

# Navigating Nebraska's Water Rights Administrative Process

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## Abstract

The Niobrara National Scenic River, located in north-central Nebraska, provides a valuable case study of the challenges facing federal agencies responsible for managing rivers under the National Wild and Scenic Rivers system. In 1991, Congress designated 76 miles of the Niobrara River as a unit of the national Wild and Scenic Rivers System. The river is known for its beauty, biologic significance, and superb canoeing.

Recently, the National Park Service has become concerned about new surface water diversions and groundwater appropriations affecting instream flows, particularly during the summer recreational boating season. The purpose of the Wild and Scenic Rivers Act is to protect selected rivers for the benefit and enjoyment of present and future generations. Based on the language of the act and its legislative history, it is generally understood that the act creates unquantified federal water rights. The amount of the water right depends upon unappropriated flows at the time of designation and the values for which the river was set aside. The National Park Service is concerned that new appropriations will diminish these values.

The challenge for the National Park Service is that Nebraska refuses to recognize its federal water right. By failing to recognize the water right, the state has denied the federal agencies the ability to participate in the state administrative process and the ability to protect the values for which the river was designated. Protecting instream flows for a wild and scenic river in a state where the state legal system does not recognize federal water rights is an unanticipated challenge for many river managers.

This presentation provides important lessons for river managers on navigating the state water right administrative process, and understanding the tools available to protect rivers from future appropriations when the state system is inadequate.

## **Efficient Use of Water by Cities**

Drew Beckwith<sup>1</sup>

Three sources of water are generally cited for to support continued population growth in the West: new diversions from rivers, transfers from agriculture to cities, or reduced use through conservation. Municipal conservation is the cheapest of the three, and often has the least impact on Western rivers.

This presentation will describe the potential for conservation to reduce future demands, provide examples of implementation (including rate structures, water loss reduction, and indoor and outdoor best practice programs), and discuss Colorado state-level resources available to develop and implement conservation plans. Important concerns and issues regarding water conservation will also be addressed, including cost to the consumer, water quality, and impacts to return flows.

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# FERC 101

## (Who, What and How)

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River Management Society

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### **Abstract**

The Federal Energy Regulatory Commission (FERC) is an Independent Commission that sets and regulates the process and procedures for involvement during a formal license proceeding. The objectives of this overview are to provide interested participants an understanding of: 1) **WHO** FERC is; 2) **WHAT** this strictly regulated process requires in terms of participation; and 3) **HOW** participants can prepare and participate to succeed in a proceeding. The scope of the presentation will cover process as well and identify key points in a proceeding to focus their time and effort in order to effectively participate.

## **Proposed Panel Titled: Great River, Got Water?**

### **Bill Hansen, National Park Service**

Rivers throughout the United States are facing increasing pressures due to changing climates, drought, urban and energy development, and over allocation and it is important to understand the potential tools that may be available to protect instream flows in your river. Our panel will present an overview of these challenges and describe three tools for consideration by river managers to protect and maintain instream flows important to fisheries, aquatic communities, wildlife, riparian vegetation, recreational uses and local economies. Panelists from the National Park Service, State of Colorado, Department of the Interior and The Nature Conservancy will discuss protection tools including state law, federal law and administrative mechanisms that may provide protection of instream flows. The presentation should compel each river manager to evaluate whether flows in their river are truly protected.

**Panelists:** William Hansen (National Park Service), Ted Kowalski (State of Colorado), Peter Fahmy (DOI - Office of the Solicitor) and Robert Wigington (The Nature Conservancy)

### **Ted Kowalski (State of Colorado) Colorado Water Conservation Board**

My presentation will focus on the State of Colorado's tools available for protection of in stream values. I will present on the Recreational In-Channel Diversions, instream flow water rights, and alternative management tools that involve the State as a partner with other interested federal agencies and stakeholders (i.e. alternatives to Wild and Scenic Rivers designation, ESA Recovery Implementation Programs). I will present on the nuts and bolts of these different types of state tools for river protection. In addition, I will focus on the benefits and drawbacks of using these state tools. Finally, I will discuss how these state tools work with various tools that the federal agencies and stakeholders have available for flow protection.

