

United States Department of the Interior

MEMORANDUM OF UNDERSTANDING

Between the

BUREAU OF LAND MANAGEMENT

and the

U.S. FISH AND WILDLIFE SERVICE

Regarding the

**RIGHTS-OF-WAY UNDER TITLE V OF THE
FEDERAL LAND POLICY AND MANAGEMENT ACT
AND COST REIMBURSEMENT**

May 6, 2013

A. PURPOSE

The purpose of this Memorandum of Understanding (MOU) is to establish the protocol by which cost recovery determinations and funds are handled, and to facilitate the establishment of project specific agreements between the Bureau of Land Management (BLM) and the U.S. Fish and Wildlife Service (FWS) (hereinafter referred to as “partner agencies” for the scope of this MOU), that will promote efficient review of projects proposed on public lands that require a BLM decision under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended. Local BLM and FWS offices should develop and execute such project-specific agreements to facilitate a partner agency review, analysis, and coordination necessary for the BLM to process right-of-way applications, such as renewable energy development or high-voltage electric transmission projects.

The BLM has received numerous right-of-way applications for commercial-scale solar and wind energy development, high-voltage electric transmission line projects on the public lands, and

other purposes. Many states have established progressive renewable energy portfolio standards. Demand for renewable energy and transmission projects is likely to continue. Because the BLM and FWS anticipate increased workload associated with the review of renewable energy and other processing of these project proposals, this MOU describes how the BLM and FWS will coordinate with one another when FWS uses its cost recovery authority provided under Sections 304(b) and 504(g) of FLPMA, as delegated under Secretary's Order 3327 on these and any other applicable proposed projects. This MOU also describes the types of goods and services that the BLM may purchase from FWS under the authority of the Economy Act, 31 U.S.C. § 1535.

Some projects proposed to the BLM have the potential to require FWS actions and expenditure of funds to fulfill the FWS's statutory responsibility, such as when the project may affect species currently listed or proposed to be listed under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. § 1531 et seq.), migratory birds protected by the Migratory Bird Treaty Act of 1918 (MBTA; 16 U.S.C. § 703-712), as well as bald and golden eagles protected by the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. § 668-668c; BGEPA). A BLM project authorization may require, for example, the completion of informal and/or formal consultation under Section 7 of the ESA, or the preparation and review of an appropriate Avian and Bat Protection Plan or Eagle Conservation Plan. In such circumstances, reimbursement of FWS costs under FLPMA sections 304(b) and 504(g) will be appropriate. Some projects may also benefit from technical expertise and skills FWS provides to the BLM. In such circumstances, reimbursement of FWS costs under the Economy Act may be appropriate.

B. AUTHORITIES

Section 304(b) and 504(g) of FLPMA (43 U.S.C. § 1734(b) and 43 U.S.C. § 1764(g);

The Economy Act (31 U.S.C. § 1535);

ESA (16 U.S.C. § 1531 et seq.);

Migratory Bird Treaty Act of 1918 ("MBTA", 16 U.S.C. § 703-712);

BGEPA, (16 U.S.C. § 668-668c);

National Environmental Policy Act (NEPA, 42 U.S.C. § 4371 et seq.);

Fish and Wildlife Coordination Act (16 U.S.C. § 661 et seq.); and

National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. § 668dd).

C. SCOPE OF ACTIONS

This MOU deals with applications for proposed projects on BLM-administered lands, including proposals for commercial-scale solar and wind energy development projects and high-voltage electric transmission lines, that either have the potential to affect the resources for which FWS has statutory responsibility or would benefit from technical expertise and skills FWS provides voluntarily to the BLM. This MOU provides the procedures by which the BLM may collect and provide reimbursement to FWS for actions associated with proposed projects for which the BLM has a cost reimbursement agreements with a project proponent (Proponent).

D. PROCEDURES

Under Secretary's Order 3327, the BLM is charged with being the lead agency to oversee the determination, management, and collection of costs charged under the delegated FLPMA authority for reimbursement of reasonable costs to all bureaus and offices within the Department of the Interior. Regional/State and/or Field Offices of the BLM and FWS will follow the procedures in determining and establishing a project cost recovery account under Secretary's Order 3327. Through the procedures identified below, the BLM will assist in developing specific mechanisms to determine appropriate activities for reimbursement, establishing local implementation agreements, and collecting project cost reimbursable monies.

D.1. Lead DOI Agency – The BLM agrees to:

1. Advise FWS of FLPMA reimbursable cost applicability under delegated authority under Secretarial Order 3327;
2. Establish and manage processing of regional or local project-specific reimbursable agreements with a Proponent;
3. Provide for the FWS the project-specific Interagency Agreement (IAA) documents for a project-specific reimbursable agreement;
4. Assist in structuring, developing, and administering Inter-Governmental Orders (IGO) with FWS;
5. Oversee and coordinate application processing activities with FWS;

6. Advise FWS about reimbursable account monitoring practices and otherwise assist FWS to the extent feasible under BLM and FWS authority; and
7. Notify Proponents of cost recovery bill amounts.

