United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Secretary
Assistant Secretary - Land and Minerals Management
Director, Bureau of Land Management

From: Solicitor

Subject: The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations through Mitigation

I. Introduction

You have asked for confirmation of the Bureau of Land Management's (BLM's) authority under the Federal Land Policy and Management Act of 1976 (FLPMA),[1] to identify and require the implementation of appropriate mitigation[2] when authorizing uses of the public lands.[3]

Pursuant to Secretarial Order 3300, Improving Mitigation Policies and Practices of the Department of the Interior (SO 3300)[4] and recommendations in A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior,[5] the Department and the BLM have developed policies and guidance to enhance the identification and implementation of appropriate mitigation. As part of this effort, a new chapter has been added to the Departmental

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[1] 43 U.S.C. §§ 1701–1787. This Opinion analyzes relevant FLPMA authority, and in section IV *infra* briefly discusses other relevant laws.

[2] The Council on Environmental Quality (CEQ), in regulations implementing the National Environmental Policy Act (NEPA), has defined "mitigation" to include *avoiding* the impact altogether by not taking a certain action or parts of an action; *minimizing* impacts by limiting the degree or magnitude of the action and its implementation; *rectifying* the impact by repairing, rehabilitating, or restoring the affected environment; *reducing or eliminating the impact over time* by preservation and maintenance operations during the life of the action; and *compensating* for the impact by replacing or providing substitute resources or environments. 40 C.F.R. § 1508.20. This Opinion generally condenses these five forms of mitigation into three categories: *avoidance*, *minimization*, and *compensation*, the latter of which is also referred to as "compensatory mitigation."

[3] FLPMA provides for the administration of the public lands by the Secretary through the BLM. 43 U.S.C. § 1702(e). Except in limited circumstances, the Secretary has delegated her authority to manage the public lands to the BLM. This Opinion refers to Secretarial and BLM authority interchangeably.

[4] Secretarial Order 3300, *Improving Mitigation Policies and Practices of the Department of the Interior* (Oct. 31, 2013); *see also Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*, 2015 Daily Comp. Pres. Doc. 1 (Nov. 3, 2015).

[5] *A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior* (Apr. 2014).

Manual setting forth a landscape-scale mitigation policy ("Departmental Mitigation Policy"). The new chapter, 600 DM 6, identifies three general types of mitigation "that form a sequence: avoidance, minimization, and compensatory mitigation for remaining unavoidable (also known as residual) impacts."[6] It further directs Departmental bureaus and offices to, consistent with applicable law, "identify and plan for the extent, nature, and location of mitigation, including compensatory mitigation, and to require the implementation of effective mitigation."[7] Departmental bureaus and offices should identify, plan, and implement mitigation based on a "landscape-scale approach."[8] The Departmental Mitigation Policy also exhorts bureaus and offices to consider how to protect "resources and their values, services, and functions" that are considered "important, scarce, sensitive, or otherwise suitable to achieve established goals."[9] For these resources, the Departmental Mitigation Policy states that bureaus and offices, consistent with applicable law, should seek to obtain a no net loss outcome or, if required or appropriate, a net benefit outcome.[10]

Accordingly, the BLM has developed a Mitigation Manual and a Mitigation Handbook that provide Bureau-specific policy guidance implementing the Departmental Mitigation Policy.[11] The BLM has implemented, or is considering implementing, landscape-scale mitigation in a number of endeavors, including, but not limited to, the preparation of resource management plans, such as the Desert Renewable Energy Conservation Plan (DRECP) and Greater Sage-Grouse planning initiative, the development of regional mitigation strategies, and the authorization of renewable and conventional energy projects, transmission infrastructure, and other activities on BLM-managed lands.

The BLM's authority over activities carried out on the lands it manages derives from FLPMA and other legal authorities. This Opinion focuses specifically on the general authority FLPMA vests in the BLM to require mitigation when the agency exercises its authority to engage in land use planning, the approval of site-specific projects, and other management activities. This Opinion is intended to help the BLM improve consistency across decisions; streamline

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[6] *Department of the Interior Landscape-Scale Mitigation Policy*, 600 DM at 6.4(A); *see also* BLM Mitigation *Manual*, MS-1794 (Dec. 2016) at 1.6(A)(1)(a) (same). The Departmental Mitigation Policy describes how avoidance, minimization, and compensation compose a "mitigation hierarchy" that generally provides a sequenced approach to addressing foreseeable impacts, while recognizing that in limited situations, specific circumstances may warrant a departure from this sequence. 600 DM at 6.4(B).

