

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.



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:

BLM (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:	6000.0 GAL/DAY		
USE:	REC SERVICES	FROM:	JAN 01 THRU DEC 31

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 PERTINENT 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
PAGE 1

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

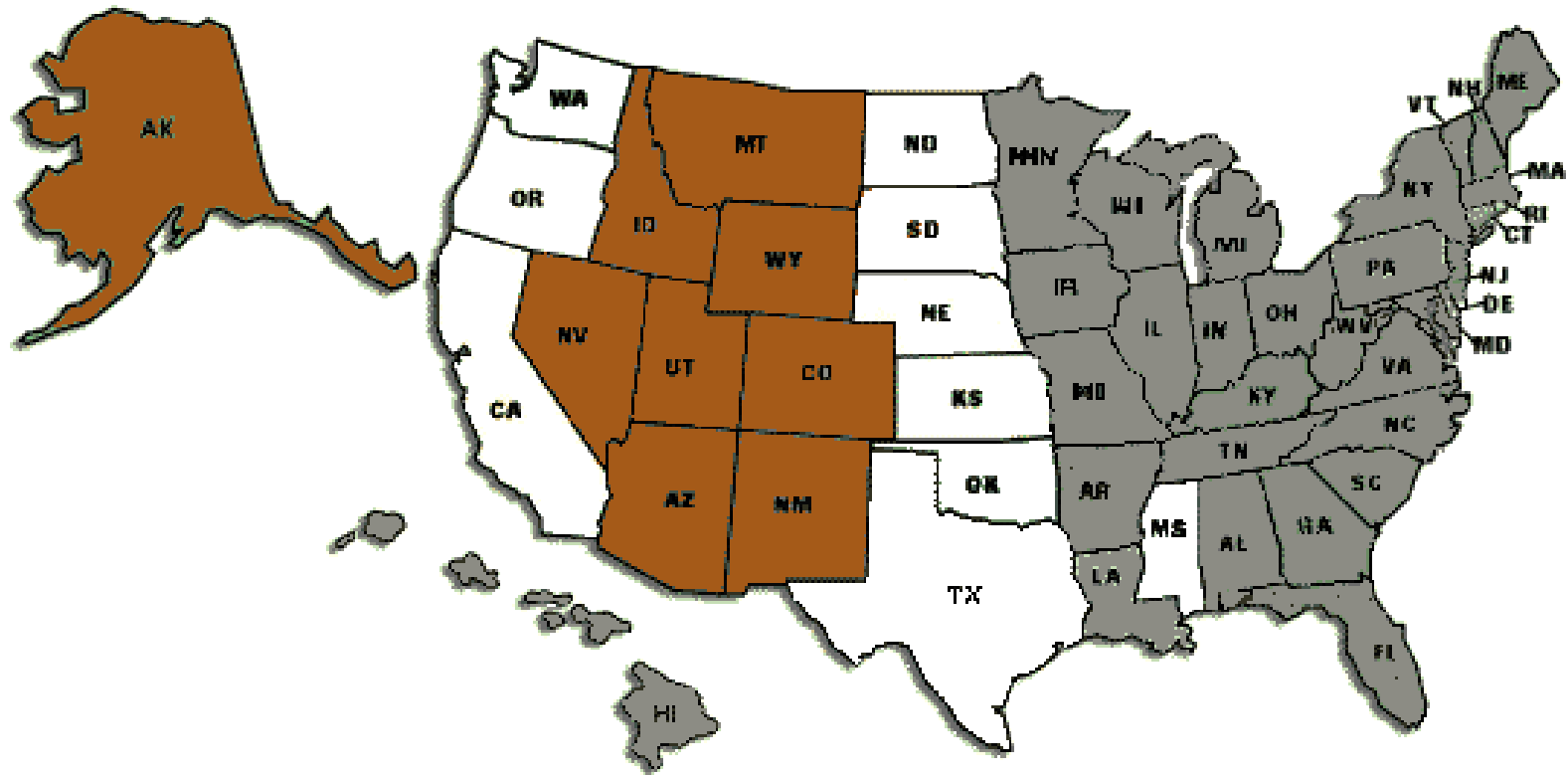
State Law Provisions

- 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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Water Law Doctrines in the U.S.



Grey – Riparian

Brown – Prior Appropriation

White - Hybrid

Prior Appropriation System

Obtaining Water Rights – Permit or Decree?



