

# Federal Reserved Water Rights: An Introduction

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Delta Wild and Scenic River, AK



# What are federal reserved water rights?

- A special class of water rights that are designed to fulfill and support the purposes of federal reservations of land.
- The purposes of federal reservations of land are specified in Congressional legislation and Presidential executive orders that create the reservations.



Birch Creek Wild and Scenic River, AK

# Federal Reserved Water Rights - Origins

Reserved rights were created by U.S. Supreme Court rulings:

- Winters v. U.S. (1908) – Congress reserved sufficient water to effect the purpose of Indian reservations.
- AZ v. CA (1963) – Extended doctrine to all federal land reservations of land.
- Cappaert v. U.S. (1976) – Reserved rights also apply to groundwater.
- U.S. v. NM – Reserved rights are limited to the primary purposes of reservation specified by Congress, and to the minimum amount necessary to satisfy purposes.



Owyhee Wild and Scenic River, OR



# Federal Reserved Water Rights - Origins

- Congress has generally delegated the allocation of water to state governments.
- The Supreme Court has ruled that federal reserved water rights are an exception.
- Congress has created processes to fit this exception into state water allocation processes.
- Via the “McCarran Amendment,” 43 USC 666 (1952), Congress allowed states to require the U.S. to participate in stream adjudications.





# What federal lands qualify as reservations?

Lands withdrawn from the public domain by legislation or by presidential executive order for a specific federal purpose.



Dolores River, CO

Unreserved BLM lands have no federal reserved water rights because they remain within the public domain. Their specific management purpose may be changed by future Congressional action, Presidential orders, or by BLM management actions.

# Examples of USFS Reserved Water Rights



Chain Lakes, Wind River Range, Shoshone NF, Wyoming

National Forests  
National  
Monuments  
National Recreation  
Areas  
Wilderness Areas  
Wild and Scenic  
Rivers



# Examples of NPS Reserved Water Rights



Colorado River, Canyonlands NP, UT

National Parks  
National Preserves  
National Monuments  
National Seashore  
National Historic Parks  
and Sites  
National Military Parks  
and Battlefields  
National Recreation  
Areas  
Wilderness Areas  
Wild and Scenic Rivers

# Examples of FWS Reserved Water Rights



Brown's Park NWR, CO

National Wildlife  
Refuges  
Wilderness  
Areas  
Wild and Scenic  
Rivers  
National Fish  
Hatcheries



# Examples of BLM Reserved Water Rights



National Conservation Areas

Riparian National Conservation Areas

National Monuments

Wild and Scenic Rivers

Wilderness Areas

Public Water Reserves

San Pedro Riparian National Conservation Area, AZ

# Reserved Lands In Alaska



- Reserved lands and waters cover 178.8 million acres in Alaska, or about 42% of the state.
- Reserved water rights could have a huge impact on future water management in Alaska.



# “Express” v. “Implied” Reserved Rights

Just because land is reserved, it doesn't always have reserved water rights:

- Congress or president can expressly state their intent, and may say reserved rights are or are not created by their action.
- Reserved rights are implied when no explicit statement is made and the purpose of the reservation would be entirely defeated without water.



Did Congress reserve this lake for me?



# The Characteristics of a Federal Reserved Water Right:

Are Controlled By Federal Law, Including:

- Priority Date
- Purposes
- Amount
- Location

Beaver Creek Wild and Scenic River, AK



# Reserved Rights: Priority Date

- Date that the reservation is established by legislation or executive order, not the date when the federal agency submits a claim.
- Some reservations may have multiple priority dates, if different portions of the reservation were established at different times.



White River National Forest, CO

# Reserved Rights: Purposes / Water Uses

- Primary purposes of the reservation, as stated in legislation or executive order.
- If primary purposes are broadly stated, then a legal interpretation may be required to identify water-dependent values and management purposes.
- It's possible that purposes do not match beneficial uses authorized under state law.



Agua Fria National Monument, AZ





# Reserved Rights: Amounts

- The minimum amount necessary to effect the primary purposes of the reservation.
- Typically established by federal agency studies using scientifically accepted methodologies.



Upper Missouri Wild and Scenic River, MT

Quantification can be technically complex, expensive, and very lengthy, because it is subject to intensive court or administrative review!