[7] 600 DM 6 at 6.5.

[8] *Id.* at 6.4(E). The Department's mitigation policy defines "landscape" as:

> an area encompassing an interacting mosaic of ecosystems and human systems characterized by a set of common management concerns. The landscape is not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context. The term "landscape" is not exclusive of areas described in terms of aquatic conditions, such as watersheds, which may represent the appropriate landscape-scale.

600 DM at 6.4(D); *see also* BLM Mitigation Manual, MS-1794, Glossary.

[9] 600 DM at 6.5.

[10] *Id.*

[11] BLM Mitigation Manual, MS-1794; BLM Mitigation Handbook, H-1794-1 (December 2016).

permitting processes; and protect important, scarce, and sensitive resources when evaluating, requiring, and implementing mitigation under this general authority.

For the reasons set forth below, I conclude that FLPMA provides the Secretary and the BLM with authority to identify and require appropriate mitigation. In certain circumstances, such mitigation may include mitigation that results in a net conservation benefit. Such mitigation may also consist of compensatory mitigation on either public lands or private lands having a connection to resources on public lands—regardless of their geographic proximity with public lands—so long as such mitigation on private lands occurs with the consent of the property owner.[12] Any specific decision to require or implement mitigation must comply with applicable legal requirements, including the requirement for non-arbitrary decision-making set forth in the Administrative Procedure Act (APA).[13]

II. Historical and Legal Background of FLPMA

Congress enacted FLPMA in 1976 in exercise of its plenary authority under the Property Clause of the Constitution[14] to establish standards and requirements for the use and management of the public lands. The enactment of FLPMA completed a paradigm change in the management of resources on public lands managed by the BLM. In an earlier era of public land management, starting roughly in the mid-19th century, Congress passed a series of laws encouraging the disposal of federal lands, such as grants to railroad and canal companies and homesteaders.[15] Congress also sought to promote specific types of resource development through public land disposal laws, such as the Mining Law of 1872,[16] Desert Land Act of 1877,[17] Timber and Stone Act of 1878,[18] and Free Timber Act of 1878.[19]

By the late 19th and early 20th century, the tide was turning away from disposal and toward retention, typically to allow for greater government control over public resources and to obtain greater public benefit from those resources. For example, Congress reserved coal deposits and other valuable minerals under the Coal Lands Acts of 1909 and 1910[20] and the Stock-Raising

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[12] For purposes of this Opinion, "compensation" and "compensatory mitigation" mean compensating for remaining impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments through the restoration, establishment, enhancement, or preservation of resources and their values, services and functions. *See* 600 DM at 6.4(C) (defining "compensatory mitigation"); BLM Mitigation Manual, MS-1764, Glossary (same); *see also supra* note 2 (citing the definition of "mitigation" in the CEQ regulations implementing NEPA). Compensatory mitigation may be implemented on or away from the area of impact.

[13] *See* 5 U.S.C. § 706(2)(A) (directing reviewing courts to hold unlawful and set aside agency actions, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[14] U.S. CONST. art. IV, § 3, cl. 2.

[15] *See, e.g.*, Timber Culture Act, ch. 277, 17 Stat. 605 (1873); Homestead Act, ch. 75, 12 Stat. 392 (1862); General Right-of-way Act, ch. 80, 10 Stat. 28 (1852); General Preemption Act, ch. 16, 5 Stat. 453 (1841).

[16] Ch. 152, 17 Stat. 91 (1872) (codified as amended at 30 U.S.C. §§ 22–54).

[17] Ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321–339).

[18] Ch. 151, 20 Stat. 89 (1878) (codified as amended at 43 U.S.C. §§ 311–313 (repealed 1955)).

[19] Ch. 190, 20 Stat. 113 (1878).

