

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7144 HOUSE RESOURCES

<u>Project</u>	<u>Benefit</u>	<u>Funding</u>
Dam Safety Reviews and inspects dams and responds to emergencies in the event of a disaster. Construction of new dams will begin in FY93.	Protects lives and property from possible dam failures.	235.6 56.4 (GF) 64.2 (GF/PR) 115.0 (Fed)
Hydrologic Survey Collects and disseminates information on Alaska's surface and ground waters. Hundreds of streams and millions of lakes have yet to be added to data base. Includes a cooperative program with US Soil Conservation Service to improve snow fall data in arctic regions.	Provides information vital to public health and economic development. The arctic snow survey may revolutionize human understanding of arctic environments thus allowing more oil and gas exploration and development.	1,536.8 558.4 (GF) 602.5 (GF/PR) 196.8 (Fed) 179.1 (I-A)
Water Rights Adjudicates water rights applications associated with the use of water for domestic, commercial and industrial needs. Enforces compliance on water users in Alaska now taking large quantities of water without authorization. Participates in land and water resource plans.	Authorizes the use of water while protecting the public interest. Provides increased revenues and increased collection of water data related to site-specific hydrology and the availability, use and distribution of water.	547.2 452.9 (GF) 44.3 (GF/PR) 50.0 (Fed)
Water Management Policies and Procedures Develops and promulgates Alaska's first comprehensive water management policy. Develops, publishes and holds public hearings on Alaska's first statewide water management strategy organized by hydrological unit.	Gives guidance to and provides context for water management decisions. An organized strategy allows public input into water management decisions.	89.1 (GF)
Title Navigability Establishes and protects the state's title to submerged lands and access to millions of acres of uplands. The emphasis is to identify and claim title to all remaining, but currently unclaimed, navigable water bodies before the state land selection process is concluded.	Increases the total upland acres the state can select. It also protects access for recreation and commerce.	93.5 (GF)

NOTICE OF PROPOSED CHANGE IN THE
REGULATIONS OF THE DEPARTMENT OF NATURAL RESOURCES

Notice is given that the Department of Natural Resources, under the authority of AS 46.15.20, proposes to adopt, amend or repeal regulations in Title 11 and Title 93 of the Alaska Administrative Code, dealing with filing fees, state water policy, and water rights to interpret and implement AS 46.15, as follows:

Amendments are proposed for 11 AAC 05.010 (a) to add or charge application fees for water use, permit extensions, temporary water use, and glacier ice. An amendment is proposed to adopt a new article and section in Chapter 93, Article 1., section 10., State Water Policy. An amendment is proposed for 11 ACC 93.970 to define when a water use would "unduly affect" an existing water right. State water law protects existing water rights against such impacts by later applicants. 11 AAC 93.970 is also being amended to clarify the definition of a "significant amount of water." An amendment to correct an error is proposed for 11 ACC 93.210. It will allow temporary water use permits to be issued for uses that are "significant" (defined by quantity) but short term (not more than five years). If a use is not "significant," no permit is necessary. In addition this section is being amended to allow for an extension of a temporary water use permit for an additional five years. 11 AAC 93 is also being amended to include a section outlining the state water policy.

Notice is also given that any person interested may present oral or written comments relevant to the proposed action at hearings to be held in Anchorage, Fairbanks and Juneau. The Juneau hearing will be held in the Southeast Regional Office's conference room A, on the Fourth Floor, 400 Willoughby Avenue on February 28, 1992. The Fairbanks hearing will be held at the Northern Regional Office, 3700 Airport Way, in the main conference room, on March 4, 1992. The Anchorage hearing will be held at the Frontier Building, 3601 C. Street, room 336 on March 3, 1992. Each hearing will be held from 11 a.m. to 2 p.m. and might be extended to accommodate those present before 2 p.m. who did not have the opportunity to testify earlier. In addition, written comments may be sent to Director, Ric Davidge, Division of Water, Department of Natural Resources, P.O. Box 107005, Anchorage, Alaska 99510-7005, to be received no later than March 20, 1992.

This action is not expected to require an increased appropriation.

Copies of the proposed regulations may be obtained upon written request to the Division of Water at the above address or in person from the division's Northern Regional Office (3700 Airport Way, Fairbanks), Southeast Regional Office (400 Willoughby Avenue, Forth Floor, Juneau) or the Southcentral Regional Office (3601 C Street, Room 822, Anchorage).

After the end of the comment period, the Department of Natural Resources will either adopt these or other proposals dealing with the same subject, without further notice, or decide to take no action on them.

TITLE 11. NATURAL RESOURCES

Part 1. Office of the Commissioner (11 AAC 03--11 AAC 06)

PART 1. OFFICE OF THE COMMISSIONER.

Chapter

05. Fees for Department Services (11 AAC 05.010--11 AAC 05.900)

CHAPTER 05. FEES FOR DEPARTMENT SERVICES.

Section

010. Fees

11 AAC 05.010(a)(8)(A) and (a)(8)(C)--(D) are amended and are adopted, to read:

11 AAC 05.010. FEES. (a) Non-refundable fees to apply for authorizations, and fees to obtain publications or services from the department, are as follows:

(8) water management

(A) water rights application,

(i) \$50 for proposed use of 5,000 gallons a day or less;

(ii) \$100 for proposed use of more than 5,000 gallons a day, but less than 30,000 gallons a day; [OR]

(iii) \$200 for proposed use of 30,000 gallons a day or more, but less than 100,000 gallons a day;

(iv) \$300 for proposed use of 100,000 gallons a days or more, but less than 500,000 gallons a day;

(v) \$500 for proposed use of 500,000 gallons a day or more, but less than 1 million gallons per day;

(vi) \$1000 for proposed use of 1 million gallons of water per day or more;

(vii) \$1500 for proposed use of 1 million gallons of water per day or more, where the water will be used outside of the hydrologic unit from which it was removed. A hydrologic unit is based on the USGS Hydrologic Unit Map of Alaska-1974.

(viii) \$20 for proposed use of 1000 gallons per day or less for single family domestic water use;

(ix) \$500 for proposed use of any quantity of glacier ice;

(B) application for reservation of water, \$500;

(C) extension of permit to appropriate water, \$50 for 5,000 gallons a day or less, or \$100 for more than 5,000 gallons a day, but less than 30,000 gallons per day, \$200 for 30,000 gallons per day or more;

(D) application for a temporary water use permit and the extension of a temporary water use permit, the same fee as for a water rights application and permit extension apply;

[(I) \$50 FOR PROPOSED USE OF 5,000 GALLONS A DAY OR LESS;]

[(II) \$100 FOR PROPOSED USE OF MORE THAN 5,000 GALLONS A DAY BUT LESS THAN 30,000 GALLONS A DAY; OR]

[(III) \$200 FOR PROPOSED USE OF 30,000 GALLONS A DAY OR MORE;]

Authority:

AS 46.15.020

AS 44.37.025

CHAPTER 93. WATER MANAGEMENT.

Article

1. State Water Policy (11 AAC 93.010.)
2. Appropriation of Water (11 AAC 93.040--11 AAC 93.174)

4. Temporary Water Use (11 AAC 93.210--11 AAC 93.220)

8. General Provisions (11 AAC 93.910--11 AAC 93.970)

ARTICLE 1. STATE WATER POLICY

Section

10. STATE WATER POLICY

11 AAC 93.15.010 is adopted to read:

11 AAC 93.010. State Water Policy. It is the policy of the State of Alaska to efficiently manage and conserve its water resources for the maximum use and benefit of its citizens, consistent with the public's interest. In so doing, the state's goal is to maximize public benefits by improving the quality of life of its residents; conserving the natural environment; facilitating and encouraging economic development; and protecting life and property. To further this policy, the following principles will guide the management of Alaska's water resources:

(1) The state is the conservator of the public's water resources;

(2) The state will permit the broadest possible access to and common use of state waters, consistent with the public's best interests, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes (Constitution of Alaska, Article VIII, Sections 3 and 14);

(3) Whenever occurring in a natural state the state shall reserve all surface and ground water resources to the people for common use. Such use and priority for use is subject to prior appropriation rights; except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law; and subject to the general reservation of fish and wildlife (Constitution of Alaska, Article VIII, Sections 3 and 13) and (AS 46.15.030);

(4) No person shall be involuntarily divested of his right to the use of waters, or improvements affecting that use, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law (Constitution of Alaska, Article VIII, Section 16);

(5) The state shall manage its water resources to ensure that adequate supplies of water are available for public water supplies; the protection of fish and wildlife habitat, migration, and propagation; recreation and park purposes; navigation and transportation purposes; and sanitary and water quality purposes, if found to be in the public interest (AS 46.15.080(b));

(6) State water quality standards shall be judiciously and uniformly enforced among all users;

(7) The state shall maintain, or improved to minimum water quality standards the quality of its water resources when feasible and prudent, so that current and future generations will have access to good quality water with which to meet their basic needs;

(8) Water resources planning is integral to wise water management. The state shall conduct the necessary water resources planning to ensure wise use and management of its waters. The state shall also solicit public participation in the planning and management of its water resources;

(9) The state will encourage water conservation and public education in its management of water resources;

(10) The state shall provide for the regulation, supervision, and periodic inspection of privately owned and state-owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, and removal of dams and reservoirs is consistent with the protection of life and property (AS 46.17.010);

(11) The state shall work cooperatively with the public and other state, local, and federal agencies to administer water rights, to conduct navigability determinations, to collect water resources data, to assure water quality standards are upheld, and to provide scientific and technical assistance as requested;

(12) The state shall systematically collect, record, store, evaluate, and distribute water resources data to determine the quality, quantity, location, and use of the state's water resources. Such activities are in the public's interest and are necessary for the orderly domestic and industrial development of the state (AS 41.08.017); and

(13) State agencies shall ensure that regulatory processes involving the state's water resources are efficient and that, to the extent feasible, regulatory or jurisdictional duplication among state agencies is avoided or eliminated wherever found. (Eff. / /92, Register ;)

Authority: AS 46.15.020.

ARTICLE 2. APPROPRIATION OF WATER

Section

100. Exemption to Notice.

11 AAC 93.100., is amended to read:

11 AAC 93.100. Exemption to Notice. An application to appropriate 5,000 gallons of water per day (gpd) or less is exempt from the notice provisions of 11 AAC 93.080 and AS 46.15.133, except that the Department of Fish and Game will be notified of an application for a water right for a quantity of water of more than 1000 gpd from an anadromous fish stream listed in the Alaska Department of Fish and Game Catalog of Water Important for Spawning, Rearing, or Migration of Anadromous Fishes or a stream identified as supporting fish in the ADF&G Habitat Regional Guides. However, in an area where the total amount of water available appears to the department to be limited with respect to the number of potential users of the same source, or upon the request of another state or federal agency or a municipality as defined by AS 29, or to protect the public interest, the commissioner will, in his or her discretion, require public notice as provided by 11 AAC 93.080. (Eff.12/29/79, Register 72; am 11/7/90, Register 116; am / /92, Register)

Authority: AS 46.15.020
AS 46.15.133

ARTICLE 4. TEMPORARY WATER USE.

Section

210. Temporary water use

11 AAC 93.210 (a) is amended, and a new 11 AAC 93.210(c) is adopted to read:

11 AAC 93.210. TEMPORARY WATER USE. (a) Simplified procedures to authorize the temporary use of water, as provided in 11 AAC 93.220, will be followed if the amount of water is [NOT] a significant amount as defined by 11 AAC 93.970(14), the use continues for less than five consecutive years, and the water applied for is not otherwise appropriated.

(c) Upon the commissioner's receipt of a written request from the permittee, a temporary water use permit will, in the commissioner's discretion, be extended for a period of time not to exceed five years. The request for a temporary water use permit extension must be accompanied by the fee prescribed by 11 AAC 05.010. (Eff. 2/8/67, Register 23; am 12/29/79, Register 72; am 11/7/90, Register 116; am / /92, Register)

Authority: AS 46.15.020
AS 46.15.040
AS 46.15.133

ARTICLE 8. GENERAL PROVISIONS.

Section

970. Definitions

11 AAC 93.970(14) is amended, and a new paragraph (38) is added to read:

11 AAC 93.970. DEFINITIONS. Unless the context indicates otherwise, in this chapter

(14) "significant amount of water" means any use of more than 5000 gallons of water in a single day from a single source, or the regular daily or recurring [SEASONAL] use of more than 500 gallons of water per day, for more than 10 days [OR MORE] per calendar year from a single source, or the nonconsumptive use of more than 30,000 gallons of water per day (0.05 cfs) from a single source, [OR ANY USE OF WATER FROM A SOURCE OR SOURCES LISTED IN THE ALASKA DEPARTMENT OF FISH AND GAME " CATALOG OF WATERS IMPORTANT FOR THE SPAWNING, REARING OR MIGRATION OF ANADROMOUS FISHES,"] or any water that might adversely affect the water rights of other appropriators or the public interest;

(38) "unduly affect" means that a prior appropriator loses the ability to reasonably acquire an adequate quantity of water to fulfill the purposes of the appropriation from the water source from which the water right is permitted or certificated, except that a prior appropriator has not been unduly affected if water can reasonably be obtained by installing more efficient diversion works for the withdrawal of water or by performing effective routine repair and maintenance of diversion works or water well equipment in order to allow for the full development of the water resource. (Eff. 2/8/67, Register 23; am 12/29/79, Register 72; am 9/11/83, Register 87; am 11/7/90, Register 116; am / /92, Register)

Authority: AS 46.15.020
AS 46.15.040
AS 46.15.050
AS 46.15.080
AS 46.15.133
AS 46.15.145

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF WATER

WALTER J. HICKEL, GOVERNOR

3601 C. Street
 P.O. Box 107005
 Anchorage, Alaska 99510-7005
 Phone: (907) 762-2575

February 21, 1992

Representative Cliff Davidson
 Alaska State Legislature
 P.O. Box V (MS 3100)
 Juneau, Alaska 99811

Post-it™ brand fax transmittal memo 7874 # of pages >	
To: <i>Heather Fredericks</i>	From: <i>Kim Davids</i>
Co: <i>Cliff Davidson</i>	Co: <i>DNR/DOA</i>
Dept: <i>Alaska Legislature</i>	Phone #: <i>762-2224</i>
Fax #: <i>465-3464</i>	Fax #: <i>4</i>

Dear Representative Davidson:

Attached is a table that addresses the questions posed in your January 24, 1992 letter regarding water right applications received and adjudicated from January 1, 1987 thru January 31, 1992.

This table addresses questions number 2a, 2c and 4. The table does not address the number of temporary water use permits (TWP) received or issued during this 5 year period because we do not tract this type of water use through the LAS system. We only have the records on the issuance of TWPs dating back to July 1, 1988. Since that time we have issued 245 TWPs. The majority of these permits were issued for construction projects such as road, highway, and airports, or for glacier ice harvesting and oil and gas development. Most of the applications were for surface water in excess of 30,000 gallons per day.

