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United States Department of the Interior

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In Reply Refer To:
7250(NV-930)P

June 30, 2005

EMS TRANSMISSION 6/30/2005
Instruction Memorandum No. NV 2005-077
Expires: 09/30/2006

To: Field Managers, Nevada
Deputy State Directors and Staff Chiefs, NSO

From: State Director, Nevada

Subject: BLM Nevada Water Rights Policy

This Instruction Memorandum updates and modifies BLM-Nevada's policy on water rights. With the changes in the Nevada Revised Statutes (N.R.S.) with the passage of S.B. 76 in 2003, the State Engineer will issue a permit to appropriate water for the purpose of watering livestock only to permit applicants who are legally entitled to place livestock on the lands for which the permit is sought, and who own or have an interest in the livestock (N.R.S. 533.503). In addition, new regulations tying appurtenance to ownership of livestock is set forth (N.R.S. 533.040). These changes in State law apply to any water application which is processed by the State Engineer after June 12, 2003. These new regulations also impact stockwatering rights in certificate status which are held by BLM. Such rights are subject to forfeiture after 5 years of non-use for a groundwater right and subject to abandonment for a surface water right.

The United States, not an individual, group, or State agency, is the legal entity responsible for management of public lands for the purposes intended by Congress. This responsibility cannot be delegated outside the agency. This direction does not preclude working cooperatively with other entities or agencies to meet mutual resource management objectives.

Field Managers are responsible for review and consideration of the general public's best interest in the decision to approve or disapprove any proposed water development projects. A Commitment of Resources Review, Form NV 7250-1 (June 2005) will be completed by the appropriate Field Office and approved by the Field Manager or Assistant Field Manager. See Attachments 1 and 2. Form NV 7250-1 can be located at <\\blm\dfs\nv\pub\Forms>.

The following direction shall serve as BLM-Nevada water rights policy.

1. APPROPRIATION OF LIVESTOCK WATER

a. BLM-Nevada will adhere to substantive and procedural requirements of State law as required by Departmental policy. Accordingly, BLM-Nevada will not file new applications with the State Engineer for permits to appropriate water(s) for the purpose of watering livestock on public lands.

b. In a case where a non-BLM entity is granted a permit and constructs a water development on public lands for the purpose of stockwater only, BLM in Nevada will not expend public funds for construction unless BLM holds a second water right for a different beneficial use(s)¹, or if an exception is granted by the State Director. If BLM is granted a permit on the same development, then public funds may be spent commensurate with the relative share of the water right. It is recognized that there may be unusual cases where BLM may agree to expend funds in excess of the commensurate share in order to assure water is available for an important need (i.e. non-BLM entity unwilling or unable to provide commensurate share).

c. A Commitment of Resources Review (CRR) will be completed in those situations in which the State Engineer has issued a permit solely in the name of a non-BLM entity for livestock watering on public lands. The rationale from the CCR will be used to determine if the proposed development will be authorized through permit, right-of-way, or Cooperative Range Improvement Agreement.

2. APPROPRIATION OF WATER FOR BENEFICIAL USES OTHER THAN LIVESTOCK WATER

a. BLM will file and hold appropriative water rights for valid beneficial uses. Each application for a permit to appropriate water shall, in accordance with Nevada State water law, contain only one valid beneficial use, with the exception of domestic use. This may include filing for State appropriative rights on water in excess of that which is reserved on springs identified as Public Water Reserve (PWR) for purposes other than stock watering or human consumption, which are the reserved right purposes identified by Executive Order(s).

b. BLM may determine it desirable to file an application for any beneficial use other than livestock water at the time of a non-BLM entity's application for livestock water. In such a case federal funds may be expended for the development, operation and maintenance of the BLM portion of the development. It is encouraged (not required) that BLM include its application at

¹ Beneficial uses recognized by the State of Nevada include: wildlife (including wild horses and burros), the establishment and maintenance of wetlands, fisheries and other wildlife habitats, recreation, quasi-municipal, irrigation, domestic, environmental, and storage. See N.R.S. Sections*: 533.023, 533.030, 533.035, 533.040, 533.055, 533.070, 533.075, 533.367, 533.437, 533.490 for limitations and exceptions as well as various State Engineer and Court Decisions.

*(N.R.S. 533.330 provided that individual domestic use may be included in an application with the other use names.)

the same time (preferably in the same envelope) with the non-BLM entity's application so that both applications receive the same priority date and time.

3. PROTESTS

a. Applications by individuals, groups, or agencies to appropriate water on public lands for programs administered by the BLM according to legislative and regulatory mandates will generally be protested.

b. If a non-BLM entity has filed an application for permit to water livestock on lands administered by BLM and the project does not provide a public benefit, then BLM will file a timely protest of the application before the State Engineer issues a permit. The State Engineer shall be informed based on supporting rationale from the CRR that, if a water right permit is issued, BLM will not authorize the development.

c. Upon notification from the State Engineer that a non-BLM entity has filed for a water right for stock water purposes on public land, the appropriate field office will complete a CRR to determine whether or not BLM will protest the application.

