

Alaska Water Rights

Roles of Agency Personnel and Legal Counsel (rev. 2016-06-27)

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OVERVIEW

Federal agency counsel is provided by the Office of the General Counsel (OGC) for the Department of Agriculture [U.S. Forest Service (USFS)] and the Office of the Solicitor (SOL) for the Department of Interior agencies [Bureau of Land Management (BLM), Fish & Wildlife Service (FWS), and the National Park Service (NPS)]. These entities provide advice and counsel to agencies within their respective Departments and represent their agency clients in administrative proceedings. The agencies are represented in court by the Department of Justice (DOJ), either through its litigating divisions in Washington D.C., its field offices, or the U.S. Attorney's Offices located in each state.

KEY ROLES OF IN-HOUSE LEGAL COUNSEL

Solicitor's Office (SOL) for BLM, FWS and NPS

Office of General Counsel (OGC) for USFS

Solicitor's Office (SOL) - US Department of Interior (DOI)

The SOL advises BLM on water rights and related issues. SOL serves as litigating attorney for DOI agencies (including BLM) in administrative proceedings. SOL also assists in judicial proceedings by coordinating with the client agency and providing client position to DOJ in judicial matters.

- **Joe Darnell** is the Regional Solicitor for the Alaska Region and oversees the Interior Department's legal work in Alaska.
- **Ken Lord** is the Attorney-Advisor with the Department of the Interior's Office of the Solicitor, Alaska Region. He provides counsel for the Interior agencies in Alaska on water-related matters such as navigability and represents the agencies in administrative proceedings, including before the Interior Board of Land Appeals (IBLA). In addition, Ken is a "Special Assistant U.S. Attorney (SAUSA)" which would allow him to file documents representing DOJ in any future formal state adjudication.

Office of General Counsel (OGC) - US Department of Agriculture

The OGC is the legal advisor to the USDA and advises USFS on water-related issues, both litigation and non-litigation; prepares referrals to DOJ in litigation and assists in such litigation; and represents USFS before administrative agencies.

- **Dawn Collinsworth** is the Attorney-Advisor with the Office of General Counsel in the Alaska Region's Juneau Office and provides legal services to USFS in Region 10 on water-related issues. To date, OGC in Alaska has not been involved in administrative proceedings or litigation regarding water rights.

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General water right matters – OGC & SOL

- Provide general legal counsel to client agencies regarding water rights issues, including research of legal issues;
- Upon request, review client agencies' water right applications, protests, and other administrative filings, and represent the agencies in administrative hearings.
 - *Note: Applications for water right permits do not have to be filed by legal counsel; however, legal review is highly recommended for unusual, complex or potentially controversial applications. Additionally, if the application is protested, early involvement by legal counsel allows them to do a better job defending the agency.*
- To date in Alaska, there are no state stream adjudications nor has there been much litigation work regarding water rights.

Administrative Hearings – OGC & SOL

Although an agency can be represented by agency personnel in an administrative proceeding, a lay representative cannot make legal arguments because she/he is not licensed to practice law. If an agency wants attorney representation, the request **must be made early** in the proceedings to SOL or OGC. Upon request, the SOL/OGC attorney represents client agencies in contested case hearings on an agency's water rights application or transfer, in protests to others' water rights applications or transfers, and in water right cancellation proceedings. Services can include:

- Develop case strategy;
- Determine standards and burden of proof for approval of application;
- Research applicable statutes, case law and rules;
- Develop with client agency the legal, factual, and technical information necessary to support the application or protest;
- Select and prepare lay and expert witnesses;
- Prepare and file motions, responses to motions, and briefs on legal issues;
- Conduct discovery and coordinate client agency's responses to discovery;
- Assist client agency's witnesses with preparation of written testimony, if applicable;
- Prepare witnesses for depositions, where applicable, and hearings;
- Represent client agency at pre-hearing conference and hearing; and
- Prepare and file any post-hearing briefs.
- Negotiate settlements and stipulations.
- Advice on appropriate legal remedies if parties violate settlements, stipulations, or parameters of their water right.

Judicial Litigation – OGC & SOL

- Client agencies typically prepare the initial litigation reports, at the request of DOJ, in judicial water right adjudications or other judicial proceedings regarding water rights;
- Assist client agencies in preparing claims or objections;
- Advise DOJ of client agency's interests and positions on issues;
- Coordinate communication between DOJ and client agencies, and with Washington D.C. offices as needed;
- Work with client agency and DOJ attorneys on defensible scope and conduct of technical studies, factual research, selection of expert witnesses, etc;

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- Assist client agency in preparation of responses to discovery requests and preparing testimony;
- Assist DOJ in discovery, preparation of motions and briefs, and in trial presentation; and
- Under special designation, may serve as “Special Assistant, U.S. Attorney (SAUSA)” to DOJ. In Alaska, SOL attorney Ken Lord is a SAUSA.

