

Alaska Water Rights

Basic Terms, Concepts & Processes

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Retired BLM Arizona



Objective

Given a variety of federal water uses within Alaska, the participant will be able to identify:

- Portions of state water law and application procedures that can be used to obtain a water right for a proposed/existing use.



Water Rights in Alaska

- **What is a Water Right and what does it look like in Alaska?**
- The Prior Appropriation Doctrine and how it is applied in Alaska
- Introduction to Types of Water Rights in Alaska
- Introduction to Processes for Obtaining Water Rights in Alaska
- Overview of Administration of Existing Rights in Alaska

Water Rights Summary

A **water right in Alaska** is no different than in other Western States in that it:

- Is the right to use water
- May be lost through nonuse
- Is real property – can be bought, sold and transferred, with approval from the Commissioner of DNR

A water right is transferable, assignable, and must be valued, inventoried and maintained.



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A water right is:

- A right of use, called a “usufructuary right” – you don’t own the water itself – it belongs to the public – but you can obtain a right to use it.
- Can be lost through non-use – “use it or lose it” concept.
- Is a type of property right: one main difference between a land right and a water right is that your right is not lost through non-use for land, but it is for water.
- According to the Federal Land Transaction Facilitation Act (FLTFA), water rights are considered to be an interest in land.
- Is part of the “bundle of rights” that must be addressed in all land tenure actions.

Water Right → Right to Use Water

- Specific quantity (rate and amount)
- Available and unappropriated water
- From an identified source
- Diverted from a specific location
- Used at a specific place
- In priority
- For a beneficial use recognized by law
- During an identified period of time
- Without waste

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER

PERMIT
TO
APPROPRIATE WATER
LAS 18757

THE STATE OF ALASKA UNDER AS 46.15, THE ALASKA WATER USE ACT,
AND THE REGULATIONS ADOPTED UNDER IT, GRANTS TO:

SEM (ANCHORAGE DISTRICT), USDI
6881 ABBOTT LOOP RD
ANCHORAGE, AK. 99507

THE RIGHT TO DEVELOP THE FOLLOWING USE OF WATER:

SOURCE: DRILLED WELL	PRIORITY DATE: 01/26/1994
QUANTITY: 4000.0 GAL/DAY	FROM: JAN 01 THRU DEC 31
USE: REC SERVICES	

THE LOCATION OF THIS WATER SOURCE IS:

A DRILLED WELL, TO BE DEVELOPED, LOCATED WITHIN THE BELOW-DESCRIBED
PARCEL OF PROPERTY.

THE LOCATION TO WHICH THIS WATER RIGHT APPERTAINS IS:

A PORTION OF CAMPBELL TRACT NEAR THE NE END OF CAMPBELL AIRSTRIP
WITHIN NW1/4SE1/4NE1/4 SECTION 3, TOWNSHIP 12 NORTH, RANGE 3
WEST, SEWARD MERIDIAN; ANCHORAGE RECORDING DISTRICT, THIRD JUDICIAL
DISTRICT, STATE OF ALASKA.

CHANGES IN THE NATURAL STATE OF WATER ARE TO BE MADE IN THE MANNER AND
ONLY FOR THE PURPOSES STATED IN THIS PERMIT. THIS PERMIT IS SUBJECT
TO THE RESIDENT STATUTORY PROVISIONS IN AS 46.15, ADMINISTRATIVE
REGULATIONS IN 11 AAC 93, AND THE FOLLOWING CONDITIONS:

THE HOLDER OF THIS PERMIT SHALL:

FOLLOW ACCEPTABLE ENGINEERING STANDARDS IN EXERCISING THE PRIVILEGE
GRANTED BY THIS PERMIT.

DEFEND AND INDEMNIFY THE STATE AGAINST AND HOLD IT HARMLESS FROM
ANY AND ALL CLAIMS, DEMANDS, LEGAL ACTIONS, LOSS, LIABILITY AND
EXPENSE FOR INJURY TO OR DEATH OF PERSONS AND DAMAGES TO OR LOSS
OF PROPERTY ARISING OUT OF OR CONNECTED WITH THE EXERCISE OF THE
PRIVILEGE GRANTED BY THIS PERMIT.

COMPLY WITH ALL APPLICABLE LAWS, REGULATIONS, AND CONDITIONS; AND KEEP
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•Quantity of water: *gallons per minute (GPM); gallons per day (GPD), acre-feet per annum (AFA); cubic feet per second (CFS); miner's inches* (old standard varied by state – in AZ, 1 mi = 11.22 GPM; in NV, 40 mi = 1 CFS; in CO, 1 mi = .026 CFS); **the GPD quantification is used in Alaska**

•Source: The water right will specify whether the diversion is from a surface stream, a lake/pond, a spring, or groundwater from a specific aquifer.