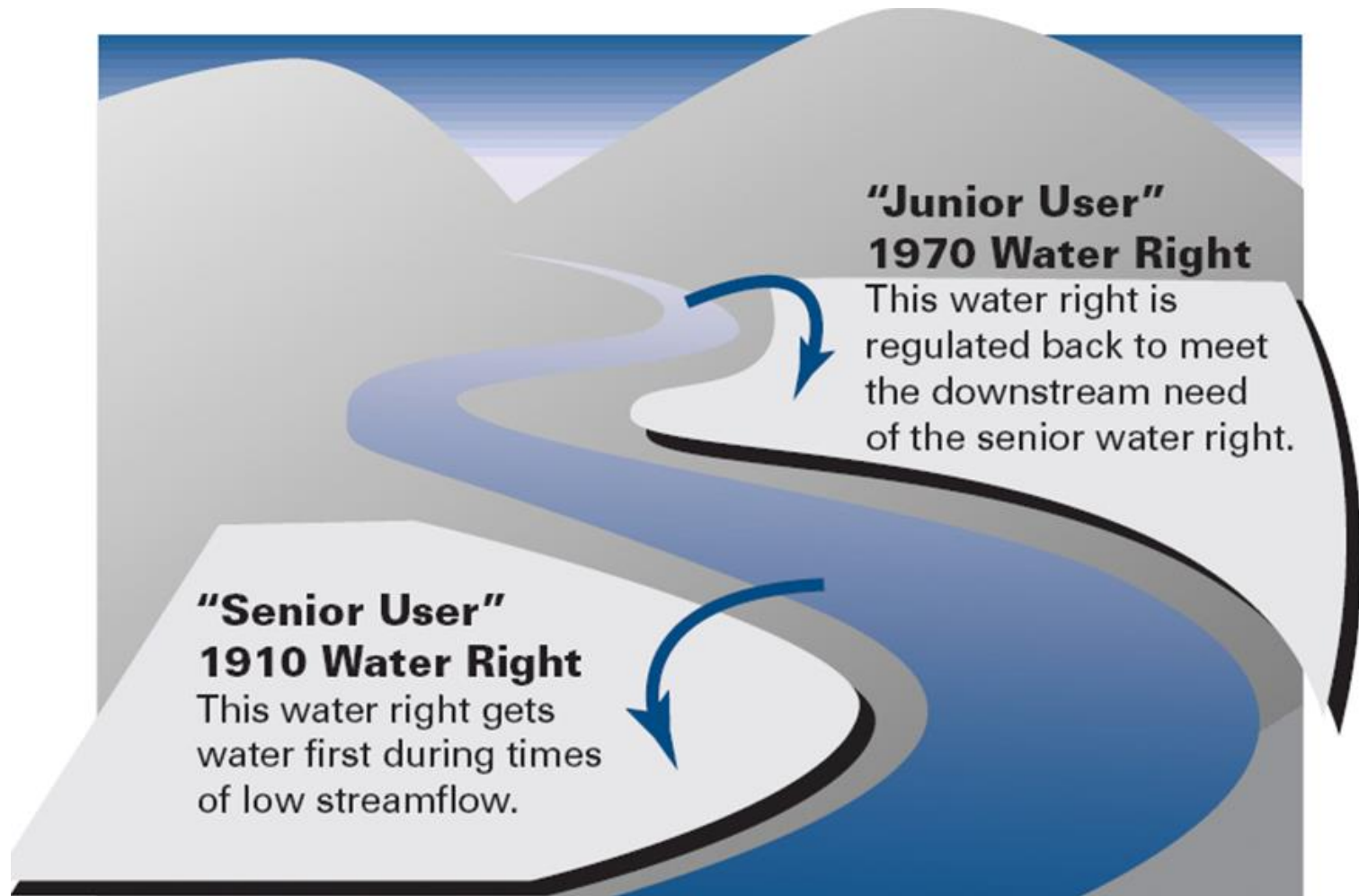
Prior Appropriation System

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

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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Consumptive v. Non-consumptive Water Rights

