

**UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
COLORADO STATE OFFICE
2850 YOUNGFIELD STREET
LAKEWOOD, COLORADO 80215-7093**

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To: All Field Offices, Deputy State Directors

From: State Director, Colorado

Subject: Land Exchange Policy and Procedures – Approval of Feasibility Reports

Land exchanges are an important component of Colorado's comprehensive land tenure adjustment strategy. Much of the existing State Office (SO) guidance pertaining to exchange processing needs to be re-issued in order to promote quality and consistency in our land exchange processes. The purpose of this memorandum is to provide updated policy and procedural guidance for processing land exchanges in Colorado.

Management Oversight and Quality Control

A feasibility report is required for all land exchanges, regardless of the land values involved. Approval of the feasibility report by the State Director (SD) is the primary focus for management oversight for all land exchanges. All feasibility reports and other exchange documents - including the Agreement to Initiate (ATI), Notice of Exchange Proposal (NOEP), Decision Record (DR), Notice of Availability of Decision (NOD) and issue summary will be directed to the Branch of Realty and Appraisal CO-935, to be reviewed for consistency with legal requirements and agency policy prior to submission, to the SD or the Washington Office (WO) for approval. Do not send your packages directly to the SD or the WO.

State-wide priorities for land exchanges will be set by the SD through the feasibility report approval process. Priorities will be reassessed throughout the year as new feasibility reports are submitted and approved. Proposals that involve projects in more than one field office (FO), involve a combination of funding sources, or use facilitators and/or non-profit partners must be coordinated through CO-935 and approved by the SD before any commitments are made.

Field Office and State Office Coordination

Coordination between the FO staff and managers and the SO realty and appraisal staff is critical, both when the exchange proposal is being developed and as the exchange is being processed, to ensure that time frames are realistic and that funds and staff are available to work on the project when needed. When a new exchange is proposed, the FO should contact the Branch Chief, CO-935 so that SO staff can be assigned to the project. FO staff and managers are encouraged to work closely with the SO realty and appraisal staff as the exchange develops.

Routine Land Exchanges

For routine land exchanges (land exchanges that are required by Congressional legislation or result from Justice Department settlement actions, and those where the value of the public land to be exchanged is less than \$500,000), a feasibility report must be approved by the SD prior to the publication of the NOEP. A draft ATI and a draft NOEP must be included with the initial feasibility report. Although the FO is not required to formally submit the NOD, nor any additional documents for SD approval, it must provide a copy of the NOD (preferably by e-mail) to CO-935 for review before it is finalized for publication.

Non-Routine Land Exchanges

Non-routine land exchanges require WO review and concurrence at various stages in their processing. Non-routine land exchanges are defined as exchanges that are not mandated by Congressional legislation, do not result from Department of Justice settlement agreements, or where the value of the public lands required to completed the exchange is \$500,000 or more. In addition, WO review is required for all assembled land exchanges. The National Land Exchange Evaluation and Assistance Team (NET) is responsible for reviewing documents pertaining to non-routine land exchanges before those documents are referred to WO-300 for approval.

The following procedures apply to all non-routine land exchanges:

- A draft ATI and a draft NOEP must be included with the initial feasibility report.
- When the FO is ready to publish the NOD, it must provide a copy of the approved feasibility report, or an amended feasibility report that addresses any changes, an appraisal summary, and an issue paper, for SD concurrence and transmittal to the WO. The issue paper should contain a concise explanation of the background of the exchange and the positions of constituencies. The section should provide a short description of the public benefits of the exchange, and how issues raised in the environmental assessment process have been resolved. Examples of appraisal summaries, summary issue papers, and background information papers can be provided by CO-935.
- The FO must also provide a draft NOD and a draft DR at the same time approval is requested to publish the NOD.

- After WO approves publication of the NOD, there will be no requirement for additional NET review prior to title transfer, provided there are no protests or appeals.
- If there are protests or appeals, the NET must review the exchange again prior to transfer of title. In this case, the FO must update the feasibility report, issue paper, and prepare a background information paper. The background information paper should document how issues raised in the protest(s) have been resolved.
- Interior's Solicitor now requires Regional Solicitor review of non-routine land exchanges. To meet this requirement, CO-935 e-mails copies of the draft documents pertaining to non-routine exchanges to the Regional Solicitor for review. If the documents are legally sufficient, the Regional Solicitor provides concurrence by e-mail, a copy of which must be included in the package forwarded from the SO to the WO and in the case file.

Case File Documentation

Proper documentation of the case file and subsequent records maintenance are vital to maintaining the credibility of the land exchange decision-making process. With the increased scrutiny currently being placed on land exchanges, we can expect increasing demands by the public and other governmental officials to inspect and review our land exchange case files. The case file is the agency's official record, and if an appeal is filed, it must be submitted to the Interior Board of Land Appeals and possibly the federal courts. It is therefore incumbent upon all of us to properly document and maintain the official case file. Several key areas in land exchanges where special attention to case file documentation is warranted are as follows.

