



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
Southern Nevada District Office
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Las Vegas, NV 89130
<http://www.blm.gov/nv/st/en/fo/lvfo.1.html>

In Reply Refer To:
2710 (NVS0055)

DECISION MEMORANDUM

To: SNPLMA Executive Committee

Through: SNPLMA Partners Working Group

From: Steve Tryon /s/ 8-16-10
Assistant District Manager, SNPLMA Division

Subject: Request Revisions to the SNPLMA Implementation Agreement for Compliance with Requirements and Regulations for Expenditure of Appropriated Funds and Compliance with Requirements for Expenditure of Funds Made by the Secretary of the Interior

Background:

The SNPLMA Implementation Agreement (IA) contains the business rules and procedures for nomination through implementation of projects funded by the Southern Nevada Public Land Management Act, including project implementation guidance on time, scope, and budget for projects approved by the Secretary of the Interior. However, the IA is not an exhaustive resource for financial guidance and the implementing agencies/entities are required to follow all applicable laws, regulations, Office of Management and Budget (OMB) circulars, and terms and conditions of their financial instruments.

The SNPLMA Division has identified several major areas of concern in implementation of SNPLMA relative to conformance with approved project nominations and compliance with the Implementation Agreement, regulations regarding expenditure of funds, and requirements imposed by the Secretary of the Interior in Decision Documents authorizing funds for SNPLMA projects. This decision memorandum proposes revisions to the Implementation Agreement to address implementation of SNPLMA projects in conformance with approved project nominations in terms of period of performance, compliance with regulations regarding expenditure of funds, and requirements imposed by the Secretary of the Interior in Decision Documents authorizing funds for SNPLMA projects.¹

Issue:

The SNPLMA Division has identified language in the Implementation Agreement that is inconsistent with Federal regulations for expenditure of appropriated funds and expenditure against a financial

¹ A separate decision memorandum will be submitted that addresses conformance with project purpose and scope in relation to the approved nomination and workplan and appropriations law.

instrument, as well as language that creates ambiguity regarding allowed expenditures and timing of those expenditures. These inconsistencies and omissions may have led to non-compliance with Federal regulations and directives from the Secretary discussed below.

Compliance with appropriations law and regulations is required. The February 25, 2005, Office of the Solicitor Opinion on SNPLMA determined that upon approval by the Secretary of the Interior, SNPLMA funds are appropriated and are to be expended in conformance with “the basic rules governing expenditures of appropriated funds.” The Solicitor’s opinion does not provide for reimbursement of funds expended on a project after Secretarial approval without following all the authorities and limitations that govern other appropriated funds (e.g., contracting regulations, principles of appropriations law, etc.).

There are three elements to the concept of availability of appropriated funds: purpose, time, and amount. The Solicitor’s Opinion focuses on the element of “purpose” by providing a detailed discussion of the “necessary expense doctrine.” The opinion stated that the Executive Committee can determine which necessary expenses will be allowed for payment by SNPLMA. The SNPLMA Division, in consultation with the recipient agency/entity, determines whether an expense meets the criteria set out by the Solicitor and outlined in the IA as a “necessary expense” to complete the project; if disputes persist, they are resolved by the Executive Committee.²

Regarding the element of time, SNPLMA funds are “no-year funds,” meaning they can be authorized for expenditure by the Secretary at any time until expended, the use of those funds is still conditioned by Federal acquisition regulations requiring that funds be expended only for obligations incurred during the period of performance specified in a financial instrument between “buyer” and “seller” (inter-/intra-agency agreements, contracts, assistance agreements, task orders). That is, the relevant financial instrument must be valid for the recipient agency to incur new obligations whether for supplies and materials, labor or new contracts.³

The Secretary of the Interior may also place conditions on the use of funds, including directives and requirements contained in the Secretary’s decision documents. Any requirements contained in the Secretarial decision documents are effective immediately upon the Secretary’s signature. For the past several rounds, the Secretary’s decision documents have included the following directive:

“Authorization for expenditures for projects submitted in Round [X] as set forth in this Decision Document shall not be construed as a final approval for any particular expenditure. The amounts authorized herein are not approved for expenditure unless and until all requisite procedures are followed as outlined in this document and in the SNPLMA Implementation Agreement.”

