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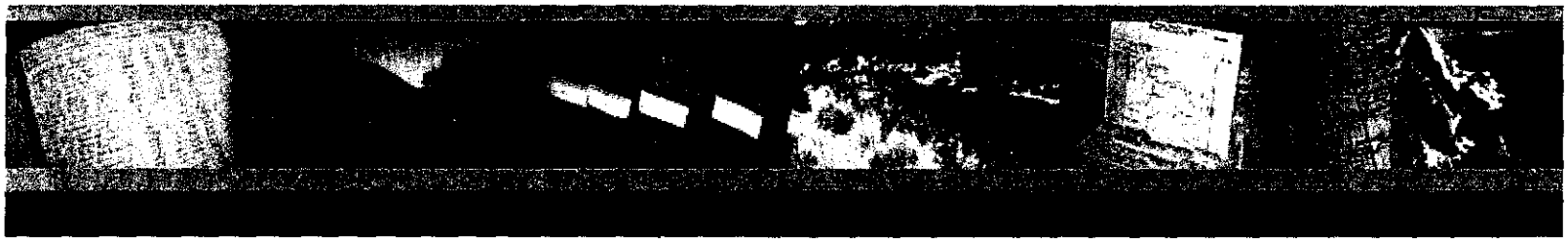
Western States Water Laws



Abstract

Water rights is a very complex issue and a critical component of the Bureau of Land Management's (BLM) water program. This complexity is due to the fact that water rights are managed to a great extent under state law. Therefore, it is critical to have a good understanding of the water right laws of each individual state and how they apply to BLM. This website reviews the water laws of eleven western states (Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Wyoming). Special attention is paid to the states' water rights systems, the application processes, groundwater regulations, the general adjudication processes, and the states' instream flow programs. Comment is also made on how the states handle federal reserved water rights and other BLM specific information. This website is designed to serve as an overview of the western states' water laws as well as a resource to water rights specialists and other interested parties.

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For Information or

comments contact:
Eric Hecox
eric_hecox@blm.gov

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Federal Reserved Water Rights

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Development and Status of Federal Reserved Water Rights:

When the United States reserves public land for uses such as Indian reservations, military reservations, national parks, forest, or monuments, it also implicitly reserves sufficient water to satisfy the purposes for which the reservation was created. Both reservations made by presidential executive order or those made by an act of Congress have implied reserved rights. The date of priority of a federal reserved right is the date the reservation was established.

The federal reserved water rights doctrine was established by the U.S. Supreme Court in 1908 in Winters *v.* United States. In this case, the U.S. Supreme Court found that an Indian reservation (in the case, the Fort Belknap Indian Reservation) may reserve water for future use in an amount necessary to fulfill the purpose of the reservation, with a priority dating from the treaty that established the reservation. This doctrine establishes that when the federal government created Indian reservations, water rights were reserved in sufficient quantity to meet the purposes for which the reservation was established.

The Winters Doctrine was a land mark case for it was the first time the federal government deviated from the established convention that water law was purely a state matter. In 1952, however, Congress passed the McCarren Amendment which returns substantial power to the states with respect to the management of water. The McCarren Amendment requires that the federal government waive its sovereign immunity in cases involving the

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general adjudication of water rights. Prior to this legislation, the federal government had reserved the right not to be included in general basin adjudications conducted under state law. The McCarren Amendment, however, recognized that the exemption of the federal government from these adjudications would undermine the state's water allocation systems. Therefore, any federal agency claiming a federal reserved water right must participate in the state's adjudication process.

Federal court decisions since the McCarren Amendment have further limited federal reserved water rights. In the 1976 Cappaert *v.* United States of America, the Court ruled that a federal reserved water right quantification was limited to the primary purpose of the reservation and only to the minimum amount of water necessary to fulfill the purpose of the reservation. In 1978, in United State of America *v.* New Mexico, the Court found that the reserved water rights on national forests apply only to the preservation of timber resources and water flows. All other claimed needs were to be considered secondary purposes and the federal government would have to obtain rights like any other appropriator under state law. These rulings have narrowed the scope of the Winter's Doctrine. Federal reserved water rights may only include quantities of water necessary to meet the primary purpose for which the reservation was established ("primary purpose" requirement) and only in the minimum amounts necessary to meet those purposes ("minimal needs" requirement).

