SECRETARY OF THE ARMY
WASHINGTON

12 MAY 2014

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Directive 2014-08 (Water Rights Policy for Army Installations in the United States)

1. Reference Memorandum, Assistant Secretary of the Army (Installations, Logistics and Environment), 24 Nov 95, subject: Policy Guidance on Water Rights at Army Installations in the United States.

2. Purpose. The Army requires enough water to carry out its missions without significant disruptions. This directive, which supersedes the reference, sets policy and assigns responsibilities for identifying, asserting and preserving the Army's water rights.

3. Background. Water is scarce throughout much of the Western United States and becoming scarcer in some parts of the Eastern United States. Increasing demand for water to support growing populations and economic development places stress on the same supplies of ground and surface water that Army installations depend on to fulfill their missions. Over the past decade, several Army installations have become involved in litigation over water rights. As competition for water increases, more Army installations are likely to become involved in disputes over water. Consequently, it is critical that we protect the Army's water rights and its ability to carry out its missions.

4. Applicability. This policy applies to all Army installations in the United States. It is not applicable to U.S. Army Corps of Engineers' Civil Works projects and facilities.

5. Policy. Effective immediately:

a. the Army will acquire and maintain water rights for both ground and surface water consistent with mission requirements;

b. the Army will identify, assert, defend and preserve its water rights to the maximum extent possible under State and Federal law to sustain mission capability; and

c. Army installations will locate, record and retain documentation related to water rights.

6. Reporting. By 31 December of each calendar year, the Office of the Assistant Chief of Staff for Installation Management (OACSIM) will report to the Office of the Assistant Secretary of the Army (Installations, Energy and Environment) on the current state of the Army's water rights. This report will include the following topics: an assessment of the sufficiency of existing water rights to meet mission requirements; the state of

the sufficiency of existing water rights to meet mission requirements; the state of documentation to assert, maintain and defend the Army's water rights; and a current summary of all legal challenges to the Army's water rights.

7. Command Policy and Guidance. OACSIM will issue implementing guidance to execute this policy no more than 180 days from the date of this directive and will coordinate the guidance with the Environmental Law Division, Office of the Judge Advocate General, before it is issued. Enclosure 1 contains a legal framework for water rights to aid OACSIM, commands and command counsel in identifying, asserting and preserving water rights. Enclosure 2 offers a nonexclusive list of issues to address in the guidance.

8. Proponent. The proponent for this policy is OASCIM, who will incorporate the guidance in this directive into the next revisions of Army Regulation 405-80 (Management of Title and Granting Use of Real Property) and Army Regulation 420-1 (Army Facilities Management), as appropriate.

9. Rescission. This directive is rescinded upon publication of the revised regulations.

John M. McHugh

Encls

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## LEGAL FRAMEWORK FOR WATER RIGHTS

A water right is the legal right to use water from a source. Water rights are distinct from contractual rights of purchase. Federal installations own and can obtain water rights in support of their missions. The analysis of the status of Army water rights is specific to each installation, highly specialized and dependent on careful legal review by the installation's Staff Judge Advocate.

Army water rights may arise from State or Federal law. State water rights are typically obtained through acquisition. Although the Army is part of the Federal Government, many of its installations' water rights are held pursuant to State law. The character of these State water rights depends on the legal doctrine each State follows. In general, the Eastern States assign "riparian" water rights: all landowners whose property adjoins a body of water have the right to make reasonable use of it. The Western States use a system called "prior appropriation," which assigns water rights prioritized by the date on which a person first put a quantity of water to beneficial use. In these prior appropriation States, ownership of land is divorced from ownership of water rights. Some States have hybrids of these two systems. Each State's specific laws are unique and should be reviewed by the installation legal counsel.

Federal water rights differ significantly from State water rights and, most critically, take priority over State rights. Army installations may have obtained Federal water rights in one of the following ways:

- Federal Reserved Water Rights. When the Federal Government withdraws land from the public domain to establish a reservation or installation, courts infer the intent to reserve unappropriated water to fulfill the reservation's established purpose, both presently and in the future.

- Cession. On land ceded to the Federal Government, the cession authorization may include water rights.

- Preemption. When Congress has clearly and specifically preempted State water law, either expressly or by necessary implication, on lands that are not reserved, the Federal installation will have senior water rights.

For Federal reserved rights, uses of water to fulfill the "primary purpose" of the reservation or installation include all municipal and industrial uses of water necessary to sustain a self-contained community, including water adequate for the morale and welfare needs of the Army community. Federal reserved rights may also change over time, depending on the installation's future needs.