The procedures for authorization to expend funds included in the recent decision documents are that for both Federal and non-Federal projects “no amount authorized herein shall be considered to be an amount approved for expenditure until a work plan has been submitted by the proponent and accepted by the BLM” and that “[t]he work plan shall set forth a schedule of periodic expenditures reflecting logical phases of the project.” For non-Federal projects, until “a cooperative agreement or grant between the recipient entity and the Bureau of Land Management (BLM) or other Federal agency has been fully executed.”

² Other aspects of the “purpose statute” as it relates to identifying and modifying the scope of work for approved projects is very complex so will be discussed in a separate decision memorandum.

³ See “Period of Availability of Funds” in 43 CFR, Part 12, Subpart C, §12.63 (a) and Subpart F, §12.928 relative to assistance agreements; see OMB Circular A-11, Part 1, Section 20.13, (c), fifth bullet, relative to inter/intra-agency agreements. (Final payments/reimbursements can be made after an instrument has expired provided no costs were or will be incurred after the expiration date.)

The Secretary's requirement for a "schedule of periodic expenditures reflecting logical phases of the project" as part of the workplan reflects the expectation that all projects will include a project duration from start to completion. Thus, start and end dates for all projects are necessary, regardless of how the project is funded. Project nominations have always been required to provide milestone dates, including anticipated completion date, as part of the nomination, either in the narrative or on the estimated necessary expense form. This duration from the nomination is used to establish the specific period of performance based on when the recipient agency/entity first requests funds to initiate work on the project. The only funding method that does not have a means to document the project's period of performance is the 1151 direct transfer process.

Request:

Because the IA has not been revised since 2007, it inadequately addresses the compliance requirements discussed above. The SNPLMA Division is recommending that the Implementation Agreement be amended as follows:

1. Revise IA Section VII, "2005 Solicitor's Opinion. . .", to more thoroughly address the guidance in the opinion and provide references to the principles of appropriations law and regulations as they relate to implementation of SNPLMA projects and provide examples of how these have been applied and implications for SNPLMA projects.
2. Add a section that outlines the requirements contained in the Secretary's decision documents that must be met before funds may be expended. Specify that any changes or additional requirements in future decision documents are to be incorporated by reference in the IA, will take effect immediately, and will be communicated to the partners and participants by a notification from the SNPLMA Division, until the changes can be reflected in a future revision to the IA.
3. Remove any reference that allows reimbursement of agency/entity funds that are expended prior to execution of the appropriate financial instrument, approval of the project workplan or any other requirements in the Secretarial decision. The Implementation Agreement states "Necessary expenses incurred after the Secretarial approval, but prior to issuance of a notification of funds availability, IGO/agreement/task order, or transfer of funds, are reimbursable." This provision and similar references throughout the IA are inconsistent with the compliance requirements discussed above and create misunderstandings regarding when funds can be expended to start or continue a project and still be eligible for reimbursement.
4. Add, revise, or clarify business rules to specifically state that obligations and expenditures will not be paid with or reimbursed using SNPLMA funds if any of the below conditions exist:
 - a. A workplan has not been accepted in writing by the BLM,
 - b. The valid financial instrument or transfer documentation is not in place;
 - c. The project is in on-hold status;
 - d. The period of performance in the financial instrument (i.e., an IGO, IAA, task order, assistance agreement, contract) or in the transfer documentation expired before an obligation was made or an expenditure was incurred and paid⁴, or
 - e. The expenditure does not qualify as a "necessary expense."
5. To ensure time extensions can be processed prior to project expiration (e.g., expiration of financial instrument) add a requirement that requests for time extensions must be submitted at least 120 days in advance of the project expiration date or expiration of the financial instrument and that the requests

⁴ This contrasts with expenditures which are payments against financial obligations created prior to expiration of the period of performance; such expenditures can be made after the period of performance has expired.

must include an updated workplan to reflect those deliverables and associated tasks and subtasks that will be completed during the extension period.

