ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7145 HOUSE RESOURCES

WESTERN STATES WATER COUNCIL

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February 21, 1992

Ms. Heather Bradner
Legislative Staff
Representative Cliff Davidson
State Capitol
Juneau, AK 99801

Dear Heather:

Tony Willardson of our staff has advised me of your request to join by conference call the joint meeting of the House Resources Committee and the Water Board. He has also indicated the areas that you would like to discuss with us, including our views with regard to proposed legislation regarding water use fees on water exports and establishing instream flows. While we are flattered by the request, the nature of our organization is such that we will not be able to offer an opinion regarding the merits of such proposed legislation. I, therefore, do not believe that we would be able to participate constructively in the discussion. However, I do want to enclose some information that in my opinion may be helpful to the meeting participants in comparing and evaluating these proposals.

Let me first explain the nature of our organization. The Western States Water Council was formed by the Western Governors' Conference in 1965. Our members are appointed by the governors and serve at the pleasure of the governors. As they are directly accountable to governors, we likewise are directly accountable to them. In your case, Rio Davidge is the lead representative from Alaska. The governor has also appointed Mike Menge, Director of the Division of Environmental Quality, as a Council member. A member of the Board has also been serving, although that spot is temporarily vacant.

A primary purpose of the Council is to provide a forum for the exchange of views and perspectives among the member states and to provide information regarding federal and state developments in order to assist member states in evaluating impacts of federal laws and programs and the effectiveness of state laws and policies. We also provide a collective voice for western states regarding matters pertaining to national policy. For example, we have been heavily involved with Alaska and other western state representatives in discussions regarding the reauthorization and amendment of the Clean Water Act and national wetlands policy. When there is a consensus among our member states, we believe we can provide an effective forum for expressing that consensus to Congress and the Administration.

However, while expressing positions with regard to proposed federal laws and policies, we have not attempted to render judgment with regard to proposed state laws and policies. Rather, we have provided a forum for exchange of information and have generated reports and studies that deal with issues of common concern to our member states. They are then in a position to better evaluate the merits of their own laws and policies and proposed changes and additions to those laws and policies.

For example, at Mr. Davidge's request, we helped facilitate the gathering of information regarding water use fees imposed by our member states, as well as how our various member states are organized to address water resource management. Mr. Davidge has copies of all the information that was gathered as a result of this effort, and I am sure he would be most pleased to share them with you. He also has a copy of a report prepared in the Oregon Governor's Office which attempts to summarize the use of water fees in the West.

With respect to the associated question of the imposition of water use fees on water exported out of the state, in light of the Supreme Court's decision in Sporhase, this was also a matter of considerable discussion within the Council. One of the work products that resulted is a law review article prepared by Norm Johnson, our Legal Counsel, and Charles DuMars, Professor of Law at the University of New Mexico and also a Council member. I am enclosing a copy of that portion of the article which discusses the Sporhase decision and how states have responded to that decision.

We have also spent considerable time examining instream flow protection in the West. We previously sent you a copy of the proceedings of a symposium which the Council sponsored on the subject.

In summary, we found that a considerable range exists within our member states regarding the extent and methods by which they protect instream flow values. For example, New Mexico contains no express provisions for instream flow protection, but instead relies on interstate compacts, international treaties, federal court decrees, and existing water rights, as well as geography and public land ownership patterns, to provide protection for instream values.

California recognizes the use of water for recreation and preservation and enhancement of fish and wildlife resources as a beneficial use of water. However, diversion or impoundment of water must be made to establish an appropriative right. So the state may grant a right to impound water for use downstream from the impoundment to enhance fish and wildlife habitat. Such a right may be issued to a public or private entity.

A state agency in Oregon and other states may protect instream flows under state public interest statutes by imposing terms and conditions to be included in appropriative rights to maintain bypass flows.

In Montana, a public entity may acquire a water reservation to secure the equivalent of a right for an instream flow. The law provides that reservations for the maintenance of minimum flow, level, or quality of water may make up to a maximum of 50% of the average annual flow of gauged streams. Laws in California, Oregon, and Washington also provide for reservation of water by a state agency, pursuant to a similar process.

Wyoming considers instream flow and storage of water for release to maintain instream flow to be beneficial uses under certain conditions, and has established a procedure for appropriating water for such uses. Utah has enacted a similar statute. It allows for acquisition of established water rights by the state to "provide water for instream flows in natural channels necessary for the preservation or propagation of fish within a designated section of a natural stream channel."

In Washington, the legislature declared that the policy of the state was "that a flow of water sufficient to support game, fish, and foodfish populations be maintained at all times in the streams of

the state." The statute allows the Department of Ecology director to refuse to issue permits where instream flow needs would be harmed. Often, rather than deny permits, the Department issues them with conditions protecting instream flows. The Department of Ecology, on its own, or when requested by the Department of Fisheries, may establish minimum streamflows and lake levels to protect fish and wildlife resources.

Since my letter of January 29th, I have had a chance to review Alaska law in this area. Our information indicates that Alaska law allows for the reservation of water for the following instream uses: (1) protection of fish and wildlife habitat, migration and propagation; (2) recreation and park purposes; (3) navigation and transportation purposes; and (4) sanitary and water quality purposes. The statute authorizes local, state, and federal agencies, as well as private individuals, to apply for reservations for instream uses.

The process to secure such a reservation includes the following steps: the filing of an application, public notice, evaluation of the effects of the proposed reservation on prior appropriators, and the public interest, determination of the need for the reservation and whether unappropriated water is available for it, issuance of a certificate of reservation, and mandatory ten-year review of reservation certificates. To assist applicants in applying for water for instream use, the state has published a booklet that describes the instream flow reservation program and contains detailed instructions on how to apply for a reservation. Further, Alaska may reject applications to appropriate water if it determines that there would be an unacceptable effect on fish and game resources and on public recreational opportunities.

Based on this assessment, and looking at our other member states, I would conclude that your state has gone far in providing legal mechanisms and opportunities for protecting instream flows. However, I have no information with regard to what extent these authorities have been used to protect instream flows. Furthermore, I am not saying that further authority may not be necessary or desirable. In my view, that must be a judgment made by the state based on its own values and interests. I believe Alaska's political process is also the best means for determining whether and by what means it should levy a fee for water use.

I hope the above information may provide a useful comparison with regard to other states. In order to provide you more detailed information regarding instream flows in the western states, I am also including a portion of an article which we prepared which was published in "Environmental Law," published by the Northwestern School of Law of Lewis and Clark College. Also, you may wish to contact Larry Morandi, of the National Council of State Legislatures in Denver. Larry has written a good deal on water policy issues and may well be able to provide you with further information. His telephone number is (303) 623-7800.

Again, we hope this information may be of assistance to you as you meet with the Board.

Sincerely,

Craig

D. Craig Bell
Executive Director

cc: Rio Davidge

law, including public interest criteria.

Arizona statutes require the Department of Water Resources Director to consider the potential effect on the public interest and welfare when considering applications to use surface water. The Director must reject such applications where a proposed use is contrary to public values.[29] The Arizona State Land Department (the predecessor to the Arizona Department of Water Resources which reviewed water appropriation applications) used public interest criteria to deny an application which, if granted, would have resulted in the loss of 1.7% of the total recharge of one of Arizona's ground water basins.[30]

The State Land Department determined that it would not have been in the public interest to place additional strain on a source of ground water supply experiencing substantial overdraft.[31] The Arizona Court of Appeals upheld the denial of the application. It emphasized that, in a water short area, even a small reduction in recharge might cause substantial injury to the public welfare, particularly if followed by additional reductions.[32]

2. *Instream Flow Laws*

Public interest protection in western water resource management is also enhanced by establishing and maintaining instream flows. The traditional law of prior appropriation favored offstream uses. However, instream flows were indirectly protected. Longtime New Mexico State Engineer, Steve Reynolds, observed:

> The streamflow required at various points in the State is governed by interstate compacts, international treaties, federal court decrees, water rights conferred by the state . . . and legislation authorizing federal water development projects. In many situations, an incidental effect of these institutional constraints is an instream flow having important value in terms of recreation, fish and wildlife habitat, and aesthetics. Furthermore, in many areas of the state the geography and public land ownership patterns adequately protect instream values. Mountain streams generally do not provide favorable sites for conservation, storage, and beneficial use of water.[33]

29. ARIZ. REV. STAT. ANN. § 45-153(A) (1987).

30. Arizona Game & Fish Dep't v. Arizona State Land Dep't, 24 Ariz. App. 29, 535 P.2d 621 (1975), *reh'g denied* (1979).

31. *Id.* at 30, 535 P.2d at 622.

32. *Id.* at 31, 535 P.2d at 623.

Reynolds' comments describe the incidental "base-line" of in stream flow protection under the appropriation doctrine. Hi comments also apply to states other than New Mexico. In addi tion, the western states have established instream flows to en hance preservation of public values in water resource manage ment. Instream flow establishment provides water for fish wildlife, recreation uses, and aesthetics. In every western state legal mechanisms are now in place to provide some protection fo instream flows.

Instream values are protected in California where public in terest statutes form a legal basis to protect "use of water for rec reation and preservation and enhancement of fish and wildlife re sources [as] a beneficial use of water."[34] However, a diversion o impoundment of water must be made to establish an appropria tive right to effect protection of instream values. For example, th state might grant a right to impound water for use downstream t enhance fish and wildlife habitat. Such a right could be issued t a public or a private entity.[35] A state agency may also protect in stream flows in California, Oregon, and other states, under stat public interest statutes that allow terms and conditions to be in cluded in appropriative rights to maintain bypass flows.[36]

These provisions affect water appropriation for instream use in various ways. First, the state agency may disallow new appro priations where wildlife or aesthetic values would be harmed. Sec ond, the state agency may allow new appropriation only where . by-pass flow can be assured. Further, the state agency may disal low a transfer proposal if it is detrimental to the public interest A state agency or, in some instances, a private party protestin the transfer may assert the proposed transfer's detrimental effec on the public interest.

33. Memorandum by Steve Reynolds at 4, Re: House Bill 228 (Feb. 7, 1977 (State Engineer Files, Santa Fe, New Mexico) *quoted in* INSTREAM FLOW PROTEC TION IN THE WEST 334 (L. MacDonnell, T. Rice & S. Shupe, ed. 1989).

34. CAL. WATER CODE § 1243 (West 1971 & 1990 Supp.).

35. California also recognizes limited riparian rights, which may be similar t appropriative rights for instream flows in some instances. *See In re* Matter of Hal lett Creek Stream Sys., 44 Cal. 3d 448, 749 P.2d 324, 243 Cal. Rptr. 887 (1987) *cert. denied* 109 S.Ct 71 (1988).

36. CAL. WATER CODE § 1243.5; OR. REV. STAT. § 537.170 (5)(a) (1989). *Se supra* text accompanying notes 11-32.

In Montana, a public entity may acquire a water reservation o secure the equivalent of a right for instream flow. The law pro-ides that reservations for the "maintenance of minimum flow, evel, or quality of water [may be made up] to a maximum of 50% f the average annual flow of . . . gauged streams."[37] Laws in Cali-ornia,[38] Oregon,[39] and Washington[40] also provide for water reser-ation by a state agency, or a similar process.

Wyoming considers instream flow and water storage for later release to maintain instream flow to be beneficial uses under certain conditions, and established a procedure for appropriating water for such uses.[41] The Game and Fish Commission identifies stream segments and flow rates that should be appropriated and reports them to the Water Development Commission which then files an application to appropriate natural flow after analyzing whether natural flow is available, whether storage is required, or whether a combination of both must be used. The appropriative right's priority date is the Water Development Commission's application date. Water commissioners regulate the water course to provide water for the instream use on the basis of its priority.[42]

Utah enacted a similar statute.[43] The state may acquire established water rights to provide "water for instream flows in natural channels necessary for the preservation or propagation of fish

37. MONT. CODE ANN § 85-2-316 (1989).

38. *See* Lilly, *Protecting Stream Flows in California*, 8 ECOLOGY L.Q. 697 (1979). The use of the term "reserve" in this context refers to the state setting aside, or "reserving" from appropriation, sufficient water to assure maintenance of instream flows and should not be confused with federal "reserved water rights" recognized under the "reserved rights" doctrine. *See infra* notes 233-54 and accompanying text (§ III(C)(6)) (1989).

39. OR. REV. STAT. § 536.410 allows the Water Resources Commission to withdraw waters from further appropriation while the order of withdrawal is in effect. This is somewhat different from the reservation concept in Montana, which involves reservation of a quantity of water with a priority date. Any Oregon state agency may request a reservation of unappropriated water for future economic development under OR. REV. STAT. §§ 537.356, .358. As to instream flow protection, Oregon has a minimum stream flow program authorized by OR. REV. STAT. § 536.325. As a practical matter, the minimum streamflow program has been largely supplanted by the Water Resources Commission's instream water rights program.

40. WASH. REV. CODE ANN § 90.22.010 (1962 & Supp. 1990).

41. *See* WYO. STAT. §§ 41-3-1001 to -1014 (Supp. 1990).

42. *Id.*

within a designated section of a natural stream channel."[44] In Colorado, the Water Conservation Board may appropriate "such waters of natural streams and lakes as the Board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree."[45]

Idaho law provides two methods to protect instream flows for public use. First, applications to appropriate water for out-of-stream purposes must be evaluated against broad "local public interest"[46] criteria, which include a determination of minimum streamflow to be retained in the natural channel. Second, a minimum instream flow may be assured by establishing a recorded right for the flow. The Idaho Water Resources Board, an eight-member citizen policy commission, is authorized under state law to apply for and hold such rights.[47] The Idaho Supreme Court affirmed the validity of instream flow rights. The court recognized some instream public uses as beneficial uses under state law.[48]

Oregon protects instream flows in a variety of ways. One is legislative[49] or administrative[50] withdrawal of streams from further appropriation. In 1983, Oregon also administratively established minimum streamflows to support aquatic life and minimize pollution.[51] In 1987, the Oregon legislature explicitly authorized instream water rights, largely superseding the state's minimum streamflow program.[52] The Oregon Departments of Fish and Wildlife, Environmental Quality, and Parks and Recreation may apply for instream water rights for public use.[53] Public uses include "(a) recreation; (b) conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; (c) pollution abatement; or (d

44. *Id.*

45. COLO. REV. STAT. § 37-92-102(3) (Cum. Supp. 1987).

46. IDAHO CODE § 42-203A(5) (1990).

47. *Id.* § 42-1503.

48. State Dep't of Parks v. Idaho Dep't of Water Admin., 96 Idaho 440, 444-45, 530 P.2d 924, 928-29 (1974).

49. OR. REV. STAT. §§ 538.010-.300 (1989).

50. *Id.* § 536.410.

51. Act of Aug. 8, 1983, ch. 796, § 2, 1983 Or. Laws 1634 (codified as amended at OR. REV. STAT. §§ 536.235, .325).

52. Act of July 18, 1987, ch. 859, § 2, 1987 Or. Laws 1757 (codified at OR. REV. STAT. §§ 537.332-.360).

navigation."[54] The Water Resources Commission holds instream water rights in trust for the people of the state.[55] The Commission converted most of the earlier established minimum streamflows to instream rights.[56]

In 1949, the Washington legislature declared "that a flow of water sufficient to support game, fish and foodfish populations be maintained at all times in the streams of [the] State."[57] The Director of the Department of Ecology may refuse to issue permits where instream flow needs would be harmed.[58] Rather than denying permits, the Department often issues them with conditions protecting instream flows. Also, Washington law provides a more formal process to protect instream flows. The Department of Ecology, on its own or when requested by the Department of Fisheries or the Game Commission, may establish minimum streamflows and lake levels to protect fish and wildlife resources, recreation, or aesthetic values.[59]

Further, Washington's Water Resources Act of 1971 provides that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."[60] Between 1975 and 1985 the Department secured instream flows for a substantial area of the state under the administrative process established pursuant to the 1971 Act.[61]

In Alaska, the Water Use Act allows for the reservation of water for the following instream uses: "(1) protection of fish and wildlife habitat, migration, and propagation; (2) recreation and park purposes; (3) navigation and transportation purposes; and (4) sanitary and water quality purposes."[62] The statute authorizes local, state, and federal agencies, and private individuals to apply for reservations for instream uses. To aid private entities, the

54. *Id.* § 537.332(4).
55. *Id.* § 537.341.
56. *Id.* § 537.346.
57. Fisheries Code, ch. 112, § 48, 1949 Wash. Laws 272 (codified at WASH. REV. CODE ANN. § 75.20.050 (1962 & Supp. 1990)).
58. *Id.*
59. *Id.* § 90.22.
60. *Id.* § 90.54.020(3)(a).
61. WASH. ADMIN. CODE § 173-500 (1989) (Water Resources Management Programs established pursuant to the Water Resources Act of 1971).

state published a booklet describing the instream flow reservation program, including instructions on how to apply for a reservation.[63]

There are a few states where instream flow appropriations or their equivalent are not recognized by statute. Nevertheless, state administrators may provide protection pursuant to public interest provisions.[64] For example, in Arizona and Nevada, state officials have interpreted their laws requiring a diversion to establish a water right to allow for *in situ* (instream) water use. The Arizona Court of Appeals held that state statutes authorize *in situ* appropriations for recreation and wildlife purposes.[65] The Arizona Department of Water Resources issued three permits to appropriate water for instream use: two permits to the Nature Conservancy in April 1983, and one permit to the federal Bureau of Land Management in March 1989.[66]

In Nevada, the State Supreme Court upheld the State Engineer's issuance of appropriative water rights to two federal agencies for recreation, fishery, and stock and wildlife watering purposes, including instream rights.[67] The court said: "[A]pplications by United States agencies to appropriate water for applications to beneficial uses pursuant to their land management functions must be treated on an equal basis with applications by private landowners."[68] Thus, instream rights were provided for use on federal lands under state regulatory authority, not federal proprietary claims. These rights will enjoy the protection of state law and will be integrated into the regimen of rights administered by the State Engineer.

3. *Water Transfers*

Transfers may also promote the public interest by allowing

63. ALASKA DEP'T OF NATURAL RESOURCES, STATE OF ALASKA INSTREAM FLOW HANDBOOK - A GUIDE TO RESERVING WATER FOR INSTREAM USE (1985).
64. *See generally* Grant, *supra* note 11.
65. McClellan v. Jantzen, 26 Ariz. App. 223, 225, 547 P.2d 494, 496 (1976).
66. Letter from Kathleen Ferris, Director, Arizona Dep't of Water Resources to Norman K. Johnson (June 20, 1986) (copy on file at the Western States Water Council office); telephone conversation between Laurence Linser, Arizona Dep't of Water Resources, and Norman K. Johnson (Dec. 19, 1989).
67. Nevada v. Morros, 766 P.2d 263 (Nev. 1988).
68. *Id.* at 269.

established uses to change with evolving values and needs. The ability to make such transfers was recognized early in the development of the prior appropriation doctrine.[69] As used here, "transfer" refers to the conveyance of a water right from one user to another involving a change in the location or type of use.

The interrelated nature of appropriative water rights requires state agencies to play an active role in the water right transfer process. Generally, before a transfer may proceed, a "change" or "transfer" application must be filed with and approved by a state administrative body or a state water court. This gives third parties the opportunity to protest the transfer if they believe it may harm their rights. Usually a state agency or court must also determine whether the transfer will be in the public interest.[70]

A transfer application is either approved or disapproved after a time period for objections by third parties and a state agency's consideration of the transfer implications. Historic consumptive use is generally the quantity of water that may be transferred. The state agency's decision is usually subject to judicial review. Complex transfers, with the potential to affect a number of vested rights, can be costly and time consuming, while simple transfers are routine in many states.[71] Most states recognize instream flows as a beneficial use to which water may be transferred. However, in some states only state entities are authorized to obtain transfer approval of a diversionary water right to an instream right.[72]

According to a 1986 survey by the Western States Water Council, the annual number of transfers varies significantly from state to state. Water rights are rarely transferred in Alaska, Nebraska, and North and South Dakota, while water rights are transferred frequently in other states. Colorado, Idaho, Nevada, New Mexico, Utah, Washington, and Wyoming reported that fifty or more transfers occur annually. Colorado, Nevada, and Utah reported that more than 300 transfers occur each year.[73]

69. *See* McDonald v. Bear River & Auburn Water & Mineral Co., 13 Cal. 220, 232-33 (1859); Thayer v. California Dev. Co., 164 Cal. 117, 128 P. 21 (1912).

70. A matrix summarizing state-by-state water right transfer information is included in Western Governors' Ass'n Water Efficiency Working Group, Water Efficiency: Opportunities For Action, Report to The Western Governors app. at 136 (1987).

71. *Id.*

Recently, some states have simplified the marketing of water rights. In 1979, Idaho formalized some types of water transfer activities by creating a water bank for marketing purposes.[74] The bank "provide[s] a source of adequate water supplies to benefit new and supplemental water uses, and provide[s] a source of funding for improving water user facilities and efficiencies."[75] The Idaho Water Resource Board operates the bank on a statewide basis and appoints committees in local drainage areas. Farmers "deposit" water held under private rights or by allocations in federal reservoirs into either the state or the local water bank, where it may be leased by other water users.

