AREA OFFICE
McGrath Airport
Box 130
McGrath, Alaska 99627
524-3010

KENAI PENINSULA AREA OFFICE
Mile 92.5 Sterling Highway
S.R.2, Box 107
Soldotna, Alaska 99669
262-7559

COPPER RIVER AREA OFFICE
Mile 110 Richardson Highway
Post Office Box 185
Glennallen, Alaska 99588
822-5534



Fact Sheet: FEDERAL RESERVED WATER RIGHTS

JULY, 1985

WHAT ARE FEDERAL RESERVED WATER RIGHTS?

- Federal reserved water rights are created when federal lands are withdrawn from entry (by Congress or other lawful means) for federal use.
- Federal reserved water rights:
 - apply to both instream and out-of-stream use
 - may be created without actual diversion or beneficial use
 - are not lost by non-use
 - priority dates are established as the date the land is withdrawn for the primary purpose(s)
 - are created for the minimal amount of water reasonably necessary to satisfy both existing and reasonable foreseeable future uses of water for the primary purpose(s) for which the land is withdrawn
- Water rights for secondary purposes must be obtained under state law, AS 46.15.

WHY ARE FEDERAL RESERVED WATER RIGHTS IMPORTANT TO YOU?

- Water users in areas where there are federal land withdrawals should file for water rights with DNR in order to protect their use of water. If a basin wide adjudication is started for your river basin, you can then be assured of being included in the adjudication.
- Holders of water rights with priority dates established before the withdrawal of federal lands within a basin will have water rights senior to the federal government. Water users filing for water rights after the withdrawal of federal lands within a specific basin will have water rights with priority dates later than those of the federal government.

HOW ARE FEDERAL RESERVED WATER RIGHTS ADJUDICATED?

- Federal reserved water rights are a judicial creation. The United States Supreme Court first recognized federal reserved water rights in

Winters v. United States, 207 U.S. 564 (1908), an Indian reservation case. Since that time, court cases have extended the Winters Doctrine to other types of federal land withdrawals.

- Federal law, the McCarren Amendment (43 U.S.C. 666), allows judicial adjudication of federal reserved water rights in state court.
- The McCarren Amendment requires that state court adjudications include all water rights in a river basin, including all claimed federal reserved water rights and state administered water rights.

WHY ARE WE CONCERNED ABOUT FEDERAL RESERVED WATER RIGHTS?

- Because federal reserved water rights are unquantified, DNR does not know how much water is needed or used for the primary purposes of federal land withdrawals in Alaska. Because the unappropriated water available from a water source and the amount of water reserved by a federal withdrawal is unknown, water resources cannot be effectively managed.
- Alaska's growing population and development pressures have caused water supply and water rights conflicts in several areas of unquantified federal reserved water rights. Examples include Sitka's Indian River and Anchorage's Ship Creek.
- For DNR to effectively manage and allocate the state's water and adjudicate water rights, it is necessary to have the federal reserved water rights in Alaska inventoried and quantified by the appropriate federal land management agencies in cooperation with the State of Alaska. The state can then integrate federal reserved water rights with state administratively adjudicated water rights and manage water sources with greater certainty.



HOW MUCH LAND IN ALASKA HAS FEDERAL RESERVED WATER RIGHTS?

- Of the 367.7 million acres in Alaska, almost 49 percent, or more than 178 million acres are reserved federal lands which may have federal reserved water rights:

These federal lands are made up of:

Military land - 2.5 million acres
National Forests - 23.2 million acres
BLM lands - 26.1 million acres
National Parks - 51 million acres
Fish and Wildlife Refuges - 76 million acres

For more information about federal reserved water rights and application forms for water rights, please call, write, or come to one of the following Offices:

DEPARTMENT OF NATURAL RESOURCES DIVISION OF LAND AND WATER MANAGEMENT

SOUTHEASTERN REGIONAL OFFICE
400 Willoughby Avenue
Suite 400
Juneau, Alaska 99801
465-3400