4. CONDITIONS FOR EXPENDITURE OF PUBLIC FUNDS

a. No expenditures of public funds for construction or infrastructure development shall be authorized on water sources for which the State Engineer has issued a permit of appropriation for livestock watering on public lands to a non BLM entity, unless BLM holds a second water right for other purposes, or an exception is granted by the State Director.

b. In those situations where BLM already holds a certificated water right for stockwater, the State Engineer has notified BLM that the right is subject to forfeiture or abandonment after 5 years of non-use. Therefore, before public funds may be used for operation, maintenance or modification of the water development, BLM must be granted a Change of Beneficial Use for a different category of use(s).

c. Modifications, i.e. change in point of diversion, of an existing livestock water development may be authorized after completion of a CRR; provided that the modification is consistent with resource management objectives as set forth in BLM Resource Management Plans or other land use plans. Modifications must be consistent with previous policy statements. Should the proposed modification require a new application to the State Engineer, an application will be filed.

d. BLM may file to appropriate water for all identified beneficial uses for programs administered by the BLM according to legislative and regulatory mandates, other than livestock. No development/construction or expenditures of public funds shall be authorized on water sources for which the State Engineer has not issued a permit of appropriation except for public water reserves (see 5. Public Water Reserves).

e. BLM may, after completion and documentation of a CRR, authorize through a cooperative range improvement agreement² pipelines on public lands where the source originates on private lands and the permittee holds a valid State appropriative or vested water right. The cooperative range improvement agreement will include specific requirements for: construction, maintenance, requirements for removal of materials on abandonment, and documentation of the acknowledgement and acceptance of any imposed condition(s) of approval, such as making water available for wildlife and wild horses or burros as, well as other permittees' livestock in common use allotments.

5. PUBLIC WATER RESERVES (PWR)

a. All new applications filed by any non-BLM entity to appropriate water at springs, seeps, or waterholes which are in conflict with current or foreseeable, quantifiable or quantified needs for human and animal use, previously reserved by executive order as a PWR, shall be protested. If a notification that the source is reserved has not been filed with the State Engineer, notification shall accompany the protest or be completed by the earliest possible date.

b. If the dependable flow of a spring or waterhole exceeds the quantity necessary to fulfill the PWR purpose, then the spring or waterhole will be evaluated to determine public needs for State appropriative water right for non-reserved beneficial uses as allowed under State law. BLM will file for and hold appropriative water rights for valid beneficial uses.

c. Pursuant to an existing agreement with the Nevada State Engineer, Field Office shall notify the State Engineer regarding the surface waters, springs and waterholes, on public lands that qualify as a PWR (as authorized by Executive Order 107 and other valid Executive Orders).

d. No expenditures of public funds shall be authorized for development/construction of reserved waters for the purpose of livestock grazing on public lands without prior State Engineer notification that the source water is reserved under PWR 107 or other valid existing PWR.

e. BLM will pay the appropriate fees established by the state for notification of reserved rights, except when notifications are being made as part of a general adjudication. BLM does not pay fees for submission of water rights claims in adjudications that fall under the McCarran Amendment.

f. In cases where water from a PWR is to be piped to a different 40 acre parcel, BLM will use the notification process to alert the State Engineer of the place of use. BLM will not file a Change of Place of Use Application with the State Engineer.

6. WATER RIGHTS RELATING TO REALTY ACTIONS

Review of the BLM Acquisitions Handbook is strongly recommended prior to pursuit of any acquisition of interest in lands.

² Consistent with 43 CFR 4120.3-2(b) which states in pertinent part, "...The authorization for all new permanent water developments such as spring developments, wells, reservoirs, stock tanks, and pipelines shall be through cooperative range improvement agreements," projects may be authorized and developed through Cooperative Range Improvement Agreements.

a. All acquisitions of interests in land (e.g. water rights) must be consistent with approved land use plans prepared pursuant to the Federal Land Policy and Management Act (FLPMA).

b. For any proposed acquisition of water associated with a land acquisition (purchase or exchange), it must be determined if the BLM can make sustained beneficial use of existing water rights which may be offered as a component of the realty action. BLM Nevada will acquire only those quantities of water determined necessary to support the management objectives for the acquired lands. If BLM is unable to make sustained beneficial use of the existing water right, the current owner will obtain a Change of Beneficial Use from the State Engineer for the category of use and water quantities prescribed by BLM.

c. When water rights are changed from one beneficial use to another, the duty (quantity of water appropriated by that right) may be adjusted by the State Engineer. Therefore, the duty or quantity of water to be transferred should be determined and documented by the Field Office prior to the appraisal process.

d. In the nomination phase, a BLM Field Office must perform an assessment of the water right offered to ascertain the priority date, quantity of water available, place(s) of diversion, place(s) of use, beneficial use(s) and the status of the water right(s). Such work may be contracted to a private source.

e. The authority for accepting title to interests in land rests with the Office of the Regional Solicitor (Sacramento). In most cases, BLM will be unable to acquire water rights by a General Warranty Deed. Often the acquisition will be a quitclaim deed, although it may be possible to negotiate the use of a special warranty deed. Under this type of deed, the current owner will warrant title from any defects due to the grantors' actions and for the period the current owner has held title to the water. Only after receipt of a satisfactory final title opinion, should the federal payment for the water be completed.

Questions regarding this Instruction Memorandum should be directed to Meg Jensen, DSD, Resources, Lands and Planning at 861-6464 or Ted Angle, Acting Soil, Water and Air Program Lead at 861-6401.

Signed by:
Robert V. Abbey
State Director, Nevada

Authenticated by:
Ellyn Darrah
Staff Assistant

Attachments (2)

- 1) Instructions for Commitment of Resources Review (1 p)
- 2) Commitment of Resources Review NV 7250-1 Form (1p)