UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
<http://www.blm.gov>

May 14, 2010

In Reply Refer To:
2200 (300) I

EMS TRANSMISSION 05/20/2010
Instruction Memorandum No. 2010-122
Expires: 09/30/2011

To: All Field Officials

From: Assistant Director, Minerals and Realty Management

Subject: Processing of Land Exchanges and Management of Value DD: 06/30/2010

Imbalances in Land Exchanges

**Program Area:**  Lands – Exchanges.

**Purpose:**  This Instruction Memorandum (IM) clarifies and emphasizes existing policies, requirements, and guidance in statutes, regulations, and the Bureau of Land Management’s (BLM) H-2200-1 Land Exchange Handbook (Handbook), particularly Chapters 7 and 11 of the Handbook, and provides additional guidance on processing land exchanges, especially multiple phase exchanges and management of value imbalances, including ledgers.

**Policy/Action:**

Cash Equalization Policy

In many cases, the appraised values of the Federal and non-Federal lands in a land exchange will not be exactly equal and a cash payment, either to or from the United States, may be necessary to equalize the value imbalance in a land exchange. In conformance with the Federal Land Policy and Management Act (FLPMA), the regulations at 43 Code of Federal Regulations (CFR) part 2200, and the Handbook, it is BLM policy to minimize the amount of any cash equalization payment. Section 206(b) of the FLPMA directs the Secretary to “try to reduce the amount of the payment of money to as small an amount as possible” and the regulations at 43 CFR 2201.6(a)(2) state the BLM would use cash equalization “after making all reasonable efforts to equalize values by adding or excluding lands.” “Reasonable efforts” will be case-specific, may vary in each exchange, and may be affected by manageability issues or other factors. Generally, equalization would be achieved by excluding lands from the exchange, as adding lands would require amending the Agreement to Initiate a Land Exchange (ATI), publishing a new Notice of Exchange Proposal to include the additional lands, and incorporating the additional lands in all exchange processing steps.

The policy of minimizing cash equalization should be addressed in initial negotiations with the non-Federal exchange party, documented in the feasibility analysis and the ATI, and carried forward through the processing of the land exchange. The decision on the land exchange must identify the values of the Federal and non-Federal lands and the amount of cash equalization, and must justify how the chosen configuration of the land exchange is the most reasonable alternative to minimize cash equalization. A non-Federal party’s unwillingness to close the land exchange without a large value imbalance and cash equalization payment will not be sufficient justification by itself. Although the statutory and regulatory maximum for cash equalization is 25 percent of the value of the Federal land conveyed in the land exchange, both the percentage and the actual dollar amount of the cash equalization must be considered in determining the acceptability of the cash equalization. A large dollar amount of cash equalization may not be acceptable even if it represents a relatively small percentage of the value of the Federal land. In addition, the ability to deposit cash equalization paid to the United States into certain accounts when authorized by legislation, (e.g., the Federal Land Transaction Facilitation Act) may make cash equalization more acceptable, but should not be considered as an excuse to maximize such equalization paid to the United States.

Processing of Assembled and Multiple-Phase Assembled Exchanges

In any assembled land exchange, it must be clear that the process is a land exchange and is not a “buy-and-sell” transaction or series of such transactions. The entities conveying title to, and receiving title from, the United States may not be the same entities; however, with the exceptions of the ATI, binding exchange agreement, and closing instructions, the United States cannot be a party to the agreements or financial arrangements between the non-Federal entities. The processes for conveyance of titles should be carefully scrutinized, including consultation with the Solicitor’s Office if necessary, to ensure the conveyances cannot be construed as sales and purchases by the United States.

Proposing a multiple-phase land exchange at the feasibility stage is discouraged. Completion of a land exchange in a single transaction is preferred, and completion in multiple transactions should generally be considered because of issues (e.g., title, hazardous substances, need for mitigation, etc.) encountered during processing that may preclude the exchange from being completed in one transaction. The authorized officer must evaluate multiple transactions over time versus the delay of completing the land exchange in a single transaction (complexity, costs, need to redo or update time-sensitive processes, risk that subsequent transactions may not occur, etc.) and document in the decision why the public interest is better served by completing the exchange in multiple phases rather than in a single transaction. The public interest must be considered at each phase so the completed portion(s) of the land exchange can be justified if the subsequent phases(s) do not occur and certain lands would not be conveyed. Lands acquired by the United States in each phase must be manageable on their own, and that manageability must be documented in the decision on the land exchange.