D.2. Partner Agency – The FWS agrees to:

1. Enter into the project-specific IAA with documentation provided by the BLM for a project-specific reimbursable agreement;
2. Coordinate application processing activities with the BLM;
3. Submit bills and appropriate supporting documentation to the BLM in a timely manner; and
4. Manage FWS project-specific expenses and schedule and notify the BLM when additional funds and/or scheduling adjustments are necessary.

D.3 Reimbursement Procedures

1. After a Proponent makes the BLM aware of a project proposal, the BLM and FWS will discuss the scope of the work necessary for processing the project proposal. These discussions will result in a Cost Estimate from each partner agency.
2. FWS will provide the BLM with its initial Cost Estimate within 30 days of the project scope of work discussions. The Cost Estimate should:
 - a. Contain a list of deliverable items and a preliminary schedule that estimates when the deliverable items can be completed,
 - b. Identify which deliverable items FWS is statutorily required to perform (e.g., Section 7 consultations) and which ones are being provided on a voluntary basis (e.g., NEPA review assistance), and
 - c. Use the FWS Indirect Cost Rate of 17 percent for overall FWS reimbursable project costs.
3. The BLM will review FWS's Cost Estimate and confirm that the costs are recoverable as "actual" and/or "reasonable" costs as defined by FLPMA and 43 CFR § 2801.5(b). The BLM will notify FWS of its determination. If FWS objects to the determination, then the BLM and FWS will attempt to reach agreement within 15 days.

4. The BLM and the Proponent will sign a cost reimbursable agreement, including the Cost Estimate provided by FWS.
5. The BLM will establish project-specific accounts for each project into which it will deposit funds for use by FWS when the BLM receives payment from Proponents.
6. The Proponent will pay the BLM as described within the cost reimbursable agreement.
7. The BLM will deposit the payment in the Collections and Billing System suspense account until the BLM establishes the Work Breakdown Structure(s) (WBS) in the Financial and Business Management System.
8. The BLM will prepare the Subcontract Purchase Requisition. The Subcontract Purchase Requisition must contain:
 - a. Indirect Cost Rates for both agencies,
 - b. The FWS Cost Estimate, developed above,
 - c. A statement of work for the FWS cost estimate, and
 - d. The BLM accounting data to be used in the IAA agreement.
9. The BLM Contracting Officer will draft the IAA. The IAA must include:
 - a. An itemized statement of work, with a period of performance and the amount of financial authority. The period of performance of the work as well as a description of how the work is non-severable and would allow work to continue beyond the end of the fiscal year, if limited by the type use of funds;
 - b. The authority for the transfer, which must be one or both of the following:
 - i. **Economy Act** – Requires a determination and finding and recovery of actual costs including indirect costs unless waived by BLM-delegated authority. The expectation of this authority is that the work to be done by FWS will be funded via project-specific financial agreements developed pursuant to this MOU. The funding for each project will remain available for use by the FWS until necessary work is completed, unless otherwise stated in the project-specific agreement or required by law; and
 - ii. **FLPMA** – Section 304(b) of FLPMA authorizes the Secretary to charge for reasonable costs of the United States concerning “applications and other documents relating to [the public] lands”; Section 504(g) of FLPMA authorizes the Secretary to charge for “all reasonable administrative and

other costs incurred in processing” a right-of-way application. These authorities should be used whenever the BLM intends to reimburse FWS for FWS statutorily-required activities, such as Section 7 consultations and Biological Opinions. Section 304(b) may be used for any application on public lands; Section 504(g) may be used only for applications pertaining to rights-of-way; and

- c. Any other items required by law or policy.
10. The FWS Contracting Officer will conclude and execute the IAA by providing the BLM with:
 - a. The BLM accounting data and reimbursable WBS, and
 - b. An acceptance signature on the IAA.
11. The IAA will use budget authority against the WBS but the IAA would not be expensed to the project until:
 - a. The FWS bills the BLM for actual costs incurred, and
 - b. The BLM releases the billed funds as required by the IAA when FWS provides adequate bill support documentation, such as labor reports and purchase receipts.
12. The BLM and FWS will begin or continue work, incurring actual costs to specified WBS codes.
13. When FWS work is complete, FWS will notify the BLM of final costs for the subcontract within 60 days of the final FWS project action. The BLM will reimburse FWS for final costs within 3 weeks of the completed bill request, or as soon as possible afterwards.
14. After FWS completes its work, and BLM makes the final payment to FWS, the IAA will be modified to de-obligate any additional authority.
15. In accordance with FLPMA regulations, the BLM may use the de-obligated amount to either refund the Proponent OR to cover any additional costs incurred in the BLM WBS.
16. Once the BLM completes all project processing actions, the BLM may refund any unused funds to the Proponent.
17. Change Orders: FWS will perform work within the cost estimate and deliverable schedule to the maximum extent practical. FWS will notify the BLM at the earliest possible date when conditions occur that would disrupt the deliverable schedule or affect the cost estimate. FWS will provide detailed information on conditions and provide a proposed

change order estimate. The BLM will consult with FWS on specific aspects of a proposed change order to determine the extent to which it may be warranted. If agencies agree that a change order is warranted, the BLM will initiate a purchase request to modify the IAA. If necessary, the BLM will work with the Proponent to amend the cost reimbursable agreement to address the scheduling or cost estimate changes.

