



## 403 FW 2, Authorities and Definitions

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**2.1 Authorities.** Numerous laws and court cases provide the authorities under which the Service acquires, manages, and protects its water rights.

**A. Federal Laws.** Service facilities, and their associated water rights, have been established and administered under various Federal laws, in addition to Executive orders, public land orders, and administrative regulations. Five of the most important laws are:

- (1) The Fish and Wildlife Act of 1956 (16 U.S.C. 742a-742j), as amended, authorizes the Secretary of the Interior to take steps "required for the development, advancement, management, conservation, and protection of fish and wildlife resources including, but not limited to, . . . acquisition by purchase or exchange of land and water or interests therein".
- (2) The Fish and Wildlife Coordination Act (16 U.S.C. 661-667e (1934)), as amended, authorizes Federal water resource agencies to acquire lands or interests in connection with water use projects specifically for mitigation and enhancement of fish and wildlife, and provides for management of such lands by the Service or by State wildlife agencies.
- (3) Migratory Bird Conservation Act (16 U.S.C. 715-715r (1929)), as amended, establishes a Migratory Bird Conservation Commission to approve acquisition of land, water, or land and water, recommended by the Secretary of the Interior as suitable for use for migratory birds. The act also authorizes appropriation of funds for the construction of dams, dikes, ditches, flumes, spillways, buildings, and other necessary improvements.
- (4) The Endangered Species Act of 1973 (16 U.S.C. 1531-1544), as amended, provides for the conservation of threatened and endangered species of fish, wildlife, and plants by Federal action and by encouraging the establishment of State programs.
- (5) The McCarran Amendment (43 U.S.C. 666 (1952)), waives the sovereign immunity of the United States and permits State courts to adjudicate all Federal water rights where there is a

general adjudication designed to establish all rights in a watershed and the United States is properly served.

**B. Judicial Decisions.** A number of judicial decisions have defined and affected the water rights of the Service. Three of those decisions concerning the "Winters Doctrine" or the doctrine of Federal reserved water rights, are:

(1) In Winters v. United States (1908), which involved the rights of an Indian tribe, the Supreme Court determined that when the Federal Government withdraws land from the public domain for a particular purpose, by implication it also reserves whatever unappropriated water is necessary to accomplish that purpose. That reserved right carries a priority as of the date of the reservation, regardless of when the water is actually put to use.

(2) In Arizona v. California (1963), the Court found that the principle underlying the reservation of water rights for Indian reservations was equally applicable to other Federal reservations, including wildlife refuges.

(3) In United States v. New Mexico (1978), the Supreme Court reaffirmed the doctrine of Federal reserved water rights but narrowed its parameters by differentiating between primary and secondary, or incidental, purposes. The Court ruled that a reserved right exists only for the primary purposes of the reservation, and that water rights for secondary purposes must be acquired in compliance with State law.

**2.2 Definitions.** The following definitions are provided to aid in the interpretation of this directive.

**A. Abandonment and Forfeiture of Water Rights.** Under the Appropriation Doctrine, a State water resource agency may find that a water right has been abandoned or forfeited. Abandonment requires an intent to permanently give up the water right. Forfeiture results from failure to use the water in the manner described in State statutes. Reserved water rights are not subject to State rules on abandonment or forfeiture.

**B. Adjudication of Water Rights.** An adjudication is an administrative or judicial determination of all rights to use water in a particular stream system or watershed to establish the priority, point of diversion, place and nature of use, and the quantity of water used among the various claimants. These stream or watershed adjudications can be initiated by a water user (including the United States) or by the State. The United States may be joined in an adjudication if the requirements of the McCarran Amendment are met.

**C. Appropriation Doctrine.** Water laws developed in the arid Western States--where water supplies are limited and often inadequate--are known as the Appropriation Doctrine. This doctrine is essentially a rule of capture, and awards a water right to a person actually using the water. It has two fundamental principles:

(1) First in time of use is first in right (i.e., the earliest appropriator on a stream has the first right to use the water), and

(2) Application of the water to a beneficial use is the basis and measure of the right.

**D. Beneficial Use.** Beneficial use is a cardinal principle of the Appropriation Doctrine. It has two components: the nature or purpose of the use and the efficient or nonwasteful use of water. State constitutions, statutes, or case law may define uses of water that are beneficial, those uses may be different in each State, and the definition of what uses are beneficial may change over time. The right to use water established under State law may be lost if the beneficial use is discontinued for the prescribed period of time. (See Abandonment and Forfeiture.)

**E. Consumptive Use.** Consumptive use represents the difference between the amount of water diverted and the amount of the return flow to the system (e.g., surface stream or underground basin). It is that amount by which the total resource is depleted.

**F. Instream Flow Requirement.** Instream flow is the amount of water flowing through a natural stream course that is needed to sustain the instream values at an acceptable level. Instream values and uses include: protection of fish and wildlife habitat, migration, and propagation; outdoor recreation activities; navigation; hydropower generation; waste assimilation (water quality); and ecosystem maintenance which includes recruitment of fresh water to the estuaries, riparian vegetation, floodplain wetlands, and maintenance of channel geomorphology. Water requirements sufficient to maintain all of these uses at an acceptable level are the "instream flow requirements."

**G. Perfected Right.** This term is used by Western States to indicate that all required steps to secure a State appropriative water right have been completed with due diligence. At this time a Water License or Certificate is usually issued. This document is prima facie evidence of a water right and is considered real property.

## **H. Priority.**

(1) Priority determines the order of rank of the rights to use water in a system. Under the Appropriation Doctrine, priority is the concept that the person first using water for a beneficial purpose has a right superior to those commencing their use later. The priority date of a Federal reserved water right is the date the land is withdrawn from the public domain. Priority is important when the quantity of available water is insufficient to meet the needs of all those having rights to use water from a common source. Under the prior appropriation system, shortages are not shared.

(2) Some Western State statutes contain priority or preference categories of water use, under which higher priority uses (such as domestic) have first right to water in times of shortage, regardless of priority date. There may also be constraints against changes or transfers involving these priority uses.

**I. Public Trust Doctrine.** This doctrine refers to the responsibility of the State to hold property rights in trust for the benefit of the citizens of the State. Historically, the doctrine applied to the beds of navigable waters, but it has recently been extended to other resources, such as beaches, parks, and even "all natural resources." In California, the doctrine has been extended to water

rights, and was used successfully to challenge water rights held by the City of Los Angeles when it was discovered that the City's diversions from tributaries of Mono Lake were destroying the Lake's unique habitat.

**J. Riparian Doctrine.** This doctrine is in effect in most Eastern States, some Midwestern and Southern States, and the State of California (which also uses the appropriation doctrine). In almost all jurisdictions, the doctrine has been modified to fit local conditions. It applies to all bodies of water including streams, lakes, ponds, and marshes, and grants to all riparian owners the right to make reasonable use of the water so long as the water use does not interfere with the reasonable use of water by other riparian users. Disputes over what constitutes reasonable use are generally resolved by the courts. The fundamental principles of this doctrine are:

(1) Ownership of land along a body of water (riparian ownership) is essential to the existence of a right to that water; and

(2) Each riparian owner has an equal right to make use of the water in its natural state (no storage), no matter when use of the water was initiated; thus, shortages are shared.

**K. Vested Right.** An appropriative right established by actual use of water prior to enactment of a State water right permit system is known as a vested right.

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