

BLM-045



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
Nevada State Office
1340 Financial Boulevard
Reno, Nevada 89502-7147
<http://www.blm.gov/nv>
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In Reply Refer To:
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EMS TRANSMISSION 09/24/14
Instruction Memorandum: No. NV-2014-044
Expires: 09/30/2016

To: State Leadership Team, Expanded
From: State Director
Subject: Bureau of Land Management (BLM) Nevada Water Rights Policy

Purpose: The purpose of this Instruction Memorandum (IM) is to outline more detailed direction with regards to water rights and ensure compliance with Nevada water law.

Policy/Action: BLM Managers should review and comply with the policy outlined in this IM when dealing with water rights issues in Nevada.

Timeframe: This IM is effective upon receipt and until superseded.

Budget Impacts: None

Background: 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, A.B. 410 in 2011 and new BLM Manual Direction (MS-7250), the BLM Nevada is revising existing and providing additional guidance for implementing policy on water rights.

The United States, under the administration of the BLM, 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 **Section 3d** of this policy). 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\nv\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

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 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.)

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 managed BLM resources according to legislative and regulatory mandates will generally be protested^{2,3}. 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\nv\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.

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. (<http://water.nv.gov/data/monthly/>).

³ See Federal Land and Policy Management Act of 1976 (FLPMA) and Bureau Manual MS-7250 Water Rights Manual, pages 5,6,9

1. If a water right permit was to be issued and BLM would not authorize the development, the protest should specifically state as to why the BLM will not authorize the development. For example, the development will impact a federally listed threatened or endangered species, or the development is in conflict with an existing right-of-way or other authorized use.
2. If BLM is already allowing use of the source for livestock and the water right application is merely making the use legal, then BLM will need to decide whether or not to allow the continued use of the water and whether or not to protest. If the BLM will allow the continued use of the source, BLM could still protest asking for a decreased quantity to allow for riparian habitat maintenance. If BLM will not allow for continued use of the source, then the BLM should state such in its protest, why it will not allow for use (i.e. resource protection of the source), inform the permittee, make any necessary changes to terms and conditions of the grazing permit and install any necessary structures (i.e. fence) to keep cattle away from the source.

d. All protests must state reasons and grounds for the protest and must meet at least one of the protest points. These protest points include: a. there is no unappropriated water at the proposed source; b. the proposed use conflicts with existing rights; c. the proposed use conflicts with protectable interests in existing domestic wells as set forth in NRS § 533.024; or d. the proposed use threatens to prove detrimental to the public interest. (NRS 533.370)

e. The Nevada 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). The Nevada Revised Statutes require that any protest which is filed by a government, governmental agency or political subdivision against:

1. 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 (NRS 533.365), or
2. for a permit to operate a project for the recharge, storage and recovery of water (NRS 534.270),

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 the Nevada State Office only.

f. If an office is considering filing a protest and/or once a protest has been filed, the office must inform the Soil, Water, Air State Lead and/or the Water Rights Solicitor. Notification should include a copy of the filed protest. This will ensure that the State Office and Solicitor's Office are both aware of the protest and involved with the process should the protest go to hearing or if discussions regarding a stipulated agreement is made between the parties.

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 agreement⁴ 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, may be protested. If a

⁴ 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.

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 reasons and grounds for protest are solely based on a potential PWR claim held by the BLM, the protest will most likely be denied by the NSE (see past NSE Rulings). All protests on water rights applications for water sources that have potential PWR claims should also include reasons and grounds that meet one of the protest points (See Section 3- Protests). For example, BLM will not allow use of the spring because it is habitat for a federally listed endangered species or use of the spring will result in environmental degradation.

c. 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.

d. Pursuant to an existing agreement with the Nevada State Engineer, the 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).

e. 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.

f. 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.

g. 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.

h. 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.

i. Springs and waterholes that qualify as PWR withdrawals were reserved pursuant to the Pickett Act of 1910 and the lands and water encompassed in these withdrawals are closed to public entry with one exception. The Pickett Act was amended in 1912 to specifically provide that lands withdrawn under this authority shall, at all times, be open to exploration, discovery and occupation and purchase under the mining laws of the United States “so far as the same apply to **metalliferous minerals** (emphasis added).” Therefore, valid mining claims under the 1872 Mining Law within a PWR withdrawal cannot be affected by such withdrawals.

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. Additionally, NRS

501.097 defines wildlife as “... any wild mammal, wild bird, fish, reptile, amphibian, mollusk or crustacean found naturally in a wild state, whether indigenous to Nevada or not and whether raised in captivity or not.”

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

8. Working with water right holders on public lands

a. There are several thousand water rights located on public lands which are held by non-federal entities. These entities include permittees, project proponents, and other government agencies. As discussed in Section 3, the BLM should be reviewing all water rights applications, both on and off public lands, to determine if the use will impact BLM resources and protesting those applications appropriately.

b. If a water right has already been issued on public lands to a non-federal entity, the status of the water right will determine how BLM will need to work with the water right holder to ensure that there is no potential for a takings claim.

1. If the entity holds a **certificated water right, a vested claim or a vested water right**, BLM cannot prohibit all access to the water, but any access can be reasonably regulated (*Colvin Cattle Co. v. United States*, 468 F.3d 803, (Fed. Cir. 2006); *County of Okanogan v. National Marine Fisheries Service*, 347 F.3d 1081, (Fed. Cir. 2003)). If a drought management decision results in a temporary closure or change in permitted use, the water right holder may need to change how or where the water is put to beneficial use. For example, the BLM could authorize a right-of-way to pipe the water off of federal lands for use on private lands (following cost-recovery authority under Section V of the Federal Land Policy and Management Act (43 CFR 2804.14)). If the entity holds vested claims, which are unadjudicated vested water rights, BLM would need some evidence that the claim of the vested right is likely to be valid. This does not require BLM to “adjudicate” the right, merely to obtain some objective evidence that the water was put to beneficial use prior to 1905 by a predecessor-in-interest and that the use has not been abandoned. BLM’s acknowledgement of the water right would not bind the State Engineer in any subsequent water rights proceeding; the State Engineer may not accept these claims as valid claims in a water rights adjudication regardless of whether or not BLM accepted the claims in authorizing access to the public lands so as to divert or put the water to beneficial use.
2. If the permittee holds a **permitted water right and no water under that permit** has yet been put to beneficial use, no appropriation has yet occurred and there is no binding water right as against other users (*Salmon River Canal Co., Ltd. v. Bell Brand Ranches, Inc.*, 564 F.2d 1244 (1977 9th Cir.)). BLM does not have to allow any access to water validated with a permit only. In *Washoe County v. U.S.*, 319 F.3d 1320 (Fed. Cir. 2003), the Plaintiff received water right permits through change

applications from the Nevada State Engineer's Office and sought a right-of-way across federal land. The court found that "... the government had no obligation as a neighbor to assist Washoe County or the other Appellants in putting their water rights to the most profitable use or to pay just compensation because the State of Nevada granted Washoe County authorization under state law to make a particular use of the water on the Ranch." This is so since issuance by BLM of post- FLPMA water-related rights-of-ways are discretionary actions. The BLM has no obligation to award a right-of-way grant just because the applicant holds a water right.

3. If the entity has applied for a water right and the current status of the application with NDWR states either **application, ready for action (RFA) or ready for action (protested) (RFP)**, then the water right is still in the application process and has not been permitted. The applicant has no right to utilize water until the status of the application states '**Permit**'.
4. If the permittee has **private land inholdings** that are surrounded by public lands, the BLM has to provide reasonable access to those private lands, which can be put to any lawful use by the owner/lessee. However, if the land is unfenced and intermingled with public lands such that livestock can move freely from the private lands onto public lands, then under the "access theory" (i.e., that livestock on private unfenced lands that are intermingled public lands will also access forage on public lands) the rancher would be in trespass if the livestock are not authorized to graze the public lands. (*Holland Livestock Ranch v. United States*, 655 F.2d 1002, 1005 (9th Cir. 1981))

9. Water Hauling for Livestock and Wild Horses

a. During drought conditions most of the naturally available surface water sources on public lands have too low of discharge or go completely dry, particularly in the late summer and fall months, to support livestock and/or wild horses and burros. During these times, it may be necessary for the BLM to approve hauling of water for use by wild horses and burros or for permittees to haul water for permitted livestock.

b. Water hauling activities: In the past, the BLM has provided water for wild horses using three different methods, use of a contracted water tender, drafting water from a BLM facility (i.e. District Office or fire station) that is hooked up to a municipal water source, and drafting water from a source (i.e. well or spring) that is close to the haul site and not covered by a municipality. For all of the below options, the place of use (POU) where the water will be hauled must be located within an HMA if the water is to be used for wild horses and burros.

1. Contracting water hauling activities

If the office decides to contract out the water hauling, then the office should ensure that there is specific language in the contract holding the contractor responsible for complying with Nevada water law and applying for any necessary permits, temporary permits or change applications.

2. Using water that is supplied by a municipality

Water that is supplied by a municipality should be paid for by the user. The user should contact the local municipality to ensure that the use is allowed under the entities water rights and other local regulations or ordinances. The municipality may need to submit a temporary change application to NDWR in order for the use to occur.

3. Using water that is not supplied by a municipality

Water from a source that is not supplied by a municipality would need to have a water right on the source with a manner of use (MOU) for a wildlife use and a POU identifying the hauling site location. It is the responsibility of the water right holder to ensure that the water right is in compliance with Nevada water law. If BLM holds an existing water right on the source to be used, then the BLM can submit a temporary change application to change the MOU and/or POU. If the existing water right is held by another entity, the BLM could work with the water right holder to use a portion of their water right. In both of these cases, temporary change applications would need to be filed with the NDWR Office temporarily changing the MOU and POU. Temporary change applications are a viable option, particularly in emergency situations. Temporary change applications go through the application process fairly easily and are not subject to a protest period, however, a temporary change cannot exceed 1 year.

If no water right exists on the proposed water source, the BLM could file a temporary change application also changing the point of diversion (POD) moving a water right from one source to the proposed new source. Or the BLM could file for a new appropriated water right on the proposed water source. The approval of a water right through the state appropriations process could take time depending on whether or not the application is protested. Additionally, the BLM would need to put the water to beneficial use and regularly use the water right to ensure that the right is not forfeited or abandoned.

c. Permittees would be required to follow the same procedures as noted above for hauling water for livestock use and must be in compliance with the Nevada water law and local regulation and ordinances.

10. Importance of Soil, Water, Air program workload associated with water rights

a. Water rights held by the BLM, whether appropriated or federally reserved, are considered federal property rights. Water rights are valuable resources to be used to manage public lands and should be treated as real property. Only the Secretary of the Interior can revoke the withdrawal of a federally reserved water right.

b. The BLM must comply with Nevada state water law and therefore are subject to any requirements or time limits as defined within the Nevada Revised Statutes. Failure to do so could result in loss of federally held water rights or impacts to federally managed lands.

c. Workload activities associated with water rights must be considered a high priority at the local level. These types of activities include adjudications, water right filings, reviewing applications filed for both on and off federal lands that could impact BLM resources, filing protests, proving

for certification of rights, monitoring and measuring for proving of rights, court cases (both state and federal court) which have a water right component to the case, and filing for any necessary time extensions for proving water rights.

d. Since the State of Nevada is responsible for the administration and enforcement of Nevada's water law and BLM is required to abide by state water law, the BLM does not have purview to miss deadlines or requirements set forth in the Nevada Revised Statutes. Additionally, some of the water rights workload is associated with state and federal court cases involving collaboration with the Solicitor's Office and the Department of Justice, which should be the highest priority at the local level.

Manual/handbook Sections Affected: This policy is in accordance with BLM Manual 7250.

Contacts: Questions regarding this Instruction Memorandum should be directed to Raul Morales, DSD, Resources, Lands and Planning at 775-861-6464 or Sarah Peterson, Soil, Water, Air and Riparian Programs Lead at 775-861-6516.

Signed by:
Gary Johnson
Acting 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)