NORTHERN REGIONAL OFFICE
4420 Airport Way
Fairbanks, Alaska 99701
479-2243

SOUTHCENTRAL REGIONAL OFFICE
Frontier Building
3601 C Street, 10th Floor
Pouch 7-005
Anchorage, Alaska 99510
561-2020

Mat-Su Area Office
Century Plaza, Suite 202
Pouch 874008
Wasilla, Alaska 99510
376-4595

DIVISION OF FORESTRY

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

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

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

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

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

SOUTHWEST (McGRATH) AREA OFFICE
McGrath Airport
Box 130
McGrath, Alaska 99627
524-3010

KENAI PENINSULA AREA OFFICE
Mile 92.5 Sterling Highway
S.R. 2, Box 107
Soldotna, Alaska 99669
262-7559

COPPER RIVER AREA OFFICE
Mile 110 Richardson Highway
Post Office Box 185
Glennallen, Alaska 99588
822-5534



Alaska Department of

NATURAL RESOURCES

ESTHER WUNNICKE,
COMMISSIONER

Fact Sheet: RESERVING WATER FOR INSTREAM USE

OCTOBER, 1984

WHAT ARE RESERVATIONS OF WATERS?

A reservation of water is a type of water right. The use of water within a stream, lake, or other surface water body may be reserved to maintain an adequate instream flow or level of water for specific activities, such as fish spawning or a river rafting enterprise. Water can be reserved for one or more permissible uses at a particular point or part of a stream or other waterbody, during a certain period of time. Under Alaska Statute 46.15.145, permissible instream uses include:

- Protection of fish and wildlife habitat, migration and propagation.
- Recreation and park purposes.
- Navigation and transportation purposes, and
- Sanitary and water quality purposes.

A reservation of water for one use may also serve as a reservation for another purpose. For example, a reservation for fish spawning may also benefit recreation.

Like out-of-stream water rights, a reservation of water is a property right. However, it cannot be abandoned, conveyed, transferred, assigned, or converted to another use without the approval of the Department of Natural Resources.

WHO CAN APPLY FOR A RESERVATION OF WATER?

Private individuals or organizations as well as government agencies may apply for a reservation of water for instream use. This is not a required permit, but rather an optional water right. Those who wish to divert, impound, or withdraw water from a surface or ground water source will continue to file for their water rights under Title 46 for obtaining diversionary water rights.

HOW CAN I APPLY FOR A RESERVATION OF WATER

- You can get an Application for Reservation of Water (Form 10-1151) at any Department of Natural Resources, Division of Land and Water

Management district office. Your application, however, must be submitted to the district office in the area where your proposed reservation of water will occur.

- Before submitting your application, you should talk with the district office people about the type of work or study needed to quantify the instream water use, and information needed in your application.
- When your application is complete and has been accepted, it will be reviewed to ascertain the need for the reservation of water, impacts on other water right holders, and the public interest. An assessment will be made to determine if water is available for the reservation, and if the hydrologic and technical information in the application is accurate and adequate. Public notice of your application must be given.
- Certificates of reservation, when issued, will be granted to the applicant. Conditions may be placed on certificates.
- Certificates of reservation must be reviewed by the Division of Land and Water Management every ten years, but can be reviewed in less than ten years if changed conditions warrant a review.

WHAT COSTS ARE INVOLVED?

- The Application for Reservation of Water should be accompanied by the appropriate filing fee as set forth in the fee schedule of the Department of Natural Resources.
- You will be required to pay the cost of a legal advertisement to notify the public of your proposed reservation of water.
- If a certificate is issued, you may be required to install and maintain measuring devices, such as stream gages, weirs, or staff gages, and monitor and report on the instream flow or level of water.
- You may also be responsible for additional data collection or analysis during the certificate review period.

WHY SHOULD I APPLY FOR A RESERVATION OF WATER?

You should apply if you want to ensure that the level or flow of water in a stream or lake that you need for your purposes will be available when and where you need it, and will not be appropriated or diverted for another use.

If you have an established instream water right, you have priority use of that water over people who file later for water rights as well as legal standing in case of conflicting uses of water by those without a water right.

