

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 86/2

4240 SRES SB 150 *1120*

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

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

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

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

- ° No land disposals or future mineral entry will be allowed within the designated river corridors; (Note: Directional drilling may be permitted from outside the river corridors.)
- ° The state must quantify and apply for minimum instream flow reservations necessary to maintain the management intent of the designated rivers.

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

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

Lake Creek
Little Susitna
Talachulitna
Talkeetna
Moose Creek
Kroto Creek

- ° The proposed legislative designation includes a mile wide corridor along the identified streams which encompasses a total of 220,000 acres of state owned land.
- ° The Matanuska-Susitna Borough has agreed to dedicate Borough owned lands lying within the specified corridors to management similar to that outlined in HB 93.

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

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

The proposed comprehensive water management program consists of three parts:

- 1) Data collection - prioritizing and coordinating federal/state water resource inventories to provide state and local governments with information necessary for wise resource management decisions;
- 2) Data integration - organizing and managing collected data in a format which is readily available for analysis and integration into the decision making processes;
- 3) Planning Processes - participating in planning efforts to ensure consideration of water resources in land planning and water management decisions.

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

- 1) Develop a program to establish regular contact with planning staffs and planning and zoning commissions of Alaskan cities.
- 2) "Sell" its water data system and structure special studies so that they will be most timely and useful to the local decision makers.

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

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

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

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

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

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

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

March 7, 1985

WORK SESSION

Resolutions: The Board drafted and passed the following resolutions:

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

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

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

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

MEETING WITH GOVERNOR SHEFFIELD

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

March 8, 1985

SENATE RESOURCES COMMITTEE MEETING

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

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

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

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

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

SB 150

Issue 1 - Cost of Implementation:

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

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

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

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

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

Issue 3 - Revocation of Water Permits

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

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

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

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

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

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

Issue 5 - Intent of Providing Water Rights - Section 1

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

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

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

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

Issue 6 - Alaska Water Resources Board Proposed SB 150 Amendments

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

Issue 7 - Placer Mining: Proposed SB 150 Amendments

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

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

Meeting Summary
ALASKA WATER RESOURCES BOARD
Anchorage, Alaska
September 12-13, 1985

The Alaska Water Resources Board held their fall meeting September 12-13, 1985, in Anchorage at the Bureau of Land Management Anchorage District Office and at the Municipality of Anchorage Pioneer School House.

Board Members in attendance were:

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

September 12, 1985

This summary paraphrases what was said unless otherwise noted.

Randy Wanamaker, Chairman, called the meeting order.

Esther Wunnicke, Commissioner, Department of Natural Resources and the Board's Executive Secretary, gave a brief report on the Western States Water Council's 79th Quarterly Meeting held in Anchorage on July 18, 1985. Governor Bill Sheffield told the Council about the proposed \$130 million Susitna hydropower project on the Susitna River, and Anchorage Mayor Tony Knowles addressed the Council regarding the challenge of providing water for the largest city in Alaska. Committee meetings of the Council included discussions about a number of important issues including "compacts" as a method for dealing with federal reserved water rights.

The Commissioner then summarized the status of Board Resolutions 85-9 through 85-15, adopted at the March 1985 meeting:

- ° Resolution 85-09 - EPA National Placer Mining Standards

Deferred discussion to Commissioner Ross.

- ° Resolution 85-10 - Clean Water Act Field Laboratory

Deferred discussion to Commissioner Ross.

- ° Resolution 85-11 - Administration of Water Appropriation Permits and Instream Flow Applications

DLWM has begun drafting regulations to establish a permitting process for instream flow applications. This will allow an applicant for instream flow to receive a priority date when the application is filed, in advance

of quantifying the instream flow reservation. Regulations are also being drafted to set time limits for permits for the various types of water appropriations. Initial drafts are currently being reviewed by DNR's regulations specialist. They will subsequently be revised and circulated for review.

° Resolution 85-12 - Recreational Rivers Bill: HB 93

This bill was not passed by the Legislature. It was significantly modified to allow multiple use management in these special use areas, including such uses as access to mining, timber harvest, and other resource uses; access for oil, gas, and geothermal exploration and development; and for land settlement.

° Resolution 85-13 - Water Management Staffing

All of the positions in our water resources programs, including the Water Management Section, are now filled and we are fully staffed. There have been some recent staffing changes and promotions which we believe will produce positive results for our water programs.

° Resolution 85-14 - Dam Safety: SB 95

This bill was passed out of the Senate Resources Committee with a "Do Pass" recommendation. It is now in the Senate Judiciary Committee.

° Resolution 85-15 - Alaska Water Resources Board Funding

Funding for the Board is once more being included under DNR's budget for FY'87. Budget requests for FY'87 will be held to the FY'86 adjusted base.

The Commissioner discussed the analysis of the Department project to increase efficiency in light of declining revenues.

In light of declining revenues, the Water Resources Board will not be able to meet twice a year in the future. The Board will be able to meet in the Spring of 1986, and possibly by teleconferencing at other times.

A question and answer period between Board members and the Commissioner followed the Commissioner's remarks.

QUESTIONS AND COMMENTS:

David Vanderbrink suggested that the Department of Fish and Game conduct a departmental analysis project like that done by DNR.

Peg Tileston stressed the significance of the Water Resources Board and its long running acknowledgement of problems now coming to fruition.

Mike Neimeyer asked the Commissioner concerning her remarks about getting the private sector to perform some of the functions of the department. A: The Commissioner stated that functions would be analyzed to see if they could be done effectively by the private sector.

Tom Meacham asked the Commissioner about a Memorandum of Understanding between DNR and DEC concerning Village Safe Water Projects. The document in the meeting packet held a signature by Commissioner Wunnicke but none by the Commissioner of DEC. A: A response to the MOU from DEC was included in the packet.

Stan Rybachek asked if any water issues between the western states and Alaska were similar. A: The Commissioner discussed some of the major water issues in the western states. Tom Hawkins added that generally our water issues are dwarfed next to theirs.

Tom Hawkins, Director, Division of Land and Water Management, discussed DLWM's efforts to address water-related issues.

Federal Reserved Water Rights: DLWM held two meetings within the past two weeks, one with state agencies, and one with federal agencies. The purpose was to discuss cooperation efforts regarding federal reserved water rights (FRWR). It was quickly discovered that everyone (federal and state) favored administrative adjudication of FRWR. The Director gave a rundown on the Indian River basin-wide adjudication. He described the process as glacial (slow) with all things considered.

The Director also discussed the Bradley Lake hydropower project. A present stumbling block in the project is the National Park Service, who would like the Nuka River to flow into the Kenai Fjords National Park every year rather than one year in ten as it presently does naturally.

The DLWM issued a new fact sheet on federal reserved water rights that has been circulated to Legislative Information Offices and a variety of agencies.

Legislation: Senate Bill 150, the basin-wide adjudication and Alaska Water Use Act housekeeping bill, did not pass, but it did receive a couple of hearings. The Division is now exploring the possibility of dealing with the housekeeping measures as separate legislation.

Senate Bill 95, the Dam Safety legislation, vaulted through the Senate Resources Committee with a "Do Pass" recommendation, but stalled in the Judiciary Committee, probably because it was at the end of the legislative session. It may encounter some difficulty in gaining passage due to concerns by certain legislators over duplication with FERC licensed dams.

Dam Safety: Since the inception of the dam safety inspection program in 1984, we have inspected 28 dams; 22 by consultants, 6 by Water Management staff. Three new contracts have been awarded, which will result in inspections of 27 additional dams during FY'86. The cost of contract inspections this year is considerably less than last year, perhaps because of the growing hunger among consulting firms these days.

Water Planning: Data is complete and available on water use in 19 cities in Alaska. The focus of this project next year will be adding new data, but with particular emphasis on uses such as fisheries and industry.

The AWARE program has been updated and DGGS should get double credit for their efforts.

Water Elements in Area Plans:

1. Copper River Area Plan
2. Kuskokwim Area Plan
3. Hatcher Pass Plan
4. Matanuska Valley Moose Range Plan

Water Rights: DNR created a Critical Water Management Area in the Auk Nu/Indian Cove area because water problems there are extreme.

The U.S. Borax project contains a large volume water appropriation. The instream flow on Wilson and Tunnel Creeks is about done. The second draft Environmental Impact Statement is due in November.

Well monitoring in the Fairbanks area has been an activity of DLWM and DGGs.

North Slope water use for oil and gas development continues high, although drilling has slowed down.

The Southcentral Region has been processing a number of new water rights applications for micro-hydro sites throughout the region, as well as the bushel baskets-full of other uses.

The big excitement in Southcentral Region's Water Unit this summer is the Anchorage Hillside water problem. Basically, we are starved for information from the Hillside. Staff spent the summer there measuring water level changes.

Frank Mielke, Acting Deputy Director, Division of Land and Water Management, discussed FY'86 budget allocations and FY'87 budget strategies.

In FY'86, DNR got a 10 percent cut to meet budget reductions. This was one of the smallest cuts of all the departments. In spite of this, the Dam Safety program got funded at the Governor's request, the Water Resources Development budget got a \$20,000 cut from \$389,000, and Water Rights Adjudication lost a little over \$68,000 and one position. Compared to the rest of the department, Water was treated very well.

According to Mielke, we can anticipate at least a 10 percent drop in revenues for next year. This leaves two possible alternatives: 1) cut the level of services, or 2) look for some other method of funding, such as application fees and program receipts.

QUESTIONS AND COMMENTS:

Tom Meacham asked Mielke if it wouldn't be helpful to present a case for more demands on services to the public and expansion of services. A: Mielke responded that he did not think it would work because it is the argument everybody uses. The legislature says "You are going to have to do less because there are less revenues." The legislature feels that it is DNR's job to produce money, so DNR is not necessarily rewarded for doing a good job.

L.A. Dutton, Chief, Water Management Section, Division of Land and Water Management, described the Water Management organization. He described the numbers of water resources staff in each of the DLWM offices and further noted the chain of command between each of the offices and the director of the division. He discussed casefile adjudication production, compared production numbers between the regional offices, giving an explanation and interpretation of the numbers relative to each office.

