

ADDITIONAL GUIDANCE

SUMMARY OF MITIGATION AUTHORITIES AND REQUIREMENTS IN VARIOUS SITUATIONS

Locatable Mineral Development

1. The Bureau of Land Management (BLM) has regulatory authority under 43 Code of Federal Regulations (CFR) 3809 regulations to mitigate impacts to desert tortoise on public lands.
2. Split estates (Federal minerals and private/State surface)

Listed species: The 6840 Manual indicates that "the provisions of the Endangered Species Act (ESA) apply regardless of surface ownership. The important point is that if the BLM is authorizing the action we must ensure that the action will not jeopardize the continued existence of a Threatened or Endangered (T/E) species or adversely modify or destroy critical habitat."

Other species: The 43 CFR 3809 provide for reclamation and development of mitigating measures on Federal lands. However, when Federal mineral estates with private or State surfaces occur, the BLM normally does not exercise regulatory authority over locatable mineral activities with the following exceptions:

For lands patented under the Stockraising Homestead Act, as amended (Public Law 103-23, April 16, 1993), claimants must submit a Plan of Operations for all activities other than casual use unless the surface owner consents in writing to the mining activities.

If the claimant does not obtain the surface owner's consent, the BLM must approve the Plan of Operation, which follows the existing rules and administrative guidance provided under 43 CFR 3809. In that context, reclamation and mitigating measures can be incorporated into the plan to protect the surface owner (see Section I(f) Plan of Operations).

The BLM does not have regulatory authority over surface activities on non-Federal land that were not patented under the Stockraising Homestead Act. In this situation, the BLM does not have authority to require mitigation of negative impacts to Sonoran desert tortoise populations or habitat.

The BLM often processes mining proposals that involve a combination of Federal lands and private lands with Federal mineral estates. In this situation, an Environmental Assessment (EA) will include an analysis of impacts for the entire proposal regardless of surface ownership. Mitigating measures should also be prepared for the entire proposal. The BLM may recommend mitigating measures to the surface owner during this stage of the Environmental Analysis (Environmental Impact Statement (EIS)/EA). These discussions should highlight the benefits of mitigation to the species and the long-term advantages to the land owner. If the land owner commits to mitigation/compensation, the EA can address impacts as if mitigation/compensation will be carried out. If the land owner cannot or will not commit to mitigation/compensation, the analysis should address both scenarios: (1) the impacts if mitigation/compensation occurs on private land and; (2) impacts when mitigation/compensation does not occur on private lands.

The decision document (Record of Decision (ROD)/Decision Record (DR)) will reflect the selected alternative, thus referencing the mitigation that will be done. The decision document should identify how the mitigation/compensation will be carried out, time frames, and any other important criteria to implementing mitigation/compensation. If the private land owner did not commit to mitigation/compensation during the EA process, the BLM can recommend appropriate mitigating measures on private or State lands in a cover letter to the decision document. It's important to encourage the surface owner and mining operator to carry out the recommended mitigation measures, but they cannot be required to do so.

The preferred means of incorporating mitigating measures (including compensation, if appropriate) is to make them part of the Plan of Operations. The plan should include mitigation and compensation on Federal lands and private or State lands if the landowner agrees to mitigation/compensation measures.

Leasable Mineral Development

The 43 CFR 3162.5-1 identifies the following legal responsibilities of the BLM for oil and gas leasing and operations, including split estate lands.

- a. Endangered Species Act (ESA) Responsibilities: Oil and gas leasing and operations on split estate lands constitute Federal actions under the ESA. As such, the requirements and procedures of the ESA apply to split estate lands just as they do to Federal lands including, as appropriate, preparation of biological assessments and conduct of consultations.
- b. National Environmental Policy Act (NEPA) Responsibilities: The BLM's NEPA responsibilities on split estate lands are basically the same as for Federal surface. The fact that impacts will occur on private surface does not diminish our responsibility to consider alternatives or our authority to impose mitigation measures because the impacts will be caused as a direct consequence of activity approved by the BLM and conducted

pursuant to a Federal oil and gas lease. Once consideration is given, however, there is a good deal of flexibility.

