

Water-Related Rights-of-Way and Special Use Permits on Federal Lands

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Why do we discuss authorization of water facilities on federal lands in a water rights course?

- Proposed developments can have significant impacts on federal water rights and water-dependent resources.
- Federal agencies should be an effective partner with the state in reacting to and guiding proposed water development.
- Federal agencies should engage in the water rights process when new facilities are proposed.

Module Objectives:

Given a proposed water diversion and conveyance facility on federal lands, students will be able to:

- determine the legal authority and processes that should be used to evaluate the facility and make an authorization decision
- identify the general types of operational terms and conditions that may be appropriate, if the facility is authorized
- Identify how federal agencies should participate in the water rights process for a proposed facility

What types of facilities are you likely to encounter?

- Ditches, canal, laterals
- Pipelines, flumes, siphons
- Diversion dams, headgates, pump stations
- Dams, spillways, inundation
- Livestock ponds, fish ponds, settling ponds, recharge pits, stormwater reservoirs
- Spring developments, storage tanks, troughs



What types of facilities are you likely to encounter?



- Wells: production, domestic, livestock, injection, monitor
- Infiltration galleries in streambeds
- Measurement infrastructure – stream gages, flumes, stage rods, flow meters
- Related infrastructure – roads, electric lines, turbines, maintenance facilities

Land Use Authorizations For Water-Related Facilities

- First, **PROCESS** . . .

What processes should we use ?

With whom should we coordinate?

What do we say in the water rights process?

- Then, **SUBSTANCE**. . .

What issues should we analyze?

How do we make a decision to approve or deny?

What terms and conditions should we use in a land use authorization?



This presentation focuses only on new land use authorizations in Alaska.

- In the Lower 48 states, many water facilities operate under pre-Federal Land Policy and Management Act (pre-FLPMA) Rights-Of-Way and Special Use Permits.
- These authorization have an entirely different legal basis and management approach.



Processing land use applications for water-related facilities

What comes first?

Land use authorization or water rights process?



The land use authorization process and water rights process should proceed **simultaneously**.

- Carefully review all water rights applications for activities that could affect federal lands. Don't assume state will notify you, because state must rely on applicant-supplied info.
- Encourage applicants to consult with both feds and state BEFORE water right and land use applications are filed.



The land use authorization process and water rights process should proceed **simultaneously**.

- Protest the water right application if the federal agency has not authorized or cannot authorize the facility.
- Don't issue final land use authorization unless you are confident that the water right will be granted. Consult with AK DNR on application status.



What points can I make in a protest?

- Status of land use authorization
- Laws, regs, and plans that will govern authorization process
- Federal water rights that could be injured if application approved
- Potential impacts and injury to federal water rights and to water-dependent resources on federal lands



What points can I make in a protest?

- Data that the state can use during evaluation of the water right application
- Delay approval of application until we are confident that federal land use authorization can be obtained OR include term/condition that right will terminate if federal land use authorization is denied



Processing land use applications: how do I resolve water rights issues?

- **NEVER** issue authorization:
 - without investigating water rights situation first
 - when any federal agency water rights protest is unresolved
- **NEVER** assume authorization needs to be issued just because applicant already has a permit or water right.
- **REMINDEE** applicant that federal land use approval is a **DISCRETIONARY ACTION**.



Shelby says: Get out on the ground and investigate the water rights situation!

Processing land use applications: how do I resolve water rights issues?

- **Instead**, proceed through land use authorization and NEPA process to identify whether facility can be authorized without significant impact to federal resources and water rights.
- **Notify** state of analysis results and/or decision, including terms and conditions regarding location, amount, and timing of water use.



Resolving water rights issues: who should own water rights on federal lands?

In U.S. ownership when:

- When water is used by public or agency for federal land management purposes (e.g. visitor facilities, wildlife water facilities, etc.)
- When permittee, contractor, or other public land users consume water for federal land management purposes (e.g. concessions, forestry management contract, etc.)