QUESTIONS AND COMMENTS:

Peg Tileston noted the equal number of employees in Water Management at Southcentral and Northern Regional offices and the great difference in casefile load at each. She asked why. Dutton explained that there are many reasons for the situation, among them:

1. The department's reluctance to transfer people
2. The different nature of case types between the regions
3. The amount of field presence in each region.

Chris Landis, Regional Water Officer, DLWM Southeast Regional Office, briefed the Board on the Auke Nu/Indian Cove groundwater problem by a detailed timeline of events.

QUESTIONS AND COMMENTS:

Stan Rybachek asked if, in talking about water quality, are we talking about saltwater intrusion? A: "Yes." Q: Is there a problem with sewage discharge? A: "That does not seem to have been a problem."

Tom Meacham asked about the National Park Service land at Indian Point--what function they have there and do they have a well there? A: The location is used in support of Glacier Bay National Park and they do have a well there. Q: Has the Park Service exerted any overriding federal interest in the area? A: "No, they strictly made an appropriation."

Mike Niemeyer asked about the earliest priority use in the area and how the neighborhood feels about people getting equal cuts in water somewhere down the road. A: It is hard to determine how they feel, but they did testify at the hearing that they are used to rationing water and they are willing to continue in the future.

David Vanderbrink asked if any of the area people use roof catchment systems. A: Yes, absolutely, Yes. Most of the Indian Cove Water Company users have cisterns used as backups. Q: Are those water quantities used in the area water use figures? A: Basically, No.

Randy Wanamaker asked if there has been some kind of analysis on the authority that can be used to create and implement such a management plan? A: Couldn't really answer, but assumed that Mike Frank did some sort of an analysis.

Gary Prokosch, Regional Water Officer, DLWM Southcentral Region, and **Jim Munter**, Hydrologist, Division of Geological and Geophysical Surveys, briefed the Board on the Anchorage Hillside groundwater problem by illustration of the problem and what DNR is doing in response.

Points covered included:

- Water levels are declining throughout the Hillside at a rate of 1-5 feet per year.
- A significant number of domestic wells have low tolerance to water level decline.
- Some wells have failed and have been deeped.
- There is potential for much greater consumption in the area.

The objective of fieldwork in the summer of 1985 was to determine the magnitude of the problem. The fieldwork consisted of measuring water levels in wells of known water depths at time of drilling. In the survey area, it was surprisingly the deeper wells that had lost water, while more shallow wells often gained water.

Alternatives for remedying the situation were presented and discussed.

QUESTIONS AND COMMENTS:

Peg Tileston asked if any studies dealing with brush fires on the Hillside had been done. A: Munter said he was not the person to ask. He had not done any and did not know of any.

Mike Niemeyer asked Jim Munter if he had an estimate of the number of wells in the Hillside area. A: "Not a very good one." There are probably thousands. Prokosch called attention to a sheet of data in a handout with 1984 figures from the municipality. There were 8,095 structures within the study area.

Tom Meacham asked for clarification of municipal wells in the Hillside. The question was cleared up by Prokosch and Munter.

Stan Rybachek suggested to Prokosch that conservation measures be explored. A: Prokosch responded by saying that the golf course was looking at alternatives for conservation.

Tom Meacham made the comment that the study should be a socio-economic study as much as a water study because of the semi-rural life flavor desired by the area residents. A: Prokosch acknowledged, and reiterated alternatives to relieve the problem without changing the semi-rural life flavor of the area.

Peg Tileston asked if homeowners trying to sell had experienced any problem in selling due to water problems in the area. A: Prokosch replied that he had not heard of any problem, however, he heard that in some lending institutions, they were not lending money on homes without water rights.

David Vanderbrink asked about the date on the water right. A: Prokosch answered that it is dated as it is received. If they don't submit an application, they have no legal right to take water.

Conrad Christianson, Project Officer, Department of Environmental Conservation, briefed the Board on SB 461, the Placer Mining Grant Program. This Bill authorized DNR and DEC to develop the grant program, which aimed at decreasing environmental damage from placer mining operations. The main goal of the pro-

gram was to clean up Alaska's streams. But it should also provide information to help government agencies in regulating the placer mining industry and the information should help the EPA in developing new standards for the industry in 1987. Another goal is to increase gold recovery efficiencies. Grants could be used for the following:

1. To purchase and test new equipment.
2. To test innovative methods using present equipment.
3. To test methods already used in other areas or fields.

DNR grants were to focus on innovative gold recovery and water use reduction, and DEC grants were to focus on innovative waste disposal and water pollution control. The applicants were required to show a successful history of mining in Alaska and an ability to test and report on the results.

There were several questions dealing with administration of the grant program, which Christianson answered.

Bill Ross, Commissioner, Department of Environmental Conservation, briefed the Board on DEC's water related activities. Ross emphasized DEC's strong activity in water quality concerns. The main points that he covered include:

205 J Funds (federal funds): Water Quality activities

1. Delta Agriculture Project - pesticide runoff
2. Log transfer facility study in Southeast - dealing with bark accumulation on bay bottoms
3. Placer mining monitoring on specific streams
4. Placer Mining Advisory Group

Review of Subdivisions

1. Wastewater/Drinking Water
2. On-site review

Particulate Criteria Review: A study for settleable solids and turbidity on placer mining activities

Triannual Review: A look at water quality standards in light of federal law to see what revisions may be needed.

Use Inventory Study: A contract with Dames and Moore to gather data on drainages with regards to their historical and current uses and to get background information on stream quality and biological parameters and how to manage.

LUST Project (Leaking Underground Storage Tanks): A nationwide attempt to inventory all underground storage tanks and a handle on whether or not they are leaking.

Anchorage Stream Pollution: This is becoming a real local issue of concern. Has evolved into the Mayor's Water Quality Task force.

Wetlands Management in Juneau: Anchorage faced this several years ago and developed its Wetlands Management Plan; it is hoped Juneau will go along this way also.

Alyeska Ballast Water Treatment facility: DEC is engaged in a very extensive oversight and review process of this facility.

Bureau of Mines Flocculation Project: A process developed in Florida to take turbidity out of the water. It seems to meet all of the needs that Alaska has. It seems to be ideal under Alaskan conditions. Testing will be done in Alaska if funding is given.

Forecast for 1987: It's hard to predict, but it's likely the same issues will continue on in 1987 and that the platter of work will be full.

QUESTIONS AND ANSWERS:

Tom Meacham asked the Commissioner if he could forecast any water management or water quality legislation that DEC would seek during the next legislative session. A: The Commissioner did not think there would be any, but did mention two areas where there could be legislation. These include 1) Placer Mining Standards and Recreational Rivers Bill; 2) Hazardous Waste

Mike Niemeyer asked how much money the flocculation study would need in Alaska. A: The Commissioner thought a round figure would be \$250,000.

Tom Meacham asked about an RFP to examine the Clean Water Act. A: This was a DNR contract to assess where the state was currently at regarding stream classification, water standards and the Act.

Tom Meacham asked about DEC on-site AHFC-financed homes where they have individual water and sewer and related with DNR-DEC Memorandum of Understanding dealing with Village Safe Water Project Grants for Public Water. A letter was sent from Gary Hayden, DEC, to DNR regarding the MOU. **Tom Meacham** asked if this letter was DEC's position. A: Yes, (with an explanation).

Al Ewing, Assistant Regional Administrator, EPA, discussed the background of the authority that the EPA has for what they are doing in terms of development of regulations, the public review process and the schedule for finalizing effluent guidelines for placer mining.

Federal Water Pollution Control Act of 1972: The EPA authority for regulating placer mining. Regulations for placer mining did not meet deadlines in the 1970's so Best Professional Judgment ("BPJ") guidelines were issued. These standards were challenged by industry and environmental concerns as well.

Effluent Guidelines soon to be proposed: currently in review by OMB at the President's level. Will be signed off on probably in October 1985. To develop the guidelines, the industry was divided into four categories.

1. Less than 20 cubic yards per day - recreational accessment mining - no guidelines for effluents, left in realm of BPJ.
2. More than 4,000 cubic yards per day - large dredges operating in a self-contained pond. Proposed effluent guideline is 0 discharge, 100 percent recycle.

3. Greater than 20 and less than 500 cubic yards per day. Effluent guideline for this category is .2 milliliter per liter instantaneous daily limit and 2,000 milliliters per liter for 30 day average for total suspended solids.
4. All mining methods except group 2 with a mining rate greater than 500 cubic yards per day. Guidelines are: no discharge, all recirculation.

Goal of one year for final regulations. The worst case for regulations would be May-July 1987. Judging from the way things can go, he would not be surprised if this happened.

QUESTIONS AND COMMENTS:

David Vanderbrink asked what standards have been proposed for mining in Cook Inlet. A: Not covered under these guidelines and he would not be able to answer at this time. It would be a BPJ kind of thing. David further asked about coal mining an entire basin. A: Again, not covered by these guidelines. Coal is a completely different category. Again, it would be a BPJ kind of thing.

Peg Tileston asked about BPJ and what kind of criteria is used, since professional judgment can vary. A: E uses the information they have to operate on and make the best professional judgment they can.

Mike Neimeyer asked if special consideration is given to guidelines in Alaska due to special characteristics of Alaska. A: Very definitely so. Neimeyer responded that Ewing had said these were national standards. A: "That's definitely the case, yes."

Stan Rybachek reiterated the point that there didn't seem to be any difference between Alaska standards and the national standards. A: The technology base is the same, and beyond that are state water quality standards, which affect the standards.

Randy Wanamaker asked about hardrock mining and whether or not he knew about it. A: Ewing said he was not prepared to talk about hardrock mining. Wanamaker requested an EPA review of hardrock mining regulations and guidelines for the next meeting.

Bob Martin, Department of Environmental Conservation, addressed the Board about "drill muds" and the issues associated with drill muds and the approach the DEC is presently pursuing with disposal of drill muds and waste products of the oil and gas industry.

Martin discussed the components of drill muds and why drill muds are used. Basically, the drill muds alone are environmentally benign. It's the additives that cause the problems. Additives are used for a variety of purposes.

Drill muds, even though they are runny, come under the solid waste disposal regulations. An inhouse study was done between 1983 and 1984 as to how drill muds are handled in Alaska and other states. The results were pretty well received by industry people. Policies are in draft now for DEC people to use in reviewing industry waste disposal plans.