A final significant difference between Federal and State water rights is that Federal reserved water rights clearly may not be lost by nonuse. Under the law of some prior appropriation States, a long period of nonuse may raise a rebuttable presumption of intent to abandon a State right. Reserved rights are not subject to abandonment. It is

not clear, however, whether other water rights owned by the United States are subject to State laws on abandonment.

Although the Federal Government is generally immune to lawsuits from the States, the McCarran Amendment, Title 43 United States Code section 666 (1988), provides a limited waiver of sovereign immunity for "general stream adjudications." In this situation, individual States can require the United States to quantify, assert and define its water rights. During an adjudication, a court will consider evidence to establish the existence of water rights within a watershed or basin. The result of the adjudication is a decree fixing the amounts, relative priorities and specific details of water rights. However, even when such rights have been fixed, Federal reserved rights may still trump state water rights, and the appropriation of water may have to be revisited, depending on the Army's needs.

Timely and thorough identification and characterization of an installation's water rights are important. State water rights must be preserved to prevent arguments that they have been abandoned. Generally, state adjudications of water rights also require the assertion of water rights claims to be brought within a certain timeframe. If the Army fails to assert or preserve its water rights in a timely manner, it may be in jeopardy of losing those rights.

The policy in this directive requires that the Army identify, assert, defend and preserve its water rights to the maximum extent possible under State and Federal law. The complexity and diversity of water rights means that installation commanders must consult with their Staff Judge Advocates to determine what legal rights and limitations apply at their specific installation to ensure continued access to a sufficient water supply to carry out the Army's missions. The Office of the Judge Advocate General, Environmental Law Division is available to coordinate guidance at the command level and specific implementation instructions at the installation level.

The assertion and defense of Army water rights must be coordinated, through the installation and land holding command's Office of the Staff Judge Advocate or legal office, with the Chief, Environmental Law Division, U.S. Army Legal Services Agency. The Environmental Law Division represents the Department of the Army in litigation (and some administrative proceedings) involving water rights and other environmental and natural resources matters. The U.S. Department of Justice has the primary responsibility for representing Federal agencies in litigation. Consequently, the Environmental Law Division will coordinate as necessary with the Justice Department and Office of the Army General Counsel on all matters related to Army water rights.

## ISSUES TO ADDRESS IN GUIDANCE

Here is a nonexclusive list of issues the Office of the Assistant Chief of Staff for Installation Management (OACSIM) will include in its water rights guidance to commands. Commands may issue further guidance to aid in local implementation as they deem necessary. Local implementation should also address any additional Federal, State or regional issues that may be unique to the command's particular missions and circumstances.

1. Importance of the Army Water Rights Policy. Each command must emphasize the critical importance that sufficient water rights and access to water may have on the command's ability to continue to carry out its missions in the future.

2. Assignment of Responsibilities. Each command must clearly establish who is responsible for collecting and maintaining records; analyzing current and future water needs and supply; analyzing water rights necessary for continued access to a sufficient supply of water; and asserting, maintaining and defending water rights and access.

3. Federal and State Water Rights Laws. OACSIM's guidance should include a summary of Federal and State water laws, and also direct appropriate legal counsel to supplement this summary with State and regional laws and issues that may be pertinent to each installation or activity. The guidance should discuss potentially relevant Federal laws, such as the Endangered Species Act of 1973.

4. Analysis of Existing Water Rights. All installations or activities must analyze the adequacy of their current and future water supply needs, rights and access. Such rights and access should be sufficient to continue essential activities under drought or other shortage conditions and to support increased demand due to mobilization, contingency operations or increases in population or missions. Attention should be paid to actions necessary to maintain existing water rights, including planning and continued beneficial use to avoid abandonment or loss. Likewise, any privatization of Army-owned water systems must be accomplished in such a manner as to not jeopardize the Army's water rights. If additional water access or rights are necessary, the analysis should also include what other sources of water are available and how to acquire the rights or access to that water.

5. Identification of Supporting Data and Records. The guidance should address the importance of collecting and maintaining sufficient evidentiary records to assert, maintain and defend the Army's water rights. Guidance should be provided on how to locate, record and retain existing and future water rights documentation. As applicable, this documentation should include information concerning the dates, locations, means, rates of diversion and uses of water, as well as documents establishing the acquisition and history of all water rights acquired (for example, executive orders, decrees or permits).

6. Maintenance of Records. OACSIM should require commands to initiate procedures for permanently maintaining such records. These procedures should clearly identify who is responsible for the maintenance, how the maintenance will be monitored to ensure that it is carried out, and how such records will be passed on to successors. The transfer of documents is especially important given the indefinite number of years during which the Army will need to assert, maintain and/or defend its water rights. Effective retention of information collected, now and in the future, will be key to protecting the current and future property interests of the United States Army.