E. BLM and FWS MUTUALLY AGREE TO:

1. Cooperate in developing and completing timely reviews of applications for the use of public land to the BLM, such as renewable energy development, high-voltage electric transmission projects, and other projects on BLM-administered lands, including compliance with the laws applicable to partner agencies, as identified in the project-specific agreements. This cooperation includes, but is not limited to, informal and open exchanges of information and data needs, and expeditious response to requests for information or clarification; and
2. Expeditiously elevate disagreements between staff to ensure that identified timelines are met. Disagreements will be elevated promptly within the BLM and FWS to the next higher comparable decision-making level of the partner agency (i.e., Regional FWS Office and BLM State Office) until resolution, ending with the Directors of FWS and the BLM.

F. GENERAL PROVISIONS

1. Meeting the timelines outlined in any agreement is contingent upon the availability of adequate funding and sufficient staff for the partner agencies, pursuant to the conditions of the project-specific agreement.
2. This MOU is intended only to improve the internal coordination and review process of the partner agency, and is neither intended to nor creates any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, and any other person.
3. Nothing in this agreement may be construed to obligate the BLM, or FWS, or the United States to any current or future expenditure of resources in advance of the availability of appropriations from Congress. Nor does this agreement obligate the BLM, or FWS, or the United States to spend funds on any particular project or purpose, even if funds are available.

4. The mission requirements, funding, personnel, and other priorities of the partner agencies may affect their ability to fully implement all the provisions identified in this MOU.
5. Specific activities that involve services or transfer of project-related property between or among the partner agencies will require execution of separate agreements or contracts.
6. Nothing in this MOU is intended to or will be construed to restrict the partner agency from participating in similar activities or arrangements with other public or private agencies, organizations, or individuals.
7. Any document furnished between the partner agencies under this MOU may be subject to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, et seq. The partner agencies agree to inform one another prior to releasing sensitive but non-exempt documents.
8. All press releases and public statements issued by the partner agencies concerning or characterizing this MOU will be jointly reviewed and agreed to by delegated staff representing each of the undersigned signatories.

G. NON-FUND OBLIGATION DOCUMENT

This instrument is neither a fiscal nor a funds obligation document. Any endeavor or transfer of anything of value involving reimbursement or contribution of funds between the parties to this instrument will be handled in accordance with applicable laws, regulations, and procedures including those for Government procurement and printing. Such endeavors will be outlined in separate agreements that will be made in writing by representatives of the parties and will be independently authorized by appropriate statutory authority. This instrument does not provide such authority. Specifically, this instrument does not establish authority for noncompetitive award to the cooperator of any contract or other agreement. Any contract or agreement for training or other services must fully comply with all applicable requirements for competition.

H. MODIFICATION

The terms of this agreement may be modified at any time by mutual agreement. Should disagreement arise as to the interpretation of the provisions of this agreement, or amendments and/or revisions thereto, that cannot be resolved at the operating level, each party will reduce the area(s) of disagreement to writing and present to the other party for consideration. If agreement

on interpretation is not reached within 30 days, the parties will forward the written presentation of the disagreement to their respective higher officials for appropriate resolution.

I. PRINCIPAL CONTACTS

The principal contacts for this MOU are:

Bureau of Land Management

Program Contact: Ray Brady
Manager, National Renewable Energy Coordination Office

Finance Contact: Linda Smith
Chief, Budget Division

U.S. Fish and Wildlife Service

Program Contact: Larry Bright
Conservation Planning Assistance

Finance Contact: Thomas Angus
Chief, National Financial Policy Branch

J. TERM OF AGREEMENT/TERMINATION

This agreement is executed as of the date of last signature and will remain effective until modified or terminated. Any party may terminate participation in this MOU 90 days after providing written notice to the other parties. Sub-agreements and IAAs under this agreement that are in effect on the date of termination will remain valid until complete and will not be extended or renewed. In the event of termination, the parties may separately agree to terminate any sub-agreements or IAAs before they are complete.


K. SIGNATORIES

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the last written date below:



Principal Deputy Director, Bureau of Land Management

5/1/13
Date



Director, U.S. Fish and Wildlife Service

5-6-13
Date