# Reserved Rights: Locations

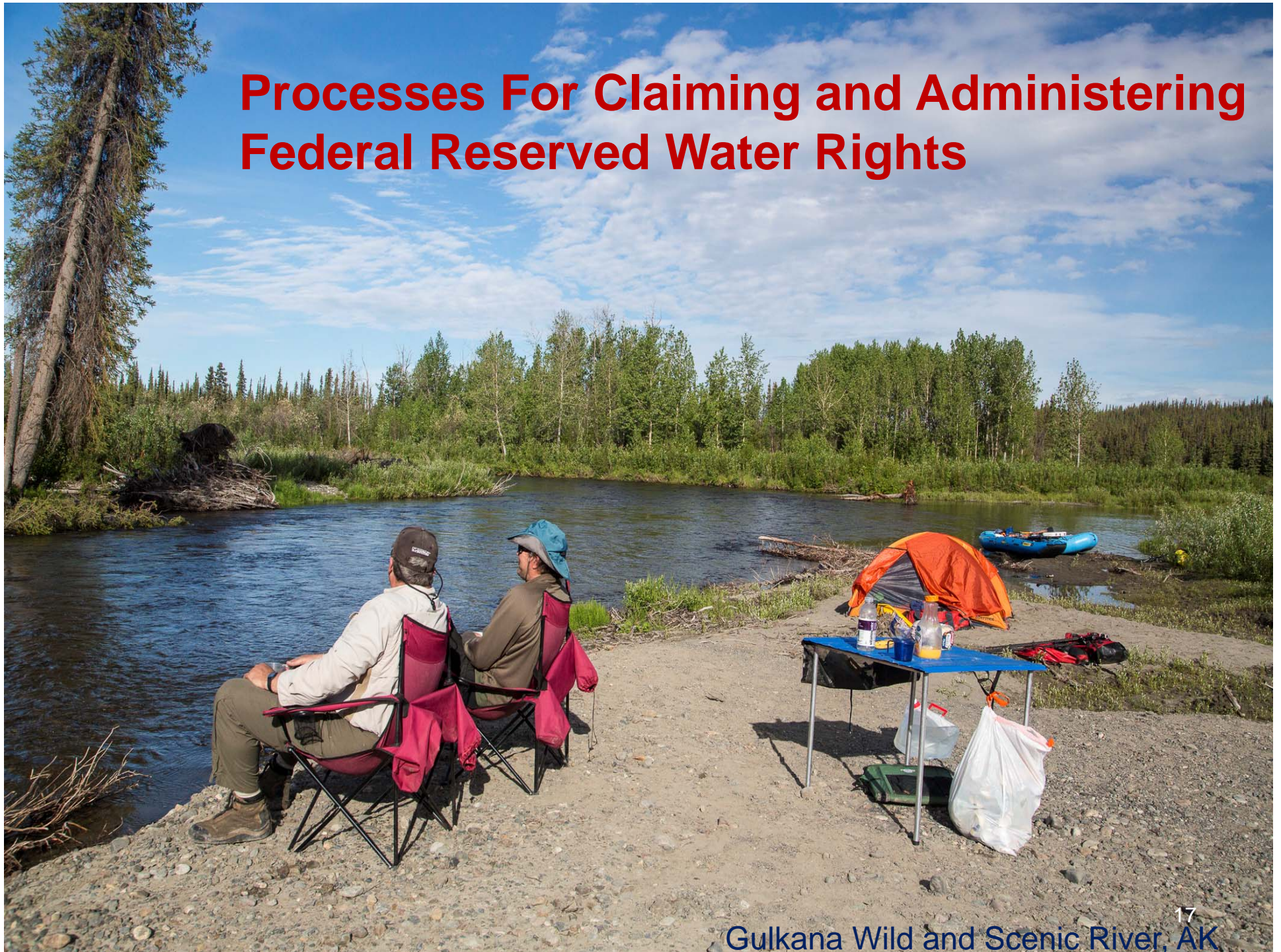
- Wherever water is needed to accomplish the primary purposes of the reservation.
- Can include developed sources (wells, reservoirs) undeveloped sources (natural lakes, springs)
- Can include entire flowing systems (surface instream flows and underground rivers) and groundwater systems (aquifers and caves)



Great Sand Dunes NP and Preserve, CO



# Processes For Claiming and Administering Federal Reserved Water Rights





# Adjudication of Reserved Rights

- Reserved rights are typically determined by state-run adjudications.
- An adjudication is a judicial proceeding that determines water rights on a specific stream system
- Typically includes all claims for water rights claimed under state law and all federal reserved water rights.
- Alaska law has specific procedures for determining federal reserved water rights.



