

# MEMORANDUM

State of Alaska

Dept. of Natural Resources

Division of Mining & Water Mgmt

TO: Jules V. Tileston  
Director

DATE: September 15, 1995

TELEPHONE NO: 762-2571

FAX NO: 562-1384

FROM: Gary Prokosch  
Chief, Water Resources

SUBJECT: Water Management, FY97

The need for, and importance of water management in Alaska.

*For all life water is necessary. For many uses it is convenient. In much of its functioning it is commonplace.*

*But commonplace things often are the least appreciated and the hardest to understand. We pay great attention to the movement of water from place to place as vapor and clouds in the air, as rain on the soil, and then as streams back to the ocean. We know that water is the most abundant liquid on earth. Always we use or fight its tendency to find its own level. In considering its uses and abundance and properties, however, we must keep in mind this main fact: Water is needed for life. (Water, Yearbook, Dept. Of Agriculture 1955)*

Water management, and water rights specifically, is a property interest of primary importance to Alaskans. Our culture, lifestyle, and future development depend upon sound water resource management decisions today. No one should be lulled into the misconception that issuance of water rights is a question of lesser importance given the relative abundance of water in Alaska. Alaska has great rivers, millions of large lakes, large underground aquifers, and vast areas of wetlands. But a net annual surplus of water over the total area of the state does not mean that there are no water shortages in the state. Southeast, the Aleutians Islands, and Kodiak Island are dependent on surface water as their only feasible source of supply; even a short drought as experienced in 1993 may result in water shortages. In the interior during the winter many streams and shallow lakes freeze solid, and ground water in many areas is of questionable quality. In this area the occurrence and availability of groundwater are limited by



permafrost. There are areas of the Arctic Slope Basin that are frozen deserts with about 5 inches of annual precipitation, or less than deserts in Nevada and California. In Southcentral Alaska many areas around the population centers have experienced groundwater mining and limited supplies due to competition. Yes, water resources in Alaska are abundant, but not necessarily when and where it is needed. Moreover, from an economic development perspective, it is not only its abundance that allows the use of a particular resource in a development enterprise, but also security of rights to that resource. While a recording function can provide security of title for land and land-based resources, the natural yearly and seasonal variation of water's availability requires active management to provide security of rights, with minimum transaction costs, for the use of water.

### The Water Use Act:

One of the primary duties of State Government is the management of its natural resources for the benefit of the citizens of the State. Repeal of the water use act is the abdication of State responsibilities and sovereign rights with regard to its management of its water resources, and in violation of its own constitution and statutes. Article VIII, Section 1 of the Alaska Constitution states "It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest". The Water Use Act establishes a modern water rights administration system to accomplish these dual objectives. Maximum use is encouraged by clarity in the availability of unappropriated water and the status of prior rights, and by minimizing transaction costs; the public interest is served by a visible and accountable process that considers a broad range of water resource values. Article VIII, Section 3 states: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." This section establishes Alaska's water as a common property resource. Article VIII, Section 2 states: "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and **waters**, for the maximum benefit of its people." Section 13 deals more specifically with water rights, and states: "All surface and subsurface **waters** reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right." Section 16 addresses protection of the rights of the citizens of the State, and states: "No person shall be involuntarily divested



*of his right to the use of **waters**, his interest in land, or improvements affecting either, except for superior beneficial use or public purpose and then only with just compensation and by operation of law."*

Clearly, the constitution requires the management of its water resources. These sections of the constitution are based on the doctrine of prior appropriation as established in most of the western states, and ratified by the U.S. Supreme Court. The guiding principles of the doctrine of prior appropriation are that beneficial use of water, not land ownership, gives the basis of the right of water use, and that priority use, not equality of right, is the basis of the allocation of water between appropriators when there is insufficient supply. In response to the mandates as established in the State Constitution, and consistent with the doctrine of prior appropriation, Alaska adopted The Alaska Water Use Act.

The Alaska Department of Natural Resources (DNR) was delegated authority to administer the Act. A water right is a legal right to use surface or groundwater under the Water Use Act. Under DNR the Act has been established as a procedural method for protection of existing water rights and the issuance of new rights to surface and subsurface water of the State. The statutory procedure to secure new water rights requires the filing of an Application for Water Rights with the Commissioner of DNR. The State shall grant a water right permit or certificate if the Commissioner finds that the rights of a prior appropriator are not unduly affected, the means of diversion are adequate, the proposed use is beneficial, and the proposed appropriation is in the public interest. In determining public interest, the Commissioner will consider: benefit to the applicant; effect on economic activity; effect on fish, wildlife, and recreation; effect on public health; loss of alternative uses for water; harm to other persons; ability of applicant to complete appropriation; and effect on access to navigable or public waters. The certificate of appropriation granted by the state to a user allows a specific amount of water from a specific water source to be diverted, impounded, or withdrawn for a specific use and period of time. Existing water rights are protected through this process by establishment of a priority date of appropriation following the doctrine of prior appropriation.

