



Public Lands Foundation Position Statement

Water Rights on Public Lands Administered by the Bureau of Land Management

Executive Summary

The Public Lands Foundation (PLF) supports public ownership of the rights to waters (both surface and ground) on public lands to ensure that the water is available for livestock, wildlife, fisheries, recreation, wild horses and burros, fire suppression, instream flows and other multiple uses that occur on the public lands administered by the Bureau of Land Management (BLM). The courts have determined that the states have the authority to allocate the rights to unappropriated waters on the public lands administered by the BLM. The BLM should actively pursue a program of acquiring the rights to waters on public lands and claim the most senior priority date(s). Methods of acquisition include (in no particular order): file applications and claims with the appropriate state water agencies for state-based rights; negotiate with the holders of existing water rights on the public lands administered by the BLM; and perfect and assert Federal Reserved Water Rights (FRWR).

Background

On September 30, 2013, the BLM Director issued the revised 7250 Water Rights Manual to establish policy and guidance for the BLM in locating, perfecting, documenting and protecting BLM-administered water rights, which are considered property rights, necessary to manage and conserve the economic and resource values of the public lands. The 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. Water rights that result in sole title of said water to the U.S. for uses on federal lands should be the primary objective, whenever possible. To date, there are three states (Idaho, Nevada and Utah) that preclude the BLM from applying for *new* livestock water rights, although the BLM can continue to hold historic livestock water rights in these states established prior to changes in applicable state statutes.

Discussion

A review of court decisions and other documents clearly shows that federal water policy is established by Congress and is interpreted by the United States Supreme Court. The Court's decisions 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 executive order (e.g., Public Water Reserve No. 107, Executive Order of 04-17-1926) or congressional/presidential proclamation (e.g., P.L. 116-9, John D. Dingell, Jr. Conservation, Management & Recreation Act of 2019).

The United States Supreme Court has established federal water policy with decisions that provide waters on lands withdrawn from the public domain may be 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 appropriators under state law.

The PLF advocates public ownership of the rights to waters on public lands to ensure that water remains on the land for livestock grazing and all other multiple uses of the public lands. The courts have determined that rights to unappropriated waters will be available for appropriation under state laws. The BLM should actively pursue a program of acquiring the rights to public land waters by filing state-based water rights with the appropriate state water agencies, through negotiations with the holders of existing water rights and by asserting applicable FRWR.

With increasing in-migration from other regions and large cities and population growth, the West has been changing, and so are the western citizens' perceptions regarding water and other natural resources. This brings 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. The BLM should be ready to take advantage of these opportunities.

PLF Position

1. The multiple resource management responsibilities of the BLM under the Federal Land Policy and Management Act (FLPMA) supports an active water rights program, to ensure that adequate water is available for multiple uses on the public lands. This program should:
 - a. Conduct a water sources/uses inventory on federal lands of all point sources of water (springs, wells and impoundments) and conduct studies to quantify the rate, timing and location of water needed to support water-dependent values on rivers and streams;
 - b. Acquire and perfect water rights with the most senior priority dates possible – by filing and perfecting water rights through state law and, if not available, by asserting and perfecting applicable FRWR necessary to carry out public land management purposes;
 - c. Protect and manage existing water rights – protect FRWR and BLM-held state water rights by reviewing state notices and filing protests to applications or claims filed by other parties that could injure BLM-administered water rights or uses; using existing BLM state-based water rights in a manner to avoid forfeiture or abandonment due to non-use; and by asserting FRWR and state-based water rights by participating in general stream adjudications or negotiated settlements.
2. In all land tenure adjustments (exchanges, acquisitions, disposals, direct sales, donations and conservation easements), the BLM should identify all water rights associated with properties that will either enter or leave federal ownership or (in the case of acquiring conservation easements) be needed for conservation purposes. The BLM should acquire or retain ownership of water rights needed to fulfill the purposes of acquired lands and should transfer ownership of water rights no longer needed for multiple use purposes to other parties.
3. In all land use authorizations issued to third parties (e.g., rights-of-way, Plans of Operation under 43 CFR 3809 and leases), the BLM should include appropriate terms and conditions to protect water rights and water uses on the public lands. Establishment of a water right on public lands by a third-party user does not limit BLM's authority to both regulate land use and occupancy and to prevent injury to property of the U.S. The BLM needs to ensure, in cooperation with the state, that third party uses of appropriative water on BLM-administered lands comply with all applicable state laws.
4. The BLM should purchase or lease essential water rights when needed for resource management objectives and when water is not otherwise available.

5. Opportunities should be sought to cooperate with state, local and tribal governments, conservation groups and other stakeholders on water rights and water use issues when such cooperation can serve to maintain and enhance water-dependent values and uses managed by the BLM, such as for protecting instream flows.

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Updated from No. PLF 12-99, January 10, 1999 and Position Statement dated June 10, 2010.

Approved: September 2021