

APPENDIX 18—COMPENSATION (OFFSITE) MITIGATION

Offsite or compensation mitigation (OSM) would be used as a voluntary tool to address loss of habitat effectiveness when reclamation, best management practices (BMP), and onsite mitigation measures are not adequate to mitigate the impacts of activities authorized on the public land. Offsite mitigation or compensatory mitigation is a voluntary measure consistent with WO-IM-2005-069, Interim Offsite Compensatory Mitigation for Oil, Gas, Geothermal, and Energy Rights-of-Way Authorizations. This Instruction Memorandum (IM) is applicable only to oil, gas, and geothermal authorizations and energy right-of-way authorizations granted by the Bureau of Land Management (BLM). This IM has expired (see attachment A18-1). Other program guidance (3809 regulations) addresses offsite or compensation mitigation for hard rock (locatable) minerals. When an applicant's offsite mitigation proposal is part of the plan of development for an approved permit or grant, that mitigation will pass from being a voluntary proposal to becoming a requirement of the authorization. The applicant becomes committed to the offsite mitigation component once the authorization is granted.

The order of use of mitigation methods from most to least preferred would be as follows:

- Onsite mitigation directly resolving impacts created by the action
- Compensation mitigation to the resources affected by the action that cannot be resolved onsite
- Compensation mitigation to similar or related resources affected by the action that cannot be resolved onsite
- Compensation mitigation through the use of proponent-generated funds to a third party for use on same, related, or tangible benefits.

The following stipulations would apply to offsite mitigation measures:

- Compensation mitigation would be used as a last choice, not a first choice, when developing mitigation measures.
- Compensation mitigation proposals would describe the replacement or substitution activities or methods that would be used to address potential impacts to specific resources or environments or both.
- Compensation mitigation must be as close to “in kind” in replacement or substitution of resources, habitat function, or environments (e.g., elk habitat for elk habitat; historical properties for historical properties) as possible.
- Compensation mitigation activities are to occur as near to the project or impacted area as possible or as scientific information and impact analysis suggests.
- Compensation mitigation practices must last as long as the impacts are expected to occur.
- Compensation mitigation cannot be in any form of monetary compensation directly made to the BLM.
- Compensation mitigation practices are to be developed, conducted or performed, and funded by the project proponent.

- Compensation mitigation activities must be conducted subject to BLM review and approval that the mitigations will actually address the impacts occurring on the public lands.

Thresholds

When a threshold is reached, offsite mitigation would be applied. Thresholds would generally be set at the point where disturbance in a specific area exceeds the level that would be tolerated by wildlife, or exceeds the physical capacity of an area to absorb or dampen the impact (for example, actions causing surface runoff in excess of the capacity of soils to absorb or surface channels to carry without erosion of the channels). Threshold points for initiation of offsite or compensation mitigation would be developed on a project specific basis and could include—

- Oil and gas development in excess of 16 surface well pad locations per 640-acre section. (See Oil and Gas Operations Appendix for information on surface disturbance, including roads, associated with typical well pads.)
- Physical long-term surface disturbance in excess of 80 acres per 640-acre section, or 12.5 percent of odd-sized or smaller sections.
- Disturbance to cultural resources (settings) when setting is an element of National Register status.

The first threshold reached would trigger the compensatory offsite mitigation. More thresholds could be developed throughout the life of the Resource Management Plan (RMP) as knowledge of impacts and mitigation technology is gained. Additional thresholds could address impacts such as acres of limited habitat types, amount of aspen disturbed, noise levels, and human presence factors, like the number of vehicle trips in a specific area per day.

Options for specifics of compensation mitigation actions, including potential location of the compensating mitigation, methods, and number of acres treated, would be dependent on the proposed alternatives, and would be discussed at the implementation level—for example, through project-level Environmental Impact Statements for oil and gas field development. Some site-specific impacts cannot be known until projects are physically implemented. For this reason, final compensation mitigation requirements may not be determined, in some cases, until after the impacting action has occurred.

ATTACHMENT A18-1. IM 2005-069

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

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In Reply Refer To:
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EMS TRANSMISSION 02/02/2005
Instruction Memorandum No. 2005-069
Expires: 09/30/2006

To: All State Directors and Field Managers

From: Director

Subject: Interim Offsite Compensatory Mitigation for Oil, Gas, Geothermal and Energy Rights-of-Way Authorizations

Purpose: This Instruction Memorandum (IM) outlines interim policy for the use of compensatory (offsite) mitigation for authorizations issued by the Bureau of Land Management (BLM) in the oil, gas, geothermal and energy right-of-way programs.

