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BLM NEVADA WATER RIGHTS POLICY

NV IM-2013-007

Instruction Memorandum

In Reply Refer To:
7250 (NV930) P

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
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EMS TRANSMISSION

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

From: State Director

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 (NRS) with the passage of S.B. 76 in 2003 and A.B. 410 in 2011, BLM-Nevada is revising existing guidance and adding additional guidance regarding policy on water rights.

With S.B. 76, 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 (NRS 533.503). In addition, new regulations tying appurtenance to ownership of livestock is set forth (NRS 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.

With A.B. 410, the State Engineer will not accept a protest filed by a government agency on certain types of water rights applications unless it is signed by the person in charge of the agency (NRS 533.365, NRS 534.270). This bill requires that:

1. any protest which is filed by a government, governmental agency or political subdivision against the granting of an application for a permit to change the place of diversion, the manner of use or the place of use of water already appropriated within the same basin, or
2. for a permit to operate a project for the recharge, storage and recovery of water, be verified or signed by the director, administrator, chief, head, or other person in charge of that government, governmental agency or political subdivision. For the BLM Nevada, the signing authority for protests on these types of applications is the State Director of Nevada.

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 have the delegated authority to sign water rights applications and water rights protests (with the exception of those specified under A.B. 410). Field Managers are also responsible for review and consideration of the general public's best interest in the decision to approve or disapprove any proposed water development projects. Use of the Commitment of Resources Review, Form NV 7250-1 (May 2012) will be completed by the appropriate Field Office and approved by the Field Manager or Assistant Field Manager. (See Attachments 1 and 2). The Water Right Protest Evaluation, Form NV 7250-2, can be used by specialists and managers to help determine whether or not to protest a water right application. Forms NV 7250-1 and NV 7250-2 can be located at \\Blm\dfs\inv\Pub\Forms, Nevada.

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-Nevada will not expend public funds for construction unless BLM holds a 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 must 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 (i.e. non-BLM entity unwilling or unable to provide commensurate share) in order to assure water is available for an important need such as to reduce stress on riparian habitat or provide water for wildlife use.

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 CRR will be used to determine if the proposed development will be authorized through permit, right-of-way, or Cooperative Range Improvement Agreement. The CRR form must be finished and submitted to the State Director when requesting for an exception to expend funds.

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 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 that may impact BLM resources according to legislative and regulatory mandates will generally be protested². Protests may be avoided or withdrawn if a stipulated agreement between the BLM and applicant is signed to address issues and identify mitigation measures are in place.

1. Field Offices will review all water rights applications submitted to the State Engineer's Office on BLM lands by non-BLM entities, determine if there are potential impacts to BLM resources and/or water rights and determine whether or not a protest is needed.

2. Field Offices will also review any water rights applications on non-BLM managed lands, determine if there are potential impacts to BLM resources and/or water rights and determine whether or not a protest is needed.

3. Protests may be filed on water right applications for programs administered by the BLM as well as projects seeking or currently holding a right-of-way on public land. The water rights protest process is separate from other BLM management processes.

4. For help determining whether or not a protest is needed, Field Offices can use the Water Right Protest Evaluation form (WRPE) to help in the decision making process. (See Attachment 3). Form NV 7250-2 can be located at \\blm\dfs\inv\pub\FORMS, Nevada.

b. 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 and WRPE to determine whether or not BLM will protest the application.

c. If a non-BLM entity has filed a water rights application to water livestock on lands administered by BLM and the project would result in impacts to other BLM resources, 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 and WRPE that, if a water right permit is issued, BLM will not authorize the development. The protest should be specific as to why the BLM will not authorize the development, for example, the development will impact a threatened or endangered species or the development is in conflict with an existing right-of-way.

d. The State Director is the only authorized official for signing protests to change applications and protests to applications for a permit to operate a project for the recharge, storage and recovery of water (refer to page 1 of the IM).

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. Upon notification by the State Engineer that a BLM stockwater right (permitted, certificated, decreed, or vested) is subject to abandonment or forfeiture due to non-use, expenditure of public funds may not be used for operation, maintenance, or modification of the development related to the water right in question until the BLM has applied for and been granted a Change in Beneficial Use. BLM may choose to apply for a Change in Beneficial Use on previously held stockwater rights prior to notification of forfeiture or abandonment by the State Engineer.

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 agreement³ and expend public funds on 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 rights 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 Offices 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.

g. Based on Ruling 5729, the Nevada State Engineer may require additional information for PWR notifications. Although the BLM does not agree with the requirement for this information, it may be in the best interest of the District to acquire this information and submit during adjudication. Flow rate, water quality, access, discreteness of flow are all examples of the additional information that may be requested by 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.