•Location: The water right will provide a legal description for the point of diversion (POD) and place(s) of use (POU).

•Priority date: A priority date is assigned to a water right, based upon when the beneficial use began (vested water right) or when the water right application was filed (new water rights).

•Recognized beneficial uses are usually listed in state water statutes.

•Period of use: The water right defines the annual dates of use; for example, year-round use (domestic) or seasonal use (irrigation).

•Water is to be used for a beneficial use, *without waste*. "Waste" is the amount of water in excess of the minimum needed to support the beneficial use authorized on the water right. Waste is not well-defined by statute or rule, is often overlooked and is rarely enforced.

A Water Right *State Law Provisions*

- Water is property of the State:

[Alaska Statute 46.15.010 – Determination of Water Rights](#)

The Department of Natural Resources shall determine and adjudicate rights in the water of the state, and in its appropriation and distribution.

[Alaska Statute 46.15.030 – Water Reserved to the People](#)

Wherever occurring in a natural state, the water is reserved to the people for common use and is subject to appropriation and beneficial use and to reservation of instream flows and levels of water...

A Water Right *State Law Provisions*

- State determines:
 - How water right can be obtained
 - Steps required to obtain water right
 - What uses of water are “beneficial”
 - What can be done once water right is obtained
 - How ground & surface water will be integrated
- Regulation of water rights & water use is prescribed by state statute, regulation and policy

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For Alaska:

- How a water right can be obtained: AS 46.15.040-133, 145 and 155
- Beneficial uses of water: AS 46.15.260 (3)
- What can be done with a water right once it is obtained:
 - AS 46.15.140 – Abandonment, forfeiture and reversion
 - AS 46.15.160 – Transfer and Change of Appropriation
 - AS 46.15.165 – Administrative Adjudication
 - AS 46.15.166 – Judicial Adjudication
- Alaska Statutes Chapter 46.15 – Water Use Act
- Alaska Administrative Code Title 11 – Natural Resources; Chapter 93 – Water Management [11 AAC 93]

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Water Law Doctrines in the U.S.



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The **Riparian Doctrine** is used primarily in the Eastern states; it is based on English law and is suited for areas with an abundance of water and a wetter climate. It is a shared use system where water use is based on land ownership appurtenant to a water body.

The **Prior Appropriation Doctrine** was developed to allocate water use in the Western (drier) states. It is based on a priority system of “first in time, first in right”. **Alaska** follows the prior appropriation system which provides more certainty for water users in a state that is still in its early stages of water development.

Some states use a **Hybrid System**, which contains qualities of both the Riparian and Appropriation Doctrines – examples are CA, OR and WA. These states began using the riparian system but evolved into using the prior appropriation system.

Prior Appropriation System

Obtaining Water Rights – Permit or Decree?



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Most Western states use a **permit system** to obtain water rights (e.g., AK, AZ, CA, ID, MT, NM, NV, OR, ND, SD, UT, WA and WY).

In Alaska, water rights are administered by the Department of Natural Resources (DNR).

In Colorado, water rights are obtained in water court via a **decree**.

Prior Appropriation System Alaska / Western States

- No shared use of water
- “First in time is first in right”
- Every water right has a priority date
Earlier > senior or Later > junior
- Earliest - entitled to water when supply is limited
- Right to use - independent from stream ownership
- *Focus - physical diversion & water removal from streams
- Water must be used – nonuse can lead to forfeiture or loss of the water right

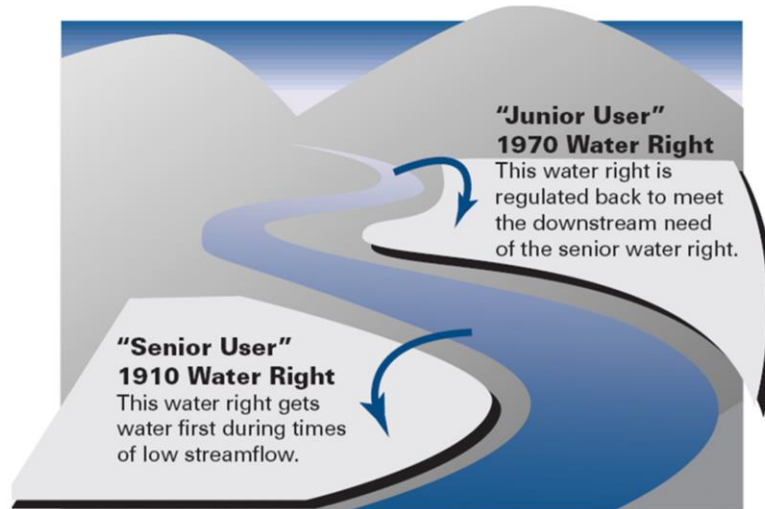
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* The majority of the states that follow the prior appropriation doctrine have statutes that allow for leaving water in the streams. Due to the relative abundance of water, Alaska has perhaps the most “progressive” statutes that allow for reservations of water to be left in the streams (instream flows) and in lakes (lake “levels”).