1. Please define divert, impound and withdraw and differentiate between these uses of water. the Water Use Act (AS 46.15) allows the right to divert, impound or withdraw the surface and subsurface waters of the state.

Divert: to turn, modify, or change the direction of the natural flow of water. A diversion is usually accomplished by using a ditch, berm, culvert or pipe.

Impound: to gather and/or enclose water. An impoundment is usually accomplished through the use of a dam, berm or reservolrs.

Withdraw: to take or remove water from its natural source or from an impoundment. Water withdrawn from a source is usually accomplished through the use of a pump and/or gravity.

Note: The out-of-stream appropriations are associated with one or more of these definitions. Water reserved under an Instream flow reservations is not diverted, impounded, or withdrawn from its source and is considered a beneficial use in Alaska.

2.a) How many applications to appropriate water has the Department received over the five years from January 1987 to January 1992 ? Please list by calendar year.

The Department has received 1119 water rights applications over the past five years. We did not request from the department programmers the total number of applications received by calendar year because of the additional programming time. This information is being gathered and should be available by noon on Tuesday, February 25th.

2.b) Of these applications how many were to divert, impound, or withdraw water ? How many were for instream and out-of-stream applications ? How many were for surface or subsurface?

Of the 1119 applications received all of them involved the diversion or withdrawal of water except for the 38 applications for a reservation of water (instream flow). We are not sure of the total number that had an impoundment associated with the withdrawal or diversion of water, this information is not tracked in LAS.

2.c) What is the status of these applications ?

The attached table shows the status of the 1119 applications filed during this five year period. To summarize; 253 are still in the application stage, 391 have been issued permits, 360 have been issued certificates and 115 have been closed.

3. How does your division consider non-consumptive use of water ? Do these uses of water fit into the above statistics ? If not, please explain.

11 AAC 93.970. Definitions (33) "non-consumptive water use" means the instream use of water, or the diversion of water where the quantity of water diverted is not diminished except by evaporation or transpiration and the water is returned to its original source at the original point of diversion immediately after its use;

A water right application for a non-consumptive use (such as small suction dredge) is adjudicated under the same authority and in the same manner as an application for a consumptive use. So the answer is yes, they fit into the statistics as discussed above, but we do not keep track of consumptive and non-consumptive water uses in different categories.

4. Of the applications to appropriate water the Department has received over the past five years, please breakdown how many were for:

500 gallons per day (gpd) or less

1,000 gpd or less

5,000 gpd or less

10,000 gpd or less

30,000 gpd or less

40,000 gpd or less

greater than 100,000 gpd or less

Please give these figures in acre feet , GPD, cubic feet per second. Please also provide a conversion chart.

The answer to this question is provided in the attached table. In summary: 500 gpd or less, 445 applications were received; 500 gpd thru 1000 gpd, 121 applications were received; 1000 gpd thru 5000 gpd, 96 applications were received; 5000 gpd thru 10,000 gpd, 41 applications were received; 10,000 gpd thru 30,000 gpd, 63 applications were received; 30,000 gpd thru 40,000 gpd, 8 applications were received; 40,000 gpd thru 100,000 gpd, 44 applications were received; over 100,000 gpd, 301 applications were received. Attached for your information is a conversion table.

5. How do you treat a diversion of water that is not put to a beneficial use ?

On April 4, 1977, Thomas Meacham, AGO, Anchorage address this issue in a memorandum to the Department of Fish and Game, copy attached, the memorandum stated, if there is not a beneficial use of water associated with the diversion, withdrawal or impoundment of water DNR does not have the authority under the Water Use Act to issue a permit. It was not until June 17, 1980 that the Department stopped accepting and adjudicating applications to alter a waterbody. A copy of Director's Policy File 80-50 is attached for your information.

If we can be of further assistance please call.

Sincerely:


Ric Davidge
Director

cc: Harold Heinze, Commissioner
Gary Prokosch, DOW
Carol Wilson, commissioner's Office

5 YEAR REPORT

FEB 21 '92 02:02PM ST-AK DNR MINING 907 563 1853

Status of Applications Received from January 1987 thru January 1992.											
Gallons per Day	Application Pending		Permit Issued		Certificate Issued		Closed		Source Totals		Total Files
	Sur	Sub	Sur	Sub	Sur	Sub	Sur	Sub	Sur	Sub	
500 or Less	31	58	42	18	36	235	16	9	125	320	445
500 thru 1,000	4	23	9	12	9	49	9	6	31	90	121
1,000 thru 5,000	14	20	25	18	0	10	8	1	47	49	96
5,000 thru 10,000	12	6	11	4	1	2	3	2	27	14	41
10,000 thru 30,000	9	9	11	18	4	1	6	5	30	33	63
30,000 thru 40,000	0	1	2	3	0	0	1	1	3	5	8
40,000 thru 100,000	9	3	22	7	0	0	3	0	34	10	44
Over 100,000	43	11	178	11	13	0	36	9	270	31	301
Total	122	131	300	91	63	297	82	33	567	552	1119

Notes

*Does not include Temporary Water Permits

*Only includes applications with a priority date 01-01-1987 or later.

*When multiple quantities due to seasonal variation occurs w/in a file, the greatest gpd value was selected.

*When multiple uses occur within a file, quantities were added together for a single gpd value.

WATER CONVERSION FACTORS

1 Acre-foot per day (AF/d) = 325,851 gallons
 = 226 gpm
 = 0.505 cfs
 = 1,358.8 tons
50 AF/y (365 days/year) = 44,640 gpd

1 Gallon per minute (gpm) = 1440 gpd
 = .0044 AF/d
 = .0022 cfs
 = 1.6 AF/y
 = 0.72 tons

1 Cubic-Foot per second (cfs) = 646,358 gpd
 = 449 gpm
 = 1.98 AF/d
 = 722.7 AF/y
 = 2695.3 tons

1 million gallons per day = 694 gpm
 = 1.55 cfs
 = 3.07 AF/d
 = 1,120 AF/y
 = 4,170 tons

AF/d = Acre feet per day

AF/y = Acre feet per year

gpm = Gallons per minute

gpd = Gallons per day

cfs = Cubic foot per second

tons = 2000 pounds (1 gallon weights 8.34 pounds)

STATE
of ALASKA

MEMORANDUM

P. 5/9/16 V

[Handwritten signature/initials]

1976

HABITAT
REGIONAL OFFICE

TO: Bruce Barrett
Habitat Section
Alaska Department of Fish & Game
333 Raspberry Road
Anchorage, Alaska

DATE: April 4, 1977

FILE NO:

TELEPHONE NO:

FROM: Thomas E. Meacham
AGO - Anchorage

SUBJECT: Scope of Permit Authority
for Alteration of Stream
Banks or Diversion of
Water Flow.

I have been informally requested several times, by different individuals, to examine the statutory basis, if any, in Title 46 under which the State Division of Lands may require application for a permit, with payment of appropriate fees, to authorize the diversion of natural water flows, or the alteration of stream banks or stream location, where no appropriation of the water itself takes place or is intended to take place. Up to the present time the Division of Lands has apparently been requiring applications for such permits under the premise that the alteration of stream banks or the diversion of water flow constituted an "appropriation" of water under AS 46.15.260 (1) and (3).

In the Alaska Water Use Act, an appropriation is defined in AS 46.15.260 as follows:

- (1) "appropriate" means to divert, impound, or withdraw a quantity of water from a source of water for a beneficial use;...

In the same statute, the word "appropriation" is defined as follows:

- (2) "appropriation" means the diversion, impounding or withdrawal of the quantity of water from a source of water for a beneficial use;...

The phrase "beneficial use" is defined as follows:

- (3) "beneficial use" means a use of water for the benefit of the appropriator, other persons or the public, that is reasonable and consistent with the public interest, including, but not limited to, domestic, agricultural, irrigation, industrial, manufacturing, mining, power, public, sanitary, fish and wildlife, and recreational use;...

It may be seen from the context of the definitions that the diversion, impoundment, or withdrawal of water becomes an "appropriation" when it is applied to "beneficial use". The mere act of diverting, impounding, or withdrawing water, or the alteration of stream banks to do so, cannot constitute an appropriation unless that water is applied to a beneficial use. If

[Handwritten initials]

Bruce Barrett

-2-

April 4, 1977

permits for, the alteration of stream banks or diversion of water not constituting an appropriation. In view of the State's vital interest in protecting natural streams and stream flows, such control would seem to be imperative. However, it is my view that it cannot be directly accomplished at the present time by requiring applications for permits under the appropriation provisions of the existing Alaska Water Use Act, AS 46.15.

cc: Dean Nation
Water Resources Section
Alaska Division of Lands
McKay Building, 323 E. 4th Ave.
Anchorage, Alaska 99501

TEH:nb

Druce Barrett

-2-

April 4, 1977

it is merely returned unaltered, in quantity or quality, to the natural stream from which it was taken, no appropriation has occurred. Of course, if the quantity returned is less than that diverted, the missing water may have been applied to a beneficial use. Likewise, if the quality of the water is altered (by pollutants, turbidity, etc.) then a beneficial use may still not exist, but other statutory authority regarding water quality would seem to be adequate to meet this situation.

The context of the Water Use Act compels an interpretation that, to be perfected, an appropriation must consist of both a diversion, etc., and a beneficial use. AS 46.15.010 permits the Department of Natural Resources to adjudicate water rights "...in the waters of the State, and in its [sic] appropriation and distribution." AS 46.15.030 states that, "...wherever occurring in a natural state, the waters are reserved to the people for common use and are subject to appropriation and beneficial use as provided in this chapter."
[Emphasis supplied]

Given this background, and the specific legal significance of the definitions of "appropriate" and "appropriation", it is important to note that AS 46.15.120, which is the penalty provision of the Alaska Water Use Act, makes criminal the acts of, "...a person who constructs works for an appropriation, or diverts, impounds, withdraws or uses a significant amount of water from any source without a permit or certificate of appropriation;..." This criminal penalty, by its terms, applies to unpermitted appropriations, i.e. the diversion, etc. of water for a beneficial use. Since such a person could not obtain a permit or certificate of appropriation if he "...diverts, impounds or withdraws..." water without putting it to a beneficial use, such an action, with no intention or possibility of perfecting an appropriation, can not be criminal under the statutes. An elementary maxim of law is that criminal or penal statutes are to be interpreted strictly, and any doubt in the construction or application of a criminal provision is to be resolved in favor of the individual, and against the State. State vs. Marathon Oil Co., 523 P.2d 293 (Alaska 1974); Stock vs. State, 526 P.2d 3 (Alaska 1974); Harks vs. City of Anchorage, 500 P.2d 644 (Alaska 1972).

It is the responsibility of the Legislature to accurately define crimes and criminal conduct, and under this guideline, if the alteration of a stream bed or diversion of water from a natural watercourse does not amount to an appropriation, it follows that no permit to do such an act can be required under existing law, and no crime for failure to obtain such a permit has been created. The draft bill which Professor Frank Trelease has circulated would seem to fill this void, and would give the State the opportunity to review, and to issue

Director's Policy File

2

June 17, 1980

adjudicated as a land use permit. All other pending waterbody alterations will be closed. Issued waterbody alteration permits will be closed when practicable based on project completion, project abandonment, or lack of information from the permittee on the status of the project.

MEMORANDUM

State of Alaska

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF FOREST, LAND AND WATER MANAGEMENT

TO:	DIRECTOR'S POLICY FILE 80-50	DATE:	June 17, 1980
		FILE NO:	1130, X-File 3200
		TELEPHONE NO	279-5577
FROM:	THEODORE G. SMITH <i>TS</i> Director	SUBJECT:	Waterbody Alterations

Situation: There is currently within the division confusion regarding waterbody alteration application submittal, pending applications and issued permits. Is the division accepting waterbody alteration applications? What is the status of adjudicating pending waterbody alteration applications and issued permits?

Policy: It is the policy of the Division of Forest, Land and Water Management that the division will cease accepting waterbody alteration applications. This policy is based on the decision that the Water Use Act, AS 46.15, does not contain language of such specificity to allow the department to issue waterbody alteration permits where there is no beneficial use of water. All existing waterbody alteration application forms shall be destroyed. After this date applicants for waterbody alterations that include a beneficial use of water pursuant to AS 46.15.080 and AS 46.15.260(3) shall be instructed to file an application for water rights. If a dam is to be constructed or modified that is 10 feet or more in height or stores 50 acre-feet or more of water, the applicant shall be instructed to file an application to construct or modify a dam. If the waterbody alteration is on state land, whether associated with a beneficial use of water or not, the applicant will be requested to submit an application for a land use permit pursuant to AS 38.05.330. Applicants for activities involving waterbody alterations will be informed that they may also require permits from ADF&G, the Corps of Engineers and if the activity is in a borough, from the borough. If the waterbody alteration is not subject to a water rights permit but interferes with the water right of another person, a Commissioner's Order pursuant to 11AAC 93.290 may be issued to protect the rights of prior appropriators.

Additionally, it is the policy of the Division of Forest, Land and Water Management that pending waterbody alteration applications shall be processed as soon as practicable. Pending waterbody alteration applications associated with a beneficial use of water shall be adjudicated as a water rights application. The date of filing shall constitute the priority date for water rights purposes. Pending waterbody alterations not associated with a beneficial use of water but that take place on state land will be



Alaska State Legislature

HOUSE RESOURCES COMMITTEE

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3715

January 24, 1991

Mr. Ric Davidge, Director
Division of Water
Department of Natural Resources
P.O. Box 107005
Anchorage, Alaska 99510-7005

Dear Mr. Davidge:

In preparation for the Division of Water briefing before the House Resources Committee on Tuesday, January 28, I would appreciate the following information in writing by Monday, January 27.

1. Please define "divert," "impound," and "withdraw" and differentiate between these uses of water. Alaska's Water Use Act (AS 46.15) allows the right to divert, impound or withdraw the surface or subsurface waters of the state.

2.a) How many applications to appropriate water has the Department received over the last year, including January 1992?

b) Of these applications, how many were to divert, impound, or withdraw water? How many were for instream and out-of-stream applications? How many were for surface or subsurface water?

c) What is the status of these applications?

How many are still in the adjudication process and at what stage?

How many have been granted certificates of appropriation?

How many have been granted permits?

How many have been denied?

How many of these are for a temporary and standard water use permit?

3. How does your division consider non-consumptive uses of water? Do these uses of water fit into the above statistics? If not, please explain.

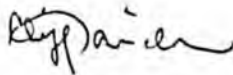
Page 2

I have also enclosed five additional questions. Please provide this information by Thursday, February 6. I would appreciate your contacting my office if you need additional time to fulfill this request.

Thank you for your assistance in this matter. I look forward to working with you throughout the session to improve the policy and management of this important public resource.

Thank you for contacting my staff on water issues this interim. Please contact my office if you have any questions or wish clarification on any of these requests. With best regards,

Cordially,



Representative Cliff Davidson

Enclosure

cc: Commissioner Harold Heinze

1. Please define "divert", "impound," and "withdraw" and differentiate between these uses of water. Alaska's Water Use Act (AS 46.15) allows the right to divert, impound or withdraw the surface or subsurface waters of the state.