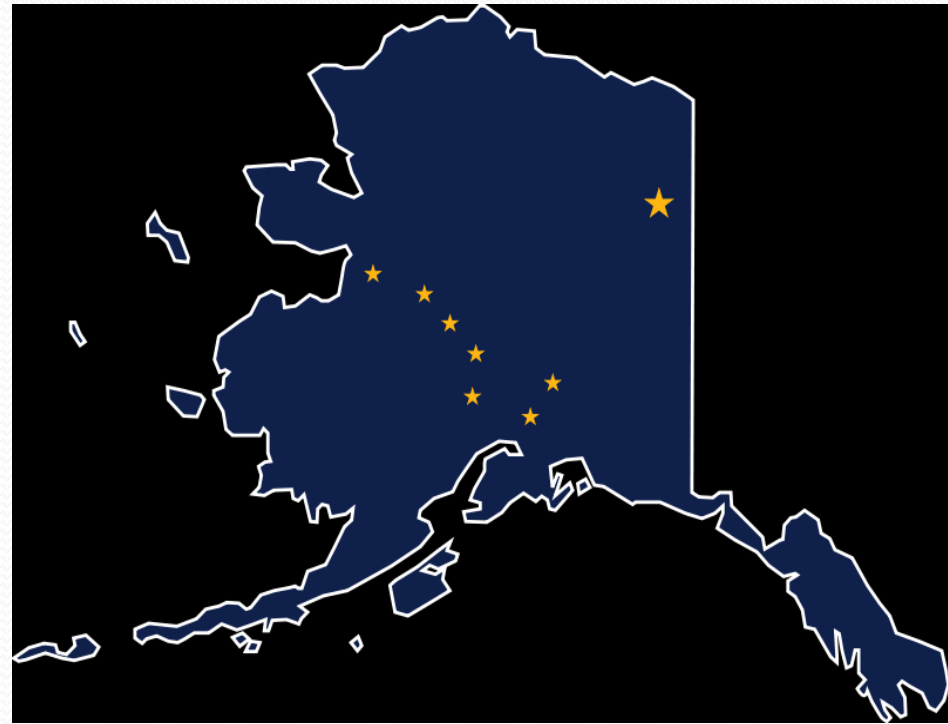
In private ownership when:

- Federal agency authorizes permanent facility on federal lands for a usage location that occurs off of federal lands (e.g. municipal water supply)
- For time-limited energy, mineral, and commodity development and water use ceases when authorization ends. Rights should be forfeited or assigned to U.S. upon termination.

Resolving water rights issues:

Does state deal with all water use impacts?

- States typically have authority only for **water allocation**, not for addressing environmental impacts from water use.
- Federal agencies have authority and obligation to conduct impact analysis, avoid/minimize impacts, and make decisions that provide for sustainable resource use.
- Federal agencies are obligated to address impacts associated with water usage, even if decisions result in reduced yields for approved water rights.



What processes do we use to authorize water-related facilities?

Fish and Wildlife Service:

- Application letter pursuant to National Wildlife Refuge System Act
- Letter requirements set forth in 50 CFR Subpart B, Section 29

National Park Service:

- Application for Special Use Permit, *and/or*
- Application for Transportation and Utility Systems on Federal Lands (SF-299)



What processes do we use to authorize water-related facilities?

BLM & USFS

Multiple Use Methods

- Pre-Federal Land Policy and Management Act Rights-of-Way (pre-1976)
- Federal Land Policy and Management Act Authorizations
 - Rights-of-Way (BLM)
 - Special Use Permits (USFS)



What methods can we use to authorize water-related facilities?



BLM & USFS: Program-Specific Methods

- Plans of Operation for Minerals/Energy Leases – oil, gas, coal, geothermal, etc.
- Recreations Leases (BLM) and Permits (USFS) – ski areas, concessions, recreational residences, etc.
- Forestry Contracts – special stipulations

What methods can we use to authorize water-related facilities?



ANILCA processes for utility systems in Conservation System Units (Title XI)

- Utility systems include any water conveyance facility
- Joint applications to all federal agencies affected
- Joint EIS by federal agencies, if required
- Statutory deadlines for a decision

ANILCA Process Requirements



Federal agencies must analyze:

- Need and economic feasibility
- Alternative routes through non-CSU lands
- Impacts on local economics, fish and wildlife, and traditional rural lifestyles
- Impacts on purpose of the CSU
- Impacts on public values versus long-term public benefits

Processing ROW/SUP applications: What analysis process should I use?

Federal agencies **must**:

- **Collect data** to justify terms and conditions
- Provide documentation of **reasoned analysis**
- **Reference laws/regs/policies** leading to decision
- **Consider mitigation** measures proposed by applicant

Appeal decisions assume that federal agencies follow procedures correctly. The appealing party must prove that the federal process or analysis was in error.

Federal agencies can **reject** (not process) applications if:

- Proposed use is inconsistent with law/regs/land use plans
- Do not comply with screening criteria found in regulations

What goes into a “reasoned analysis”?

1. Questions about the water source:

- Is access to the water source available on private lands?
- Are other water sources available?
- Would the proposed use injure existing uses from this source?
- Would the water source itself be damaged?

2. Questions about the resource: What impact on riparian, wetlands, wildlife, water quality, erosion, cultural, T&E species, etc?



“Reasoned Analysis” Example

- Are there other water sources for livestock?
- Will the aquifer be damaged? Are aquifer levels stable?
- Can well construction techniques avoid impacts?
- Will fens be impacted?
- Will water be available for wildlife use?