QUESTIONS AND COMMENTS:

Stan Rybachek asked if any thought had been given as to what it will cost for industry to implement the waste disposal standards. A: Certainly, the industry has given a lot of thought to it and DEC has given thought to not developing regulations that are not financially or technically feasible, but DEC's primary concern is protecting public health; so it's not primarily DEC's job to be developing cost estimates for disposal practices. These standards are not out of line with other states, so it's not out of line with what industry is used to doing in other states, and in fact, in some cases, in Alaska.

Stan Rybachek asked if there have been any complaints from communities about drilling muds going into the environment causing health problems. A: There have certainly been plenty of complaints from residents on the Kenai Peninsula.

Tom Meacham asked, following up on Stan's question, if there has been any evidence of drinking water supplies being contaminated with substances from drilling muds. A: DEC monitoring on the Kenai Peninsula has found contaminants escaping drill mud pits. Water supplies have been found essentially clean.

Public Comment Session

David Vanderbrink introduced **Tom Mears** from the Cook Inlet Aquaculture Association (CIAA). Tom briefed the Board and the public present on the background and goals of the CIAA. Mr. Mears then presented a slide show on the Paint River, which discharges into Kamishak Bay in southern Cook Inlet. Studies by the ADF&G and CIAA show that the Paint River would be an ideal salmon fishery. Planted salmon fry have grown in the Paint River drainage, gone out to sea and returned. The River is ideal except for one rocky problem -- a 40-foot waterfall the fish cannot jump. A tunnel fish ladder is proposed to solve this problem.

The CIAA requests the Alaska Water Resources Board to seek the Governor's support for the Paint River project.

Joann Richter of the Anchorage Waterways Council briefed the Board on the concerns and dedication of the Council.

The Council asked the Board to use whatever influence it has to facilitate the necessary flow of information and technical services between the municipality and the various state and federal agencies. Further, the Council encouraged all people to support the upcoming bond measure that will appropriate \$10 million toward various water quality improvements. Vote Yes on Proposition 8.

The remainder of the public comments meeting centered on two discussions; the Anchorage Hillside groundwater decline and placer mining.

A number of Anchorage Hillside residents spoke on the problem of wells going dry and the overuse of the Hillside aquifers. DNR personnel discussed current groundwater research efforts, the significance and validity of water rights, and possible solutions to the Hillside problem. Two people from the

Anchorage Water and Wastewater Utility discussed the Municipality's water development plans and possible solutions to the problem. Board members entered the open discussion with questions of the speakers and answers to questions. A feeling of consensus was reached that a solution needed to be worked out.

Key comments in the Hillside water discussion included:

- Presentations by several Hillside residents whose wells have gone dry since last spring and had to deepen them. Some of these people have had their wells for 30 years or more and had no trouble with their wells prior to recently, other than the 1964 earthquake.
- A USGS research paper of 1975 predicting Anchorage Hillside water shortage by 1985.
- The value of water rights was questioned. Several people responded in affirmation of the water rights program. **Randy Wanamaker** posed the question: What harm will it do to have water rights? It can't hurt! He stated that people working together can carry weight and solve problems and people standing alone generally can't. **L.A. Dutton** said water rights would not in themselves solve any problems, but would give valuable information in determining the extent of the problems. **David Vanderbrink** stated that had all the people on the Hillside gotten their water rights when they moved there, they would see the value of them.
- A passionate plea to get the Municipality to stand behind its moral commitment to protect the zoned lifestyle of the Hillside as it said it would over 10 years ago. **Tom Meacham** responded by saying that a new Anchorage Municipal Administration probably should not be bound to a commitment of a previous administration without allowing it to look at its options first. A moral commitment would not carry much weight in court.

Placer Mining

The second discussion focused on the current plight of the placer miner. The speaker discussed how the times and attitudes have changed toward mining in Alaska. He called for any actions involving mining to have the participation of mining engineers and environmental engineers - the experts. He called for careful consideration of all regulations and standards.

Rose Rybachek briefed the Board on the mining situation in the Livengood-Tolovana Mining District. She stated that a number of miners did not go into the field this year for fear of what might happen (with regard to water quality standards). A number of other miners are facing further action by the EPA. She also discussed the need for a Clean Water Act Field Laboratory in Alaska and support for continuation of the Placer Mining Demonstration Grant Program.

September 13, 1985

Work Session

Resolutions: The Water Resources Board drafted, passed and finalized the following resolutions:

- ° 86-1 - EPA National Placer Mining Standards
- ° 86-2 - Re-Affirmation of Administrative Order No. 67
- ° 86-3 - South Anchorage Groundwater Decline

- 86-4 - Department of Natural Resources Fees for Water Rights Applications
- 86-5 - Federal Reserved Water Rights Adjudication
- 86-6 - Advisement of Legislative Action
- 86-7 - Filing Fee Advertisement

Letters: The Water Resources Board prepared five letters - four to the Governor and one to the Mayor of Anchorage.

- To the Governor - Flocculation Study Funding
 - Clean Water Act Field Laboratory
 - Paint River Aquaculture Project
 - Placer Mining Demonstration Grant Program
- To the Mayor of Anchorage - Anchorage Hillside Groundwater Decline

KGH:kmb

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

SB 150
BILL SHEFFIELD, GOVERNOR

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

September 26, 1985

Boyd Evison
National Park Service
2525 Gambell St., Room 107
ANCHORAGE, AK 99503-2892

Dear Mr. Evison:

Enclosed is a summary of the August 29, 1985 meeting of federal and state agencies, convened by the Alaska Department of Natural Resources, to initiate discussion of quantification and adjudication of federal reserved water rights in Alaska. The meeting was very well attended and, we believe, very productive in exchanging information and state and federal concerns about federal reserved water rights. We applaud both the state and federal agencies who participated in this meeting for the enthusiasm and cooperative attitudes that were expressed.

Several areas of general consensus were apparent during the meeting. It was the consensus of the group that administrative adjudication of federal reserved water rights by the Department of Natural Resources followed by a consent decree in state court, as envisioned in proposed Senate Bill 150 (copy enclosed), is the best alternative to pursue in Alaska, rather than lengthy court adjudications or compacts. It was also agreed that it would be useful to cooperatively develop an inventory of federal land reservations and their associated federal reserved water rights, and subsequently to prioritize specific basins for quantification and adjudication of water rights.

We believe that identifying and adjudicating federal reserved water rights is an activity we should actively pursue in Alaska in order to systematically allocate water resources in our state. Since your agency will likely be directly involved with federal reserved water rights, we would like your assistance in cooperatively working out the procedural rules for identifying and adjudicating federal water rights. It was the consensus of the agencies present at the August 29th meeting to establish a staff level working group representing agencies with major responsibilities for water rights to work on these issues. Your agency is one of those identified. I am therefore asking you to designate one staff person, who is familiar with administering water rights as well as the application of techniques for identifying and quantifying instream and out-of-stream water requirements, to represent your agency in this work group. Resources, in the form of staff time, will be required for participating in the Working Group.

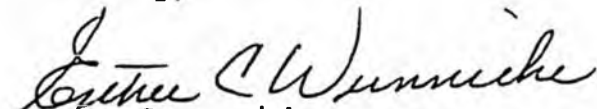
Roger Contor
September 26, 1985
Page Two

We envision most meetings of this group to be held in Anchorage; therefore, travel monies may be required for some agency representatives.

We have scheduled the first meeting of the Work Group for November 7, 1985 in the eighth floor conference room, Room 800, Frontier Building, Anchorage. The meeting will convene at 9:00 a.m. with two major topics to address: inter-agency review of Senate Bill 150, and review of our proposed inventory of federal reserved water rights in Alaska. Enclosed is a copy of Senate Bill 150, which would establish procedures in the Water Use Act for administrative and judicial adjudication of water rights. It was introduced last session and is still in the Senate Resources Committee. We would like your agency to review the legislation and for your representative to bring any comments or recommendations to the Work Group meeting on November 7th. Also enclosed is a draft copy of the proposed format and information elements for our Inventory of Federal Reserved Water Rights in Alaska, which we would like your agency to review and have your representative be prepared to discuss, and hopefully, finalize at the Work Group meeting.

If you have questions or scheduling difficulties concerning the Work Group, the November 7 meeting, Senate Bill 150, or the proposed inventory, please contact L. A. Dutton, Chief of Water Management at Pouch 7-005, Anchorage 99510, 762-4317. We look forward to being notified of your staff representative to the Work Group and meeting with your agency representative on November 7, 1985. We thank you again for your participation in this effort.

Sincerely,


Esther C. Wunnicke
Commissioner

Enclosures

cc: Tom Hawkins
Senator Arliss Sturgulewski ✓
Representative Adelheid Herrmann
Representative Richard Shultz
Molly McCammon

Stan Ponce

**FEDERAL RESERVED WATER RIGHTS
STATE-FEDERAL AGENCY MEETING
ANCHORAGE, AK - August 29, 1985
MEETING SUMMARY**

Twenty-eight people attended and participated in a meeting of state and federal agencies concerning federal reserved water rights at the BLM training room in the Federal Building. A list of attendees is attached.

Frank Mielke, Deputy Director of the Division of Land and Water Management for the Alaska Department of Natural Resources (DNR), opened the meeting and welcomed those present to the "first" federal-state meeting on federal reserved water rights. He said this was the beginning of a continuing effort by these agencies to determine federal water rights within Alaska.

L. A. (Dutt) Dutton, Water Management Section Chief for Alaska DNR, provided an introduction concerning the need for federal-state action on reserved water rights. He referred to a fact sheet that had been distributed to the group explaining federal reserved water rights. Dutt talked about the "formidable" task for both the state and federal agencies because of the estimated 250 federal reservations within the state.

Dutt discussed reserved and secondary water rights and how each is determined. He noted that there is increasing contacts between federal agencies and the state because of increasing developments such as Indian River and Ship Creek and asked that the state and federal agencies work together on a federal reserved water rights inventory and priority of adjudication of water rights.

Mary Lu Harle, DNR Water Management Section, discussed the need for each agency to give an overview of what they are doing in regard to reserved water rights and how they thought we could best meet the challenge of adjudicating federal reserved water rights. She asked the agencies to review and comment on proposed state legislation, Senate Bill 150.

Mary Lu discussed the ongoing water quantification study and upcoming adjudication of Indian River at Sitka. She talked about state review of conservation system unit plans and said that this effort is a high priority of DNR Commissioner Wunnicke. Alaska DNR is asking that a standard water rights statement appear in all CSU plans.