Example: Snake River Basin Adjudication, ID

*Reaching settlements in adjudications may require approval from state agency directors, federal agency directors, and even Congress!*



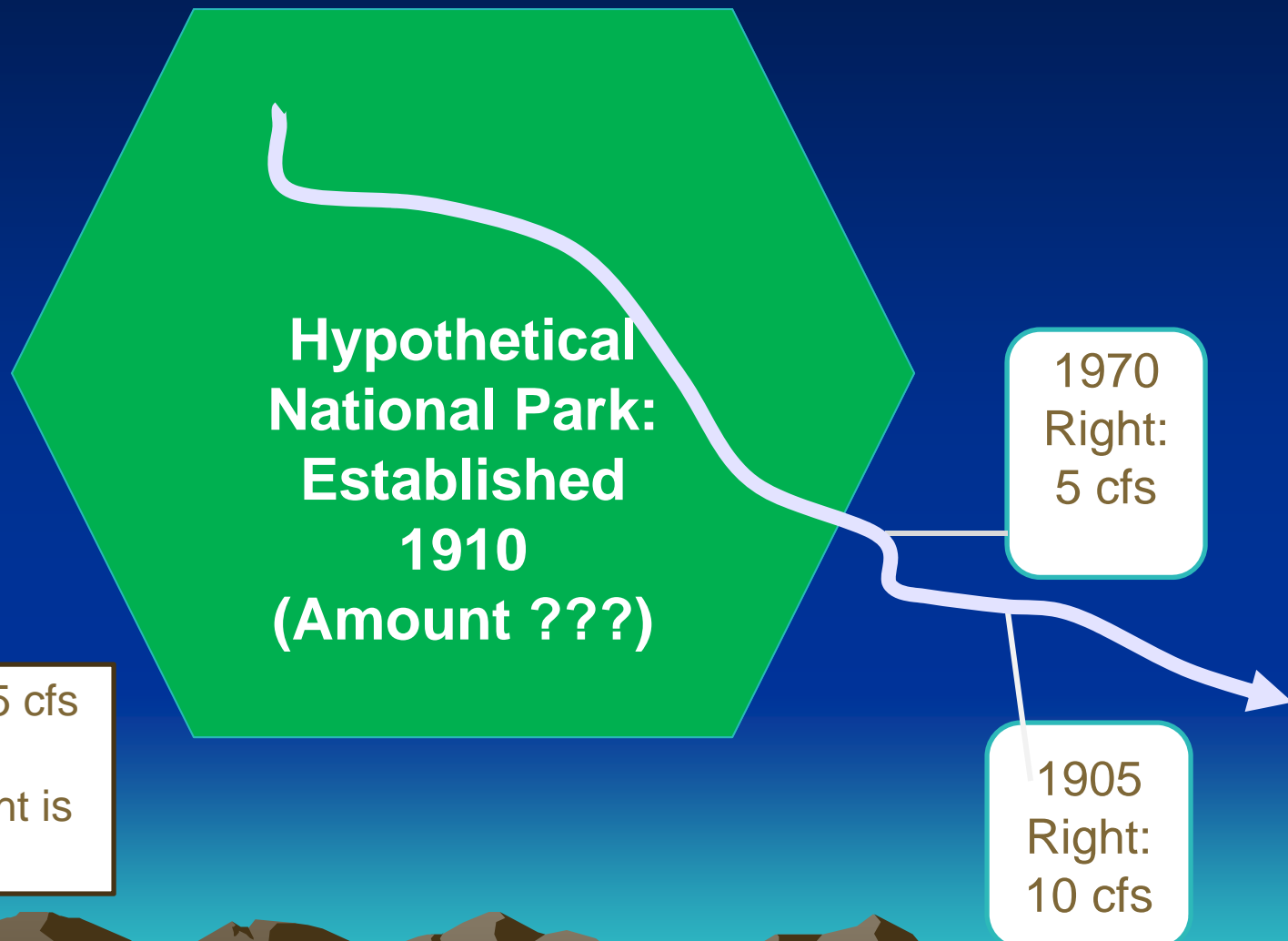
# Administration of Reserved Rights

- Reserved water rights are not subject to loss through non-use
- Reserved water rights include present uses and foreseeable future uses
- Federal agencies are subject to priority system and must submit water use reports, just like other users
- If a federal right has not been determined, it creates great uncertainty for all users



Rio Grande NF, CO – an adjudicated and administered federal reserved water right.