### **Federal Reserved Water Rights for Instream Flow Protection**

Peter Fahmy, Attorney-Advisor, Office of the Solicitor, DOI<sup>2</sup>

Since their inception, federal reserved water rights have proven to be a powerful legal tool for protecting instream flows on federal lands. Whether created by virtue of a general statute, such as the Wild and Scenic Rivers Act, or individual statutes establishing national park and monuments, wilderness areas, and national conservation areas, this class of water rights is unique in the universe of traditional water rights based on state laws. This presentation will review the genesis of the underlying legal doctrine from which these rights are derived, and then focus on their unique challenges associated with defining the parameters of each right. Finally, a sampling of how these rights have been established, via adjudication and/or settlement, and

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thereafter used by federal river managers to protect instream flows in a wide variety of settings will be presented and discussed.

## **Administrative Tools for Protecting River Flow Regimes**

Presentation by Robert Wigington

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This presentation will follow-up the panel titled: Great Rivers, Got Water. This panel will discuss state law, federal law and administrative mechanisms for legally protecting river flow regimes. I will present three administrative mechanisms that are being applied in the Upper Colorado River Basin: 1) programmatic biological opinions on water development and operations, 2) alternatives to determinations of wild & scenic suitability and to consequent wild & scenic designation, and 3) interstate agreements for shepherding forgone water use to forestall compact curtailment.

## **Water Rights vs. Reservations of Water**

David W. Schade ADNR/MLW/ Water Resources Section

David W. Schade will present an overview of the concepts of traditional water rights vs the more recent concept of Reservations of Water with a review of west and east coast issues.

In the current times, many systems have allocated 100 per cent of the water, yet there is a growing recognition that wildlife must have water to survive. In many states, including Alaska, water “rights” can be held which keep the water in the river/lake for wildlife and other purposes. However, that does not remove the conflicts which are already apparent, and at times, conflicts and priorities for the future.

## **Water Rights and Public Uses of River and Lakes**

David W. Schade ADNR/MLW/ Water Resources Section  
Risa Shimoda / RMS Executive Director

This discussion will focus on the conflicts of traditional water rights and the public trust doctrine of public use of waters.

An overview of a representative sample of different States current status with Public Trust and how that can /is in conflict with traditional water rights will be discussed. While the presentation/style has not been fully developed, it is anticipated that an overview will be given by David W. Schade for western state and Risa Shimoda for eastern States, with participant discussion to follow.

## **Getting the Most out of the Form 80: Tips for Quantifying Recreation Use & Gathering Better Data**

Mark I. Ivy, PhD, Federal Energy Regulatory Commission

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Recreation use data is gathered at over 1000 FERC licensed hydropower projects nation-wide on a six year cycle. In 2014 licensees will be collecting data to complete their Form 80s (the form used to report visitor use and the degree to which recreation amenities are being used to capacity) for the next reporting cycle. This data can help river managers and enthusiasts understand the recreation use that is occurring both in the water and along the banks of rivers with FERC licensed projects.

This workshop will introduce participants to tools that can be used to gather visitor use and recreation needs data, provide hands-on experience estimating capacity of recreation amenities, explain recent modifications to the Form 80 and how Form 80 data is used for compliance and re-licensing. We will travel to a nearby reservoir to assess recreation capacity for a variety of recreation amenities, to explore methods for estimating recreation use, and to discuss the types of recreation enhancements typically provided at hydropower projects which are licensed by FERC. The classroom portion of the workshop will provide in-depth discussion of visitor counting technologies and methods, of why managers should care about visitor needs and perceptions, and of the Form 80 and how managers can partner with licensees to gather data that will meet the requirements of the Form 80 as well as inform management strategies.