Bill Edwards, U.S. Forest Service, discussed what the Forest Service is doing in regard to water rights. He stated that he would like to see Alaska keep "but in front" on water rights instead of getting behind like some of the other states have done. He said the Forest Service has been working and will continue to work cooperatively with Alaska DNR on water rights.

Bill said the Forest Service has been developing policy and procedures for dealing with water rights. They have been working on a water rights inventory system which will include an inventory map. He said Forest Service water rights work so far has been mainly for consumptive uses by the Forest Service, private land owners, and permittees. He said the Forest Service is highly supportive of DNR efforts to resolve federal water rights.

Stan Ponce, National Park Service, said he would support an administrative adjudication of reserved water rights if it is possible to go that route. He said he agreed with DNR to pursue reserved water rights and NPS will work cooperatively with DNR. Stan said he sees little difference in attitudes between Alaska and other states. He said the Park Service is mostly a non-consumptive user of water and will probably be asking for "natural flow" for streams within national parks.

Ron Huntsinger, U.S. Bureau of Land Management, discussed BLM plans to quantify water rights for the Gulkana River and Beaver Creek, two of the designated Wild and Scenic Rivers in Alaska. He said results of the Gulkana quantification should be available to DNR by early 1987, and that BLM is looking at enhancement of the fishery for the Gulkana River as well as maintaining the other recreational values of the river.

Ron was supportive of administrative adjudication of federal reserved water rights and thinks there will be little conflict of uses. He would like to see standardized adjudication methods. Ron also gave an overview of other wild and scenic rivers within the state on which BLM will be doing instream flow studies in the future.

Keith Bayha, U.S. Fish and Wildlife Service, said that about 50 percent of the federal reserves in Alaska are under USFWS administration. He said the FWS is also providing technical assistance to other federal agencies for instream flow studies on Alaska streams that are not on wildlife refuges.

Keith explained the training in instream flow provided by his agency at Ft. Collins, Colorado, and said such training is available to other agency personnel and may be available in Alaska by 1986 or 1987.

Keith said he would support the approach DNR is taking on cooperative efforts for adjudication of federal reserved water rights. He also said he favored an approach to prioritize adjudications with use of a map.

Philip Emery, U.S. Geological Survey, said there were about 7,200 creeks and 1,200 rivers in Alaska which have been named, and that only 11 percent of the rivers and six percent of the creeks have water flow measurements for more than one year duration. In Alaska there is one stream gage for each 5,700 square miles compared to one stream gage for each 400 square miles in the lower 48 states.

Phil said that the USGS is trying to improve the stream gaging network for Alaska, and recommends that this network be partially designed around the priority for federal reserved water rights adjudications.

Bruce Landon, U.S. Department of Justice, said he supports interagency negotiation on water rights and notes that there has been more coordination between federal agencies in recent months.

Jack Wilcock, Alaska Department of Natural Resources, discussed plans by the state to complete an inventory of federal reservations in Alaska and list water rights reserved with the land. He estimated that 25 to 40 percent of the reservations will not have need for water, as they are mountain-top radio relay sites or military target areas.

Jack stated that DNR had determined that this inventory should serve as both a permanent file and as a computer file, and that he has designed a preliminary format using the IBM PC and the Wordstar software program. He stated that both the format and the computer program are open to review by the group.

It was suggested by members of the group that if a "work group" is to be formed, that this work group review and define the purpose of the inventory, and determine the format and computer program to use for the inventory so it will best serve the needs of all agencies involved.

L. A. Dutton, DNR, suggested that the group develop some action recommendations and also suggested that a work group be set up.

Keith Bayha, USFWS, agreed, and suggested two groups be set up on different levels: one at the decision making or management level, and one at the working or staff level. He also suggested that these groups produce a package that would assist agencies with their budget requests.

L. A. Dutton said that his agency would follow up with a meeting summary and a request for the agencies to make appointments to the work group. He asked if a written agreement between the state and the federal agencies was needed. He was assured by several agency people that a written agreement is not needed as long as cross-expenditure of state and federal funds is not involved.

Ann Puffer, U.S. Forest Service, recommended that objectives for the Work Group be established. The following were listed and discussed:

1. Prioritize river basins for adjudication
2. Reach agreement on an inventory
3. Review State Senate Bill 150
4. Determine method of notification of state for claimed federal water rights
5. Cooperative review of procedural methods

It was recommended that the request to the federal agencies to make appointments to the Work Group come as a letter from the DNR Commissioner setting up the goals and objectives of the Group.

Discussion followed, centering mostly on how to set priorities for adjudication and the need for funds by the agencies to complete work on reserved water rights. Portions of a letter from the Secretary of Interior were read, which stated that all requests from states to the federal agencies for quantification of water rights would be responded to promptly.

It was pointed out that the federal agencies must compete for funds with other states where conflicts with water use and water rights may be more pressing than in Alaska. It was also noted that requests for funds may be based on a desire to have quantification of water rights accomplished without adjudication.

ATTENDEES

1. Mary Lu Harle	Water Resource Manager	DNR/DLWM/Water	762-4317
2. Keith Harding	Natural Resource Officer	DNR/DLWM/Water	762-4317
3. Chris Landis	Natural Resource Officer	DNR/DLWM/SERO	465-3400
4. Frank Mielke	Deputy Director	DNR/DLWM	762-4355
5. Ann Puffer	Regional Hydrologist	US Forest Service Juneau	586-7847
6. Bill Edwards	Acting Director, Lands, Minerals, & Watershed	US Forest Service Juneau	586-7847
7. Christopher Estes	Statewide Instream Flow Coordinator	DF&G-Sportfish	267-2142
8. Ron Huntsinger	Hydrologist	BLM	267-1318
9. Jules Tileston	Deputy State Director	BLM-ASO	271-5069
10. Larry Wright	Outdoor Rec. Planner	NPS	261-2636
11. Stan Ponce	Chief, Water Rights Br.	NPS-Ft. Collins, Colorado	(303)221-5341
12. Nancy Deschu	Water Quality Tech	NPS, Anch/Denali	683-2294
13. Ron Hyra	Outdoor Rec. Planner	NPS, Seattle	(206)442-5366
14. Dick Nadeau	Regional Instream Flow Study Coordinator	USEWS	786-3350
15. Keith Bayha	Deputy Asst. Reg. Dir.	USEWS	786-3537
16. Philip A. Emery	District Chief	USGS/WRD	271-4379
17. David Dorris	Chief, Br. Bio. Res.	BLM-ASO	271-3349
18. Bruce Landon	Trial Attorney	U.S. Justice Dept.	271-5452
19. Sandra Rabinowitch	Planner	NPS	261-2480
20. Jack Mosby	Planner	NPS	261-2480
21. Al Lovaas	Natural Resources	NPS	261-2612
22. Keith Goltz	Attorney	SOL	271-4131
23. Carl Yanagawa	Regional Supervisor	DF&G - Habitat	267-2283
24. Gary Prokosch	Regional Water Officer	DNR/DLWM/SCRO	762-2277
25. Jack Wilcock	Natural Resource Manager	DNR/DLWM/Water	762-4317
26. L.A. Dutton	Chief, Water Management	DNR/DLWM/Water	762-4317
27. Laura Davis	Asst. Attorney General	DOL - Juneau	465-3600
28. Mike Frank	Asst. Attorney General	DOL - Anchorage	276-3550

SB 150 cont'd

Governor's transmittal letter dated February 12:

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 (1903), 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 accordingly 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.

SB 150 cont'd

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.

February 12, 1985

SB 150 cont'd

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 46.15.165 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

SB 151

SENATE BILL NO. 151 by the Rules Committee by request of the Governor, entitled:

"An Act amending the controlled substance, imitation controlled substance, and forfeiture laws."

was read the first time and referred to the Health, Education and Social Services Committee and the Judiciary Committee.

Department of Corrections fiscal note is zero. Department of Law fiscal note is zero with analysis: "This bill would streamline and standardize forfeiture procedures, making it easier to execute forfeitures. The bill would also slightly increase the number of controlled substances and imitation controlled substance cases the department can successfully prosecute by correcting omissions, ambiguities, contradictions, and an overbreadth problem which exists in portions of our current laws. Although there will be a slight increase in the number of cases handled, this increase will be more than offset by the efficiencies that will be realized by streamlining current laws."

February 12, 1985

SB 151 cont'd

Governor's transmittal letter dated February 12:

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill which makes several changes in Alaska's laws regarding controlled substances and imitation controlled substances. These changes are needed to eliminate ambiguities, contradictions, omissions, and an overbreadth problem which exist in current law, and to improve the state's ability to forfeit property which has been used in violation of the drug laws.

A section-by-section analysis of the bill, explaining in detail the effect of and reasons for the proposed changes, appears at the end of this letter. In brief summary, sec. 1 of the bill consolidates most state forfeiture procedures in a single new article added to AS 09. This consolidation of state forfeiture procedures will minimize the possibilities of unintended inconsistencies in coverage and reduce the volume of laws that are required whenever forfeiture is authorized.

Section 2 of the bill provides that anyone who attempts to obtain possession of a controlled substance through fraud or other deceptive techniques commits the same class of crime and faces the same penalty as someone who successfully obtains possession of a controlled substance through fraud or other deception.

Section 3 adds the commissioner of corrections to the nine member Controlled Substances Advisory Committee. Sections 4 and 7 add necessary cross-references to other statutes. Section 5 is a minor amendment which clears up a drafting oversight and potential overbreadth problem in the existing definition of an "imitation controlled substance."

Section 6 of the bill broadens the description of property which is subject to forfeiture to the state, and will eliminate some difficult proof problems caused by the language of the current law. Section 8 defines "violation" of the drug laws to include attempts and solicitations to violate the law. Section 9 repeals statutes replaced by the provisions contained in sec. 1 of the bill.

In order to allow more effective enforcement of our criminal and civil laws against drug abuse in Alaska, I urge your prompt and favorable action on this bill.

Section-by-section Analysis of Bill

Section 1:

This section of the bill has two related purposes. First, it specifies the procedures applicable to the forfeiture of property authorized by AS 11.73.060 and AS 17.30.110.

