



MEMORANDUM

TO: Mark Myers, Ph.D. Commissioner
Marty Rutherford, Deputy Commissioner
Ed Fogels, Deputy Commissioner

Thru: Brent Goodrum, DMLW Director

From: David W. Schade, MPA, Chief 
Michael Walton, J.D., Natural Resource Manager II 
Water Resources Management Unit Manager

Date: September 29, 2015

Subject: Types of Water Use Authorizations; a primer

In Article 8, Section 3 of the Alaska Constitution, the State of Alaska established that water, wherever occurring in a natural state, is reserved to the people for common use. Section 13 of the Constitution then established that Alaska will use the Prior Appropriation Doctrine subject to statutes established by the Alaska Legislature. That system was codified as Title 46, Chapter 15, cited as the Alaska Water Use Act (Act). This Act gives the Alaska Department of Natural Resources (Department) the duty to manage water appropriation and distribution. The Act, as amended, also gives the Department the authority to Reserve Waters for Instream flow levels or lake levels, and the responsibility to authorize the Temporary Use of Water.

A traditional water right in Alaska is granted in much the same manner as in most western states. The first applicant who applies for the use of water from a given water source, can become the most senior right holder and is given a permit to appropriate water allowing them to perfect the right to use water for a particular beneficial purpose. Water use priority dates are based on the date of water right application receipt by the Department for applications that are accepted for filing. After the permit to appropriate is granted, the applicant has time (a number of years) to build the necessary facilities, and then to operate a system in order to establish actual beneficial use of an amount of water. Upon filing a Statement of Beneficial Use of Water, a permanent water right can be given. This perpetual right can only be lost by voluntary relinquishment or non-use (abandonment or forfeiture) of the water.

A reservation of water is a second type of water right. Water flow within a stream, or a lake level can be reserved to maintain an adequate instream flow reservation or level of water for specific purposes. Water can be reserved for one or more permissible purposes at a particular point or part of a stream or other waterbody, during a certain period of time. Under Alaska Statute 46.15.145, permissible reserved purposes include: Protection of fish and wildlife habitat, migration, and propagation; Recreation and park purposes; Navigation and Transportation Purposes, and; Sanitary and water quality purposes. A reservation of water cannot be voluntarily abandoned, conveyed, transferred, assigned, or converted to another use without the approval of the Department. Private individuals or organizations, as well as governmental agencies may apply for a reservation. Like traditional water rights, the Department adjudicates, certificates and enforces these water rights. However, in order to establish a reservation, unappropriated water must be available for the reservation. This is also a perpetual right, however, current statute requires a review of the reservation if the Commissioner determines that the purpose for the reservation or any finding(s) in the reservation issuance decision have changed, but in any case, at least once every 10 years.

Last, the Department can provide authorization to use unappropriated water on a temporary basis. Temporary Water Use Authorizations (TWUA) are required for the use of any water quantity that is a significant amount of water as defined in regulation, and are at-will authorizations that can be revoked at any time in the public interest or to protect appropriators of record. Further, these authorizations can be issued for up to 5 separate sources of water, but are limited to a maximum duration of 5 years from date of issuance. The term “significant amount of water” is defined in 11 AAC93.035. Temporary Water Use Authorizations do not have a priority date.

For a quick review, see the following Water Authorization Summary:

Water Right	Reservation of Water	TWUA
Water Available Beneficial Use Permit / Certificate Establishes Right Permanent*	Water Unappropriated Rate or Level Protected Certificate Establishes Protection Reviewable (at least every 10 years)	Water Unappropriated Beneficial Use Authorization Temporary Use Revocable (at will)
14976 Certificates** 496 Applications	131 Certificates 394 Applications	762 Authorizations 415 Applications
* As long as beneficial use continues. ** As of 7-24-15 These numbers change daily.		

Alaskan Statistics:

586,412 Square Miles of Land Area

43 % of the Alaska is wetlands

Over 3 Million Lakes > 1 acre

Up to 15 Million Miles of “potentially” navigable waterways ; 167,000 “rivers” in Alaska

More Coastline than the rest of the Continental US.