Prior Appropriation System

Example – 1st in Time, 1st in Right



Appropriative Water Right *Elements*

- **INTENT** to apply water to a beneficial use.
- **DIVERSION** of the water from a natural stream.
- An application of the water to a **BENEFICIAL USE** within a reasonable time.
- Assigned a **PRIORITY DATE**.



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•**Intent to use:** In the early settlement of the West, notice was given by “posting a notice” at the site where the water was going to be used and then recording the notice at the local land office; for example, in Alaska, after 1966, **intent** is shown by filing an application for a water right.

•**Diversion:** Water must be diverted from a stream/spring or captured by a storage facility or pumped. Some states, such as Oregon and New Mexico, require a physical diversion; in others (Arizona, Colorado and Alaska), direct consumption by livestock & wildlife at an undeveloped spring is considered a diversion.

•**Beneficial Use:** Use of water is the most important element of a water right; state law defines what constitutes a “beneficial” use. In Alaska, if there is competition between two applications, preference in issuing a permit will be given to a public water supply use.

•**Administration of Priorities:** For water rights awarded via permit, the priority date is typically the date notice was filed or the application was made. For vested or “grandfathered” water rights, the priority date is the date when the user can prove the water was first placed to beneficial use.

•**Administration of Priorities in Alaska:** Due to ample water supply, there are few instances where priorities have to be actively managed. However, this is likely to change as Alaska becomes more developed and if climate change reduces the available water supply.

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Consumptive v. Non-consumptive Water Rights

- Consumptive “Out-of-Source” Uses

(e.g. irrigation, agricultural, domestic, industrial, mining, fish & shellfish processing, manufacturing, public purposes, sanitary)

- Non-consumptive “Instream” Uses

(e.g. fisheries, recreation, wildlife, navigation & transportation, power, maintenance of water quality)

Alaska: Allows for instream flow water rights (called “reservations of water”)



Surface Water Rights

- What is a surface water right?

Right to use water from springs, lakes, rivers, & streams

- What are types of surface water rights?

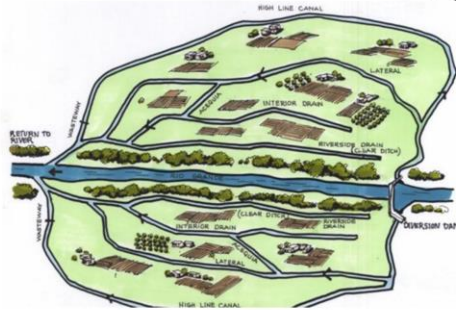
DIRECT FLOW RIGHTS & STORAGE RIGHTS

- How do Storage & Direct Flow rights relate?

- Integrated
- Neither is given preference



Surface Water Rights *Types*



DIRECT FLOW

Diversion/withdrawal from the source.



STORAGE WATER RIGHTS

Impoundment of the source for subsequent use (e.g., dam on river, lake).

Right to use stored water for any beneficial purpose.

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Direct flow rights and storage rights are often used to satisfy the same beneficial use. Typically, direct flow rights are exercised during periods of abundant stream flow and then water from storage is used during a period of low stream flow. Irrigation rights, which need a highly reliable supply of water from week to week during the growing season, often implement this approach.

Once water is diverted in priority into a storage facility, the owner can use the stored water at any time. The owner has complete control of the stored water regardless of the priority in effect on the stream system at the time the water is released from storage.

Ground Water Rights

In general, states regulate ground water via:

- *Statutory regulation:*
Controls amounts, uses, & locations that can be authorized. Distinguishes between exempt & non exempt uses.
- *Permit requirements:*
Controls well construction & operation (e.g., drilling depths, aquifers tapped, pumping rates, metering, etc.)



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- States that rely upon a permit system: A separate application must be secured to acquire a ground water right for a beneficial use, and groundwater is allocated based upon the prior appropriation system.
 - Prior appropriation: A priority date is established when a ground water right is sought and reasonable pumping levels are set in all or parts of the state.
 - Exempt uses: In Alaska, a ground water right is not required if the use is for not more than 5,000 gallons per day for one day from a single source OR if the use is for not more than 500 gallons per day from a single source for more than 10 days/ year.
- Well construction permits: Most states require a permit to drill a well in order to prevent well-to-well interference and to protect aquifers from poor well construction techniques. This permit does NOT convey a water right.
 - Alaska does not have a separate well construction permit. An approved "Application for a Water Right" serves as authorization to drill a well.
 - Well metering: Well meters are generally required for large commercial wells (>30,000 GPD) but not for small domestic wells.