In the first transaction of a multiple-phase land exchange, there must be a conveyance of both Federal and non-Federal lands. In subsequent transactions, all reasonable efforts should be made to continue to convey both Federal and non-Federal lands in order to minimize value imbalances reflected on a ledger tracking the values of the Federal and non-Federal lands conveyed in each phase of the land exchange. When the conveyance of only Federal or non-Federal land is being considered in a transaction, the administrative record must document how the conveyance facilitates equalization of value imbalances and expedites completion of the exchange. Generally, conveyance of only Federal or non-Federal land should not be considered if the value imbalance on the ledger would be increased and a series of such transactions is discouraged.

Ledger Management

In a multiple-phase land exchange, the values of the conveyed Federal and non-Federal lands do not have to be equalized until the final phase (transaction). The value imbalance is reconciled by completing a subsequent exchange transaction(s) and/or by the exchange equalization provisions of 43 CFR 2201.6 and Chapters 7 and 11 of the Handbook. Cash equalization may be used to reconcile a value imbalance in conjunction with completing any phase of a land exchange; however, any such cash equalization would not be available to reconcile value imbalances in subsequent transactions. Any cash equalization payment to the United States must immediately be deposited into the appropriate Federal account. A waiver of cash equalization under 43 CFR 2201.6 can only be used to reconcile a value imbalance, including a ledger imbalance, in the final phase of a land exchange.

A ledger imbalance may become cash equalization if subsequent phases in a land exchange do not occur. In addition, in accordance with the regulations at 43 CFR 2201.1-1, a ledger must be balanced (reduced to zero) at least every 3 years, and the value imbalance would become cash equalization if the value imbalance cannot be reconciled with conveyed land within that time period.

Therefore, it is BLM policy to minimize the value imbalances on a ledger, and the principles identified above for minimizing cash equalization apply to ledger imbalances. For each transaction of a multiple-phase land exchange, the State Director must justify how the chosen configuration of the transaction is the most reasonable alternative to minimize the ledger imbalance, especially if the value imbalance on the ledger is being increased rather than being reduced or eliminated. Generally, additional land should not be conveyed if the ledger imbalance is sufficient to cover the value of the land on the other side of the transaction. If multiple land exchanges are being processed concurrently with the same non-Federal entity, the total amount of value imbalances on all ledgers involving that entity must be considered in determining the acceptability of the proposed ledger imbalance for the current transaction, and is particularly relevant in determining the need to secure the ledger imbalance for amounts in favor of (due to) the United States.

Whenever a proposed ledger imbalance is in favor of the United States, the State Director must make a written determination on the need to secure the ledger imbalance. The determination must be included as part of the administrative record for the land exchange and reviewed and updated in conjunction with each posting to the ledger. The documentation must also be reviewed and updated 12 months after posting if a subsequent exchange transaction has not occurred within that time period and the ledger remains open. Acceptable methods for securing ledger imbalances are described in Chapter 11 of the Handbook. The security, especially if a cash bond is used, must be established and managed so that the security cannot be considered to be a sale revenue or cash equalization payment, and the security cannot be perceived as funds that have not been appropriately deposited. The security must be received and accepted by the BLM on or before the closing date of the transaction. To preclude the appearance that the financial pledge is a sale revenue or cash equalization payment, it is recommended that the financial pledge for the security be separate from any funds involved in the closing. The bonding specialist in the applicable state office should be consulted to ensure that all requirements are met for the establishment, maintenance, redemption, and release of the bond. The Personal Bond, Cash and Book Entry Deposits form is Illustration 11-1 in the Handbook. Attachments 1, 2, and 3 are sample decisions for accepting, modifying, and releasing bonds. The sample decisions are also available in the Land Exchange Directory accessible through the intranet ([\\blm\dfs\wo\pub\Land Exchange](file:///%5C%5Cblm%5Cdfs%5Cwo%5Cpub%5CLand%20Exchange)).