With the extension of the Aleutian Islands into the eastern hemisphere, it is technically both the westernmost and easternmost state in the United States, as well as also being the northernmost.

Select Cites:

Alaska Constitution

Article 8 - Natural Resources

§ 1. Statement of Policy

It is the **policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.**

§ 2. General Authority

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

§ 3. Common Use

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

§ 13. Water Rights

All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

Chapter 46.15. WATER USE ACT

Article 01. ADMINISTRATION

Sec. 46.15.010 . Determination of water rights.

The Department of Natural Resources shall determine and adjudicate rights in the water of the state, and in its appropriation and distribution.

Sec. 46.15.030. Water reserved to the people.

Wherever occurring in a natural state, ***the water is reserved to the people for common use and is subject to appropriation and beneficial use and to reservation of instream flows and levels of water***, as provided in this chapter.

46.15.040. Right to appropriate.

(a) ***A right to appropriate water can be acquired only as provided in this chapter.***

(b) ***A right to appropriate water shall be obtained by first making application to the commissioner for a permit to appropriate.***

(d) ***The commissioner's issuance of a permit under [AS 46.15.080](#) or of a certificate under [AS 46.15.065](#) or [46.15.120](#) does not represent a guarantee by the state to the permittee or certificate holder that water will be available for appropriation at a certain volume, quality, artesian pressure, or cost.***

Sec. 46.15.050. Priority.

(a) ***Priority of appropriation gives prior right.*** Priority of appropriation does not include the right to prevent changes in the condition of water occurrence, such as the increase or decrease of stream flow, or the lowering of a water table, artesian pressure, or water level, by later appropriators, if the prior appropriator can reasonably acquire the appropriator's water under the changed conditions.

(b) ***Priority of appropriation made under this chapter dates from the filing of an application*** with the commissioner.

(c) Priority of appropriation perfected before July 1, 1966, shall be determined as provided in [AS 46.15.065](#)

Sec. 46.15.080. Criteria for issuance of permit.

(a) The commissioner shall issue a permit if the commissioner finds that:

(1) ***rights of a prior appropriator will not be unduly affected;***

(2) ***the proposed means of diversion or construction are adequate;***

(3) ***the proposed use of water is beneficial;*** and

(4) the proposed ***appropriation is in the public interest.***

Sec. 46.15.080. Criteria for issuance of permit.

(b) In determining the public interest, the commissioner shall consider

(1) ***the benefit to the applicant*** resulting from the proposed appropriation;

(2) ***the effect of the economic activity*** resulting from the proposed appropriation;

(3) ***the effect on fish and game resources*** and on ***public recreational opportunities;***

(4) ***the effect on public health;***

(5) ***the effect of loss of alternate uses of water*** that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;

(6) ***harm to other persons*** resulting from the proposed appropriation;

(7) ***the intent and ability of the applicant to complete the appropriation;*** and

(8) ***the effect upon access to navigable or public water.***

Sec. 46.15.090. Preference in granting permits.

When there are ***competing applications*** for water from the same source, ***and the source is insufficient to supply all applicants***, the commissioner shall give ***preference*** first to ***public water supply and then to the use that alone or in combination with other foreseeable uses will constitute the most beneficial use.***

Sec. 46.15.120. Certificates.

Upon completion of construction of the works and commencement of use of water, **the permit holder shall notify the commissioner** that the appropriator has perfected the appropriation. **If** the commissioner determines that **the appropriation has been perfected** in substantial accordance with the permit, **the commissioner shall issue the permit holder a certificate of appropriation**. The **certificate shall set out any condition** that the commissioner may prescribe by regulation, including conditions that are necessary to protect the prior rights of other persons and the public interest.

Sec. 46.15.133. Notices; objections.

(a) If the commissioner proposes a sale of water or receives an application for appropriation or removal, the commissioner shall prepare a notice containing the location and extent of the proposed sale, appropriation, or removal, the name and address of the applicant, if applicable, and other information the commissioner considers pertinent. **The notice shall state that within 15 days of publication or service of notice, persons may file with the director written objections, stating the name and address of the objector, and any facts tending to show that rights of the objector or the public interest would be adversely affected by the proposed sale, appropriation, or removal.**

Sec. 46.15.133. Notices; objections.