Ground Water Rights

Many states regulate ground water via:

- *Conjunctive management* :
Aquifers & surface streams are managed together as one hydrologic resource; **Alaska currently manages aquifers & surface sources separately**
- *Controlled / critical / designated areas*:
Place additional restrictions on use & measurement to maintain aquifer conditions



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- Most western states use prior appropriation of groundwater PLUS establishment of controlled/critical/designated areas.
 - Prior appropriation: A priority date is established when a ground water right is sought . After the priority is established, it is administered along with the priority date for all other groundwater and surface water rights. When states recognize that surface water and groundwater are one connected system and integrate the priorities of groundwater rights and surface water rights, it is called “conjunctive use.” **Alaska currently manages aquifers and surface sources separately.**
- Most states have designated regions where there is a serious threat of overdraft – called critical or designated groundwater basins, controlled groundwater management or active management areas, or priority basins. Intensive management of the groundwater resource is required and restrictions may limit the quantity of water withdrawn, type of use allowed and require metering devices or submittal of yearly use records.
 - **Alaska has “critical ground water areas”**. DNR has only formally designated these areas a few times – in the Juneau area for saltwater intrusions and in the St. Paul area for ground water contamination. More areas may be designated in the future as ground water usage increases.

Instream Use Water Rights



Fortymile River

Traditional versus *Instream Use Water Right*

Traditional

- Usually removes water from stream
- Uses usually occur outside stream channel
- Use could occur in stream (e.g. hydrokinetic)



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Instream Use

- Leave water in stream
 - Uses occur in stream
- and/or
- Resource values are dependent upon stream or lake level



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Alaska: Reservation of Water

- In Alaska, an instream use water right is called a “reservation of water”. It sets aside water necessary to protect water uses in rivers and lakes.
- Beneficial uses of reservations of water under state law can be used for:
 1. Protection of fish and wildlife habitat, migration and propagation
 2. Recreation and parks
 3. Navigation and transportation
 4. Sanitary and water quality



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How Do I Obtain A Water Right In Alaska?



Obtaining Water Rights

“Vested” Water Rights

- ❑ Historic use that continues to present day
- ❑ Use began before state water code passed
- ❑ Use restricted to water amount historically diverted & used
- ❑ Typically claimed in adjudications, where right is confirmed or challenged
- ❑ In AK, claims for “vested or existing” rights were filed as “declarations of appropriation” with DNR. These claims were extinguished unless filed by specific dates in 1967 and 1968.

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Vested rights are water uses established prior to the establishment of a state’s water code that set forth permit and adjudication processes. ***In Alaska, vested rights are called “existing” or “grandfathered” rights.***

Notification and confirmation of vested uses varies by state. Typically, owners of vested rights are required to submit claims in an adjudication. In the adjudication, the state’s water right agency will confirm that the amount claimed is needed for the claimed uses and has been diverted continuously since the usage began. The state water agency may also require the water user to furnish proof of the date that water usage began. If a vested right is located in a basin that has never been adjudicated and is not actively administered, there may be few or no formal paperwork records to verify the amount and priority of the vested water right.

One of the purposes of adjudications is to integrate vested rights with rights more recently awarded via the permit system.

Establishing Vested Water Rights

USING Historic & Continuous Use

(latest date that can be claimed for start of usage)

Prior Appropriation State	Surface Water	Groundwater
Alaska	1966	1966
Arizona	1919 (1995)	Not Applicable
California	1914	Not Applicable
Colorado	1969	1972
Idaho	1971	1963
Montana	1973	1961
Nevada	1913	1939
New Mexico	1907	1931
North Dakota	*No vested date	Not Applicable
Oregon	1909	1955
South Dakota	1955	1978
Utah	1903	1935
Washington	1917	1945
Wyoming	1890	1945

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The public water code in Alaska was established on July 1, 1966, known as the Alaska Water Use Act. Prior to this date, a person acquired a water right by simply putting the water to beneficial use or posting a notice at the point of diversion.

After July 1, 1966, a water right was obtained by filing an Application for Water Right with the Department of Natural Resources (DNR).

Under 11 AAC 93.20, persons claiming existing or “vested” rights were given a period of time (between March, 1967 to April, 1968) to file “declarations of appropriation” with DNR, where they were validated and issued Certificates.