Further information about reservations of water for instream uses and application forms may be obtained from the following offices:

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

A permit or certificate of appropriation is required for diverting, impounding, or withdrawing water for use from a water body or ground water source.

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

DEPARTMENT OF NATURAL RESOURCES DIVISION OF LAND AND WATER MANAGEMENT

SOUTHEASTERN REGIONAL OFFICE
400 Willoughby Avenue
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Juneau, Alaska 99811
465-3400

NORTHERN REGIONAL OFFICE
4420 Airport Way
Fairbanks, Alaska 99701
479-2243

SOUTHCENTRAL REGIONAL OFFICE
3601 C Street, 10th Floor
Pouch 7-005
Anchorage, Alaska 99510
276-2653

▲ Mat-Su Area Office
Century Plaza, Suite 202
Pouch 874008
Wasilla, Alaska 99510
376-4595

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : 2/6/86

REQUEST

Bill/Resolution No. : CSSB 150 (Res)
 Title : Basinwide Water Rights and Water Use Act

Sponsor : Rules/Governor
 Requestor : Sen. Resources
 Date of Request : 1/25/86

FISCAL DETAIL

Agency Affected : Natural Resources
 BRU : Land and Water

Components : Water Management

EXPENDITURES/REVENUES : (Thousands of Dollars)

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

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING : (Thousands of Dollars)

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

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

See attached explanation.

Prepared by : Ned Farcubar *EF* *MM* Phone : 465-2400
 Division : Commissioner's Office Date : Feb. 6, 1986

Approved by Commissioner : Wm. S. James, Deputy Date : Feb. 6, 1986
 Agency : Natural Resources

Distribution (by Agency preparing fiscal note):

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

Fiscal note background
for SB 150

The Department of Natural Resources submitted a zero fiscal note for SB 150 because there is no scheduled or anticipated basinwide water rights adjudication activity during the next five years. This has been amended to show that there may be costs in future years (beyond year two) if the Department enters into an adjudication that is not currently anticipated. If adjudications become necessary, the Department will submit such project budget requests as are needed to adjudicate each water rights project.

We are able to project the costs of a typical adjudication from work that has taken place to date on Indian River (Sitka) water rights. The costs of a nonbinding preliminary adjudication at Indian River are included in our FY 87 budget submittal (pp. 000548-000549, 000553-000555). The total cost for this adjudication action is estimated at about \$8,000 per year over a three-year period.

Without this legislation, the Department and the Department of Law may face much higher costs if complainants, including federal agencies, attempt to resolve water rights issues in the courts. The legislation will set up a clear administrative system certain to be more cost-effective and efficient than court resolution of water rights issues. In other states lacking an administrative procedure the costs of court adjudications have been high. For instance Wyoming's Big Horn adjudication of non-Indian claims cost that state \$500,000-700,000 when it was negotiated and settled before the trial date; court adjudication of the Indian claims cost the state an estimated \$6,000,000.

An example of a possible area for a large administrative basinwide adjudication in Alaska is the Anchorage Lower Hillside area, encompassing about 16.5 square miles with about 2,250 existing or expected groundwater applications. To adjudicate claims in this area would take approximately three years and would be expected to cost \$500,000-700,000.



Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

KARLA L. FORSYTHE
General Counsel

303 K Street
Anchorage, AK 99501

February 6, 1986

Pat Rodey, Chair
Senate Judiciary Committee
P. O. Box V
Juneau AK 99811

Dear Senator Rodey:

I am writing with regard to CS for Senate Bill 150, which makes miscellaneous amendments to the Alaska Water Use Act and also establishes procedures for adjudication of water rights.

Section 46.15.166(b) of this bill provides that "venue is proper in a complaint filed under (a) of this section if the complaint is filed in a judicial district in which all or part of the hydrologic regime is located."

The 1985 legislature amended AS 22.10.030 to provide that venue for all actions shall be set under rules established by the supreme court. As a result, it appears that determination of proper venue in water rights cases should be set forth in court rules.

I am circulating a copy of this legislation to the presiding judges for any additional comments of a procedural nature, which I will in turn forward to the committee's attention.

Thank you for the opportunity to comment on this legislation.