(c) **Within 15 days of publication or service of notice, an interested person may file an objection**. The commissioner may hold hearings upon giving due notice and shall grant, deny, or condition the proposed sale or application for appropriation or removal in whole or in part **within 30 days of receipt of the last objection** or, if the commissioner **elects to hold hearings, within 180 days of receipt of the last objection**. Notice of the order or decision shall be served personally or mailed to any person who has filed an objection.

(d) If no objection is filed, the commissioner may proceed to make a determination upon the application for appropriation or removal or the proposal for sale.

Sec. 46.15.145. Reservation of water.

(a) The state, an agency or a political subdivision of the state, an agency of the United States or a person **may apply to the commissioner to reserve sufficient water to maintain a specified instream flow or level of water** at a specified point on a stream or body of water, or in a specified part of a stream, throughout a year or for specified times, for

- (1) protection of fish and wildlife habitat, migration, and propagation;**
- (2) recreation and park purposes;**
- (3) navigation and transportation purposes; and**
- (4) sanitary and water quality purposes.**

(b) Upon receiving an application for a reservation under this section, the commissioner shall proceed in accordance with AS 46.15.133.

c) **The commissioner shall issue a certificate** reserving the water applied for under this section **if** the commissioner finds that **(1) the rights of prior appropriators will not be affected by the reservation; (2) the applicant has demonstrated that a need exists for the reservation; (3) there is unappropriated water in the stream or body of water sufficient for the reservation; and, (4) the proposed reservation is in the public interest.**

(d) **After the issuance** of a certificate reserving water, **the water** specified in the certificate **shall be withdrawn from appropriation** and the commissioner shall reject an application for a permit to appropriate the reserved water.

(e) **A reservation under this section does not affect rights in existence** on the date the certificate reserving water is issued.

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(f) At least ***once each 10 years the commissioner shall review each reservation*** under this section to determine whether the purpose described in (a) of this section for which the certificate reserving water was issued and the findings described in (c) of this section still apply to the reservation. If the commissioner determines that the purpose, or part or all of the findings, no longer apply to the reservation, ***the commissioner may revoke or modify the certificate reserving the water after notice, hearing when appropriate, and a written determination that the revocation or modification is in the best interests of the state.***

Sec. 46.15.180. Crimes.

(a) A person may not

(1) construct works for an appropriation, or divert, impound, withdraw, or use a significant amount of water from any source without a permit, certificate of appropriation, or authorization issued under this chapter;

(2) violate an order of the commissioner to cease and desist from preventing any water from moving to a person having a prior right to use it;

(3) disobey an order of the commissioner requiring the person to take steps to cause the water to move to a person having a prior right to use it;

(4) fail or refuse to install meters, gauges, or other measuring devices or control works;

(5) violate an order establishing corrective controls for an area or for a source of water;

(6) knowingly make a false or misleading statement in a declaration of existing right.

(b) A person who violates this section is guilty of a misdemeanor.

(c) Crimes under this section are in addition to any other crimes provided by law.

Sec. 46.15.255. Enforcement and costs.

(a) In addition to a penalty imposed under [AS 46.15.180](#) for violation of an order issued under this chapter, ***the commissioner may***

(1) remove or abate unpermitted works of appropriation, diversion, impoundment, or withdrawal;

(2) install corrective controls or control works; and

(3) seek enforcement of the order by filing an action in the superior court.

(b) A person who violates an order issued under [AS 46.15.180](#) is liable for all costs of removal, abatement, or installation and for court costs and attorney fees incurred by the state in seeking enforcement of the order.

11 AAC 93.035. Requirement to apply for the use of a significant amount of water

(a) A significant amount of water is that amount of water for which an application for a water right or an application for a temporary water use authorization is required, as described in (b) of this section.

(b) A person shall file an application for a water right under 11 AAC [93.040](#) or for a temporary water use authorization under 11 AAC [93.220](#) before

(1) the consumptive use of more than 5,000 gallons of water from a single source in a single day;

(2) the regular daily or recurring consumptive use of more than 500 gpd from a single source for more than 10 days per calendar year;

(3) the non-consumptive use of more than 30,000 gpd (0.05 cubic feet per second) from a single source; or

(4) any water use that may adversely affect the water rights of other appropriators or the public interest.