IBLA Cases For Process Guidance

- **Grant Hacking (Utah)**
 - Water needed for public purposes
- **King's Meadow Ranches (Utah)**
 - Destruction of riparian habitat and erosion
- **Vogel (Oregon)**
 - BLM must have record to support decisions
- **Philp (Oregon)**
 - BLM fails to supply supporting rationale
- **Lederhause (Colorado)**
 - No obligation to approve structures that could be built on private lands

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The Substance: Standard for Approval/Denial



- Consistent with the mission of the Forest Service to manage lands and resources in a manner that will best meet the present and future needs of the American people, taking into account the needs of future generations for renewable and nonrenewable resources.
- The proposed use cannot be reasonably accommodated on non National Forest System lands.
- Does not authorize use of National Forest System lands solely because it affords the application a lower cost or less restrictive when compared with non NFS lands.

The Substance:

Standard for Approval/Denial



- Consistent with the purposes for which BLM manages public lands (multiple use)
- Consistent with public interest
- Protects natural resources
- Prevents unnecessary and undue degradation to public lands

The Substance: Standard for Approval/Denial



- Contributes to the achievement of the National Wildlife Refuge purposes
- Does not materially interfere with or detract from the mission the National Wildlife Refuge . This standard is known as “compatible use.”
- Will not unduly interfere with the management, administration, or disposal by the United States of the affected lands.

The Substance: Standard for Approval/Denial



- Does not jeopardize or unduly interfere with the primary natural or historic resources of the area involved
- Provides public services within the immediate vicinity of the park
- There are no reasonable alternatives to acquire the water
- Will not contribute to future dependency on park resources

The Substance: Terms and Conditions



Authority for Terms & Conditions

Federal Land Policy and Management Act:

“minimize damage to scenic and aesthetic values and fish and wildlife habitat or otherwise protect the environment”

Endangered Species Act:

“every federal agency shall.. ensure that any action authorized ... is not likely to jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of habitat of such species ...”

Authority for Terms & Conditions

National Environmental Policy Act:

Requires **best available science** to analyze, minimize, and avoid environmental impacts

Utah Power and Light Co. v. U.S. 243 U.S. 389

Access to state water rights on federal lands occurs under **FEDERAL LAW.**

Agency Guidance - Terms & Conditions

USFS Water Uses and Development Manual Section 2541.35:

Include stipulations in the authorizing documents to ensure the quantities of water needed to fulfill purposes of the National Forest and for environmental needs will be maintained instream.

BLM Water Rights Manual 7250 - Section 1.5.B.6:

In all land use authorizations, the BLM shall include terms and conditions to protect water rights and water uses on public lands.

Agency Guidance - Terms & Conditions

50 CFR 29.21-4 (Fish and Wildlife Service regs):

An applicant, by accepting an easement or permit agrees to such terms and conditions as may be prescribed by the Regional Director in the granting document.

NPS Director's Order #53, Special Park Uses – Section 8

To protect NPS interests, the Superintendent shall incorporate appropriate conditions into all special park use permits.

Federal management objectives for water-related ROWs/SUPs

- Predictability of operations and impacts
- Minimization and avoidance of impacts
- Applicants remain within authorized purposes
- Authorize practices, not just structures
- **RESULT:** Facility operation plans; increased reporting



Meeting federal management objectives with terms/conditions

Example General Stipulations:

- Applicant will not sell, lease, or use water for any other than stated purposes
- Applicant may not change type, place, or volume of use without consent
- Usage must include water conservation measures
- Modify water facility to support other values, such as wildlife and wetlands



ROWs/SUPs in hydrologic systems where little data exists

Example Stipulations:

- Applicant collects baseline data impacts analysis
- Applicant pays for studies to ID relationships between groundwater basin and springs, streams, and adjacent basins
- Applicant agrees to long-term monitoring.
- Applicant agrees to adaptive management and project modification if unexpected impacts occur



Meeting federal management objectives with terms/conditions



Example stipulations for *surface water* facilities:

- Limit volume/rate diverted
- Limit diversion season
- Design structures to prevent fish entrainment and allow fish passage
- Move facility locations to avoid sensitive habitats
- Use alternative sources of water (e.g. wells, water stored in reservoirs) during sensitive low flow periods

Addressing new environmental drivers with terms/conditions



Example stipulations for *groundwater* facilities:

- Submit copies of all permits and test results
- Require well pump test before authorizing project
- Cease pumping during critical aquifer periods
- Monitor water quality for unexpected changes
- Install meter and submit annual report on pump rates and pump volumes

Water Facility Operation Plans: Certainty and Communication

- Diversions - rates, dates, and measurement procedures
- Access – routes, equipment, and snow removal
- Repairs – routine, major, catastrophic
- Maintenance – timing, tools
- Ditch problems – washouts, downcutting, erosion
- Instream work – diversion dams, vegetation control



What happens when a flood destroys facility?

Water Facility Operation Plans: Advantages

- Can include a schedule for regular revision and updates
- Revision to an operating plan doesn't require amending the right-of-way grant or special use permit
- Can and should be negotiated before the SUP or ROW is offered



What happens when a flood destroys facility?

Notebook References