2.a) How many applications to appropriate water has the Department received over the five years from January 1987 to January 1992? Please list by calendar year.

b) Of these applications, how many were to divert, impound, or withdraw water? How many were for instream and out-of-stream applications? How many were for surface or subsurface water?

c) What is the status of these applications?

How many are still in the adjudication process and at what stage?

How many have been granted certificates of appropriation?

How many have been granted permits?

How many have been denied?

How many of these are for a temporary and standard water use permit?

3. How does your division consider non-consumptive uses of water? Do these uses of water fit into the above statistics? If not, please explain.

4. Of the applications to appropriate water the Department has received over the past five years, please breakdown how many were for:

-500 gallons per day or less

-1,000 gallons per day or less

-5,000 gallons per day or less

-10,000 gallons per day or less

-30,000 gallons per day or less

-40,000 to 100,000 gallons per day or less

-greater than 100,000 gallons per day or less

Please give these figures in acre per feet, gallons per day, and cubic feet per second. Please also provide a conversion chart.

5. How do you treat a diversion of water that is not put to a beneficial use?

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF WATER

WALTER J. HICKEL, GOVERNOR

3601 C. Street
P.O. Box 107005
Anchorage, Alaska 99510-7005
Phone: (907) 762-2575

January 27, 1992

Representative Cliff Davidson
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Representative Davidson:

The following are the answers to the questions posed in your January 24, 1992 memo regarding water right applications received and adjudicated during 1991. The answers are addressed in the order they appear in your memo.

Divert: to turn, modify, or change the direction of the natural flow of water. A diversion is usually accomplished by using a ditch, berm, culvert or pipe.

Impound: to gather and/or enclose water. An impoundment is usually accomplished through the use of a dam, berm or reservoirs.

Withdraw: to take or remove water from its natural source or from an impoundment. Water withdrawn from a source is usually accomplished through the use of a pump and/or gravity.

Note: The out-of-stream appropriations are associated with one or more of these definitions. Water reserved under an Instream flow reservations are not diverted, impounded, or withdrawn from its source and is considered a beneficial use in Alaska.

2a. Total number of applications received since 1/1/91: 217

2b. divert, impound or withdraw: 209
instream flow reservations: 8
subsurface: 100
surface: 117

2c. still in adjudication process: 148
granted certificates: 3
issued permits: 59
denied: 7
temporary water use permits : 61
non-temporary: 156

The Division of Water, Water Management Section adjudicated 627 water files during 1991. These included water rights applications, permit extensions, certificate and permit amendments and temporary water use permits.

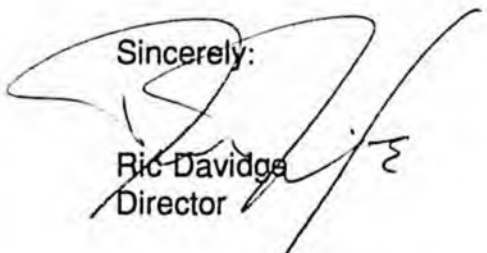
3. 11 AAC 93.970. Definitions (33) "non-consumptive water use" means the instream use of water, or the diversion of water where the quantity of water diverted is not diminished except by evaporation or transpiration and the water is returned to its original source at the original point of diversion immediately after its use;

A water right application for a non-consumptive use (such as placer mining) is adjudicated under the same authority and in the same manner as and application for a consumptive use.

The questions you posed regarding applications and adjudication of water rights over the past 5 years will be sent as soon as the information can be generated from our computer system. We anticipate that the programming will take a week and the first draft of information should be available to us within 10 days. We will pass the information on to you as soon as we are sure it is correct.

If we can be of further assistance please call.

Sincerely:



Ric Davidge
Director

cc: Harold Heinze, Commissioner
Gary Prokosch, DOW



Alaska State Legislature

HOUSE RESOURCES COMMITTEE

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3715

February 20, 1992

Ric Davidge, Director
Division of Water
Dept. of Natural Resources
P.O. Box 107005
Anchorage, Alaska 99510-7005

Dear Mr. Davidge:

Thank you for your response to my January 24 request for information on water rights applications the Department has received from January 1991 to January 1992. Please clarify the following questions regarding your response dated January 27.

First, in your response to 2a, does the figure 217 include applications through January 1992? Also, in your response to 2b. am I to assume the 8 instream flow applications are a subset of the 117 surface water applications? Also, in your response to 2b. how many of the 209 applications to divert, impound and withdraw water were to divert water? How many were to impound water? How many were to withdraw water?

Second, please clarify how your answer to 2c relates to the numbers in 2a and 2b.

Third, in your response to the definition of non-consumptive, would you have any objection to putting this definition in statute and why? And, if so, why? Please explain.

Fourth, I also note there are three other categories I did not consider: permit extensions and certificate and permit amendments. Please include these in the category breakdown for calendar years 1987 through 1992.

Fifth, I would still appreciate how many of the above applications specified in question #2 are for non-consumptive uses of water.

Page 2


Sixth, please clarify how many out of stream permits and certificates have been issued as far back is reasonably possible to ascertain. Based on previous correspondence from the Department, this number is 4,496. (1,607 out-of-stream permits issued and 2,889 out-of-stream certificates issued). However, based on recent conversations with your staff and in presentations, I have heard you state there are over 12,000 active water rights files in the state. Please clarify this discrepancy and define "active water rights" files. I would appreciate this clarification as soon as possible.

And, finally, I am requesting a breakdown of the number of out of stream permits and certificates issued as far back as is possible to ascertain. Please provide this per calendar year and by month and in the same format as requested in the January 24 letter. Please indicate how many water rights were grandfathered under the 1966 Water Use Act. Again, I would also appreciate this information as soon as possible.

Thank you for your attention to this matter. I appreciate your providing this data without which we can not make informed policy decisions regarding this important public resource.

With best regards,

Cordially,



Representative Cliff Davidson
Chairman, House Resources Committee

cc: Commissioner Harold Heinze
Department of Natural Resources

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

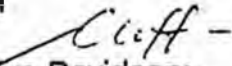
DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
410 WILLOUGHBY AVENUE, SUITE 105
JUNEAU, AK 99801-1795

Phone: (907) 465-5000
Fax: (907) 465-5070

January 29, 1992

The Honorable Cliff Davidson, Chairman
House Resources Committee
Alaska House of Representatives
P.O. Box V
Juneau, AK 99811


Dear Representative Davidson:

Thank you for your letter of January 22 requesting additional information on the Water Summit scheduled for January 30. I look forward to your involvement at the meeting.

The purpose of the Water Summit is to improve coordination and sharing of expertise between State agencies. This should eliminate some existing confusion on agency roles in managing water resources. The enclosed Administrative Order No. 120 defines the relative responsibilities of the Departments of Natural Resources (DNR) and Environmental Conservation with respect to carrying out the Alaska Groundwater Protection Strategy. It could well serve as a model for clarifying other water-related programs where the management lines may not be clearly delineated, such as has been outlined in DNR's response to you.

I believe the multitude of water-related programs throughout State government could be better coordinated to solve the State's water use and quality problems. Uncoordinated water monitoring programs, confusion over which agency is the lead on a particular issue, and a failure to develop a reliable and accessible interagency water database are examples of issues that sometimes constrain our ability to effectively solve problems.

Some information that you requested is not available and will logically be work products generated by the participants after the Water Summit meeting. For example, a listing of various agency programs that need better coordination and efficiency will be developed after each agency gives an overview of their current water related programs and opportunities for coordination are discussed. Similarly, identification of both particularly well-run programs and any existing problems is expected to be a product of the meeting. Concerning a list of participants, the memorandum announcing the Water Summit was mailed to the commissioners of the Departments of Fish and Game, Commerce and Economic Development, Community and Regional Affairs, Transportation and Public Facilities, to the Division of Governmental

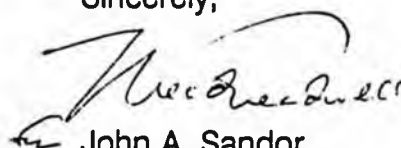
January 29, 1992

Coordination, and to the Department of Military and Veterans Affairs with the understanding that they would decide which staff should attend from their respective agencies. The meeting is open to the public.

In addition to the above-referenced Administrative Order, I have also enclosed copies of what correspondence we have in our files on the Water Summit.

Thank you for your inquiry. I look forward to a productive meeting on January 30.

Sincerely,



John A. Sandor
Commissioner

DR/JA/JS/bkt (EQ-Commis\Davidson.ltr)

Enclosures

cc/enc: House Resources Committee
The Honorable Kay Brown, House of Representatives
The Honorable Mark Boyer, House of Representatives
The Honorable Jim Duncan, Alaska State Senate
Harold C. Heinze, Commissioner
Department of Natural Resources
Janice Adair, Special Assistant
Commissioner's Office/ADEC

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

ADMINISTRATIVE ORDER NO. 120

Under the authority of Article III, Sections 1, 16 and 24, of the Alaska Constitution, AS 41.08.017(a), AS 44.17.060 and AS 44.19.145(c), I hereby (1) describe the need for all Alaskans to protect the state's groundwater resource consistent with the "Alaska Groundwater Quality Protection Strategy" and (2) assign the responsibilities for implementing that strategy to the Department of Environmental Conservation (DEC) and the Department of Natural Resources (DNR) in investigating, managing and protecting this resource.

Section 1. Findings. Groundwater is an important resource that is vulnerable to contamination. Alaska must implement, with a prevention-oriented approach, improvements in existing government industry, and public efforts to protect this valuable resource. DEC, in cooperation with the public, industry, local governments, and state and federal agencies, developed the "Alaska Groundwater Quality Protection Strategy" to guide improvements in managing and protecting our groundwater. The Strategy is based on the following facts:

- (a) protection of groundwater is essential for the health, welfare, and economic prosperity of all Alaskans;
- (b) groundwater is used by many Alaskans for their source of drinking water;
- (c) groundwater is widely used for industrial water supply and fish processing;
- (d) groundwater provides water to streams, lakes, marshes, and intertidal areas important for sustaining fish and wildlife;
- (e) prevention of groundwater pollution is more economical and easier than detection and cleanup;
- (f) Alaskans are finding more and more of their groundwater resource polluted, and

(g) all Alaskans share a responsibility for protection of our groundwater resource.

Section 2. Responsibilities. DEC and DNR are the primary state agencies responsible for the identification, management and protection of Alaska's groundwater resource. DEC's responsibilities are:

- (a) to prevent and abate pollution of the state's groundwater resource;
- (b) to systematically identify, investigate, and quantify potential sources of soil and groundwater pollution;
- (c) to oversee the investigation and cleanup of sites with soil or groundwater pollution;
- (d) to coordinate management of data related to regulatory responsibilities for protection of public health and the environment; and
- (e) to work with local governments, state and federal agencies, and the public to improve groundwater protection activities.

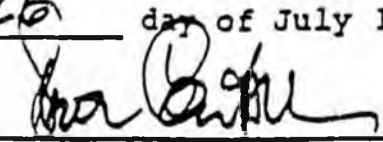
DNR's responsibilities are:

- (a) to collect, record, evaluate, and distribute data on the quantity, quality, location, and use of groundwater;
- (b) to periodically publish data related to the quantity or quality of groundwater of the state;
- (c) to systematically identify, investigate, and quantify the quantity and quality of the state's groundwater resource;
- (d) to coordinate management of data related to geologic and hydrologic characteristics of aquifers;
- (e) to work with local governments to improve the knowledge and understanding of the groundwater resource in their area;
- (f) to adjudicate and grant water rights for the use of groundwater; and
- (g) to establish policy related to groundwater use and management.

Section 3. Interagency Cooperation. DEC and DNR, where there is a joint concern, shall initiate cooperative efforts or studies to provide information for aquifer protection, planning and management. DNR shall collect and be the lead agency in investigating aquifer and groundwater characteristics and in managing the use of groundwater. DEC shall be the lead agency in investigating actual or potential sources of groundwater contamination. Both agencies shall coordinate with other state and federal agencies, local governments, industry, and the public to enhance protection and management of Alaska's groundwater resource.

This order takes effect immediately.

Dated at Juneau, Alaska, this 20 day of July 1990.



Steve Cowper
Governor

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF WATER

400 WILLOUGHBY AVENUE
SUITE 400
JUNEAU, ALASKA 99801
PHONE: (907) 465-3400

January 27, 1992

Representative Cliff Davidson
Chairman
House Resources Committee

RECEIVED

JAN 28 1992

A.D.E.C.
COMMISSIONER'S OFFICE

Dear Mr. Chairman:

In response to your letter which we received January 23, 1992, containing questions regarding the Water Summit Meeting scheduled for January 30, 1992, we have prepared the following responses:

1. The purpose of the summit is to begin an open and constructive dialog on water resource management by bringing together the many State agencies that have various levels of water management responsibilities and reviewing just what each is doing. Additionally we are attempting to move forward with efforts in water program coordination to ensure that we are not duplicating the expenditure of public funds in various water management activities. The intentions of this meeting are to eventually formalize this discussion on water program coordination, including Federal agencies, to ensure the highest quality of service at the most responsible cost. We have suggested, for example, the creation of a Water Management Council made up of the various program managers. As indicated to your staff previously, this recommendation is in response to concerns raised by the State Water Management Board and the late Frank Trelease who wrote the State Water Act and subsequently reviewed its implementation.
2. The use of terms such as "state water programs" and "water policies" are used in a very broad and general sense. We have enclosed a DRAFT illustration of the many water program activities within state government that will give you some sense of the scope of these concepts.
3. One of the purposes of this joint meeting is to explore the problems that each of the agencies has identified. Some examples are as follows:

One of the fundamental responsibilities of the Division of Water is the collection, storage, management, presentation and distribution of water data. This includes both surface and ground water as well as coastal waters. Most of the groundwater data collected, which is essential to our developing a clearer understanding of state groundwater resources, comes from water well logs provided by water well drilling companies. State law, for some years, has required all water well drillers to provide a copy of their water well log to the state. However, there is

no enforcement provision in the law and many of the companies drilling water wells do not comply. This is further complicated by the fact that Alaska does not require a specific license to drill a water well. Consequently, the option to revoke a license due to a failure to comply with this statutory requirement is not available. Additionally, ADEC collects well log data for all public and subdivision water supplies as they review and approve permits for the systems necessary to deliver this water. Except for the Kenai Peninsula, these well log data are filed manually by ADEC, and they are not in a form that can be easily transferred to the DOW for entry into the state water resource data base. We believe that with a little coordination and possible statutory clarifications, the amount of well log data now available to the state can dramatically be increased and made much more useful. Please understand that in all areas of the state this information provides critical data essential to the understanding of current and future groundwater problems. This is also the most cost effective mechanism to collect such data.