The California legislature adopted a policy to encourage transfers. It directs the Department of Water Resources, the State Water Resource Control Board, and other appropriate state agencies "to encourage voluntary transfers of water and water rights, including, but not limited to, providing technical assistance to persons to identify and implement water conservation measures which will make additional water available for transfer."[76] The legislature also requested the Department of Water Resources to establish a program to facilitate the voluntary exchange of water rights and to report legal and procedural changes that could be made to facilitate water marketing. Further, the Department must prepare and update a "water transfer guide" and create and maintain a periodically updated list of entities seeking to enter water transfer, lease, or exchange agreements.[77]

4. *Other Developments*

The western states have acted to protect public interest values in various other ways.[78] For example, Colorado expanded the

73. *Id. See also* L. McDonnell, The Water Transfer Process as a Management Option For Meeting Changing Demands (Report prepared for the U.S. Geological Survey, 1990).

74. *See* Idaho Code § 42-1761 (1990).

75. *Id.*

76. Cal. Water Code § 109(b) (West 1971).

77. *Id.* §§ 470-483 (West 1989).

78. Although this Article focuses on state water quantity laws, western states have also become increasingly active in water quality protection. Many surface

state role in the administration of appropriative water rights, with an increased recognition of the State Engineer's discretion to make rules governing water use. Instead of being guided by the priority of application alone, the Engineer can formulate rules to optimize water use.[79] The courts have expanded this principle, indicating that "maximum utilization" does not require a "single-minded endeavor to squeeze every drop of water" from a water source, but to make "optimum use" of the resource.[80]

Also, the State Engineer more strictly enforces the due dili-

Act (CWA), 33 U.S.C. §§ 1251-1377 (1988), which allows states to attain primacy for carrying out the most important federal water pollution control programs. *Id.* § 1342. The CWA recognizes "the primary responsibilities and rights of States" to mitigate and control water pollution. *Id.* § 1251(b).

In addition to state and federal efforts to mitigate surface water pollution under federal law, every state has acted to protect ground water quality. *See* WESTERN STATES WATER COUNCIL, WESTERN STATE GROUND WATER MANAGEMENT (1986). The states continue to enhance their legal protection of ground water quality. The U.S. Environmental Protection Agency reported in 1988 that 37 states enacted ground water legislation during the period 1985-1987, with 27 states enacting underground storage tank programs and 25 enacting legislation to protect ground water from contamination by agricultural chemicals. Twelve states enacted comprehensive statewide ground water protection strategies. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, SURVEY OF STATE GROUND WATER QUALITY PROTECTION LEGISLATION ENACTED 1985-1987, at vii-xi (1989).

States have also expanded upon federal legal protection for surface water. Many states establish standards more stringent than national standards to protect public drinking water supplies, for purposes of secondary wastewater treatment, and with respect to baseline water quality. States have also acted independently of federal law to control water pollution by establishing (1) underground storage tank programs (*see, e.g.*, ARIZ. REV. STAT. ANN. §§ 49-1081 to -1814 (1988 & Supp. 1989); MONT. CODE ANN. §§ 75-10-403 to -451 (1989); and S.D. COMPILED LAWS ANN § 34A-2-98 to -99 (1987)); (2) chemigation controls (*see, e.g.*, CAL. FOOD & AGRIC. CODE § 13145 (West 1986); COLO. REV. STAT. § 35-11-106 (Supp. 1989); N.D. CENT. CODE § 4-35.1-03 (1987)); (3) pesticide controls (*see, e.g.*, ARIZ. REV. STAT. ANN. §§ 49-301 to -309 (1988); and CAL. FOOD & AGRIC. CODE §§ 13141 - 13152 (West 1986)); and (4) critical ground water management areas (*see, e.g.*, COLO. REV. STAT. § 37-90-106 (1973 & Supp. 1989); IDAHO CODE § 42-233 (1990); OR. REV. STAT. § 537.730 (1989)), among other water quality programs. States have also created state superfunds and programs to control hazardous waste and toxic substances. *See* Begley, Hager, Wright, Springen, Hutchison, de la Pena & Mott, *E pluribus pluries: Without Leadership from Washington, the States Set the Environmental Agenda for the Nation*, Newsweek, Nov. 13, 1989, at 70.

79. *See* Fellhauer v. People, 167 Colo. 320, 336, 447 P.2d 986, 994 (1968); Colorado Springs v. Bender, 148 Colo. 458, 464, 366 P.2d 552, 556 (1961).

80. Alamosa-La Jara Water Users Protection Ass'n v. Gould, 674 P.2d 914, 935 (Colo. 1983).

gence requirements relating to the acquisition of conditional water rights. In the past, conditional rights, those established by declaring an intent to divert water without making a diversion, have sometimes been maintained for many years with only minimal physical effort or investment. Colorado courts have imposed stricter requirements.[81] Thus, the water courts are scrutinizing such rights to insure that there is a genuine intent to appropriate, not merely speculate.[82] Further, Colorado law[83] now requires proof that a project will be completed with diligence before a decree for a conditional right can be issued.[84] Imposing stricter requirements on conditional rights makes more water available for current demands to meet present economic uses.

In 1987, Oregon enacted a law to provide for the sale or lease of "conserved water."[85] The law defines "conserved water" as "that amount . . . previously unavailable to subsequent appropriators, that results from conservation measures."[86] "Conservation" is defined as "the reduction of the amount of water [previously] consumed or irretrievably lost . . . achieved either by improving the technology or method for diverting, transporting, applying or recovering the water or by implementing other improved conservation measures".[87] Any water right holder may apply to the Water Resources Commission for approval to implement conservation measures.

In evaluating the applications, the Water Resources Commis-

81. Colorado River Water Conservation Dist. v. City & County of Denver, 640 P.2d 1139 (Colo. 1982).

82. *See, e.g.* Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co., 197 Colo. 413, 417, 594 P.2d 566, 568 (1979).

83. COLO. REV. STAT. § 37-92-305(9)(b) (Cum. Supp. 1987).

84. *See* Southeastern Colorado Water Conservancy Dist. v. City of Florence, 688 P.2d 715, 718 (Colo. 1984); *see also* Talco Ltd. v. Danielson, 769 P.2d 468 (Colo. 1989).

85. OR. REV. STAT. §§ 537.455-.500 (1989).

86. *Id.* § 537.455(2).

87. *Id.* § 537.455(1). The Washington legislature enacted a somewhat similar program which allows the state Department of Ecology to assist the water right holders in the Yakima River Basin in the financing of water conservation projects. *See* WASH. REV. CODE ANN. §§ 90.38.005-.902 (1962 & Supp. 1990). The conserved water then becomes a "trust water right" which is conveyed to the Department of Ecology to increase the state's overall ability to manage water in the Yakima Basin. *Id.* § 90.38.030. The statute may be expanded in the next legislative session to cover the entire state.

sion must consider whether the project would be feasible, whether the public interest would be served, if any injury would accrue to other vested water rights, and if the project adequately mitigates effects on other water users. The Commission allocates a percentage of the water proposed to be conserved to the applicant (usually seventy-five percent), and a percentage (presumed to be twenty-five percent unless reasons dictate a lesser or greater percentage) to the state.[88]

After the applicant successfully carries out the conservation project, the Commission determines the amount of conserved water and issues a new water right certificate to the conserving party for that party's percentage of the water.[89] The certificate contains a priority to the conserved water "one minute after the priority of the water right held by the person implementing the conservation measure."[90] This law encourages water conservation and protects the public interest by allowing a water user not only to benefit from his conservation measures, but at the same time, to increase water available for other public uses. Any person or agency allocated conserved water may reserve the water instream for future out-of-stream use or otherwise use or dispose of conserved water.[91]

5. *Public Trust Doctrine*

Public interest values in western water resource management are also protected by the public trust doctrine. This doctrine is based on ancient common-law principles forcefully articulated in the United States Supreme Court's 1892 decision in *Illinois Central Railroad v. Illinois*.[92] In *Illinois Central*, the Illinois legisla-

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88. *Id.* § 537.470.

89. *Id.* § 537.475.

90. *Id.* § 537.485.

91. *Id.* § 537.490. Oregon is also formulating a policy to expand the state's longstanding prohibition of waste in water use to require water users to employ best practicable technology to assure maximum efficiency. Public hearings on the subject are currently being held. The hearings have been well-attended and interest in the subject has been high. *See* remarks by William Young, Director, Oregon Water Resources Dep't, Meeting of the Western States Water Council (July 13, 1990) (included as part of the minutes on file at the Western States Water Council Office). Washington State is considering similar actions. *See id.* remarks by Ken Slattery, Washington Dep't of Ecology.

92. 146 U.S. 387 (1892).

California recently enacted a law requiring the State Department of Water Resources (DWR) to establish a program to facilitate the voluntary exchange of water rights and to report to the legislature legal and procedural changes which could be made to facilitate water marketing. Also, DWR must prepare a "water transfer guide" and create and maintain a periodically updated list of entities seeking to enter into water transfers, leases, or exchanges.[125]

In 1986 Idaho enacted legislative changes to streamline water marketing activities.[126] Minor modifications were made to various statutes to simplify the transfer process and to ensure that those who need to acquire water do so through appropriate state procedures. Other states are considering legislative changes which would facilitate transfer activity.

INTERSTATE SALE AND LEASE OF WATER

Intrastate water transfers have occurred under the appropriation doctrine almost since its inception. Statutes and administrative regulations governing transfers have evolved in each state and are still gradually changing. Legal and administrative procedures related to intrastate transfers also evolved through time. Recent developments, however, have required significant changes in some state laws.

Justice Marshall, in *Wilson v. Blackbird Creek Marsh Co.*,[127] suggested the states have plenary power to regulate water resources within state boundaries. Justice Holmes, in *Hudson Water Co. v. McCarter*,[128] was even more emphatic in holding that a state plainly had the right to control the water resources exclusively within its boundaries. Both of these cases, however, occurred in the East where the riparian doctrine applied and water was part of the land it abutted.

A western state's right to control water supplies is based on two doctrines. The first was enunciated in the Desert Lands Act of 1877[129] which made it clear that the state had the right to control waters on the federal public domain. The second was the doctrine of equitable apportionment, which provides that when two states share the surface flows of a stream the states have the power to compact for the use of that water.[130] If they fail to do so, the Supreme Court gives each state a portion of the stream for its exclusive use.[131] Finally, based on these concepts, numerous western state constitutions provide that the waters of the state belong to the people of the state or the state itself.[132]

125. *Id.*, §§ 470-483 (West 1989).
126. Ch. 313, 1986 Idaho Sess. Laws, 763.
127. 27 U.S. (2 Pet.) 245 (1829).
128. 209 U.S. 349 (1908).
129. 43 U.S.C. §§ 321-339 (1983); See discussion in California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).
130. *See, e.g.*, Upper Colorado River Basin Compact, ch. 48, 63 Stat. 31 (1949).
131. *See e.g.*, Kansas v. Colorado, 206 U.S. 46 (1907).

While all of these theoretical public ownership of water pronouncements were taking place, the western water law of prior appropriation was maturing in a somewhat different direction. Since the turn of the century, the courts of the western states have been concluding that a water right is a property right that can be freely sold and transferred like any other commodity.[133] Many commentators and water administrators argued persuasively that if water rights were allowed to be traded in the marketplace as any ordinary commodity, then water rights would pass to the highest and best use.[134] Thus, there was a great disparity between the language of many state constitutions which declared water to be a public good subject to planning and control by the state, and the actual practice of treating water as a commodity.

This disparity was revealed poignantly in *Sporhase v. Nebraska ex rel. Douglas*,[135] in which the United States Supreme Court was asked to decide whether a Nebraska statute was unconstitutional because it prohibited the export of water to a state which would not reciprocate by allowing water to be imported into Nebraska. While, as the late Frank Trelease stated, the case should not have been used to make precedent because it involved "but a cupful of water," the Supreme Court took this opportunity to clarify its view of the nature of water under western prior appropriation law.[136]

The Supreme Court held that state ownership of water as articulated by Nebraska was a fiction and that the western water resource is a commodity in commerce.[137] Therefore, the *Pike v. Bruce Church, Inc.*[138] analysis of statutes discriminating against interstate commerce must be applied. Under this test a statute regulating a resource in interstate commerce must regulate evenhandedly to promote a legitimate local interest and must be narrowly drawn to achieve that purpose. The Nebraska statute failed that test.

The Court did, however, acknowledge that the nature of water resources required a somewhat different and more careful review than the Pike analysis.[139] The Court pointed out that protection of the public welfare and the conservation of water were legitimate bases for regulating the transfer of water rights, and that a demonstrably arid state should certainly

132. *See e.g.*, N.D. CONST. art. XI, § 3.
133. *See infra* p. 38 and accompanying notes.
134. *Id.*
135. 458 U.S. 941 (1982).
136. Conversation of Charles T. DuMars with Frank Trelease (June 1983).
137. *Sporhase*, 458 U.S. at 958.
138. 397 U.S. 137 (1970).
139. *Sporhase*, 458 U.S. at 956.

be able to assert a limited preference for its citizens in times of shortage.[140] It also suggested that, if a state had a real plan for using its water resources rather than simply a theoretical anticipated future need, the state could exercise such a limited preference.[141]

Relying on *Sporhase v. Nebraska ex rel. Douglas*, a federal district court in New Mexico in *City of El Paso v. Reynolds* [El Paso II][142] struck down a New Mexico statute which placed an absolute embargo on out-of-state transfers of groundwater. The court pointed out that groundwater in New Mexico had been treated as a commodity for purposes of intrastate transfers and that New Mexico could not deny that status simply because this particular transfer was to an out-of-state municipality.[143]

States have responded variously to this decision. No one can ever really know the motivations of a state legislature. Nevertheless, in at least some instances the *Sporhase* decision has undoubtedly had the effect of encouraging water planning legislation of the kind discussed below. Other statutes discussed below may antedate *Sporhase;* however, they address similar concerns with respect to out-of-state water use.

Certainly no state is anxious to allow its water resources to be taken without some control over the ultimate use of the water from a conservation standpoint. It is also likely that a state may seek to acquire some value for the resource as it leaves the state. These goals seem to have motivated legislation in various western states.

In Colorado, for example, a statute provides in part that "[a]ny diversion of water from this state which is not in compliance with this section shall not be recognized as a beneficial use."[144] This section provides for complicated determinations by the state of the impact on surface water compacts and the public welfare when water is transported out of state. It further provides a charge of fifty dollars per acre-foot to be assessed and collected on out-of-state transfers. The Colorado Attorney General has opined, however, that the fee is probably unconstitutional.[145]

South Dakota requires that applications for appropriation of water "in excess of one thousand acre feet annually" be approved by the legislature.[146] The South Dakota statute provides for extensive water planning to achieve a myriad of purposes within the concept of "public welfare." These range from economic welfare and prosperity to water quality to joint projects with Indian tribes.[147]

140. *Id.* at 956-57.
141. *Id.*
142. 563 F. Supp. 379 (D.N.M. 1983), *later proceeding*, 597 F. Supp. 693 (D.N.M. 1984).
143. 563 F. Supp. at 391.
144. COLO. REV. STAT. § 37-81-101 (Cum. Supp. 1987).
145. Ag. alpha No. NR WE AGAON (Sept. 10, 1985).
146. S.D. CODIFIED LAWS ANN. § 46-5-20.1 (1983).
147. S.D. CODIFIED LAWS ANN. § 46A-2-2 (1983).

Idaho also has stated that "[a]ll ground waters in this state are declared to be the property of the state"[148] and has placed a limit on the amount of water that can be taken out of a groundwater basin. It further requires legislative approval of any application exceeding that amount.[149]

California has a history, dating back to 1927, of reserving some quantity of water for the state. The state through its agencies can file applications to appropriate water "required in the development and completion . . . of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the state."[150] State appropriations are exempt from diligence requirements and remain dormant (reserved) until development occurs. The California Department of Water Resources, as operator of the State Water Project, controls allocation of a significant proportion of state-appropriated water. The California Water Resources Control Board is an independent quasi-judicial body whose regulatory authority includes jurisdiction over the State Water Project and all other appropriators. Board members are appointed by the Governor and must be confirmed by the State Senate. Although most of these appropriations are held for specific governmental purposes, some are held by the state because the state funded the projects that made the waters available for use. If the water is owned by the state, it is available to the interstate market, but like any other seller, a state can be flexible about when and how much it wants to sell.

Montana's laws[151] tightly centralize state control over water resources. The Department of Natural Resources has full control over all waters in the state not under the exclusive control of the federal government or vested in private ownership. Since there is a great deal of unappropriated water in Montana, this statute has a significant effect. The Department has a duty to appropriate and conserve water for "the use of the people."[152] Its authority extends to "rights to the natural flows of the waters of th[e] state which it may acquire by condemnation, purchase, exchange, appropriation or agreement."[153] Its decisions are subject to approval by the Board of Natural Resources and Conservation.

Montana laws allow the state to appropriate only amounts greater than 4,000 acre-feet per year and 5.5 cubic feet per second for any consumptive use.[154] The state appropriates such quantities in its own name and then leases them to users under the State Water Leasing Program.[155] The state

148. IDAHO CODE § 42-108 (Supp. 1988).
149. *Id.*
150. CAL. WATER CODE §§ 10500-10507 (West 1971).
151. MONT. CODE ANN. § 85-2-101 (1988).
152. *Id.*
153. *Id.*
154. *Id.* § 85-2-301(2)(a)(ii).
155. *Id.* § 85-2-141(1).

may acquire water rights for its leasing program through agreement with, or purchase from, other water right owners, as well as by appropriation.[156] Water from the state leasing program must be obtained from specified sources,[157] and no more than 50,000 acre-feet may be leased by any entity.[158] Lease terms may be longer than 50 years but may be extended for additional terms.[159] Water may be leased for any beneficial use. Special provisions relating to the evaluation of the impact on Montana apply to appropriations for large quantities if the water is to be transferred for use out of state.[160]

In Texas, provisions for appropriation by the state have appeared in a number of fairly recent legislative initiatives.[161] In 1985, the Texas Department of Water Resources was abolished and its authority and duties were divided between the Texas Water Development Board and the Texas Water Commission. The Texas Water Development Board is an advisory body whose members are appointed by the Governor. The board administers financial assistance to political subdivisions for water development projects. Recent legislation allows the board to sell public water acquired by the state.[162]

The board administers the state's storage acquisition fund. The board may use the fund for design, acquisition, lease, construction, reconstruction, development, or enlargement, in whole or part of any existing or proposed water storage project.

The board may also "sell any unappropriated public waters of the state and other water acquired by the state that is stored by or for it."[163] The board, however, may not compete with any political subdivision in the sale of water if the competition jeopardizes the ability of the political subdivision to meet obligations incurred to finance its own water supply projects. Political subdivisions also have a preferential, but not an exclusive, right to purchase, acquire, or lease facilities and water from facilities. Finally, the statute provides that "[t]he board and the commission shall coordinate their efforts to meet these objectives and to assure that the public water, which is held in trust for the use and benefit of the public, will be conserved, developed, and utilized in the greatest practicable measure for the public welfare."[164]

Wyoming has a water development program administered by the same

156. *Id.* §85-2-141(2).
157. *Id.* §85-2-141(3).
158. *Id.* §85-2-141(4).
159. *Id.* §85-2-141(5).
160. *Id.* §85-2-402(5)(b)(i).
161. *See, e.g.*, TEX. WATER CODE ANN. §15.323(a) (Vernon 1988)
162. *Id.*
163. *Id.* §15.324(a).
164. *Id.* §15.326

commission that formulates water resource plans. Under that program, the Commission must provide: "procedures and policies for the planning, selection, financing, construction, acquisition and operation of projects and facilities for the conservation, storage, distribution and use of water necessary in the public interest to develop and preserve Wyoming's water and related resources."[165] The program is intended to "encourage development of water facilities for irrigation, for reduction of flood damage, for abatement of pollution, for preservation and development of fish and wildlife resources and for protection and improvement of public lands."[166] The water development program is also intended to make state waters available for all beneficial uses, including protecting the "health, safety and general welfare of the people of the state of Wyoming."[167]

On the basis of the state water plan or as directed by the legislature, the Commission identifies and selects potential projects for inclusion in the water development program. The selection process includes several steps. Each step terminates with recommendations to the legislature as to whether a project should be studied further or discarded. The first stage requires that "reconnaissance studies"[168] be made. The second stage requires "feasibility studies."[169] The studies address economic feasibility, whether a project is socially desirable, and if so, what obstacles might be faced if it is attempted. The third stage requires development plans,[170] which include an analysis of economic feasibility along with other factors. If a project is found to be in the public interest and private enterprise does not want to build or operate the project, construction and operating plans proceed as authorized and approved by the legislature under the direction and control of the Construction Division of the Commission. In addition to new projects, the program provides for rehabilitation of existing water projects.

In Wyoming, the Administrator of the Water Development Commission, at the direction of the governor, files applications in the name of the state for permits to appropriate water, to construct dams and other works. He is also directed to take steps necessary to acquire, maintain, or preserve the priority of any right essential to any project which is or may become a project of the state water development program.[171]

In February of 1983, the New Mexico legislature passed a water ex-

165. WYO. STAT. §41-2-112(a) (Supp. 1988).
166. *Id.*
167. *Id.*
168. Reconnaissance studies involve preliminary assessment of the various factors that are relevant in seeking to develop a project including need, environmental impact and legal impediments.
169. Feasibility studies involve more detailed analyses often associated problems and reflect the responses of public comment, test drilling and needed legislation.
170. Both plans and the economic analysis are required.
171. WYO. STAT. §41-2-116 (Supp. 1988).

portation statute replacing the one struck down in *El Paso I*. That statute legitimizes the interstate transportation and use of New Mexico's public waters. This statute reads as follows:

> The state of New Mexico has long recognized the importance of the conservation of its public waters and the necessity to maintain adequate water supplies for the state's water requirements. The state of New Mexico also recognizes that under appropriate conditions the out-of-state transportation and use of its public waters is not in conflict with the public welfare of its citizens or the conservation of its waters.[172]

The exportation statute struck down in *El Paso I* explicitly banned the out-of-state transport and use of New Mexico groundwater. In contrast, the new statute provides that "under appropriate conditions" the interstate transportation and use of New Mexico's public waters may not be in conflict with the public welfare of the state's citizens or the conservation of the state's waters.[173] The new statute is not limited to groundwater but also encompasses surface waters.