Adjudications – OGC & SOL

Represent client agencies in Alaska water rights administrative adjudications and, if appropriate, request DOJ to also represent agencies. Services include:

- Develop case strategy;
- Research applicable laws and rules;
- Consult with experts regarding claims preparation and defense, including design, scope, and implementations of technical studies, witness selection, etc.;
- Coordinate with client agencies and file water right claims;
- Coordinate with client agencies and file objections to the preliminary order of determination;
- Solicit agencies’ views on issues and related matters;
- Prepare filings, such as motions, briefs, responses to motions and briefs and provide drafts to other agency attorneys and client agencies for review, comment, and approval, and when indicated, for WO office approval;
- Conduct and respond to discovery requests;
- Represent client agencies at hearings on motions, prehearing conferences, and at the water rights hearing;
- Prepare any post-hearing filings, negotiations and settlements; and
- Request DOJ representation in any appeals.

ROLE OF U.S. DEPARTMENT OF JUSTICE (DOJ)

The role of DOJ is to represent the United States in judicial, i.e. court, proceedings. These proceedings include adjudications, appeals to courts of decisions in administrative proceedings, and appeals of decisions in any court-initiated proceeding. Where DOJ is legal counsel, DOJ conducts discovery, prepares court filings and represents the agency in hearings. DOJ also takes the lead in negotiating settlements and resolving competing claims and disputes among federal agencies. In-house legal counsel and the client agency assist DOJ in this process, including the preparation and filing of exceptions to the order of determination in adjudications.

- **Dean Dunsmore** (DOJ, Environmental and Natural Resources Division, Anchorage) represents the federal agencies in judicial proceedings in Alaska.

ROLE OF U.S. FOREST SERVICE (USFS) PERSONNEL

Forest Supervisor’s Office Staff and Ranger District Staff

Forest and Ranger District Staff are the front line in the water rights program. Their areas of responsibility may include maintaining an inventory of state-based and federally reserved rights on USFS lands; reviewing USFS activities that may involve water use and water rights; review new water rights applications and current water right uses that may affect USFS activities or resources;

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consult with the Regional Office Water Rights Coordinator to obtain advice and direction on actions to be taken with respect to water rights and activities before contacting OGC; provide technical and factual assistance to the Regional Office Water Rights Coordinator; provide assistance to OGC as requested; prepare water rights applications or claims as requested by the Regional Office Water Rights Coordinator or OGC; obtain Ranger or Forest Supervisor approval as appropriate; assist with litigation as appropriate.

USFS Regional Office

Provide technical and policy advice and direction to the Forests and Districts; obtain advice from the National Office on issues that are highly controversial or of national importance of effect; coordinate and forward requests to OGC for advice or action; work with other Regions and National office to formulate and distribute national direction and policy; provide training to Forest and District staff as needed; provides assistance to OGC in administrative and judicial litigation as requested.

When OGC gets involved in USFS water rights issues

1. The Ranger District or Forest Supervisor's office must first consult with the Regional Office Water Rights Coordinator to determine whether the issues can be addressed with advice from Regional Office Water Rights Coordinator (policy or law), or if the Washington Office can provide policy guidance.
2. If it cannot be addressed by Forest Service Regional or WO staff, then Forest or District staff must obtain copies of all relevant documents, prepare a statement of relevant facts, and a written statement of the issue and questions for the Regional Office Water Rights Coordinator. The Coordinator will review the submission for accuracy and completeness, the forward those submissions with a Regional Office memo outlining its views to OGC. The case will be assigned to an attorney by OGC management.
3. If an appearance in an administrative hearing by USFS is anticipated, the Regional Office should be contacted as soon as possible. In most cases, it is advised that USFS personnel not attempt to represent the agency in administrative hearings. This includes the filing of responses, defenses, applications, etc., as well as appearing at a hearing.
4. When a water rights matter will be addressed in State or Federal court, USFS must be represented by the Department of Justice. OGC must make a request for representation by the Attorney General at the request of the Regional Forester if the matter that needs to be resolved is in court. USFS must prepare a complete litigation report in order for OGC to request DOJ representation.
5. If USFS is served with a complaint filed in State or Federal Court, those pleadings should be forwarded to the Regional Office as soon as possible.