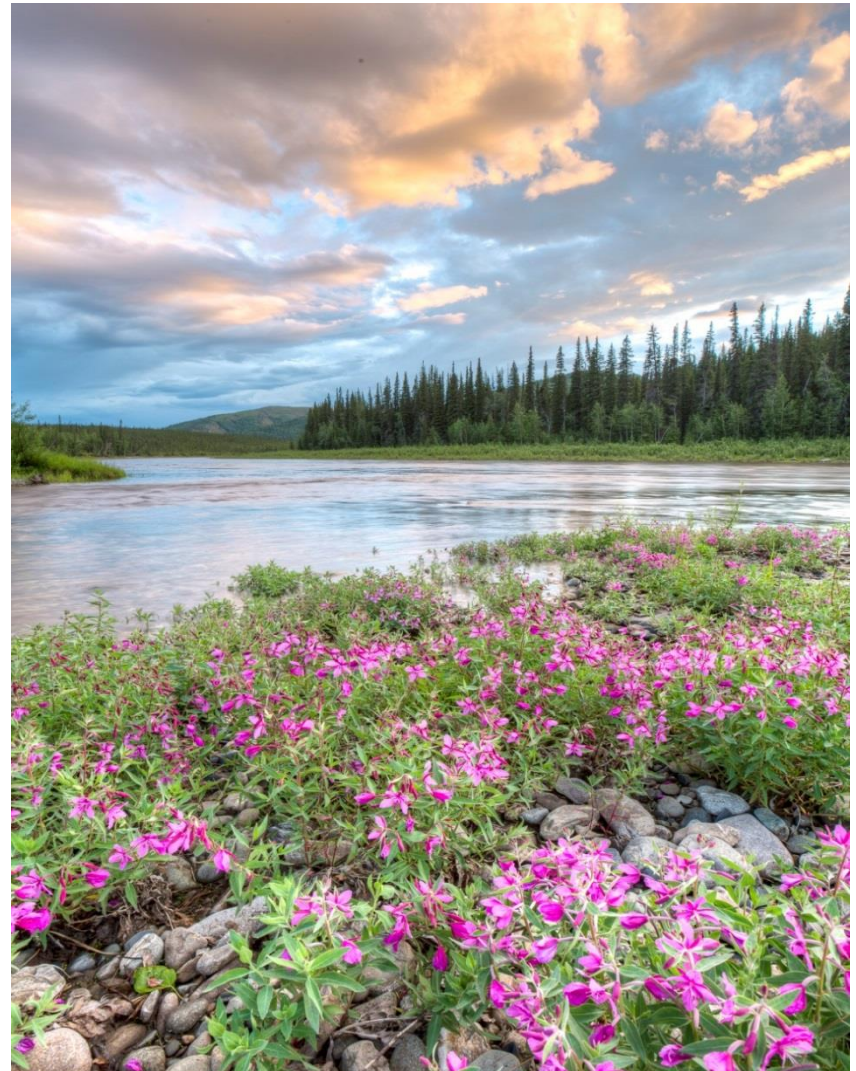
- Consumptive “Out-of-Source” Uses

(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?

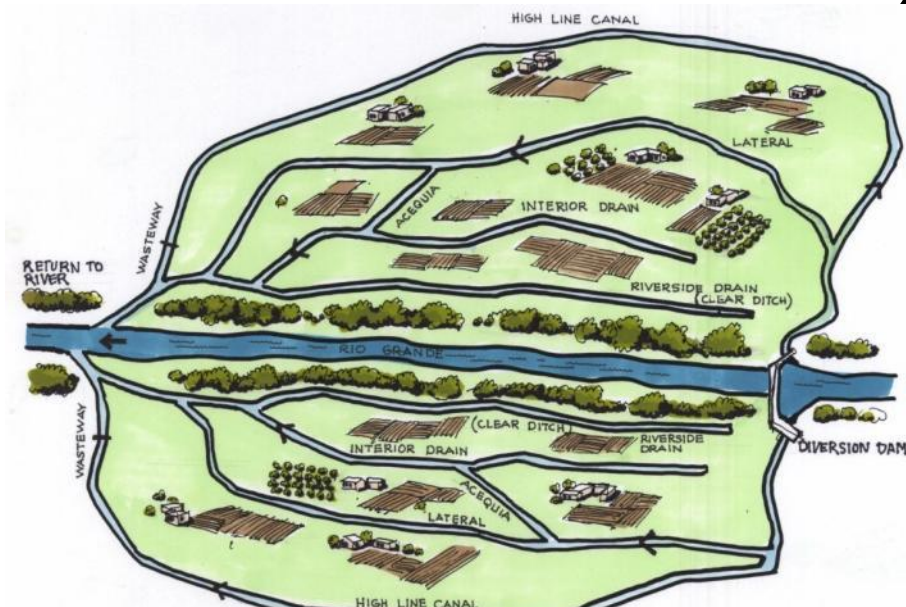
DIRECT FLOW RIGHTS & STORAGE RIGHTS

- 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.

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.)



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



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)



Instream Use

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



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.

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

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.