Another concern is that ADEC permits public drinking water systems without DOW ever receiving a permit application for that water. We have found in test surveys in the Mat-Su area, for example, that a number of persons who thought they had a "water permit" only had a DEC permit for the "system" but no permit for the "water". This is not only confusing to the citizens of Alaska but also a violation of state statute. Thus, we believe that this meeting will help begin a level of coordination between ADEC and DOW to ensure that public drinking water system permits are not issued by DEC until the water is legally available.

DEC certifies EPA NPDES permits without checking with DOW to see if the water user (seafood processor, miner or others) has received a permit for the use of the water.

In the Village Safe Water program, DEC gives grants for the construction of water and waste water systems yet there are many DEC funded systems in the state that do not have a state permitted water right as required by law.

The ADF&G (Title 16) permits have authorized structures in a stream such as dams, water intakes, or discharge pipes without the applicant having rights to the water. Again this is a function of program coordination and regulatory consistency.

DCRA also awards water and waste water grants, however the DOW is never notified of such grants or applications. The result is state funds being expended when it is possible that sufficient water appropriations are not available. Program coordination not only increases compliance of statutes, but also cuts down on red tape and the public perception that one hand of government is unaware of what the other is doing.

Consistent with law, any action by a state agency that could result in an appropriation of water should trigger notification of DOW, and no permit for a water related structure or activity that would result in an appropriation should be issued without the water permit having been approved.

Additional coordination is necessary between Dam Safety and Construction and the state and local emergency services program. In the event of a dam failure or potential dam failure, notification and evacuation will be carried out under the direction of either the local or state emergency services agency. In order to provide adequate protection to lives and property, additional coordination with these agencies is essential. In order to illustrate this problem we have requested that during the next state/federal joint earthquake or natural disaster exercise that a number of dams fail.

There are a large number of smaller dams that are not regulated by the Dam Safety and Construction Section of DOW. This is because they are not jurisdictional under AS 46.17. These dams need to be inspected to ensure proper operation and maintenance to protect the capital investment in the dams if for no other reason. If the dams were to fail, it is likely the owners would seek state funding for replacement of the structures. This would involve voluntary cooperation between the dam owners, municipalities, DOW and state agencies.

To get "hands on" training, the State Dam Safety Engineer needs further coordination with the Alaska Energy Authority and the Federal Energy Regulatory Commission. Larger dams in the state are generally operated by AEA and regulated by FERC and therefore are exempt from regulation by DNR. Allowing DNR personnel to be involved in the inspection of these dams would provide valuable, cost effective training for the State Dam Safety Engineer.

One of the sections in DOW is Hydrological Survey. We have discovered, after calls from other agencies advising that they have hydrologists and wanted to know what to do with them, that there are at least three other agencies with hydrologists on staff. Hydrology is a scientific discipline and one that requires constant and continuing education/training. It also requires that a certain "critical mass" of hydrologists, with different academic credentials and theoretical perspectives, be of enough number and in an environment that allows them to interact on consultations and project reviews to ensure that the different scientific perspectives are considered. We have thus suggested that all hydrologists in the employ of the state be located in the Hydrological Survey Section and that if an agency requires the services of a hydrologist that they contract with the private sector or with DOW for those services.

ADF&G, DOT/PF and AEA, for example, collect water resource data through private contracts and by internal staff. At present there is no program or mechanism for data coordination that ensures this water resource data is transferred to the DOW and assimilated with the State Water Resource Data Base. Recent discussions with the US Geological Survey and the US Soil Conservation Service indicate that with

a coordinated state agency water data collection, storage, and management program in cooperation with these federal agencies, we could significantly increase available water data as well as dramatically reduce redundancies in gathering, storage and use.

At a recent meeting of the Interagency Hydrology Committee (IHC), it recognized the inadequate water data base for Alaska as well as the lack of an overall and coordinated state and federal plan for data collection, storage and distribution. The IHC is now proposing that USGS (for federal agencies) and DOW (for state agencies) respectively coordinate all water data collection projects within Alaska.


There are many other examples in water conservation, water education, instream flow coordination and prioritization with ADF&G, coordination of field activities, title navigability reviews, and so forth.

4. We have attached the proposed Water Management Policy/Regulations now under final review in the Attorney General's office. We have also attached the Administrative Order referenced.

5. ADEC has prepared the invitation list with the consultation of DNR. The DNR and DOW will have the following in attendance:

Commissioner Harold Heinze
Director Ric Davidge
Water Management Section Chief Gary Prokosch
Water Policy and Special Projects Section Chief David Orr
Hydrological Survey Section Chief Dr. Bill Long

We are pleased to hear of your interest in participating in our efforts to identify areas which could be improved for the responsible management of state water resources.



Ric Davidge
Director

CC: Heinze
Sandor

MEMORANDUM

STATE OF ALASKA

Department of Environmental Conservation

TO: Harold Heinze, Commissioner
Department of Natural Resources

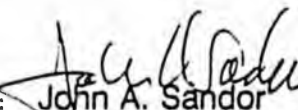
DATE: December 27, 1991

FILE NO:

THRU:

TELEPHONE NO: 465-5050, Fax 465-5070

FROM:


John A. Sandor
Commissioner

SUBJECT: Consolidation of Water Boards

I have received the proposal to merge the Water and Wastewater Works Advisory Board and the Water Resources Board. While I believe this suggestion has merit, I think it should be discussed in the context of overall water management. If the Boards are combined, I would like to see more specific duties described in the charter.

You will recall my November 18 memorandum to you (copy attached). I recommended that our departments and other interested parties meet to discuss state water policies. We are in the process of scheduling this meeting for sometime in January as people's schedules permit. Let's discuss this issue along with the proposed agenda for this meeting.

I look forward to some significant activities in improving Alaska's water protection and management programs.

JA/JAS/vr (CO-comm\davidge.brd)

Attachment: November 18 memorandum to Harold Heinze

cc w/attachment: Mead Treadwell, Deputy Commissioner, DEC
Janice Adair, Special Assistant/CO, DEC
Ric Davidge, Director, Division of Water/DNR
Deena Henkins, Water Wastewater Treatment/EQ, DEC

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
P.O. BOX 0, JUNEAU, ALASKA 99811-1800

Fax: (907) 465-2617
Phone: (907) 465-2600

November 18, 1991

MEMORANDUM

TO: Harold C. Heinze
Commissioner
Department of Natural Resources

FROM: 
John A. Sandor
Commissioner

SUBJECT: Alaska's Water Policies, Regulations and Management

The Department of Environmental Conservation (DEC) staff has reviewed the September 27, 1991 Draft of the State of Alaska Water Policy and had no suggestions for modification of these statements.

I believe the policy statement is excellent, but would like to suggest that the existing processes by which the Federal government, State agencies and local communities regulate and manage the water resources of Alaska should be carefully reviewed and redefined. It is my observation that Federal, State and local government policies, objectives and practices are not effectively integrated (or coordinated); and are sometimes in conflict. These deficiencies are a barrier to the achievement of our water management and related objectives.

As you know, the DEC is engaged in many activities related to water resource protection. We are developing new regulations as mandated by the Safe Drinking Water Act and we are working with the urban and rural communities of the state in the development of public water/waste water systems. I believe our existing water quality regulations and their application to the waters of our State should be revised.

I would like to suggest that our Departments, with participation by ADF&G, EPA, local governments and professional water/waste-water organizations explore the opportunities for reforming and improving the way in which we regulate and manage our water resources. I am convinced that substantial improvements can be made in the organization and administration of these activities.

I believe it would be worthwhile for key members of our staffs to meet with us within the next several weeks to lay out an action plan that will achieve these objectives.

MEMORANDUM
DEPARTMENT OF NATURAL RESOURCES

STATE OF ALASKA
DIVISION

TO: John Sandor, Commissioner
Dept. of Environmental Conservation

DATE: December 2,

THRU: Harold Heinze, Commissioner
Dept. of Natural Resources

FILE NO:

TELEPHONE NO.: 762-2572

FROM: Ric Davidge
Director

SUBJECT: Consolidation of Water Boards

*See
memo
"Meeting"
12/10*

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DEC 05 1991

ADEC
COMMISSIONER'S OFFICE

Attached are fact sheets concerning the Water and Wastewater Works Advisory Board and the Water Resources Board. Although the two boards may have significantly different stated missions, I believe they have similar functional missions and interests and should therefore be combined.

By combining the two boards into one, the goal of statewide water management would be enhanced. In addition, the state could save money, eliminate duplication of effort, conserve personnel costs related to staff support of the boards, and still have a board reflective of the interests of DNR and DEC...perhaps even more so.

Recommendations:

1. Combine the Water and Wastewater Works Advisory Board and the Water Resources Board into a new Water Resources Management Board. Savings in administrative costs would be significant.
2. The new board would consist of six members plus a chairperson. Savings of eight people and associated per diem costs, and a reduction in state employee, postage, and supplies support costs.
3. DNR supports the Water Resources Board on approximately \$10,000 annually. I do not know how much your department spends on the Water and Wastewater Works Advisory Board. Perhaps our two departments could jointly spend approximately \$15,000 so that the new board is more effective than the combined efforts of the two existing boards.
 - A. Increase length of meetings from two to three days.
 - B. Additional funding will allow the board to meet in communities around the state other than just Anchorage or Juneau which has been the norm for the Water Resources Board. In the past, per diem and travel costs have prevented that board from meeting in communities which are more expensive to travel to or stay in.
4. A revision to Article 3 of AS 46.15, the Water Use Act, which established the Alaska Water Resources Board, may have to be accomplished, and we can do the same if there is a similar technicality concerning the Water and Wastewater Works Advisory Board. We will check with the AG's office before proceeding beyond your concurrence.

If you concur with these recommendations, I will proceed with advising Don Tanner, Director, Boards and Commissions.

CONCUR:

Harold C. Heinze Date
Commissioner

John A. Sandor Date
Commissioner

BOARD: WATER AND WASTEWATER WORKS ADVISORY BOARD

BOARD NUMBER: 105

TITLE: Water and Wastewater Works Advisory Board

DEPT: Department of Environmental Conservation

AUTHORITY: AS 46.30.020

STATUS: ACTIVE

REQUIREMENTS:

PROHIBITIONS:

TERM: 5 years

DESCRIPTION: 8 members appointed by Governor; serve at the pleasure of Governor, plus the Commissioner of the Dept. of Environmental Conservation.

SPECIAL FACTS:

FUNCTION: Advises and assists departmental preparation of certification exam; develops regulations governing water and wastewater operator certification; system classification; also serves as a semi-final authority in settling disputes between operators and the department.

COMPENSATION: Standard travel/per diem.

MEETINGS: 1-2 times per year; 4-5 days maximum.

*FOR FURTHER INFORMATION CONTACT: Certification and Training Engineer, Division of Facilities Construction and Operation, Dept. of Environmental Conservation, Box O, Juneau, AK 99811
PHONE: 465-2673

MEMORANDUM

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RESOURCES

ENCLOSURE 2
OFFICE OF
MANAGEMENT & BUDGET
State of Alaska

SEP 5 1991

TO: Harold Heinze
Commissioner

DATE: August GOVERNMENTAL
COORDINATION

FILE NO:

TELEPHONE NO.: 762-2145

FROM: Ric Davidge
Director

SUBJECT: Consolidation of
Water Related
Programs

As we have discussed the consolidation of water related programs into the new Division of Water would realize significant government wide cost savings, increase program efficiencies, provide one stop shopping for water related permitting and activities, allow better public understanding of State water management and generally be consistent with what other states have done or would like to do.

Upon my arrival I reviewed a number of studies and discussion papers on the way the State of Alaska should organize and manage water related activities. The consistent theme of these reviews, some of which go back 12 years, is that by consolidating water programs the coordination necessary in government to meet the expectations of service and cost efficiency can be better realized by water program consolidation.

At present six State departments have water responsibilities. These include DNR which is mainly focused on water policy, quantity management, water appropriations, water resource research necessary to support ownership and allocations (Fed, State and private), dam and diversion safety and State ownership of submerged lands.

The other water programs located in DEC, ADF&G, CRA, DOT/PT, CED and the Alaska Energy Authority include:

- Erosion Control
- Flooding
- Transportation System Crossings (roads/rail)
- Stream Restoration
- Stream Reclamation
- Subdivision Review
- Hydrologic Management & Multiple Uses
- Village Safe Water
- Title 16 Permitting
- Wetlands
- Water Labs (now two - one in Juneau and one in Fbks)
- Waste Water
- Drinking Water

The old political argument that you need checks and balances in government is not consistent with the original intent of checks and balances which was between the Exec, Judicial and Leg branches not within the Exec branch. Now, someone involved in a water related program spend a great deal of time and money working with

three or four different agencies in order to accomplish a single project. This inefficiency also cost the State of Alaska a great deal of time and money.

The other old political argument that DNR as the "development" agency can not properly manage "regulatory" programs because of some philosophical incompatibility. This is uninformed. The legal standards of performance required of programs now in DEC, for example, do not change if the program is managed by DNR. Compliance requirements are not "relaxed" based on where the program is located, they are driven by law.

One of the things I have heard since arriving is that many involved in regulating the use of resources do not have a good understanding of what that resource is or how it is used. By consolidating water related programs under one Division, the collegial integration that occurs allows for very effective cross training that will lead to increasing the effectiveness of field efforts while decreasing manpower and other cost requirements.

As a three year goal I would like to secure your support and that of OMB and the Governor to complete a government wide consolidation of water programs. This effort will start with a preliminary study of dollars and personnel savings that can be realized with such a consolidation. My target for implementation would begin in the later part of FY93 and completed by FY94. The models used will be based on existing and proposed water organizations in other states. The Western States Water Council has offered to be of assistance already at no cost.

I recognize that this effort has some political problems, but put in the context of better government and lower cost - and given the concerns of many water user constituencies in the face of budget reductions I believe it can sell and be implemented.

I have inclosed a copy of a proposed program organization with program areas outlined under the various sections. Please review this concept as you consider your decision.

MEMORANDUM

State of Alaska

DEPARTMENT OF FISH AND GAME

TO: Harold Heinze
Commissioner
Department of Natural
Resources

DATE: November 15, 1991

FILE NO.:

TELEPHONE NO.: 465-4100

SUBJECT: State Water Policy

FROM: Carl L. Rosier
Commissioner
Department of Fish and Game

Sanders

Mund

11/29

Dr. a

J. a. a.

EQ

file - water

As requested in your enclosed October 24 memorandum, we have reviewed your September 27 proposal for a state water policy.

I assume from your reference to a state water policy, your partial reference to statutory authorities of agencies other than DNR, and the enclosed August memorandum by your director of Water Resources, that your intent is indeed for the draft document to reflect the policies of all state agencies with water related authorities. In accordance with past practices, it is essential that a state policy be finalized with the concurrence of all appropriate departments..

