



403 FW 1, Policy, Objectives, and Responsibilities

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1.1 Purpose. The purpose is to promulgate policies, roles, and responsibilities applicable to the Service's water rights management program.

1.2 Objectives. Objectives are to obtain water supplies of adequate quantity and quality, and the legal rights to use that water, for development, use, and management of Service lands and facilities, and for other congressionally authorized objectives such as protection of endangered species and maintenance of instream flows. These objectives can be achieved by:

- A.** Reviewing and documenting the need for and use of water at field stations and research laboratories.
- B.** Identifying and evaluating water rights appurtenant to, or which may be applied to beneficial use on, lands proposed for protection, restoration, enhancement, development, or acquisition.
- C.** Asserting appropriative, riparian, vested, and reserved water rights in proper administrative and judicial forums.
- D.** Submitting applications for new State appropriative water rights and changes to existing State appropriative water rights according to State law.
- E.** Providing technical and evaluation data to the Solicitor and Department of Justice to resolve water rights controversies through negotiation and litigation.

F. Identifying and pursuing opportunities to acquire water through mitigation, settlement of litigation, legislation, or other means to satisfy Service objectives.

G. Communicating water rights technical and policy guidance to project leaders and Service managers.

1.3 Policy. It is the Service's policy to comply with State laws, regulations, and procedures in obtaining and protecting water rights, both for Service facilities and for trust fish and wildlife resources on lands not owned by the United States, except where application of State statutes and regulations does not permit Federal purposes to be achieved. Federal reserved water rights will be quantified and asserted when necessary to accomplish the primary purpose of the reservation. Water rights shall be purchased if essential to Service activities and not otherwise available. Water rights appurtenant to lands proposed for protection, restoration, enhancement, development, or acquisition will be identified and evaluated early in the planning process, and proposed actions will not proceed until water rights have been acquired. All water rights associated with water uses by permittees will be secured in the name of the United States, Fish and Wildlife Service, and permittees may be issued special use permits allowing the use. Service water rights shall be managed to ensure that they are not lost and water use/distribution systems will be designed and operated for efficient use of water. The Service shall cooperate with the States on all matters related to water use and water rights and will seek to resolve conflicts through negotiation, in coordination with the Solicitor's Office, as appropriate. However, if negotiations prove unproductive, other courses of action, including litigation, will be pursued.

1.4 Responsibilities. This section defines the water rights responsibilities of various organizational levels of the Service.

A. Director. The Director has the authority to acquire, perfect, and protect water rights pursuant to the provisions of State and Federal law and in conformity with applicable interstate compacts and international treaties, and to take the necessary steps, including litigation, to maintain such water rights in good standing.

B. Regional Director. The Regional Director establishes Regional water rights policy. The Regional Director designates a Regional Water Rights Manager who has management responsibility for the water rights program.

C. Assistant Regional Director. At the discretion of the Regional Director, the appropriate Assistant Regional Director provides technical assistance and management support for the water rights management program. The Assistant Regional Directors for Refuges and Wildlife, Fisheries and Federal Aid, and

Ecological Services ensure that use of water under the Service's water rights program is consistent with laws and regulations.

D. Regional Water Rights Manager. The Regional Water Rights Manager is appointed by the Regional Director. The Regional Water Rights Manager is responsible for managing Service water rights in the Region. Duties may include:

- (1) Providing guidance on policy and technical issues that may affect the Service's water rights.
- (2) Coordinating water rights issues with the Solicitor's Office, Federal and State agencies, and private entities.
- (3) Providing the Solicitor's Office and the Department of Justice with water rights data for administrative proceedings, litigation, and negotiation as needed.
- (4) Representing the Regional Director in meetings, hearings, and negotiation sessions on water rights issues.
- (5) Identifying and quantifying Federal reserved water rights, in consultation with the Solicitor's Office.
- (6) Filing applications required to obtain new water rights or make changes to existing water rights administered under State law.
- (7) Filing objections and protests with the appropriate authority when other appropriators file applications for new water rights or changes to existing water rights that may adversely affect Service water rights.
- (8) Reviewing annual water management plans and other reports, as necessary, to ensure that water use at Service facilities is in accordance with each facility's water rights.
- (9) Recommending changes in water management practices, as appropriate.
- (10) Preparing and/or reviewing and submitting all legally required water rights/use reports, documents, and data.
- (11) Identifying and evaluating water rights proposed for acquisition.

E. Project Leader. The Project Leader is responsible for the management and documentation of all water use applicable to, or on, the field station (and at research laboratories). The Project Leader:

- (1)** Advises the Regional Water Rights Manager, and the appropriate Assistant Regional Director, of the need for new water rights, the need to change existing rights, threats to the facility's water rights or water supply, and any other water rights activities which could impact the facility's water resources.
- (2)** Maintains records of water use sufficient to document beneficial use of water.
- (3)** Ensures that water use is in accordance with the terms of the water right.
- (4)** Submits an annual water use report and management plan to the appropriate Assistant Regional Director. The Regional Water Rights Manager reviews the report/plan to ensure compliance with the facility's water rights.
- (5)** Submits draft water rights applications, State-required water use reports, and other water rights documents through the appropriate Assistant Regional Director to the Regional Water Rights Manager.



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.