- c. The BLM should carefully consider the views of the surface owner and the effect on the owner's use of the surface from carrying out possible mitigation measures. The effect such measures have on attaining other program goals should be considered.

Land Exchanges

43 CFR 2200.0-6(b) Policy:

Determination of Public Interest. The authorized officer may complete an exchange only after a determination is made that the public interest will be well served. When considering the public interest, the authorized officer shall give full consideration to the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values, enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs.

Desert tortoise populations and habitat will be a consideration in the public interest determination required under land exchanges (43 CFR 2220.0-6(b)).

Acquiring lands with equal or better quality and quantity tortoise habitat can serve as mitigation for tortoise habitat transferred or impacted as a result of an exchange. Category I and Category II desert tortoise habitat should be one of the priority criteria in identifying lands to be acquired through exchange.

Avoid identifying desert tortoise habitat for disposal in the Land Use Plan (LUP) process. The Desert Tortoise Rangeland Plan (page 21) states: "Retain Category I and II tortoise Habitat Areas unless (a) it clearly is in the National public interest to dispose of them and (b) losses can be mitigated."

Exchange regulations require lands to be exchanged value for value based on accepted appraisal techniques. In this situation, the normal compensation formula cannot be applied in the traditional sense. However, it should be used as a guide in:

- Avoiding or minimizing desert tortoise habitat selected for disposal;
- Identifying lands which may have approximately equal economic value, but meet the compensation policy in quality and/or quantity of tortoise habitat.

After these considerations are made, any deficits in the desired ratio may become part of the project costs rather than part of the land value (i.e. in order to exchange a parcel of land, certain mitigation must occur and that becomes part of the operating cost of the project).

Exchanges of split mineral estates (Federal minerals and private/State surface) basically follow a scenario similar to locatable minerals.

The BLM will normally prepare an EA/EIS to address impacts of an exchange. However, if the lands have low mineral potential, there would be little or no impact to the surface estate. If the lands do have mineral potential, the Federal action could result in impacts to the surface estate. Therefore:

- Prepare an analysis of impacts to tortoise populations and habitat for the proposed exchange. Develop recommended mitigating measures for the proposed exchange.
- Because we do not have regulatory authority over surface activities on private lands with Federal minerals, mitigating/compensation measures for tortoise populations and habitat on these lands should be discussed with the surface owner. If the owner agrees to implement the mitigating/compensation measures, the EIS/EA should reflect the impacts as such. If the owner cannot or will not incorporate the mitigating/compensation measures, the EA should identify alternatives describing: (1) a partial mitigation scenario which reflects no mitigation on private or State lands and (2) a scenario which reflects mitigation on the entire project area.
- The ROD/DR will reflect the selected alternative, thus referencing the level of mitigation that will occur. The ROD/DR should identify how the mitigation/compensation will be carried out, time frames, and any other important criteria to implementing mitigation/compensation.
- The BLM may decide to recommend appropriate mitigating measures on private or State lands in a cover letter to the land owner. We should encourage the surface owner and mining operator to implement the recommended mitigation measures, but we cannot require them to do so.
- Compensating residual impacts to desert tortoise habitat resulting from exchange of

split estate Federal minerals (private surface/Federal minerals) is not specifically required in the Desert Tortoise Compensation Report. However, the exchange action will generally impact tortoises and result in the loss of habitat. Therefore, acquiring high-quality desert tortoise habitat in exchange for the mineral estate should be given a high priority in the selection of offered lands. The BLM's selection of lands should mitigate the loss generated from the exchange.

Habitat gains made in one exchange should not be used as banked mitigation for a subsequent exchange. A repeat exchange proponent should not be allowed to use habitat gains from an earlier exchange as compensation or mitigation for a proposed exchange. Each exchange should simply be evaluated and analyzed on its own merits for potential positive or negative effects to all natural resources, including desert tortoises.