The statute requires that the person or entity who wants to export water outside New Mexico shall apply for a permit from the state engineer. In addition to requiring the State Engineer to publish notice of the permit application, the statute stipulates that the state engineer, before granting the permit, must find that the proposed export is neither contrary to water conservation policies within the state nor otherwise detrimental to the public welfare of New Mexico's citizens. In making his decisions the state engineer must consider, among others, the following factors:

> (1) the supply of water available to New Mexico;
> (2) water demands of New Mexico;
> (3) whether there are water shortages within New Mexico;
> (4) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in New Mexico;
> (5) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
> (6) the demands placed on the applicant's supply in the state where the applicant intends to use the water.[174]

The statute further provides that by filing an application to export New Mexico water, the applicant shall abide by the New Mexico laws governing the appropriation and use of the water. The state engineer is empowered to condition the permit to guarantee that the water, once out

172. N.M. STAT. ANN. §72-12B-1, -2 (1988).
173. *Id.* §72-12B-1(B).
174. *Id.* §72-12B-1(B)(C).

of state, will be used in accordance with the rules and regulations imposed upon in-state users.

In response to the *El Paso* court's observation that New Mexico law placed no conservation restrictions on in-state groundwater permit applicants, the New Mexico legislature amended its in-state groundwater withdrawal criteria. Before the *El Paso* decision, the in-state groundwater application statute required the state engineer to issue a withdrawal permit if it found that unappropriated groundwater was available and that the withdrawal would not impair existing water rights. As discussed above, following the *El Paso* ruling, in-state applicants must meet two additional criteria: the appropriation must not be (1) contrary to water conservation within New Mexico or (2) detrimental to the public welfare of the state's citizens.[175] The new statute was upheld in *El Paso II*,[176] in which the federal district court found the statute to be evenhanded and nondiscriminatory on its face. In addition to the statutory amendments, after three and one-half years of study, the New Mexico legislature in 1987 authorized the Interstate Streams Commission to fund regional water planning in New Mexico. The goal was to allow the various regions of the state to plan for the future use of water supplies for time horizons up to forty years.[177]

Thus, the range of reaction in the prior appropriation states to the potential for interstate transfers of water has been varied. Some states have attempted to capture economic value as water is transferred out of the state by assessing export fees or by establishing a lease system. Others have attempted to control the activity through legislative approval of transfers. Still others have adopted broad, evenhanded criteria related to the conservation of water and the public welfare similar to that referred to as "legitimate" in *Sporhase*. Others have attempted to promote bona fide water planning with respect to unappropriated water to ensure that their state has sufficient water supplies in the future. The constitutionality of each of these provisions will undoubtedly depend on the factual contexts in which they are challenged and the evolution of Supreme Court case law.

OTHER INNOVATIONS IN WESTERN WATER LAW

Arizona's response to problems associated with the groundwater overdraft signals significant development in western water law. The allocation and use of groundwater is now governed by Arizona's Ground Water Code, which was adopted in 1980 and has been amended as nec-

175. *Id.* §72-12-3E.
176. 597 F. Supp. 693 (D.N.M. 1984) (1985 Repl.).
177. Act of Apr. 8, 1987, ch. 182, 1987 N.M. Laws 1039.

WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201/942 East 7145 South/Midvale, Utah 84047/(801) 561-5300 / FAX (801) 255-9642

February 24, 1992

Ms. Heather Bradner
Legislative Staff
Rep. Cliff Davidson
State Capitol
Juneau, AK 99801

Dear Heather:

Enclosed please find ten copies of our most recently published Annual Report (1990). The 1991 report has not yet been published. I am also enclosing a recent membership list, which includes several changes from that published in the Annual Report.

As I indicated in my letter to you of February 21, a primary purpose of the Council is to provide a forum for the exchange of views and perspectives among the member states and to provide information regarding federal and state developments in order to assist member states in evaluating impacts of federal laws and programs and the effectiveness of state laws and policies. With regard to state laws, we believe our member states are then in a better position to evaluate the merits of their own laws and policies and any proposed changes and additions to those laws and policies.

In that spirit, we would be glad to be available for your meeting this Wednesday for questions pertaining to the history of water law in the western states, as you have requested. Norm Johnson, our Legal Counsel, and I will plan to call the number you gave us at five minutes before 3:00 p.m. your time.

With regard to the second part of Rep. Davidson's request, we will plan to provide you with our reaction to House bills 353, 354, and 355. As indicated, we will not attempt to render judgement on the merits of these bills, but rather provide some reflections with regard to these bills in light of other western state laws and programs in general. With regard to H.R. 355, most of the information we could provide in this regard was included in the letter or in the enclosed materials. However, if you have any questions regarding these materials, we would be happy to answer them. We will attempt to provide you similar reactions with regard to House bills 353 and 354.

For purposes of this coming Wednesday's discussion, we will plan to be especially prepared to answer questions with regard to the meaning of the Sporhase decision, and how various states have

responded to that decision. Some information in this regard was enclosed with the February 21st letter. I have also enclosed with this mailing copies of our most recent issue of "Water Intelligence Monthly." I am also enclosing a portion of an article which Mr. Johnson of our staff and Professor DuMars prepared regarding water right transfers in the West. It includes some prices for water transfers in various of our western states. You will see a broad range of prices. Please feel free to use any of the materials we have provided to you in the package for the legislators and members of the Board. I look forward to talking with you again on Wednesday afternoon.

Sincerely,

Craig

D. Craig Bell
Executive Director

Enclosures

P.S. I will probably defer to our Legal Counsel for most questions pertaining to water law. I would be happy to answer any questions about the organization itself and its purposes and functions.

WATER INTELLIGENCE MONTHLY

Water Strategist Supplement

Editors:
Rodney T. Smith
Roger J. Vaughan

Advisory Editor:
Steven J. Shupe

Publisher:
Lisa Hahn

October 1991

Water Strategist
P.O. Box 963
Claremont, CA 91711
(714) 621-4793

$190/year subscription rate for Water Strategist and Water Intelligence Monthly

TRANSACTIONS

CA: Santa Barbara Sells 4,319 af/yr of Desalted Water Under 5-Year Agreements

Acquirers:	*a) Goleta Water District and b) Montecito Water District*
Supplier:	*City of Santa Barbara*
Water:	*a) up to 3,069 af/yr and b) up to 1,250 af/yr from Santa Barbara's desalination plant*
Purpose:	*Municipal Use*
Terms:	*Both at $1,935/af, escalated, with standby fees*
Status:	*Complete*

The City of Santa Barbara has entered into five-year agreements with the Goleta Water District and the Montecito Water District for the delivery of water from the city's desalination plant. Goleta may purchase up to 3,069 af/yr, and Montecito may purchase up to 1,250 af/yr. The districts will use the purchased water to replace water supplies lost because of the current drought.

The water will be delivered from the city's temporary emergency desalination plant currently under construction. The plant, with an initial capacity of 5,000 af/yr, is expected to begin operations in February 1992. Because the city is expected to request only 3,181 af/yr, Goleta and Montecito will begin taking deliveries at that time. An additional capacity of 2,500 af/yr will be completed in the spring, so that sufficient water will be available to meet the city's demand of 3,181 af/yr and the maximum deliveries the districts may request under the five-year agreements.

The financial terms of the city-district agreements incorporate the financial terms of the city's agreement with *Ionics, Inc.* for the construction and operation of the desalination plant. The districts must pay $1,916/af for delivered water, the sum of a capital facilities component and a water delivery component (each component originally accounts for about half of the total). The capital facilities component amortizes, over a five-year period, the total capital cost of the plant at a 10 percent annual interest rate. The capital facilities component will be adjusted annually to reflect changes in Ionic's local property tax payments. The water delivery component will be escalated at the beginning of each contract year by 75 percent of the percentage increase in the consumer price index for urban consumers residing in the Los Angeles-Anaheim-Riverside area.

The districts are not obligated to take all water available under the agreements. During the first three years, the districts may elect to pay a "short-term standby fee" on the water not taken, designed to cover all fixed and variable portions of the costs of capital facilities, operations, maintenance and decommissioning costs associated with the plant when on short-term standby status. The fee consists of the capital facilities component (see above) and a "short-term standby component". Under the city-district agreements, the short-term standby fee is $1,213/af for the first year of the agreement. The short-term standby fee component will be escalated at the beginning of each contract year at 100 percent of the percentage increase in the consumer price index used to escalate the water delivery fee. Following the third year of the contract, the districts may elect to pay a "long-term standby fee" on the water not taken. This fee consists of the capital facilities component (see above) and a "long-term standby component," which is escalated at the beginning of each contract year by the percentage increase in the same consumer price index.

The five-year, city-district agreements include an option to extend the agreements another five years. While the financial terms of renewal are not specified, it is expected

that contract prices may be below those in the initial agreement because the capital costs of the desalination plant will be paid. Under the city's agreement with Ionics, the city has the option to extend the term of the 5-year agreement. Last June, voters in Santa Barbara approved, by a 5-1 margin, an advisory measure that the city should develop a permanent desalination facility (WIM *7-8/91*).

CA: Yuba County Water Agency Sells 157,200 af to DWR

Acquirer:	*Department of Water Resources*
Supplier:	*Yuba County Water Agency*
Water:	*Total of 157,200 af Yuba River water stored in New Bullards Bar Reservoir*
Purpose:	*a) 30,000 af held in storage for next year; b) 99,200 af for State Water Bank; c) 28,000 af for California Department of Fish and Game*
Terms:	*a) and b) $125/af; c) $50/af*
Status:	*a) and b) complete; c) awaiting Governor's signature of AB 12*

The Yuba County Water Agency has sold a total of 157,200 af of water stored in its New Bullards Bar Reservoir to the Department of Water Resources (DWR). Under the agreement, Yuba County agrees to transfer to DWR a total of 129,200 af--99,200 af will be released in 1991 for the State Water Bank and 30,000 af will be banked by the agency in its reservoir on behalf of DWR for release during 1992. The agency further agrees to transfer an additional 28,000 af to the State Water Bank who, in turn, will make the water available to the Department of Fish and Game, provided Fish and Game concurs that Yuba County may apply shortages of up to 28,000 af for instream flow releases in 1992 in accordance with the shortage provisions of a 1965 Agreement on stream flow releases between Yuba County and the Department of Fish and Game.

DWR will pay Yuba County $125/af of water transferred to the State Water Bank or stored on behalf of DWR. It will pay $50/af for water transferred to the Department for use by Fish and Game. The completion of the financial arrangements for the acquisition for Fish and Game is pending the Governor's signature of AB 12, which would appropriate $16.3 million for Fish and Game's efforts "to minimize the effects of the drought on fish and wildlife." Of that amount, $7.9 million can be used for support costs for "opportunity purchases of water for rare, threatened, or endangered species and anadromous fish," $3.0 million for support costs and $1.0 million for capital outlays to develop and fund alternative water supplies, "including surface, groundwater, and reclaimed water entitlements, by grant, contract, transfer, or other appropriate methods of transactions."

CO: 235 CBT Units Change Hands

Acquirer:	*Ft Collins-Loveland Water District*
Suppliers:	*Farmers*
Water:	*135 CBT units*
Purpose:	*Municipal use*
Terms:	*$1,500/unit*
Status:	*Complete*

Ft Collins-Loveland Water District has acquired 135 CBT units at $1,500/unit from two farmers to meet future demands. Until it needs the water, the district will lease back the water for $15/unit to the farmer who sold 130 units. The city is financing its purchases from a tap fee of $1,700.

Acquirer:	*Northern Colorado Water Association*
Supplier:	*Farmer*
Water:	*100 CBT units*
Purpose:	*Long term municipal use*
Terms:	*not available*
Status:	*Complete*

The Northern Colorado Water Association has acquired 100 CBT units from a farmer for an undisclosed price through Harrison Resource Corporation. The water will be used to meet future municipal demands.

KS: Wichita Buys 1142 af of Groundwater Rights Options

Acquirer:	*City of Wichita*
Supplier:	*Farmer*
Water:	*Options for 7 certified groundwater rights yielding 1142 af/year. 642 af from the Little Arkansas River; 500 af from the Equus Beds Aquifer*
Purpose:	*Future municipal supply*
Terms:	*$400/af*
Status:	*Complete*

The City of Wichita has purchased 7 certified groundwater rights to the Equus Beds Aquifer yielding 1142 af/year under its standing offer price of $400/af (described in WIM, 11/90). Three other suppliers who were negotiating with the city failed to reach agreement. The city will not begin using the water until 2002 and the farmer will use the water at no cost until that date.

The option is purchased for 5% of the $400/af upon signing the agreement. The initial term is for one year but may be extended by the city for up to ten years by paying the owner annual progress payments equal to one-half of the option price ($10/af) for the second and third year and one-quarter of the option price ($5/af) annually from the fourth to the ninth years. Wichita can exercise its right to purchase by paying the seller the difference between the full price of $400/af and the sum of the option and progress payments to date.

Wichita will pump the water through its existing wells. The quantity of water available for a change to municipal use has been determined by state agencies. There will be a 10% conveyance lost when the water is actually delivered to Wichita.

NV: 874 af of Rights Dedicated to Reno/Sparks & Washoe Co

Acquirers:	*Cities of Reno (467 af) and Sparks (338 af) and Washoe Co (69 af)*
Suppliers:	*Developers*
Water:	*Water rights purchased from Sierra Pacific Resources and groundwater rights appurtenant to land owned by developers or purchased from other sources*
Purpose:	*Municipal*
Terms:	*Dedication in exchange for service*
Status:	*Complete*

In 78 separate transactions, developers have dedicated rights to 874 af of water to the cities of Reno and Sparks and Washoe County in exchange for water service. Sierra Pacific Resources water rights were purchased at the standard price of $2,600/af. The remaining rights were appurtenant to the developed land or were already owned by the developers.

TX: Bexar MWD Buys 'Excess' Irrigation Water from Lakes

Acquirer:	*Bexar Metropolitan Water District*
Supplier:	*Bexar-Medina-Atascosa Counties Water Control and Improvement District No.1*
Water:	*Up to 26,000 af/year surface water from Medina, Diversion and Chicon Lakes for 20 years*
Purpose:	*Municipal use*
Terms:	*$56/af for first two years plus pro-rated share of watermaster's fees. Seller has right to adjust price after two years*
Status:	*Subject to approval of Texas Water Commission*

Bexar Metropolitan Water District (MWD) has purchased for 20 years 'excess' irrigation water owned by the Bexar-Medina-Atascosa Counties Water Control and Improvement District No.1 for $56/af plus its pro-rated share of the watermaster's fees. Bexar-Medina owns rights to 66,000 af/year of surface water from Medina, Diversion, and Chicon Lakes. Its average annual use over the past 50 years has been only 40,000 af/year.

The excess water is defined as water remaining from Bexar-Medina's 66,000 af/year rights that is 1) not already adjudicated to Bexar-Medina's landowners (they have approximately 2 af per acre of land), and water needed to meet Springhill Water Management District's request for 5,000 af/year. The level of 'excess' water is determined 'in good faith' each month by the seller. The buyer must pay for the full amount declared surplus whether or not it is actually taken. If the MWD sells any of the water at a price above what it is paying Bexar-Medina, the purchase price will be adjusted upward by 50% of the price difference. After two years, the contract price can be adjusted reflecting any increases in the seller's costs.

The MWD serves a population of about 100,000 people utilizing about 15,000 af/year--mostly groundwater from the Edwards Aquifer. Because the Aquifer is seriously overdrawn, the District has been seeking alternative supplies. It will have to construct a conveyance system to take delivery of the water.

TX: Union Water Supply Co Leases up to 250 af of Rio Grande Surface Water

Up to 250 af Rio Grande surface water

Acquirer:	*Municipal use*	
Supplier:	*$3,750 or $15/af*	*District*
Water:	*Up to 250 af Rio Grande surface water*	
Purpose:	*Municipal use*	
Terms:	*$3,750 or $15/af*	
Status:	*Complete*	

Union Water Supply Corporation has purchased up to 250 af of Rio Grande surface water for one year for $15/af from Brownsville Irrigation and Drainage District. The water the District is selling was conserved when the District replaced canals with underground pipes. The water will be diverted from the Rio Grande into elevated supply tanks, and from these to the towns of Garciasville, La Porta, La Casita, and Santa Cruz, served by Union Water. Union Water will pay the full $3,750 whether or not it takes delivery of the full 250 af.

FEDERAL ACTIONS

Senate Hearings on Western Water Policy Review Act

On September 19, the Water and Power Subcommittee of the Senate Energy and Natural Resources Committee held hearings on the *Western Water Policy Review Act of 1991* (S. 1228). Introduced on June 6 by Senator Hatfield (R-OR), the bill would direct the Secretary of Interior "to undertake a comprehensive review of Federal activities in the nineteen Western States which directly or indirectly affect the allocation and use of water resources, whether surface or subsurface." Within five years of enactment of the act, the Secretary must submit findings and recommendations to the President, the President of the Senate, and the Speaker of the House. In conducting the review, the Interior Secretary is directed to consult with the "Western Water River Commission," which would include fourteen members (the ranking majority and minority members of the Senate Committees on Energy and Natural Resources and Appropriations and the House Committees on Appropriations and Interior and Insular Affairs, and six persons appointed by the President).

The Commission shall: 1) review present and anticipated national water problems affecting the nineteen western states (reclamation states plus Alaska and Hawaii), and identify alternative ways to meet requirements--including efficient use of existing supplies and innovations to encourage the highest economic use of water; 2) examine current federal programs and recommend whether they should be continued, reorganized, or consolidated; 3) review the need for additional storage; 4) review the effectiveness of institutional arrangements, including interstate water compacts, federal-state regional corporations, municipal and irrigation districts, and the authorities of BuRec under reclamation law; 5) review legal regimes governing the development and use of water, the respective role of both the Federal government and the states, and various doctrines of federal reserved water rights (including Indian water rights and the public trust doctrine); 6) review the activities, authorities, and responsibilities of the various federal agencies with direct water management responsibilities, including the Federal Energy Regulatory Commission.

The bill would authorize appropriations up to $18 million. Governors of each State may designate a representative to work closely with the Commission and its staff. The

Commission, at its discretion, may also invite "appropriate public or private interest groups" to work closely with the Commission and its staff.

Testimony at the hearing evidenced a consensus that the scope of the policy review should be national. Some witnesses urged that the membership on the Commission should be expanded to include states and Indian tribes. Within the next three weeks, the bill is expected to be marked-up in the Energy and Natural Resources Committee to make the bill national in focus. The main outstanding issues are the length of the study and the budget.

STATE POLICY ACTIONS

CA: Legislature Passes Bill That Creates Markets for Desalted Water

On the eve of adjournment, the Legislature passed the *Desalination for Assured Water Policy Act* (AB 2111), a bill sponsored by Assemblyman Polanco (D-55) to 1) facilitate public-private partnerships to develop desalination facilities; 2) provide opportunities for scientific advances in desalination technology; and 3) establish a marketing and distribution system for desalted water. Under the bill, local water agencies are required to purchase desalted water from owners or operators of "qualifying facilities" at the "actual cost" of obtaining new, additional supplies of water from other sources. Purchases mandated by the act would be conducted under a three-step procedure.

First, owners or operators of a desalination facility may request a local water agency to determine the "actual cost" of providing new, additional supplies of water. The bill defines actual cost to include:

1) the costs which the agency would otherwise incur in developing new supplies of comparable quality and quantities to those offered by the desalination facility;
2) the full incremental cost to the local agency of procuring or developing new water supplies which would be delivered as reliably as the water from the desalination facility.

The owners or operators of the desalination facility must pay a fee to the local agency at the time they submit their request. The fee shall sufficient for the agency to calculate the "actual cost."

After the calculation of actual cost, the owners or operations may request that the local agency designate the facility as a "qualifying water facility". A "qualifying facility" is a desalination facility which is owned or operated by a private or not-for-profit entity, reduces the concentration of dissolved solids and mineral compounds in surface, underground, or seawater (making the water suitable for normal uses of the agency's customers), and has a desalination capacity of at least 400,000 gallons per day.

Following both the designation as a qualified facility and construction of the desalination facility, the owners or operators may request the local agency to issue an order which includes the following requirements:

1) the physical connection of the facility to the local agency's treatment and transmission facilities;
2) the purchase by the local agency of water desalted and supplied by the qualifying facility;
3) necessary action to make effective the above physical connections (*e.g.* connections ineffective due to inadequate size, poor maintenance, physical or mechanical unreliability);
4) the sale of water, or the exchange of water with another local agency as may be necessary to connect the desalination facility to the agency's treatment and transmission facilities.

The agency shall issue the order if deliveries from the desalination facility:

1) will improve or equal the quality and reliability of water for the agency's customers;
2) will reduce the likelihood that any local agency, which has imposed mandatory rationing for more than 90 days during the previous ten years, will experience future shortages;
3) will not result in uncompensated financial losses for the local agency;
4) will not impair the local agency's ability to deliver potable water to its customers;
5) will not exceed the amount of water purchased by the agency's customers;
6) will not cause the agency to discontinue, in whole or in part, an existing supply source which provides water at a cost lower than the price paid for desalted water.