The ledger must identify whether it is open or closed, and must identify the 3-year anniversary date by which the ledger must be balanced (reduced to zero). The standard ledger format in Illustration 11-2 of the Handbook is obsolete and has been replaced by the standard formats in Attachments 4 and 5. Attachment 4 is a sample ledger for the first phase and Attachment 5 is a sample ledger for the final phase of a multiple-phase land exchange. Attachment 4 may be modified as necessary if there are additional intervening transactions. The sample ledgers, in both Word and Excel versions, are also available in the Land Exchange Directory. The standard ledger formats must be used for all land exchange transactions involving a ledger, including land exchanges currently in process, unless the Director approves the use of a different format. Written requests for the use of a different format, with the accompanying rationale as to why the standard formats should not be used, may be submitted for the Director’s concurrence through the National Land Exchange Team (NLET). The request must explain how the identification of whether the ledger is open or closed and the 3-year anniversary date would be documented.

Processing Requirements

If a multiple-phase land exchange is proposed at either the feasibility or decision stages, the feasibility or decision package submitted to the NLET, the Washington Office (WO) and the Solicitor’s Office for formal review must explain the rationale for the multiple phases versus a single closing. The provisions for the multiple phases must be documented in the draft ATI or draft ATI amendment. Any decision package for a proposed multiple-phase exchange in which a ledger is proposed must also include the following:

* The State Director’s draft approval for the establishment of the ledger, either in a draft amendment to the ATI or a separate draft memorandum.
* The State Director’s draft determination and rationale on the need to secure the ledger imbalance for a proposed ledger imbalance in favor of the United States. If it is determined security is required, the decision package must also include the draft bond, type of security, and the applicable draft bond decision.
* The draft ledger for the current phase of the land exchange.

Each State Director must verify the outstanding value imbalances for all land exchanges with open ledgers within their jurisdiction and ensure that supporting documentation has been updated in accordance with the requirements in the Handbook and this IM. Before June 30, 2010, the following items must be submitted to the NLET for any such exchange: copy of the current ledger, copies of the updated security documentation (if applicable), the 3-year anniversary date for the ledger, and the anticipated date of the next exchange transaction. If no open ledgers exist, a declaration to that effect must be submitted to the NLET. For all future transactions involving ledgers, copies of all executed ledgers and updated security determinations and documentation must be submitted to the NLET immediately after signature by the State Director.

**Timeframe:**  This IM is effective immediately.

**Budget Impact:**  None.

**Background:**  The Government Accountability Office’s (GAO) June 2009 report entitled *“FEDERAL LAND MANAGEMENT: BLM and the Forest Service Have Improved Oversight of the Land Exchange Process, but Additional Actions Are Needed”* (GAO-09-611) identified six recommendations related to management of value imbalances in land exchanges. This IM will implement the Department of the Interior’s Statement of Actions dated September 10, 2009, in response to these six recommendations.

**Manual/Handbook Sections Affected:** This IM supplements guidance in BLM Manual Handbook H-2200-1.

**Coordination:**  This IM was coordinated with the Division of Lands, Realty and Cadastral Survey (WO-350), the Division of Information Resources Management Governance (WO-560) and realty personnel in each state office.

**Contact:**  Please address any questions to me at 202-208-4201 or your staff may contact Kim Berns, Division Chief, Lands, Realty and Cadastral Survey, at 202-912-7350 or Carolyn Spoon, Branch Chief, Lands and Realty (WO-350), at 202-912-7574.

Signed by: Authenticated by:

Michael Nedd Robert M. Williams

Assistant Director Division of IRM Governance, WO-560

Minerals and Realty Management

5 Attachments

 1 – Sample Decision – Cash Bond Accepted (2 pp)

 2 – Sample Decision – Bond Amount Reduced (1 p)

 3 – Sample Decision – Unconditional Release of Bond (1 p)

 4 – Sample Ledger – First Transaction (2 pp)

 5 – Sample Ledger – Final Transaction (2 pp)