It is important to follow through and do what is necessary to protect tortoise habitat that the BLM acquires through exchange or compensation. If the habitat was important enough to acquire for the tortoise, then the BLM needs to take the appropriate steps to ensure the habitat is not threatened in the future. Consider designating the habitat as an Area of Critical Environmental Concern (ACEC), withdrawing it from mineral entry or any other suitable action.

Recreation and Public Purposes Applications

The Recreation and Public Purposes Act (R&PP) of 1926, as amended, was enacted to make public lands available for recreation or public purposes to governmental and non-profit entities at little or no cost. Lands needed for public purposes may include the placement of improvements resulting in the loss of tortoise habitat (i.e., landfills, schools, fire stations, and municipal buildings). Lands needed for recreational purposes may or may not include uses that destroy habitat (i.e., parks, trails, and open space).

BLM Manual H-2740-1 states:

- a. That proposals must be consistent with applicable BLM policy, management objectives, and LUP decisions.
- b. In order to be leased or conveyed under the R&PP Act, the lands involved must first be classified and opened for such purpose. To be determined suitable, the following must be met:
 - Any criteria for R&PP use established in the LUP.
 - Criteria for land classifications set forth in 43 CFR 2400.
 - Specific criteria established under the regulations contained in 43 CFR 2740 and/or 2912.
- c. Based on information contained in the application and needs identified in the

environmental analysis, additional terms and conditions may need to be incorporated in the lease.

These terms could contain tortoise mitigation requirements if lands containing tortoise habitat have not been excluded through applying the criteria. Important habitat should not be considered unless the proposed use is compatible or beneficial to tortoise populations.

The challenge in dealing with compensation and R&PP applications revolves around the intent of the R&PP Act. It was established as a mechanism to provide local governments and other organizations an opportunity to acquire public land at little or no cost. A compensation ratio of even 1:1 may be prohibitive to the R&PP applicant. That is why it is important to seek alternative sites outside of tortoise habitat whenever possible. When that is not possible: (1) mitigate impacts on site as much as possible; and (2) negotiate a mitigation strategy with the applicant and utilize innovative approaches to resolve issues. For instance, the Littlefield School District will develop a desert tortoise education program addressing the conservation of tortoises as a compensation measure.

GUIDELINES FOR ACCEPTING COMPENSATION LAND OR DOLLARS

The overall objective of compensation is to maintain our Category I and II desert tortoise habitat base. As a matter of practicality, however, Arizona BLM will not normally accept land in parcels less than 80 acres due to the high overhead cost, time required to process, and small return for our effort.

When BLM Arizona accepts land from a party for compensation of unmitigated residual impacts, we will also collect a 25 percent of Operations Cost (OC) to cover the cost of bringing the land into Federal ownership. When the BLM accepts dollars in lieu of land, we will collect (1) a value for the land based on established Land Compensation Rates (LCR), or in unusual circumstances, actual appraisal; (2) Administrative Overhead Surcharge (AOS) based on the BLM standard rate, currently 18.4 percent (this percent varies by year); and (3) an OC fee to cover costs associated with titling the land and/or managing the dollars collected, 25 percent of the LCR up to a maximum of \$11,000, which is the estimated average cost of transferring a title.

The BLM will only collect AOS when funds are collected in lieu of land, and normally we will not request any reductions or waivers of this fee. The OC will be collected in all cases, regardless of whether the BLM accepts land or dollars.

Land Compensation Rates for Desert Tortoise Habitat

In Arizona, the BLM will use the Land and Building value established by WO-350 as the LCR for desert tortoise habitat in Arizona. The BLM updated its linear right-of-way regulations by final rule published in the Federal Register on Friday, October 31, 2008 (73 FR 65040). The BLM used a new formula based on land values by County throughout the United States as determined by the United States Department of Agricultural (USDA) National Agricultural

Statistical Service (NASS) for base land values. The above regulations go into detail on determining rental fees, but their root is 80 percent of the land values by County. The BLM, in the final rule, pointed out various reasons for the 80 percent figure, but for consistency, and the fact that rarely is the entire value of a tract of land completely lost as habitat, the BLM will use this column in the table below as the dollar value of lands by County for desert tortoise compensation in Arizona. Although the desert tortoise does not occur in all the Arizona Counties, the table below shows all Counties for both completeness and comparison.