Instream flow amendments to the Water Use Act have allowed for private and public entities to apply to DNR for reservations of



water for instream uses, including fisheries, navigation, recreation, and maintenance of water quality. This expansion of the Water Use Act has directed DNR to maintain sufficient flow in streams and rivers to continue to support uses crucial to the lifestyles, health and security, and economy of regions surrounding streams and rivers.

### Legal Needs

Whenever water rights are granted to a manufacturer, public water supplier, seafood processor, miner, or farmer, they want a firm right that can be given legal protection against the acts of others that might interfere with their water use. A water user, even though he or she may be first on a stream or drill the first well in an area, needs a definite right that will identify his or her property and differentiate it from the property of others. Physical ownership of a water source is impossible; a person can be given a right defined in terms of the acts that may be done in relation to the water source and in relation to the acts of other persons. When others begin to divert and use water, a mechanism must be in place to enforce the water rights and allocate the water accordingly.

There can be legal shortages of water even though a river, lake, or aquifer is full. A shortage exists at any time or place where all demands on a source of water cannot be met. If one person wants to dam or divert a stream, another wants to use water to carry away or dilute waste from a city or industry, while others need water to flow in its natural state for fish and their habitat or for recreation -and all of these uses cannot be met at the same time- water becomes a scarce commodity whose use must be regulated. The legal problem becomes one of allocating the water to the use or uses which will produce the greatest benefit to the people of the State. The Water Use Act provides a mechanism for making allocations and adjustments wisely, and does not permit one type of water use to harm another without a careful balancing of the various interests.

Many Alaskans seem to have the mistaken belief that since so much of the land within the state is federal public domain, or within the boundaries of National Forests, federal law applies instead of state law. This is not the case. Since 1866 Congress has declared, and the courts have ruled, that local customs, laws, and decisions relating to the appropriation of water for mining, agriculture, manufacturing, or other beneficial purposes are the laws to be



applied to water rights on public domain lands. Basic water rights will always depend upon State Law.

What then would be the effect of repeal of the entire Water Use Act? In addition to being in violation of the State Constitution, an abdication of an authority granted to the State to manage its own natural resources, and in violation of its own Statutes, repeal would be detrimental to private, public, and industrial users of water. It must be emphasized that water is the natural resource most under state management authority. With few exceptions, water in the State of Alaska is managed and appropriated exclusively by the State, even when flowing across federal or private lands. Nearly all other natural resources fall under a joint federal state management authority. The Water Use Act was designed to manage the water for the maximum benefit of all Alaskans according to the State Constitution and State management objectives. These objectives have included the preservation of water quality and quantity while providing appropriate allocations to ensure the lifestyles, health and security, and economy of the State. Repeal of the Water Use Act severs the State from these objectives and leaves no water management policy in place for the protection of the water resource, the citizens, and the economy of Alaska. Other State resources not managed constitutionally reverted to Federal Jurisdiction and management. This analogy to recent history of game management in the State needs to be considered when considering the repeal of the Water Use Act. Currently federal legislation on the Clean Water Act, Safe Drinking Water Act, and the Federal Power Act could expand federal authority, in the absence of state authority, resulting in the defacto allocation of Alaska's water resources.

Repeal of the Water Use Act would require water users, developers, and investors to rely much more heavily on common law for the determination, establishment, and defense of water rights. Transaction costs and investment risks would likely escalate, with a negative effect on water-dependent (virtually all) economic development. Cost-shifting from the administrative water rights system to increased use of the courts could more than cancel any savings in the state's budget. Uncertainty of rights would shift costs from the public to the private sector, by placing greater legal, record research, and hydrologic information burdens on potential water appropriators.

#### **Elimination of funding:**



Much of the discussion above is applicable to the elimination of funding for water management. Although under this funding elimination plan there would be no repeal of the Water Use Act and, therefore, no technical violation of the State Constitution, the effect upon the people and economy of Alaska would be similar.

Without the funding for effective coordinated water management, legal water right appropriations will cease. The immediate impact of such an action would be the complete cessation of appropriations of water and the administrative protections offered under the current law. Currently, there is a backlog of approximately 2300 case files, including applications, permits, and certificates waiting adjudication of water rights. This backlog would increase by approximately 400 case files per year as no further certificates would be issued. Existing water right certificate holders would be unable to secure from the state any assistance in defending their water rights from newer users. Industrial or other large users of water without State oversight may impact quantity and quality of water to groundwater and surface water users, adversely affecting health and security, lifestyle, economy, recreational activities, and the environment.

The long-term effect of the elimination of funding for water management would not be dissimilar to the complete repeal of the Water Use Act. The short-sighted funding cut would leave the State with no coordinated long-term water management presence. This is again an abdication of a fundamental, sovereign State's right to manage its water resource for the benefit of the citizens of the State. It would also leave 16,000 water right holders without administrative protection of the rights they have been granted. Admittedly, protecting a senior water right holder can be obtained by taking legal actions through the Alaska Court System, but this would be an expensive and cumbersome process, and is not what was envisioned by the Constitution and Statutes of the State of Alaska.