*Note: Formation of North Dakota's State Engineer's Office occurred in 1905; both riparian and prior appropriation rights were administered from 1905 until 1963, when the Prior Appropriation Doctrine was used exclusively. Also in 1963, a law was passed creating a registration of existing prescriptive rights (including documentation of riparian rights).

Obtaining Water Rights

Permits → Authorize Proposed New Uses

Permit application will generally be approved if:

1. Applicant follows prescribed procedures & the proposed use is beneficial;
2. State authority determines that there is unappropriated water available;
3. The proposed means of diversion or construction are adequate;
4. The proposed appropriation is in the public interest;

AND

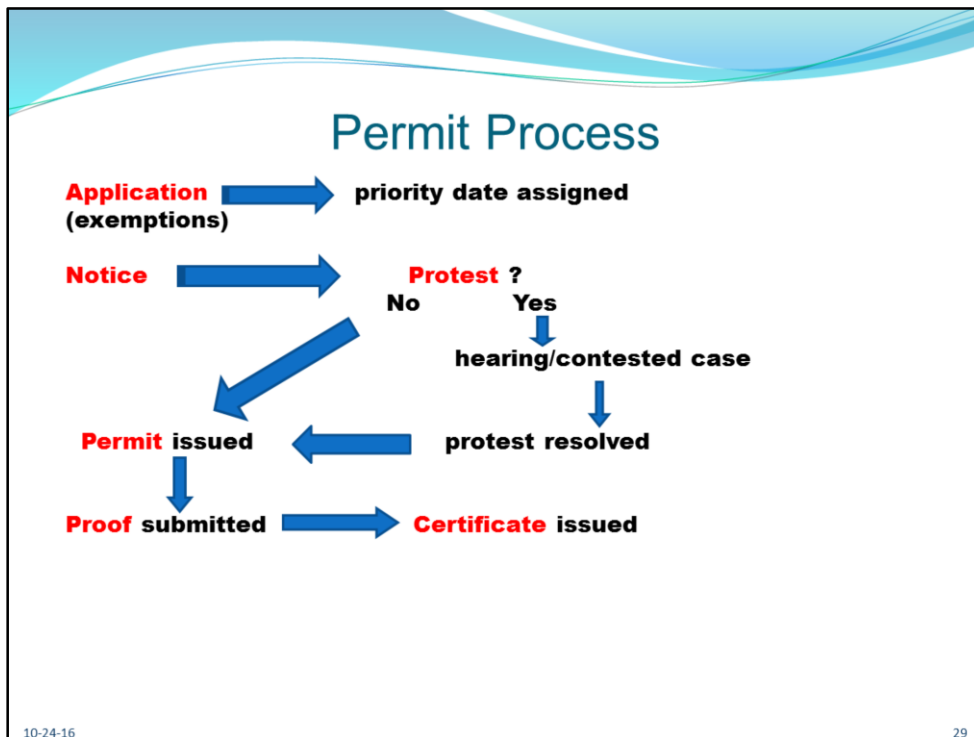
5. Appropriation does not harm the public welfare or senior water rights.

Permit Process

Major Steps:

1. File an **application**
2. Post a **notice**
3. **Permit** is issued with terms & conditions
4. User submits **proof** of completion
5. **Certificate or license** is issued





1. File an **application** with the state water agency, describing the water use and the proposed water development.
 - A **priority date** is established by the date an application is accepted by the state water agency.
2. In most states, the application is published or **noticed** in the local paper, and on a state internet site.

In Alaska, new applications are posted on DNR's website and at the nearest post office, published in a local newspaper, and/or sent to appropriators DNR feels might be affected.

 - Interested parties are allowed to **protest** the permit application in a state administrative process. *In Alaska, protests can be made within 15 days of publication of the notice.*
 - If protests are received, a public hearing may be held to gather further information and evidence.
3. If no protests are received or protests are resolved, a **permit** is issued with terms and conditions, and development may begin.
 - **Exemptions.** Some states (e.g., OR,WA) exempt certain small uses of water, such as for stockwatering, wildlife or small domestic uses, from the permitting process (do not require a water right). *For AK: no water right is needed for consumptive use of not more than 5,000 GPD from a single source for a single day; not more than 500 GPD from a single source for more than 10 days/year; or not more than 30,000 GPD non-consumptive use from a single source,*

Proof of Completion – Beneficial Use

STATEMENT OF BENEFICIAL USE OF WATER

208167

Permit No. _____

ADL _____

Construction of structures authorized under the above numbered Permit to Appropriate Water, of which I am the lawful holder, have been completed and beneficial use of water is being made. I hereby request that a Certificate of Appropriation be issued to me. I certify that I have complied with all conditions on the permit.

