FEDERAL RESERVE WATER RIGHTS

1) The McCarran Amendment to the act of July 10, 1952(43 USC 666a) granted to the States the right to join federal agencies in state court for the purpose of adjudicating water rights. By waving federal sovereign immunity, the law explicitly recognized the authority of the states in the management of water rights. The U.S. Supreme Court confirmed the general applicability of the McCarran Amendment to federal reserve water rights in 1971 (US v Eagle County, Colorado, 401 US 520), and in 1978 held that the Amendment waived the United States' sovereign immunity for all water rights (US v New Mexico, 438 US 696).

2) The State of Alaska and the Department of Natural Resources has had the same position regarding federal reserve water rights for the past 10 or more years. The position simply states that a federal reserved water right may be implied when federal land is withdrawn from entry for federal use. If a reserved water right exists, it is limited to the minimum amount of water reasonably necessary to satisfy the primary purpose of the withdrawal. The extent of the right is determined as of the date of the withdrawal.

3) Regarding the wilderness classification, the State of Alaska feels the opinion presented by Solicitor Ralph W. Tarr and concurred with by Edwin Meese in 1988 which states that additional reserved water rights for wilderness areas was never intended by congress unless explicitly spelled out in the federal withdrawal. This 1988 opinion has recently been suspended by John D. Leshy, the current Department of the Interior Solicitor.

4) Jurisdiction over land use further clouded by the FERC. The State of alaska has to determine the water rights for the proposed project, one of the criteria we require is possessory interest in the point of use and legal access to the point of diversion. The FERC can have a major role in determining possessory interest and legal access even on federal lands. In addition, FERC, because of a Supreme Court decision in California v. FERC (1990) has the authority to set minimum stream flow requirements below hydro projects. The FERC will work with state and federal agencies to determine what the instream flow will be but, the final decision is theirs.

IN A NUT SHELL

A) Federal reserved rights are impled until proven.

B) The priority date is the date the federal lands were withdrawn from the public domain.

C) The quantity of water claimed can not exceed the minimum necessary to fulfill the primary purpose of the withdrawal.

D) Once the water rights are granted (through State court procedures) they can not be lost for nonuse.

E) Once the water rights are granted they are incorporated into the State water rights system and have no greater rights than any other water user in Alaska.

FEDERAL RESERVE WATER RIGHTS

Alaska has more than 40% of the entire nation's free flowing surface water, with more than 3 million lakes, and 12,000 rivers. The federal government owns and manages 60% of the land in Alaska. These Federal land owners include the Departments of Defense, Interior, and Agriculture. These parks, refuges, national forests, military reservations, and wild and scenic rivers may be subject to federal reserve water rights. At the same time, at statehood congress granted title to all navigable waters, and the lands under navigable waters to the State of Alaska, many of which are within federal conservation systems established after statehood.

There has never been a general stream adjudication in Alaska to quantify a federal reserved water right. As a general policy the State of Alaska has encouraged any federal agency using water to file for water rights under state water law. Over the past ten years the U.S. Fish and Wildlife Service, Bureau of Land Management, and the U.S. Forest Service have applied and received water rights under the State system, but in reality this represents a small portion of the water that is actually being used in Alaska by federal agencies. By using State water law to quantify federal agencies current water use in Alaska it could save both the state and federal government the cost of a federal reserve water right adjudication. In most cases a state adjudicated water right would grant the federal agency a priority date senior to most other water uses because either there are no current water rights existing or there are no existing conflicts over an abundant water source..

Federal agencies in Alaska are aware of the states policy encouraging the use of existing state water law to secure water rights for existing uses, including off stream and ground water diversions, and instream flow uses, but they continue to withdraw water and use water for management purposes without state water right or a quantified federal reserve water right. Manageing state waters under theses conditions is at best difficult and places a cloud over existing water rights where federal lands exist, which with 60% of the land in federal ownership is most often the case.

Alaska water law reconizes the use of water for beneficial use including all traditional uses and instream flows for protection of fish and wildlifre habitat, migration and propagation; recreqation and parks; navagation and trasportation; and sanitary and water quality. It would benefit the State of Alaska and the federl government to use the State, Water Use Act to apply for and quantify the water needs of the federal agencies today rather than wait and allow conflicts over water use to drive the quantification of Federal Reserved Water Rights into costly and lengthy litigation.

A recent decision by the Ninth Circuit Court of Appeals has complicated the question of federal reserved water rights in Alaska. In Katie John v. Babbit, 72 F.3d 698 (9th Cir. 1996) the court ruled that the definition of "federal public land" contained in the Alaska National Interest Conservation Act (ANILCA), 16 U.S.C. S 301 et seq, included all navigable water bodies in which the federal government has a reserved water right. Under ANILCA, rural residents of Alaska have a priority for subsistence uses of fish and game on federal public lands. 43 U.S.C. S S 3114, 3115. As part of its decision the court instructed the Interior and Agriculture Departments to identify navigable waters in which the United States has a federal reserved water right. 72 F. 3d at 704. The agencies

need not determine the quantity of the federal water right in any particular water body, merely whether one exists. In the event that competing water users or the State of Alaska disagrees with any federal water rights identification made by the agencies, it may be necessary to appeal those decisions or initiate general stream adjudications in which the federal government could be joined.