No agency may be required to purchase water if, as a result of the purchase, desalinated water would contribute more than 8 percent of the amount of water which the agency delivered to its customers during the previous year. Prior to issuing the order, the local agency shall provide opportunities for public comment. The term of the order shall be 10 years for facilities capable of supplying up to 20 million gallons per day (gpd), and 20 years for facilities with capacities above 20 million gpd.

Any order will be terminated if a qualifying facility is not capable of providing desalted water to the agency within the following periods: two years for facilities with capacity below 10 million gpd; four years for facilities with capacities between 10 million gpd and 20 million gpd; and six years for facilities with capacities above 20 million gpd.

Governor Wilson has until October 14 to sign or veto the bill, which was strenuously opposed by the Metropolitan Water District.

NV: Status Conference Held on Las Vegas's Application

On September 17, the State Engineer held a status meeting with interested parties to review the progress of preparations for the September 1992 public hearing on the application by the Las Vegas Valley Water District (LVVWD) to appropriate ground and surface waters in Clark, Lincoln, White Pine, and Nye Counties. LVVWD, the counties, and the State Engineer agreed to participate in defining the scope of study for an analysis of the district's project. (After an August interim ruling--described below--LVVWD agreed to work with federal agencies on a computer model that would estimate the hydrologic impact of the planned appropriations.) The State Engineer also gave the counties 60 days to decide how they wish to proceed with the 25 applications (totalling 53,500 af/year) that LVVWD had conveyed, without compensation, to them last April. The State Engineer also declined a request by Nye County that LVVWD be ordered to do an environmental impact statement--LVVWD has agreed to retain the environmental consultant for the project. Finally, LVVWD offered to establish a Regional Conservancy Board which would include the rural counties.

The status meeting was held less than a month after an Interim Ruling issued by the State Engineer on August 26. The State Engineer ordered LVVWD to supply rural counties with "all relevant information which will be the basis for the applicant's evidence and testimony." He also granted, in part, a motion filed by the United States on January 28, 1991, requesting a 18 month delay in the hearings so that studies may be conducted to determine the overall impact of the project. He set a September 1992 date for evidentiary hearings, "giving the United States 18 months to conduct the studies and 60 days for the applicant to avail itself of the results."

Finally, the State Engineer's interim ruling rejected a challenge by LVVWD to the standing of many protestants to its applications. The district argued that protestants have no standing unless they hold an existing water right in the proposed source of supply which has been fully appropriated, or one of the applicant's applications would conflict with their existing rights, or they have the legal capacity to sue to vindicate the public interest. The State Engineer concluded that Nevada law allows "virtually any existing water right holder, member of the public, or governmental entity who has timely protested an application to be heard on its concerns."

LVVWD plans to acquire rights to 250,000 af/year (185,000 af/year of ground water and 65,000 af/year of surface water from the Virgin River) to satisfy projected population growth to the year 2050. LVVWD estimates the project will cost $1.9 billion over 30 years. Under Nevada law, the State Engineer evaluates an application to appropriate unappropriated ground water on 1) whether the water may be pumped and still maintain safe yield in the basin, 2) whether increased pumping will harm existing users, and 3) whether increased pumping will be detrimental to the public interest.

Another status conference will be held in February 1992. The public hearing process will proceed in three steps: the September 1992 hearing will address the entire project, a separate hearing will then be held on the Virgin River applications, followed by hearings in rural counties. For more background, see WIM (*4/91*, *4/90*).

WATER QUALITY & THE ENVIRONMENT

CO: State Engineer Proposes Rules to Implement Senate Bill 181

In October, the Office of the State Engineer (SEO) will hold hearings on Proposed Rules and Regulations for the Implementation of Senate Bill 181. Passed in 1989, the bill requires SEO to implement water quality standards and classifications promulgated by the Water Quality Control Commission in those instances where SEO has water quality authority. Under Colorado law, the Commission adopts standards and classifications for ground and surface water (it classifies water according to beneficial uses--public water supply, agricultural, industrial--then sets standards for concentrations of various organic, inorganic, and bacteriological parameters suitable for classified uses). SEO is responsible for implementing standards for discharges other than point source discharges into surface water, regulates the drilling and construction of wells to assure that ground water is not contaminated, and has jurisdiction over substitute supply plans, augmentation plans, and exchanges.

The Proposed Rules and Regulations address three major areas: discharges to ground water, nondecreed exchanges and substitute supply plans, and decreed exchanges and augmentation plans. According to Rule 3.6, "nothing in these rules shall be construed, enforced, or applied so as to cause or result in material injury to water rights."

Discharges to Ground Water (Rule 5): The SEO relies on the promulgation of the Board of Examiners of Water Well Construction and Pump Installation Contractors Rules and Regulations to ensure that well permitting and licensing (a) does not result in a discharge to state water, and (b) contaminate or pollute aquifers. For other activities which may result in discharges to ground water, "the point of compliance shall be located at the boundary of the area of the spreading basin or the area physically disturbed by the construction of the pit or excavation."

Nondecreeed Exchanges and Substitute Supply Plans (Rule 6): Water offered under nondecreed exchanges and substitute supply plans shall be of a quality to meet the requirements of use to which the senior appropriation has normally been put. Analysis and

evaluation by the SEO may consider, among other factors, any appropriate water quality standards and/or classifications established by the Water Quality Control Commission for the use which is appropriate for the senior appropriator. Evaluation of water quality data of the substitute supply will be at or near the point where replacement water enters the waterway or aquifer.

Decreed Exchanges and Augmentation Plans (Rule 7): The SEO may oppose applications to a water court for augmentation plans, including exchanges, in which any substituted water may not meet the water requirements of the senior appropriator. Analysis and evaluation by the SEO may consider the same factors of nondecreed exchanges and substitute supply plans--*e.g.* appropriate water quality standards and/or classifications established by the Water Quality Control Commission. Similarly, evaluation of water quality data of the substitute supply will be at or near the point where replacement water enters the waterway or aquifer.

Under Rule 8, the SEO may grant, upon written request, variances to the rules. The applicant must show that the requested variance will comply with the intent of the rules to protect the public health, safety, health and environment, and prevent the waste or contamination of surface water and ground water, without material injury to water rights.

ID: State Ground Water Quality Plan Nears Completion

In mid-October, the Ground Water Council will undertake final revisions of the *Idaho Ground Water Quality Plan*, which is designed to protect and maintain the quality of Idaho's ground water. Required by the Ground Water Protection Act of 1989, the goals of the plan include:

1) maintain the existing high quality of the state's ground water to satisfy existing and future beneficial uses;
2) restore the quality of contaminated ground water where feasible and appropriate;
3) prevent contamination of ground water from point and nonpoint sources of contamination to the maximum extent possible;
4) provide direction for appropriate clean up of contaminated ground water;
5) investigate ground water quality;
6) develop ground water monitoring programs;
7) prevent ground water contamination from agricultural activities.

The Plan has three sections -- general ground water, monitoring, and agricultural chemicals.

The general ground water section includes:

a) *contamination prevention program*: developing Best Management Practices for major land uses improving existing prevention programs, and developing a wellhead protection program;
b) *remediation program*: determining when to clean up, how, and to what level, and who is responsible (specific regulations will be developed by Division of Environmental Quality);
c) *aquifer categorization for protection*: specifying three levels of protection according to present water quality, the aquifer's vulnerability to contamination, and existing and future beneficial uses

The prevention program is an important part of the Plan because it entails lower financial and social costs than the clean up of contaminated ground water.

The monitoring section provides for the development of programs to assess current state ground water quality and localized problem areas. The Department of Water Re-

sources is currently developing a statewide monitoring network. The Plan would require the Division of Environmental Quality to monitor known areas of contamination to determine both the source of contamination problems and the best solutions.

Under the guidance of the Idaho Department of Agriculture, the agricultural chemicals section focuses on the prevention of agricultural activities that reduce ground water quality. The Plan relies on the use Best Management Practices for agricultural activities, including field use of pesticides and fertilizers, agricultural waste disposal, and irrigation water management.

Public comments on the plan were received during meetings held in July and August. The Council will respond to the comments and make final revisions to the Plan in two sets of meetings scheduled to be held on October 17-18 and November 13-14. The governor-appointed Council includes 22-members representing industry, the general public, environmental groups, and local governments.

The final Plan will be submitted to the Legislature for ratification when it reconvenes in January. Legislative action will include legislation for ratification, providing local authorities with any new powers necessary to implement the Plan, and funding for overall implementation as well as specific programs undertaken by the Division of Environmental Quality, the Department of Water Resources, and the Department of Agriculture.

BRIEFLY NOTED

Federal

The U.S. Fish and Wildlife Service has listed the Delta Smelt as "threatened" under the Endangedered Species Act. Fish and Wildlife Service biologlists had recommended that the fish be listed as "endangered." * * * The Senate Energy and Natural Resources Committee has passed by an unanimous vote the *Reclamation States Relief Act of 1991* (H.R. 355). For background on H.R. 355, see WIM *4/91*. * * * The same committee has yet to act on The *Omnibus Reclamation Bill* (H.R. 429), passed by the House on June 20. * * * In testimony before the House Interior Subcommittee, the Director of the Bureau of Land Management (Cy Jamison) urged Congress to pass H.R. 3066, the *California Public Lands Wilderness Act*. The bill calls for wilderness preservation of 2.3 million acres of BLM lands, and the placement under management of another 4.8 million acres.

Around the States

Arizona: The Salt River Project has announced an improvement program for the Roosevelt Dam which will provide for more water storage and improved spillway and diversion facilities for dam safety. Once construction is completed in 1995, water conservation capacity will be increased to 1.6 million af from the current 1.3 million af capacity, and an additional 1.8 million af of storage will be available for flood control. During construction, water normally stored in Roosevelt Lake above the 75-percent capacity limit will be released into the Salt River, which will translate into a loss of 340,000 af of water storage capacity.

California: The State Water Project ended the 1990-91 water year with 2.4 million af in storage, almost 0.6 million af *above* the amount in storage at the end of the 1989-90 water year. * * * At a three-day retreat, the Board of the Metropolitan Water District endorsed, in concept, increased reliance on voluntary water transfers to meet water demands in its service area, increased sensitivity to environmental concerns, and substantial increases in water rates and taxes to replace financial reserves depleted by the drought and

to finance the district's $8 billion capital plan. Resolutions incorporating major shifts in MWD policy are expected to be passed in future months. * * * The Board of Directors of the Marin Municipal Water District have placed an $80 million bond measure on the November 1991 ballot to approve funding of a plan to import up to an additional 10,000 af of water annually from the Russian River.

Kansas: Kansas State University has begun a study of the economic impact of water table stabilization on Northwest Kansas. The study is part of the assessment of policy options for the Northwest Kansas Groundwater Management District.

Oregon: The Water Resources Commission has approved the McKay and Umatilla River Water Management Plan.

Pacific Northwest: The Northwest Power Planning Council is reviewing some 125 proposals submitted by state and federal fish and wildlife agencies, Indian tribes, utilities, and citizens to aid the recovery of depleted salmon stocks. Among them include a proposal for experimental drawdown of reservoirs behind hydro-dams on the lower Snake River in 1992 to improve the survival of young salmon and steelhead migrating to the Pacific Ocean.

for the use and benefit of the public"[110] and provides for state ownership of reservoirs in situations necessary to achieve optimum reservoir development.[111] This provision, in addition to the state's police powers, the wide variety of purposes recognized as beneficial uses under state water law, and the protection of instream uses, fish and wildlife habitat, and bays and estuaries, suggests to some state officials that the public trust doctrine may have a life of its own related to water resource allocation outside the Texas Water Code and Constitution.

As further attempts are made to employ the public trust doctrine to satisfy competing demands for water resources, the interpretation and implementation of the doctrine will undoubtedly be modified in different ways from state to state. One important issue which is not yet resolved is the question of compensation for appropriative rights which are modified or taken. A minority view may be that such rights are inherently subject to modification. The majority view, indeed what some would call the settled law in the West, is that because vested water rights are constitutionally protected property interests they are not subject to modification unless expressly conditioned. Yet the application of the public trust doctrine in its purest form to rescind or modify a vested water right would be a noncompensable taking, akin to a "taking" under the navigation servitude. The theory is that no compensable taking occurs because the holder of the right could never have possessed a property interest contrary to the public trust. Many observers find this objectionable. Even some proponents of applying the public trust doctrine to modify or, as necessary, rescind vested water rights see the result as equitable only if those who lose such rights, or a portion of them, receive payment for them. Others may question the need for application of the public trust doctrine outside a system of water allocation which they believe presently protects trust uses.

WATER RIGHT TRANSFERS

The "reallocation" of appropriated water by transfer of water rights is another method of promoting public interest values as well as meeting new water demands. The use of this method varies from state to state in the West. A transfer refers to the conveyance of a water right from one water user to another or to a change in the location or type of use by the holder of an appropriative water right. The transferability of appropriative water rights promotes the public interest by allowing established uses to change in accordance with changing needs and values. This characteristic

110. TEX. CONST. art III, § 49d (Supp. 1989).
111. *Id.*

of appropriative water rights was recognized early in the development of appropriative water law.[112] As the appropriation doctrine has developed, some states have acted to facilitate the transfer process through legal and administrative means.

In 1859, the California Supreme Court recognized the right to use water under the appropriation doctrine as "substantive and valuable property."[113] That court also said:

> Under the law of this state as established at the beginning, the water-right which a person gains by diversion from a stream for a beneficial use is a private right, a right subject to ownership and disposition by him, as in the case of other private property. All the decisions recognize it as such.[114]

An important treatise on western water law simply concludes, "the basic right of ownership and divestiture of ownership [of appropriative water rights] was so well established in the early development of the appropriation doctrine in the West, and so consistently confirmed, as to be axiomatic."[115]

Before an appropriative water right may be transferred, certain criteria must be met. First, the right must be vested, that is, all requirements entitling the applicant to the use of the water must be fulfilled. Second, the parties must intend that the transfer take place. Third, the transfer must not detrimentally affect other water users. This requirement stems from the interrelated nature of the rights to use water on any water course. Fourth, a "change application," or its equivalent, must be filed with and approved by a state administrative body or a water court. This gives the administrative agency or court the opportunity to notify other parties which may be affected by the transfer and to rule on whether the transfer should be approved. Affected parties may protest the transfer if they believe it will harm their rights. After a time period for objections, the transfer is either approved by the state agency or court, or further hearings or proceedings are held. Complex transfers, with the potential to adversely affect many vested rights, can be costly and time consuming. More routine transfers are part of "business as usual" in many states.[116]

112. *See* Thayer v. California Dev. Co., 164 Cal. 117, 128 Pac. 21 (1912).
113. McDonald v. Bear River & Auburn Water & Mineral Co., 13 Cal. 220, 232 (1859).
114. Thayer v. California Dev. Co., *supra* note 112, at 164 Cal. 125.
115. 1 W. HUTCHINS, *supra* note 3, at 468.
116. *See* K. HIGGINSON & J. BARNETT, WATER RIGHTS AND THEIR TRANSFER IN THE WESTERN UNITED STATES—A REPORT TO THE CONSERVATION FOUNDATION (1984). This report indicates that in 1982 (the final year for which information is included) more than 100 transfer applications were filed in California, Colorado, Idaho, Kansas, Montana, Nevada, Oregon, and Utah. *Id.* at 8.

In 1986, the Western States Water Council surveyed its members requesting information on water right transfer activity.[117] While the specific state laws relating to transfer vary, the following generalizations can be made. In virtually every western state, appropriative water rights may be severed from the land to which they are appurtenant and transferred. Changes in point of diversion, place, or nature of use, or other changes with the potential to affect the rights of other users, require state agency or court approval. A simple change in ownership of a water right usually requires no such approval. The time required to approve a transfer ranges from 30 days to more than one year, with an average of 60 to 90 days. Most states charge fees to process transfer applications. They range from $10 to $150, with an average fee of about $50. In a few states the fee depends on the volume of the transferred right. In all states the cost associated with contested transfers can be significant. In all states, injury to other vested water rights must be considered in determining whether to approve a transfer application. In most of the states "public interest" factors (variously defined) must also be considered. Most states allow temporary transfer, or water leasing. Usually historic consumptive use determines the quantity of water which may be transferred. Most states allow out-of-state transfers, and most recognize instream flows as a beneficial use to which water may be transferred.

Prices paid for an acre-foot or other measured unit of a transferred or conveyed water right vary drastically depending on the location of the water, supply and demand in the area, the use to which the water will be put, the priority date of the right, and other factors. Reported prices in the council's survey range from a low of $30 per acre-foot for a sale which occurred in Utah to a high of $12,500 per acre-foot for a sale in New Mexico. The most drastic range in a state was $300 to $10,000 per acre-foot which was reported by Nevada.

The annual number of transfers also varies greatly from state to state. In North Dakota new appropriations are apparently available to meet all water needs. While state law provides for the transfer of appropriative water rights, very few occur. Alaska, Nebraska, and South Dakota also reported a paucity of transfers and no sales or purchases of water rights. At the other extreme, water rights are bought and sold frequently in other states. Colorado, Idaho, Nevada, New Mexico, Utah, Washington, and Wyoming reported that 50 or more transfers occur annually. Colorado, Nevada, and Utah reported that more than 300 transfers occur each year.

The monthly periodical *Water Market Update*, which began publication

117. A matrix summarizing the results of this survey was published as an appendix to WATER EFFICIENCY TASK FORCE, REPORT TO THE WESTERN GOVERNOR'S ASS'N, WESTERN WATER: TUNING THE SYSTEM (B. Driver ed. 1986).

in January 1987, reports on business activities and transactions in the water markets of the western states. A sampling of the news reported in the January 1989 issue, reviewing information for 1988, gives an idea of trends in water marketing in the West. For example, while the drought in many western states contributed to marketing pressures, prices for water rights generally remained steady through the year. Interest in western water rights by institutional investors increased sharply. Environmental activists, state departments of game and fish, sportsmen's clubs, and others who desired to protect instream habitat, used water markets and water transfers together with other strategies to meet their goals. Controversy surrounding the protection of rural communities from indiscriminate water transfer activity and the ability of Indian tribes to market their water rights off-reservation continued.[118]

Prices paid per acre-foot of permanent water right ranged from a low of $15 per acre-foot for certain sales in Idaho, to more than $4,000 per acre-foot in the Denver, Colorado area. In the Reno, Nevada area a number of senior rights on formerly irrigated land that has been urbanized were sold for $2,000 per acre-foot. Along the Colorado Front Range many Colorado-Big Thompson project water rights were marketed within the district at prices ranging from $1,000 to $3,000. Water immediately south of the district sold for three to four times that amount. Irrigation rights transferred to municipal and domestic use along the lower Rio Grande in southern Texas brought prices between $400 and $600. Marketing of groundwater rights in the Tucson and Phoenix, Arizona, area continued to be active, with prices ranging from $700 to $1,000 per acre-foot. Albuquerque, New Mexico maintained its program of purchasing water rights for future growth needs. The average price paid by the city was $1,000 per acre-foot of water.[119]

These brief examples, culled from many listed in the *Water Market Update*, are not necessarily representative of market conditions in any state or area. They are included to illustrate the activity in various western water markets. Indeed, publication of this monthly periodical indicates strong interest in such activity. Two other periodicals have performed functions similar to those of the *Water Market Update*. *Water Strategist*[120] focuses on water marketing, finance, legislation, and litigation in the West. *Water Exchange Information Service*[121] provides detailed information on water rights for sale in Colorado.

Measures have been taken in some states to facilitate the marketing of water rights. In Idaho, for example, farmers began in the 1930s to "deposit" water allocated to them in federal reservoirs in the Upper Snake River to be "withdrawn" by other farmers. These "deposits" and "withdrawals" were made on a yearly basis using lease agreements. Because questions arose about the continued beneficial use of water deposited every year, in 1979 the Idaho Legislature formalized the activity by creating a "waterbank" for marketing purposes.[122] The bank is operated by the Idaho Water Resources Board, which can appoint local committees to oversee the rental of stored water. The bank was created to:

> Provide a source of adequate water supplies to benefit new and supplemental water uses, and provide a source of funding for improving water user facilities and efficiencies.[123]

The principal recent use of the bank has been by the local committee in the Upper Snake River Basin where farmers with entitlements to Bureau of Reclamation water have made "deposits" and the Idaho Power Company has made "withdrawals" and used water to produce electricity. Both parties benefit since the farmers are paid for water they do not need, and the Power Company obtains water to increase its production of electricity, saving its rate payers money. A water banking program also functions in Kern County, California.

In Colorado, where water is marketed statewide, a particularly active market exists in the Northern Colorado Water Conservancy District where water rights from the Colorado-Big Thompson Project are actively bought and sold. Market transactions have been simplified by assignment of individual water shares to members of the district. A periodic auction of such shares further facilitates their purchase. A number of real estate professionals in the district specialize in water right transactions. Active trading of water rights also occurs within mutual irrigation districts in Utah and other western states.

The California Water Code has clear statements of policy and procedure encouraging water right transfers. A portion of the Code reads:

> It is hereby declared to be the established policy of this State to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import. The Legislature hereby directs the Department of Water Resources, the State Water Resources Control Board, and all other appropriate state agencies to encourage voluntary transfers of water and water rights, including, but not limited to, providing technical assistance to persons to identify and implement water conservation measures which will make additional water available for transfer.[124]

118. 3 WATER MARKET UPDATE, Jan. 1989, at 1.
119. *Id.* at 2-4.
120. *See* WATER STRATEGIST, Apr. 1987.
121. *See* WATER EXCHANGE INFORMATION SERVICE, Apr. 1987.
122. *See* IDAHO CODE § 42-1761 (Supp. 1988).
123. *Id.*
124. CAL. WATER CODE § 109 (West 1971)

California recently enacted a law requiring the State Department of Water Resources (DWR) to establish a program to facilitate the voluntary exchange of water rights and to report to the legislature legal and procedural changes which could be made to facilitate water marketing. Also, DWR must prepare a "water transfer guide" and create and maintain a periodically updated list of entities seeking to enter into water transfers, leases, or exchanges.[125]

In 1986 Idaho enacted legislative changes to streamline water marketing activities.[126] Minor modifications were made to various statutes to simplify the transfer process and to ensure that those who need to acquire water do so through appropriate state procedures. Other states are considering legislative changes which would facilitate transfer activity.

