

**-June 2002 Memorandum of Understanding-
Instream Flow Applications and Adjudication
Alaska Department of Natural Resources
Alaska Department of Fish and Game
(Amended December 13, 2002)**

Background

This Memorandum of Understanding (MOU) between the Alaska Department of Natural Resources (DNR) and the Alaska Department of Fish and Game (ADF&G) addresses the coordination of processing reservations of water, commonly called "Instream Flow." "Instream flow" is the term commonly given to an appropriation of water under AS 46.15 to reserve a specific amount of water within a stream, river, or lake to protect fish, wildlife, recreation, parks, navigation, transportation, and water quality.

The DNR has the statutory responsibility to adjudicate instream flow applications and to reserve water under AS 46.15.035, AS 46.15.037 or AS 46.15.145. DNR has a large backlog of applications for instream flow reservations and other water uses.

The ADF&G has the statutory responsibility to manage, protect, maintain and where possible extend fish and wildlife habitat and production in the interest of the economy and general well-being of the state per AS 16 (e.g. AS 16.05.020, .050, .840 .870 and 16.20.010, .180, and .500). Accordingly, the ADF&G has a program to gather, collect, and analyze data to quantify instream flow needs for fish and wildlife and its habitat; and to prepare instream flow applications to submit to DNR for adjudication.

Adjudicating existing and future instream flow applications on a timely basis is in the best public interest of the State of Alaska. Adjudicating the current backlog of water reservations applications will improve the timelines of processing other pending and future applications to withdraw, divert, and impound water.

Objectives of this Memorandum of Understanding

1. ***Jointly Prioritize Adjudication of the backlog of Instream Flow Water Rights Applications.*** Subject to DNR's statutory responsibilities and resources to process applications, DNR and ADF&G will agree upon the process for prioritizing the order in which DNR will complete the adjudication of instream flow reservation applications for the protection of fish and wildlife.
2. ***Jointly Prioritize New Applications for Instream Flow.*** Subject to ADF&G's statutory responsibilities and resources to protect fish and wildlife, ADF&G and DNR will agree upon a process to prioritize water bodies for future ADF&G instream flow applications.

3. ***Outline DNR's Adjudication Process.*** This MOU will describe and, to the extent appropriate, formalize DNR's current adjudication processes for instream flow under AS 46.15.145, .035, and .037.
4. ***Integrate the Application and Adjudication Process.*** This MOU will establish a process to better integrate and coordinate DNR's adjudication processes with ADF&G's processes for preparing an application to make the processes as a whole more efficient, timely, and cost effective for both agencies.

The Agreement

DNR and the ADF&G agree to the following:

1. *General Procedures.*

Process. The DNR and ADF&G agree to work together to adjudicate DNR's existing backlog of applications for reservations of water, and to seek measures to expedite adjudications of future applications filed according to the provisions described below. The DNR and ADF&G may invite other agencies such as DEC to assist the DNR and ADF&G to reach agreement for implementing the provisions described under this MOU.

Schedule. The agencies will begin discussions to reach agreement on how to implement this MOU in the fall 2002. Both agencies agree to begin meeting no later than October 15th, 2002 with the intention of reaching agreement before December 15th, 2002. Upon written agreement by both agencies, this schedule can be revised.

Resolution Process. If DNR and ADF&G cannot agree at the staff level, any outstanding disagreements will be elevated to the directors of the ADF&G Sport Fish Division, Habitat and Restoration and/or other relevant divisions, and the DNR Division of Mining, Land and Water. If directors cannot reach agreements, any outstanding disagreements will be elevated to the relevant Commissioners for resolution.

2. Jointly Prioritize Adjudication of Instream Flow Applications. Beginning with completion of the agreement for implementation in December 2002 and at the beginning of subsequent state fiscal years, DNR and ADF&G will jointly agree on the schedule and order of existing and new applications to be adjudicated that year by DNR before beginning adjudication of an instream application. DNR will supply ADF&G with an updated list of pending instream flow applications available for adjudication, along with a summary of other out-of-stream water right applications and relevant information for the same water sources so that the agencies can assess the potential for conflicting water uses.

3. Jointly Prioritize Preparation of New Applications for Instream Flow. Each fiscal year, before the field season, ADF&G and DNR will jointly select waterways for which DNR or ADF&G will prepare new instream flow applications.