[20] Coal Lands Act of 1910, ch. 318, 36 Stat. 583 (codified as amended at 30 U.S.C. §§ 83–85); Coal Lands Act of 1909, ch. 270, 35 Stat. 844 (codified as amended at 30 U.S.C. § 81).

Homestead Act of 1916.[21] Congress further modified management of certain valuable mineral resources in 1920 through the Mineral Leasing Act, which provided for a leasing process and imposed royalty payment requirements on developers to benefit the American people.[22] Congress also authorized the creation of forest reserves,[23] to improve and protect forest resources and "furnish a continuous supply of timber for the use and necessities of citizens of the United States,"[24] and established national parks to "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[25] In 1934, through the Taylor Grazing Act,[26] Congress promoted livestock grazing on the federal lands by authorizing the creation of grazing districts and providing for protection of rangeland resources through federally issued permits.[27]

Despite this evolution and the closure of most of the public lands to homesteading by Executive Order in 1934[28] and 1935,[29] Congress had not yet provided a comprehensive legal regime to guide either the disposition or management of the lands held by the United States. Instead, a hodgepodge of authorities—literally, hundreds of sometimes inconsistent public lands laws—governed these lands. By the 1970s, Congress recognized that many of these laws took an arcane and outdated approach to land management and continued to facilitate disposal of the lands.[30] In a letter to Senator Henry Jackson, Chairman of the Senate Committee on Energy and Natural Resources, regarding Senate Bill 507, the bill that became FLPMA, Assistant Secretary Jack Horton wrote:

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[21] Stock Raising Homestead Act of 1916, ch. 9, § 9, 39 Stat. 864 (codified as amended at 43 U.S.C. § 299)

[22] Mineral Leasing Act of 1920, 30 U.S.C. §§ 181–287.

[23] Organic Administration Act of 1897, ch. 2, 30 Stat. 34–36 (codified as amended at 16 U.S.C. §§ 472–482) (establishing National Forest System); General Revision Act of 1891, § 24, ch. 561, 26 Stat. 1095 (authorizing the reservation of forest lands).

[24] 16 U.S.C. § 472.

[25] *See* National Park Service Organic Act of 1916, 39 Stat. 535 (codified as amended at 54 U.S.C. § 100101(a)).

[26] 43 U.S.C. §§ 315–315r.

[27] The goals of the Taylor Grazing Act included to "stabilize the livestock industry," "stop injury to the public grazing lands by preventing overgrazing and soil deterioration," and "provide for th[e] orderly use, improvement, and development" of the public range. *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 742 (2000) (quoting 48 Stat. 1269).

[28] Exec. Order No. 6910 (Nov. 26, 1934).

[29] Exec. Order No. 6964 (Feb. 5, 1935).

[30] *See* S. REP. NO. 94-583, at 24 (1975) (describing "3,000 public land laws," which "were written at a time when Federal ownership of the national resource lands was expected to be short lived and, consequently, the Federal Government was regarded as only a temporary custodian of those lands."); 122 CONG. REC. 1,231 (1975) (statement of Sen. Haskell) ("The only management tools available to the BLM remain some 3,000 public land laws which have accumulated over the last 170 years. A goodly proportion of these laws were written in the last century at a time when the disposal policy prevailed. Not unexpectedly, therefore, these laws are often conflicting, sometimes truly contradictory, and certainly incomplete and inadequate."); *id.* at 1,242 (statement of Sen. Jackson) (noting the "[t]he lack of a modern management mandate for the Bureau and its dependence on some 3,000 public land laws, many of which are clearly antiquated").

> The national resource lands were for many years used as a means of stimulating the growth and development of the West. Consequently, little attention was given to preserving the irreplaceable values of those lands. Many of the laws pertaining to the lands were designed primarily to facilitate disposal. Although there has been a growing awareness that these lands are an invaluable national asset and although our policy is now to preserve their values, to obtain authority to develop sound planning of their uses and generally to maintain them in Federal ownership, these lands have inherited an archaic and often conflicting conglomeration of laws which govern their use.[31]