6. Add a provision authorizing the SNPLMA Division to waive the 120-day-in-advance rule for time extension requests and approve one 90-day extension over and above any previous time extensions (including ones approved by the Executive Committee) to cover unexpected circumstances where the agency needs just a short time to complete the project and prepare and submit a closeout package.
7. Revise Section IX. “Special Account Transfer Process...” to include a standardized notification documenting the period of performance for Federal projects that receive funds by 1151 direct transfer in order to document the time period over which the recipient will schedule periodic expenditures as required by the Secretary. The start date will be the date funds for the project are initially transferred by Treasury to the agency and the end date will be based on the duration of the project as described in the nomination. The documentation will also include the basic requirements to comply with the IA, the Secretary’s decision, appropriations law and necessary expense doctrine in carrying out the project.
8. Add a requirement that requests for time extensions will include an updated workplan, except requests for the one-time 90-day extension to close out a project discussed in number six above.
9. Remove or revise any language or provisions in the Implementation Agreement that are inconsistent with or contradictory to these proposed revisions.

If approved by the Executive Committee, the SNPLMA Division will notify all recipients of the new rules and post the decision memorandum on the SNPLMA web site until an updated version of the Implementation Agreement can be posted.

Analysis:

The missing, inconsistent, and ambiguous guidance in the IA regarding the difference between availability of funds and funds being authorized for expenditure and the Secretary’s requirements for expenditure of funds has contributed to the following implementation practices that are inconsistent with the compliance requirements described above:

- Spending with expectation of reimbursement before a financial instrument (inter-agency agreement, assistance agreement, task order, or agreement for transfer of funds) has been put in place.
- Spending after an executed financial instrument or approved period of performance has expired.
- Spending before a workplan has been completed and approved by the BLM.
- Obligating or expending funds for project activities in excess of the available funding prior to requesting and/or receiving approval for additional funds.

Although the 2005 Solicitor’s opinion focused on the “necessary expense” doctrine under appropriation law, by establishing that SNPLMA funds are appropriated dollars, all appropriation laws and regulations apply to SNPLMA project funds just as they do to all appropriated funds. The policies and procedures in the IA, expectations of recipients regarding utilization of project funds, and practices in approving requests for additional funds have insufficiently referenced appropriation laws and regulations. Thus, one of the Division’s most serious concerns is inadequate adherence to appropriations law and regulations (e.g., The “Principles of Appropriations Law” Guide states “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law” (31 U.S.C. § 1301(a)), GAO Red Book, Vol. I, page 4-6).

The changes proposed in this decision memorandum are overdue. Although project modifications that have already been approved should not be reversed due to the hardships that would be created for agencies, the SNPLMA partners can agree to apply the principles of appropriations law and appropriations regulations developed by OMB and the U.S. Treasury from this point forward.

Recommendation:

Recommend that the Executive Committee approve all of the above requested changes to the Implementation Agreement to be effective immediately for all projects not yet completed or terminated, but that no prior approved project modifications will be reversed based on this decision. Also direct the SNPLMA Division to modify the October 22, 2007, Reissued Implementation Agreement to include all changes to the Implementation Agreement approved through the decision memorandum process since that date and distribute a new re-issued version as soon as possible.

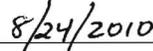
Action Needed: Partners Working Group members should provide their vote via email and/or voice vote during conference calls or meetings to Mike Holbert, Chair of the SNPLMA Partners Working Group with a copy to the SNPLMA Division. Once all votes have been submitted or 14 days have passed, the Working Group's recommendation will be finalized by the Working Group Chair.

Partners Working Group Decision: The signature below indicates the decision made by majority vote on the above SNPLMA Division recommendation.

BY: Michael R. Holbert, SNPLMA Partners Working Group Chair



Approve SNPLMA Division Recommendation



Date

Approve Alternate Recommendation
(Refer to rationale provided below)

Date

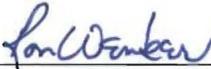
Disapprove
(Refer to rationale provided below.)

Date

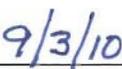
If the Partners Working Group (PWG) disagrees with the SNPLMA Division recommendation and/or approves an alternate action, please explain below:

Executive Committee Decision: By signature below, indicate the decision made by majority vote on the above recommendation of the Partners Working Group (PWG).

BY: Ron Wenker, SNPLMA Executive Committee Chair



Approve PWG Recommendation



Date

Disapprove PWG Recommendation
(Refer to rationale provided below.)

Date

If the Executive Committee disagrees with the Partners Working Group recommendation and/or approves an alternate action, please explain below:

The Executive Committee will notify the Partners Working Group of its decision and return the original signed document to the SNPLMA Division to be maintained in the administrative record.