Feasibility Reports – the feasibility report documents Bureau of Land Management's (BLM's) initial determination that pursuing the exchange is in the public interest. FO's should use the feasibility report format shown as Illustration 2(a) on page 85 of the Land Exchange Handbook H-2200-1 (August 1997). Be sure that the feasibility report contains the following information:

- A complete legal description of both offered and selected lands. Include legible color maps at a scale sufficient to provide necessary detail.
- A preliminary value estimate, prepared by the FO realty specialist. Support from the appraisal staff may be required if the exchange involves lands in rapidly changing real estate markets. Do not request a formal appraisal until the feasibility report is approved.
- Estimated costs of processing the exchange, including SO costs, and how those costs will be apportioned between BLM and the exchange proponent.
- If the exchange is part of an assembled land exchange, the feasibility report must provide an initial analysis of the properties to be disposed of and the properties to

be acquired. Supplemental feasibility reports will be required to address any changes that occur after the initial feasibility report is approved.

Feasibility reports must be approved by the SD for routine exchanges and the WO for non-routine exchanges before the NOEP is published. The document approving the feasibility report must be filed in the case file.

Notice of Exchange Proposal – a draft NOEP must accompany each feasibility report at the time it is submitted for approval. Information to be included in the NOEP, publication requirements, and distribution requirements are found in the exchange regulations.

The Federal Land Transaction Facilitation Act (FLTFA), passed on July 25, 2000, includes certain provisions that allow BLM to utilize cash equalization payments from land exchanges to acquire land. These provisions only apply to those land exchanges where the public land parcels were identified for disposal by sale or exchange in a land use plan that was in effect on July 25, 2000. If disposal of the public land parcels in your exchange meets the criteria outlined in FLTFA for cash equalization payments, all NOEPs published after issuance of this IM must include the following statement.

- The public lands described in this Notice of Exchange Proposal were identified for disposal in a land use plan which was in effect on July 25, 2000. If the exchange is completed and a cash payment is made to the United States to equalize values, the payment to the United States will be deposited in the Federal Land Disposal Account authorized under Section 206 of the Federal Land Transaction Facilitation Act of 2000 (Public Law 106-248).

Agreement to Initiate – after the feasibility report is approved, the Field Office (FO) will enter into an ATI with the exchange proponent. Each party will share in the costs of processing a land exchange. How those costs will be shared will be negotiated between the parties and documented in the ATI. Unless there are extenuating circumstances with which the SD concurs, the exchange proponent will pay those costs associated with preparing the private property for conveyance to BLM, including title insurance, closing costs, as well as the costs to appraise the offered private property, remove unacceptable encumbrances, and clean up any hazardous substances present on the private property. The proponent also will be required reimburse BLM for 50 percent of the costs the agency incurs to process the exchange, including cultural resources inventory and mitigation, preparation of various resource analyses and environmental documentation, mineral reports, title clearance work, patent preparation, and appraisal review. Exceptions to this policy will require SD concurrence and approval.

The following language will be included in all ATIs where the proponent will pay for some or all of the costs of the appraisal report, whether provided by a contract fee appraiser, or a BLM staff appraiser:

- The proponent agrees to pay for the appraisal of the private lands included in the exchange. The appraisal will be conducted under the control and direction of

BLM. The appraisal will be prepared in accordance with BLM standards as prescribed in 43 CFR 2201.3 and will be subject to BLM's review and approval. The proponent agrees that the appraisal report is being prepared for use by BLM and will be subject to release and public review after it has been approved by the Chief State Appraiser. The proponent further agrees that BLM is considered the client for the appraisal and that the approved appraisal report shall be the property of BLM.

Increased management oversight of land exchanges has extended the customary time frames for completing land exchanges. These requirements have made it increasingly difficult to complete an exchange within the time established for the "shelf life" of the appraisal. An agreement to "lock in" values at the approved appraised value may be appropriate if the configuration of the land exchange is not likely to change, the assumptions the appraisal is based on will remain constant, and both sides of the transaction are appreciating at approximately the same rate. If such an agreement is in order, the ATI should either include, or be amended to include, the following language:

- The parties agree that the values of the offered and selected lands will be the approved appraised fair market value. The values of the offered and selected lands will be fixed at the approved appraised fair market value until the land exchange is completed.

FO managers and realty staff should discuss the merit of locking in the approved appraised values with the Chief State Appraiser before including this provision in the ATI.

Properties on both sides of the land exchange will be valued at the approved appraised fair market value, and in the absence of unusual circumstances, neither party will compensate the other for processing costs by adjusting the appraised value of the property. The ATI will include the following provision:

- The parties agree to accept the value established by the approved appraisal as the fair market value of the properties included in the exchange and to waive the provisions for bargaining and arbitration pursuant to 43 CFR 2201.4(a)(1). The parties further agree to waive any adjustments or compensation for assumption of costs pursuant to 43 CFR 2201.1-3.