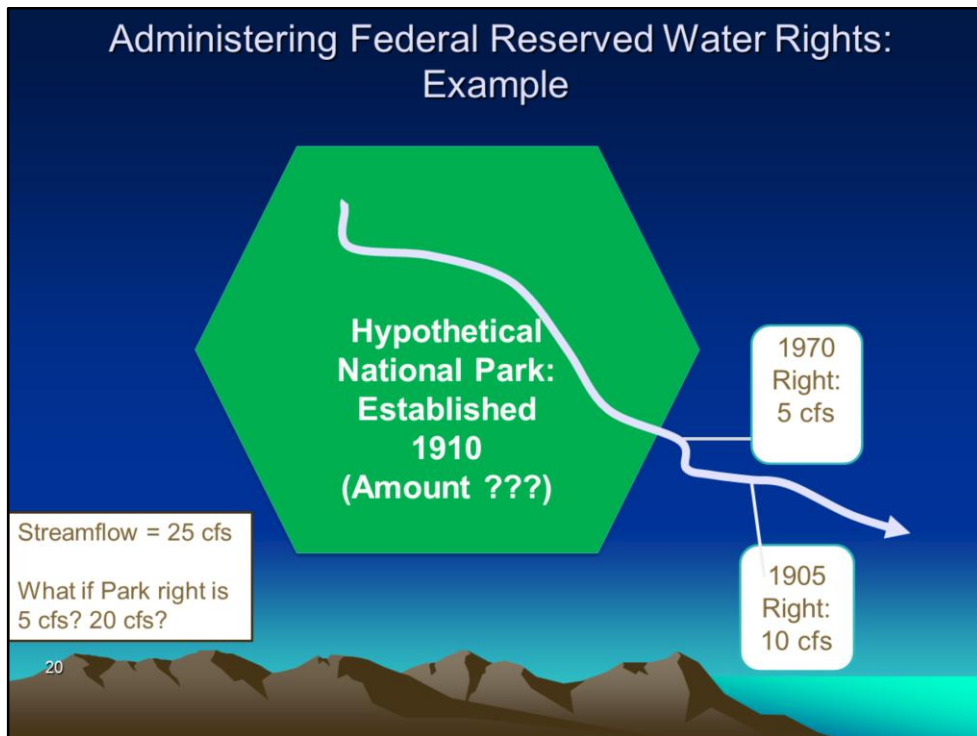
# Administering Federal Reserved Water Rights: Example



Streamflow = 25 cfs

What if Park right is  
5 cfs? 20 cfs?





Also need look at priority dates

Creates uncertainty in other users: how should I invest in regard to my water right if I don't know the reliability of water supply?

# Example Reserved Water Right Claim: Zion National Park 1996 Settlement Agreement





# Zion NP Settlement Agreement

- 1996 agreement between NPS, the State of Utah, and two water districts.
- In context of a state adjudication of Virgin River watershed
- Surface and groundwater administered together
- Avoided a very long, very expensive litigation
- **Recognized and quantified federal reserved right** for Zion NP for both surface and groundwater



# Zion NP Settlement Agreement

What does the Agreement do?

- ***Recognizes and quantifies*** federal reserved rights
- Contains ***volumetric limits*** on park and private water use
- ***Recognizes Zion NP purposes*** in reserved right
  - Preserve canyon erosion, preserve for scientific interest, protect scenery, preserve natural and historic objects
- Allows limited additional water for development ***outside park***
- Establishes GW protection zones ***outside park***
- Agreement has been issued as a partial decree and is being enforced by the State





# Federal Reserved Water Rights in Alaska



# Many Federal Reserved Rights Were Established Before ANILCA



Wonder Lake, Denali NP

- Existing National Forests – Tongass and Chugach
- Existing National Parks – Denali, Katmai, Glacier Bay
- Existing National Wildlife Refuges – Alaska Maritime, Arctic, Izembek, Kenai, Kodiak, Togiak, Yukon Delta



# ANILCA Created New Reserved Rights



- Section 101(d) (Purposes) specifies that Conservation Systems Units (CSUs) are reserved lands
- Section 102(4) (Definitions) specifies that CSUs are NPS units, FWS units, Wild & Scenic Rivers, National Trails, Wilderness Areas, and USFS monuments.
- Title V specifies that Steese NCA and White Mountains NRA are managed under FLPMA (no reserved rights)