By enacting FLPMA, Congress replaced the fragmented public land laws with a comprehensive regime under which the federal government generally would retain and manage the public lands.[32] FLPMA designated the Secretary of the Interior, acting through the BLM, as the steward of those lands, and set forth a broad set of principles and tools to guide and implement that stewardship. In FLPMA, Congress instituted a policy for the United States to retain the public lands in federal ownership, unless a disposal would promote the national interest,[33] and to manage the public lands "on the basis of multiple use and sustained yield unless otherwise specified by law."[34] Congress further declared it to be the policy of the United States that the BLM should manage the public lands

> in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archeological values; . . . preserve and protect certain public lands in their natural condition; . . . provide food and habitat for fish and wildlife; and . . . provide for outdoor recreation and human occupancy and use.[35]

FLPMA provides the Secretary and the BLM with several specific tools to achieve these goals. It directs the BLM to prepare land use plans to guide its management,[36] and to "regulate, through easements, permits, leases, licenses, published rules, or other instruments, the use, occupancy, and development of the public lands"[37] in accordance with the land use plans.[38] FLPMA also mandates that the Secretary, "[i]n managing the public lands . . . shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."[39]

III. Analysis

FLPMA vests authority in the Secretary and the BLM to manage the public lands, and the Secretary generally has delegated the authority vested in her to the BLM. As a result, this

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[31] S. REP. NO. 94-583, at 90 (quoting Letter from Jack Horton, Assistant Secretary for Land and Water Resources, Department of the Interior, to Senator Henry M. Jackson (Mar. 6, 1975)).

[32] "Public lands" are defined, with limited exceptions, as those lands owned by the United States and administered by the BLM. 43 U.S.C. § 1702(e).

[33] 43 U.S.C. § 1701(a).

[34] *Id.* §§ 1701(a)(7), 1732(a).

[35] *Id.* § 1701(a)(8).

[36] *Id.* § 1712(a).

[37] *Id.* § 1732(b).

[38] *Id.* § 1732(a).

[39] *Id.*

Opinion will discuss the authority vested in the Department generally as authority exercised by the BLM.

As discussed in detail below, FLPMA provides expansive authority to the BLM, both as a regulator and a manager of lands owned by the United States, to pursue Congress's goals of public land management based on principles of multiple use and sustained yield. That authority encompasses broad discretion to manage the use of public lands and to take action to conserve or enhance public land values to enable current and future generations to use public lands in pursuit of their diverse set of interests. Among the tools the BLM may use to conserve or enhance public land values is its authority to require project sponsors to undertake mitigation as a condition of the BLM authorizing use of the public lands. Such authority is not unlimited—under principles of administrative law, the BLM should not impose arbitrary or capricious mitigation measures. To that end, the BLM generally should identify the impacts to which mitigation relates and provide an explanation as to how the mitigation avoids, minimizes, or compensates for the identified impacts. Within that framework, and where otherwise consistent with law, FLPMA provides the BLM with ample authority to require public land users to take steps to minimize the negative effects of their use and, where appropriate, to leave the public lands in better condition than they found them.

A. FLPMA vests the BLM with authority to conserve or enhance environmental and other use values for the benefit of current and future generations

1. FLPMA establishes a policy of managing public lands based on principles of multiple use and sustained yield

Congress enacted FLPMA to reshape the management of public lands. In the public law enacting FLPMA, Congress explained its intent to provide for the "protection . . . and enhancement of the public lands."[40] Congress included environmental and stewardship objectives into FLPMA's declaration of policy,[41] which incorporates the principle that the public lands generally should be "retained in Federal ownership," rather than transferred into private hands.[42] FLPMA charges the

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[40] P. L. 94-579 (Oct. 21, 1976) (stating an intent "[t]o establish public land policy; to establish guidelines for its administration; to provide for the management, protection, development, *and enhancement of the public lands*; and for other purposes." (emphasis added)).

[41] 43 U.S.C. § 1701(a)(7), (8), (11). Subparagraph (b) of this section provides that "[t]he policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law." *Id.* § 1701(b). The Interior Board of Land Appeals has concluded that the language in section 102(b) of FLPMA means that the policy statements outlined in section 102(a) are not the operative sections of the statute and do not prevail over FLPMA's specific provisions. *Mallon Oil*, 104 IBLA 145 (1988). Nonetheless, it has been recognized that the policy statements provide guidance in the interpretation of specific provisions of FLPMA. *See Colorado Open Space Council*, 109 IBLA 274, 301 n.12 (1989) (Irwin, A.J., dissenting). In that regard, Congress has included specific operative sections in FLPMA to carry out the policy statements and that authorize the Secretary to identify and require appropriate mitigation when authorizing public land uses.