If there are unusual circumstances and the SD agrees that an exception to this policy is justified, the FO staff must consult with the SO realty and appraisal staff to develop alternative language pertaining to bargaining, arbitration, or compensation for assumption of costs to be included in the ATI.

If the exchange is part of an assembled land exchange, the ATI must outline the sequence of events that will occur as each transaction is completed. Both the offered and selected lands for

each transaction included in the assembled land exchange must be identified in the ATI. Any changes on either side of a specific transaction must be documented in an amendment to the ATI.

If the exchange is facilitated by a third party, the ATI must include a provision requiring the facilitator to disclose to the seller of the offered private land that the facilitator intends to transfer the land to BLM, and to disclose to BLM the purchase price for the offered private land. The ATI must also specify that the third-party facilitator will be required to disclose the terms and conditions of its agreement(s) with other parties who will acquire title to the public land parcels selected in the exchange. The language for this disclosure provision follows:

- By entering into this ATI, the facilitator agrees that it will disclose to the seller of the offered private land that the facilitator intends to transfer the land to BLM. The facilitator agrees to disclose to BLM the purchase price it has paid for the offered private land. The facilitator further agrees to fully disclose to the BLM all contracts, options and other related agreements it has with all clients represented by the facilitator who will acquire title to the selected public land parcels in the exchange. BLM agrees that all confidential business information and all information covered by the Privacy Act will be protected to the extent allowed by federal law.

National Environmental Policy Act Documentation and the Decision Record – The Environmental Assessment (EA) prepared for a land exchange must analyze the impacts associated with disposing of the public lands and the acquisition of the private lands. All reasonably foreseeable impacts must be considered. The EA also must document BLM’s determination whether the exchange is in the public interest. This determination must be supported by an analysis which shows that the resource values present on the offered private lands are equal to or greater than those resource values that would be realized if the selected lands remain in federal ownership.

The DR provides a concise summary of the information contained in the EA and documents BLM’s final determination whether the exchange is in the public interest and in conformance with BLM’s land use planning for the area. The DR must contain sufficient detail to advise the public of the basis for BLM’s decision to approve or not approve the exchange. It also should summarize BLM’s response to issues raised during the EA process. A draft DR is required when requesting WO approval to publish the NOD for non-routine land exchanges.

Notice of Availability of Decision – when the EA has been completed and the appraisals have been approved, the next step in processing the exchange is to publish the NOD. The NOD documents BLM’s determination whether the exchange is in the public interest and should include a concise statement of the rationale for this determination. It should also include instructions for obtaining a copy of the DR and other information pertaining to the exchange. Publication of the NOD establishes the date the protest period begins and serves to notify the public of BLM’s decision on a particular land exchange proposal.

As stated earlier, FLTFA includes certain provisions that allow BLM to utilize cash equalization

payments from land exchanges to acquire land. If the exchange results in a cash equalization payment to the United States and if the public land parcels in your exchange were identified for disposal in a land use plan in effect on July 25, 2000, NOD published after issuance of this Instruction Memorandum (IM) must include the following statement:

- The public lands described in this notice were identified for disposal in a land use plan that was in effect on July 25, 2000. The cash payment due to the United States to equalize values in the exchange will be deposited in the Federal Land Disposal Account authorized under Section 206 of the Federal Land Transaction Facilitation Act of 2000 (Public Law 106-248).

Releasing Appraisal Information to the Public – appraisal reports and portions of appraisal reports cannot be released to the public before they are approved by the Chief State Appraiser, while negotiations are pending, or before a particular realty transaction is completed. A Freedom of Information Act (FOIA) request is required before an approved appraisal report on a completed transaction can be released to a member of the public. Preliminary estimates of value, even if approved, are never available for public review because they are considered internal working documents.

It has been a long-standing policy in Colorado to make copies of the appraisal summary, the appraisal review statement, and comparable sales information available to the public on a case-by-case basis after a final appraisal has been approved. Release of this limited appraisal information does not require a FOIA request. For land exchanges, Colorado will continue to make this appraisal information available for public review during the protest period allowed in the NOD. This policy applies to all appraisals, including those paid for by exchange proponents and third-party facilitator.

Examples of various documents can be requested from CO-935 to assist you in preparing your submissions. To facilitate review and eliminate the need for retyping hard copies, the FO staff should e-mail an electronic version of the feasibility report and other required documents to the appropriate SO staff prior to the time the package is submitted for SD approval.

The guidance contained in this IM is effective immediately and will remain in effect until it is cancelled or superseded. If you have any questions, please contact Jenny Saunders at (303) 239-3708.

Signed by
Douglas M. Koza
Associate State Director

Authenticated by
Don Snow
EMS Operator