INTERSTATE SALE AND LEASE OF WATER

Intrastate water transfers have occurred under the appropriation doctrine almost since its inception. Statutes and administrative regulations governing transfers have evolved in each state and are still gradually changing. Legal and administrative procedures related to intrastate transfers also evolved through time. Recent developments, however, have required significant changes in some state laws.

Justice Marshall, in *Wilson v. Blackbird Creek Marsh Co.*,[127] suggested the states have plenary power to regulate water resources within state boundaries. Justice Holmes, in *Hudson Water Co. v. McCarter*,[128] was even more emphatic in holding that a state plainly had the right to control the water resources exclusively within its boundaries. Both of these cases, however, occurred in the East where the riparian doctrine applied and water was part of the land it abutted.

A western state's right to control water supplies is based on two doctrines. The first was enunciated in the Desert Lands Act of 1877[129] which made it clear that the state had the right to control waters on the federal public domain. The second was the doctrine of equitable apportionment, which provides that when two states share the surface flows of a stream the states have the power to compact for the use of that water.[130] If they fail to do so, the Supreme Court gives each state a portion of the stream for its exclusive use.[131] Finally, based on these concepts, numerous west-

125. *Id.*, §§ 470-483 (West 1989).
126. Ch. 313, 1986 Idaho Sess. Laws, 763.
127. 27 U.S. (2 Pet.) 245 (1829).
128. 209 U.S. 349 (1908).
129. 43 U.S.C. §§ 321-339 (1983); See discussion in California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).
130. *See, e.g.*, Upper Colorado River Basin Compact, ch. 48, 63 Stat. 31 (1949).
131. *See e.g.*, Kansas v. Colorado, 206 U.S. 46 (1907).

Review of DNR Planning Process 1-29-92

House Resource Committee Testimony - January 29, 1992

by

Joseph F. Wehrman III

Thank you Chairman Davidson for the opportunity to share a few of my thoughts and observations with regard to DNR's planning process. From 1979 to 1985 I represented the Division of Forestry on state-wide and area planning teams. Since 1990 I have been in the private sector. It is enlightening to see the process and implementation of the results from both perspectives.

DNR goes the extra mile to have local meetings. This gives residents with the inclination and the time, the opportunity to both gather information on what is going on and provide input.

At every level of the planning process - state-wide, regional, area, local, resource levels - the land base gets further fragmented and options further restricted. (See sample chart attached.) By the time all the plans get done the use identified as that of primary interest in the state-wide planning process may well not even be allowed when on the ground management planning takes place. You will never see more options opened up as plans focus on smaller units, you will only see increased restrictions. These cost direct dollars, increase development costs unnecessarily and can even effectively preclude the generation of jobs and dollars so sorely needed as Alaska tries to wean itself from oil dependence.

Of further concern is DNR's tendency to create "co-primary" designations for resource uses in its various plans, but most notably, its area plans. When it comes time for implementation, the most restrictive use/access co-primary is the one that sets the standard for the entire area. The planner's credo has historically been "an activity can only occur if it doesn't negatively impact any other co-primary use." This premise effectively makes the entire area whatever the single most restrictive use co-primary designation is.

In my opinion, what DNR's planners need to begin the process, is direction on what the State wants to accomplish as the landowner. Part of the "owner state's" responsibility is setting this policy. The way it works now the land is divided up into enclaves that reinforce the public perception of the incompatibility of several resource uses/development to occur on the same area. Generally the planning staff tries to follow a path of least resistance. This can result in planners interpreting inputs or leading the process towards their personal preferences, rather than consider science. This would not be the case if there were established goals for land uses up front.

The playing field within even the agency planning teams is not normally level. Frequently one or another of the resource interests is unable to participate fully in the process, while other interests have three to five people at most meetings. In one planning effort the only non-agency person who could attend nearly every single

agency team member meeting was invited to sit at the table and speak as if they were an agency representative. This individual had a single special interest they were espousing, yet got unilaterally increased authority granted by the planning staff. To be fair every resource should be represented by a balanced team using an identical authorization to support that resource's interest. When you have one resource being advanced under a "get all you can" mandate and another being represented under "seek a balance" rules, you end up 3/4 of the way toward the former, if you are lucky.

In my experience, DNR's planning staff is long on education but lacking in practical application backgrounds. They are planners, not experienced land or resource managers. Rarely is a planner made responsible for implementing the plan they developed. The Matanuska-Susitna Valley Moose Range is the only exception that comes to mind.

When I worked for the Division of Forestry, we actively lobbied the author of one area plan to take over Division programs on that area and actually implement a portion of their overall plan on the ground. The response we got was that the plan - remember this was the author speaking - wasn't implementable! They also stated that they didn't need to go out in the field and put up with the conflicts and pressures, that they could stay in planning and get promoted. (Incidentally, that is exactly what happened.)

As I stated earlier, DNR does an outstanding job of reaching out to the public. One area where there is a real opportunity to improve

the process is to utilize this public outreach to correct misconceptions that influence or drive public comments that are inaccurate. DNR has the opportunity to make the planning process an educational tool. In the past the effect of plan allocations has been to reinforce these misconceptions. The State must seize every opportunity to educate Alaska's residents.

With regret that I was unable to attend and address any questions you might have in person as well as listen to the other speakers.

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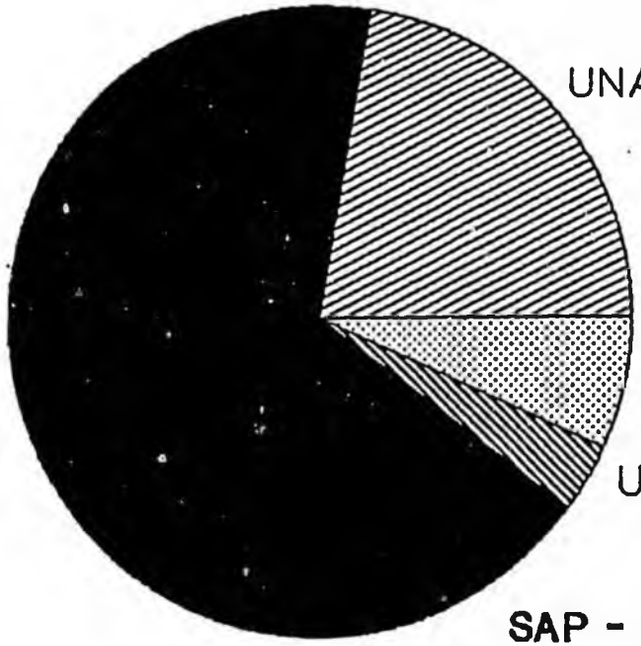

SAP - Susitna Area Plan
SFRP - Susitna Regional Forest Plan
SALE PRP - Timber Sale Preparation

From various plan related documents.

Alaska State Legislature

Legislative Research Agency

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

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January 29, 1992

MEMORANDUM

TO: Representative Tom Moyer

FROM: Glenn T. Gray GTG
Legislative Analyst

RE: A Comparative Analysis of Land Use Planning in Alaska and Other Areas
Research Request 92.096

You asked us to compare the regional land-use planning process used by the Alaska Department of Natural Resources (DNR) with the processes used by other land management agencies. You also asked us to assess the overall effectiveness of the DNR planning program.

This memorandum contains seven major sections: 1) summary, 2) general background and history of regional land use planning, 3) land use planning in Alaska, 4) assessment of the DNR planning process, 5) land use planning in Oregon and Washington, 6) land use planning in the Yukon Territory and British Columbia, 7) Bureau of Land Management and Forest Service land use planning, and 8) conclusion.

SUMMARY

No other state has a regional land use planning program comparable to that of Alaska. The basic planning procedures used by DNR's Division of Land are similar to those used by other state and federal land use planning agencies in the United States. However, the scope of the division's program differs dramatically from other state planning programs in several ways. First, other states have far less state-owned land to manage: Alaska's land entitlement is 20 times that of any other state--larger than the state of California, and much of this land remains undeveloped and unclassified. Second, municipal governments in these states have a greater role in land use planning. Third, the primary role of state land planning authorities in these states is to coordinate local planning programs and to implement growth management controls.

Land use planning programs in the Yukon Territory and British Columbia also differ from Alaska although like Alaska, both of these jurisdictions manage a large acreage and their economies are driven by natural resource development. Although British Columbia had a strong regional planning program during the mid-1970s, today land use planning occurs primarily at the municipal level of government and within provincial agencies responsible for single-resource sectors. The Yukon Territory recently terminated a regional planning effort

that involved the federal and territorial governments and Native interests. After the Native land claims are settled there, cooperative efforts in regional land use planning will likely resume.

Department of Natural Resources' planning responsibilities more closely resemble those of two United States federal agencies, the Bureau of Land Management (BLM) and the Forest Service. These agencies manage their land for multiple uses and must complete regional land use plans. The Forest Service and the BLM, however, must follow meticulous direction from a number of congressional acts, agency regulations and policy mandates. The DNR has legislatively mandated regional land use planning responsibilities, but it does not have to conform to as many requirements as federal agencies.

Alaskans have varied opinions about the success of the Division of Land's planning program. While some people believe the flexibility of the division's program and the lack of influence of outside interests are desirable, others prefer the constraints of the federal system because it reduces the amount of discretion of agency personnel. The strongest critics of the division's planning program are pro-development and pro-environmental groups, both of which perceive DNR to be working against their interests.

INTRODUCTION

Regional land use planning is the process that determines how specific areas within a large region will be classified for use. For relatively unsettled areas, particularly in the west, regional land use planning often focusses on natural resource development issues. Some planning processes suggest general guidelines or recommended uses while other processes prescribe classification of areas for specific uses. Governments prepare regional land use plans to determine which uses should have priority in particular areas of a large region. In theory, a plan will give precedence to the highest and best use of an area and reduce land use conflicts. For example, planning for entire regions encourages interest groups to assess which areas in the region are best suited for the uses they advocate. On the other hand, when each development proposal is reviewed in isolation, advocates for specific conflicting uses (e.g., timber harvest and roadless recreation) are likely to argue that the use they advocate is the best possible use of the site.

While some federal agencies manage large tracts of land, no other state manages an amount of land comparable to the acreage managed by the State of Alaska. Additionally, several federal agencies have a mandate to manage their land for a single purpose (e.g., the National Park Services manages parks and the Fish and Wildlife Service manages wildlife refuges). However, the United States Forest Service and the Bureau of Land Management have the responsibility to manage lands for multiple uses.

The history of regional land use planning in the United States began in connection with New Deal projects in the 1930s. The most notable example of

these efforts was the Tennessee Valley Authority, a program designed to employ people and to develop hydroelectric power, provide water for irrigation projects, and to control floods. During the same period, the federal Natural Resource Planning Board encouraged states to develop and coordinate regional development plans. Later, interstate river basin commissions provided a means to plan at the regional level. Since the 1970s, however, Congress has required federal land management agencies to prepare regional land use plans.

Land use planning has historically received less emphasis by state governments than by local governments. Because municipal governments plan only for lands within their boundaries, regional land use planning occurs primarily at the state and federal level.

During the 1960s and early 1970s, communities acquired an interest in urban planning. A decade later, states began to assert new authority over local planning to deal with growth and to address issues avoided by individual communities. Hawaii and Oregon were two of the earliest states that passed legislation encouraging state involvement in community land use planning for private lands. Hawaii chose a unique approach by requiring the state to zone both private and state lands.[1] Oregon, on the other hand, took a growth management approach permitting counties and cities to develop their own land use plans with a requirement that they be approved at the state level. The Oregon initiative began in 1973 and the Washington Legislature passed similar legislation in 1990. Both the Washington and Oregon programs are discussed in more detail later in the memorandum.

STATE LAND USE PLANNING IN ALASKA

Land use planning occurs in Alaska at four levels: local (cities), regional (boroughs and coastal resource districts), state, and federal.[2] This section of the memorandum discusses the history of the land use planning since statehood, legislation affecting DNR's Division of Land, and land use planning completed by other state agencies. Federal land use planning is discussed later in this memorandum.

General Direction for State Land Use Planning in Alaska

The Alaska Constitution embodies a presumption that development is desirable and should occur within the limits of the doctrines of sustained yield and

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[1]According to Ester Ueda, executive officer of the Hawaii State Land Use Commission, developers must comply with both state and county land use classifications.

[2]Thomas Gallagher, Ph.D, 1991, *Who's Planning Alaska: The Alaska Planning Directory*, University of Alaska, Fairbanks.

general public interest. Section 1 of Article VIII encourages "the settlement of its land and the development of its resources by making them available for maximum uses consistent with the public interest." Section 2 directs the legislature to "provide for the utilization, development, and conservation [wise use] of all natural resources of the state, including land and waters, for the maximum benefit of its people." It is within this context that land use planning has developed.

Alaska is unique among all the states in the amount and type of land it manages. The federal Alaska Statehood Act entitled the state to select over 103 million acres for community expansion and recreation (400,000 acres of national forests and 400,000 acres of unreserved federal lands) and for general purposes (102.35 million acres of unreserved federal lands). This land entitlement is twenty times that of any other state and larger than the state of California. Alaska's land entitlement is also unique because most of its land is sparsely populated and its resources are relatively undeveloped. Statehood advocates believed that statehood and the accompanying land entitlement would facilitate development of Alaska's natural resources after years of restrictive control by the federal government.

Land Use Planning Direction for the Division of Land

The first Alaska state legislature placed an importance on land use planning and classification when it passed the Alaska Land Act in 1959, the basis for the current land use statutes in Title 38 (Chapter 169 SLA 1959). This act created the Department of Natural Resources and the department's Division of Lands and gave the division's director jurisdiction over state lands. The act also mandated that the director "make a preliminary classification for surface use of areas where he deems it necessary and proper for future development" (Section 1 Article III Chapter 169 SLA 1959). This section further instructed the director to complete a land use plan to accompany classifications for the commissioner's approval.

The Alaska legislature expanded the planning and classification requirements in 1978 when it created a new article to address inventory, planning and classification (AS 38.04.060 - AS 38.04.070). Today, this article, along with an amended version of the original classification statute (AS 38.05.300) and a general statement of policy about land planning and management (AS 38.04.005) provide the statutory direction for land use planning and classification.

Among other requirements, the planning statutes require the department to:

- provide opportunities for meaningful involvement of the general public and local governments,
- involve other agencies using an interdisciplinary approach,
- observe the principles of multiple use and sustained yield,

- assure that plans are consistent with municipal land use plans,
- classify lands according procedures outlined in AS 38.05.300, and
- consider the needs of future generations by reserving a variety of lands throughout different locations "to provide an opportunity for future decisions."

Regulations provide further direction for land use planning and classification (11 AAC 55.010 - 11 AAC 55.280). Unlike the federal planning mandates for the Forest Service and the Bureau of Land Management, neither the Alaska statutes nor the regulations address specific steps of the state planning process. These are set forth in the division's policy and procedures manual (Attachment A).

According to Frank Rue, formerly a planning supervisor for the Division of Land, because Alaska's land ownership situation was so unique, the division hired consultants to design a planning program that would suit Alaska's needs. The division decided to use a computer-assisted process so that information could be readily retrieved. Mr. Rue also said that the division placed high importance on public involvement.

The actual planning process is similar to that used by the Bureau of Land Management and the Forest Service, although statutes and regulations do not provide as much direction as either federal program. The DNR process includes the following steps:

- identification of issues,
- gathering of information,
- preparation of alternatives,
- public review of alternatives,
- preparation of a draft plan,
- public review of draft plan,
- preparation of final plan, and
- approval of the plan.

The Division of Land prepares three kinds of land use plans: area plans (for large regions), management areas (for subregions) and site-specific plans. Management plans generally provide a greater level of detail than area plans, and site-specific plans address only small areas with a specific land use.

Planning teams prepare the plans using an interdisciplinary approach. Representatives of other DNR divisions, federal and state agencies, and interest groups make up the planning teams. Citizen advisory boards and public attitude surveys provide information to the planning teams. Major public involvement occurs during three steps: issue identification, review of alternatives and review of the draft plan.

Before the alternatives are reviewed by the public, the planning teams suggest primary and secondary use designations for specific management units. A statement of management intent and management guidelines accompany the use designation.[3] The management units are created with consideration of current use patterns and resource values.[4] The team suggests alternative designations only for specific areas where there are apparent land use conflicts. In contrast, federal agencies create several alternatives for the entire plan rather than a each specific area within a plan. Anna Plagger, a DNR planner in Fairbanks, said that the division's process differs from federal processes because all of the alternatives are reasonable and feasible while the federal processes include at least two unrealistic alternatives (usually a full development alternative and a full wilderness alternative). Additionally, Ms. Plagger said that unlike the federal process, the alternatives are first presented to the public without a preferred alternative. After this public review, a preferred alternative is selected and the draft plan is reviewed by the public.

After the plan has been reviewed by the public, the commissioner approves the plan. Since the planning team generally operates on a consensus basis, there may be areas where they cannot agree on a land use designation, and the commissioner makes a final decision for these areas. Although empowered to do so, the commissioner generally does not alter the planning team's recommendations.

After the commissioner approves the plan, the department implements it by classifying the land use designations in each management according to classifications outlined in the regulations (11 AAC 55). A single classification may encompass several more specific land use designations. Department adjudicators regularly use the plans when they review permit applications. The division reviews the plans every five years although there are no specific requirements for monitoring plans' effectiveness. Amendments

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[3]For many plans, a single set of primary and secondary land use designations and management intent is developed for each management area. For other plans, the management units may be subdivided into separate designation areas and, therefore, there may be many separate sets of land use designations within one management unit.

[4]Although originally created to reflect watershed characteristics, today management units are generally linear to facilitate the recording of the legal description required during land classification.

to the plan must go through a public process unless they are minor changes that do not change the intent of the plan. Attachment B provides a description of the planning process, a list of area plans in progress and a map of regions used by the department.

Other Land Use Planning in Alaska

Alaska statutes mandate land use planning for municipalities and other state agencies. The municipal code (Title 29) requires first- and second-class boroughs to complete comprehensive land use plans for themselves and for first- and second-class cities within their boundaries. First-class cities outside an organized borough must also complete plans.

The Alaska Coastal Management Act of 1977 requires land use planning at the local, regional and state level to provide a balance of resource development and protection.[5] The act requires coastal resource districts to develop coastal management programs based on municipal comprehensive plans. Coastal resource districts include municipalities with planning functions and coastal resource service areas for areas in the unorganized borough where local comprehensive planning is not mandated. Once these plans are approved by the statewide Coastal Policy Council, administration of municipal and state regulations must be consistent with coastal resource programs. The council also approves the statewide coastal management program, and actions of federal agencies must be consistent with the state program. The Division of Governmental Coordination in the Office of the Governor coordinates review of coastal zone project proposals among state agencies and local coastal districts.

Besides the statewide Alaska Coastal Management Program, other agencies complete land use planning at the state level. In addition to the Division of Land, two other DNR divisions prepare land use plans: the Division of Parks and Outdoor Recreation completes state park management plans (AS 41.21) and the Division of Forestry prepares state forest management plans (AS 41.17.200). The Habitat Division of the Alaska Department of Fish and Game (ADF&G) completes plans for special management areas (Title 16). The Department of Community and Regional Affairs assists communities to develop their land use plans, and formerly the department completed "regional strategies" to assist regions within the unorganized borough resolve land use issues. Other state land use planning occurs on mental health trust, university, and Alaska Railroad lands.

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[5]The federal Coastal Zone Management Act of 1972 encouraged states to develop and implement their own programs. The actions of federal agencies must be consistent with an approved state program.

EVALUATION OF THE DNR LAND USE PLANNING PROCESS

To evaluate the success of DNR's regional land use planning process, we interviewed 25 people including state and local government officials and representatives of forestry, mining, fisheries, and environmental groups. We asked each person several questions about his or her perceptions of DNR's regional planning program. Their responses are presented in seven categories: efficiency of the process, involvement of various interests, competence of planners, balance of land uses, multiple use, comparison of DNR's planning process to that used by other agencies, monitoring the plan's implementation, and suggestions for improving DNR's land use planning program. We guaranteed the anonymity of these people in an attempt to obtain honest responses. While not a scientific sample of opinion, we believe that this informal telephone survey provides a reasonably reliable reflection of the perception various interest groups have about the DNR land use planning process.

Efficiency

We asked the people interviewed if they thought the Division of Land's planning process was efficient; in other words, if the division completed plans with the most judicious use of resources. Responses were evenly divided among those who thought the process was not efficient, those who thought it was, and those who thought it was as efficient as it could be.

Those who thought the process was not efficient offered several explanations:

- "Environmental groups slow the process down,"
- "ADF&G blocks everything,"
- "DNR prolongs the process until they get what they want" (i.e., a more developmentally oriented plan), and
- "Too much time is expended to collection information."