Amount of water being used for each type of water use: 2,000 GPD - Office Facilities

Location of point of withdrawal, include sketch: S.W. ¼ of Sec. 3, T. 12 N., R. 3 W.,
Seward Meridian

Location of point of use, include sketch: As above

Briefly describe the structures for withdrawing and conveying water to the point of use (if a well, please attach copy of well log): Two wells plumbed to office facilities - pump driven

I certify under penalty of perjury that the foregoing is a true and accurate statement of the extent to which the above water use has been developed.

SUBSCRIBED AND SWORN TO before me

SIGNED _____

(Permit Holder)

this 12 day of Nov, 1980

DATE 12/10/80

Harold J. Martin
Notary Public or Postmaster

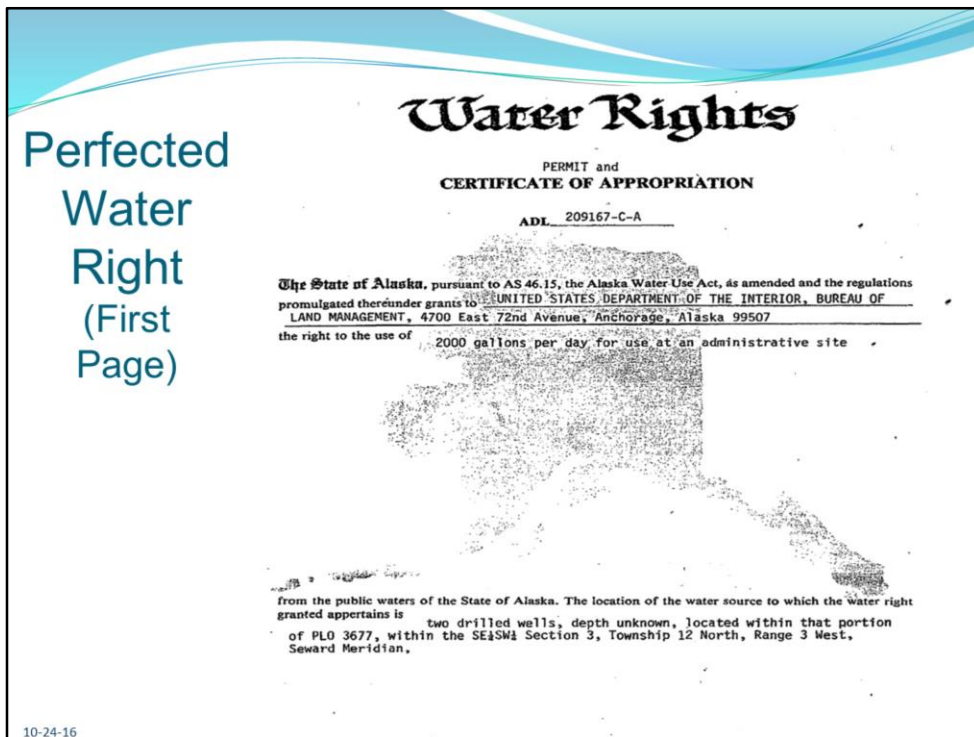
PLACE Unalaska

State of Alaska

Commission expires Nov. 19, 1983

4. **Proof of completion** forms are submitted to the state once development has been constructed (shows diversion is made) and water put to its intended beneficial use.

- For Alaska: a “**Statement of Beneficial Use of Water**” form is submitted to DNR.
- A licensed engineer or surveyor is not needed to complete a Statement of Beneficial Use form.



5. A **certificate or license** is issued once the proof has been received that water is being beneficially used consistent with the terms of the permit. The right is now considered “***perfected***”.
- ***A perfected right in Alaska is called a certificate of appropriation.***
 - ***Instream flow reservation applications are processed using the same general process, with the exception that there is an additional ten-year review of each certificate (to determine if it should be revoked or modified). There is no intervening permit to appropriate water that is issued before a certificate of reservation is issued.***

Perfected
Water
Right
(Second
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PLD 3677 located within the SE1/4 Sec 3, Township 12 North,
Range 3 West, Seward Meridian.

Priority of appropriation began JANUARY 22, 1981. The water right is subject to the provisions of AS 46.15.140-160 and applicable regulations which deal with abandonment, forfeiture, and reversion of appropriations, preferred use, and transfer and change of appropriations.

The State of Alaska, Division of Forest, Land and Water Management pursuant to AS 46.15, as amended, issues this Certificate of Appropriation on this 28th day of May, A.D. 1981.

