

Alaska Legislature Considers Innovative Instream Flow Law

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Members of the Alaska State Legislature are once again gearing up for an attempt to pass the most innovative and protective instream flow legislation in the United States. The proposed legislation (H.B. 355, 17th Leg. 1st Sess. Alaska 1991) was introduced on the last day of the 1991 legislative session and will, thus, be actively considered when the legislature reconvenes in January 1992. Similar legislation was introduced and debated in the 1989-1990 legislative session and proved to be quite controversial (H.B. 210, 16th Leg. 1st Sess. Alaska 1989). It failed to pass on a floor vote in the House of Representatives and was never considered in the Senate. This article focuses on the legislation that was introduced and debated in the 16th Alaska Legislature and briefly compares that proposed legislation with the most recently introduced proposal.

Passage of the instream flow legislation proposed in 1989 would have amended the existing instream flow law (A.S. 46.15.145 et seq.) to guarantee a reservation of instream flows for fish in all fish-bearing waters. Under existing law, before granting a permit to appropriate water, the state is required to consider its effect on fish and game resources, as well as other public interest criteria (A.S. 46.15.080[b](3)). The Alaska Constitution, however, provides that, except for public water supplies, any appropriative water rights are "subject . . . to the general reservation of fish and wildlife [for common use]" (Alaska Const. art. VIII, § 13). The sponsor of the legislation—Representative Cliff Davidson—cited this provision as a "constitutional mandate . . . to reserve water for fish and wildlife" and noted that the proposed law "would bring state law into compliance with [Alaska's] Constitution" (Cliff Davidson, memorandum to House Finance Committee Co-chairs Lyman Hoffman and Ron Larson, 19 February 1990; copy on file with Native American Rights Fund, Anchorage, Alaska).

All parties seem to agree that protection of fish habitat is good and of great importance to Alaska's economic well-being, but opponents fear that the legislation will unduly interfere with the extraction and development of Alaska's other natural resources. To the contrary, such legislation is essential to ward off the seemingly inevitable ruin of anadromous and resident fish populations that has resulted from the withdrawal and impoundment of water in other states. For example, the American Fisheries Society recently published a list of 214 depleted Pacific salmon, steelhead, and sea-run cutthroat stocks from California, Washington, and Idaho. Their depletion has been caused by habitat loss attributable in large part to reservoir construction and out-of-stream diversions (Nehlsen et al. 1991). Massive withdrawals of water and construction of dams in the Columbia and Snake river systems have caused the National Marine Fisheries Service to propose listing the Snake River sockeye salmon under the Endangered Species Act (56 Fed. Reg. 14055). Had those states adopted protective instream flow legislation prior to the wide-scale appropriation of water for hydropower and out-of-stream applications such as agriculture, mining, and various industrial uses, they would not now be in the unfortunate position of attempting to restore instream flows by closing the headgates of irrigators and modifying releases from dams long after the fish populations have been decimated. In California this has led to resurrection of the public trust doctrine

¹ The views expressed in this article are solely those of the author and not necessarily those of the Native American Rights Fund or its clients.

in an attempt to limit the property rights of those who have damaged Mono Lake by diverting inflows to it (*National Audubon Society v. Superior Court*, 658 P.2d 709 [Calif. 1983], cert. denied, 464 U.S. 977). If Alaska takes steps to guarantee instream flow protection now, it will never be in the same position as those states that are desperately seeking to limit the property rights of out-of-stream water users to reclaim some fish habitat (Sax 1990).

THE IMPORTANCE OF WATER RESOURCES TO ALASKA

From time immemorial the inhabitants of what is now the state of Alaska have depended on the state's waters for their livelihood. Alaska Natives, as well as newcomers, rely on fishery resources for their physical sustenance, economic well-being, and retention of their culture. Indeed, the one common feature of the 212 Native villages scattered around the state is their proximity to water. Congress took note of this fact when it passed the subsistence provisions of the Alaska National Interest Lands Conservation Act (ANILCA) in 1980, and, thus, accorded the subsistence uses of fish and game by rural residents of Alaska priority over other uses on the public lands (Pub. L. 96-487, Title VIII, 2 December 1980, 94 Stat. 2423). The chief sponsor of the legislation explained that:

The location of these [Native] villages is no accident. Prior to the intrusion of western culture into Native Alaska in the late 1800s, most Alaska Natives traveled from hunting camp to fish camp, and fish camp to hunting camp, following the natural cycle of the seasons and the migratory patterns of the fish and wildlife in their area . . . Today, the same social, cultural and economic purposes of these same villages remains (126 Cong. Rec. 29278 [1980] [Cong. Udall]).