Before getting into specific details of your September 27 proposal, it is important that the Resource Cabinet and the governor come to terms with the implicit assumption in your proposed draft that all water related statutory authorities and responsibilities of other agencies be shifted to DNR. I do not concur that all water conservation authority be vested in the Division of Water within DNR.

ADF&G is fully supportive of developing a state of Alaska water policy that incorporates water related authorities and responsibilities across department lines. My Department is also committed to providing a streamlined regulatory process consistent with our statutory responsibilities and authorities.

The degree and extent to which the management of renewable and nonrenewable natural resources features in the affairs of Alaska is unparalleled in any other state in this country, and it is for good reason that those organizing state government following statehood chose to establish separate Departments of Fish and Game, Natural Resources, and Environmental Conservation. Contrary to the Division of Water Resources suggestion, it is the checks and balances between these departments that help to ensure that natural resource management decisions are made in the overall best interest of Alaskans. Those who advocate combining the basic statutory responsibilities of the three resource agencies under one department in the name of increased government efficiency invite a public perception that, first, there is significant duplication of effort between the departments and, second, that an effort is being made to manipulate the interdisciplinary process

by which agency decisions are derived. The reality is that, overall, resource agency authorities complement rather than duplicate one another.

I am prepared to discuss this important subject with you and other cabinet members. The following are (1) more specific comments regarding your September 27 proposal, and (2) a revision of your proposed policy which reflects our comments.

Preamble. For the policy to be statewide in scope, the preamble needs to reflect the statutory authorities and responsibilities of ADF&G and DEC that relate to water quality or aquatic habitat protection.

Item 2. Article VIII, Section 14 of the Alaska Constitution provides for the "free access to the navigable or public waters of the state . . . except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes." This constitutional language should be cited and reflected in the policy.

Item 6. The term, "judiciously," should be dropped because it implies that the state needs a policy to make an informed decision on whether to enforce water quality standards. Inasmuch as DEC is responsible by statute for implementing the state's water quality standards, that department's statutory authority for doing so needs to be cited. There are ample discretionary authorities available to DEC.

Item 7. The policy should be to meet minimum water quality standards and to strive for the highest attainable water quality rather than simply "good" water quality. Again, it is DEC which has the statutory responsibility to enforce water quality standards, and the insertion of "when feasible and prudent" into your proposed policy is inconsistent with DEC statutes.

Item 8. AS 38.04.065 requires DNR to "provide for meaningful participation in the planning process by affected local governments, state and federal agencies, adjacent landowners, and the general public." To say that the state shall "encourage" public participation does not adequately reflect this.

Item 11. The language, "to assure water quality standards are upheld," should be deleted. DNR does not have the statutory authority to accomplish this. Rather, the legislature, under AS 46.03.020, has charged DEC with the authority to ensure that state water quality standards are upheld.

Item 13. This item should be changed to read, "State agencies shall ensure that regulatory processes involving the state's water resources are efficient and that, to the extent feasible, regulatory or jurisdictional duplication among state agencies is avoided." This rewording removes the presumption that inefficiency and duplication exist and simply indicates agency responsibility to see that it does not.

In reality, there are a number of procedural mechanisms in place that are intended to ensure efficiency and to avoid duplication of effort, and these should be capitalized upon. One example is the tri-agency project review process for placer mining projects. That policy provides for one-stop permit application for miners as well as coordinated field assistance and enforcement actions by the three resource agencies. Another example consists of the regulatory procedures governing the multiagency reviews of projects within the coastal zone. The point is that we should continue to implement those process which are working well, fine-tune those in need of adjustment, and fix any that it can be demonstrated are inadequate.

In the area of water management per se, the basic statutory division of labor between the resource agencies is clear. DNR regulates water appropriations which include diversions; DEC regulates wastewater discharges; and ADF&G regulates uses in anadromous and resident streams, applies to DNR for instream flow reservations, and applies to DNR for water appropriations for activities or facilities such as fish hatcheries.

An area of state water management that we believe is in need of streamlining is DNR's water appropriation adjudication process. Many applicants wait years to obtain a decision on their water rights and there continues to be a backlog of appropriation applications.

In closing, a meaningful state policy needs to reflect the statutory water management responsibilities of other state agencies as well as DNR. As indicated above, we are prepared to continue working with you and other appropriate agencies toward this end.

Enclosures

cc: The Cabinet
Paul Rusanowski, Director, DGC

Water Policy
Draft Sept. 27, 1991
Page 3 of 3

13[*] State agencies shall ensure that regulatory processes involving the state's water resources are efficient and that, to the extent feasible, regulatory or jurisdictional duplication among state agencies is avoided. [REGULATORY PROCESSES CONCERNING THE STATE'S WATER RESOURCES SHALL BE STREAMLINED. TO THE EXTENT FEASIBLE AND PRUDENT, REGULATORY OR JURISDICTIONAL DUPLICATION AMONG STATE AGENCIES SHALL BE IDENTIFIED AND ELIMINATED.]

Supersedes drafts dated 9/19/91 and 9/24/91. All previous versions of the proposed water policy should be discarded.

NOVEMBER 12, 1991 ADF&G MARKUP
OF

STATE OF ALASKA WATER POLICY

DRAFT September 27, 1991

Supersedes drafts dated 9/19/91 and 9/24/91. All previous versions of the proposed water policy should be discarded.

It is the policy of the State of Alaska, [THROUGH ITS DIVISION OF WATER,] to efficiently manage and conserve its water resources for the maximum use and benefit of its citizens, consistency with the public's interest. In so doing, the state's goal is to maximize public benefits by improving the quality of life of its residents; conserving the natural environment; stimulating and encouraging economic development; and protecting life and property. To further this policy, the following principles will guide the management of Alaska's water resources..

- 1[*] The state is the conservator of the public's water resources.
- 2[*] Permit the broadest possible access to common use of state waters, consistent with the public's best interests (Constitution of Alaska, Article VIII, Section 3), and provide "free access to the navigable or public waters of the state . . . except that the legislature may, by general law regulate and limit such access for other beneficial uses or public purposes." (Constitution of Alaska, Article VIII, Section 4).
- 3[*] Whenever occurring in a natural state, all surface and ground water resources are reserved to the people for common use. Such use and priority for use is subject to prior appropriation rights; except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law; and subject to the general reservation of fish and wildlife (Constitution of Alaska, Article VIII, Sections 3 and 13) and (AS 46.15.030).
- 4[*] No person shall be involuntarily divested of his right to the use of waters, or improvements affecting that use, except for a superior beneficial use of public purpose and then only with just compensation and by operation of law (Constitution of Alaska, Article VIII, Section 16).
- 5[*] Water resources shall be managed to ensure that adequate supplies of water are reserved for public water supplies; the protection of fish and wildlife habitat, migration, and propagation; recreation and park purposes; navigation and transportation purposes; and sanitary and water quality purposes (AS 46.15.080 (b)).

- 6[*] State water quality standards shall be [JUDICIOUSLY] and uniformly enforced among all users (cite applicable DEC statutes).
- 7[*] [THE EXISTING QUALITY OF] W[ater] resources will be managed to meet [MAINTAINED, OR IMPROVED TO] minimum water quality standards and to strive for the highest attainable water quality [WHEN FEASIBLE AND PRUDENT,] so that current and future generations of Alaskans will have access to good quality water with which to meet their basic needs.
- 8[*] Water resources planning is integral to wise water management. The state shall ensure [ENCOURAGE] public participation in the planning and management of its water resources.
- 9[*] The state will encourage water conservation and public education in its management of water resources.
- 10[*] The Department of Natural Resources [DIVISION OF WATER] shall provide for the regulation, supervision, and periodic inspection of privately owned and state-owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, and removal of dams and reservoirs is consistent with the protection of life and property (AS 46.17.010).
- 11[*] The Department of Natural Resources [DIVISION OF WATER] shall work cooperatively with the public and other state, local, and federal agencies to administer water rights, to conduct navigability determinations, and to collect water resources data (cite applicable DNR statutes). The Department of Environmental Conservation shall ensure that [TO ASSURE] water quality standards are met [UPHELD] (cite applicable DEC statutes). The Department of Fish and Game shall ensure that fish and wildlife and aquatic habitats are protected (AS 16.05.840 and AS 16.05.870). All three agencies shall provide scientific and technical assistance as requested.
- 12[*] The Department of Natural Resources [DIVISION OF WATER] shall systematically collect, record, store, evaluate, and distribute water resources data to determine the quantity, [QUALITY,] location, and use of the state's water resources. Such activities are in the public interest and are necessary for the orderly domestic and industrial development of the state (AS 41.08.017). The Department of Environmental Conservation shall monitor the quality of the state's resources (cite applicable DEC statutes).

OCT 31 1991 11:04 AM ADF2G HABITAT DIVISION

ENCLOSURE 2

P. 4/6

MEMORANDUMDEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RESOURCESOFFICE OF
State of Alaska MANAGEMENT SUPPORT

SEP 5 1991

TO: Harold Heinze
CommissionerDATE: August GOVERNMENTAL
COORDINATION

FILE NO:

RECEIVED TELEPHONE NO. 1 763-2145

FROM: Ric Davidge
Director

DEC 04 1991

SUBJECT: Consolidation of
Water Related
ProgramA.D.E.C.
COMMISSIONER'S OFFICE

As we have discussed the consolidation of water related programs into the new Division of Water would realize significant government wide cost savings, increase program efficiencies, provide one stop shopping for water related permitting and activities, allow better public understanding of state water management and generally be consistent with what other states have done or would like to do.

Upon my arrival I reviewed a number of studies and discussion papers on the way the state of Alaska should organize and manage water related activities. The consistent theme of these reviews, some of which go back 12 years, is that by consolidating water programs the coordination necessary in government to meet the expectations of service and cost efficiency can be better realized by water program consolidation.

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P. 5/6

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The other old political argument that DNR as the "development" agency can not properly manage "regulatory" programs because of some philosophical incompatibility. This is uninformed. The legal standards of performance required of programs now in DEC, for example, do not change if the program is managed by DNR. Compliance requirements are not "relaxed" based on where the program is located, they are driven by law.

One of the things I have heard since arriving is that many involved in regulating the use of resources do not have a good understanding of what that resource is or how it is used. By consolidating water related programs under one Division, the collegial integration that occurs allows for very effective cross training that will lead to increasing the effectiveness of field efforts while decreasing manpower and other cost requirements.

As a three year goal I would like to secure your support and that of CMG and the Governor to complete a government wide consolidation of water programs. This effort will start with a preliminary study of dollars and personnel savings that can be realized with such a consolidation. My target for implementation would begin in the later part of FY93 and completed by FY94. The models used will be based on existing and proposed water organizations in other States. The Western States Water Council has offered to be of assistance already at no cost.

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of pages 1

To	<i>Doug Kasburn</i>	From	<i>Murphy</i>
Co.	<i>FYE</i>	Co.	
Dept.			

L, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
P.O. BOX 0, JUNEAU, ALASKA 99811-1800

Fax: (907) 465-2617
Phone: (907) 465-2600

November 18, 1991

MEMORANDUM

TO: Harold C. Heinze
Commissioner
Department of Natural Resources

John A. Sandor
FROM: John A. Sandor
Commissioner

SUBJECT: Alaska's Water Policies, Regulations and Management

The Department of Environmental Conservation (DEC) staff has reviewed the September 27, 1991 Draft of the State of Alaska Water Policy and had no suggestions for modification of these statements.

I believe the policy statement is excellent, but would like to suggest that the existing processes by which the Federal government, State agencies and local communities regulate and manage the water resources of Alaska should be carefully reviewed and redefined. It is my observation that Federal, State and local government policies, objectives and practices are not effectively integrated (or coordinated); and are sometimes in conflict. These deficiencies are a barrier to the achievement of our water management and related objectives.

As you know, the DEC is engaged in many activities related to water resource protection. We are developing new regulations as mandated by the Safe Drinking Water Act and we are working with the urban and rural communities of the state in the development of public water/waste water systems. I believe our existing water quality regulations and their application to the waters of our State should be revised.

I would like to suggest that our Departments, with participation by ADF&G, EPA, local governments and professional water/waste-water organizations explore the opportunities for reforming and improving the way in which we regulate and manage our water resources. I am convinced that substantial improvements can be made in the organization and administration of these activities.

I believe it would be worthwhile for key members of our staffs to meet with us within the next several weeks to lay out an action plan that will achieve these objectives.

Rodburri

MEMORANDUM STATE OF ALASKA
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of the Commissioner

TO: Harold Heinze
Commissioner
Department of Natural Resources

DATE: November 26, 1991

FILE #:

THRU:

PHONE #: 465-2600

John A. Sandor
FROM: John A. Sandor
Commissioner

SUBJECT: Additional Comments on
Proposed Alaska Water
Policy

My November 18 memorandum to you inadvertently omitted staff comments on the Department of Natural Resources proposed Alaska Water Policy. Please include these with my earlier comments as part of the department's formal response to the proposed policy. Thank you.

DR/mf

RECEIVED
NOV 27 1991
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

staff

DRAFT
CARD #

MEMORANDUM STATE OF ALASKA

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
OFFICE OF THE COMMISSIONER

TO: Harold C. Heinze
Commissioner
Department of Natural Resources

DATE: November 22, 1991

FILE NO.:

FROM: John A. Sandor
Commissioner
Department of Environmental Conservation

PHONE NO.: 465-2600

SUBJECT: Draft State Water Use Policy

The Department of Environmental Conservation submits the attached comments on the Department of Natural Resource's draft State Water Policy. I commend the Department for its efforts to clarify water use policy within its jurisdiction. This is an important step. However, I believe the policy needs to clearly acknowledge the separate authorities and responsibilities of the Departments of Natural Resources and Environmental Conservation. Our proposed revisions suggest language to achieve this.

We have proposed retitling the policy as "State of Alaska Water Use and Management Policy" to reflect that the policy implements only the authorities of the Department of Natural Resources. We have added language to reflect DEC's authorities and responsibilities for protection of water quality, and have suggested minor editing. We also recommend that the Governor's Administrative Order No. 120 be used as a model to clarify the respective responsibilities. This order defines the separate authorities and responsibilities of DNR and DEC in implementation of the Alaska Groundwater Quality Protection Strategy.

Mike Menge, Director of the Division of Environmental Quality, will be meeting soon with members of the Division of Water to discuss the draft State Water Policy. After that meeting, we will be prepared to discuss the proposed policy at a Cabinet-level meeting.

Thank you.

CC: Mead Treadwell
Mike Menge

staff

DRAFT
CARD # _____ BY _____

Attachment

STATE OF ALASKA

WATER USE AND MANAGEMENT POLICY

DEC Comments, 11-15-91

It is the policy of the State of Alaska, through the Department of Natural Resources, Division of Water, to efficiently manage and conserve ~~protect~~, its the state's water resources for the maximum use and benefit of its citizens, consistent with the public interest. In so doing, the state's goal is to maximize public benefits by improving the quality of life of its residents; conserving the natural environment; ~~maintaining and improving the quality of its waters~~; stimulating and encouraging economic development; and protecting life and property.