Introduced: 2/12/85
Referred: Resources and Judiciary Land & Water mgmt.

EW → BA → file

cc MV
D. Hor
J. H

FEB 19 1985

Director's Office

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE SENATE

2 SENATE BILL NO. 150

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST 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) A right to appropriate water granted under this chapter may
15 not be construed against the state as a guarantee of a particular
16 water level or volume, except as provided in AS 46.15.145, as a guar-
17 antee of a particular artesian pressure or water quality, or as a
18 guarantee that water may be withdrawn or diverted at a particular
19 cost.

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

21 (f) The adjudication process for a declaration filed under (a)
22 of this section, which is pending before the commissioner on the
23 effective date of this Act, is to continue under the procedures set
24 out in this section until the commissioner finally determines whether
25 the declarant is entitled to a certificate. If a certificate is
26 issued under this section, the certificate holder may be included as a
27 participant in an adjudication under the procedures set out in AS 46.-
28 15.165 or 46.15.166.

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

2/19/85

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 the certificate of appropri-
4 ation in whole or in part if an appropriator, with intention to aban-
5 don, does not make beneficial use of all or a part of the [HIS] appro-
6 priated water. [AN APPROPRIATION SO FORFEITED AND ABANDONED REVERTS
7 TO THE STATE AND THE WATER BECOMES UNAPPROPRIATED WATER.]

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

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

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

22 (e) If the commissioner revokes a certificate in whole or in
23 part, that portion of the certificate covered by the revocation re-
24 verts to the state and the water becomes unappropriated water.

25 * Sec. 4. AS 46.15.145(f) is amended to read:

26 (f) At least once each 10 years the commissioner shall review
27 each reservation under this section to determine whether the purpose
28 described in (a) of this section for which the certificate reserving
29 water was issued and the findings described in (c) of this section

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

7 * Sec. 5. AS 46.15 is amended by adding new sections to read:

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

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

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

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

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

26 (3) serve the order on any person who owns land within the
27 adjudication area if the land is held in trust by the United States or
28 if the patent or deed to the land contains a restriction on alienation
29 imposed under 25 U.S.C. sec. 334 (Indian General Allotment Act of

1 February 8, 1887, 24 Stat. 389, as amended and supplemented), 25
2 U.S.C. sec. 372 (the Allotment Act of June 25, 1910, 36 Stat. 855), or
3 43 U.S.C. secs. 270-1, 270-2 (the Allotment Act of May 17, 1906, 34
4 Stat. 197), and on the United States on behalf of any such person;

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

10 (5) publish the order once each week during four consecu-
11 tive weeks in a newspaper of general circulation in the adjudication
12 area.

13 (d) Service of the order under (c)(1) of this section is suffi-
14 cient if mailed by certified mail, return receipt requested, to the
15 last known address that the applicant, certificate holder, or
16 permittee has given to the division of the department responsible for
17 administration of water rights. A person served under (c)(1) -- (4)
18 of this section who fails to appear in a timely manner and assert a
19 claim as prescribed by the commissioner is estopped from subsequently
20 asserting any objection to the adjudication of that person's water
21 rights within the adjudication area, unless the person is entitled to
22 a federal reserved water right and has failed to consent under (i) of
23 this section.

24 (e) In an adjudication under this section, the commissioner may
25 appoint an impartial qualified person as a master to preside over the
26 adjudication; to hold hearings; to take testimony; to collect evi-
27 dence; to propose to the commissioner an order adjudicating the valid-
28 ity of, quantifying, and determining the priority of all water rights;
29 and to take other action the commissioner decides is necessary. The

1 master may be an employee of the state.

2 (f) Any division of the department, or other departments, may
3 provide support during the adjudication, in the form of documentary
4 and testimonial evidence; research; and scientific analysis. If
5 funding permits, the commissioner may obtain similar support from
6 sources outside government. Any state agency may assert a water right
7 on behalf of the state in the adjudication.

8 (g) In managing an adjudication, the commissioner may take such
9 action as is necessary for the efficient and fair administration and
10 use of the state's water, including but not limited to

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

13 (2) classifying applicants, certificate holders, per-
14 mittees, and claimants in groups that share similar interests, such as
15 by the amount of water used or the type of use, and restricting their
16 active participation in the adjudication by appointing group represen-
17 tatives for the purposes of receiving notices, examining witnesses,
18 and other adjudicatory functions;

19 (3) entering such interlocutory orders as may be appropri-
20 ate to dispose of all or part of the issues in the adjudication, and
21 designating these orders as final ones for the purposes of any appeal
22 to superior court under (j) of this section; and

23 (4) allocating to a participant any extra costs that the
24 state has incurred in conducting the adjudication because the partici-
25 pant has in bad faith asserted a claim to water wholly without merit
26 or has unreasonably delayed the proceeding.

27 (h) For the purposes of asserting a water right in an adjudica-
28 tion, a certificate issued under this chapter is prima facie evidence
29 of the water right and its priority date.

1 (i) If the commissioner has initiated the adjudication, and the
2 federal government or a private person who has been served under
3 (c)(2) -- (4) of this section asserts a federal reserved water right
4 but fails to consent in writing to the adjudication, then the commis-
5 sioner shall exclude the federal government or that person, respec-
6 tively, as participants in the adjudication. The commissioner may
7 negotiate the terms of the written consent.

8 (j) A person adversely affected by a final order of the commis-
9 sioner adjudicating water rights under this section may appeal to the
10 superior court within 30 days after the decision is mailed or de-
11 livered to the person.

12 (k) The commissioner may adopt regulations setting out proce-
13 dures for administrative adjudications under this section.

14 Sec. 46.15.166. JUDICIAL ADJUDICATIONS. (a) Instead of initi-
15 ating an adjudication under AS 46.15.165, the commissioner may, with
16 the concurrence of the attorney general, file on behalf of the state a
17 complaint in superior court to initiate a judicial adjudication con-
18 sistent with 43 U.S.C. sec. 666 to quantify and determine the priority
19 of all water rights in a drainage basin, river system, ground water
20 aquifer system, or other identifiable and distinct hydrologic regime,
21 including any hydrologically interrelated surface and ground water
22 systems. The commissioner may initiate an adjudication under this
23 section only if a federal reserved water right has been or might be
24 asserted

25 (1) by the United States or any of its component agencies;

26 (2) by or on behalf of a person whose patent or deed to
27 land contains a restriction on alienation imposed by a federal statute
28 cited in AS 46.15.165(c)(3) or (4), or whose land is held in trust by
29 the United States.

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

4 (c) In an action brought under (a) of this section, the court
5 may initially appoint a designee of the commissioner as a master to
6 hold hearings, take testimony, collect evidence, and make recommenda-
7 tions to the court regarding the scope and content of a proposed
8 judicial decree that would finally adjudicate the validity of water
9 rights, quantify them, and determine priorities among the water right
10 appropriations in the adjudication area. The master may be an employ-
11 ee of the state. In managing the action, the master may, with the
12 court's permission, take such action as the commissioner would be
13 authorized to take in an administrative adjudication under AS 46.15.-
14 165.

15 (d) In an adjudication under this section, the court may incor-
16 porate in any order or judgment any final orders of the commissioner
17 previously issued under AS 46.15.165.

18 (e) Proceedings under this section are conducted without a jury.

19 Sec. 46.15.167. EFFECT OF DECISION. A final order of the com-
20 missioner under AS 46.15.165, or a final judgment of a court under
21 AS 46.15.166, is binding on all parties to the adjudication and on all
22 persons who subsequently make an application for a water right. The
23 court or the commissioner may retain continuing jurisdiction for the
24 periods of time necessary to implement any adjudication order or
25 judgment and to provide for any subsequent water appropriations.

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

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

4 (c) The commissioner may enter into arbitration with a private
5 person or the federal government to resolve a water rights issue.

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

10 Sec. 46.15.169. FEDERAL RESERVED WATER RIGHTS. Nothing in
11 AS 46.15 is an admission by the State of Alaska that a federal re-
12 served water right exists in the state.

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

14 Sec. 46.15.255. ENFORCEMENT. (a) In addition to a penalty that
15 may be imposed under AS 46.15.180 for violation of an order issued
16 under AS 46.15, the department may

17 (1) remove or abate unpermitted works of appropriation,
18 diversion, impoundment, or withdrawal;

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

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

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

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

28 (1) inspect books, records, meters, gauges, well logs,
29 works of appropriation, diversion, impoundment, withdrawal, or

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

control; and any other relevant information or physical condition;

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

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

* Sec. 7. This Act takes effect immediately in accordance with AS 01.-
10.070(c).

FEDERAL RESERVED WATER RIGHTS INVENTORY

The attached inventory form is designed to provide basic information about each federal reservation within the State of Alaska. The information provided will assist the Alaska Department of Natural Resources and the federal agencies to determine what the existing and future water needs may be for that reservation.

In addition to identifying the administrative office for each reservation, this data will help to locate the reservation and cross-reference it to a map showing the geographical location of each reservation within the State. The map will help to prioritize the need for water rights adjudication.

The legal history of the federal legislation or executive action creating the reservation will provide the purposes for which the lands were withdrawn from the public domain, describe the explicit or implied water rights, and provide the priority dates for the water rights.

The second section of the inventory will consist of information on existing water rights and actions planned or underway to determine the amount of water needed for the reserved water rights for each federal reservation. This data will be entered into the inventory as the information becomes available.

The Alaska Department of Natural Resources, Division of Land & Water Management, will prepare and maintain the inventory with information provided by the federal agencies. The data will be computerized and maintained as a permanent file for use by DNR and the federal agencies.