[42] *See* 43 U.S.C. § 1701(a)(1).

BLM with management and stewardship of the public lands for the use of current and future generations.

FLPMA implemented this fundamental change in congressional policy through the "principles of multiple use and sustained yield" that it set as the goals for BLM land management.[43] These principles also serve as the touchstone for three general delegations of authority: Section 202 of FLPMA vests the Department with land use planning authority and provides that such planning shall "use and observe the principles of multiple use and sustained yield set forth in this and other applicable laws." Section 302(a) of FLPMA directs the Secretary to "manage the public lands under principles of multiple use and sustained yield, in accordance with land use plans developed under section 202 of th[e] Act."[44] And section 303(a) of FLPMA directs the Secretary to promulgate any "regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands." Section 310 similarly directs the Secretary to promulgate "rules and regulations to carry out the purposes of this Act."[45]

Land management based on principles of multiple use and sustained yield involves balancing competing interests in public lands between current and future generations—"interests as diverse as the lands themselves,"[46]—ranging from economic and industrial values, to recreational, aesthetic, and environmental values. FLPMA's definitions make clear the breadth of the Department's charge.

The detailed definition of the term "multiple use" provides:

> The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present *and future* needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the *long-term needs of future*

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[43] *Id.* §§ 1701(a)(7), 1732(a). FLPMA provides that only certain of its provisions, including the BLM's obligation to "take any action necessary to prevent unnecessary or undue degradation of the lands," "amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act." *Id.* § 1732(b).

[44] *Id.* § 1732(a). Section 202 of FLPMA, in turn, requires the Secretary to "use and observe the principles of multiple use and sustained yield" in the development of land use plans. *Id.* § 1712(c)(1). Multiple use and sustained yield principles apply to the management of public lands "except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law." *Id.* § 1732(a). Therefore, where applicable legal authority so provides, some public land areas are managed under different management principles. For example, designated wilderness areas on BLM-administered lands are managed according to the Wilderness Act, 16 U.S.C. §§ 1131–1136. Other public land areas, such as national monuments designated under the Antiquities Act of 1906, 54 U.S.C. §§ 320301–320303, and areas governed by the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937, 43 U.S.C. §§ 1181a–1181j, continue to be managed according to the principles of multiple use and sustained yield, as well as additional management principles or constraints.

[45] 43 U.S.C. §§ 1733(a), 1740.

[46] *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982).

> *generations for renewable and nonrenewable resources*, including, but not limited to, recreation, range, timber, minerals, *watershed, wildlife and fish, and natural scenic, scientific and historical values*; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.[47]

The principle of "multiple use" therefore requires consideration of both the interests of current and future generations; the definition expressly mentions the future twice and prohibits permanent impairment to the productivity of the land and the quality of the environment. It also provides for consideration of development uses ("range, timber, minerals"), as well as recreational uses and conservation ("watershed, wildlife and fish, and natural scenic, scientific and historical values").[48] By creating such a bold, forward-looking stewardship mandate, Congress granted the BLM broad discretion to chart a course for public lands that accounts for development, conservation, and long-term management.[49]

The phrase "sustained yield" reinforces the broad stewardship mandate under which the BLM manage federal lands. Under FLPMA, "'sustained yield' means the achievement and maintenance *in perpetuity* of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[50] The term cautions against managing public lands for the short-term expediencies of the day, and, as the Supreme Court has explained, "requires the BLM to control depleting uses over time, so as to ensure a high level of valuable uses in the future."[51] Because the term "sustained yield" expressly incorporates principles of "multiple use," its reference to perpetually maintained "output" accounts for impacts to both developable resources, such as timber for harvest, and environmental resources, such as watersheds and wildlife. Principles of sustained yield, like principles of multiple use, do not elevate certain uses over others, but rather, delegate discretion

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[47] 43 U.S.C. § 1702(c) (emphasis added).