Sincerely,

Karla L. Forsythe
General Counsel

KF/k1

cc: Arthur H. Snowden, II
Mike Frank, Asst. AG Anchorage

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

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

OFFICE OF THE COMMISSIONER

February 17, 1986

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

Re: SF 150, Basin-wide Adjudication of Water Rights

Dear Senator Sturgulewski:

At the January 27, 1986 hearing on Senate Bill 150, several questions were raised to which we would like to respond. Scott Haskins, a miner speaking from the Fairbanks teleconference, stated that he has encountered problems in getting his water rights from DNR. We researched his cases, and located three water rights for which he applied for lode mining claims which he leased from Placid Oil Company. The case files indicated that our Northern Regional Office attempted to contact Mr. Haskins by phone and by mail several times at the listed phone number and address in order to obtain additional information and to provide public newspaper notice as required by AS 46.15.133. The regional office was unable to get a response from Mr. Haskins, so they attempted to reach him through Placid Oil Company, but again received no response. The regional office subsequently closed the case files because adjudication could not proceed. We did not locate any other water rights filed by Mr. Scott Haskins.

As a follow-up, you asked for an analysis of permits and certificates issued to placer miners. It normally takes several months to issue a water rights permit for a mining operation. This time period assumes the operation is fairly routine and includes the time for inter-agency and public notice and comment as required by AS 46.15.133. At the present time DNR has issued 960 permits and 254 certificates for placer mining.

On a different question, Senator Fahrenkamp asked whether we have drafted regulations to implement SB 150. As we responded at the hearing, regulations have not been drafted. Regulations are normally drafted after a bill is enacted so that

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the administering agency knows what the final language of the bill is. To do otherwise would require constant revisions of draft regulations as the bill makes its way through the Legislature. It should be noted that all legislators have the opportunity to review and comment on regulations during the public review process. I will ask the Division of Land and Water Management to analyze the bill and identify areas where regulations would be necessary for implementation of the statute.

Finally, Senator Coghill asked for an explanation of "rebuttable presumption." This means that after the state proves that an appropriation has been abandoned for five successive years under AS 46.15.140(b), there is a presumption that the appropriation has been abandoned or forfeited and the burden of proof shifts to the certificate holder to rebut or disprove this presumption.

I hope this answers all the questions raised at the hearing. If we can be of further assistance, please contact us.

Sincerely,

Esther C. Wunnicke

f Esther C. Wunnicke
Commissioner

cc: Senator Fahrenkamp
Senator Coghill
Senator Eliason
Senator Vic Fischer
Senator Halford
Senator Zharoff
Tom Hawkins, Director, Division of
Land and Water Management
Mike Frank, Department of Law

**STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE**

Revision Date : 2/6/86

REQUEST

Bill/Resolution No. : CSSB 150 (Res)
 Title : Basinwide Water Rights and
 Water Use Act
 Sponsor : Rules/Governor
 Requestor : Sen. Resources
 Date of Request : 1/21/86

FISCAL DETAIL

Agency Affected : Natural Resources
 BRU : Land and Water
 Components : Water Management

EXPENDITURES/REVENUES : (Thousands of Dollars)

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

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING : (Thousands of Dollars)

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

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

See attached explanation.

Prepared by : Ned Farcular *NF* *MM* Phone : 465-2400
 Division : Commissioner's Office Date : Feb. 6, 1986

Approved by Commissioner : *Wm S. James, Deputy* Date : Feb. 6, 1986
 Agency : Natural Resources

Distribution (by Agency preparing fiscal note) :

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

Fiscal note background
for SB 150

The Department of Natural Resources submitted a zero fiscal note for SB 150 because there is no scheduled or anticipated basinwide water rights adjudication activity during the next five years. This has been amended to show that there may be costs in future years (beyond year two) if the Department enters into an adjudication that is not currently anticipated. If adjudications become necessary, the Department will submit such project budget requests as are needed to adjudicate each water rights project.