Excerpt from Adjusted 2007 NASS Census Per Acre Land and Building (L/B) Value WO-350, June 1, 2009, for Calendar Years 2011-2015.

State	County	80% - 2007 L/B values
Arizona	Apache	\$ 155
Arizona	Cochise	\$1,526
Arizona	Coconino	\$158
Arizona	Gila	\$304
Arizona	Graham	\$441
Arizona	Greenlee	\$1,874
Arizona	La Paz	\$868
Arizona	Maricopa	\$6,798
Arizona	Mohave	\$451
Arizona	Navajo	\$221
Arizona	Pima	\$357
Arizona	Pinal	\$2,910
Arizona	Santa Cruz	\$1,833
Arizona	Yavapai	\$1,423
Arizona	Yuma	\$6,689

The L/B values are updated every 5 years. When the above table is revised by WO-350, the new values will be adopted for our compensation land values. Thus, land values for compensation purposes will be updated every 5 years.

Lands in California, administered by the Colorado River District, will use the LCR established for California. The California LCR for Fiscal Year (FY) 2012 is \$500 per acre. Any subsequent changes to the LCR in California will be adopted.

When the authorized officer decides to accept funds in lieu of land for compensation of residual impacts, the dollar compensation rate may be based on the L/B values table, above. It is expected that the above method will be sufficient in the vast majority of cases. This method may not apply in determining every land compensation rate. The authorized officer, after considering the time and dollar cost involved, may use appraisals to determine land values if it is deemed appropriate.

Administrative Overhead Surcharges (AOS)

Arizona BLM will collect AOS in all situations where the authorized officer decides to accept

funds in lieu of land for compensation of unmitigated residual impacts. Collection of the AOS is to be handled in accordance with BLM policy and manual direction, as adjusted to the current annual rate (see BLM Manual Section 1681, and Handbook H-1681-1). For FY 2012, the AOS is 18.4 percent (this percent varies by year). In those rare instances where a reduction or waiver of the indirect administrative cost rate may be warranted, the State Director may request, in writing, such reduction or waiver from the Headquarters Office.

Operating Costs (OC)

When the authorized officer determines that there is a residual unmitigated loss of desert tortoise habitat that requires compensation with land or money, he/she will collect an OC fee of 25 percent of the LCR. These funds will be used to cover the cost of labor, escrow fees, title insurance, etc., associated with the purchase of lands or labor and operations dollars for the development and obligations related to contracts, cooperative agreements, or interagency agreements for research, monitoring or habitat improvement projects. The 25 percent figure was derived based on the BLM collecting the "normal" cost of a land acquisition transaction. That cost is estimated to be approximately \$11,000 dollars. When calculating the OC fee, if the total for any given situation exceeds \$11,000, the maximum OC fee collected will be \$11,000, i.e. the BLM will collect no more than \$11,000 in operating costs for any given acquisition of land or money. For example, if 100 acres of land were required for compensation in Mohave County at a LCR of \$451, the OC would be \$11,000 even though the 25 percent OC formula would equal \$11,275.

Calculating Compensation

Once the Acreage of Compensation Required for residual unmitigated impacts has been calculated using the compensation rate calculations described in Table 2 of Attachment 1, the acreage figure is applied to one of the following formulas to determine the land and/or dollar requirements for compensation.

$$\text{LAND} = \text{Land Title} + [0.25 \times \text{LCR} \times \text{Acres of compensation required}] = \text{Total Deposit}$$

$$\text{DOLLARS} = [\text{LCR} + (\text{LCR} \times 0.25 \text{ (OC)}) + (\text{LCR} \times 0.184 \text{ (AOS)})] \times \text{Acres of Compensation Required} = \text{Total Deposit}$$

Example #1: Proponent has a compensation requirement of 20 Acres in Mohave County and will compensate with Land Title:

Mohave County (LCR \$451), use the LAND formula

$$\text{LAND} = \text{Land Title} + [0.25 \times \text{LCR} \times \text{Acres of compensation required}] = \text{Total Deposit}$$

