

Attachment 3: Bonding and Financial Assurances

1. Bonding

Authorized officers have discretion to require a bond from a restoration or mitigation lessee. The BLM may use principles for other types of land use authorizations as guidance when imposing bonding requirements on restoration and mitigation lease holders and should consult with HQ300 for additional support in deciding whether to require a bond. These principles are currently outlined in IM 2019-013, *National Policy for Rights of Way Bonding* (note: this IM is expired and is being updated). Bond amounts are based on potential reclamation costs and should be calculated using the reclamation cost estimate spreadsheet and instructions from IM 2019-013.

Some considerations for determining whether a performance bond is appropriate include:

1. Is the lease applicant a federal, state or county government? (refer to 43 CFR 2806.14)
2. Will the lease activities include surface disturbance? Refer to proposed lease development plan to determine whether lease activities have the potential to cause significant damage to resources or the natural or human environment.
3. What amount and type of active restoration is being proposed?
4. Is the applicant proposing use of non-natural restoration methods, such as the use of pesticides? Seedings using non-native species would be considered a non-natural restoration method.
5. Is the applicant proposing use of experimental methods of restoration?
6. Will the proposed restoration activities result in a risk of compounding effects, such as a proliferation of invasive species?
7. Is there a fire risk resulting from the restoration activities?
8. If the lessee will construct, operate, and maintain facilities, how much would it cost to federally contract the reclamation of the lease facilities in the event that the lessee becomes financially insolvent or is not able to otherwise reclaim and decommission their facilities?

Performance bonds are generally appropriate for leases with activities that have a potential to cause significant damage to resources or the human or natural environment; leases with low or no resource damage potential would generally not merit a bond. Reclamation and decommissioning bonds may be appropriate if new facilities are needed to achieve the goals and objectives of the restoration or mitigation lease development plan and the facilities would no longer be required once the goals and objectives are met. Restoration and mitigation leases whose reclamation costs would be less than the construction micro-purchase threshold (currently \$2,000) do not require a bond.

Below are two example scenarios for determining whether a bond is necessary:

- Example of a restoration lease for which a bond would be appropriate: A potential lessee applies for a restoration lease to restore stream habitat that will require the use of heavy equipment and in-stream work. It is possible that the BLM would need to re-do the work

if the initial work by the lessee is done incorrectly, and the cost of the restoration work is estimated to be \$100,000. A performance bond would be appropriate for this lease.

- Example of a restoration lease for which a bond would likely not be necessary: A potential lessee applies for a restoration lease to do passive restoration in a burned area. The lease development plan states that the leaseholder plans to re-seed the burned area with certified weed free native seed and leave the area alone to allow the seed to grow. These activities are unlikely to cause significant resource impacts, and a bond would likely not be necessary.

2. Financial Assurances for Mitigation Leases

The leasing regulations provide that financial assurances are usually required for mitigation leases (43 CFR 6102.4.2(a)). Those regulations state that, to ensure the development plan is sufficiently funded, the lessee will usually be required to provide financial assurance instruments in the form of irrevocable letters of credit or an established escrow account for the full amount needed to ensure the plan can be successfully implemented (43 CFR 6102.4.2(a)). Financial assurance instruments should identify a third-party beneficiary that the BLM determines has the capacity to implement the development plan should the lessee fail to meet performance criteria. Good candidates for a third-party beneficiary may be an environmental 501(c)(3) non-profit organization or an accredited land trust that has a history of performing the actions described in the mitigation lease development plan.

For mitigation leases that require management and monitoring of the mitigation site(s) beyond the development plan phase, it may be appropriate for the lease holder to deposit sufficient funds with a qualified mitigation fund holder (43 CFR 6102.5.1(e)) to fund the long-term management plan (refer to Attachment 1 Part I). The amount of the deposit should be based on the required monitoring protocols, management activities, duration of the mitigation lease, and a reasonable percentage of the total amount needed to fund the plan to cover contingencies. Funds to cover contingencies may be deposited into a separate or reserve account held by a qualified mitigation fund holder. The cost analysis to determine the total amount needed to fund the long-term management plan should include, but would not be limited to, an itemized list of all activities to be performed (e.g., special status species surveys, vegetation monitoring, or hydrologic testing), specialists required (e.g., hydrologist or botanist), equipment and materials needed (e.g., water quality testing instruments, tractor rental, or fencing), administrative tasks to be performed (e.g., reporting), and the frequency of expenditures for each item listed for the duration of the lease.

For mitigation leases with long term management and monitoring requirements, funding for interim management will be required and should be included in the financial assurances for the development plan. Generally, withdrawals can be made from the long-term management account following a one to three year waiting period after the development plan performance criteria have been met. This waiting period allows the principle in the account to gain return on investment, so withdrawals do not delete the account balance prematurely. The authorized officer will determine the appropriate length for interim management funding.

- Example, a mitigation project requires special status species surveys to be performed three times a year in years 1-3, 5, 10, 15, and 20 after development plan performance

criteria have been met. Based on the total amount and duration that financial assurances will be needed for the project, interim management funding will be required for three years. Funding for these surveys for years 1-3 would be included in the financial assurance instrument for the development plan and funding for the remaining four survey years would be deposited in the long-term management plan account held by the mitigation fund holder.