The Winters Doctrine originally applied to Indian reservations but has since been applied to other federal land reservations. A variety of court decisions have extended the reserved right doctrine to encompass not only Indian reservations, but water uses in national forests, national parks and monuments, and military reservations. In the 1963 Arizona *v.* California decision, the U.S. Supreme Court found the Winters Doctrine equally applicable to other federal establishments and affirmed an allocation of water for non-Indian federal uses.

Today, federal reserved water rights can be asserted on most lands managed by the federal government. Reserved rights are, for the most part, immune from state water laws and therefore, are not subject to diversion and beneficial use requirements and cannot be lost by non-use. The federal government, however, is required to submit all reserved water rights claims to the state's adjudication process, and are limited by the "primary purpose" and "minimal needs" requirements. In addition, federal reserved water rights are nontransferable. By law, these rights can only exist on lands owned by the federal government. If a land transfer occurs, any existing federal reserved water right becomes

For Information or

comments contact:
Eric Hecox
eric_hecox@blm.gov

invalid.

Because federal reserved water rights must meet the "primary purpose" and "minimal needs" requirements, it is important to quantify any federal reserved right. Generally, quantifying a federal reserved right requires specifying the amount of water claimed, the water sources, the primary purpose of the reservation for which the water is needed, and the priority date of the claim (the date the reservation was created). The most contentious issue is often the amount of water claimed. The quantification of a federal reserved water right often involves the sophisticated integration of ecological models with surface and ground water flow models. The data necessary for accurate modeling is often unavailable or needs to be collected, and there are often discrepancies over appropriate modeling techniques and the interpretation of results. As a result, much of the current controversy is not centered around asserting a federal reserved right, but in the quantification of that assertion.

Federal Reserved Water Rights and the Bureau of Land Management:

The following types of federal reserved water rights can occur on BLM lands: public water holes and springs; mineral hot springs; stock driveways; public oil shale withdrawals; wild and scenic rivers; national monuments and conservation areas; and wilderness areas.

Probably the most common federal reserved water right for BLM is for public water holes and springs. These rights were created by executive orders called Public Water Reserves (PWR). Until 1926, PWRs were created on an ad hoc and sight specific basis. Federal agencies would identify the springs they wanted reserved and these would be incorporated (by executive order) into a chronologically numbered Public Water Reserve. Therefore PWRs with early numbers refer to sight specific reservations. In 1926, a cart blank Public Water Reserve was created through an executive order by President Coolidge entitled "Public Water Reserves No. 107". PWR 107 ended the sight specific system of reserving springs and water holes. The purpose of PWR 107 was to reserve natural springs and water holes yielding amounts in excess of homesteading requirements. This order states that "legal subdivision(s) of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water be reserved for public use". There was no intent to reserve the entire yield of each public spring or water hole, rather reserved water was limited to domestic human consumption and stockwatering. All waters from these sources in excess of the minimum amount necessary for these limited public

watering purposes is available for appropriation through state water law. To date, many of these Public Water Reserves have not been registered with the state and/or are not adjudicated.

Wilderness designations can be considered the most restrictive of the federal land management designation. Reserved water rights are set aside pursuant to the Wilderness Act of 1964 (16 USC section 1131). Development within wilderness areas is restricted, and these restrictions extend to the development of water supplies. The Wilderness Act reserves the amount of water within the wilderness area necessary to preserve and protect the specific values responsible for designation of the area, and to provide for public enjoyment of these values. Only the minimum amount of water necessary to fulfill the primary purpose of the reservation may be asserted as a reserved right.

Wild and Scenic River designations are derived from the Wild and Scenic Rivers Act of 1968 (16 USC section 1271). This legislation states that "certain selected rivers of the nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations". Designation of a stream or river segment as "wild and scenic" prevents construction of flow modifying structures and other facilities on the selected stretch. The area of restricted development can vary, but generally includes at least the area within one-quarter mile of the ordinary high water mark on either side of the river. The act also reserved to the United States the amount of unappropriated water flowing through the public lands necessary to preserve and protect in free-flowing condition the specific values which were responsible for designation of the watercourse. The act, however, does not automatically reserve the entire unappropriated flow of the river.

Stock driveways are reserved pursuant to Section 10 of the Stock-Raising Homestead Act of 1916. This act was repealed by Section 704(a) of the FLPMA, but reservations made prior to 1976 remain in effect until changed in accordance with the act. This act authorized the withdrawal of public lands containing water holds needed for watering stock during their movement to seasonal ranges or shipping points. The priority date for each water hole is the date on which the application for the land withdrawal was approved.