A municipal planner thought that planning teams become paralyzed with too much information. This person suggested that planners be given more time to summarize information for the planning teams. Two respondents suggested that the process could be accelerated if there were time lines built into each phase.[6]

Those who thought the process was efficient or at least as efficient as it could be attributed the length of the process to the varied constituencies and

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[6]According to DNR planners, time lines are built into the planning process, although they are sometimes extended.

the large area represented by regional plans. One local government planning official thought that the process could be too quick for new boroughs which do not have the staff or resources to participate fully in the planning process. Another person thought that there should be more of an iterative process to permit reevaluation of goals and to feed new information into the process.

Dee Koester, a Division of Land planner in Juneau, noted that completion of area plans leads to greater efficiency in the long run. She said that the department cannot complete land sales or long-term leases without a completed land use plan. Rather than completing a management plan for each long-term lease, it is more efficient to complete one area plan for an entire region. Ms. Koester also said that the division attempts to make the planning process more efficient by assigning specific issues to working groups (composed of planning team members) rather than having the entire team investigate every aspect of each issue.

Involvement of Various Interests

All but one of the people with whom we spoke thought that DNR did an adequate job of involving the public, local government and special interest groups in the planning process. Many people, however, suggested changes with respect to involvement of interest groups in the process.

Those people who praised DNR's public involvement efforts mentioned that the department attempted to involve all interests in various stages of the process, involved various interests on the planning teams, informed people through large mailings, held public meetings in different areas, and used large graphic advertisements to notify the public about meetings. One person thought that the planning process provided a practical means to resolve conflicts and that it reduced the number of "individual battles" that arise after a plan is produced.

The people who suggested changes to the process or expressed concerns fell into two groups: those who thought that there was too much public involvement and those who expressed minor concerns or suggested technical changes to the process. Generally, people representing resource development interests thought that DNR gave environmental interests undue consideration and that environmental groups often stacked meetings. People who expressed technical concerns about the process commented that:

- "There are not enough meetings outside of the planning area,"
- "The most important meetings [planning team meetings] are held during the day when most people work,"
- "No one represents roadless recreation on the planning teams,"

- "When DNR makes a decision against the public sentiment, it should explain why it chooses to do so,"
- "The most vocal people attract the most attention from DNR,"
- "Municipalities are not on equal footing with other interests because municipal planners cannot take a firm stand until the plan is reviewed by the city council," and
- "DNR should involve more local people on the planning team to represent subsistence concerns."

One person with whom we spoke, however, was highly critical of DNR's public involvement process. This person said that public involvement efforts were superficial because the planning teams are loaded with developers. This person also said that DNR does not put enough weight on public sentiment and that the department does not divulge how many people are for or against certain alternatives. Additionally, the individual thought that DNR considered form letters (letters distributed by an interest group but signed by individuals) as one response rather than individual responses.[7]

Representatives of the division with whom we spoke perceived themselves as unbiased facilitators attempting to forge a compromise or consensus about land use classification conflicts. The department has placed a priority on training its planners including mediation and negotiation skills.

A person representing Native interests thought that DNR was successful in its public involvement efforts and noted that the department recently received national recognition. During 1990, the DNR's Northwest Area plan, published in English and Inupiaq, won the American Planning Association's Paul Davidoff Award, an annual award for involving minorities in regional or urban planning efforts.[8]

Competence of Planners

Many of the people we interviewed volunteered their perceptions about the competence of planners, even though this was not a specific question asked. A common comment was that the planners' role in the process and their competence was more important than the design of the process itself. Some people thought that planners have a broad range of discretion and that an inexperienced or incompetent planner would likely produce an inadequate plan.

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[7]According to Anna Plagger, rather than weight different kinds of responses, the department considers all kinds of public responses together with comments from industry and other government agencies.

[8]Jim Schwab, "Alaska's Northwest Area Plan," *Planning*, March 1990: 11.

One respondent thought that planners should have practical management experience in addition to training in planning or that more resource managers should be brought into the process. Another person thought that the planners were competent and that it was important to hire people with conflict resolution, communication and cross cultural skills. Several people thought that budgetary reductions had resulted in too few planners.

While some people thought that the division's planners were competent and overworked, other people thought that the planners were biased. One respondent said that they lacked integrity. The majority of the people representing development interests perceived planners as being biased against development in favor of environmental interests. To the contrary, those representing environmental interests as well as one local government representative commented that the division planners were biased toward development interests. Another person thought that planners were not sufficiently acquainted with areas for which they were planning.

Results of Plans

We asked the respondents if they thought that plans resulted in a suitable balance of different land use designations. Generally, the responses reflected a dissatisfaction with the outcome of the final plans. This dissatisfaction may, however, be endemic to all planning efforts because the outcome of land use plans seldom reflect all of an individual's objectives.

Predictably, differences in opinions about the balance of land uses surfaced between people representing development interests and those people representing environmental interests. People with a concern for protecting the environment perceived that the division's biases towards resource extraction resulted in too much land classified for timber and mineral use. These people complained that the planning teams did not include anyone representing roadless recreation interests. Development-minded people held a contrary view and thought that all lands should be open to resource extraction. They complained that each level of planning diminishes the ability of the resource sectors to contribute to the Alaska economy. Some of these people commented that they thought that the commissioner should set specific resource development goals in an effort to offset the declining contribution of the oil industry to Alaska. One person noted that the state does not have to produce a product and therefore does not have the motivation to produce revenue as is the case in private industry. Another person objected that few opportunities existed for "mom and pop" timber

operations. Additionally, one person argued that the legislature should have to approve any closure of land to a specific use greater than 640 acres.[9]

Several of the people with whom we spoke thought that the division was doing a fair job at classifying lands for a variety of uses. One person commented that the division is "torn ten ways from Sunday" and any decision is likely to result in opposition.

A few respondents, all local government planners, thought that division plans resulted in an appropriate balance of classifications. One municipal planner favorably responded that area plans adequately reflect the planning objects outlined in local plans.

Multiple Use

Article VIII of the Alaska Constitution provides direction to develop a variety of natural resources. Although it never uses the term multiple use, it directs the state to develop both renewable and nonrenewable resources for the maximum benefit of the people. Two sections of this article, however, address preferences of uses. Section 4 mandates that renewable resources will be managed on a sustained yield basis "subject to preferences among beneficial uses." Section 7 enables the legislature to reserve sites for special purposes including "areas of natural beauty or of historic, cultural, recreational, or scientific value."

The statutory definition of multiple use in AS 38.04.910 provides only general guidance and is interpreted differently by various interests. It calls for the "most judicious use of the land" and that some land may be used for "less than all of the resources." The department's 1992 report to the legislature about state land classification states that:

> [a]ll classification categories are for multiple use, although a particular use may be considered primary. . . . Uses are presumed to be compatible until proven otherwise (p. 5).

We asked the people surveyed if the division shared their definition of multiple use. Although related to the previous question, this question was asked to encourage respondents to provide more in-depth information about their perception of the success of the final plan. Few respondents thought that their definition of multiple use was the same as the one used by the division.

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[9]Current statutes prohibit the closure of lands greater than 640 acres to multiple use without legislative approval (AS 38.05.301). The original statute in the Alaska Land Act, however, also prohibited the restriction of mining in an area greater than 640 acres without legislative approval (Section 1, Article III, Chapter 169 SLA 1959).

Again, resource development and environmental interests perceived that the division held opposite views to their own. Almost all of the people representing timber and mining interests thought that the DNR classified too many areas for single uses. These people tended to interpret the concept of multiple use as meaning the inclusion of all uses on each parcel of land. Several respondents stated that timber harvest was compatible with recreation, wildlife and scenic resources. They suggested that expanding the road system would open up more areas for recreation. One person said that DNR did not recognize that mining resulted in only a temporary incompatibility of uses because once areas have been reclaimed, they are available for other uses. Another person stated that restricting uses on certain parcels of land resulted in an "unmanageable patchwork of uses."

In contrast, environmental representatives thought that restricting certain types of uses on a parcel of land did not mean that multiple use would be compromised. They suggested that multiple use exists even in roadless areas because those areas accommodate subsistence, wildlife and recreational uses. This constituency generally felt that DNR assumes that uses are more compatible than they actually are and that DNR is reluctant to classify areas for single purposes. One person felt that nondevelopment uses are tolerated as long as they do not retard development. Two people commented that there is no statutory classification for roadless or remote recreation.

Several people representing resource, environmental and local government interests suggested that the legislature refine the definition of multiple use. They thought that a more precise definition would resolve some of the conflicts.

Monitoring and Revision of Plans

Although not asked specifically about monitoring and revising plans, several people offered comments on this issue. One person said that the requirement to update plans every five years is arbitrary because some plans may need to be updated earlier and others later. Relating to this comment, several people thought that there was no way to feed new data into the process during the planning process or when the plan was finished. One person suggested that DNR use an iterative process where goals could be periodically reexamined to incorporate new information and changing assumptions. Another respondent said that there are no means to monitor implementation of plans. A final view was that the current system cannot monitor cumulative impacts of activities.

The Division of Land Planning Process Compared to Other Processes

We asked the people interviewed to compare other land use planning programs with the one used by DNR. Many of the people most critical of Division of Land's program preferred it to others. No one stated a preference for another state agency's planning process although some people thought specific aspects

of certain federal processes were better. A few people thought that the division's process was basically the same as that used by other state and federal agencies.

Many of the people we interviewed preferred the Division of Land process to other state programs because the division did not represent a specific interest. These people commented that agencies representing a single interest (i.e., parks, fish and wildlife, and forestry) were biased towards certain outcomes of the planning process. Some of the specific comments comparing the Division of Land's planning program to other state agencies include:

- "ADF&G constantly changes the rules of the game,"
- "The Division of Parks does not listen to the public,"
- "The Division of Parks process is more ad hoc and not as good,"
- "The Division of Forestry misrepresents information," and
- "The Division of Land is more responsive than the Division of Forestry."

One person thought that the division should adopt ADF&G's practice developing regulations concurrently with the plans (instead of approving regulations after the plan has been approved).

Generally, those people who preferred the division's process over federal processes thought the federal government acted too slowly, was influenced by outside interests, had to receive approval from Washington D.C. before acting, and produced documents that were difficult to understand. Many people commented that the Division of Land's process had more meaningful public participation than that of the federal agencies. Other comments comparing the division's process to that of federal agencies include:

- "The Forest Service process is worse because it causes more aggravation,"
- "Federal employees move around too much; there is more consistency of lower to mid-echelon employees within the DNR,"
- "Forest Service plans have little resemblance to public input,"
- "The feds are the worst; they have preconceived notions and are shaped by forces outside of Alaska. DNR has a better public process,"
- "The BLM process is worse and the National Park Service is worst of all because they ignore subsistence. The state is more responsive,"

- "The feds are too dogmatic," and
- "The state lets people know what they did with the comments."

Some people thought that certain aspects of the federal processes were better. They commented that:

- "The DNR has more public meetings but it is also more influenced by local special interests,"
- "Federal agencies operate on specific mandates and cannot alter decision-making criteria,"
- "The Forest Service sets measurable resource extraction objectives, feeds information back into the system, provides for subsistence uses, requires full disclosure of impacts, and restricts discretion of employees by requiring certain findings," and
- "The federal process is better because it results in more alternatives than the state process,"

One timber industry representative was disappointed with all U.S. planning processes and said "When someone wants to cut timber, I tell them to go to British Columbia."

REGIONAL LAND USE PLANNING IN OTHER STATES

Since the mid-1970s, a number of states have initiated more control over land use planning which was traditionally a function of local rather than state government. States wanted to stem urban sprawl, the loss of agriculture land, and the disappearance of forest land. Also, because efforts by communities to limit and control growth shifted problems to neighboring communities, state governments were forced to become involved in these issues.

Land use planning programs of Oregon and Washington are discussed below in more detail. Oregon has nearly two decades of experience in state control of local land use planning while Washington has only two years of experience.

Land Use Planning in Oregon

Oregon's land use planning law, passed in 1973, has withstood many attempts by citizens to overturn it. This law instituted one of the first state growth management programs in the country and established nineteen statewide land use planning goals (Attachment C). Although cities and counties complete the plans, each plan must be consistent with the statewide goals and be approved by the seven-member state Land Conservation and Development Council (LCDC).

Land management on state lands must be consistent with local and regional government plans.

Oregon requires local land use plans to include designation of "urban growth boundaries." Services such as sewer and water cannot extend past the boundaries of these areas for a twenty-year period, and most development of lands outside of these boundaries is restricted. The statutes also encourage protection of forest and agricultural lands to prevent urban encroachment from eroding the economic contribution of these sectors. A standing legislative committee monitors the state's planning program to assess the performance of the LCDC and the effect the law has on controlling growth and protecting agricultu e and forest lands from development.

Oregon's program has received mixed reviews, but voters have consistently rejected efforts to repeal the law.[10] Critics of the program, however, perceive significant flaws such as its failure to link transportation system planning with land use planning and reduction of land values in areas outside of the growth boundaries (due to restrictions on development). On the other hand, supporters of the planning program point to its benefits:

- permits are issued quicker,
- developers have greater certainty (appropriate projects are likely to be approved within an urban growth boundary),
- conflicts among environmental impact assessments, zoning rules and plans are reduced,
- plans provide direction for zoning (rather than the converse),
- urban growth tends to be contiguous and compact,
- forest and farm land receive tax subsidies, and
- planning is more coordinated.

Recent amendments to the state program emphasize mediation as a method for resolving land use and resource management disputes.

Land use plans for state-owned land must be consistent with local plans as well as statewide planning goals. According to Steve Purchase, assistant director of the Oregon Division of Lands, most of the land the division manages (1.5 percent of the total state land base) has been classified for specific uses. Also, state agency programs to coordinate state procedures affecting land use must be approved by the LCDC.

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[10]There have been at least seven unsuccessful attempts to repeal the program through ballot measures.

Land Use Planning in Washington

As a result of rapid population growth in Washington during recent years, the legislature adopted a growth management program during 1990 and subsequently strengthened it during 1991. Although not as restrictive as Oregon's program, Washington's program is similar in several respects: it creates thirteen statewide planning goals, mandates land use planning in counties with large populations or rapid growth, and requires creation of growth boundaries. Only non-urban related growth may occur outside of these areas. Two or more cities or counties may cooperate to form a regional commission to develop plans for larger regions. Additionally, the plans must classify forest, agricultural, and mineral lands as well as critical areas.[11]

According to Phil Clark, a resource manager for the Washington Department of Natural Resources, state agencies used to develop their own land use plans. Now, however, counties are involved in classification of state lands and the state must comply with the local comprehensive plans. The 1991 amendments to the law created three regional Growth Planning Hearings Boards where petitions may be initiated to require state agencies, counties and cities to comply with comprehensive plans.[12]

The success of Washington's program will not be known until it has been implemented for a few years. Initially, it appears that some counties favor more restrictive land uses on state lands than preferred by state agencies.

REGIONAL LAND USE PLANNING IN BRITISH COLUMBIA AND THE YUKON TERRITORY

Both Northern British Columbia and the Yukon Territory have large tracts of undeveloped land and in this respect they more resemble Alaska than either Washington or Oregon. The land ownership patterns and resource management responsibilities, however, differ from that of Alaska. The Canadian government technically owns 98 percent of the Yukon Territory, but control of the land and its natural resources is gradually being devolved to the territory.[13] The province of British Columbia, on the other hand, controls 93 percent of the land and manages all of the natural resources except marine fisheries. Although both the territory and the province have some experience with regional

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[11]Critical areas include habitat, flood zones, geophysical hazard areas, and ground water recharge areas.

[12]Each board is composed of three people, one of whom must be an attorney and one must be a city official.

[13]Wildlife is the only natural resource currently managed by the territory although forest management is expected to be given to the territory in the near future.

land use planning, neither jurisdiction has a current program similar to that of the Alaska Department of Natural Resources.

Provincial Land Use Planning in British Columbia

During recent years, British Columbia has not made regional land use planning a high policy priority.[14] The Social Credit (Socred) party has governed the province for 36 years of the past four decades, and this government has not placed much importance on public involvement in land use issues.[15] Natural resource and land management responsibilities in British Columbia traditionally have been shared by many different government agencies which are frequently switched from one ministry to another.[16] Although some type of resource planning occurs within each resource management agency, little multiple use planning occurs. Other than a permit referral system where agency personnel comment on project proposals, little inter-ministry coordination occurs for day-to-day management of the resources. The Environment and Land Use Committee, a group of land and resource management ministers, addresses large project proposals but seldom becomes involved in coordination of smaller projects.

The lack of emphasis on land use planning in British Columbia and inter-ministry coordination has resulted in land use conflicts for many areas and may have contributed to the over-commitment of timber to private corporations.[17] Management plans for the Stikine River basin (located in the transboundary area of Southeast Alaska-British Columbia) illustrate problems endemic to the land use planning program in British Columbia. During the early 1980s, while one government corporation planned to flood the area for a hydroelectric project, another government corporation was building a multi-million dollar railway grade and bridge over the Stikine River. Both projects were later terminated when it was determined that the province would not need the power until after

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[14]Community land use planning is a function of local government and still occurs in British Columbia.

[15]During 20 of these years, W.A.C. Bennett acted as the premier and three of these years his son, William Bennett acted as premier. Between 1972 and 1975 and since 1991, the New Democratic Party governed British Columbia.

[16]Members of the ruling party of the legislative assembly are chosen to lead the various ministries (departments) clouding the separation of powers between the executive and legislative branches of government. Reorganization of the ministries occurs often after an election and sometimes in between elections.

[17]The government has given companies harvest rights for more timber than is available.

the turn of the century and that there was not sufficient economic justification for the railroad.[18]

Several innovative land use planning and coordination programs initiated during the 1970s were eliminated or de-emphasized during the mid 1980s. These coordinating measures include a land use planning function by regional districts, interagency committees (regional resource management committees--RRMCs), coordinated land and resource management, and a Secretariat to the Environment and Land Use Committee. The Secretariat and RRMCs no longer exist and the planning authority for the regional districts was removed during the early 1980s. Additionally, many provincial planners were laid off during this period in an effort to reduce government.

During the past few years, civil protests about provincial land use decisions have increased dramatically and have gained international attention. A dissatisfaction with the province's management style added to a movement to unseat the Socred party, and last year voters elected a new government in the provincial Legislative Assembly. There is some indication that the New Democratic Party will place a greater emphasis on coordinated regional planning.

Land Use Planning for State Lands in the Yukon Territory

Neither the federal nor territorial governments currently have a mandate to complete regional planning in the Yukon Territory although this situation is expected to change once the Yukon First Nation Comprehensive Land Claims are settled. Four different kinds of land use planning occur or have recently occurred in the Yukon: community, local, district, and regional planning.

Legislation of the Yukon Territory authorizes two kinds of land use planning. The Municipal Act requires the eight incorporated communities to complete community plans. The Area Development Act empowers the Ministry of Community and Transportation Services (MCTS) to complete community plans for communities in unincorporated areas and local area plans for areas which have been designated as development areas. The minister of MCTS may designate any area as a development area but these designations have generally occurred along road corridors and around settlements.

The Yukon Territory has also completed a few district plans which generally cover larger areas than local area plans. District plans include general recommendations and are not as detailed as local area or community plans. The Dempster Highway corridor--the road leading to the Mackenzie River delta--is an example of a district plan. Currently there is no legislative authority for the territory to complete district plans.

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[18]Glenn Gray, 1989, International Cooperation in the Alaska-British Columbia-Yukon Region, Masters Thesis, University of British Columbia.

A regional planning program initiated by the federal Department of Indian and Northern Affairs for the Yukon and Northwest Territories ended last year. Ross McLachan, geographic information system application manager for the federal Department of Indian and Northern Affairs in Whitehorse, said that the program was not legislatively mandated and involved a voluntary agreement between the federal and territorial governments and the Council of Yukon Indians.[19] Although several land use plans were completed in the Northwest Territories, the main emphasis of the program in the Yukon was completion of the Greater Kluane Regional Land Use Plan for the area just north of Southeast Alaska. According Mr. McLachan, rather than focussing on land inventory and classification, the process concentrated on development of general land use guidelines. The program was terminated due to funding cuts and uncertainty about how Native land claims will affect current land ownership.

The federal Environmental Review Assessment Process (EARP) provides a means to review large resource development proposals. Although similar to the U.S. environmental assessment process, the Canadian process tends to be used only for large-scale projects.

FOREST SERVICE AND BUREAU OF LAND MANAGEMENT LAND USE PLANNING IN ALASKA

The Forest Service (U.S. Department of Agriculture), and the Bureau of Land Management (U.S. Department of the Interior) both engage in regional land use planning in Alaska.[20] As does the Division of Land, both of these agencies manage their lands for multiple uses, although the Forest Service has historically had a greater emphasis on forestry.

Congressional Direction for Forest Service and Bureau of Land Management Land Use Planning

Prior to the Alaska National Interest Lands Conservation Act (ANILCA) of 1980, the Bureau of Land Management (BLM) managed the vast majority of land within Alaska. ANILCA designated a significant portion of former BLM lands for inclusion in the national forest, park and wildlife refuge systems. The BLM, however, still manages a considerable amount of land in Alaska and the Forest Service manages the Tongass and Chugach national forests.

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[19]Although this program is not legislatively mandated, the Umbrella Final Agreement (the initial land claims settlement document), commits the parties to participate in both regional planning and development assessment processes in the future.

[20]The National Park Service completes plans for parks and monuments and the U.S. Fish and Wildlife Service completes plans for National Wildlife Ranges. Both of these agencies manage their lands primarily for single uses.