ROLE OF DOI AGENCIES PERSONNEL

BUREAU OF LAND MANAGEMENT (BLM) PERSONNEL

BLM State Office Coordinates with District and Field Offices

Field office personnel are responsible for identifying water uses for which a water right is needed or required. They are also responsible for developing the technical data to support the water right application. Field Office personnel are responsible for regularly reviewing

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public notices of water right applications filed by other parties, and identifying applications that should be protested by BLM.

Once the need for a water right application or protest is identified, field office personnel should coordinate with the BLM Alaska State Office Soil/Water/Air program lead to determine the appropriate process to utilize (reservation or permit application, protest to reservation or permit application, notification of reserved water right, etc.) In addition, a determination should be made with the State Office soil/water/air lead if the protest or application presents legal issues that warrant involvement by the SOL. If legal counsel is needed, the soil/water/air lead will prepare a formal request to the SOL, to be signed by the Deputy State Director for Resources.

If involvement of legal counsel is warranted, case preparation may entail technical assistance by legal counsel, attendance at negotiation meetings, and developing formal responses to requests for discovery or interrogatories. Working on water rights issues requires a team - policy, technical, and legal. It is the responsibility of the Field and State Offices in coordination with the SOL, for correct and timely filing for, and protection of, BLM's water rights.

BLM Washington, D.C. Office (WO)

The BLM WO Director is responsible for establishing policy and the WO Deputy Director is responsible for developing the necessary directives and other guidelines to implement BLM water policy. The WO provides guidance and review of issues of national importance, novel issues with no previous Departmental/Bureau position, or highly controversial issues. The WO also assists with identifying resources necessary to support highly resource-intensive water right works, such as litigation of federal reserved water rights.

BLM WO issued revised water rights manual MS 7250 on September 30, 2013.

U.S. FISH AND WILDLIFE SERVICE (FWS) PERSONNEL

FWS Refuges Coordinate with Regional Water Rights Coordinator

Refuge personnel are responsible for identifying extractive water uses (such as wells for facilities) for which a water right is needed or required. They are also responsible for developing the technical data to support the water right application. The Water Resources Branch (WRB) at the Regional Office works in conjunction with the refuges to identify water bodies (rivers and lakes) that provide critical habitat (or source waters to critical habitat) for fish and wildlife. Then the WRB pursues instream flow water rights to meet the refuges' ANILCA obligations to provide "adequate water quantity and quality" via those water rights.

The Regional Water Rights Coordinator, in conjunction with refuge personnel, is responsible for regularly reviewing public notices of water right applications filed by other parties, and identifying applications that should be protested by FWS.

Once the need for a water right application or protest is identified, refuge personnel should coordinate with the Regional Water Rights Coordinator in the WRB of the Regional Office to determine the appropriate process to utilize (permit application, protest to permit application, notification of reserved water right, etc.) The Regional Water Rights Coordinator has delegated authority to sign water rights applications and water right related documents and

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sends copies of these types of documents to the Chief of Refuges or the Regional Director prior to submitting them formally.

However, if a determination is made by the water rights coordinator that the protest or application presents legal issues that warrant involvement by the SOL and a formal, written legal “opinion” is sought, the water rights coordinator will prepare a formal request to the SOL, to be signed by the Chief of Refuges or the Regional Director. The level of signing authority would depend upon the opinion being sought and the implications of the decision to other agencies.

If involvement of legal counsel is warranted, case preparation may entail technical assistance by legal counsel, attendance at negotiation meetings, and developing formal responses to requests for discovery or interrogatories. Working on water rights issues requires a team - policy, technical, and legal. It is the responsibility of the refuges and regional office, in coordination with the SOL, for correct and timely filing for, and protection of, FWS’s water rights in Alaska.

The National Water Team is a group of FWS regional water chiefs that meets monthly via conference call and annually/biannually in person. If an agency-wide policy was desired, this group would prepare it and send it up the chain to D.C. for consideration and approval.

U.S. NATIONAL PARK SERVICE (NPS) PERSONNEL

National Park Units Coordinate with Regional Water Rights Lead

National Park units coordinate with the Regional Hydrologist and Regional Lands Team to identify water uses for which a water right is needed or required. Park staff, in coordination with the Regional Hydrologist and the appropriate Inventory and Monitoring Network staff, are responsible for developing the technical data to support the water right application. Park unit personnel and the Regional Hydrologist are responsible for regularly reviewing public notices of water right applications filed by other parties, and identifying applications that should be protested by NPS.

Once the need for a water right application or protest is identified, park unit personnel should coordinate with the Regional Hydrologist and Regional Lands Team to determine the appropriate process to utilize (permit application, protest to permit application, notification of reserved water right, etc.). The Regional staff will work in cooperation with the NPS Water Rights Branch to develop the official NPS response and to determine if the protest or application presents legal issues that warrant involvement by the SOL. If legal counsel is needed, the Regional Hydrologist and NPS Water Rights Team will prepare a formal request to the SOL, to be signed by the Regional Director.