United States of America

State of Alaska

This is to Certify that on the 28th day of May, 1981, before me, the undersigned Notary Public, personally appeared George K. Hollitt known to me and known by me to be the Director or his authorized representative of the Division of Forest, Land and Water Management, Department of Natural Resources, and acknowledged to me that he executed the foregoing certificate for and on behalf of said State, freely and voluntarily and for the use and purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

NOTARY PUBLIC in and for the State of Alaska
My Commission Expires February 28, 1986

PURSUANT to AS 46.15.160 and applicable regulations the certificate holder shall notify the Alaska Division of Forest, Land and Water Management upon CHANGE OF ADDRESS or TRANSFER OF ANY REAL PROPERTY related thereto.

Permit Process *Changes & Amendments*

- ❖ Most states allow short-term & long-term changes to existing water rights if:
 - There is no injury to existing senior or junior water rights, including vested rights
 - There is no expansion of historic use
 - The right to be changed is not subject to forfeiture or abandonment
- ❖ The procedure to change an existing permit or certificate is similar to making an application for a new water right

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Most states allow short- or long-term **changes** where certain portions of an existing water right can be changed if there is no injury to other water users or no expanded use.

Under 11 AAC 93.930, the procedure in Alaska to change an aspect of an existing permit or certificate is similar to that of filing a new application (notice, protest, revised permit and/or certificate).

- However, there is NO form to change an aspect of an existing permit or certificate. A letter should be submitted to DNR with the requested change.
- DNR will either deny the change or grant it by amending the permit/certificate or issuing an intermediate change permit.

Permitting Process *Changes*

Water rights elements that can be changed:

- Point of diversion
- Means of diversion
- Place of use
- Type of use
- Time of use (expanding
seasonal use is not allowed in
AK)



Unique Alaska Process: Temporary Water Use Authorization (TWUA)

- A short-term, revocable use of a significant amount of water (for up to 5 consecutive years, including one extension)
- **File an “Application for Temporary Use of Water” form**
- A TWUA is exempt from the public notice process but DNR does notify ADF&G and ADEC
- **A TWUA does not establish a water right and there is no priority date**
- A TWUA is good for a maximum of 5 water sources
- **A TWUA is issued only for water not already appropriated**
- For mining, a TWUA is generally issued for exploration and mine construction. A water right should be applied for mining operations.

Alaska Ground Water Appropriation Process



Appropriation of Groundwater in Alaska

1. File "Application for Water Right" for ground water
 - a. DNR authorizes applicant to drill a well
 - b. Conduct research to choose water well contractor
2. Drill well - driller submits "Water Well Log" within 45 days after completion to DNR – incorporate into WELTS system
3. DNR issues Permit to Appropriate Water
4. Permit holder completes "Statement of Beneficial Use" form
4. DNR issues Certificate for groundwater use

OR

Applicant files for a TWUA to drill a well & then files for the "Application for Water Right"

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To drill a new water well in Alaska:

- Submit an "Application for Water Right" with DNR
 - DNR will issue permit for the applicant to drill a new well.
 - Alaska does not have a specific process for general water well contractors to be "certified" in well construction. It is up to the well owner to research contractors.
 - National Ground Water Association (NGWA) has a list of certified NGWA well contractors.
 - Alaska Water Well Associates (AWWA) also has a list of Alaska professional water well contractors.
- Once the well has been drilled, the contractor must submit the "Water Well Log" form within 45 days after completion to both the well owner and DNR (to be incorporated into the WELTS system).
- Submit a completed "Statement of Beneficial Use of Water" form to DNR
- Receive a Certificate of Appropriation for ground water use

Appropriation of Groundwater in Alaska

- To deepen, modify or abandon a water well OR to drill a monitoring, observation or aquifer testing well
 - ❖ Submit "Water Well Log" to DNR
 - ❖ To abandon a well, also need to submit "Well Record of Decommissioning" form
- Mineral/medicinal water: no appropriation by DNR – mineral water is regulated by Alaska Oil & Gas Conservation Commission; medicinal water is reserved by the Federal Government under PLO No. 399



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Alaska's Dam Safety Program



Dam Safety Program

- Most Western states have special regulations to manage large reservoirs. In Alaska, large dams are managed by the Dam Safety and Construction Unit (DSCU) of DNR.
- To qualify, a dam must:
 - ☐ Impound 50 acre-feet or more **AND** have a dam height of 10 feet or greater;
 - ☐ Have a dam height of 20 feet or more; or
 - ☐ Threaten lives and property if it failed
- These statutes do not apply to federally-owned /operated dams or to hydroelectric dams managed by FERC.

Dam Safety Program

- For new dams, an “*Application for Certificate of Approval to Construct, Modify, Repair, Remove or Abandon a Dam*” is required.
- Once the dam is constructed but before it can be put into operation, a “*Certificate of Approval to Operate a Dam*” is issued after review and approval of a completion report.
- To change ownership of a dam, an “*Application to Transfer a Certificate of Approval to Operate a Dam*” is used.