SECTION ONE

I. Name of Federal Reservation Index No: _____

A. Current Name:

B. Previous Names:

II. Agency Administering the Reservation

A. Dept. & Bureau:

B. Contact Office Address:

Telephone:

C. Individual to contact:

III. Legal history of the Reservation

A. Original Reservation

1. Authority:

2. Date:

B. Primary Purposes of Reservation:

C. Subsequent Revisions

1. Authorization:

2. Date:

3. Primary Purposes:

FEDERAL RESERVED WATER RIGHTS INVENTORY

SECTION TWO

1 I. Activities underway or
2 planned with regard to
3 Federal Reserved Water
4 Rights for this Reservation:
5
6

7
8 II. Quantification of Federal
9 Reserved Water Rights

10
11 A. Status of Claim:

12
13 B. Quantity Claimed:

14
15 C. Place of Use:

16
17 D. Source:

18
19 E. Claimed Priority Date:

20
21 F. Claimed Purpose:

22
23
24 G. ADL/LAS Numbers:
25

26
27
28
29
30 III. Information Available

31
32 A. Location of Filed Data:
33

34
35
36 B. Other Information Sources:
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56

Alaska State Legislature

ARLISS STURGULEWSKI, Chairman
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

MEMORANDUM

March 7, 1985

TO: All Members
Senate Resources Committee

FROM: Staff FH
Senate Resources Committee

RE: SB 150 "An Act making miscellaneous amendments to the Alaska Water Use Act (AS 46.15); establishing a 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 and judicial adjudication of water rights and make miscellaneous amendments to the Alaska Water Use Act (AS 46.15).

The bill is an attempt to clarify and simplify the procedure for the adjudication of water rights. In many western states, thousands of lawsuits have arisen where there were more appropriators than water available. The conflicts arose where federal reserves existed and as a result of the McCarran Amendment those cases against the federal government could be heard in state courts. This placed a tremendous burden on the court systems of the various states. SB 150 is designed to try to avoid those problems.

Substantial differences, however, exist among interested parties as specified in the attached correspondence received by the committee. A brief overview of those portions is outlined below:

Governor's Bill

Alaska Miners
Association Comments

Livengood/Tolovana
Mining District Comments

Section 1

Disclaimer section
asserting that water
rights are not guarantee
of quality, volume,
pressure or cost.

Not Necessary

Not Necessary

Governor's Bill

Alaska Miners
Association Comments

Livengood/Tolovana
Mining District Comments

Section 2

Clarifies relationship of pending declarations to proposed procedures.

No Comment

No Comment

Section 3

If water rights not used for five years may be declared abandoned.

Should not be changed from present statutes.

Should not be changed from present statutes.

Section 4

Clarifies how commissioner may terminate an in-stream flow reservation for best interest of state.

Opposed to words "best interest of state."

Opposed to words "best interest of state."

Section 5

Allows commissioner of DNR to initiate an administrative adjudication for state and federal water rights.

Federal reserved water rights should be in separate statute.

An administrative adjudication of federal reserved water rights only after a complete hydrology study.

Section 6

DNR has authority to remove unsafe or unpermitted works of appropriation.

Not Necessary

Should be deleted.

Included in this packet are:

1. Governor's transmittal letter;
2. Department of Natural Resources fiscal note which is zero;
3. Letter from the Alaska Miners Association;
4. Letter from the Livengood/Tolovana Mining District;
5. Letter from the Alaska Court System.
6. Alaska Water Resources Board Resolution 84-5.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

2/12/85

ra:50

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

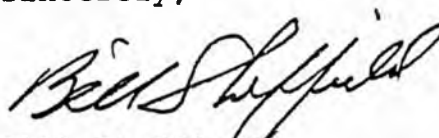
water right. A person or entity claiming a federal reserved water right who is served with notice, but who fails to consent to an administrative adjudication, would be excluded as a participant. Under AS 46.15.165 the commissioner would have authority to adopt procedural regulations and to appoint a 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

Sponsor: _____
Requestor: _____
Date of Request: _____

FISCAL DETAIL

Agency Affected: Natural Resources
Program Category Affected: NRMEC

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						
----------------	--	--	--	--	--	--

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

FUNDING: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
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

ALASKA MINERS ASSOCIATION
Fairbanks Branch State Oversight Committee
P.O. Box 73069
Fairbanks, Ak 99707

FEB 27 1985

RE: SB 150

Dear Resource Committees;

We are concerned about the implications of SB 150. We agree with the Alaska Resources Boards findings that the current statutes and regulations are adequate to implement basinwide adjudication of federal reserved water rights. We feel that SB 150 addresses issues that should not be addressed, while not adequately addressing the issues that should be addressed:

We are also concerned about the reported Department of Natural Resources estimate that the fiscal note is zero. The bill, as currently written, contains at least two sections that will be very costly to manage. These two sections are contained in Section 6 and deal with "Enforcement" and "Data Collection Authority". Several other sections will certainly carry a high price tag if implemented. We fear that the Department of Natural Resources will be forced to shift their work load from other areas that are critical to orderly development of the State.

The following comments are addressed to specific sections of the bill:

SECTION 1: Since this specific "disclaimer" wording has never been upheld in a court of law, according to the Governor's transmittal letter, we feel that it is not necessary to include it in our statutes. It could lead to costly court battles that are extremely unnecessary.

SECTION 3: Sec. 46.15.140 (c) states that the Failure to use beneficially, etc. The word beneficially is a buzz word that is hard to define, and should be deleted from that section. We believe that the entire section should remain as it currently appears in the Statutes, and the proposed change should not be considered.

SECTION 4: The term "in the best interests of the state" is one that has been difficult to define. It leaves room for arbitrary and capricious decisions. We suggest that this term be deleted and the term "in accordance with AS 46.14.140(b)" be left in that section.

SECTION 5: We feel that the federal reserved water rights should be properly adjudicated. However, we believe that by adding the federal reserved water rights to the water use act, the Governor has only confused issues. We would suggest that the federal reserved water rights be addressed in a separate statute. Thus Sec. 46.15.165, Sec. AS 46.15.166, Sec. AS 46.15.167, Sec. 46.15.168, and Sec. 46.15.169 could all be incorporated into a separate statute dealing only with federal reserved water rights, and not infringe upon the current Water Use Bill and the rights and privileges granted under it.

SECTION 6: This entire section should be deleted. Other agencies have enforcement powers, and the addition of this power to DNR would only be a duplication of effort.



LIVENGOOD/TOLOVANA MINING DISTRICT

P. O. BOX 73069 - FAIRBANKS, ALASKA 99705

February 23, 1985

Dear Legislator:

The Livengood/Tolovana Mining District expressed concerns to you regarding SB 150 in a Public Opinion Message on February 19. This bill would have an impact upon the General Public of Alaska, as there are many different type of water appropriations issued for the State. We would like to submit the following comments on SB 150.

In the opening paragraph of the Governor's letter of transmittal dated February 12, 1985, he stated, "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 administration and judicial adjudication of water rights, particularly federal reserved water rights."

In the minutes from the Alaska Water Board dated March 13-14, 1984, the following comments are made:

Resolution to the Commissioner of DNR to propose legislation for basinwide adjudication. Current statutes and regulations are adequate to implement basinwide adjudication of federal reserved water rights. 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, since this type of case has not previously occurred in Alaska.

Although the Governor has the authority to introduce legislation resolving perceived problems such as the Water Board indicated, the proposed legislation goes far beyond the recommendations of the Board. The Board found that current statutes and regulations are adequate to implement a basinwide adjudication of federal reserved rights, and requested statutes only to establish the Superior Court's duties and responsibilities. We believe the recommendations of the Water Resource Board are valid, and SB 150 should only address the Superior Court's duties and responsibilities.

The February 12, 1985 Senate Journal, page 279, regarding SB 150 reads: "Department of Natural Resources fiscal note is zero." We are concerned that if the fiscal note is indeed zero, the Department of Natural Resources will be forced to shift their work load from critical areas into administration of the bill. We therefore feel the bill should be submitted to the Finance Committee for appropriate budgetary appropriations. Section 6 AS 46.15.255 (ENFORCEMENT) and 256 (DATA COLLECTION AUTHORITY) are extremely costly sections to administer.

The bill seriously amends the Water Use Act in established areas. The following comments are addressed to specific sections of the bill.

SECTION 1: In the letter of transmittal Governor Sheffield admitted that this concept had never been upheld in a court of law. Why waste the courts time with an indefensible law? If Section 1 is amended as suggested by SB 150, it makes an appropriation of a specific amount of water meaningless. How can a developer of any type proceed with engineering and funding a venture under such circumstances?

SECTION 3: This section does not appear to recognize that a water right is a property right that can be leased or sold. This section, by regulation, would divest the property owner of his entire water right, or an unused portion, if that appropriation, or portion thereof, were not used over a 5 year period. (See Sections 46.15.255 and 256). AS 46.15.140 as it currently appears in the Statutes is appropriate without change.

SECTION 4: We feel that by the addition of the words "best interests of the state" and deletion of "in accordance with AS 46.15.140 (b)" this section provides for arbitrary and capricious decisions.

SECTION 5: We feel that water should be adjudicated, especially with respect to federal reservations. We suggest the following change of wording:

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

SECTION 6. This entire section should be deleted. Article VIII Section 16 of the Constitution of Alaska states, "No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."

We sincerely appreciate your consideration of these comments. If we can be of assistance to you in any manner, please do not hesitate to call on us.

Sincerely yours

Rose Rybachek

Rose Rybachek, President

*Burden of proof
abandonment — & structure
voluntary
not punitive See 5.*



MAR 4 1985

Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

KARLA L. FORSYTHE
General Counsel

303 K Street
Anchorage, AK 99501

February 26, 1985

Senator Arliss Sturgulewski
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Sturgulewski:

I am writing to bring to your attention a minor concern with SB 150, an act establishing procedures for administrative and judicial adjudication of water rights under the Alaska Water Use Act.

Proposed Sec. 46.15.166(c) (page 7, lines 4- 14), provides that in an action, the court may initially appoint a designee of the commissioner as a master. The master may be an employee of the state.

If the master is a state employee, I assume that the costs of the master will be absorbed as part of the employee's regular salary. However, it would be helpful if the legislation provided that if the master is not a state employee, the costs of the master and any related expenses incurred by the master shall be paid by the parties to the adjudication.

Thank you for your consideration of this comment. If there are any questions, I will be glad to provide further information.

Sincerely,

Karla L. Forsythe
General Counsel

KLF:smh

cc: Arthur H. Snowden, II
Art Peterson

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.

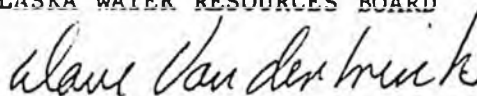
Of the 367.7 million acres in Alaska, federal reserve water rights exist on almost 60 percent of the land mass or over 215 million acres. From a miniscule 2.5 million acres of military land, to 50 and 75 million acres of land for national parks and fish and wildlife refuges respectively, federal reserve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



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?

