

ALASKA WATER RIGHTS ADJUDICATION PROCESS

Alaska water law is founded on the doctrine of prior appropriation. The law is set forth in Article VIII Section 13 of the Constitution of the State of Alaska and the Alaska Water Use Act, Alaska Statute 46.15. Alaska Department of Natural Resources (DNR), Division of Water (DOW) administers water rights and is responsible for the appropriation and distribution of water in the State. The only way to establish a new water right is through the filing of an application to appropriate water as set forth under law. Initially a Permit to Appropriate Water is issued until the beneficial use is established. A Certificate of Appropriation is granted after the water right is perfected. In Alaska the use of water without a permit or certificate does not give the user defensible legal rights to the water no matter how long the water has been in use or continues to be in use. The following is a brief summary of the process that an applicant must follow to establish a water right from either a surface or ground water source and for any water use in excess of 500 gallons per day.

To initiate a water right, the applicant is required to submit a completed application form along with the required supporting documentation and correct filing fee to the Division of Water. The date on which an application is filed serves as the priority date for the eventual water right. The proposed appropriation is reviewed for completeness, accepted, then initiated into an indexed tracking and retrieval system. The pending applications are adjudicated in the order in which they are received. Prior to public notice, the adjudicator establishes the proper quantity of water to be permitted, the proper legal description to the points of take and use, determine which prior appropriators to notify, and if there is any other additional information or concerns that need to be addressed prior to public notice. Public notice is required if the appropriation is over 5,000 gallons per day; if it comes from an anadromous fish stream; or if the water source has a high level of competition. This notice process includes certified mailings to prior appropriators that might be affected; the Departments of Fish & Game and Environmental Conservation; local governments; and regional native corporation and other interested parties. The legal notice is published in a local newspaper or when appropriate posted in a local post office. A 15-day comment period is required for public and agency notice. All substantive objections are addressed in writing before a permit will be issued.

In addition, if a proposed water use is to take place within the Alaska coastal zone boundary or within an approved coastal resource district, a coastal zone consistency review and determination must be made prior to the issuance of a permit to appropriate water. The CZM determination review will either be conducted by DOW or the Division of Governmental Coordination depending on other state or federal permits that may be required.

In approving or rejecting an application, the Division of Water must find the following: 1) rights of prior appropriators will not be unduly affected; 2) the proposed means of diversion or construction are adequate; 3) the proposed use of water is beneficial; and 4) the proposed appropriation is in the public interest. In determining the public interest, the Division of Water shall consider: 1) the benefit to the applicant resulting from the proposed appropriation; 2) the effect of the economic activity resulting from the proposed appropriation; 3) the effect on fish and game resources and on public recreational opportunities; 4) the effect on public health; 5) 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; 6) harm to other persons resulting from the proposed appropriation; 7) the intent and ability of the applicant to complete the appropriation; and 8) the effect upon access to navigable or public water. If the applicant or objector disagrees with the DOW's decision, an appeal in writing must be received by the Director of DOW within 30 days from receipt of notification. The DOW may hold a hearing on the objections. After a decision to issue or deny a permit, an applicant or the objector may appeal the decision to the Commissioner and then finally to the Alaska Superior Court.

When a permit is approved it will include specific conditions, such as, requirements that fish passage and minimum flows for fish be maintained, water use is metered and reported to DOW, establishment of gaging stations and submittal of flow records, mandatory recycling, submittal of design

specifications, as-built plans, plan of operation, and any other condition DOW feels is necessary to protect prior appropriators and the public interest. A permit is granted for a specific period of time (generally two or five years) in which to develop the project. If additional time is needed, a request for an extension of time must be filed and a like period may be granted for good cause. A site inspection may be conducted by DOW or in cooperation with other state and federal agencies to verify that water is being used and the size and type of operation or equipment used to determine the appropriate quantity of water needed. Once the system is fully developed, the full amount of beneficially used water is established, all the permit conditions have been complied with, and a sworn Statement of Beneficial Use is submitted, a Certificate of Appropriation can be granted. This right becomes attached to the land where the water is being used for as long as the water is used. If the land is sold, the water right transfers with the land to the new owner, unless the DOW approves its severance from the land (severance by regulation requires a public interest determination).

A Permit to Appropriate Water and a Certificate of Appropriation can be amended to decrease the quantity of water used, to change the take points, points of use, type of water use, structures used to divert, impound, withdraw and beneficially use water. DOW must review the proposed changes in order to determine its impact on other water rights holders and the public interest, if approved, a 1-year permit is issued to make the change. If no objections are raised within that year, the change becomes final.

A water right can be lost in whole or part by abandonment or forfeiture. A certificate holder may voluntarily relinquish his or her water right by submitting a notarized statement. A water right is lost by forfeiture with 5 successive years of nonuse. Water lost through abandonment or forfeiture reverts back to the state and is subject to future appropriation.

If the water use requires construction of a dam that impounds 50 acre-feet of water and is at least 10 feet high, or is at least 20 feet high, or poses a threat to life and property, a certificate of approval issued by the DOW is required.

An instream flow reservation can be granted by the DOW to protect fish and wildlife habitat, migration, and propagation; recreation and park purposes; navigation and transportation; and sanitary and water quality purposes. Private individuals, organizations, and government agencies may apply for a reservation of water for instream use. The adjudication of an Instream Flow Application is similar to that of a water right. The major difference is in the quantification of the flows to be reserved and the expanded public and agency notice.

A public water supplier can exercise a preferred use to water under Alaska Statutes and can be granted rights to water over prior appropriators. This preference right can only be granted if just compensation is made to prior appropriators.

A temporary water use permit (TWP) may be issued to take and use water for a period of time not to exceed 5 years. No water rights are assigned with a TWP and the use is junior to current and future appropriations of water. Notice to ADF&G and DEC is still required and where appropriate the water use must be found consistent with the Alaska Coastal Management Program.

The State of Alaska may be the first and only state, to date, with the express statutory authority to appropriate water to itself for the purpose of sale. The water for sale must be surplus to needs within the hydrologic unit from which it is appropriated. A purchaser of water from the state shall acquire only those contractual rights to the water set out in sale documents prepared by the Division of Water.

The state agency with responsibility for issuing water rights and for the management of Alaska's water resources is the Alaska Department of Natural Resources, Division of Water. For further information please contact the Director, Division of Water, PO Box 107005, Anchorage, AK 99510-7005 or call (907) 762-2575.