Mineral hot springs with medicinal or curative properties located on vacant, unappropriated, and unreserved public lands constitute federal reserved water rights. The

BLM is authorized to lease these springs for public purposes.

Public oil shale withdrawals reserve that quantity of water which can be used for investigating, examining, and classifying oil shale, but only those waters needed for assessment of the oil shale resources. Federal reserved rights do not apply to waters necessary to develop the oil shale. Waters for development must come through state law and allocation procedures.

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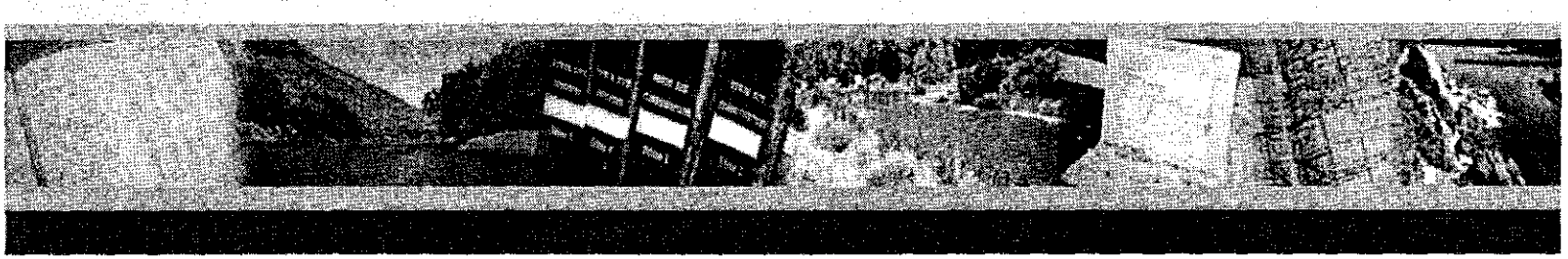

Alaska

WATER RIGHTS FACT SHEET

August 15, 2001

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Water Rights System:

Alaska water law is based on the doctrine of prior appropriation. Historically, there have been riparian rights in Alaska, but when the Alaska Water Use Act was passed in 1966, all riparian rights were converted to prior appropriation rights. Water for public water supplies may be granted as a preferred use in Alaska. This means that a prior appropriation water right is not absolute, but may be subject to changes to meet public needs for domestic water use. If this occurs, the water right holder must be compensated for the loss. The state's water law is contained in the Alaska Water Use Act, Alaska Statute 46.15. Water rights are regulated by Alaska Administrative Code 11 AC 93.

Responsible Agency:

The Alaska Department of Natural Resources, Division of Mining, Land, and Water (the Division), administers water rights in Alaska. This agency is responsible for the appropriation and distribution of surface and ground water in the state.

Application Process:

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The only way to establish a new water right in Alaska is to file an application to appropriate water. The types of applications which can be filed in Alaska can be seen in Appendix One. The applicant is required to submit the application along with a filing fee to the Division of Mining, Land, and Water, at which time the application is indexed into a tracking system. The date when the application is filed is the priority date for the water right. Pending applications in Alaska are adjudicated in the order in which they are received. Public notice of an application is required in the following instances: If the proposed appropriation is over 5,000 gallons per day; if it comes from an anadromous fish stream (one in which fish migrate upstream from the sea to breed), or if the water source has a high level of competition. If notice is required, certified mailings are sent to current appropriators that may be affected by the new application, and to the Departments of Fish and Game and Environmental Conservation. In addition, legal notices are published in a local newspaper or post office for 15 days. Objections to the proposed appropriation can be directed to the Division, and all objections are addressed in writing prior to the issuance of a permit.

When approving or rejecting an application, the Division considers whether: rights of other appropriators will be affected; the proposed means of diversion are adequate; the proposed use of water is beneficial; and if the proposed appropriation is in the public interest (see Appendix Two for Criteria to Assess the Public Interest). After these considerations, the Division issues a decision. If the applicant or objecting parties disagrees with the decision, an appeal can be requested. The appeal must be received within thirty days from the receipt of notification, and the Division then holds a hearing on the objection(s).

When a permit is approved a specific time period (usually two to five years) is granted within which to develop the project. Once the system is fully developed, the total amount of beneficially used water is established, and all permit conditions have been met, a Certificate of Appropriation is granted.