# Alaska Statutory Procedures For Adjudicating Federal Reserved Water Rights



Two options:

- Conduct a judicial adjudication using the Alaska Superior Court
- Conduct an administrative adjudication, run by AK DNR; a special master can be appointed

- Federal agencies are required to participate in either process, if served formal notice under the federal McCarran Amendment
- Both processes involve notice to water users, submission of claims, investigation of claims, hearings, and final order/decreed



# How do I protect federal reserved water rights before an adjudication occurs?



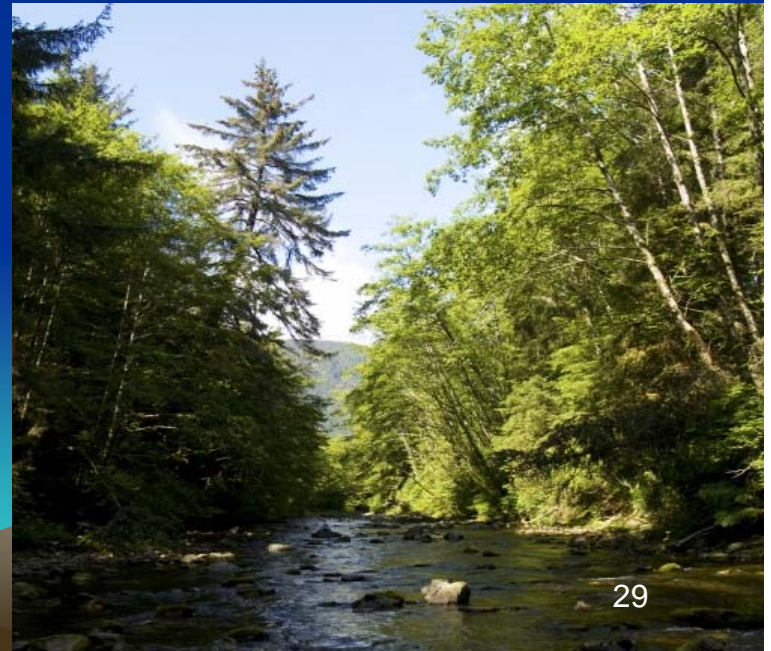
Watch what's happening!

Three steps (more on these in later modules):

- Conduct studies to determine the likely location, amount, and timing of your reserved right
- Carefully monitor public notices of water right applications in your watersheds
- File a comment or protest letter with AK DNR if you believe the application would injure the reserved water right

# Reserved Water Rights Case Study in AK: Indian River and Sitka NHP

- Park established in 1890 to preserve battle site between Russian settlers and Alaska Natives
- Located along mouth of Indian River
- Other users of river water include:
  - City and Borough of Sitka
  - Sitka Science Center (Sheldon Jackson College)
  - Alaska Dept. of Fish & Game
  - Small domestic users on private lands





# Reserved Water Rights Case Study in AK: Indian River and Sitka NHP

- 1984: DNR decides to initiate basin-wide adjudication; completes hydrology report
- 1985: DNR IDs water users and landowners
- 1987: NPS willing to enter negotiations if result is binding on all water users; NPS completes quantification reports



# Reserved Water Rights Case Study in AK: Indian River and Sitka NHP

- 1988: DNR asks ADF&G to complete instream flow analysis for state reservation of water
- 1989: ADF&G files reservation of water application
- 1990: DNR grants certificate for reservation of water
- 1990: DNR abandons adjudication effort with change in administration
- Now: NPS and others reviewing reservation to ensure all needs met





# Reserved Rights in AK: Looking Forward

- State of AK Policy: “For DNR to efficiently manage and allocate the state’s water and to adjudicate water rights, it is necessary to have federal reserved water rights in AK inventoried and quantified by the federal land management agencies in cooperation with the State of Alaska.”
- General federal land management agency policy: Adjudicate and rely upon federal reserved water rights whenever it is legally, technically, and operationally feasible to do so.

# Reserved Rights in AK: Looking Forward

- State and federal policy do not prohibit federal agencies from participating in other water right processes that can protect their water uses until an adjudication of federal reserved water rights occurs. These processes might include state-based instream flow reservations, requesting a state engineer to shut down illegal diversions, or reaching operational agreements with water rights owners.
- Obtaining protection of federal water uses through processes other than adjudicating federal reserved rights may significantly reduce cost, time, and controversy.



# Federal Reserved Water Rights: Questions?

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Fortymile Wild and Scenic River<sup>34</sup>, AK