

## **QUESTION AND ANSWER SESSION WITH DEPARTMENT OF NATURAL RESOURCES AND CLASS PARTICIPANTS – OCTOBER 25, 2016**

### **PUBLIC TRUST DOCTRINE**

#### **Q: What is the Public Trust Doctrine and how does it apply to Alaska?**

A: The doctrine began in the Lower 48 states. It is the ability of the public to use public resources (rivers and trails) for travel. Rivers in AK are a major transportation route and the public has legal access to travel on or through any river between the high water marks on either bank.

### **PUBLIC WATER SUPPLY**

#### **Q: Is “Public Water Supply” a higher beneficial use and can it curtail other senior users?**

A: Yes, a PWS takes precedence among other water uses, as stated in the AK Constitution. There is only a certain amount of water available so there is a process in place that when an applicant files for a PWS use, he/she can bounce a senior water right holder, but the senior user must be compensated for his loss.

### **TEMPORARY WATER USE AUTHORIZATIONS (TWUA)**

#### **Q: Can a TWUA be issued for an instream flow for fish & wildlife purposes?**

A: Uncertain. DNR has not been faced with this scenario yet and will address this issue when it comes up. Initial response would be no: a TWUA would not work unless there was unappropriated water available; a TWUA is only for a short period of time so it wouldn't provide long-term protection for fish & wildlife; a TWUA is only for consumptive uses, not non-consumptive ones; and one TWUA can trump another one. DNR's preferred course of action is for an applicant to file a reservation application.

#### **Q: What are the limitations to how long a TWUA can be granted?**

A: A TWUA is issued for 5 years for up to 5 water sources. If the initial 5-year period has not expired, a one-time extension of 5 years can be sought. Once the renewal period has been reached, the TWUA is extinguished. If the need for water continues, the applicant would have to file for a new TWUA.

#### **Q: If there are other pending applications not yet adjudicated, how many times can the TWUA be issued and for how long?**

A: See the answer to the question above. A TWUA, issued for 5 years, can be renewed only once for another 5 years.

### **INSTREAM FLOW RESERVATIONS**

#### **Q: Can nearby stream gage data from adjacent watersheds be used as proxy in applications for instream flow reservations for ungaged watersheds?**

A: Yes, stream gage data from other watersheds can be used to come up with synthetic data, but only if the watershed is similar to the ungaged one.

**Q: What changes are being considered related to water reservations (i.e., 14B77)?**

A: DNR's recent request for comments regarding 14B77 has yielded over 1,057 comments. There will definitely be some definition changes. We have not seen any comments that affect federal applications or that should be of concern to the feds.

**Q: For lake reservations (AS46.15.030), how are lake levels administered?**

A: Lakes and other water bodies can be measured by volume (rate of water flowing in) and lake elevation level. For lake levels, elevations are mentioned in the Statutes. A benchmark is established, and from that benchmark elevations are noted for the lake's water level, for the outlet or spillway, and for the top of the dam (if applicable). If water is needed for the entire year, more than one measurement is needed (e.g., to take into account elevation levels during the winter period).

**Q: Is there an example of a reservation for water quality purposes?**

A: No, no reservation for water quality has been submitted to DNR yet.

**Q: Can one get an instream reservation for ground water to maintain surface water for fish & wildlife, water quality, navigation, etc.?**

A: The applicant would have to demonstrate the connectivity between surface and ground water. This would be a challenge for DNR to review.

**Q: Does current law/regulation allow conversion of a traditional consumptive use right to an instream reservation by the holder with DNR permission?**

A: No. A conversion of a traditional right to an instream right has not been done yet; there could very well be legal challenges to doing this.

**Q: Does current law allow an instream reservation to be transferred to another applicant with DNR permission?**

A: No.

**Q: For instream reservations, how current does the 5-year hydrologic data set have to be? Can we use USGS-gaged data that is now 10-20 years old or older and where the gages have been disconnected?**

A: DNR prefers that current data is used or "best available data", if older data is the only data available.