When it enacted ANILCA, Congress also placed millions of acres in federal reserved status, often with explicitly stated purposes of providing for subsistence uses and protecting fish habitat (e.g., 16 U.S.C. § 410hh establishing Wrangell-St. Elias National Park). Such reservations surely have a federally reserved water right with a 1980 priority date (*United States v. New Mexico*, 438 U.S. 696 [1978]), which provides yet another angle for protection of fisheries habitat. Questions regarding the existence and extent of these reserved rights are currently being litigated in *John et al. v. United States and State of Alaska* (No. A90-484 [D. Alaska 1990]), a dispute over subsistence fishing rights.

In addition to subsistence, instream uses of water are important for recreational activities such as sport fishing, rafting, and kayaking. Indeed, what outdoor enthusiast has not dreamed of a vacation to Alaska to pursue the gigantic king salmon or numerous other species that abound throughout the state? The major rivers are also used for transportation by many segments of the population. Rural residents not only travel the state's watercourses regularly in the open-water months, but also make their way along the frozen rivers—the only “highways” in most of rural Alaska—in the winter. Fish-related industries provide the second largest source of income to the state, second only to the oil and gas industry (“Alaska seafood industry study: A technical report,” Alaska Sea Grant College Program, Fairbanks, Alaska [unpublished]). Fish, however, will maintain their significant role in the economy of the state long after oil and gas resources have been depleted, so long as there is sufficient water in Alaska's rivers to provide good habitat.

These commercial, recreational, and subsistence uses of Alaska's water resources take place along the state's lakes, streams, and rivers. More than 12,000 rivers and streams have been identified as fish-bearing streams, but only 171 of them have continuous instream flow records of 10 years or longer—the minimum necessary for development of a reliable regional flow analysis (Estes 1990). Of the 30 largest rivers in the United States, 6 are located in Alaska; its lakes are so numerous that they remain uncounted (Harle 1989). Conditions are desert-like in the Arctic, while in some locations of the southeast panhandle rainfall seems to be nearly constant. Relative to the lower 48 states, there is presently little competition for the use of water and almost no streams are

known to be overappropriated (Harle 1989). There is, however, substantial competition for water in Anchorage, Juneau, Kodiak, Sitka, and the North Slope (C. Estes, Alaska Department of Fish and Game, personal communication). Alaska is, therefore, in the enviable position in which most of the northwestern states found themselves before their populations mushroomed. That growth brought the development of hydropower, industrialization, and projects designed to withdraw massive amounts of water for irrigation and other out-of-stream uses. The looming question at present is whether Alaska will take the current opportunity to legislate protection of the valuable, renewable natural resources and uses that depend on instream flow. The time to act is now. There have for years been numerous proposals to siphon Alaska's water to the lower 48 states. Alaska's Governor, Walter J. Hickel, has proposed construction of a pipeline capable of diverting 4 million acre feet of water per year from Alaska to Lake Shasta in California (*Anchorage Times*, p. A-1 [4 June 1991]). Before such a scheme is endorsed, the resources that require instream flows for their survival should be guaranteed protection by statute.

SUMMARY OF PRESENT ALASKA WATER LAW

Alaska follows the usual western water law doctrine of prior appropriation (Alaska Const. Art. VIII, § 13; A.S. 46.15.050; *Paug-Vik, Inc. v. Wards Cove Packing Co.*, 633 P.2d 1015 [Alaska 1981]). As in most other states that follow the doctrine, an individual establishes the right to withdraw, impound, or divert water for a beneficial use by filing an application to appropriate water (11 A.A.C. 93.040). This is followed by the issuance of a permit (11 A.A.C. 93.120) and finally, the issuance of a certificate of appropriation of water (11 A.A.C. 93.130). The water right has a priority as of the date of application and may be accompanied by conditions imposed to protect fish and wildlife habitat and other enumerated elements of the public interest (11 A.A.C. 93.130). Once awarded, however, the water right constitutes an interest in property that may not be taken by the state without payment of just compensation.

Alaska also has an innovative statute that, contrary to nearly every other state, allows private individuals, as well as federal, state, and local governmental agencies, to reserve instream flows for purposes of: "(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" (A.S. 46.15.145). The administrative steps required to obtain a certificate of reservation are roughly the same as those required for obtaining the right to divert, impound, or withdraw water. At this point, however, a major defect in the statutory scheme is revealed. The reserved instream flow right is subject to periodic review (at least every 10 years) by the Alaska Commissioner of Natural Resources to determine, among other things, whether the reservation remains consistent with the public interest (A.S. 46.15.145). This presents no problem so long as the state administration gives preservation of fisheries, and thus instream flows to support fish habitat, top priority. If this were to change, however, the instream flow right could be eliminated by an administrative finding that the public interest requires water previously reserved for instream use to be made available for some out-of-stream use. In effect, this provision could allow the state to give with one hand and take away with the other, based on an administrator's determination that an out-of-stream use is more important to the public than maintaining fish habitat.