We are able to project the costs of a typical adjudication from work that has taken place to date on Indian River (Sitka) water rights. The costs of a nonbinding preliminary adjudication at Indian River are included in our FY 87 budget submittal (pp. 000548-000549, 000553-000555). The total cost for this adjudication action is estimated at about \$8,000 per year over a three-year period.

Without this legislation, the Department and the Department of Law may face much higher costs if complainants, including federal agencies, attempt to resolve water rights issues in the courts. The legislation will set up a clear administrative system certain to be more cost-effective and efficient than court resolution of water rights issues. In other states lacking an administrative procedure the costs of court adjudications have been high. For instance Wyoming's Big Horn adjudication of non-Indian claims cost that state \$500,000-700,000 when it was negotiated and settled before the trial date; court adjudication of the Indian claims cost the state an estimated \$6,000,000.

An example of a possible area for a large administrative basinwide adjudication in Alaska is the Anchorage Lower Hillside area, encompassing about 16.5 square miles with about 2,250 existing or expected groundwater applications. To adjudicate claims in this area would take approximately three years and would be expected to cost \$500,000-700,000.

Original sponsor: Rules/Governor

1 IN THE SENATE

BY THE RESOURCES COMMITTEE

2 CS FOR SENATE BILL NO. 150 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

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

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

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

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

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

22 (f) The adjudication process for a declaration filed under (a)
23 of this section that is pending before the commissioner on the effec-
24 tive date of this Act continues under the procedures set out in this
25 section until the commissioner finally determines whether the declar-
26 ant is entitled to a certificate. If a certificate is issued under
27 this section, the certificate holder may be included as a participant
28 in an adjudication under AS 46.15.165 or 46.15.166.

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

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

9 (b) The commissioner may declare that an appropriator has [AN
10 APPROPRIATION TO BE] wholly or partially forfeited an appropriation,
11 and shall revoke the certificate of appropriation in whole or in part
12 if the [AN] appropriator voluntarily fails or neglects, without suffi-
13 cient cause, to make use of all or a part of the [HIS] appropriated
14 water for a period of five successive years.

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

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

22 (d) A state agency or a municipality may not abandon or forfeit
23 an appropriation in whole or in part except after public notice.

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

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

28 (f) At least once each 10 years the commissioner shall review
29 each reservation under this section to determine whether the purpose

1 described in (a) of this section for which the certificate reserving
2 water was issued and the findings described in (c) of this section
3 still apply to the reservation. If the commissioner determines that
4 the purpose, or part or all of the findings, no longer apply to the
5 reservation, the commissioner [HE] may revoke or modify the certifi-
6 cate reserving the water after notice, hearing when appropriate, and a
7 written determination that the revocation or modification is in the
8 best interests of the state [IN ACCORDANCE WITH AS 46.15.140(b)].

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

10 Sec. 46.15.165. ADMINISTRATIVE ADJUDICATIONS. (a) The commis-
11 sioner may, by order, initiate an administrative adjudication to
12 quantify and determine the priority of all water rights and claims in
13 a drainage basin, river system, ground water aquifer system, or other
14 identifiable and distinct hydrologic regime, including any hydrologi-
15 cally interrelated surface and ground water systems.

16 (b) In the order initiating an administrative adjudication, the
17 commissioner shall describe the appropriate geographic and hydrologic
18 boundaries of the adjudication area. During the adjudication, the
19 commissioner may adjust the boundaries to ensure the efficient admin-
20 istration of water appropriations among users.

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

22 (1) serve the order on each applicant, certificate holder,
23 or permittee listed in the department's records within the adjudica-
24 tion area;

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

28 (3) serve the order on any person who owns or claims land
29 within the adjudication area if the land is held in trust by the

1 United States for the person or if the patent, deed, or certificate to
2 the land from the United States was issued under 25 U.S.C. 334 (Indian
3 General Allotment Act of February 8, 1887, 24 Stat. 389, as amended
4 and supplemented), 25 U.S.C. 372 (the Allotment Act of June 25, 1910,
5 36 Stat. 855), 43 U.S.C. 270-1, 270-2 (the Allotment Act of May 17,
6 1906, 34 Stat. 197), any other allotment act, or the Alaska Native
7 Townsite Act of May 25, 1926, 44 Stat. 629, and serve the order on the
8 United States on behalf of the person;