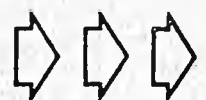
- Federal reserved water rights are a judicial creation. The United States Supreme Court first recognized federal reserved water rights in

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
Giennallen, Alaska 99588
822-5534



Fact Sheet:

WATER RIGHTS IN ALASKA

SEPTEMBER 1985

WHAT ARE WATER RIGHTS?

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

HOW DO I OBTAIN WATER RIGHTS?

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

WHAT COSTS ARE INVOLVED?

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

WHY SHOULD I APPLY FOR WATER RIGHTS?

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

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

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

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

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

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

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

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



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

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

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

DEPARTMENT OF NATURAL RESOURCES DIVISION OF LAND AND WATER MANAGEMENT

SOUTHEASTERN REGIONAL OFFICE

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

NORTHERN REGIONAL OFFICE

4420 Airport Way
Fairbanks, Alaska 99701
479-2243

SOUTHCENTRAL REGIONAL OFFICE

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

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

DIVISION OF FORESTRY

HAINES AREA OFFICE

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

KETCHIKAN AREA OFFICE

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

PETERSBURG AREA OFFICE

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

DELTA AREA OFFICE

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

TOK AREA OFFICE

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

SOUTHWEST (McGRATH) AREA OFFICE

McGrath Airport
Box 130
McGrath, Alaska 99627
524-3010

KENAI PENINSULA AREA OFFICE

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

COPPER RIVER AREA OFFICE

Mile 110 Richardson Highway
Post Office Box 185
Glennallen, Alaska 99588
822-5534

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

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

OFFICE OF THE COMMISSIONER

Senate Bill 150

Testimony/Senate Resource Committee

Department of Natural Resources

Senator Sturgelewski, Members of the Committee:

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

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

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

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

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

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

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

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

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

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

Alaska Water Resources Board

January 22, 1986

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

RE: Committee Substitute for SB 150

Dear Senator Stureulewski:

The Committee Substitute (Bradley 61/20/86) for SB 150 has been proposed as an act to make miscellaneous amendments to the Alaska Water Use Act (AS 46.15), to establish procedures for the administrative and judicial adjudication of water rights under the act and to provide for an effective date. The substitute bill appears to meet the concerns identified by the Alaska Water Resources Board, the administrative needs of the Alaska Department of Natural Resources (as identified to you in a letter from Commissioner Munnichs dated January 9, 1986) and to provide the means to properly adjudicate any Federal Reserved Water Rights that may be asserted.

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

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

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

Respectfully,

Cyril R. Wanamaker

Cyril R. Wanamaker, Chairman
Alaska Water Resources Board

cc: All Board members

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

January 24, 1986

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

JAN 27 1986

BILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

Re: CS For Senate Bill No. 150
(Amending the Water Use Act)

Dear Senator Sturgulewski:

During the January 22, 1986, hearing on the proposed amendments to the Alaska Water Use Act, both Senators Fahrenkamp and Halford asked very good questions with respect to the proposed new AS 46.15.040(d) (section 1 of the proposed committee substitute for Senate Bill No. 150). Through the Division of Land and Water Management, proposed substitute language for subsection (d) will be offered which should clarify the intent and language of this subsection.

The intent of subsection (d) as drafted was to insure that water appropriators are not under the mistaken impression that when the state issues a permit or certificate the state is also guaranteeing some aspect of the appropriation, such as that the appropriator will be able to withdraw water from a well at a particular flow rate. In other words, the issuance of a permit or certificate only authorizes the use of the water, but promises nothing about it's flow rate, quality, etc. The hope was that subsection (d) would help the state avoid law suits claiming a permit or certificate is a state guarantee of some sort.

The subsection as written was not designed to insulate the state from liability for taking water and thereby adversely affecting a prior appropriator when the state itself is a permittee or certificate holder (such as in the case of a fish hatchery or a hydropower project). When the state itself is an appropriator, and the state's taking of water adversely affects the water right of an appropriator with a priority date earlier than the state, under Alaska law the prior appropriator has an enforceable right against the state for damages. This right is secured by AS 46.15.050 and art. VIII, sec. 16 of the Alaska Constitution.

Honorable Arliss Sturgulewski
Senate Resources Committee
Alaska State Legislature

January 24, 1986
Page 2

Also, during the hearing Senator Fahrenkamp asked me for a statutory reference giving authority to the commissioner to declare critical water management areas. The relevant cite is AS 46.15.020(a) and (b)(1). Current regulatory authority in 11 AAC 93 is now being revised in light of the experience in declaring such an area at Auk Nu-Indian Cove in Juneau.

Again, thank you very much for helping arrange on short notice the teleconference to Anchorage.

Sincerely yours,

HAROLD M. BROWN
ATTORNEY GENERAL

By:



Michael J. Frank
Assistant Attorney General

MJF:amh

cc: Senator Rick Halford
Senator Betty Fahrenkamp
Ned Farquhar
Mary Lu Harle
Tom Hawkins

January 25, 1986

Dear Arliss;

First of all, thank you for the opportunity to make further comments on SB 150. As you know, this issue is of grave concern to me. I understand that you are holding a Senate Resources Hearing on the issue on Monday. I would like to request that we be allowed to address the Committee via the teleconference, if that is available.

Secondly, I realize that the State has a problem regarding appropriated water rights being essentially tied up by people that no longer have a use for them. This gives water management people a real problem.

However, it takes many years to perfect a mining claim and bring it into production. One of the major obstacles is to obtain a certificate of appropriation for needed water. This process involves research, public hearings, etc. Additionally, years may be involved in exploration and development. In the meantime, the certificate of water could be lost due to the present language in SB 150 under the Abandonment section.

I have been assured that a miner who files an affidavit of annual labor on an unpatented mining claim is making a showing of an intent to hold his water rights. However, I do not see that spelled out in the bill.

I have a suggestion that might work, but it would take some research and discussion with miners to win their approval. That would be to insert language that would allow a water appropriator to file an "intent to hold" their water appropriation, similar to the one used by BLM to hold federal mining claims. On unpatented mining claims, this could be simply by filing their affidavit of annual labor. In other instances, such as patented claims or agriculture, etc., a short letter of intent could be used to confirm their intention.

As I stated, this is strictly a personal idea at this time---I have not had the time to discuss it with other miners, or the Board of Directors of AMA. Therefore, I am requesting that you not move the bill from your committee until we have had an opportunity to ascertain if this approach is feasible.

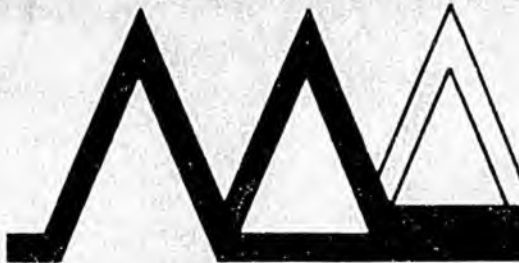
On another matter, I am enclosing a Resolution just passed by the Alaska Miners Association. I believe mining, particularly placer mining, is standing on the threshold of extinction. I believe that the formation of such a Commission could possibly determine just what the underlying problems are, and arrive at solutions. I hope you will consider sponsoring such a bill. I have also sent copies of the Resolution to Senator's Fahrenkamp, Bennet, and Coghill, and Representatives Schultz and Frank.

Again, thank you for this opportunity. We appreciate the support you are giving the mining industry.

Yours,

Rose Rybackek

SB150



WESTERN LEGISLATIVE CONFERENCE
THE COUNCIL OF STATE GOVERNMENTS

720 SACRAMENTO STREET, SAN FRANCISCO, CALIFORNIA 94108 (415) 986-3760

APPROVED RESOLUTION NO.85-11

**PRIMACY OF STATE LAW IN
RIPARIAN AREA LAND MANAGEMENT**

(Introduced by the Water Policy Committee)

**Urging Application of State Water
Law in Riparian Area Land Management**

WHEREAS, riparian lands are crucial to the economic development, environmental protection and scenic resources of the west and are protected under state law for those uses; and

WHEREAS, various proposals have been made to expand the powers of federal land agencies under the Federal Land Policy and Management Act (FLPMA) of 1976 to manage riparian lands; and

WHEREAS, the Bureau of Land Management has asserted authority under FLPMA to separately classify and manage riparian lands; and

WHEREAS, the definition of "riparian area habitat" as a separate land management classification fails to recognize state water law primacy in the definition of beneficial uses of western streams and rivers; and

WHEREAS, the Department of Agriculture has attempted to manage western state water resources by imposing stream channel stability requirements; and

WHEREAS, under the existing law of many states, a definition of beneficial use has developed which meets the concerns and purposes of riparian area habitat management; and

WHEREAS, the U.S. Supreme Court in the cases of U.S. v. New Mexico, 438 U.S. 696 (1978), and U.S. v. California, U.S. (1978), clearly stated that waters necessary for management of public lands should be quantified and administered pursuant to state law;



WESTERN LEGISLATIVE CONFERENCE
THE COUNCIL OF STATE GOVERNMENTS

720 SACRAMENTO STREET, SAN FRANCISCO, CALIFORNIA 94108 (415) 986-3760

APPROVED RESOLUTION NO. 85-12

RESERVED WATER RIGHTS

(Introduced by the Water Policy Committee)

Opposing the Creation of New Reserved Rights

WHEREAS, the western semi-arid portions of the United States were settled and developed under local property laws and with the help and encouragement of the federal government under local property and water laws which have been recognized by Congress and the courts; and

WHEREAS, the Congress has consistently recognized and deferred to state water laws for well over 100 years; and

WHEREAS, state primacy in water allocation and management allows individual states to determine for themselves the water uses necessary to meet their present and future needs; and

WHEREAS, the "federal reserved water rights doctrine" was developed by the U.S. Supreme Court as a means for the federal government and Indian tribes to secure the water necessary to meet the purposes for which federal lands were withdrawn or designated; and

WHEREAS, as long as these federal reserved water rights remain unquantified, they interfere with the ability of state water agencies to manage the resource as well as threaten longstanding but junior appropriations who have historically relied on the resource; and

WHEREAS, Congress and the U.S. Supreme Court have also recognized that it is appropriate for state courts to quantify federal reserved rights as a part of a valid general stream adjudication proceeding; and