403 FW 3, Acquisition and Protection

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3.1 Acquisition of Water Rights. The Service acquires water rights in the Western States in several different ways. If the lands were withdrawn from the public domain, the associated Federal reserved water rights must be quantified and asserted when the watershed or basin is included in a general stream (McCarran Amendment) adjudication. (See [403 FW 2.1A\(a5\)](#).) Water rights for acquired lands are usually obtained under State law. In Eastern States, regulation of water use, except for water quality purposes, has not been common or extensive, although a number of these States have implemented permit systems.

A. Other Entities and Private Lands Programs. The Service also works with other entities to acquire water rights and protect water supplies for wildlife habitat purposes. Under Partners for Wildlife and other private lands programs, Federal funds are used to develop, enhance and restore wetlands on private lands, and the Service assists landowners in acquiring State water rights for the projects.

B. Water Rights Appurtenant to Acquired Lands. When the Service acquires land, it also acquires appurtenant water rights unless those rights are reserved by the grantor, or are outstanding in third parties. Diversion and use of water under those rights is limited to the historic practices; in other words, those rights should be utilized to divert the same quantities of water for the same purposes, during the same periods of use, and at the same points of diversion and places of use. If a change in some element of an existing water right (such as purpose or place of use) is necessary to carry out Service management programs, a change application must be submitted to and approved by the State before the change is implemented. A change in the purpose, place of use, or point of diversion of an acquired right may be denied or conditioned to prevent injury to another appropriator using water from the same source.

C. Acquisition of New Water Rights. In most Western States, a State agency, commonly designated as the State Water or Natural Resources Department or State Engineer, has responsibility for allocating and administering the waters of the State. That office reviews and approves or disapproves applications for new water uses, appoints river commissioners or water masters to supervise the distribution of water in accordance with water rights of record, and maintains water rights and use records. If the Service does not have water rights sufficient for an existing or proposed project, it will seek to acquire the necessary rights. An approved permit to appropriate water must be received before any construction is begun or water actually used.

D. Instream Flow. Increasing demands for water have been accompanied by greater concern for maintaining streamflows for fish and wildlife, water quality, and recreational purposes, as well as for aesthetic reasons. These flows are being protected through a variety of mechanisms, such as granting water permits for an identified flow rate, imposing minimum streamflow conditions on new permits, and closing stream systems to new appropriations. Many Western States now provide mechanisms by which existing consumptive water rights may be changed, either temporarily or permanently, to instream water rights.

E. Fish and Wildlife Coordination Act and Endangered Species Act. In some States, the Service, under its Fish and Wildlife Coordination Act and Endangered Species Act responsibilities, is working with other parties to identify and maintain streamflows needed for wildlife purposes. Through the consultation process, the Service may request or require project sponsors to ensure passage of minimum streamflows for spawning, rearing, and maintaining fishery resources, including endangered and threatened fish species, and for maintaining riparian habitats; the identified water flows can sometimes be protected through State water rights systems.

3.2 Water Rights Protection. Because they are valuable property rights, and critical to meeting resource management objectives, Service water rights shall be managed to ensure that they are not diminished in quantity or quality, or lost.

A. Identification of Water Rights. The Service will maintain a systematic program to identify all water rights associated with each Service facility.

(1) Historic water use records, warranty deeds, aerial photos, and other documents will be reviewed in order to establish an accurate inventory of all vested, riparian, appropriative, and Federal reserved water rights. A water rights map may also be prepared for each facility.

(2) Water rights associated with proposed acquisition projects will be identified early in the planning process. An analysis of the rights, and of their utility for fulfilling management objectives, will be completed prior to acquisition.

B. Use of Water Rights. To a great extent, the protection and preservation of Service water rights is accomplished at the place of use.

(1) Facility managers must comply with the terms and conditions of their water rights if the rights are to remain in good standing. Water must be utilized for the correct purpose at the designated place of use as indicated on the water permit or license, and it must be used efficiently, so as to avoid waste. All water diverted and impounded should be properly measured and a record of water use maintained to document the beneficial use under each water right.

(2) The facility manager must also be alert to the activities of other water users, such as illegal or unauthorized diversions of water, dumping of sewage or toxic wastes, flood control hazards, and drainage which might have adverse impacts upon the quantity and/or quality of existing or future facility water supplies.

(3) Public notices in local newspapers must be reviewed by facility managers to determine if new applications for water rights would conflict with facility water use and/or rights. If an application may do so, the Regional Water Rights Manager should be promptly notified so that an objection or protest to granting a water permit for that application can be filed with the appropriate State agency.

(4) All water rights permits for uses of water on Service lands will be filed in the name of the United States, Fish and Wildlife Service. Permittees may be issued special use permits allowing them to use water under those rights.

C. Adjudication of Water Rights. When the United States is properly joined in a general stream adjudication, pursuant to the McCarran Amendment, all Federal agencies, including the Service, must file statements of claim for Federal reserved, State appropriative, vested, and riparian rights. Facility water use records are valuable tools for documenting Service water rights. Technical engineering and hydrological data, including computer models, and biological information to support the beneficial nature of the Service's water use, are also important in preparing water rights claims. The Service works closely with the Solicitor's Office and the Department of Justice in asserting and defending its water rights.