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

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

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

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

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

26 (e) Service of the order under (c)(1) of this section is suffi-
27 cient if mailed by certified mail, return receipt requested, to the
28 last known address that the applicant, certificate holder, permittee,
29 or claimant has given to the division of the department responsible

1 for administration of water rights. A person served under (c)(1) -
2 (7) of this section who fails to appear in a timely manner and assert
3 a claim as prescribed by the commissioner is estopped from subsequent-
4 ly asserting an objection to the adjudication of that person's water
5 rights within the adjudication area, unless the person is entitled to
6 a federal reserved water right and has failed to consent under (k) of
7 this section.

8 (f) In an adjudication under this section, the commissioner may
9 appoint an impartial qualified person as a master to preside over the
10 adjudication, to hold hearings, to take testimony, to collect evi-
11 dence, to propose to the commissioner an order adjudicating the valid-
12 ity of, quantifying, and determining the priority of all water rights,
13 and to take other action the commissioner decides is necessary.

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

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

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

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

25 (2) classifying applicants, certificate holders, permit-
26 tees, and claimants in groups that share similar interests, such as by
27 the amount of water used or the type of use, and restricting their
28 active participation in the adjudication by appointing group represen-
29 tatives for the purposes of receiving notices, examining witnesses,

1 and other adjudicatory functions;

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

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

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

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

20 (l) A person adversely affected by a final order of the commis-
21 sioner adjudicating water rights under this section may appeal to the
22 superior court within 30 days after the decision is mailed or de-
23 livered to the person.

24 (m) The commissioner may adopt regulations setting out proce-
25 dures for administrative adjudications under this section.

26 Sec. 46.15.166. JUDICIAL ADJUDICATIONS. (a) Instead of initi-
27 ating an adjudication under AS 46.15.165, the commissioner may, with
28 the concurrence of the attorney general, if a federal reserved water
29 right has been or might be asserted by an agency of the United States

1 on its own behalf or on behalf of a person described in AS 46.15.-
2 165(c)(3) - (6), file on behalf of the state a complaint in superior
3 court to initiate a judicial adjudication consistent with 43 U.S.C.
4 666 to quantify and determine the priority of all water rights in a
5 drainage basin, river system, ground water aquifer system, or other
6 identifiable and distinct hydrologic regime, including any hydrologi-
7 cally interrelated surface and ground water systems.

8 (b) Venue is proper in a complaint filed under (a) of this
9 section if the complaint is filed in a judicial district in which all
10 or a part of the hydrologic regime is located.

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

24 (d) In an adjudication under this section, the court may incor-
25 porate in an order or judgment final orders of the commissioner previ-
26 ously issued under AS 46.15.165.

27 (e) Proceedings under this section shall be conducted without a
28 jury.

29 Sec. 46.15.167. EFFECT OF DECISION. The final order of the

1 commissioner under AS 46.15.165 and the final judgment of a court
2 under AS 46.15.166 are binding on each party to the adjudication and
3 on each person who subsequently makes an application for a water
4 right. The court or the commissioner may retain jurisdiction for a
5 period of time necessary to implement an adjudication order or judg-
6 ment and to provide for subsequent water appropriations.

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

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

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

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

20 Sec. 46.15.169. FEDERAL RESERVED WATER RIGHTS. This chapter
21 does not represent a commitment by the state to a specific federal re-
22 served water right.

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

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

27 (1) remove or abate unpermitted works of appropriation,
28 diversion, impoundment, or withdrawal;

29 (2) install corrective controls or control works; and

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

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

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

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

12 (2) enter private property at all reasonable times after
13 obtaining a search warrant from a judicial officer if the owner re-
14 fuses consent to entry; and

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

19 * Sec. 8. This Act takes effect immediately in accordance with AS 01.-
20 10.070(c).

WATER RESOURCES BOARD

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

May 9, 1986

Senator Patrick Rodey
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Senator Rodey:

RE: SB 150

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

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

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

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

Respectfully,



Cyril R. Wanamaker, Chairman