

PUBLIC NOTICE

Pursuant to § 11-8-II(A)(2)(e) of the Wind River Water Code, the Wind River Water Resources Control Board at its November 6, 1996 meeting approved the following proposed regulations for public comment and review. These regulations shall be published pursuant to § 11-8-VII(C) of the Water Code. The deadline for submitting written comments on the regulations is extended until the close of business on January 10, 1997. Public meetings on the proposed regulations shall be held on December 16, 1996 at Eagle Hall in St. Stephens, December 23, 1996 at the Wyoming Indian High School Tech. Center in Ethete, December 30, 1996 at Big Wind Hall in Crowheart, and January 6, 1997 at Rocky Mountain Hall in Fort Washakie. All public hearings will be from 7:00 to 8:00 p.m. All written comments and the transcripts of the hearing shall be made a part of the record.

Amend Chapter 1, General Provisions, of the existing Water Board regulations by inserting in § R-11-8-100 the following definitions in the appropriate alphabetical order and renumbering all definitions accordingly:

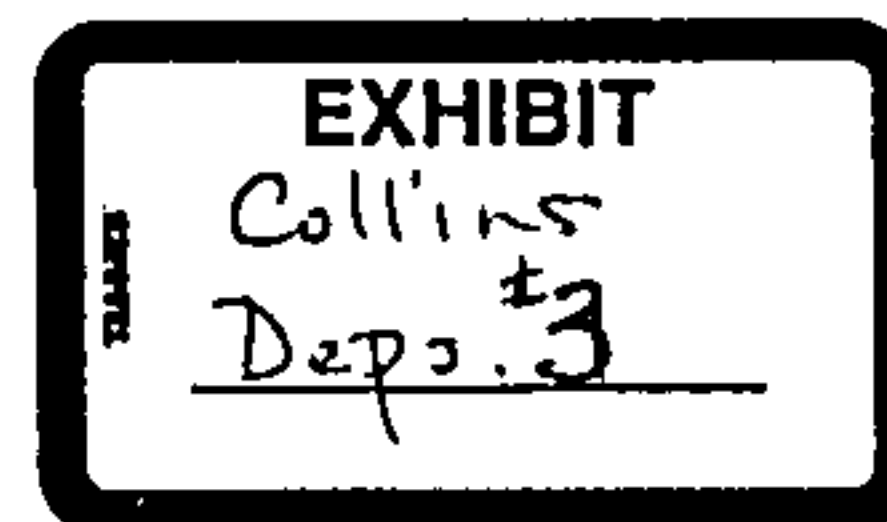
- ___ "Encumbrance" means a deed of trust, mortgage, security agreement, or any other security device which creates a security interest in any land including any water permitted therefore, where a use permitted under this code occurs.
- ___ "Encumbrancer" means the owner or holder of an encumbrance.

Amend Chapter 4, Permits, of the existing Water Board regulations by replacing subsection R-11-8-400(d) with the following:

d. Purchasers or Transferee of Individual Lands. A person who is a successor-in-interest to lands held in individual ownership, including any encumbrancer, for which 1868 Tribal water use has been permitted under these regulations is eligible for a water permit pursuant to the terms of the Water Code and the regulations. Proposed purchasers or transferees may apply for a permit prior to the closing of such transaction. If the land, including any water permitted therefore, is or will be subject to any encumbrance, the permit shall include the name and address of the encumbrancer at the written request of an encumbrancer. Any permit approved to a successor-in-interest prior to the completion of the land transfer shall provide that the permit shall become effective on completion of the transfer.

Amend Chapter 4, Permits, of the existing Water Board regulations by inserting a new subsection R-11-8-401(b)(iv) as follows:

iv. Encumbrancers. In the event the holder of a permit under the Water Code breaches the terms of an encumbrance, the encumbrancer may exercise any rights provided therein. In the event the encumbrancer is successor to the holder of a permit as a result of such actions, the encumbrancer shall be



substituted for the permittee on the permit provided the encumbrancer provides written notice to the Tribal Water Engineer that it has succeeded to the interests of the permit holder in accordance with applicable law. Any successor-in-interest to the encumbrancer shall have the same rights as any other successor-in-interest pursuant to §§ R-11-8-400(d), R-11-8-401(b)(i)(B), R-11-8-401(b)(i)(C), or R-11-8-401(b)(iii)(B).

Add new section R-11-8-600 as follows:

R-11-8-600 Official Interpretations.