~~It is acknowledged that the Department of Environmental Conservation has separate authorities and responsibilities not covered under this policy. Specifically, the Department of Environmental Conservation, Division of Environmental Quality, is responsible for preventing and abating pollution of the state's waters and for maintaining and enforcing the Alaska Water Quality Standard.~~

~~The Department of Natural Resources, Division of Water, is responsible for managing use of the state's surface and groundwater resources.~~ To further this policy, the following principles will guide the management of ~~Division of Water in managing~~ Alaska's water resources.

- The state is ~~the conservator~~ both the manager and protector of the public's water resources.
- ~~The state will promote~~ Permit the broadest possible access to and common use of state waters, consistent with the public's best interests (Constitution of Alaska, Article VIII, Section 3).
- Whenever occurring in a natural state, all surface and ground water resources are reserved to the people for common use. Such use and priority for use is ~~are~~ subject to prior appropriation rights; except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law; and subject to the general reservation of water for fish and wildlife (Constitution of Alaska, Article VIII, Sections 3 and 13; and AS 46.15.030).
- No person shall be involuntarily divested of his ~~or her~~ right to the use of waters, or improvements affecting that such use, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law (Constitution of Alaska, Article VIII, Section 16).
- Water resources shall be managed to ensure that adequate supplies of water are reserved for public water supplies; the protection of fish and wildlife habitat, migration, and propagation; recreation and park purposes; navigation and transportation purposes; and sanitary and water quality purposes (AS 46.15.080(b)).

~~State water quality standards shall be judiciously and uniformly enforced among all users:~~

~~The existing quality of water resources will be maintained, or improved to meet minimum water quality standards when feasible and prudent; The Department of Natural Resources shall manage the state's land and water resources to maintain and attain the Alaska Water Quality Standards~~ so that current and future generations of Alaskans will have access to good quality water with which to meet their basic needs.

Water resources planning is integral to wise water management. ~~The state shall conduct the necessary water resources planning to ensure wise use and management of its waters.~~ The state shall encourage public participation in the planning and management of its water resources.

The state will encourage water conservation and public education in its management of water resources.

The Division of Water shall provide for the regulation, supervision, and periodic inspection of privately owned and state-owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, and removal of dams and reservoirs is consistent with the protection of life and property (AS 46.17.010).

The Division of Water shall work cooperatively with the public and other state, local, and federal agencies to administer water rights, to conduct navigability determinations, to collect water resources data, to assure water quality standards are upheld, and to provide scientific and technical assistance as requested.

The Division of Water shall systematically collect, record, store, evaluate, and distribute water resources data to determine the quantity, quality, location, and use of the state's water resources, and to ~~make such data available to the public in a form and manner as may be necessary for the protection of the public interest.~~ Such activities are in the public interest and are necessary for the orderly domestic and industrial development of the state (AS 41.08.017).

Regulatory processes concerning ~~state~~ the state's water resources shall be streamlined. To the extent feasible and prudent, regulatory or jurisdictional duplication among state agencies shall be identified and eliminated.

~~The Department of Natural Resources shall be responsible for the development and implementation of the state's water resources management plan. The plan shall be developed in cooperation with the public and other state, local, and federal agencies. The plan shall be updated periodically to reflect changes in the state's water resources and the needs of the public. The plan shall be a guide for the development and implementation of water resources management programs and policies. The plan shall be subject to periodic review and evaluation by the public and other state, local, and federal agencies. The plan shall be a living document that evolves over time as the state's water resources and the needs of the public change. The plan shall be a key component of the state's water resources management system. The plan shall be developed and implemented in a timely and efficient manner. The plan shall be a model of transparency and accountability. The plan shall be a source of pride for the state and its people. The plan shall be a testament to the state's commitment to the protection and management of its water resources for the benefit of all Alaskans.~~

MEMORANDUM**State of Alaska**

DEPARTMENT OF FISH AND GAME

TO: Harold Heinze
Commissioner
Department of Natural
Resources

DATE: November 15, 1991

FILE NO.:

TELEPHONE NO.: 465-4100

FROM: Carl L. Rosier
Commissioner
Department of Fish and Game

SUBJECT: State Water Policy

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I assume from your reference to a state water policy, your partial reference to statutory authorities of agencies other than DNR, and the enclosed August memorandum by your director of Water Resources, that your intent is indeed for the draft document to reflect the policies of all state agencies with water related authorities. In accordance with past practices, it is essential that a state policy be finalized with the concurrence of all appropriate departments..

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Harold Heinze

- 2 -

November 15, 1991

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Harold Heinze

- 3 -

November 15, 1991

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DRAFT September 27, 1991

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It is the policy of the State of Alaska, [THROUGH ITS DIVISION OF WATER,] to efficiently manage and conserve its water resources for the maximum use and benefit of its citizens, consistency with the public's interest. In so doing, the state's goal is to maximize public benefits by improving the quality of life of its residents; conserving the natural environment; stimulating and encouraging economic development; and protecting life and property. To further this policy, the following principles will guide the management of Alaska's water resources..

- 1[*] The state is the conservator of the public's water resources.
- 2[*] Permit the broadest possible access to common use of state waters, consistent with the public's best interests (Constitution of Alaska, Article VIII, Section 3), and provide "free access to the navigable or public waters of the state . . . except that the legislature may, by general law regulate and limit such access for other beneficial uses or public purposes." (Constitution of Alaska, Article VIII, Section 4).
- 3[*] Whenever occurring in a natural state, all surface and ground water resources are reserved to the people for common use. Such use and priority for use is subject to prior appropriation rights; except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law; and subject to the general reservation of fish and wildlife (Constitution of Alaska, Article VIII, Sections 3 and 13) and (AS 46.15.030).
- 4[*] No person shall be involuntarily divested of his right to the use of waters, or improvements affecting that use, except for a superior beneficial use of public purpose and then only with just compensation and by operation of law (Constitution of Alaska, Article VIII, Section 16).
- 5[*] Water resources shall be managed to ensure that adequate supplies of water are reserved for public water supplies; the protection of fish and wildlife habitat, migration, and propagation; recreation and park purposes; navigation and transportation purposes; and sanitary and water quality purposes (AS 46.15.080 (b)).

Water Policy
Draft Sept. 27, 1991
Page 2 of 3

- 6[*] State water quality standards shall be [JUDICIOUSLY] ~~and~~ uniformly enforced among all users (cite applicable DEC statutes).
- 7[*] [THE EXISTING QUALITY OF] W[w]ater resources will be managed to meet [MAINTAINED, OR IMPROVED TO] minimum water quality standards and to strive for the highest attainable water quality [WHEN FEASIBLE AND PRUDENT,] so that current and future generations of Alaskans will have access to good quality water with which to meet their basic needs.
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- 9[*] The state will encourage water conservation and public education in its management of water resources.
- 10[*] The Department of Natural Resources [DIVISION OF WATER] shall provide for the regulation, supervision, and periodic inspection of privately owned and state-owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, and removal of dams and reservoirs is consistent with the protection of life and property (AS 46.17.010).
- 11[*] The Department of Natural Resources [DIVISION OF WATER] shall work cooperatively with the public and other state, local, and federal agencies to administer water rights, to conduct navigability determinations, and to collect water resources data (cite applicable DNR statutes). The Department of Environmental Conservation shall ensure that [TO ASSURE] water quality standards are met [UPHELD] (cite applicable DEC statutes). The Department of Fish and Game shall ensure that fish and wildlife and aquatic habitats are protected (AS 16.05.840 and AS 16.05.870). All three agencies shall provide scientific and technical assistance as requested.
- 12[*] The Department of Natural Resources [DIVISION OF WATER] shall systematically collect, record, store, evaluate, and distribute water resources data to determine the quantity, [QUALITY,] location, and use of the state's water resources. Such activities are in the public interest and are necessary for the orderly domestic and industrial development of the state (AS 41.08.017). The Department of Environmental Conservation shall monitor the quality of the state's resources (cite applicable DEC statutes).

Water Policy
Draft Sept. 27, 1991
Page 3 of 3

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Supersedes drafts dated 9/19/91 and 9/24/91. All previous versions of the proposed water policy should be discarded.

MEMORANDUM

DEPARTMENT OF NATURAL RESOURCES

TO: The Cabinet and Director, DGC

State of Alaska

DATE: October 11, 1991

FILE NO:

TELEPHONE NO: 465-2400

FROM: Harold C. Heinze
Commissioner

Harold Heinze

SUBJECT: Draft Water Policy
Review

Attached is a draft of the state's water policy dated September 24, 1991. Please take the time to give this proposed policy your careful review and consideration. I would appreciate your written comments concerning this proposed water policy by Nov 15, 1991. If your department does not have any comments, please so indicate.

Written comments may be sent to me directly, or to the Division of Water.

10/23/91
RECEIVED
OCT 23 1991
COMMISSIONER
Heinze

comments
→ *Handwritten to G.*
Division of Water
Meeting next week
Thank you.

RECEIVED
OCT 3 1991
Department of
Environmental Conservation

STATE OF ALASKA WATER POLICY

DRAFT September 27, 1991

Supersedes drafts dated 9/19/91 and 9/24/91. All previous versions of this proposed water policy should be discarded.

It is the policy of the State of Alaska, through its Division of Water, to efficiently manage and conserve its water resources for the maximum use and benefit of its citizens, consistent with the public's interest. In so doing, the state's goal is to maximize public benefits by improving the quality of life of its residents; conserving the natural environment; stimulating and encouraging economic development; and protecting life and property. To further this policy, the following principles will guide the management of Alaska's water resources.

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- Permit the broadest possible access to and common use of state waters, consistent with the public's best interests (Constitution of Alaska, Article VIII, Section 3).
- Whenever occurring in a natural state, all surface and ground water resources are reserved to the people for common use. Such use and priority for use is subject to prior appropriation rights; except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law; and subject to the general reservation of fish and wildlife (Constitution of Alaska, Article VIII, Sections 3 and 13) and (AS 46.15.030).
- No person shall be involuntarily divested of his right to the use of waters, or improvements affecting that use, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law (Constitution of Alaska, Article VIII, Section 16).
- Water resources shall be managed to ensure that adequate supplies of water are reserved for public water supplies; the protection of fish and wildlife habitat, migration, and propagation; recreation and park purposes; navigation and transportation purposes; and sanitary and water quality purposes [AS 46.15.080(b)].
- State water quality standards shall be judiciously and uniformly enforced among all users.
- The existing quality of water resources will be maintained, or improved to minimum water quality standards when feasible and prudent, so that current and future generations of Alaskans will have access to good quality water with which to meet their basic needs.
- Water resources planning is integral to wise water management. The state shall encourage public participation in the planning and management of its water resources.
- The state will encourage water conservation and public education in its management of water resources.
- The Division of Water shall provide for the regulation, supervision, and periodic inspection of privately owned and state-owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, and removal of dams and reservoirs is consistent with the protection of life and property (AS 46.17.010).

- The Division of Water shall work cooperatively with the public and other state, local, and federal agencies to administer water rights, to conduct navigability determinations, to collect water resources data, to assure water quality standards are upheld, and to provide scientific and technical assistance as requested.
- The Division of Water shall systematically collect, record, store, evaluate, and distribute water resources data to determine the quantity, quality, location, and use of the state's water resources. Such activities are in the public interest and are necessary for the orderly domestic and industrial development of the state (AS 41.08.017).
- Regulatory processes concerning the state's water resources shall be streamlined. To the extent feasible and prudent, regulatory or jurisdictional duplication among state agencies shall be identified and eliminated.

Supersedes drafts dated 9/19/91 and 9/24/91. All previous versions of this proposed water policy should be discarded.

OCT 31 1991 ADFEG HABITAT DIVISION

ENCLOSURE 2

P. 4/6

MEMORANDUMDEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RESOURCESOFFICE OF
MANAGEMENT & REPORTS
State of Alaska

SEP 5 1991

TO: Harold Halze
CommissionerDATE: August GOVERNMENTAL
COORDINATION

FILE NO:

TELEPHONE NO. 1 762-2149

FROM: Ric Davidge
DirectorSUBJECT: Consolidation of
Water Related
Programs

As we have discussed the consolidation of water related programs into the new Division of Water would realize significant government wide cost savings, increase program efficiencies, provide one stop shopping for water related permitting and activities, allow better public understanding of state water management and generally be consistent with what other states have done or would like to do.

Upon my arrival I reviewed a number of studies and discussion papers on the way the state of Alaska should organize and manage water related activities. The consistent theme of these reviews, some of which go back 12 years, is that by consolidating water programs the coordination necessary in government to meet the expectations of service and cost efficiency can be better realized by water program consolidation.

At present six state departments have water responsibilities. These include DNR which is mainly focused on water policy, quantity management, water appropriations, water resource research necessary to support ownership and allocations (Fed, state and private), dam and diversion safety and state ownership of submerged lands.

The other water programs located in DEC, ADFEG, CRA, DOT/PT, CID and the Alaska Energy Authority include:

- Erosion Control
- Flooding
- Transportation System Crossings (roads/rail)
- Stream Restoration
- Stream Reclamation
- subdivision Review
- Hydrologic Management & Multiple Uses
- Village Safe Water
- Title 16 Permitting
- Wetlands
- Water Labs (now two - one in Umanau and one in Fbks)
- Waste Water
- Drinking Water

The old political argument that you need checks and balances in government is not consistent with the original intent of checks and balances in the Fed. Judicial and Leg branches not

OCT 31 '93: 11:37:41 WDF&G-HABITAT DIVISION

P. 5/6

three or four different agencies in order to accomplish a single project. This inefficiency also cost the State of Alaska a great deal of time and money.

The other old political argument that ONR as the "development" agency can not properly manage "regulatory" programs because of some philosophical incompatibility. This is uninformed. The legal standards of performance required of programs now in DEC, for example, do not change if the program is managed by ONR. Compliance requirements are not "relaxed" based on where the program is located, they are driven by law.

One of the things I have heard since arriving is that many involved in regulating the use of resources do not have a good understanding of what that resource is or how it is used. By consolidating water related programs under one Division, the collegial integration that occurs allows for very effective cross training that will lead to increasing the effectiveness of field efforts while decreasing manpower and other cost requirements.

As a three year goal I would like to secure your support and that of CMS and the Governor to complete a government wide consolidation of water programs. This effort will start with a preliminary study of dollars and personnel savings that can be realized with such a consolidation. My target for implementation would begin in the later part of FY93 and completed by FY94. The models used will be based on existing and proposed water organizations in other states. The Western States Water Council has offered to be of assistance already at no cost.

I recognize that this effort has some political problems, but put in the context of better government and lower cost - and given the concerns of many water user constituencies in the face of budget reductions I believe it can sell and be implemented.

I have inclosed a copy of a proposed program organization with program areas outlined under the various sections. Please review this concept as you consider your decision.

Post-It™ brand fax transmittal memo 7671 # of pages > 1

To	<i>Doc Redburn</i>	From	<i>Mertha</i>
Co.	<i>FYI</i>	Co.	
Dept.			

L. GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
P.O. BOX 0, JUNEAU, ALASKA 99811-1800

Fax: (907) 465-2617
Phone: (907) 465-2600

November 18, 1991

MEMORANDUM

TO: Harold C. Heinze
Commissioner
Department of Natural Resources

FROM: *John A. Sandor*
John A. Sandor
Commissioner

SUBJECT: Alaska's Water Policies, Regulations and Management

The Department of Environmental Conservation (DEC) staff has reviewed the September 27, 1991 Draft of the State of Alaska Water Policy and had no suggestions for modification of these statements.

I believe the policy statement is excellent, but would like to suggest that the existing processes by which the Federal government, State agencies and local communities regulate and manage the water resources of Alaska should be carefully reviewed and redefined. It is my observation that Federal, State and local government policies, objectives and practices are not effectively integrated (or coordinated); and are sometimes in conflict. These deficiencies are a barrier to the achievement of our water management and related objectives.

As you know, the DEC is engaged in many activities related to water resource protection. We are developing new regulations as mandated by the Safe Drinking Water Act and we are working with the urban and rural communities of the state in the development of public water/waste water systems. I believe our existing water quality regulations and their application to the waters of our State should be revised.

I would like to suggest that our Departments, with participation by ADF&G, EPA, local governments and professional water/waste-water organizations explore the opportunities for reforming and improving the way in which we regulate and manage our water resources. I am convinced that substantial improvements can be made in the organization and administration of these activities.

I believe it would be worthwhile for key members of our staffs to meet with us within the next several weeks to lay out an action plan that will achieve these objectives.

Robberson

MEMORANDUM STATE OF ALASKA
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of the Commissioner

TO: Harold Heinze
Commissioner
Department of Natural Resources

DATE: November 26, 1991

FILE #:

THRU:

PHONE #: 465-2600

Handwritten:
Office
Hair

FROM: John A. Sandor
Commissioner

SUBJECT: Additional Comments on
Proposed Alaska Water
Policy

My November 18 memorandum to you inadvertently omitted staff comments on the Department of Natural Resources proposed Alaska Water Policy. Please include these with my earlier comments as part of the department's formal response to the proposed policy. Thank you.

DR/mf

NOV 27 1991

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

STATE OF ALASKA

WATER USE AND MANAGEMENT POLICY

DEC Comments, 11-15-91

It is the policy of the State of Alaska, through the Department of Natural Resources, Division of Water, to efficiently manage and conserve protect, its the state's water resources for the maximum use and benefit of its citizens, consistent with the public interest. In so doing, the state's goal is to maximize public benefits by improving the quality of life of its residents; conserving the natural environment; maintaining and improving the quality of its waters; stimulating and encouraging economic development; and protecting life and property.

~~It is acknowledged that the Department of Environmental Conservation has separate authorities and responsibilities not covered under this policy. Specifically, the Department of Environmental Conservation, Division of Environmental Quality, is responsible for preventing and abating pollution of the state's waters and for maintaining and enforcing the Alaska Water Quality Standards.~~

~~The Department of Natural Resources, Division of Water, is responsible for managing use of the state's surface and groundwater resources. To further this policy, the following principles will guide the management of Division of Water in managing Alaska's water resources.~~

- ~~The state is the conservator both the manager and protector~~ of the public's water resources.
- ~~The state will promote~~ Permit the broadest possible access to and common use of state waters, consistent with the public's best interests (Constitution of Alaska, Article VIII, Section 3).
- Whenever occurring in a natural state, all surface and ground water resources are reserved to the people for common use. Such use and priority for use are subject to prior appropriation rights; except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law; and subject to the general reservation of water for fish and wildlife (Constitution of Alaska, Article VIII, Sections 3 and 13; and AS 46.15.030).
- No person shall be involuntarily divested of his ~~other~~ right to the use of waters, or improvements affecting that such use, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law (Constitution of Alaska, Article VIII, Section 16).
- Water resources shall be managed to ensure that adequate supplies of water are reserved for public water supplies; the protection of fish and wildlife habitat, migration, and propagation; recreation and park purposes; navigation and transportation purposes; and sanitary and water quality purposes (AS 46.15.080(b)).

- ~~State water quality standards shall be judiciously and uniformly enforced among all users.~~
- ~~The existing quality of water resources will be maintained, or improved to meet minimum water quality standards when feasible and prudent. The Department of Natural Resources shall manage the state's land and water resources to maintain and attain the Alaska Water Quality Standards so that current and future generations of Alaskans will have access to good quality water with which to meet their basic needs.~~
- Water resources planning is integral to wise water management. ~~The state shall conduct the necessary water resources planning to ensure wise use and management of its waters.~~ The state shall encourage public participation in the planning and management of its water resources.
- The state will encourage water conservation and public education in its management of water resources.
- The Division of Water shall provide for the regulation, supervision, and periodic inspection of privately owned and state-owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, and removal of dams and reservoirs is consistent with the protection of life and property (AS 46.17.010).
- The Division of Water shall work cooperatively with the public and other state, local, and federal agencies to administer water rights, to conduct navigability determinations, to collect water resources data, to assure water quality standards are upheld, and to provide scientific and technical assistance as requested.
- The Division of Water shall systematically collect, record, store, evaluate, and distribute water resources data to determine the quantity, quality, location, and use of the state's water resources, ~~and shall work cooperatively with the public and other state, local, and federal agencies in these activities.~~ Such activities are in the public interest and are necessary for the orderly domestic and industrial development of the state (AS 41.08.017).
- Regulatory processes concerning use of the state's water resources shall be streamlined. To the extent feasible and prudent, regulatory or jurisdictional duplication among state agencies shall be identified and eliminated.
- ~~The Department of Natural Resources shall undertake a coordinated effort to implement the Alaska Groundwater Protection Strategy as directed by the Governor's Administrative Order No. 120. Agency responsibilities for the protection of groundwater resources are itemized in the order. In general, the Department of Natural Resources shall be the lead agency in collecting groundwater data, investigating aquifer and groundwater characteristics, and managing the use of groundwater. The Department of Environmental Conservation shall be the lead agency in investigating actual or potential sources of groundwater contamination.~~

MEMORANDUM

State of Alaska

DEPARTMENT OF FISH AND GAME

TO: Harold Heinze
Commissioner
Department of Natural
Resources

DATE: November 15, 1991

FILE NO.:

TELEPHONE NO.: 465-4100

SUBJECT: State Water Policy

FROM: Carl L. Rosier
Commissioner
Department of Fish and Game

As requested in your enclosed October 24 memorandum, we have reviewed your September 27 proposal for a state water policy.

I assume from your reference to a state water policy, your partial reference to statutory authorities of agencies other than DNR, and the enclosed August memorandum by your director of Water Resources, that your intent is indeed for the draft document to reflect the policies of all state agencies with water related authorities. In accordance with past practices, it is essential that a state policy be finalized with the concurrence of all appropriate departments..

Before getting into specific details of your September 27 proposal, it is important that the Resource Cabinet and the governor come to terms with the implicit assumption in your proposed draft that all water related statutory authorities and responsibilities of other agencies be shifted to DNR. I do not concur that all water conservation authority be vested in the Division of Water within DNR.

ADF&G is fully supportive of developing a state of Alaska water policy that incorporates water related authorities and responsibilities across department lines. My Department is also committed to providing a streamlined regulatory process consistent with our statutory responsibilities and authorities.

The degree and extent to which the management of renewable and nonrenewable natural resources features in the affairs of Alaska is unparalleled in any other state in this country, and it is for good reason that those organizing state government following statehood chose to establish separate Departments of Fish and Game, Natural Resources, and Environmental Conservation. Contrary to the Division of Water Resources suggestion, it is the checks and balances between these departments that help to ensure that natural resource management decisions are made in the overall best interest of Alaskans. Those who advocate combining the basic statutory responsibilities of the three resource agencies under one department in the name of increased government efficiency invite a public perception that, first, there is significant duplication of effort between the departments and, second, that an effort is being made to manipulate the interdisciplinary process

Harold Heinze

- 2 -

November 15, 1991

by which agency decisions are derived. The reality is that, overall, resource agency authorities complement rather than duplicate one another.

I am prepared to discuss this important subject with you and other cabinet members. The following are (1) more specific comments regarding your September 27 proposal, and (2) a revision of your proposed policy which reflects our comments.

Preamble. For the policy to be statewide in scope, the preamble needs to reflect the statutory authorities and responsibilities of ADF&G and DEC that relate to water quality or aquatic habitat protection.

Item 2. Article VIII, Section 14 of the Alaska Constitution provides for the "free access to the navigable or public waters of the state . . . except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes." This constitutional language should be cited and reflected in the policy.

Item 6. The term, "judiciously," should be dropped because it implies that the state needs a policy to make an informed decision on whether to enforce water quality standards. Inasmuch as DEC is responsible by statute for implementing the state's water quality standards, that department's statutory authority for doing so needs to be cited. There are ample discretionary authorities available to DEC.

Item 7. The policy should be to meet minimum water quality standards and to strive for the highest attainable water quality rather than simply "good" water quality. Again, it is DEC which has the statutory responsibility to enforce water quality standards, and the insertion of "when feasible and prudent" into your proposed policy is inconsistent with DEC statutes.

Item 8. AS 38.04.065 requires DNR to "provide for meaningful participation in the planning process by affected local governments, state and federal agencies, adjacent landowners, and the general public." To say that the state shall "encourage" public participation does not adequately reflect this.

Item 11. The language, "to assure water quality standards are upheld," should be deleted. DNR does not have the statutory authority to accomplish this. Rather, the legislature, under AS 46.03.020, has charged DEC with the authority to ensure that state water quality standards are upheld.

Harold Heinze

- 3 -

November 15, 1991

Item 13. This item should be changed to read, "State agencies shall ensure that regulatory processes involving the state's water resources are efficient and that, to the extent feasible, regulatory or jurisdictional duplication among state agencies is avoided." This rewording removes the presumption that inefficiency and duplication exist and simply indicates agency responsibility to see that it does not.

In reality, there are a number of procedural mechanisms in place that are intended to ensure efficiency and to avoid duplication of effort, and these should be capitalized upon. One example is the tri-agency project review process for placer mining projects. That policy provides for one-stop permit application for miners as well as coordinated field assistance and enforcement actions by the three resource agencies. Another example consists of the regulatory procedures governing the multiagency reviews of projects within the coastal zone. The point is that we should continue to implement those process which are working well, fine-tune those in need of adjustment, and fix any that it can be demonstrated are inadequate.

In the area of water management per se, the basic statutory division of labor between the resource agencies is clear. DNR regulates water appropriations which include diversions; DEC regulates wastewater discharges; and ADF&G regulates uses in anadromous and resident streams, applies to DNR for instream flow reservations, and applies to DNR for water appropriations for activities or facilities such as fish hatcheries.

An area of state water management that we believe is in need of streamlining is DNR's water appropriation adjudication process. Many applicants wait years to obtain a decision on their water rights and there continues to be a backlog of appropriation applications.

In closing, a meaningful state policy needs to reflect the statutory water management responsibilities of other state agencies as well as DNR. As indicated above, we are prepared to continue working with you and other appropriate agencies toward this end.

Enclosures

cc: The Cabinet
Paul Rusanowski, Director, DGC

NOVEMBER 12, 1991 ADF&G MARKUP
OR

STATE OF ALASKA WATER POLICY

DRAFT September 27, 1991

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Water Policy
Draft Sept. 27, 1991
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Water Policy
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Supersedes drafts dated 9/19/91 and 9/24/91. All previous versions of the proposed water policy should be discarded.

MEMORANDUM

State of Alaska
Department of Natural Resources - Division of Land and Water
Management

TO: Gary Gustafson
Director

DATE: March 7, 1991

TELEPHONE NO: 762-2680

SUBJECT: Selling Alaskan Water

FROM: Mary Lu Harle
Water Resources Manager

MLH

You asked me to contact the Attorney General's Office concerning whether there are any constitutional problems with selling and exporting Alaska's water to other states. I contacted Mike Frank and we discussed the issue. He concluded, as I had, that a state would have to apply for and receive an appropriation to divert, use, and export water from Alaska in compliance with the Alaska Constitution, Article VIII, Section 13, and AS 46.15. This would be similar to the collection and exportation of glacial ice. The provisions of Sporhase v. Nebraska would apply. A short discussion of this case and its implications is attached, excerpted from the draft report on interregional water transfers being written by the Western States Water Council.

Mike and I also discussed collecting revenue from the sale of water. He concluded that a new statute rather than simply a new regulation would be needed to allow Alaska to charge for the use of water or to sell water as a resource commodity. Presently, AS 46.15.020(b)(4) allows DNR to prescribe fees or service charges for any public service rendered. Selling water as a commodity would go beyond this statute however thus a new statute addressing a user or sale charge would be needed.

cc: Mike Frank
Ron Swanson
Regional Water Officers

complex under current state water laws. Three areas of major importance in this regard are export statutes, public interest protection, and area-of-origin protection.

1. Export Statutes

Traditionally, western states were flexible relative to conveyance of water from its natural location to any other place of beneficial use, providing, however, the conveyance did not cross state lines. Out-of-state conveyance was often allowed, but carefully restricted. The restrictions varied from state to state. In some instances states enacted embargo statutes that strictly prohibited water export. The states assumed the power to require such restrictions on the theory that the waters of the state were owned by the state, or owned by the "public" and held by the state.

This assumption was challenged in a case involving a Nebraska statute that restricted out-of-state export of water to other states that reciprocally allowed import of water into Nebraska. In 1982, in Sporhase v. Nebraska ex rel. Douglas,¹⁰ the Supreme Court held that state water "ownership" as articulated under Nebraska law was a legal fiction, and that water is a commodity in

¹⁰ 458 U.S. 941 (1982).

interstate commerce.¹¹ Therefore, the Court analyzed the Nebraska statute¹² as one which discriminated against interstate commerce. The Court has required a statute regulating the interstate movement of an article in commerce to regulate evenhandedly and to be narrowly drawn to promote only permissible local interests.' The Nebraska reciprocity statute failed the test and was struck down by the Supreme Court.¹³

Relying on Sporhase, a federal district court in New Mexico, struck down a New Mexico statute that placed an absolute embargo on out-of-state transfers of ground water.¹⁴ The court pointed out that ground water in New Mexico had been treated as a commodity for purposes of intrastate transfer and that New Mexico could not deny that status simply because a particular transfer was to an out-of-state municipality.

These important rulings changed the way interstate transfer of water was viewed in the West, but they did not portend the unfettered purchase and sale of water West-wide. Some restrictions are allowed. Also, the Supreme Court acknowledged in Sporhase that the nature of water resources required a somewhat different and

¹¹ Id. at 958.

¹² Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

¹³ Sporhase, 458 U.S. 941.