Background: Provisions of the Federal Land Policy and Management Act (FLPMA), including section 302(b) (43 U.S.C. §1732(b)), and of the Mineral Leasing Act, including section 17(g) (30 U.S.C. § 226(g)), provide BLM the authority to require mitigation in the oil, gas, geothermal and energy right-of-way programs. Mitigation measures are actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands and protect surface resources in the approval of surface use plans. Mitigation measures are oftentimes proposed by proponents seeking BLM authorizations. These measures, as part of a proposed action, are analyzed as part of BLM's compliance with the National Environmental Policy Act (NEPA). Mitigation, as defined by the Council on Environmental Quality (CEQ) for NEPA purposes in 40 CFR 1508.20, may include one or more of the following:

- “(a) Avoiding the impact altogether by not taking a certain action or parts of an action;*
(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
*(e) **Compensating** for the impact by replacing or providing substitute resources or environments.”* (emphasis added)

This IM addresses the last category—offsite compensatory mitigation of impacts by replacing or providing substitute resources or environments. The application of this IM is further limited to the oil, gas, geothermal and energy right-of-way programs.

The last time the BLM addressed offsite mitigation in national policy was during promulgation of revisions to 43 CFR 3809-Surface Management regulations for locatable (hardrock) minerals, 65 FR 69998 (November 21, 2000). The BLM explained in the preamble that in the case of minerals, “BLM will approach mitigation on a mandatory basis where it can be performed on site, and on a voluntary basis, where mitigation (including compensation) can be performed offsite” 65 FR 69998 at 70012.

Because of recent interest expressed by cooperating agencies, State governments, and the public regarding offsite mitigation in the energy programs, the BLM is providing this policy guidance.

Attachment 1 defines terms used in conjunction with compensatory mitigation. Also, other Department of the Interior agencies have well-developed compensatory mitigation policies and procedures. A discussion of those programs is contained in Attachment 2.

Policy: The BLM will approach compensatory mitigation on an “as appropriate” basis where it can be performed onsite and on a voluntary basis where it is performed offsite. Further, this IM is not intended to establish an equivalency of mitigation policy by the BLM (i.e. acre for acre).

Since this policy generally adds a new dimension in mitigation practice for both BLM and public land users, it is being issued as interim guidance. The policy will

be reviewed and updated prior to the expiration date of this IM. We anticipate both internal and external feedback that will lead to improvements and policy modification.

General

- This IM is applicable only to oil, gas, and geothermal authorizations and energy right-of-way authorizations granted by the BLM. Energy right-of-way authorizations include oil and gas pipelines, electric transmission lines, and wind and solar energy authorizations. The IM does not apply to any other BLM program or activity.
- When an applicant's offsite mitigation proposal is part of the plan of development for an approved permit or grant, that mitigation will pass from being a voluntary proposal to becoming a requirement of the authorization. The applicant becomes committed to the offsite mitigation component once the authorization is granted.
- Offsite mitigation may be considered after application of other forms of onsite mitigation including best management practices (see also "Limitations" section).
- The BLM continues to have an obligation to ensure that actions do not result in unnecessary or undue degradation to the public lands. 43 U.S.C. §302(b).
- Offsite mitigation is to be entirely voluntary on the part of the applicant.
- When offsite mitigation is being considered as a design feature of the applicant's submission, BLM NEPA analysis should: 1) evaluate the need for offsite mitigation, 2) consider the effectiveness of offsite mitigation in reducing, resolving, or eliminating impacts of the proposed project(s), and 3) comparatively analyze the proposal with and without the offsite mitigation.
- The BLM may identify other offsite mitigation opportunities to address impacts of the project proposal, but is not to carry them forward for detailed analysis unless volunteered by the applicant.
- When applying offsite mitigation, it must be implemented in a timely manner and generally for the same or similar impacted species or habitats (for example, sagebrush/grassland for sagebrush/grassland).
- Offsite mitigation need not be permanent but should be of duration appropriate to the anticipated impact(s) being mitigated.
- This IM does not establish an equivalency requirement for offsite mitigation (no 1:1 compensation ratio).
- Any existing mandatory offsite mitigation programs used by Field Offices are to be reviewed in light of this national policy, and modified as appropriate.

- Offsite mitigation that has resulted from a formal Section 7 or Section 106 consultation is not affected by this IM.
- In cases where offsite mitigation is applied to an authorization to reduce impacts to less than “significant” for NEPA purposes the offsite mitigation must be committed and a condition of approval in the authorization issued.
- Offsite mitigation must not infringe on or affect other property rights including those of any mineral lessee of the offsite tract without agreement of affected parties.
- Offsite mitigation associated with a split estate lease must be in agreement with IM 2003-131 Permitting Oil and Gas on Split Estate Lands and Guidance for Onshore Oil and Gas Order No. 1.

Resource Management Plans

Older land use plans may not mention compensatory or offsite mitigation. Omission of such discussion does not prohibit consideration of offsite mitigation in accordance with this IM.

Endangered Species Act Section 7 Consultation

As mentioned earlier, any consultation with the U.S. Fish and Wildlife Service is subject to the applicable regulations and procedures for Endangered Species Act (ESA) consultation efforts. Any mitigation measures developed as a result of ESA consultation are not affected by the policies and procedures for use of offsite mitigation outlined in this IM.