This section contains interpretations of the Wind River Water Code or Water Resources Control Board regulations that have been adopted for general application by the Water Board.

a. Permanent Status of Code. Questions have been raised concerning the current effectiveness of § 11-8-III(A)(5) of the Water Code. Section 11-8-III(A)(5) provides that "[a]ll permits and licenses issued under this Code are provisional and shall not be construed to create an entitlement in the user beyond the provisional period nor to allow reliance thereon by any other person. This section of the Water Code was not discussed when interim language in other portions of the code were amended in 1991.

In determining whether a repeal has been effectuated, the nature of the law, the history of the legislation, the nature of the defect are all factors to be considered. Sutherland, Statutory Construction. In addition, the implementation of the act by the administering agency is an important consideration.

On March 18, 1991, the Wind River Water Code was amended. At the time the code was amended the word "interim" was deleted throughout the Water Code. This change was made so that the code would be in place until amended by future legislative action. This change was made to address criticism of the provisional or interim nature of the code at that time. In addition, at the time the code was amended changes were made to confirm to the District Court's decision substituting the Tribes as water master under the Court for all water rights within the Reservation. The legislative history indicates that the goal of the changes was to provide certainty and reliability for water users on the Reservation.

Since the revisions to the Water Code in 1991, the Water Resources Control Board has replaced all then existing permits of provisional duration with permits of no specific time limit. All new permits, except leases of water, have been issued without specific time limits.

It is the opinion of the Water Board that the application of § 11-8-III(A)(5) is inconsistent with the actions and intent of the legislative bodies adopting amendments to the law in 1991. Therefore, it is the opinion of the board that this provision was repealed by implication when amendments were made in 1991.

INFORMATIONAL HANDOUT

Proposed Water Board Regulations
Concerning Processing of Water Permits
When the Land Is Encumbered

The Wind River Water Resources Control Board ("Water Board") recently published for public comment amendments to the Water Board's regulations. The proposed regulations clarify how water use permits are processed when there is a mortgage or other security interest on lands on which a Tribal 1868 priority water use has been permitted. The current regulations fully protect any successor-in-interest consistent with federal law. The nature of the water right as Tribal water reserved under the Treaty is not altered by the proposed regulations. The regulations, in substance, provide protection similar to the security lenders have with respect to State permitted water rights. In contrast to the State system, the Tribal system of issuing a permit to the current landowner ensures the accuracy of the water use permitted and deliverability of water. The State system places the lender in the position of relying on paper rights which may reflect amounts of water significantly in excess of the State law beneficial use limitations. Lenders therefore know with a Tribal permit that the water use permitted is sufficient for the landowner to irrigate the lands in question and generate revenues to pay the loan. The Water Board developed the proposed regulations to provide clarification for lenders and to ensure that lenders had no basis for redlining the reservation with respect to loans on lands with senior 1868 water rights.

The amendments to the regulations clarify the rights of encumbrancers as successors-in-interest to lands which have a Tribal 1868 priority water permit. Section R-11-8-100 is amended to define an encumbrance as any security interest and an encumbrancer as any owner or holder of security interest. Section R-11-8-400(d) is amended to make it clear that a lender (encumbrancer) has rights equal to any purchaser or transferee of lands for which a 1868 water use permit has been permitted. To place persons on notice that the land is encumbered, a lender may have its name and address included on the permit so potential purchasers or transferees will be aware of the lender's security interest in the land. Section R-11-8-401(b)(iv) of the regulations is added to make it clear that an 1868 water use permit neither impairs nor enhances a lender's right to foreclose in accordance with its agreements with the borrower and under applicable law. The regulations clarify that a successor's rights under federal law to use a ratable share of confirmed Tribal 1868 water rights are protected. Simply, if the borrower defaults on the loan, the lender would proceed through normal legal channels to foreclose on the property. If the lender obtains the land in the foreclosure proceedings, it provides the Tribal Water Engineer with written notice of the result of such proceedings and the lender will be substituted as permittee. When the land is transferred to a successor-in-interest to the lender either through foreclosure sale or otherwise, that successor-in-interest is assured it has the same protection as a normal purchaser or transferee.

The Water Board also published for comment its interpretation of Section 11-8-III(A)(5) of the Water Code. This section of the Water Code is inconsistent with amendments made to the code in 1991 to eliminate the interim or provisional nature of the Water Code. The Water Board's interpretation makes it clear that all water use permits are not provisional, but are subject to the Water Code as amended. In accordance with this interpretation, all permits under the current code have been issued without duration.