If involvement of legal counsel is warranted, case preparation may entail technical assistance by legal counsel, attendance at negotiation meetings, and developing formal responses to requests for discovery or interrogatories. Working on water rights issues requires a team - policy, technical, and legal. It is the responsibility of the park and regional offices in coordination with the SOL, for correct and timely filing for, and protection of, NPS’s water rights.

NPS Water Resources Division (WRD) of the Natural Resources Stewardship and Science (NRSS)

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The Water Rights Program & Branch (WRB) of NPS's national Water Resources Division (WRD), located in Ft. Collins, CO, is responsible for establishing policy and the Director is responsible for developing the necessary directives and other guidelines to implement NPS water policy. The Director provides guidance and review of issues of national importance, novel issues with no previous Departmental/Park position, or highly controversial issues. The Director also assists with identifying resources necessary to support highly resource-intensive water right works, such as litigation of federal reserved water rights.

When the Solicitor's Office gets involved in DOI agencies' water rights issues

1. First, the local office/refuge/park unit consults with the State/Regional Office water rights lead to determine if this is a management/policy issue or a legal issue and, thus, whether and when to bring a SOL attorney into the matter.
2. Following State/Regional Office guidelines/recommendations, the local office/refuge/park unit consults with the SOL early for informal discussion/information.
3. If formal SOL response or participation is needed, agency protocol is followed.
4. If protests are filed to agency applications or, if the agency files protests to others' applications and a protest hearing is likely, the agency should consider involving the SOL in the matter. SOL attorneys can represent BLM in the proceeding, conduct legal research, make legal arguments, prepare witnesses, conduct the case at the hearing, and may be helpful in negotiating a legally sufficient settlement, although an agency employee can represent the agency at a protest hearing.
5. The SOL will request DOJ representation when a matter reaches court.

CASE PREPARATION GUIDELINES

Need for Good Field Work and Technical Support for Claims

When filing any water right application, remember that it can be protested and can develop into a case put before an administrative hearing office or judge. A case is only as strong as its factual, technical, and legal support. Be diligent and use the best science available in preparing and defending claims, objections to claims, water right applications, water right change applications or protests to such applications. Where possible, use methodologies and approaches that are commonly accepted in the field. If a new approach needs to be developed for a particular type of claim, the agency with their attorneys should look at the value of peer review or publication in a refereed scientific journal. Claims preparations should include: use of available data; additional data collection as needed; scientifically sound analyses; visits to the claim sites; and a record of the field conditions, including photographs.

Make a Good Case

Put on the full case in the direct testimony and do as good of a job as possible. A party wins its case by its direct evidence (testimony and physical evidence). If a party's strategy is to "save" their testimony for rebuttal, or cross-examination, they may never get the chance. Rebuttal testimony in court may only address the direct testimony of another. Further, if a witness is not cross-examined, s/he will not get a chance to further explain their direct testimony. In proceedings before the Alaska Department of Natural Resources (DNR), rebuttal testimony is often not allowed.

Need to Start Early, Make an Early and Lasting Commitment

The agency needs to work with legal counsel to identify early the data, scientific investigations, analyses, and witnesses needed to prepare and defend their claims, objections, water right

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applications, water right changes or protests to such applications. The agency then needs to make an early commitment to conduct and complete the necessary studies in the allowed timeframe. Failure to adequately fund necessary studies and commit necessary staff to the project can be disastrous to an agency's case.

Need to "Refresh" Data

Adjudications or even other administrative proceedings can take a long time to complete, so data may get stale or out of date and may need to be supplemented.

- Protests also need to be supported by data!

Witnesses

For complex matters, expert witnesses and studies may be needed in addition to lay witnesses, i.e., fact witnesses. Both lay and expert witnesses likely need to undergo witness training, unless they are regularly in litigation. In addition, the litigating attorneys will walk their witnesses through the testifying process and practice sessions.

Informal Nature of Administrative Proceeding

Most judicial procedural and evidence rules do not apply in proceedings before the DNR. For example, hearsay is reliable if it is the kind of information a prudent person would reasonably rely on in the conduct of his or her affairs and discovery of expert witnesses may not be allowed. Also, there are not clear rules or any rules for all circumstances, so that hearings are sometimes trial by surprise, contrary to usual judicial hearings. In proceedings before DNR, the primary goal is to provide information that is essential to the decision the DNR is being asked to make.