[48] *Id.*; *see, e.g.*, *Friends of the Bow Predator Project*, 139 IBLA 141, 143–44 (1997) (stating that the "thrust of the multiple-use mandate requires a choice of the appropriate balance to strike between competing resource uses, recognizing that not every possible use can take place fully on any given area of the public lands at any one time" and that "[m]ultiple use necessitates a trade-off between competing uses," but that multiple-use management "does not dictate the choice or require that any one resource, or corresponding use, take precedence").

[49] *See Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975) (describing the multiple use standard under the Classification and Multiple Use Act of 1964 as "breath[ing] discretion at every pore"); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 518 (D.C. Cir. 2010) ("the Bureau has wide discretion to determine how those [FLPMA] principles [of multiple use and sustained yield] should be applied."); *Or. Nat. Desert Ass'n v. BLM*, 531 F.3d 1114, 1134 (9th Cir. 2008) (recognizing that the BLM's "wide authority to manage the public lands under principles of multiple use and sustained yield allows it ample discretion for management of lands with wilderness values") (internal citations and quotation marks omitted); *Moapa Band of Paiutes v. BLM*, 2011 U.S. Dist. LEXIS 116046, at *6 (D. Nev. 2011) (citing *Strickland*); *Or. Natural Desert Ass'n v. Shuford*, 2007 U.S. Dist. LEXIS 42614, at *28 (D. Or. 2007) (stating the BLM "has broad discretion in managing public lands for multiple use").

[50] 43 U.S.C. § 1702(h) (emphasis added).

[51] *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 58 (2004).

to the BLM to manage public lands in the best interests of the American people today, tomorrow, and into the future.

Congress's charge to the BLM to manage for "multiple use" and "sustained yield" requires a holistic, long-term approach to managing public lands. As the BLM carries out its land management responsibility to address and resolve competing resource values, maintain high levels of outputs of renewable resources, and ensure that public lands meet the needs of future generations, the agency necessarily exercises discretion over whether and how to develop or conserve resources. In some areas and at appropriate times, this may mean authorizing extractive uses of resources on the public lands, prioritizing conservation, or managing public lands to restore or enhance values for the use of future generations. Just as the BLM has the authority to replant forests—or, where appropriate, to require permit applicants to replant forests—to provide future generations with timber harvest use, so too can it build and enhance wildlife habitat—or, where appropriate, to require permit applicants to build and enhance wildlife habitat—to provide future generations with recreational and environmental use. Such enhancement may be particularly necessary for those public lands with a historical legacy of degradation, the result of past uses that have left enduring impacts that impair certain resource values. This legacy includes lands where past use occurred before current federal regulations came into force or where the land user may have adhered to the standards and practices that prevailed at the time, but which we now understand, with the benefit of greater experience and scientific insight, to have been destructive to one or more resource values.

2. BLM has expansive authority to pursue congressional goals established in FLPMA

FLPMA provides the BLM and the Department with expansive authority to manage public lands so that current and future generations may enjoy multiple uses and sustained yields. The broad authority conferred on the BLM arises from the special relationship of the United States to the lands it owns and manages for the benefit of the public and the plenary authority over those lands granted to Congress by the Property Clause.

The Supreme Court has long recognized that Congress exercises plenary power over the use of and activities on federal property. The capacious scope of this authority reflects the United States' dual role as both proprietor and regulator of federal lands. In *Camfield v. United States*, the Supreme Court recognized this dual source of authority, explaining that in addition to having "the power of legislating for the protection of public lands," the United States "has the same right to insist on its proprietorship . . . as an individual has to claim" control of private property.[52] Congress has repeatedly exercised this authority—and delegated it to federal agencies—to advance the public interest, sometimes authorizing appropriate consumptive uses of public lands, as it has done through statutes like the Mineral Leasing Act of 1920, and other times protecting environmental and natural uses, as it has done through statutes like the Wilderness Act of 1964

[52] 167 U.S. 518, 526 (1897). The dual nature of the federal government's role in managing public lands distinguishes the exercise of Property Clause authority from the exercise of authority under the enumerated powers in Article I, Section 8, of the Constitution, including the Commerce Clause.

and the provisions of the Omnibus Public Land Management Act of 2009, which created the National Landscape Conservation System.