Point of Diversion and Change of Use Procedures:

A Certificate of Appropriation can be amended to change the quantity of water, the legal description for the point of diversion, the type of use, the depth of taking, or to add take points. The Division reviews the proposed change to determine the impact on other water users. If approved, a one-year permit is issued to make the change. If no objections to the change are filed within that year, the change becomes final.

For Information or

comments contact:
Eric Hecox
eric_hecox@blm.gov

State Recognized Beneficial Uses:

Alaska defines "beneficial use" to mean a use of water for the benefit of the appropriator, other persons, or the public, that is reasonable and consistent with the public interest, including, but not limited to:

Agriculture
Domestic
Fish and Wildlife
Fish and Shellfish Processing
Industrial
Irrigation
Manufacturing
Mining
Navigation and Transportation
Power
Public
Recreation Uses
Water Quality

Groundwater:

Ground water and surface water in Alaska are treated the same. They are considered conjunctive and the administration and regulation of ground water does not differ from surface water except in one location. In the Critical Water Management Area around Juneau, there are additional regulations on ground water use relating to salt water intrusion in the aquifier.

Water Rights:

There are no restrictions in Alaska as to who can hold a water right. State law says any "person" can hold a water right and "person" is defined as "an individual, partnership, association, public or private corporation, state agency, political subdivision of the state, and the United States". A water right in Alaska is attached to the land where the water is being used. If the land is sold, the water right transfers with the land, unless a severance application is approved by the Division. Water rights in Alaska can be transferred from one owner to another by being bought and sold or traded. The transfer of a water right, however, must be approved through the filing of a change application with the Division of Mining, Land, and Water. The approval criteria for a change application is that the change cannot harm another water user and it must be in the public interest.

A water right in Alaska can be lost by abandonment or forfeiture. Abandonment occurs when a water right holder voluntarily relinquishes his/her water right by submitting a notarized statement to the Division. A water right is lost by forfeiture if it is not used for five

consecutive years. Water lost through abandonment or forfeiture reverts back to the state and is subject to future appropriation.

Adjudications:

In 1986, the Alaska Water Use Act was amended to establish procedures for basin wide adjudications in order to clarify water rights. Procedures were established for both administrative and judicial adjudications. Administrative adjudications are conducted by the Division of Mining, Land, and Water and results in a judicial decree which is then submitted to the courts. A judicial adjudication involves federal reserved water rights. Although procedures for these adjudications have been established (and can be found in 11AC 93 0400), they have never been used. Alaska has yet to have a basin wide adjudication.

Number of Ongoing Adjudications:

There has never been a basin wide adjudication in Alaska.

Instream Flows:

An instream flow amendment was added to Alaska's Water Use Act in 1980. This amendment allowed for the new appropriation of instream flows through reservations. An instream flow reservation may be established on any stream or body of water in Alaska that is not fully appropriated. Upon receiving an Application for Reservation of Water, the Division must establish that there is a need for the reservation, that there will be no adverse impacts on other water right holders, and that the right is in the public interest. An assessment is also made to confirm that water is available for the reservation. Instream flow reservations differ from consumptive water rights, because they are subject to additional burdens of proof of beneficial use. An instream flow right is reviewed every ten years to determine if the reservation is providing a beneficial use. Depending upon the findings of the review, the instream flow reservation may be extended, restricted, or revoked.

The 1980 amendment also established a means for transferring a water right to an instream flow reservation. In order to do this, an application must be filed with the State Water Commission. A one year permit is granted to allow other water users to object to the transfer to instream flow. If approved, the reservation retains the priority date of the

original water right and becomes an established instream flow reservation subject to review every ten years.

Recognized Beneficial Uses for Instream Flow:

In Alaska, permissible instream uses include:

- Protection of fish and wildlife habitat, migration, and propagation
- Recreation and parks
- Navigation and transportation
- Sanitation and water quality

Holdership of Instream Flow Water Rights:

Any "person" may apply for and hold an instream flow reservation. A "person" refers to any private individual, organization, or government agency as defined above.

Quantification Requirements and Procedures:

In Alaska, there are no standard quantification requirements or procedures for the establishment of an instream flow right. In order to establish an instream flow there must be a justifiable quantification based upon the particular beneficial use. There is not, however, a standard method or procedure that must be used.

Federal Reserved Water Rights:

Federal reserved water rights are included in basin wide adjudications if the federal government consents to have its federal reserved water rights administratively adjudicated by the state. Forty-nine percent of Alaska is federal lands (of which 26.1 million acres are BLM reserved land) and may have extensive federal reserved water rights.