National Historic Preservation Act Section 106 Consultation

Application of this policy to cultural resources must be consistent with the BLM’s National Historic Preservation Act (NHPA) Section 106 responsibilities and individual BLM/State protocols under the BLM National Programmatic Agreement (PA). This includes any required coordination with the State Historic Preservation Office, tribes and the Advisory Council on Historic Preservation (ACHP). There are inherent limitations to the applicability of offsite mitigation to resolution of adverse effects under Section 106 of the NHPA. Cultural resources are non-renewable and may be unique, and it may not be appropriate to mitigate loss of such resource values by attempting to identify and preserve an alternative equivalent one. This is particularly true when data recovery is used as mitigation for loss of a site important for its data value, since it may result in the destruction of two sites. There are exceptions; for instance, where treatment onsite is technically impossible and an offsite resource is also at risk, or where offsite data

recovery is part of an established research design and management strategy that will include onsite work.

Livestock Forage Mitigation

Impacts to livestock forage as a result of energy development are typically addressed through onsite mitigation using direct reclamation or rehabilitation techniques to re-establish the lost vegetation.

Financial Contributions toward Mitigation

In some circumstances, BLM may accept volunteered monies to pay for a larger effort to mitigate the impact of multiple actions when it is infeasible to require individual applicants to manage specific mitigation efforts. Such monies are to be used for on-the-ground projects. In order to qualify as offsite mitigation, the funds collected must be identified for specific types of mitigation projects and either the BLM or other parties may be identified as responsible for implementation of the project(s). However, it is not BLM policy to waive or forego onsite mitigation of impacts through payment of monies.

Where the effectiveness of mitigation will depend on future contributions from other applicants, such contributions cannot form the basis for a Finding of No Significant Impact or compliance with a legal limitation on effects, such as those in the Clean Air Act.

Whenever monies are handled either directly or indirectly by the BLM, pursuant to section 307(c) of FLPMA, a signed cooperative agreement will be required before any funds can be received or transferred. If a third-party organization agrees to accept voluntary funds from an applicant for funding of mitigation projects, the affected BLM office will enter into cooperative agreements with the affected parties (see BLM Manual 1511 and Manual Handbook 1511-1). The parties to the agreement must include the cooperators and the party or parties responsible for project implementation.

Monetary compensation can be made directly to the BLM in accordance with a formal cooperative agreement and with prior approval of the appropriate State Director. Compensation also must be properly recorded on Form 4120-9 ("Proffer of Monetary Contributions") and deposited in the appropriate 7100 (usually 7122) account for redistribution for offsite activities to offset adverse impacts for a particular action or class of actions. These accounts require assignment of specific project codes to track the contributions and subsequent expenditures. State Office Budget staff can provide assistance in establishing the project codes.

Cooperative agreements must also address the following items:

- Authority to enter into a cooperative agreement;
- Disposition of excess funds, if any;
- Project codes and tracking of funds incoming and outgoing (especially in the case of multiple contributors);
- Administrative surcharges;
- Other agency rules and requirements for cooperators; and
- Adequacy of funds for specific mitigation projects.

Field Offices are required to use a cooperative approach in approving projects where compensation funds are involved. It is usually appropriate to involve cooperators (e.g., State Game and Fish agencies) and any other directly affected parties in determining the specific mitigation projects. It is never appropriate for third parties to make these determinations without direct, local BLM involvement in the specific mitigation project. In undertaking cooperative efforts, the BLM needs to ensure compliance with the Federal Advisory Committee Act (FACA), if applicable.

Should the mitigation program provide for public input on offsite mitigation projects or the application of funds, Field Offices should be certain to comply with FACA when establishing a committee to provide it advice as a group, as opposed to the views of individual participants.

Attachment 3 is a list of “frequently asked questions” and appropriate responses for implementing this policy.

Limitations

Even with the most effective, state-of-the-art onsite mitigation, oil, gas, geothermal and energy right-of-way authorizations can result in impacts to the environment. The BLM will mitigate onsite impacts to the maximum extent practicable. Offsite mitigation is only appropriate when the specific conditions of a proposed project make such mitigation appropriate.

While the voluntary application of offsite mitigation is the general rule, there are circumstances where negotiation would be appropriate. In cases where one or more applicants in a specific geographic location have volunteered to perform offsite mitigation, it could be appropriate for other applicants in the same area to apply the same or similar offsite mitigation.

Timeframe: This IM is effective upon issuance. In instances where NEPA documentation is near completion for an action (e.g., preliminary Draft Environmental Impact Statement (EIS) is in the final stages of review), implementation of this policy may be modified to fit the specific circumstances so as not to delay publication of the EIS and approval of the project(s).

Budget Impact: None at this time.

Energy Impact: This IM may result in some increased costs to oil and gas and geothermal lessees, permittees, and operators and energy right-of-way holders. Because these parties would usually enter into offsite mitigation agreements voluntarily and with full knowledge of associated costs, it is unlikely that this policy would have any material adverse impact on energy supply, distribution, or use.

Manual/Handbook Sections Affected: None.

Coordination: Preparation of this IM was coordinated with WO-200, WO-300, WO-310, WO-350 and the Office of the Solicitor.

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3 Attachments

- 1 - Definitions (1 p)
- 2 - Departmental Compensatory Mitigation Programs (1 p)
- 3 - Frequently Asked Questions (4 pp)