In the 11 years since Alaska's instream flow law was adopted, only two private individuals have sought instream flow reservations, and both were denied because of a lack of supporting data (Harle 1989). For most of the rivers and lakes in Alaska such hydrologic data are simply unavailable (Estes 1990). The documentation problem has been alleviated by the adoption of new regulations in 1990 that substantially reduce the initial data submission requirements (11 A.A.C. 93.142). Under these regulations, an application for reservation of instream flows has a priority as of the date of application, and the applicant has 3 years in which to quantify the reservation (11 A.A.C. 93.142). As a practical matter, however, private individuals have little incentive to pursue such

an expensive and time-consuming process on a broad scale. It is fair to say that while the current Alaska instream flow law is the most progressive of the laws in the western states, it has fallen far short of guaranteeing statewide protection of fish habitat.

THE PROPOSED INSTREAM FLOW LEGISLATION

The bill introduced in the state legislature in 1989 took a straightforward approach to accomplishing its goal of protecting fish habitat by reserving instream flows. It provided that upon the receipt of an application "to appropriate water from a river, lake, or stream that is important for the spawning, incubation, rearing, or migration of fish, the commissioner [of the Department of Natural Resources] shall reserve an instantaneous flow in the river, lake, or stream for the instream use of fish and to maintain existing habitat for fish" (H.B. 210, 16th Leg. 1st Sess. Alaska 1989). The amount to be reserved was set at 60% of the mean annual flow for April through October and 30% of the mean annual flow for November through March. The percentages were arrived at through the adoption of the Tennant Method of estimating instream flow needs for fish habitat (Estes and Orsborn 1986). Because over 99% of the state's streams and rivers are ungaged, quantification of instream flows was to be based on mean annual flow. Such flows can be estimated for the majority of Alaska's streams and rivers and tied to fish habitat requirements (Estes 1990). If there were not enough unappropriated water to satisfy the instream flow reservation, any water that was available would have been reserved to the state.

There would have been no impact on existing uses, as the priority date for the instream flow right was to be the date of the act's passage. Nor would the proposed legislation have locked the state into an uncompromising position with respect to allowing other uses. Because the reservation was to be set as a percentage of the mean annual flow, ample water would generally have been available for appropriation. An applicant who wished to appropriate water that was reserved under the proposed instream flow law could have done so by demonstrating that further withdrawals would not harm fish habitat.

Given the tremendous importance of fisheries resources to all segments of Alaskan society, placing the burden on out-of-stream appropriators to demonstrate that their appropriations would not adversely affect those resources was entirely proper. Access to these uses and resources is constitutionally reserved to the people in common; individuals or entities seeking to use water for other purposes should be required to show that their actions will not adversely affect the public's rights. This is especially true because out-of-stream appropriations are typically made as part of an economic venture. Once obtained, the water itself has no cost to the user; mandatory investment in research at the outset would simply be another business cost and would ensure that the user will not be harming the public interest.

As the legislation worked its way through the committee system in the House of Representatives, several charges were leveled at it by development interests. First, they argued that out-of-river appropriations posed no present or foreseeable threat to fisheries habitat and, thus, the law was not needed. This criticism misses a fundamental point apparent to anyone who has reviewed the destruction of fish habitat in the western states. The time to act is when there is no crisis and when the competition for water is at a minimum. Experience in other states demonstrates that efforts to protect instream flows after the waters have been appropriated are at best expensive, difficult, and time-consuming and in most instances, futile (e.g., Gray 1989).

A corollary to the first argument was that under existing law, any permit and certificate to appropriate water could be conditioned to preserve fish habitat and several other broadly stated purposes (11 A.A.C. 93.120), and that accordingly the legislation was unnecessary. Although Alaska's current instream flow law undoubtedly is better than other states', this is hardly a forceful argument against making it even better. The point of the legislation was to *guarantee* a level of instream flows to protect habitat, as opposed to the present situation in which fish habitat is merely a factor that *may* be considered.

Moreover, those experienced with Alaska's current instream flow law have had great difficulty in obtaining reservations for habitat protection. This author worked with a tribal government in rural Alaska that sought an instream flow reservation, but the effort was stymied by the high cost of gathering the data required to support the application. In short, the present law looks great on paper but has not provided significant benefits on a statewide basis.

The second major argument was that as a technological matter, statewide application of the Tennant Method made little sense because of the wide variety of seasonal stream-flow conditions across the state. This issue was dealt with by amendments requiring the Department of Natural Resources to adopt regulations that would "establish hydrologic regions within the state, and specify for each hydrologic region the proportion of mean annual or monthly instream flows in rivers and streams that are reserved from further appropriation" (Resource Committee substitute for H.B. 210 [14 February 1990]). A new section of the bill required the regulations to be adopted within 18 months after becoming law, so that Tennant's 60/30 flow regime would only be in place as an interim measure (Resource Committee Substitute for A.B. 210 [14 February 1990]).