Federal reserved water rights in Alaska are different from state appropriated water rights. They:

- May apply to both instream and out-of-stream water uses.
- May be created without actual diversion or beneficial use.

- Are not lost by non-use.
- Have priority dates established as the date the land was withdrawn.
- Are for the minimum amount of water reasonably necessary to satisfy both existing and foreseeable future uses of water for the primary purposes for which the land is withdrawn.

Because most federal reserved water rights are not quantified, the Division does not know how much water is needed or used for the primary purposes of federal land withdrawals in Alaska. Although procedures have been established for the adjudication of federal reserved water rights, this process has not yet taken place. Because of the controversy surrounding the Alaska National Wildlife Refuge (ANWR), a temporary moratorium was placed on the processing of federal reserved water rights. That moratorium has been lifted, but no federal reserved water rights application have been processed since the lifting.

BLM Specific Information:

The Division of Mining, Land, and Water does not require water rights applicants to have the necessary rights-of-way approval from the BLM approved prior to approving an application.

The BLM is required to pay filing fees in Alaska. The fee for an instream flow application is $500 per application.

The Bureau of Land Management in Alaska is applying for and holds federal reserved water rights for Wild and Scenic Rivers. The BLM State Office has submitted eight applications of which one is perfected and seven are pending. Apart from Wild and Scenic Rivers, the BLM does not have (and cannot apply for at this time) any other federal reserved water rights.

The relationship between the BLM and the State of Alaska (Division of Mining, Land, and Water) regarding water rights is tenuous at best. There is a good working relationship between individuals in both offices, but policy differences frustrate meaningful cooperation. Alaska is a strong proponent of states' rights and has conflicted with federal agencies over federal reserved water rights. In some cases, they do not recognize reserved rights to which federal agencies feel they are entitled. The state has even delayed in processing federal applications. These circumstances have effected the BLM

to some extent, but are mainly being played out between the state and the National Fish and Wildlife Service.

Official Contact:

Division of Mining, Land and Water
Water Resources Section
550 West 7th Avenue, Suite 900A
Anchorage, AK 99501-3577
907-269-8503
http://www.dnr.state.ak.us/mine_wat/index.htm

Appendix One: Types of Applications

- Application for Reservation of Water
- Application for Water Rights
- Application for Temporary Water Use
- Change of Address for Water Rights
- Change of Property Ownership for Water Rights
- Notice of Relinquishment of Water Rights Form
- Request for Water Right Permit Extension
- Statement of Beneficial Use of Water

Appendix Two: Criteria to Assess the Public Interest

In determining the public interest, the Division of Mining, Land, and Water shall consider:

- The benefit to the applicant resulting from the proposed appropriation.
- The effect of the economic activity resulting from the proposed appropriation.
- The effect on fish and game resources and on public recreational opportunities.
- The effect on public health.
- The effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation.
- Harm to other persons resulting from the proposed appropriation.
- The intent and ability of the applicant to complete the appropriation.

- The effect upon access to navigable or public water.

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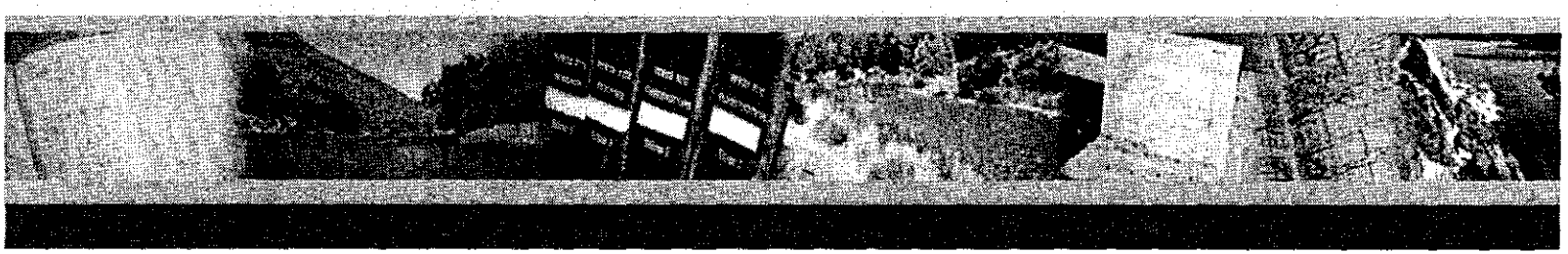

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