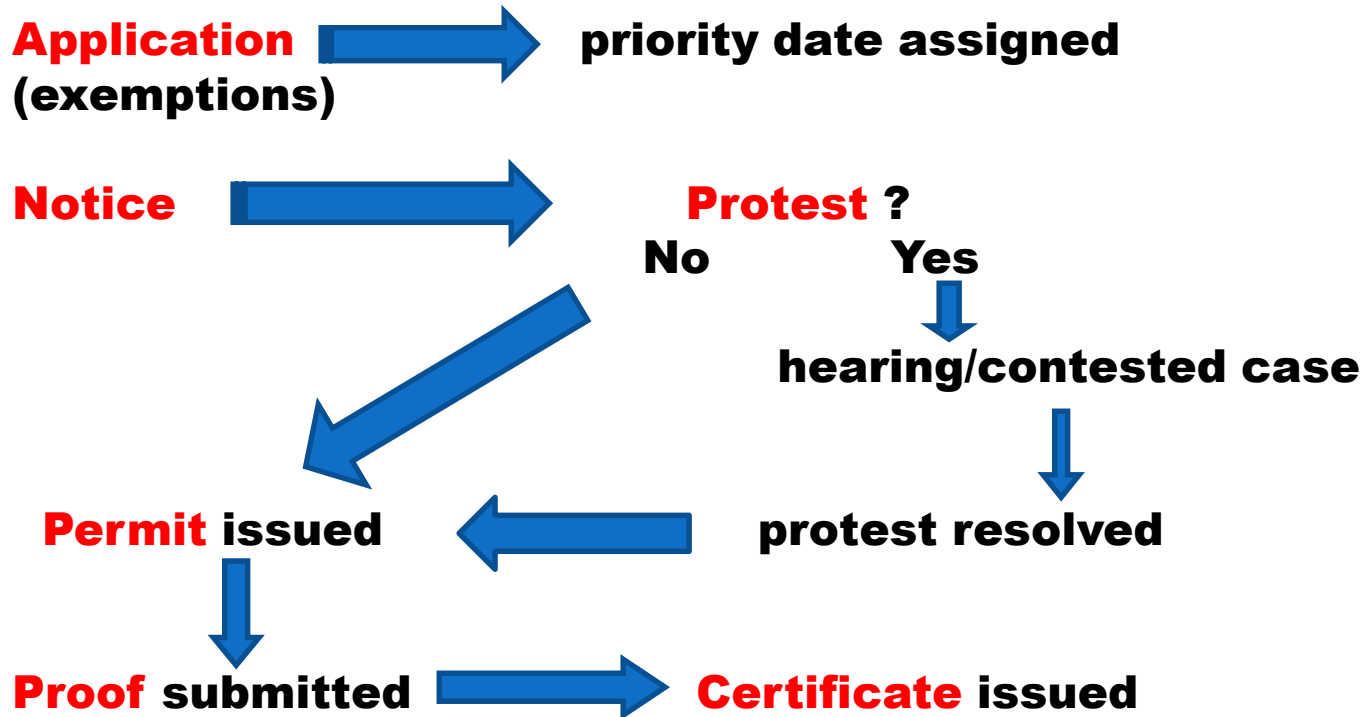
Permit Process

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



Permit Process



Proof of Completion – Beneficial Use

STATEMENT OF BENEFICIAL USE OF WATER

209187

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. 1/4 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

this 12 day of Dec, 1980

[Signature]
Notary Public or Postmaster

State of Alaska

Commission expires Nov. 19, 1983

SIGNED

[Signature]
(Permit Holder)

DATE

12/10/80

PLACE

Unalaska

Perfected Water Right (First Page)

Water Rights

PERMIT and CERTIFICATE OF APPROPRIATION

ADL 209167-C-A

The State of Alaska, pursuant to AS 46.15, the Alaska Water Use Act, as amended and the regulations promulgated thereunder grants to UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, 4700 East 72nd Avenue, Anchorage, Alaska 99507 the right to the use of 2000 gallons per day for use at an administrative site

from the public waters of the State of Alaska. The location of the water source to which the water right granted appertains is two drilled wells, depth unknown, located within that portion of PL0 3677, within the SE½SW½ Section 3, Township 12 North, Range 3 West, Seward Meridian,

Perfected Water Right (Second Page)



PL0 3677 located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 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. 19 81.




Director, Division of Forest, Land and Water Management

United States of America)

State of Alaska)

This is to Certify that on the 28th day of May, 19 81, before me, the undersigned Notary Public, personally appeared George K. Hollett 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, 1984

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

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”

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!

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

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?*