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 BLM may require the current owner to obtain a Change of Beneficial Use from the State Engineer for the category of use and water quantities prescribed by BLM. The decision as to whether to require the change in use before purchasing the water right(s) is up to local management and should be based on a risk assessment. The risk assessment should consider the potential denial for the change application by the State Engineer and the potential for the change application to be protested by other entities. If the potential for a change application to be denied by the State Engineer is high or the potential for the change application to be protested is high, the change application and new permit should be granted by the State Engineer before the BLM acquires the water right.

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.

7. WATER RIGHTS WITH WILDLIFE MANNER OF USE

a. The Nevada State Engineer does recognize wildlife use as a manner of use under Nevada water law. As stated in NRS 533.023, "Wildlife purposes" includes the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats. This includes the beneficial uses for wild horses and burros and instream flows.

b. In order to claim wild horse and burro use for a wildlife beneficial use, the source and/or the place of use must be located within an existing Herd Management Area (HMA).

1 Beneficial uses recognized by the State of Nevada include: wildlife (including wild horses and burros in HMAs), the establishment and maintenance of wetlands, fisheries and other wildlife habitats, recreation, quasi-municipal, irrigation, domestic, environmental, and storage. See NRS 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.

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

2 New water right applications can be found either in local newspapers or on the [Nevada Division of Water Resources website](#) under Mapping & Data - Monthly report.

3 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.

Questions regarding this Instruction Memorandum should be directed to Raul Morales, Deputy State Director, at 775-861-6464 or Sarah Peterson, Soil, Water, Air and Riparian Programs Lead at 775-861-6516.

Signed by:
Amy Lueders
State Director

Authenticated by:
Edison Garcia
Staff Assistant

Attachments:

- 1 - Instructions for Commitment of Resources Review (1p)
- 2 - Commitment of Resources Review NV 7250-1 Form (1p)
- 3 - Water Right Protest Evaluation NV 7250-2 Form (2p)

COMMITMENT OF RESOURCES REVIEW INSTRUCTIONS

A Commitment of Resources Review (CRR) should be completed prior to and incorporated in any and all NEPA documents relating or pertaining to the proposed development of waters by non-BLM entities on public lands. The public benefit(s) should be clearly identified and justified.

Proposals based on the following rationale would generally be approved. (Water developments will not be required to meet all six criteria in order to provide benefit to the public. However, water developments shall be in the public interest before being approved to proceed.)

1. Improve distribution of livestock away from sensitive riparian areas, and/or;
2. Protect the habitat of aquatic dependant resources, and/or;
3. Protect water quality, and/or;
4. Improve the availability of waters for wildland fire suppression, and/or;
5. Promote meeting fundamentals of rangeland health, and/or;
6. Resolve other multiple use conflicts.

Proposals based on the following rationale would generally not be approved:

1. Conflict with attainment of resource objectives including, but not limited to, habitat protection of sensitive or listed species (sagegrouse, pygmy rabbit, etc), and/ or;
2. The primary objective is to provide water for adjacent private lands (consider a right-of-way authorization), and/or;
3. The project compromises compliance with laws, regulations, and direction set forth in resource management plans or land use plans, and/or;
4. They conflict with wild horse/burro management objectives.

U.S. Department of Interior
Bureau of Land Management
Nevada State Office

COMMITMENT OF RESOURCES REVIEW

Name of Water Source _____
_____ (Township) _____ (Range) _____ (Section)

Application Number (if any) _____

Description of Proposed Project:

This proposal is consistent with one or more of the following criteria (check all applicable items):

- Improve distribution of livestock away from sensitive riparian areas
- Protect the habitat of aquatic-dependent resources
- Protect water quality
- Improve the availability of waters for wildland fire suppression
- Promote meeting fundamentals of rangeland health
- Resolve other multiple use conflicts

None of the following exceptions apply:

- Conflict with attainment of resource objective including, but not limited to, habitat protection of sensitive or listed species (sage grouse, pygmy rabbit, etc) and/or;
- Primary objective is to provide water for adjacent private lands (consider a right-of-way authorization), and/or;
- Project compromises compliance with laws, regulations, and direction set forth in resource management plans or land use plans, and/or;
- Conflict with wild horse/burro management objectives.

Based on this analysis, BLM will:

- File for a water right and expend public funds
- Protest filing by non-BLM entity

If expending public funds, proposed development will be issued through:

- Permit
- Right-of-Way
- Cooperative Range Improvement Agreement

Preparer, Title

Date

**U.S. Department of Interior
Bureau of Land Management
Nevada State Office**

WATER RIGHT PROTEST EVALUATION

The purpose of this form is to help guide new specialists and managers unfamiliar with Nevada Water Law and Nevada water rights processes in the protesting process. This form is not mandatory; it is a tool to help decision makers.

Application Number: _____
(Township) (Range) (Section)

State Engineer Basin: _____

Description of Water Right Application:

Description of resources at risk if water right is permitted: