

# Public Lands Foundation

## Position Statement: 2010-05

### Water Rights on the National System of Public Lands

June 10, 2010

#### **Executive Summary**

The Courts have determined that the States have the authority to allocate the rights to unappropriated waters on the National System of Public Lands. The Public Lands Foundation (PLF) advocates public ownership of the rights to waters on public lands to ensure that the water will remain on the land for livestock, wildlife and the other multiple uses that occur within the National System of Public Lands. The Bureau of Land Management (BLM) should actively pursue a program of acquiring the rights to waters on public lands by filing applications with the appropriate state water agencies, and through negotiations with the holders of existing water rights on the National Public Lands.

#### **Background**

In March 1984, the BLM's Director issued in manual form policies and guidance for the BLM to use in acquiring and protecting water rights necessary for multiple-use management of the public lands. The manual stipulates that States have primary authority and responsibility for the allocation and management of water resources within their boundaries even though those waters are on federal lands. BLM is to conform to the applicable state water rights laws and administrative claims procedures in managing all BLM programs and projects, except as otherwise specifically mandated by Congress.

This 1984 policy is an extension of the December 1981 policy for livestock water developments. The 1981 policy provides that BLM may file for water rights for stock water purposes according to the source of funding used to develop the watering facility. When total funding for development and maintenance of the facility is provided by the grazing permittee/lessee, the permittee/lessee may file for a state water right. For cooperative agreements prior to October 1981, the permittee/lessee may file for a state water right, provided such right has not already been granted to the United States. When a livestock water was developed entirely with federal funds, the United States should have filed. This stock water policy was adopted to encourage private investment in water supply facilities on federal lands.

This policy encourages grazing permittees/lessees to develop an exclusive right to water resources on the public lands. The policy guidance states that where state law permits, the BLM is authorized to apply to the relevant state authority to appropriate for the beneficial use for various purposes, including livestock grazing, in stream flows where a reserved water right is not otherwise available, and water rights for wild horses and

burros. The manual policy statement cites the Taylor Grazing Act, Wild and Free-Roaming Horses and Burros Act, Federal Land Policy and Management Act, and the Public Rangelands Improvement Act as the Federal statutory authority permitting the BLM to assert appropriative water rights through state statutory and administrative claims procedure.

## **Discussion**

BLM's current policy is to encourage private water rights filings on livestock waters in situations where improvements are authorized and privately funded. PLF believes that this is bad public policy that will ultimately result in the loss of availability of waters on the public lands for multiple uses.

Existing regulations provide the policy and procedures to compensate livestock permittees for their investment in range improvements should they lose use of them. Thus, there is no justification to also provide them the actual title to the water rights to protect their investment other than an attempt to provide the permittee with more "control" over the management of the public lands. Range improvements are needed for multiple use management of the lands; they are not exclusively for livestock. Additionally, we note that the various western State Land Departments do not permit their lessees to acquire water rights on state lands; nor would a private landowner leasing their land for grazing; nor should this be permitted on the National System of Public Lands.

This current policy impairs BLM's ability to manage the public lands for multiple uses. In many western states, water rights are property rights, which means that water rights can be, and often are, sold separately from the land, and the water use can be transferred off the public land or its current use changed or restricted. In such cases fish and wildlife, domestic livestock, outdoor recreation, federal administrative sites or any other use facilities requiring such appropriated water cannot be developed nor can many wilderness values be protected. In the future, if water right ownership changes from permittee/lessee to third parties, the actual availability of waters on the public lands may be lost to all other public uses and needs.

In 1992, the PLF concluded that this BLM policy of encouraging grazing permittees/lessees to develop exclusive rights to water resource on public lands was contrary to the Congressional mandates of the Federal Land Policy and Management Act of 1976, (FLPMA), and PLF's 1992 statement of BLM Water Rights Policy was based on this premise.

However, a review of court decisions and other documents clearly shows that federal land water policy is established by Congress and is interpreted by the United States Supreme Court. The Court's decisions precisely identify the authority of states to enact water rights laws, and there is no question that the federal government is to comply with state water rights laws except where water is reserved by withdrawal.

The United States Supreme Court has established federal water policy with decisions that provide that waters on lands withdrawn from the public domain were reserved and appurtenant, but only for the stated purpose of the withdrawal; and that all non-reserved waters on public lands are to be allocated among the appropriators under state law.

In the arid western states, if you control the water, you control the land. It is just that simple. PLF advocates public ownership of the rights to waters on public lands to ensure that the water will remain on the land for livestock grazing and the multiple uses of the public lands. The Courts have determined that rights to unappropriated waters will be allocated to appropriators under state laws. The BLM should actively pursue a program of acquiring the rights to public land waters by filing applications with the appropriate state water agencies, and through negotiations with the holders of existing water rights.

The West is changing, with increasing populations and changing attitudes. This will bring about increased demands and changing allocations of water, and with them, new opportunities to enhance the development of water for public uses on the public lands. BLM should be ready to take advantage of these opportunities.

### **PLF Position**

Achievement of the multiple resource management responsibilities required by FLPMA requires that:

1. Adequate water is available for the multiple uses on public lands by filing applications with the appropriate state water administration agency.
2. States be encouraged to issue all public lands water authorizations appurtenant to the public land to the federal land management agency. Where a water right on the National Public Lands is the basis for a grazing privilege on the public land, such water rights may be held by the grazing privilege holder.
3. Water rights be retained or acquired when approving the transfer of use authorizations so that the water rights remain with the National Public Lands.
4. Guidelines and criteria be established for the water needs for multiple uses and special uses on the public lands, and the water laws of the different public domain states be evaluated to determine how to best apply these guidelines and criteria in each state.
5. Opportunities be sought to gain support and assistance from state and local governments, conservation groups, and others toward assuring an adequate supply of water for all of the multiple uses on the National Public Lands.
6. All federal land management agencies (BLM and FS) should have the same water rights policy.

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