Beginning in 1960, Congress enacted a series of acts directing the Forest Service and BLM to plan for multiple use of the resources. Three acts specifically affect the Forest Service and one act affects the BLM. The Multiple Use-Sustained Yield Act of 1960 required the Forest Service to manage its land for recreation, range, watershed, wildlife, and fish purposes in addition to its original mandate of timber management. The Forest and Rangeland Renewable Resources Planning Act (RPA) of 1974 required the Forest Service to develop long-range plans, and the National Forest Management Act (NFMA) of 1976 strengthened the Forest Service's planning program requiring a meticulous land use planning process for planning at the national forest level.

The Federal Land Policy and Management Act (FLPMA) of 1976 changed the role of the BLM from a land holding and disposal agency to a land management agency. FLPMA also directs the agency to complete land use plans.

Several other federal acts affect land use planning on Forest Service and BLM lands. Perhaps of greatest significance, the National Environmental Policy Act (NEPA) of 1969 directs federal agencies to complete environmental impact statements (EISs) for major federal actions and environmental assessments for other actions that may affect the environment. Land use plans for the BLM and the Forest Service are both considered major federal actions and require completion of an EIS concurrently with the land use plan. Two other federal acts affect land use planning by the agencies. The Wilderness Act of 1964 enables Congress to set aside areas where development is extremely limited, and the Endangered Species Act of 1973 protects endangered and threatened plant and wildlife species.

Forest Service Land Use Planning

Forest Service land use planning takes place at the national, regional, national forest, management area and project level. While the NFMA provides direction for national forest level planning, the NEPA process is used for all planning processes and requires an environmental analysis or EIS for almost all federal actions. Regulations outline specific steps of the planning process used to develop forest plans, including:

- identification of issues and development opportunities,
- development of planning criteria for evaluating information and planning alternatives,
- collection of data and information,
- analysis of the management situation (the ability of the area to provide goods and services),
- formulation of alternatives,

- evaluation of alternatives, and
- recommendation of the preferred alternative (Attachment D).

An interdisciplinary team made up of federal government workers implements public participation and guides the planning process for each plan. The Forest Service involves interest groups and state agencies throughout the planning process, but major public participation occurs at two steps: during the issue identification stage and during review of the draft plan. Once the preferred alternative is chosen and a draft plan is completed, the Forest Service seeks public comment through public meetings and response forms. Although not required, public hearings are also held and official transcripts record public comment on the draft plan.

After comments to the draft plan are analyzed, the regional forester chooses the final alternative, usually a modification of the preferred alternative. The regional forester's decision can be appealed to the chief forester in Washington D.C. Once the plan has been approved, the Forest Service must monitor and evaluate the effectiveness of the plan's implementation. Forest plans must be revised every 10 to 15 years.

The Forest Service planning process differs from DNR planning in at least four ways. First, alternatives consist of overall scenarios for the entire planning area rather than for specific areas within the plan. Second, after the issue identification step, the Forest Service must formally develop criteria to analyze the type and amount of information needed and how the alternatives will respond to national and local issues. The regional forester also develops decision criteria to choose the final alternative. Third, a process step called analysis of the management situation involves computer analysis of the maximum potential of each resource. This information is used to develop alternatives. Lastly, the plan must include a plan for monitoring the effectiveness of its implementation. DNR has no formal requirement to monitor plan implementation, but reviews the plan every five years rather than every ten to fifteen years.

Bureau of Land Management (BLM) Land Use Planning

The BLM prepares land use plans for fifteen planning areas located within five major districts of Alaska. The agency completes resource management plans according to the FLPMA, NEPA and regulations. Attachment E contains the land use planning regulations for the BLM (43 CFR 1600-1610).

The specific steps of the planning process are almost identical to the ones used by the Forest Service. Like the Forest Service, the BLM also uses an interdisciplinary approach to prepare the plan and meaningful public

participation is required.[21] The plan must also indicate intervals and standards to monitor and evaluate the implementation of the plan. The state director approves the final plan, and this decision may be appealed.

Regulations require the BLM to coordinate planning efforts with federal agencies, state and local governments and Indian tribes. Regulations also require state directors to seek advice of the governor about timing and scope of coordination of components of the plan. The plan must also be consistent with land use plans of state and local governments.

CONCLUSION

The DNR Division of Land planning program differs from all of the other programs we investigated. While the division uses a planning process similar to ones used by other state and federal land use agencies, the scope of the program is different. No other state's land ownership compares with the magnitude of land owned by Alaska, and land use planning elsewhere generally occurs at the city or county level. A recent trend of state involvement in land use planning concerns growth management and coordination strategies. In some states, local governments are responsible for land use classification on state lands.

Northern British Columbia and the Yukon Territory have sizeable tracts of sparsely populated land, but at this time neither jurisdiction has a regional land use planning program similar to that of Alaska. Land use planning does occur at the local level in both the Yukon and British Columbia, and at the district level in the Yukon. Recent regional planning efforts in the Yukon have been shelved until settlement of the Yukon First Nation Comprehensive Land Claims, and it is possible that the new provincial government of British Columbia will initiate a coordinated regional planning effort.

The Division of Land's program is most similar to the processes used by the BLM and the Forest Service. All three of these agencies are required to manage their lands for multiple use although the Forest Service admittedly has a particular interest in timber management. Both of the federal agencies, however, are constrained by detailed provisions of a number of federal acts including the National Environmental Policy Act. This act requires the development of environmental impact statements for major federal actions, including the development of land use plans. Other requirements mandate creation of criteria to analyze information and evaluate alternatives, analyze the ability of the area to provide resources (e.g., timber, minerals, water and recreation), and monitor the implementation of the plan. While the federal process results in a range of alternatives for the entire planning area, DNR only develops realistic alternatives for units of the plan where conflicts

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[21]Jim Ducker, planner, Bureau of Land Management, telephone conversation, Anchorage, January 1992.

exist. Additionally, the DNR process seeks public comment on the alternatives before the preferred alternative is chosen. In summary, the DNR planning process resembles the federal process in many ways but is more flexible, has fewer constraints and the plans are reviewed every five years rather than every ten to fifteen years as required by the Forest Service.

Perceptions of the success of the DNR land use planning process vary widely among Alaskans. The people we interviewed who were most dissatisfied with the Division's planning program represented two distinct groups: those with development interests (i.e., people interested in classifying the maximum acreage for mining and timber) and those with environmental interests (i.e., people interested in setting aside as much land as possible for recreation and habitat protection). Both groups, however, perceived that the division is biased in favor of the interests of the opposite group. Development-minded people tend to think DNR planners are environmentalists while the environmentally minded people perceived DNR planners to be primarily development oriented.

The following are a sample of specific suggestions made by the respondents:

- develop management goals for resource development at the outset of each plan,
- require planners to be trained in resource management,
- develop criteria to evaluate alternatives,
- develop standards to evaluate public participation,
- define multiple use more precisely,
- reduce the amount of information that the planning team evaluates (provide summaries),
- reduce the length of planning team meetings to a maximum of four hours,
- provide roadless recreation land classification in the statutes and representation of this resource on the planning teams,
- approve regulations to implement the plan concurrently with plan approval,
- require that the plan describe how it will be monitored and evaluated,

- develop an iterative process to reevaluate the plan's goals and to make use of new information, and

- coordinate plan approval with approval of other plans.[22]

In theory, a land use planning program provides competing interests with an opportunity to resolve potential conflicts before they arise. Land use planning also has several other advantages over a system that merely reviews individual project proposals separately through permitting or environmental assessment programs. An effective planning program will help produce a common vision of how a region will develop, assess cumulative impacts, reduce the possibility of conflicting plans by different agencies, and provide developers with a measure of certainty about the likelihood that specific projects will be approved.

I hope that this information is useful for you. Please contact this agency if we may assist you further on this topic.

Attachments

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[22]Attachment F provides one proposal to initiate better coordination between land management agencies in Alaska.

APPENDIX
People Interviewed About the DNR Land Use Planning Process

Begalka, Walter. Ketchikan Pulp Company. Special Assistant to the timber division manager. Telephone conversation. Ketchikan. 10 January 1992.

Borell, Steve. Alaska Miners Association. Executive director. Telephone conversation. Anchorage. January 1992.

Cody, Jack. Sealaska Timber Corporation. Vice president of operations. Telephone conversation. Ketchikan. January 1992.

Duncan, Tom. City of Dillingham. Planning director. Telephone conversation. Dillingham. January 1992.

Eames, Cliff. Alaska Center for the Environment. Issues director. Telephone conversation. January 1992.

Gallagher, Tom. University of Alaska Southeast. School of Public Administration. Professor. Interview. January 1992.

Grist, Bert. Northwest Arctic Borough. Planning director. Telephone conversation. Kotzebue. January 1992.

Haight, Barry. Goodpaster Property Owners. President. Telephone conversation. Fairbanks. 13 January 1992.

Jaeger, Lisa. Tanana Chiefs Conference. Village Government Specialist. Telephone conversation. January 1992.

Koester, Dee. Department of Natural Resource. Division of Land. Planner. Interview. January 1992.

Lindekugel, Buck. Southeast Alaska Conservation Council. Staff attorney. Telephone conversation. Juneau. January 1992.

Mathews, Theo. United Cook Inlet Driftnet Association. Administrative assistant. Telephone conversation. Kenai. January 1992.

Mylius, Dick. Department of Natural Resources. Division of Lands. Acting Chief of Land and Resources Section. Telephone conversation. 3 January 1992.

Nutter, Rex. Fairbanks North Star Borough. Planning director. Telephone conversation. Fairbanks. January 1992.

Plagger, Anna. Department of Natural Resources, Division of Lands. Planner. Telephone conversation. Fairbanks. January 1992.

Reeder, Lois. Suisitna Valley Association. President. Telephone conversation. Anchorage. January 1992.

Reinwand, Debbie. Resource Development Council. Acting director. Telephone conversation. Anchorage. 3 January 1992.

Rue, Frank. Alaska Department of Fish and Game. Habitat Division. Director. Telephone conversation. Juneau.

Schulling, Rodney. Matunuska-Susitna Borough. Chief of planning. Telephone conversation. Palmer. January 1992.

Seller, Rick. Cook Inlet Region Inc. Manager of project development. Telephone conversation. Anchorage. January 1992.

Troeger, Dick. Kenai Peninsula Borough. Planning Director. Telephone conversation. Kenai. January 1992.

Tweiten, Paul. Chugach Alaska Corporation. Land Division manager. Telephone conversation. Anchorage. January 1992.

Wehrman, Joe. Koncor Forest Products. Governmental relations forester. Telephone conversation. Anchorage. January 1992.

Wilson, Wade. Matunuska-Susitna Borough. Forester. Telephone conversation. Palmer. January 1992.

Ziesak, Roger. Ketchikan Pulp Company. Planning and Engineering Manager. Telephone conversation. Ketchikan. 10 January 1992.

Department of Natural Resources

Area and Management Plans Briefing
House Resources Committee - January 29, 1992

When Alaska became a state in 1959, it was granted over 100 million acres of land. The citizens of Alaska became the owners of an area the size of the state of California. At statehood, the Alaska legislature charged the Department of Natural Resources (DNR) with the complex job of managing the state-owned lands for the "maximum public benefit". The range of possibilities for how state land could be used is enormous.

Within DNR, the Land and Resources Section of the Division of Land has the responsibility for land use planning. Planning is a way for sorting through the possibilities for using state land and choosing those with the greatest benefits for all Alaskans. Most importantly, planning is a way of making these decisions not only for the public, but with them. The planning process provides a link between the citizens and the agencies charged with managing their land.

Developing plans for state land is not easy because people have differing ideas of how state land can best be used. Also, not all desired uses of state land can occur compatibly in the same place at the same time. Through resource planning, DNR works with the public to determine where the important resources are, and how the land can be used for the maximum public benefit. In the planning process all resources are considered and evaluated. Wherever possible, guidelines are established that allow for multiple use. Where irreconcilable conflicts exist, alternatives are developed and evaluated.

Plans are required by statute (A.S. 38.04.065) prior to a sale or lease of state land, excluding oil and gas lease sales and staking of mining claims.

Types of Plans

Area Plans - cover 1 to 16 million acres of state owned land
- make decisions to: keep or sell state land, open or close areas to mineral entry, recommend legislative designations, and set guidelines for the use of state land
- take about three years to prepare.

Management Plans - more detailed guidance for special areas (like a recreation river corridor) or for a specific resource (like forestry)
- take one to three years to complete

History of Planning for State Land

1970's - Conflicts over use of state land increase due to demand for land sales and other development

1974 - first area plan started for Delta, followed by Haines-Skagway Area

1979 - Vic Fischer and DNR staff develop regional planning process and program for state land

1979 - Haines Skagway Area Plan adopted

1983 - 85 - plans completed for Susitna, Tanana, SW Prince of Wales Island and Bristol Bay - future state land sales are the overriding issue in development of these plans

1986 - Alaska Supreme Court, in Alaska Survival v. Alaska, rules that regional land use plans are required prior to classification of state land for a disposal (sale or lease) on state land

1990 - 66 million acres of state land included in area plans, focus begins to shift to management planning

PLANNING PROCESS

1. Identify Issues
Hold public meetings to identify issues and concerns in the area.

2. Gather Information
Throughout the planning process collect information about natural resources, present and past land use, land ownership, and the local economy.

3. Prepare and Evaluate Land Use Alternatives
Describe possible choices for managing state land based on public interests, local resources, and state policies. Describe the effects of each choice on goals for the manangement of an area.

4. Public Reviews Alternatives
Hold public meetings to review the land use choices and identify those that people prefer.

5. Prepare Draft Plan
The planning team and advisory board create a draft plan using public and agency comments. The agencies review the first draft and settle any land use conflicts that remain.

6. Public Reviews Draft Plan
Hold public meetings to provide the public the opportunity to coment on the draft plan and identify parts that need to be changed.

7. Prepare Final Plan
Review agency and public comments and revise the plan. The plan is prepared for publication.

8. Approve Plan
The Commissioner of the Department of Natural Resources approves and signs the plan.

9. Adopt and Implement Plan
The plan guides land management decisions in the planning area.

Alaska Department of Natural Resources
AREA PLANS

December 1991

Alaska Department of
NATURAL RESOURCES

AREA PLANNING STATUS

- Completed area plans
- Area plans in progress
- Not scheduled for area plans at this time

Plans Currently Under Development

Juneau. Started in September 1991, covers 26,000 acres of state uplands and 400,000 acres of state tidelands within the City and Borough of Juneau and proposed annexation area on Admiralty Island. Scheduled for completion in fall 1992.

Kenai. Started in 1990, this plan includes 1.4 million acres of state uplands in the Kenai Peninsula Borough. The plan includes 250,000 acres of state owned tidelands and submerged lands along the Gulf of Alaska and in Cook Inlet. Concurrently a more detailed management plan is being prepared for the **Caribou Hills**, scheduled for completion in September 1992. The area plan is scheduled for completion in 1994.

Turnagain Arm Management Plan. Started January 1992, includes over 23,000 acres of state selected land in Girdwood and Bear valleys, and 50,000 acres of tidelands and submerged lands in Turnagain Arm. Coordinated with plans for Municipality of Anchorage's land. Scheduled for completion December 1993.

Yakataga. Started December 1990, covers approximately 490,000 acres of state uplands, plus tidelands and submerged lands along the Gulf of Alaska and Icy and Yakutat bays. Plan mandated by legislation, must be completed by July 1993.

Central Southeast. Started in 1991, covers the area from the Cleveland Peninsula north to Frederick Sound. Includes Wrangell, Etolin, Zarembo, Kupreanof and Kuiu islands. This plan is currently on hold as staff were reassigned to Juneau and Yakataga plans.

Adopted Plans

Bristol Bay. Adopted September 1984. Covers 13 million acres of state land. This plan was prepared through a cooperative state-federal planning process. A management plan was completed in 1990 for the **Nushagak and Mulchatna Rivers** and in 1991 for **Navigable Rivers within Togiak National Wildlife Refuge.**

Copper River Basin. Adopted November 1986. Covers 3.3 million acres of state land.

Haines - Skagway. Adopted in June 1979. Much of the 400,000 acres in the original plan are now covered by the **Alaska Chilkat Bald Eagle Preserve Management Plan** (September 1985) and the **Haines State Forest Management Plan** (February, 1986).

Kuskokwim. Adopted March 1988. Covers 16 million acres of state land in the middle and upper Kuskokwim drainage.

Northwest. Adopted February 1989. Plan covers 10 million acres of state land on the Seward Peninsula, in the Northwest Arctic Borough and in the western segment of the North Slope Borough.

Prince of Wales Island. A plan for the southwestern portion of the island was completed in June 1985 and revised in 1990. A plan for the remainder of the island was adopted December 1988. These plans cover about 72,000 acres of state uplands and about two million acres of state tidelands and submerged lands.

Prince William Sound. Adopted June 1988. This plan is for 850,000 acres of state land and most of the tidelands and submerged lands in Prince William Sound.

Susitna. Adopted April 1985. Covers 9.5 million acres of state land. This plan is in need of revision in order to provide better guidance for management of land retained in state ownership. In 1982, an area plan was completed for the **Willow Sub-Basin,** a portion of the Susitna basin. Management plans have been prepared for:

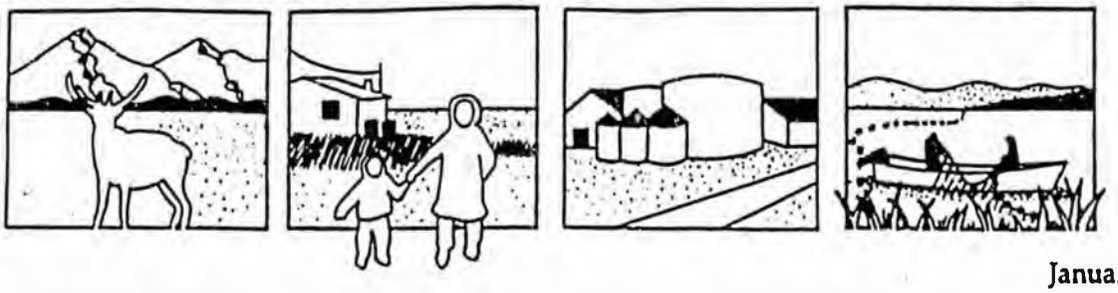
Susitna Recreation Rivers - a plan for six rivers, completed in 1991;
Susitna Forest Guidelines - guidelines for forest management and timber access, completed 1991;
Kashwitna - deals with forestry, wildlife, and access issues;
Hatcher Pass - primary issues are recreation, mining, and wildlife;
Matanuska Valley Moose Range - access, habitat management, and mining are concerns;
Fish Creek - primary issues concern agricultural disposals;
Deception Creek - former capital site, was not included in Susitna or Willow plans.

Tanana Basin. Adopted 1985, updated in 1990-91. This plan covers 14.5 million acres of state land in the Tanana valley, including the Fairbanks area. Includes Goodpaster River amendment, completed 1992. A management plan for the **Tanana Valley State Forest,** prepared by the Division of Forestry, was adopted in 1986.

State Critical Habitat Areas, Refuges and Sanctuaries. The Department of Fish and Game, Division of Habitat, prepares land use plans for these areas, in consultation with DNR.

State Park Units. The DNR - Division of Parks has prepared land use plans for most major State Park units.

NORTHWEST AREA PLAN



January 1992

BRIEFING PAPER

Purpose & Planning Area

The Northwest Area Plan describes how the Department of Natural Resources will manage state land on the Seward Peninsula and Norton Sound, the Lisburne Peninsula up to Icy Cape, and the Kobuk River Valley.

The planning area includes:

- Over 14 million acres of state-owned or selected land;
- 26 communities, from Pt. Lay to St. Michael, total population 14,000.

Planning Process

Adopted in 1989, the plan was a result of a three-year process with:

- A 17-member interagency planning team, including representatives from ten state agencies, four coastal districts or local governments, and three native corporations;
- Over 75 public meetings and workshops held during the three years;
- Widespread distribution of 3 brochures (the first one was bilinqual), 4 newsletters, 14 resource reports, 3 public comment reports, and 3 trails and easement reports.

Major Issues

- *Land sales and remote cabin* offerings were recommended for five sales on 1200 acres, and two cabin areas for 14 cabins.
- *Mineral entry* remains open to nearly all state land, except at 13 eabird rookeries (6,000 acres) and 7 sheefish spawning areas (3,000 acres).
- *Subsistence uses* and traditional activities are recognized through plan policies and guidelines to balance with other economic development.
- *Reindeer grazing* will continue to be allowed as one of the multiple uses of state land.
- *Leases and permits* will be authorized to avoid conflicts with existing uses and high-value habitat areas. Increased community notice is required for authorizations in this remote planning area.

Other

- Almost all state land in the planning area will be managed for multiple use.
- Plan guidelines are consistent with existing coastal plan policies.
- The Northwest Area Plan won a national award in 1990 from the American Planning Association.

Alaska Department of Natural Resources
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ALASKA DIVISION OF LAND

Alaska Department of NATURAL RESOURCES

TANANA BASIN AREA PLAN

BRIEFING PAPER January 1992

Purpose

To update the area plan for 14 million acres of state-owned and state-selected land in the Tanana Basin. This is the first update of a DNR area plan. The update

* Incorporates new information;
* Clarifies plan decisions for confusing or unclear policies; and
* Resolves specific issues in known problem areas.

Major Issues

Over 15 major issues were addressed, including:

* Nenana River corridor management
* Goodpaster River watershed management
* Recommended legislative and administrative designations
* Delta-Salcha Area Plan update
* Consistency with the Fairbanks North Star Borough Comprehensive Plan and Recreational Trails Plan
* New state selections review

Process

- Tanana Basin Area Plan was first adopted in 1985
- Five-year update began in spring 1989
- Special community workshops held in the Nenana and Goodpaster river areas to address specific issues, fall 1989
- Public meetings reviewed proposed changes, spring 1990
- Plan Update was adopted by commissioners of DNR & DF&G, November 30, 1990

Throughout the process, planning staff met with representatives from the inter-agency planning team, local governments, Native corporations, and organizations, interest groups, and individuals.