SB 150



WESTERN LEGISLATIVE CONFERENCE
THE COUNCIL OF STATE GOVERNMENTS

720 SACRAMENTO STREET, SAN FRANCISCO, CALIFORNIA 94108 (415) 986-3760

APPROVED RESOLUTION NO.85-11

**PRIMACY OF STATE LAW IN
RIPARIAN AREA LAND MANAGEMENT**

(Introduced by the Water Policy Committee)

**Urging Application of State Water
Law in Riparian Area Land Management**

WHEREAS, riparian lands are crucial to the economic development, environmental protection and scenic resources of the west and are protected under state law for those uses; and

WHEREAS, various proposals have been made to expand the powers of federal land agencies under the Federal Land Policy and Management Act (FLPMA) of 1976 to manage riparian lands; and

WHEREAS, the Bureau of Land Management has asserted authority under FLPMA to separately classify and manage riparian lands; and

WHEREAS, the definition of "riparian area habitat" as a separate land management classification fails to recognize state water law primacy in the definition of beneficial uses of western streams and rivers; and

WHEREAS, the Department of Agriculture has attempted to manage western state water resources by imposing stream channel stability requirements; and

WHEREAS, under the existing law of many states, a definition of beneficial use has developed which meets the concerns and purposes of riparian area habitat management; and

WHEREAS, the U.S. Supreme Court in the cases of U.S. v. New Mexico, 438 U.S. 696 (1978), and U.S. v. California, ___ U.S. ___ (1978), clearly stated that waters necessary for management of public lands should be quantified and administered pursuant to state law;

APPROVED RESOLUTION NO. 85-11

Page 2

NOW, THEREFORE, BE IT RESOLVED by the Western Legislative Conference of the Council of State Governments that federal land management agencies should not attempt to use scarce western water resources for riparian habitat management or stream channel stability purposes except as provided under state law.

(RESOLUTION APPROVED BY THE CONFERENCE AT ITS 1985 ANNUAL MEETING
ON OCTOBER IN EUGENE, OREGON)



WESTERN LEGISLATIVE CONFERENCE
THE COUNCIL OF STATE GOVERNMENTS

720 SACRAMENTO STREET, SAN FRANCISCO, CALIFORNIA 94108 (415) 986-3760

APPROVED RESOLUTION NO. 85-12

RESERVED WATER RIGHTS

(Introduced by the Water Policy Committee)

Opposing the Creation of New Reserved Rights

WHEREAS, the western semi-arid portions of the United States were settled and developed under local property laws and with the help and encouragement of the federal government under local property and water laws which have been recognized by Congress and the courts; and

WHEREAS, the Congress has consistently recognized and deferred to state water laws for well over 100 years; and

WHEREAS, state primacy in water allocation and management allows individual states to determine for themselves the water uses necessary to meet their present and future needs; and

WHEREAS, the "federal reserved water rights doctrine" was developed by the U.S. Supreme Court as a means for the federal government and Indian tribes to secure the water necessary to meet the purposes for which federal lands were withdrawn or designated; and

WHEREAS, as long as these federal reserved water rights remain unquantified, they interfere with the ability of state water agencies to manage the resource as well as threaten longstanding but junior appropriations who have historically relied on the resource; and

WHEREAS, Congress and the U.S. Supreme Court have also recognized that it is appropriate for state courts to quantify federal reserved rights as a part of a valid general stream adjudication proceeding; and

WHEREAS, the procedural laws of many Western States allow federal agencies and tribes the authority to quantify their water rights through less expensive and less confrontational negotiation procedures;

NOW, THEREFORE, BE IT RESOLVED that the Western Legislative Conference of the Council of State Governments urges that:

1. The federal government continue to acknowledge and honor the primary state role in water allocation and management,
2. The federal government and Indian tribes promptly quantify their reserved water rights claims in state general stream adjudications or non-litigative or mediation proceedings and that where necessary those resulting settlements be promptly ratified by Congress,
3. The federal land management agencies seek no new reserved rights not specified in existing federal land use legislation. Federal land management agencies should specify the federal water which will be required for purposes created in any new land use legislation or designation, and
4. The federal government provide assistance to states to expedite the quantification of reserved rights and reduce the harmful effects of reserved rights judgments or settlements.

(RESOLUTION APPROVED BY THE CONFERENCE AT ITS 1985 ANNUAL MEETING
ON OCTOBER IN EUGENE, OREGON)



WESTERN LEGISLATIVE CONFERENCE
THE COUNCIL OF STATE GOVERNMENTS

720 SACRAMENTO STREET, SAN FRANCISCO, CALIFORNIA 94108 (415) 986-3760

APPROVED RESOLUTION NO.85-13

WATER QUALITY STANDARDS

(Introduced by Water Policy Committee)

Urging Flexibility in Setting Water Quality Standards

WHEREAS, water quality standards are developed with the purpose of protecting designated beneficial uses of the nation's water; and

WHEREAS, uniform nationwide standards are promulgated to protect these designated beneficial uses; and

WHEREAS, Environmental Protection Agency (EPA) water quality standards on some waters are more stringent than documented evidence requires at the specific site, and such standards on Western waters may result in excessive costs far out of proportion to derived benefits;

NOW, THEREFORE, BE IT RESOLVED that the Western Legislative Conference of the Council of State Governments urges that EPA water quality standards should not be based on nationwide criteria if it can be documented that site-specific criteria will not impair the designated beneficial use.

(RESOLUTION APPROVED BY THE CONFERENCE AT ITS 1985 ANNUAL MEETING ON OCTOBER 2 IN EUGENE, OREGON.)

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-
---------	-----	-----	-----	-----	-----	-----

REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

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 *NE*
 Division : Commissioner's Office *MM*

Phone : 465-2400
 Date : Feb. 6, 1986

Approved by Commissioner : Wm O. Amundson, Deputy
 Agency : Natural Resources

Date : Feb. 6, 1986

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.

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

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

March 18, 1986

MAR 18 1986

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

Re: SB 150 Basin-wide Adjudication of Water Rights

Dear Senator *Arliss* Sturgulewski:

In my February 17, 1986 letter to you (copy attached) answering questions raised by your committee on Senate Bill 150, I stated that I would ask our Division of Land and Water Management to identify areas where regulations would be necessary to implement SB 150. This letter provides this information.

Section 1 of SB 150 which adds a new subsection to AS 46.15.040 will not require a regulation. Section 2 amending AS 46.15.065 by adding a new subsection will not require a regulation. Sections 3 and 4 amending AS 46.15.140, Abandonment, Forfeiture and Reversion of Appropriations, will not require an additional new regulation. The existing regulation, 11 AAC 93.940, Procedure on Abandonment and Forfeiture, could be amended to simplify the administrative procedure for voluntary abandonment of water rights. Concerning Section 5 of SB 150 which amends AS 46.15.145, the existing regulation at 11 AAC 93.147(d) and (e) will need to be amended to include the discretionary hearing and to change the citations. Public notice and a written determination are already required in the existing regulation.

Section 6 of SB 150 would add five new sections to the Water Use Act. A regulation may be needed to set forth administrative procedures for establishing basin boundaries under proposed AS 46.15.165(a). A regulation describing the contents of the order initiating an administrative adjudication under proposed AS 46.15.165(b) may be needed. Subsection (c) of proposed AS 46.15.165 may need a regulation to identify which divisions of federal, state, and local

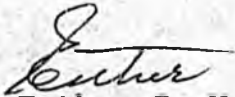
March 18, 1986

governments are notified. Subsection (i) may require regulations to set out the procedures for determining parties to the adjudication, classifying groups for efficient and cost effective adjudication, and for determining and allocating costs under subsection (4). Subsection (k) may require a regulation to detail the content of a consent by the federal government to participate in an administrative adjudication to quantify and prioritize federal reserved water rights. Proposed Section 46.15.166, Judicial Adjudications, will not require regulations. We do not foresee regulations required for proposed sections 46.15.167, 168, or 169.

Proposed Section 46.15.255 in Section 7 of SB 150 will require a regulation amendment to 11 AAC 93.290 to make this existing regulation consistent with proposed AS 46.15.255. No regulation is foreseen to implement proposed AS 46.15.256.

I hope this answers the questions raised by some of your committee members concerning regulations to implement this bill. If we can be of further assistance, please contact us.

Sincerely,



Esther C. Wunnicke
Commissioner

Attachment

cc: Senator Fahrenkamp
Senator Coghill
Senator Eliason
Senator Vic Fischer
Senator Halford
Senator Zharoff
Tom Hawkins
Mike Frank

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

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

February 17, 1986

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

Re: SB 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

February 17, 1986

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

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LAND AND WATER MANAGEMENT

Frank

BILL SHEFFIELD, GOVERNOR

555 CORDOVA STREET
POUCH 7-005
ANCHORAGE, ALASKA 99510-7005
PHONE: (907) 276-2653

September 3, 1985

Dear Alaskan:

The enclosed Fact Sheets on Federal Reserved Water Rights are provided by the Alaska Department of Natural Resources as part of our continuing effort to inform the public and government officials about water rights in Alaska.

An increasing population within the state, coupled with residential, agricultural, and industrial development, is causing an increased demand on DNR for assistance in water management and for information on water rights and permits. We believe that fact sheets, such as the enclosed, help provide for the information needs of our state's residents.

Further information may be obtained by contacting this office or one of the offices listed on the fact sheet.

Sincerely,

Tom Hawkins

Tom Hawkins
Director



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
76b-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
Mile 10 Airport
Box 1
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

INTRODUCTION TO RESERVED WATER RIGHTS

Ralph W. Johnson

Natural Resources Law Center
University of Colorado School of Law

June 11-13, 1984

INTRODUCTION TO RESERVED WATER RIGHTS

Ralph W. Johnson

Natural Resources Law Center
University of Colorado School of Law

June 11-13, 1984

INTRODUCTION.

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

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

Corker.

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

Trelease.

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

Goldberg.

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

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

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

Ely.

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

Hanks.

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

Johnson.

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

THE ORIGIN OF THE RESERVATION DOCTRINE

Disagreement on the date of origin of the doctrine.

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

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

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

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

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

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

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

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

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

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

EXPECTATIONS DASHED

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

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

WESTERN WATER RIGHTS SETTLEMENT BILLS

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

Four principal objections were raised to the doctrine.

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