Criteria. When deciding application and adjudication priorities, DNR and ADF&G will take into account at least the following:

- the order of priority of existing pending reservation of water applications,
- the existence of water use conflicts with the potential to affect fish and wildlife;
- waterbodies where likely changes in land use or development have the potential to create these conflicts in the future;
- the importance of resources at risk;
- criteria set out in AS 46.15.080; and
- the availability and adequacy of data.

4. Outline DNR's Adjudication Process. This MOU includes a summary of DNR's processes and requirements for adjudicating instream flow uses.

5. Integrate the Application and Adjudication Process. For each application and adjudication, DNR and ADF&G will jointly prepare an annual work program for that waterbody outlining the steps in gathering the data and conducting the adjudication. The work program will outline how the agencies will work together for each water body and will provide a description of agency staff commitment for the work. At a minimum, the work program will address the acquisition and review of the information outlined in the next section.

DNR's Instream Flow Adjudication Process

DNR has accepted and granted reservations based on the Tennant and modified Tennant analyses and Physical Habitat Simulation System and will continue to do so. To date these methods have only been proven satisfactory in Alaska only when the primary concerns for reserving water have been fish and fish habitat.

The Tennant Method has also been used by the ADF&G when providing instream flow recommendations to protect fish production in association with other water use applications under AS 46.15.080 and for ADF&G's AS 16 permits. DNR uses the public interest criteria in AS 46.15.080 to balance the water needs for fish with those of other existing and potential users.

Steps in the Adjudication

A "typical" instream flow application and adjudication would include the following steps.

1. Collect and review the hydrologic data necessary to calculate or estimate average annual flows, mean monthly flows, and the monthly flow exceedance curves.
2. Review the analyses and supporting application information submitted to DNR to identify the relationship between important life stages and distribution (fish periodicity) to stream stage, stream flow, and /or lake levels. A summary of supplemental hydrologic, biologic or other supporting information and when and under what conditions it would be requested will be mutually agreed upon in advance of adding these requirements.

3. Gather and review the data necessary to analyze the public interest criteria of AS 46.15.080(b). DNR will require an applicant to supply only the information necessary for DNR to make its required public interest decision. This information may include the relevant hydrologic, biologic, or other data.
4. Prepare a public interest finding (public notice).
5. Give public notice.
6. Respond to public comments and make the final finding on the reservation.

Integration of Application and Adjudication Process

With respect to the draft finding of fact and conclusion of law, DNR and ADF&G agree to engage in discussion before the draft is written. DNR will prepare an "agency review draft" of the finding for review and reach agreement with ADF&G before it is distributed for public notice.

With respect to the responses to comments, DNR and ADF&G agree to engage in discussion before a final draft is written. DNR will describe changes to the final finding, if any, and give ADF&G a chance to disagree and elevate the decision before the final determination and response to comments are signed.

If an appeal of the best interest determination or a request for its reconsideration is received by DNR, and DNR proposes to materially change the finding in response to the appeal/reconsideration request, DNR agrees to prepare an agency draft for discussion with ADF&G before the appeal/reconsideration request is signed.

If DNR and ADF&G agree on a draft or final best interest determination, both agencies agree to support that determination with the public, subject to review of public comments, or any appeal or reconsideration request.

Funding

Without additional funding, DNR's expected rate of adjudications for instream flow reservation applications is unlikely to increase. ADF&G and DNR recognize that without proper funding for DNR, the unadjudicated backlog of instream flow reservations will continue to grow.

In the absence of additional funding for DNR, the two agencies will implement this agreement regarding DNR's adjudication processes and prioritizing existing applications by ADF&G. (Agreement Steps 1, 2, and 3). However, the two agencies realize that it will not be possible to fully integrate the application and adjudication processes (Agreement Step 5) without additional funding for DNR's program.

ADF&G and DNR agree to pursue appropriate avenues to gain additional funding so that DNR and ADF&G can fully implement this MOU for improving the overall administration of water rights to insure instream flow protection on a timely basis.

This Memorandum will remain in force until either DNR or ADF&G provide written notification to the other that the agreement is terminated. All amendments must be mutually agreed upon in writing.

Signatures

The signatures below show agreement with the provisions of this MOU.

For DNR:



Robert Loeffler, Director

1/14/03

Date

For ADF&G:



Kelly Hepler, Director

1/15/03

Date