**Q: How secure is a state reservation of water? These reservations are reviewed every 10 years and can be modified by the Commissioner at that time if the modifications are in the best interest of the state. Is it possible that an existing reservation could be reduced to a point where it does not serve the federal agency, if there are subsequent applications for water on a stream that the state determines are of a higher interest to the state? If the existing state reservation**

**is within a federal management area, could a new use be so overwhelming as to lessen the existing reservation?**

A: Anything is possible, but note that such rights are held by the state for the public interest, and that any changes to such rights would be highly scrutinized.

## **SURFACE-GROUND WATER INTERACTION**

**Q: Are surface water and ground water integrated in Alaska law?**

A: Uncertain. DNR has not dealt with this issue yet.

## **THE PERMIT PROCESS**

**Q: For small uses that are exempt (example: a water source with a permanent diversion installed for domestic use of <500 GPD, 10/days per year, with no other appropriations), could a traditional water right be acquired and is it recommended?**

Q: Yes, a traditional consumptive use right can be acquired and yes, it is recommended that the agency do so. Money and time have been put into developing a water source and a water right (which is more secure versus an exemption) is recommended to protect it.

**Q: What is DNR's current backlog in processing permit applications? Processing statements of beneficial use? Issuing certificates?**

A: Presently, there are about 500 applications yet to be processed. For proofs and certificates, there is no statutory timeframe; DNR recommends that the applicant call if it has been more than a year with no action.

**Q: Please clarify the definitions of "15-day notice" and "20-day appeal" process – is this in calendar days or working days?**

A: These days are measured in "calendar days". For the "15-day notice period, the first day doesn't count and the remainder are in calendar days, except if the 15<sup>th</sup> day is on a weekend, then the 15<sup>th</sup> day is the next working day.

**Q: How is "best interest of the State" and "public interest" defined?**

A: There is a history of cases where the interest of the State is different from "in the public interest". The "State" means different agencies within the state, each with their own review criteria. DNR has to weigh in their "public interest criteria" and may disagree with other agencies.

**Q: Is the "finding of fact, conclusion of law" finding required for traditional water rights? If yes, when? If not, why not?**

A: The "finding of fact" language is not the same for instream reservations as it is for traditional certificates. For reservations, there are four findings, eight criteria to be met and a review and determination made. The final decision for a permit or certificate for traditional consumptive uses would not contain findings of fact unless the permit is protested and a hearing is held.

**Q: DNR charges an annual administrative service fee; the federal agencies are prohibited from paying these fees as our attorneys consider them to be taxes. What is DNR's response?**

A: DNR does send out annual charges for administration of water rights but does not enforce this. Recommend talking to your agency attorneys regarding payment. DNR has received payment from some agencies but not others.

## **FEDERAL RESERVED WATER RIGHT (FRWR)**

**Q: What priority date is granted to a federal agency application subject to a FRWR but filed under State law (that would have had a pre-1966 date), if the agency did not file its claim by July 1966?**

A: The priority date of a FRWR claim filed after 1966 would be the date of the federal reservation. If the feds have a pre-1966 use that is not covered by a FRWR, but did not file for a declaration (during the filing period), then it is too late to file a late declaration. Yes, DNR has a database to review all vested claims (declarations) that were timely filed.

## **DNR DATABASES AND RECORDS**

**Q: Does (or will) DNR's online database X reference other related overlapping permits from DEC, DFG, FERC, etc., including anadromous fish catalogues?**

A: No.

**Q: Does DNR have a state water rights summary of case law cases and status?**

A: DNR's water resources homepage has links to fact sheets and to statutes and regulations. However, there is nothing that summarizes case law to the public.

**Q: Will well water rights pop up in generic water rights searches or can they only be found in the well log database (WELTS)?**

A: Yes, water rights for wells will be listed as subsurface or ground water rights in generic searches.

**Q: is there a user manual to accompany DNR's online information system that was demonstrated in class?**

A: No, there is no manual.