Land title to 20 Acres plus $[0.25 \times \$451 \times 20 \text{ Acres}]$ equals a total deposit of \$2,255

Proponent would provide land title to 20 Acres of tortoise habitat plus \$2,255 in compensation

Example #2: Proponent has a compensation requirement of 20 Acres in Mohave County and will compensate with dollars:

Mohave County (LCR \$451), use the DOLLARS formula:

$$\text{DOLLARS} = [\text{LCR} + (\text{LCR} \times 0.25 \text{ (OC)}) + (\text{LCR} \times 0.184 \text{ (AOS)})] \times \text{Acres of Compensation Required} = \text{Total Deposit}$$

$$\text{Dollars} = [\$451 + \$112.75 + \$82.984] \times 20 \text{ Acres} = \$12,934.68 \text{ Total Deposit}$$

Proponent would provide \$12,934.68 in compensation or to itemize costs:

$$\$9,020 \text{ (20 acres at LCR)} + \$2,255 \text{ (OC for 20 acres)} + \$1,659.68 \text{ (AOS for 20 acres)} = \$12,934.68$$

Example #3: Proponent has a compensation requirement of 20 Acres in Maricopa County and will compensate with dollars:

Maricopa County (LCR \$6,798), use the DOLLARS formula itemizing the costs to isolate the OC to ensure the \$11,000 maximum OC fee is not exceeded

$$(\text{LCR} \times 20) + ((\text{LCR} \times \text{OC of 25\%} \times 20) + ((\text{LCR} \times \text{AOS of 18.4\%}) \times 20) = \text{Total Deposit}$$

$$(\$6,798 \times 20) + ((\$6,798 \times .20) \times 20) + ((\$6,798 \times 0.184) \times 20) = \text{Total Deposit}$$

$$\$135,960 \text{ (20 acres at LCR)} + \$33,990 \text{ (OC for 20 Acres)} + \$25,016.64 \text{ (AOS for 20 Acres)} = \text{Total Deposit}$$

Because the OC exceeds the average land acquisition cost of \$11,000, the \$11,000 figure would be used instead of the calculated 25 percent. The total compensation would be calculated as:

$$\$135,960 \text{ (LCR} \times 20) + \mathbf{\$11,000 \text{ (OC)}} + \$25,016.64 \text{ (AOS} \times 20) = \$171,976.64 \text{ Total Deposit}$$

Financial Accounting

All funds previously collected for tortoise compensation as well as new funds collected will be transferred/deposited into one of two statewide accounts. Form 4120-9, Proffer of Monetary Contributions, should be used when collecting compensation dollars and the AOS and OC fees. Funds collected for Mojave desert tortoise habitat in the Arizona Strip and Colorado River Districts will be placed in one 7122 account. Funds collected for Sonoran desert tortoise habitat will be placed in a second 7122 account. All deposits to these accounts will be nonrefundable.

The District/Field Offices will deposit funds collected for desert tortoise compensation into one of the two tortoise accounts. The State Endangered Species Coordinator will be provided: 1) the acreages of habitat lost or impacted; 2) a description of the project for which compensation was required, and 3) the compensation amount deposited.

Compensation Account Administration

Compensation funds shall be used for the sole purpose of implementing the highest priority actions that benefit desert tortoise conservation, management, and recovery in Arizona.

A BLM Arizona Desert Tortoise Technical Team comprised of the State Endangered Species Coordinator, State Wildlife Program Lead, and one Wildlife Biologist from each Field Office will meet annually or via teleconference to nominate, discuss, prioritize, and propose conservation projects that could be implemented for both desert tortoise populations using available compensation funds. Funding does not need to be fully expended each year and can be accumulated to fund high-priority projects.

The Technical Team will forward a prioritized list of projects to a Tortoise Management Team comprised of the Branch Chief for Renewable Resources and Planning (AZ-9320) and the Associate District Managers from each District. This Tortoise Management Team will review and propose statewide tortoise conservation project priorities to the BLM Arizona Deputy State Director for Resources (AZ-9300) for approval.