Third, the opponents claimed the bill would be unconstitutional in that it would place instream flow protection ahead of public water supplies, which have a constitutionally guaranteed priority (Alaska Const. art. VIII, § 13). Concerns were also raised that domestic uses in rural areas would be harmed. To ensure that the legislation would not adversely affect either domestic water users or municipal supplies, those uses were exempted from the bill's coverage.

TROUBLESOME CHANGES

At the urging of the mining industry, language was added to the bill to provide that instream flows were not reserved from "appropriation," but rather that they were merely reserved from "consumptive appropriation" (Finance Committee substitute for H.B. 210 [7 March 1990]). Without a definition of these terms, this change could have significantly diminished the legislation's effectiveness. For example, placer mining operations and hydroelectric projects generally do not "consumptively" use water; they merely remove the water from a river or stream and return most of it after it has served its purpose. The Finance Committee changes appeared to authorize the complete dewatering of a stream so long as the water was not used consumptively after the appropriation. This was a major weakness in the bill as amended. The sponsors were not concerned by this potential problem because the definition of "non-consumptive use" in the regulations (11 A.A.C. 93.970[33]) required that the water be returned at its point of diversion. Though this might have prevented the type of problem discussed above, a court might have found, based on a review of legislative history, that the purpose of the amendment was to exempt out-of-stream diversions that did not actually consume the water. Given that a regulation cannot override a statute, a key class of competitors would have been exempted from the law's application. Thus, the sponsors would have been wise to define "consumptive use" clearly in the statute, to prevent such a loophole. It could have been stated, for example, that a consumptive use is "any impoundment, withdrawal, diversion, or other use of water that changes the naturally occurring rate of flow of a river or stream."

Also troubling was the deletion of the protection provided in the original bill for the quantity of water necessary for fish habitat in lakes. Acquiescence to this change resulted from the difficulty of determining how much water would actually be required. Also, the bill was worded in terms of instream flows, which technically cannot be measured for lakes. The large gap in legislative protection of fish habitat left by the deletion could have been cured by simply adding a section providing for reservation of a particular "stage" or "elevation" of the water in fish-bearing lakes.



THE NEW LEGISLATIVE PROPOSAL

Despite the accommodations made to opponents of the legislation during the committee process, even more changes were sought on the floor of the House of Representatives. It failed to receive enough votes to pass. However, a new proposal has now been introduced (H.B. 355, 17th Leg. 1st Sess. Alaska 1991), which provides that:

upon receipt by the commissioner of an application to appropriate (1) water from a river or stream that is used by fish for spawning, incubation, rearing or migration, or that is habitat for wildlife; or (2) ground water that significantly influences the amount of water that is used by fish for spawning, incubation, rearing, or migration, or that is habitat for wildlife, the commissioner shall reserve an instream flow in the river or stream from the instream use of fish and wildlife and to maintain habitat for fish and wildlife.

One positive change is that the water would be reserved for wildlife habitat rather than simply for fisheries habitat. The proposal thus tracks the state constitution's reservation language.

Absent from this proposal, however, is the mandate that a fixed percentage of water be reserved as of the date an application to appropriate water is received. Presumably, this would require the State Commissioner of Natural Resources to quantify the amount of water needed for instream flows on a particular watercourse. This would not be a problem so long as the Commissioner were truly concerned with protecting fish and wildlife, rather than with encouraging development dependent on out-of-stream appropriation. The Commissioner would simply be required "to maintain habitat for fish and wildlife" (H.B. 355, 17th Leg. 1st Sess. Alaska 1991). This begs the question as to how much protection would be provided. The legislation could be improved by setting forth the standard of protection required by the law.

The bill exempts single-family uses, public water supplies, and appropriations of groundwater of 5,000 gal/day or less, as well as appropriations for nonconsumptive uses. As noted above, the meaning of the last should be clarified on the face of the statute. Finally, lakes are not covered by the proposal. Although instream flow rights do not technically pertain to lakes, the bill could be made stronger by requiring the Commissioner to reserve a particular level of water in a lake upon receipt of an application to appropriate water from it.

CONCLUSION

The proposed legislation constitutes a positive step toward the protection of fisheries habitat in Alaska. Though other states are doing what they can to preserve their vastly diminished fish habitat, in practicality they are left with little to do beyond speculating what they would do if they had another chance. If Alaska can learn from the mistakes of others, its fish and wildlife resources and associated uses could have statutorily guaranteed protection by as early as May 1992.

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