Forfeiture & Abandonment

Forfeiture of Water Right:

- Loss due to holder's voluntary failure or neglect to use water for a specified time period
- Loss due to water right not used for 5 successive years (in Alaska)

Abandonment of Water Right:

- Can be voluntarily surrendered or revoked
- Rebuttable presumption of abandonment shifts burden to appropriator to prove otherwise

Forfeiture or Abandonment can apply to all types of water rights – surface, groundwater, vested, etc!

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Forfeiture:

- Loss of a water right due to some kind of fault or negligence by the holder is called forfeiture.

Abandonment:

- In most states, a water right not used for four or five successive years (when water is available to satisfy the right) is considered to be abandoned.
[4 years = New Mexico; 5 years = **Alaska**, Arizona, California, Nevada, Oregon; 10 years = Colorado]
- For a water right to be considered abandoned, it must be voluntarily surrendered or relinquished and the intent to abandon must be proved.
- In Alaska, a “**Notice of Relinquishment**” form is completed by the water rights owner to voluntarily relinquish the water right ; can be used to amend the water right “down” to the amount actually used.

Special Notes:

- All state statutes contain some kind of forfeiture or abandonment language.
- Intent is very difficult to prove and most states do not actively seek to abandon or forfeit a water right.
- **In Alaska**, DNR sends notification to the water right owner by certified mail who is given 30 days to object and 60 days to submit evidence of rebuttal. If there is no rebuttal, the water is considered forfeited and the unused amount

reverts back to the public.

Water Right

Assignment/Conveyance/Change of Ownership

- There is assumption that all **appurtenant water rights automatically transfer with a change in land ownership**, unless expressly stated otherwise in deed (*except Colorado*).
- AK Statutes – With DNR approval, all or part of an appropriation can be severed, sold, leased or transferred to other purposes with a certified copy of the transferring deed.



Water Right

Assignment/Conveyance/Change of Ownership

- All western states have a process to **notify the state water agency of changes in ownership of water rights** (*except Colorado*).
- In Alaska, DNR requires submission of an “Ownership Transfer” form.
- **A MUST** - Update ownership in order to receive important notices from state.

See Land Tenure module for more information

Water Rights Adjudication Process



An administrative or judicial proceeding run by a state government to determine all water rights on a stream system.

Why adjudicate? Resolve uncertainty regarding claims for vested rights by private parties and/or reserved water rights for federal lands.

- Establishes and validates the priorities of all water rights in a stream system or watershed
- Alaska has both administrative and judicial (McCarran) adjudications

Administrative Water Adjudication *Elements*

- DNR:
 - Files notice of adjudication to all users within a specific hydrologic unit (river system, groundwater basin, etc.)
 - May appoint a Master
 - Gathers data - Hydrographic Survey Report (HSR) & Maps
 - Enters interlocutory orders
 - Final Order issued by Commissioner; appeal process
- Adjudicated Right:
 - ☐ Holder has certainty of priority & value of water right compared to other rights on stream/watershed

Judicial Water Adjudication *Federal Agencies' Participation*

- State must formally “join” federal government under the McCarran Amendment
- Adjudication must be “comprehensive”
(include all water users on the stream system)
- Federal claims processed under state procedures, but under applicable federal laws
- Alaska: to date no judicial adjudications (where federal reserved rights asserted); all federal rights claimed under state law filed under administrative adjudication process

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The McCarran Amendment, 43 U.S.C. section 666, is a federal law, created in 1952, that confirms the historic deference of the federal government to the states in water allocation matters, and it specifies procedures for including federal government water rights in state procedures.

States may enact “joinder” against the federal government (the federal government must participate) in an adjudication only if the adjudication is comprehensive and includes all water uses in the stream system.

The federal government waives its sovereign immunity for the purpose of securing federal reserved water rights recognition by the state.

To date, there has been no judicial adjudication in Alaska (where federal reserved rights have been asserted and quantified). All state appropriative rights held by federal agencies have been processed under administrative adjudications.

Summary

Water rights established by the federal agencies:

- Generally fit the types of water rights issued in Alaska;
- Generally fit within the prior appropriation system (have priority dates; are permitted, processed and administered as any other state-based water right; subject to forfeiture/abandonment and safety requirements; can be transferred, etc.)

However.... federal agencies are subject to exceptions to the guiding principle of "follow state law" in the form of a unique federal critter called the

"federal reserved water right".



Alaska Water Rights

Basic Terms, Concepts & Processes

Questions?