The continuing controversy over management of the Goodpaster area warranted further review. That six-month review was completed in September, 1991, with the adoption of the Goodpaster amendment to the Tanana Basin Area Plan.

Current Step

The plan will be printed next month, incorporating two DNR area plans and two DNR management plans into one document.

Alaska Department of Natural Resources

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Alaska Department of
NATURAL
RESOURCES

BRISTOL BAY AREA PLAN

Purposes
Designate main uses of state land
Establish guidelines to ensure that multiple uses occur compatibly
Propose changes to land ownership patterns

Area
Planning area 31 million acres total, 13 million acres of state land, including 1.4 million acres in Wood-Tikchik State Park
Includes Bristol Bay , Land and Peninsula, and Aleutians East boroughs, Bristol Bay Coastal Resource Service Area

Status
December 1980 - State-federal Bristol Bay cooperative management plan established by ANILCA Section 1203
1981 - 1984 - plan developed, originally through cooperative effort
September 1984 - adoption of Bristol Bay Area Plan for state lands; no federal action on cooperative plan

Participants
Study Group - Representatives of state and federal agencies, coastal districts, Bristol Bay Borough, and Native interests
General public - 87 meetings held in 32 communities, numerous meetings with interest groups

Major Provisions of Plan

Most state land kept in public ownership and managed for multiple use

Settlement - 14,000 acres of state land identified for new disposals

Recreation - designated a primary use on most state lands. Recreation management plans recommended for Nushagak and Mulchatna rivers (completed 1991) and Lake Iliamna.

Oil and Gas - designated a primary use on state uplands with commercial potential, lease sale held 1984
- leasing of tide and submerged lands along the Alaska Peninsula south of Pilot Point not allowed until after 1994
- no oil and gas leasing in legislatively designated Bristol Bay Fisheries Reserve

Minerals - Over 98% of state land open to new mineral entry
- designated a primary use on over 2 million acres
- 213,00 acres closed to mineral entry along 64 salmon streams
- 1.9 million acres require a lease prior to mining

Transportation - identifies transportation corridors across the Alaska Peninsula

Land Status - proposes land exchanges with federal agencies and Native corporations to improve land management and protect wildlife resources
- proposes resolution of state-federal dispute over state selections on the Alaska Peninsula (since rejected by US Department of the Interior)

NUSHAGAK & MULCHATNA RIVERS

Recreation Management Plan

NUSHAGAK AND MULCHATNA RIVERS RECREATION MANAGEMENT PLAN BRIEFING PAPER

PLAN ORIGIN. Result of Bristol Bay Area Plan and Bristol Bay Coastal Management Plan recommendations for further recreation management planning in the region. The legislature appropriated funds in FY 88 and 89 for DNR, ADF&G, and Bristol Bay Coastal Resource Service Area (BBCRSA) to prepare a joint DNR management plan/AMSA plan under the Alaska Coastal Management Program.

PURPOSES. Provide for a mix of commercial and noncommercial land uses.
Provide direction for long-term uses (longer than 15 consecutive days) and specify management units where these uses may be allowed on a case-by-case basis and where they are prohibited. Uses include permanent and temporary facilities, trapping cabins, boat storage, airstrip development, camping, and other long-term uses.
Make recommendations for future management.
Ensure availability of public use sites for all users.

The plan does not cover some topics addressed in earlier plans, fish and wildlife management issues, federal or private land management, or uses that occur for under 15 days.

AREA. 5.7 million acres in the Nushagak and Mulchatna rivers area.

PROCESS. Fall 87. Issues identified.
August 88. Resource assessment completed.
Fall 88. Alternatives workbook distributed.
December 88. Public meetings on alternatives.
May 89. Agency review draft circulated.
July 89. Public review draft completed and distributed for review.
September 89. Public meetings on public review draft.
October 31, 89. Public comment period ends.
May 15,1990. Final plan adopted.

PARTICIPANTS. Planning team: DNR (Forestry, Land and Water, Parks), ADF&G (Commercial Fish, Game, Habitat, Sport Fish, and Subsistence Divisions), and BBCRSA.
Advisory Board (representing public and private interests).
General public (public meetings and mailout response to alternatives workbook).

MAJOR ISSUES. Public use management vs. land management (managing for a recreational experience), increasing use, and amounts of development.

TOGIAK NATIONAL WILDLIFE REFUGE
PUBLIC USE MANAGEMENT PLAN

BRIEFING PAPER

PLAN ORIGIN

The US Fish and Wildlife Service's (USFWS) Comprehensive Conservation Plan for the Togiak National Wildlife Refuge calls for a more detailed management plan for public use. The USFWS began work on a public use management plan in 1988. DNR has been working closely with USFWS on the plan.

PURPOSES

To provide direction for management of public use within the Togiak Refuge.

To provide direction for management of state owned land and water within the refuge.

AREA

Togiak National Wildlife Refuge.

PROCESS

January 1989. Alternatives workbook distributed.

February 1989. Public meetings on workbook.

April 1990. Draft public use management plan completed and distributed for review. Public meetings on draft.

May 1990. Public comment period ends.

July 1990. Final plan adopted.

MAJOR ISSUES

Increasing levels of commercial and non-commercial use.

Degradation of user experience due to increases in overall use.

Conflicts between sportfishermen and subsistence users.

Restrictions on the amount of public use allowed on land and water within the refuge.

Restrictions on the amount of development allowed in the refuge.

Different state and federal authorities that apply to the management of state owned land and water.

In Brief:

Alaska Department of NATURAL RESOURCES

Division of Land and Water • January 24, 1992

SUSITNA AND WILLOW AREA PLANS

Purposes

Designate main uses of state and borough lands
Establish guidelines to ensure that multiple uses occur compatibly
Coordinate use of state and borough lands

Area

15.8 million acres of land in the Matanuska-Susitna Borough and Tyonek areas including:
-- 9.5 million acres of state land
-- 600 thousand acres of borough land

Status

Willow Subbasin Area Plan (1 million acres in Palmer-Wasilla area) adopted 1982
Susitna Area Plan (remainder of Matanuska-Susitna Borough plus Beluga area) adopted 1985
Beluga area is in Kenai Peninsula Borough and will be updated by the Kenai Area Plan now in progress
Susitna Forestry Guidelines (adopted 1991) added detailed guidelines for forest management and converted central Susitna-Willow database to GIS
Detailed management plans completed for
- Deception Creek (1989)
- Fish Creek (1984)
- Kashwitna (1991)
- Matanuska Valley Moose Range (1986)
- Hatcher Pass (1986, amended 1989)
- Susitna Basin Recreation Rivers (1991)

Areas outside management plans are overdue for updating

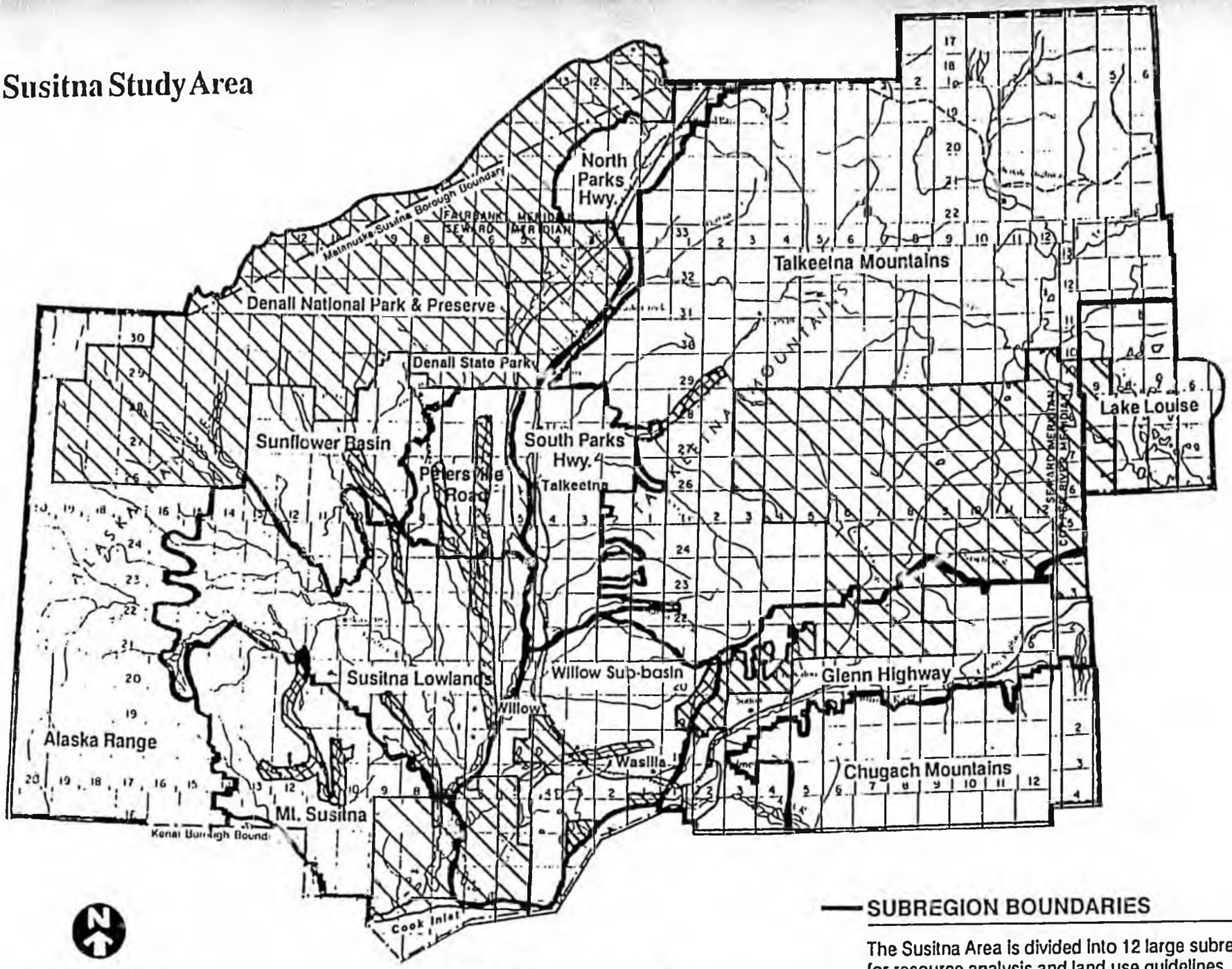
Participants

Planning team: DNR, DFG, DOT&PF, Mat-Su Borough
Cooperating agencies: USDA Soil Conservation Service, BLM, Kenai Borough
Public: 40 public meetings, written + oral comments, meetings with groups

Key issues for update

Land allocations for forestry, settlement, agriculture, and resource management areas
Review proposed legislative designations and incorporate areas that were legislatively designated since plans were adopted
Recreation opportunity spectrum and management intent for recreation and habitat lands
Road access
Remote cabin permit areas
Guidelines for retained lands within disposal areas
Land use designations for isolated parcels of state land near road system
Management of controversial areas, including Susitna Corridor, Nelchina Public Use Area, and Knik Glacier area

Susitna Study Area



Legislatively Designated Areas (not addressed by this plan)

SUBREGION BOUNDARIES

The Susitna Area is divided into 12 large subregions for resource analysis and land use guidelines.

Susitna Basin Recreation Rivers Management Plan

Alaska Department of Natural Resources
Division of Land & Water Management
Land & Resource Section

Overview

This plan was developed between 6/88 and 1/91 and provides management intent for six rivers in the Susitna Valley: Little Susitna River, Deshka River (including Moose and Kroto creeks), Talkeetna River, Lake Creek, Talachulitna River, and Alexander Creek.

Schedule

In January, 1991 the plan was submitted to the legislature for a 100 day review period in accordance with the Recreation Rivers Act. After the legislature reviewed the plan, it was signed by the Commissioner in June 1991.

Plan Provisions

The plan provides:

- Management intent for 238,000 acres and 460 river miles
- Emphasizes maintaining and enhancing the quality of the recreation resource and protection of the resource upon which this use depends
- Puts a high priority on education and making information on the rivers available
- Guidelines for recreation development including airstrips, lodges, and seasonal camps
- Recommends a commercial permit to generate revenues to help manage the rivers and to protect the public and the resource
- Recommends specific public facilities such as signs, boat launches, and privies
- Establishes non-motorized areas on the more remote parts of the rivers and the middle Little Susitna River during mid-summer
- Recommends implementation priorities, management agreements, and regulations

Current Set

In October, 1991 the department hired a Natural Resource Officer to oversee the management of the six rivers and to implement the plan. The division is now reviewing over 50 pending casefiles which include cabins that have been built without authorization over the years, airstrip applications, permits for borough recreation facilities on state lands, and proposals from landowners to exchange lands. As funding allows for this summer, an educational/informational program including signs, brochure(s), and kiosks will be implemented to inform the public about the Recreation Rivers. A volunteer program will also be initiated.

rrdsk12/January 28, 1992/briefing

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Alaska Department of NATURAL RESOURCES

In Brief:

Alaska Department of NATURAL RESOURCES

Division of Land and Water • January 24, 1992

SUSITNA FORESTRY GUIDELINES

Purpose: DNR is charged with providing jobs, habitat, wood, recreation, and other benefits from state-owned forests. Many ideas exist on how best to fulfill this charge. The Susitna Forestry Guidelines were developed to balance different demands on state owned forests in the Susitna valley, and help achieve this mission. The Guidelines direct management of forest resources, set standards for timber management and access, identify areas available for timber harvesting, summarize current timber volumes, and establish the annual allowable cut.

Process: The guidelines were developed over three years by state agencies and the public. They were adopted by the commissioners of Natural Resources and Fish and Game in October, 1991. Participants in the process included

- Interagency planning team
  Department of Natural Resources divisions of Land, Forestry, Parks and Outdoor Recreation, Agriculture, and Mining
  Department of Fish and Game
  Department of Environmental Conservation
  Department of Transportation and Public Facilities
  Department of Commerce and Economic Development
  Matanuska-Susitna Borough

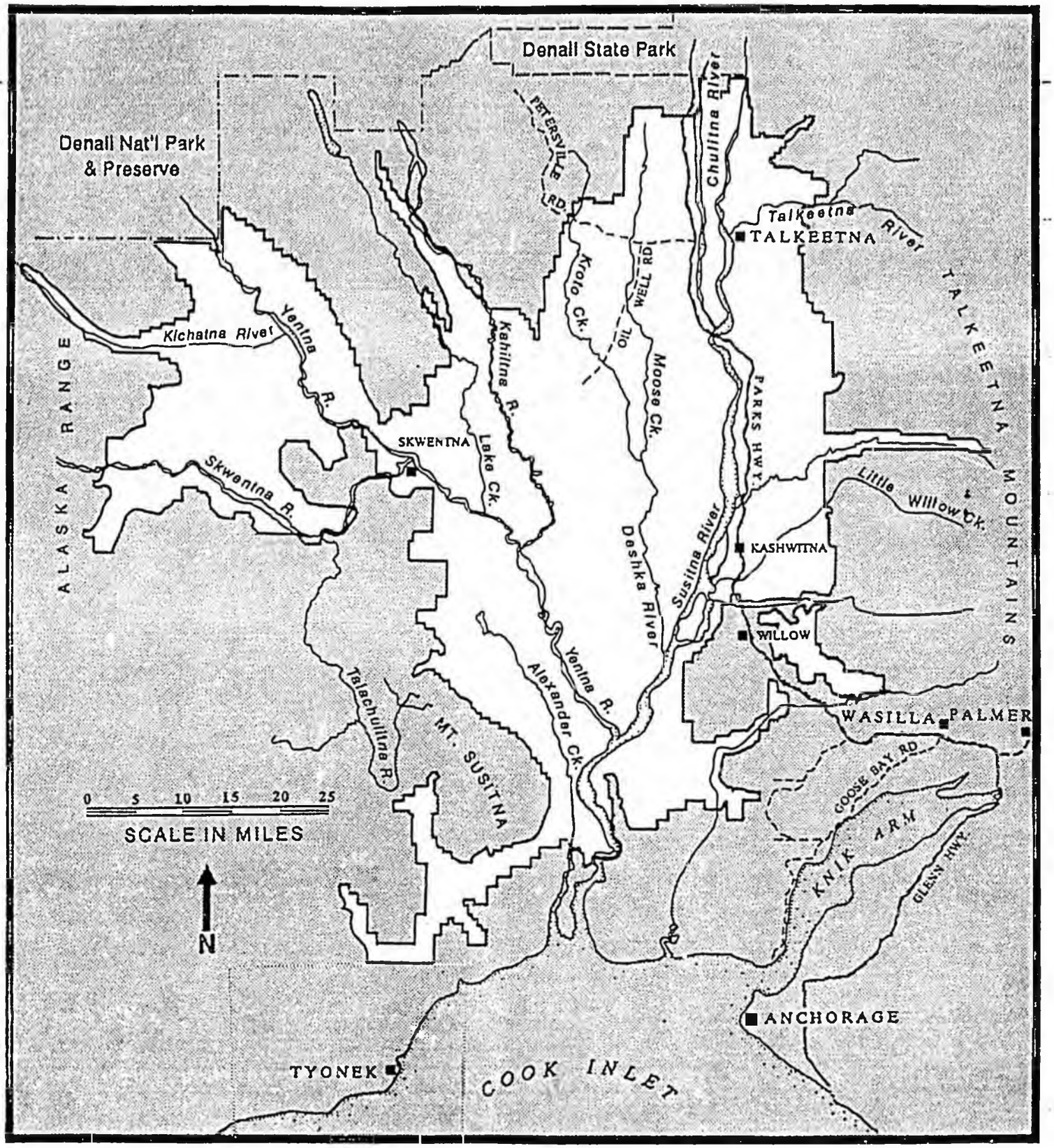
- Citizens' Advisory Committee Representatives of about 80 organizations interested in forest management in the Susitna valley. Members participated in meetings throughout the planning process, received all materials sent to the planning team, and reviewed drafts of the guidelines.

- General public Eight public meetings were held on the draft guidelines; numerous comments also were received by telephone and in writing. Comments were reviewed by the planning team before developing the final guidelines.

Key guidelines: The guidelines address forest management and access to timber resources, including

- The annual allowable cut for state forests in the Susitna valley
- Goals for forest management for commercial and personal use of wood, and protecting and supporting non-timber forest uses
- Design of timber sales and management after timber harvest
- Management of special areas such as important habitats, trail corridors, recreation sites, and wetlands
- Design and management of year-round and winter roads for timber access
- Public notice for timber management and habitat enhancement activities
- Keeping the guidelines timely through periodic reviews, amendments, and special exceptions.

Susitna Forestry Guidelines Boundary



January 1992

COPPER RIVER BASIN AREA PLAN

Purpose Designate main uses of state land
Establish guidelines that ensure that multiple uses occur compatibly

Area 3.3 million acres of state land
no local government or coastal resource service areas

Status November 1984 - plan started with public meetings to identify issues
December 1986 - plan adopted

Participants

Planning team - Representatives of state agencies and Ahtna, Inc.
Interest groups - Information sent to numerous groups, briefings as requested
General public - Over 40 public meetings and workshops held in local communities, Anchorage, Fairbanks, and Valdez

Major Provisions of Plan

Most state land to be kept in public ownership and managed for multiple use

Settlement and Agriculture - 18,000 acres identified for new land sales for settlement and agriculture over 20 years

Remote cabins - 50-60 remote cabin permits allowed

Minerals - 97% of state lands kept open to new mineral entry
- designated a primary use on 41,600 acres
- 49,000 acres closed to protect salmon spawning and rearing areas and resident fish habitat
- 30,000 acres closed in 8 existing state recreation areas and one proposed state recreation area
- 18,000 acres closed in Thompson Pass to protect recreation, transportation, and utility uses along the Richardson Highway

Oil and Gas - All state land available for oil and gas leasing

Land Status - Over 218,000 acres recommended for new state selection
- 151,000 acres recommended for relinquishment

Legislative Recommendations - state recreation areas at Thompson Pass, Kettlehole Lakes-Mendeltna Creek, Nelchina-Tazlina, and Gulkana River
- Trumpeter swan nesting area (400,000 acres)

Prince William Sound Area Plan

Overview

The Prince William Sound Area Plan describes how the Department of Natural Resources will manage state-owned uplands and tide and submerged lands. It also provides general guidance for managing units of the Alaska marine Park system within this planning area. The plan was completed in June 1988.

The overall theme of the plan is to maintain visual quality of the coastline along the marine ferry route, provide access across state tideland for resource development on adjacent private land, protect crucial-rated habitats, and protect recreation resources.

Area

984,000 acres of uplands, mostly in the Chugach Mountains, some along the coast. Approximately four million acres of submerged lands (three miles seaward) and tidelands.

Participation

Interagency Planning Team:
Department of Natural Resources: Divisions of Land and Water, Parks and Outdoor Recreation, Forestry, Mining,
Department of Fish and Game
Department of Transportation and Public Facilities
Department of Community and Regional Affairs
Department of Environmental Conservation
U.S. Department of Agriculture, Forest Service

General Public: three rounds of public meetings, public survey, meetings with individuals and interest groups

Major Decisions

Land use classifications
Land disposal locations
Administrative designations
Land selections and relinquishments
Guidelines for leases and permits on state land

Contact

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