The Ninth Circuit Court of Appeals recently determined that the Village of Venetie, Alaska is a dependent Indian community under 18 U.S.C. 115(b) and is, therefore, Indian country. Alaska v. Native Village of Venetie Tribal Gov't, 1996 WL668441, F.3d (9th Cir. 1996). The decision raised the possibility that many other predominantly Native Villages in rural Alaska may also qualify as "Indian county". This creates many questions about the State's ability to exercise jurisdiction over water rights in those villages and for management of state owned navigable waterbodies. The decision also raises the possibility of the assertion of federal reserved water rights associated with land conveyed to native corporations under the Alaska Native Claims Settlement Act, 43 U.S.C. S S 1601 et seq.

LIMITED HYDROLOGIC DATA

The dearth of hydrologic data in Alaska is perhaps the most limiting factor governing our ability to manage Alaska's water resources. Although Alaska has approximately 40 percent of the nation's surface freshwater supply, only 397 USGS continuous flow stream gaging sites have been established in Alaska since 1908.

ALASKA GAGE SITES (LENGTH OF DATA)

YEARS	GAGE SITES	
<1 year	8	
1 year	21	
>1- <5 years		111
5- <10 years	79	
10- <20 years		107
20-<50 years		69
over 50 years	2	

Typically, no more than 20 percent of these Alaskan gages are active in any one year due to funding restrictions. Sixty-eight USGS gaging stations were operating in Alaska during Water Year 1996, October 1, 1995 to September 30, 1996. This represents an average of one stream gage per 8,400 square miles in Alaska. Alaska's density of gages contrasts significantly with the lower "48" average of one gage site per 400 square miles. The stream gaging trend in Alaska is especially alarming, because as of September 30, 1996, only 45 percent (178) of the Alaskan gage sites could meet the USGS 10 year-minimum historical data standards for supporting a statistically reliable regional flow analysis. Daily stage and water surface clevation data are non-existent for the majority of Alaskan lakes.

Although regional hydrologic models were developed, they limit the ability to evaluate naturally

occurring hydrologic patterns with confidence. It is also more time consuming to estimate flow characteristics for streams having a limited or non-existent database as opposed to summarizing data for a stream having an adequate historical record. Precipitation information also required for these ungaged flow models is also limited, further complicating the process for estimation flow availability. Similar data limitations hamper efforts to quantify water reservations for lakes.

Basic hydrologic data are required by all potential water users (out-of-stream and instream), and water management agencies to enable them to project the reliability and amount of water that might be available, even if there were no other competitors for their targeted water source. Continuous flow and stage data are also necessary to manage and enforce existing water rights. Limited road systems, extremes in weather conditions, and difficulties such as loss of equipment to bears and other wildlife make data collection difficult and expensive in Alaska. Therefore, unless a commitment is made to close these data gaps in Alaska, we will continue to be limited to making decisions regarding water allocation using these models with little or no hope for improving the precision or accuracy of our flow estimates. Therefore, it should be obvious that additional gaging stations should be added for a minimum of 10 to 20 years to improve the accuracy of the information used to make decisions pertaining to water availability and allocation in Alaska. (Annual Summary of Instream Flow Reservation and Protection in Alaska, ADF&G Report 96-45, by Christopher Estes.)

The federal government as the largest land owner in Alaska (60% of Alaska is owned by the federal government) and when considering instream flow needs for fish and wildlife, the federal government is one of the largest water users of the state. The federal government should make an effort to collect continues flow data in cooperation with the State of Alaska in order to fill the many data gaps in the existing Alaska Stream Gaging Network. This commitment should equal the data collection effort put into continue flow data collection in the lower 48 states over the past 50 years.

ALASKA MOVES TOWARD A WATERSHED APPROACH

The State of Alaska, Department of Environmental Conservation (DEC) has decided to adopt a Watershed Protection Approach (WPA). Nine states have converted to a geographic problem solving approach and eight others are in the development phase. Simply stated, a WPA An essential part of adopting a Watershed Protection Approach is developing a "Framework" document that describes the
process.

The Department invited representatives from all levels of government, native organizations, environmental groups, business and industry, and the public to join them in building a framework. The Departments' hope is that various stakeholder groups and agencies will collaborate in ranking watersheds and work with them at the project level.

The workgroup has decided on a conceptual model that describes how watershed work in Alaska will be performed. There are two related streams of activity that will be ongoing. First, there are the "ACTIVE" watersheds which will generally observe a five-year cycle of activities may be

repeated beginning in year six if warranted.

The second area of activity will be the "DISCOVERY" phase. Over a six year period of time, the state will be aggressively looking at each of Alaska's six major hydrologic areas of for new candidates for the "ACTIVE" category. The workgroup has defined seven criteria that will be used to select which watershed projects will be elevated to "ACTIVE" status.

Two separate subgroups have formed to develop procedures for designing environmental indicators at the watershed level and for coordinating Geographic Information Systems. Their work products will be added to the Framework document.