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(c) A person using ***less than the amount of water described in (b) of this section acquires no water right or priority*** unless an application is filed and a permit or certificate is issued under 11 AAC [93.035](#) - 11 AAC [93.140](#). The use of water without a permit or certificate is subject to appropriation by others, and the use of water without a water right is subject to curtailment in order to supply water to lawful appropriators of record or to protect the public interest.

11 AAC 93.040. Application for a water right (a) A person may not lawfully appropriate a significant amount of water of the state without first obtaining a permit to appropriate, a certificate of appropriation, or a temporary water use authorization under this chapter.

(b) An application for a water right must be made on a form provided by the department. The form must be completed in accordance with the instructions furnished to the applicant.

(c) An application must include the following items:

- (1) the applicable application fee prescribed in [11 AAC 05.010](#);
- (2) evidence that the applicant has a present possessory interest in the property where the water is to be beneficially used, as shown by a copy of the deed, patent, license, leasehold agreement, mining location certificate, or other instrument, or a copy of a completed application that has been filed with the appropriate agency to acquire permission for the use of federal, state, or municipal property;
- (3) a map identifying (A) the section, township, range, and meridian, and showing the property boundary, for the point of water withdrawal, impoundment, or diversion; (B) the route of water transmission; (C) the point of water use; and (D) if water is to be returned to a stream or water body, the point of return flow;
- (4) evidence that the applicant has obtained or is in the process of obtaining a right of access to the property where water is to be withdrawn, impounded, or diverted, and over which water is to be transported both to the point of use and to the point of return flow;
- (5) repealed 8/20/2004;
- (6) a legal description of the point of withdrawal, diversion, or impoundment; the point of water use; and, if water is to be returned to a stream or water body, the point of return flow; the legal description must include meridian, township, range, section, and aliquot parts, or the lot, block, and subdivision, or survey number, as appropriate;
- (7) a description of the source as being either surface or ground water; the description must identify the name of the surface water source or the supply well log or well data for ground water, if available;
- (8) a description of any impoundment, diversion, or withdrawal structures, including dimensions, construction materials, plans and specifications, and operation plans, and an application to construct or modify a dam, as defined in [AS 46.17.900](#), if [11 AAC 93.171](#) requires an application;
- (9) a description of the nature of the water use and times of the year during which water is to be used;
- (10) a statement of the dates water use is expected to begin and when the maximum amount will be beneficially used;
- (11) a statement of beneficial use, signed before a notary or postmaster, if water is already in use at the time of application;
- (12) an application for a right-of-way, filed in accordance with [AS 38.05.850](#), if access to or across state land is needed;

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(13) a statement of the quantity of water requested, with documentation and calculations justifying the request if either the use or quantity is different from those listed in (d) of this section; and

(14) for a water use of more than 100,000 gpd (0.15 cfs) from a stream, a description of the mean annual flow, or mean monthly flow if available, using the best available data, or, if data are not available, an estimate of mean annual flow using hydrologic methods that the department determines to be reasonably accurate.

(15) Repealed 12/27/2012.

(d) Standard water use quantities are

- (1) single-family home, fully plumbed: 500 gpd;
- (2) single-family home, partially plumbed: 250 gpd;
- (3) single-family home, unplumbed: 75 gpd;
- (4) duplex or triplex: 1,000 gpd;
- (5) four-plex and larger housing: 250 gpd per unit;
- (6) mobile home park: 250 gpd per trailer;
- (7) motel or resort: 150 gpd per room;
- (8) cattle, other than dairy cows: 12 gpd per animal;
- (9) dairy cows: 35 gpd per animal;
- (10) horses: 15 gpd per animal;
- (11) sheep: 2 gpd per animal;
- (12) goats: 3 gpd per animal;
- (13) hogs: 4 gpd per animal;
- (14) poultry or rabbits: 0.5 gpd per animal;
- (15) dog (kennels): 1.0 gpd per animal; and
- (16) commercial irrigation: 0.5 acre feet per year per acre.