¹⁴ City of El Paso v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983), later proceeding, 597 F. Supp. (D.N.M. 1984).

more careful commerce clause review than the traditional analysis.¹⁵
The Court said that protection of the public welfare and the conservation of water were legitimate bases for regulating the transfer of water rights. It also said that a demonstrably arid state should be able to assert a preference for its citizens in times of water shortage. Further, the Court suggested that if the state had a real plan for using its water resources, rather than simply a theoretical, anticipated future need, the state could exercise a limited preference for in-state use.

The states have responded in different ways to Sporhase. Some states did not amend their export statutes after Sporhase was handed down. In several instances, however, states changed their statutes to comply with the Sporhase decision. Nine states, Arizona, Arkansas, Colorado, Idaho, Kansas, Montana, Nebraska, New Mexico, and Wyoming, specifically allow out-of-state transfer of water under certain conditions. All have public welfare and conservation of water, among other things, as criteria that must be considered when out-of-state transfers are proposed. Five states have set up complicated administrative processes by which out-of-state transfers must be judged, or have required legislative approval of such transfers.

¹⁵ Sporhase, 458 U.S. at 956.

Kansas has enacted an unusual, but evenhanded, twist on the appropriation doctrine. Its statute says that if water is to be diverted and conveyed more than a certain distance from the point of diversion, regardless of whether the point of use is in or out of state, a complex administrative process must be followed.

There are still some states that prohibit the export of water or whose statutes contain a reciprocity provision similar to that in the statute found unconstitutional in Sporhase. Regardless of what a statute might currently say, the Sporhase standard is the standard by which statutes pertaining to interstate water transfers will be judged if legally challenged.

The recognition of water as an article of interstate commerce seems to provide a solid foundation for interregional water transfers. However, as previously noted, states can legitimately impose some instructions tied to conservation of water and protection of public welfare interests. The conservation requirements must be based upon a practical evaluation of the need by the state for the water. Although public welfare interests were not defined by the Supreme Court in Sporhase, they would presumably include at a minimum health and welfare interests and state concern for environmental quality.

Also, the Sporhase analysis does not apply to water diverted pursuant to a congressionally approved compact between two or more

states. For example, under the Yellowstone River Compact unanimity of three signatory states is required before any out-of-basin transfer may be made. Without the benefit of a congressionally approved compact, application of this provision would likely violate commerce clause principles. However, in Intake Water Co. v. Yellowstone River Compact Comm'n,¹⁶ the Ninth Circuit Court of Appeals held that congressional approval of the compact immunized its provisions from constitutional challenge under the commerce clause. Similarly, Sporhase does not apply where there has been an equitable apportionment of a watercourse by the Supreme Court pursuant to its original jurisdiction.

In the future, states may choose to turn more to congressionally approved compacts with other states and equitable apportionments as means to avoid the impacts of the Sporhase decision. Alternately, states may rely on conservation and public welfare protection interests to seek greater control of their water resources.

Further, some observers believe, that in an appropriate factual setting, the Supreme Court might be convinced that the initial granting of an appropriative water right for use out-of-state is something different than the sale of a vested water right for use out-of-state. This is because the initial appropriation

¹⁶ 769 F.2d 568 (9th Cir. 1985), cert. denied, ___ U.S. ___ (1986).

of water is made under a permit issued by a state subject to whatever criteria that state imposes. It is not a market transaction like the sale of a vested water right, and the Sporhase analysis may not apply.

The Supreme Court in Sporhase hinted at another option whereby states can legitimately take greater control of their water resources by citing Reese v. State.¹⁷ This case involved the state acting as a market participant. The Supreme Court has carved out an exception to traditional commerce clause principles where states act as market participants, acquiring assets through the use of taxpayers money and distributing the wealth derived from ownership of those assets to state citizens. Although no cases have developed this doctrine with respect to water, important cases have been decided involving solid waste disposal.¹⁸ In all of those, the circuit courts of appeals have held that where a state has spent taxpayers money and developed infrastructure for a garbage dump, it has the right to refuse access to that dump to those hauling interstate garbage. Relying on the reasoning of those cases, New Mexico, with 100% state financing, built a reservoir and stores water in the reservoir that is appropriated in the name of the state. State officials opine that, regardless of Sporhase, such water is unavailable for out-of-state use unless New Mexico, in its

¹⁷ Sporhase, 458 U.S. at ____.

¹⁸ [DuMars article to be published]

unfettered discretion, chooses to allow the water to be used out-of-state.¹⁹

In summary, the principles upon which the appropriation doctrine is based imposes no special barriers to the interregional transfer of water. Traditionally, however, states acted to restrict the diversion of water for uses outside their borders. In 1982 the Supreme Court held in Sporhase that water is an article in interstate commerce and that commerce clause principles that protect the free flow of trade between states apply to statutes governing interstate water use. The Court, however, recognized some exceptions to the commerce clause analysis, and there are other limited circumstances under which a state may act to protect its interest in use of water within the state, as opposed to out-of-state use. In any event, proponents of interregional transfer projects must follow state law governing interstate water transfers, provided that such law is consistent with Sporhase and related cases.

2. Public Interest Criteria

In addition to amending export statutes, some states have recently acted to further public interest protection under state water law. Increasingly, state water laws regulating transfers

¹⁹ [DuMars speech at Symposium]

DEPARTMENT OF FISH AND GAME

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July 21, 1987

I.700.400.500 350

Ms. Mary Lu Harle
Alaska Department of Natural Resources
Water Management
Pouch 7-005
Anchorage, AK 99510

Dear Ms. Harle: *Mary Lu*

Re: Interstate Water Transfer

Per the attached article from "U.S. Water News," I am curious whether your agency has been in contact with the Alaska Congressional delegation and/or the Western States Water Council regarding interstate water transfers.

I do not know whether or how "demonstrated instate need" was defined by the U.S. Supreme Court decision in Sporhase v. Nebraska. However, I would suggest that it would be in the interest of the state of Alaska to determine whether federal legislation is required to insure that the definition of "a demonstrated instate need" (for water) encompasses instream flow reservations in addition to out of stream flow appropriations.

Because Alaska contains one third of the nation's freshwater, it is likely that any legislation that passes on this topic will affect us.

Also, please send me a copy of the Sporhase case if you have one.

Thanks.

Sincerely,

Christopher Estes

Christopher Estes
Statewide Instream Flow Coordinator,
Research and Technical Services
Division of Sport Fish
(907) 267-2142

Attachment

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Water transfers are inevitable

By Loran Schmit
Nebraska State Senator

Commercial marketing of water represents one of the most emotionally charged resource management issues ever to face the citizens and elected officials of Nebraska. Many are concerned about possible damage to the environment; others fear that farmers and ranchers will be left literally high and dry; others simply claim such transfers are not economically or physically feasible.

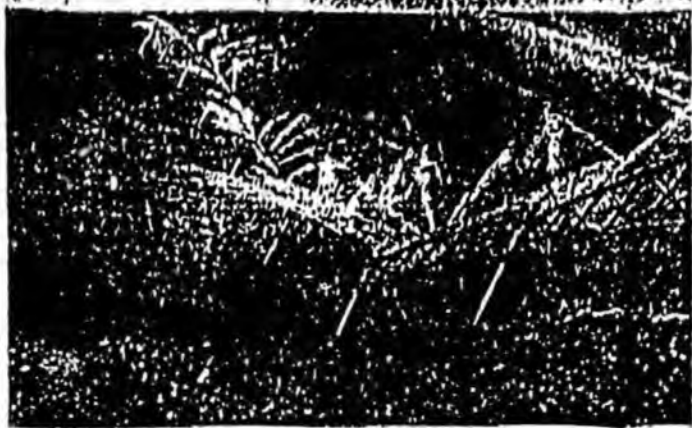
While these concerns are legitimate, they should not combine to intimidate those of us in positions of responsibility from studying the issue in-depth, reviewing our options, and producing a medium- to long-range plan for the management of one of our most valued resources.

LB 146, which I introduced, was passed this year by the Nebraska Legislature to assess the current legal, environmental, and economic framework for water marketing, and

already be in surplus and, therefore, contribute even further to the depressed economy.

The LB 146 process will hopefully provide a sound decision-making framework from which sound policy can emanate. And if interstate transfers of water are inevitable, as I feel they are, every effort should be made to ensure such transfers are carried out in a manner that is environmentally sound, economically feasible, and equitable to all parties affected.

Senator Schmit, a Nebraska legislator for 14 years, is chairman of the Legislature's Committee on Natural Resources.



Agricultural water: Saleable commodity, valued future resource — or both?

Individual states are no longer free to prohibit the interstate transfer of water, absent a demonstrated in-state need.

to identify the various positions and roles the state of Nebraska could take to this area.

LB 146 faces much opposition, even though it does nothing more than provide for a study of the water marketing issue. Many people in Nebraska simply feel that it is our water, that we can do — or not do — with it as we see fit, and that therefore we should not even discuss the possibility of transferring water to other states. In my opinion, this is a very dangerous position to take, particularly in view of the 1982 United States Supreme Court decision in *Sporhase v. Nebraska*.

While many facets of the *Sporhase* decision remain unclear and will have to wait for further judicial elaboration, one message comes across distinctly: Individual states are no longer free to prohibit the interstate transfer of water, absent a demonstrated in-state need. Furthermore, if such a transfer were to take place, there is no provision currently in the law that would require the payment of compensation.

Viewed in this light, the LB 146 process may provide some protection from out-of-state transfers of water, particularly uncompensated transfers if Nebraska Senator Loran Schmit has said, "... If the water we pour on crops is more valuable than the crop itself, then I believe the time has come to consider the possibility of making some money selling water."

Nebraska is fortunate in that it enjoys abundant supplies of high quality groundwater. The lion's share of this water is located in the Sandhills region of the state, which provides rapid recharge of the underlying aquifer but is only marginally suitable for crop production. If surplus water can be transferred to an area of shortage, then I am confident the courts, if not our own sense of equity, will permit us to do otherwise.

The matter of compensation is secondary but significant. Nebraska farmers and ranchers, many of whom are suffering from severe financial hardships, should at least have the choice of following the diversion of a portion of the water located on their land in exchange for monetary compensation — or they can continue to use it to grow crops that may

Water is too valuable for the future to sell today

By Bryce Noldig
President

Nebraska Farm Bureau Federation

In 1949, my family took an extended vacation throughout the western United States. As we prepared to drive across the Mojave Desert, we stopped at a filling station to fill our water bag. We had to pay for that water. As a teenage Nebraska farm boy, I could hardly comprehend why anyone would either charge for or pay for water.

Now in 1987, we in Nebraska have seen legislation introduced to enable us as a state and as individuals to sell our water. Those who advocate this approach have argued this would be one way in which to improve the financial condition of some farmers. But should we be willing to sell our souls for 30 pieces of silver?

Nebraska Farm Bureau Federation has a long-standing policy to develop Nebraska's water resources to the greatest benefit for the citizens of the state. We have great reservations, however, about the concept of selling water, particularly to out-of-state purchasers, because of the possible long-term consequences this

concept presents not just to agriculture, but to all Nebraskans.

The idea of selling water has brought to the forefront a number of legal and social questions which need further research and documen-

Both surface water and groundwater are more valuable to us in the future than any price we could currently receive.

tion. Numerous factual and mythical perceptions of our water resources need to be resolved before Nebraska considers selling its water.

Looming over this entire debate is the traditional perception that there is an excess of water and that, if citizens don't use it, they'll lose it. The concern of our members however, is that, once we lose it or sell it, can we ever get it back if we need it? In other words, what may be considered as "excess" or "surplus" water today may be vital for agriculture and

economic development tomorrow. Reaction to the immediate is not always in our long-term best interest.

With the largest portion of the world-famous Ogallala Aquifer underlying the state of Nebraska, perhaps we should recognize that we really do hold this great natural resource in trust, not only for Nebraskans, but for all people.

We are firmly convinced that both surface water and groundwater are more valuable to use in the future than any price we could currently receive, especially for a state such as Nebraska, which needs to diversify its economy. If, as the proponents of the sale of water argue, Nebraska's water is needed elsewhere for industry, we invite industry to come to our state, establish their business here, and share in the growth.

All in all, it just makes good sense to keep and use wisely one of life's most precious resources, rather than to simply turn it into nothing more than a commodity to be bought and sold. To do otherwise is shortsighted, if not downright irresponsible.

Bryce Noldig has been president of Nebraska Farm Bureau Federation for nearly 20 years.

Freshwater Perspective

Water plans can allow for present and future needs

The agricultural economics of the nation are shifting dramatically and, as the economic base of any industry shifts, so does its political clout. Nebraska has been grappling with this issue ever since realizing that its water supplies were more valuable than \$1.30-per-bushel corn and \$2-per-bushel wheat. As Nebraska Senator Loran Schmit has said, "... If the water we pour on crops is more valuable than the crop itself, then I believe the time has come to consider the possibility of making some money selling water."

Senator Schmit brings up a significant and sensitive point: How can states benefit from the changing economics of the West? The increasing need for water supplies by Western cities, along with their ability to pay top dollar for those supplies, is fostering the reallocation of water from agriculture to municipalities. Expanding urban areas may become the new bumper crop of the West.

There are, however, many people, particularly these in the agricultural community, who decry "selling Nebraska's future." Concern focuses on ramifications such as groundwater depletion, declining real estate values, reduced property tax income and the decline of many rural communities that could occur if farmers begin to sell their water rights.

These are important concerns that must be examined.

Yet Western water law, like Western economics, is changing. The Supreme Court case of *Sporhase v. Nebraska* states that water is an article of commerce and, as such, cannot be prohibited from being sent across state lines. The *El Paso v. Reynolds* case pending in district court could further encourage the in-

A thoughtful plan can accommodate both the present and the future, avoiding the need to make rigid 'either-or' decisions.

terstate transfer of water. This case, which involves the right of Texas to drill 326 wells just across the border in New Mexico to provide water for the people of El Paso, states that the need of El Paso's citizens for water takes precedence over New Mexico's ownership — a rather significant statement.

The caveat in the *El Paso* ruling is that El Paso's use of New Mexico water cannot threaten the health and welfare of New Mexico's citizens. New Mexico, therefore, is carefully

assessing and quantifying its future water requirements in order to protect those resources truly needed by the state.

One of the important byproducts of these court cases has been the development of long-range state water plans, which in the end may provide the only real means of protecting local water resources.

As states begin to assess and quantify their future water needs, they can build into these plans the flexibility needed to respond to current economic realities as well as future contingencies. A thoughtful plan can accommodate both the present and the future, avoiding the need to make rigid "either-or" decisions.

The true potential effect of water marketing on agriculture needs to be kept in perspective. Agriculture holds the rights to 85 percent of the water in the West, and a yield of only about 10 percent of that water would provide sufficient additional supplies into the 21st century.

The real question is not whether agriculture will survive water marketing — it will. Percentage-wise, urban needs are not large enough to threaten the agricultural economy as a whole. The critical question for the future of agriculture is how effectively and efficiently it uses the remaining 75 percent.