The Supreme Court also has explained that Congress has delegated its "general managerial power" to the Secretary of the Interior.[53] Even prior to the enactment of FLPMA, the Court "repeatedly observed that 'the power over the public land . . . entrusted to Congress is without limitations.'"[54] This "complete power" to control and regulate federal property, is to be construed broadly and extends to the protection of wildlife on federal property, as well as to the regulation of activities on private lands that threaten federal property.[55]

The Court has further recognized that the Department's "general power of management over the public lands" continues to persist "unless such authority [is] withdrawn."[56] When Congress exercised its broad Property Clause power to pass FLPMA, it did not diminish, but expanded, the Department of the Interior's existing authority over public lands, enabling the Department to account for the expansive public interest of current and future generations.[57] Congress enacted the statute to replace a "myriad of public land laws serving a variety of competing and often conflicting interests" with a "comprehensive statement of congressional policies concerning the management of the public lands."[58] In consolidating the Department's authority, empowering the Department to engage in comprehensive land use planning, and establishing the goal of managing for multiple use and sustained yield, Congress buttressed, rather than restricted, the Department's authority over public lands. The Department can exercise that authority, which is both proprietary and regulatory in nature, in numerous ways, including by developing land use plans,[59] engaging in land management activities,[60] or promulgating regulations.[61] In other words, under FLPMA, the Department may use any tool at its disposal—absent a constraint imposed upon it by another source of law—to achieve the goals of multiple use and sustained yield.

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[53] *Boesche v. Udall*, 373 U.S. 472, 476 (1963).

[54] *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

[55] *Id.* at 540–41; *United States v. Alford*, 274 U.S. 264 (1927); *Camfield*, 167 U.S. at 526. *See generally* Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001).

[56] *Boesche*, 373 U.S. at 476. In *Boesche* the Court rejected the argument that the Mineral Leasing Act had limited the Department's authority to administratively cancel a lease invalid at its inception. *Id.* Similarly, the D.C. Circuit has held that the Secretary has authority to terminate a public land sale after the bidder has made payment but before the Department has issued a patent for the land. *Silver State Land, LLC v. Schneider*, No. 16-5018, 2016 U.S. App. LEXIS 22343 (D.C. Cir. Dec. 16, 2016). The D.C. Circuit held the Secretary's "plenary authority over the administration of public lands" included the authority to terminate the land sale and refund monies to the bidder. *Id.* at *6 (quoting *Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 336 (1963)).

[57] The Supreme Court similarly viewed the Mineral Leasing Act as "intended to expand, not contract" the Department's authority. *Id.* at 481.

[58] *Rocky Mountain Oil & Gas Ass'n*, 696 F.2d at 737.

[59] *See* 43 U.S.C. § 1712(a)

[60] *Id.* § 1732(a),

[61] *See id.* §§ 1733(a), 1740.

The authority granted in FLPMA includes the power, which any land owner has, to prohibit uses where appropriate to conserve natural resources. "It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses."[62] This authority also allows the BLM to undertake activities on federal lands to conserve, protect, enhance, or develop natural resources. The BLM exercises that authority to benefit an array of uses: the BLM builds trails and other facilities to enhance recreational uses, restores habitat to enhance wildlife uses, rehabilitates wetlands to enhance environmental uses, and builds and maintains roads to enhance grazing, timbering, and mineral exploration and development. Similarly, as will be discussed below, in the absence of specific statutory limitations, requiring mitigation is an appropriate tool for the BLM to use to pursue legitimate purposes including carrying out Congress's goal of land management based on principles of multiple use and sustained yield.

B. BLM and the Department Have the Discretion to Require Appropriate Mitigation to Further FLPMA's Land Management Policies

1. Appropriate mitigation of various forms is an essential tool for the BLM to manage federal public lands for current and future generations

Before analyzing in detail the provisions of FLPMA, this section of my Opinion explains that the BLM's authority to require mitigation is consonant with the practice and authority of other land use and regulatory agencies. It also identifies some varieties of mitigation that the BLM may consider or require in appropriate situations under the provisions of FLPMA discussed later.

Regulatory and land management agencies commonly require mitigation. Just as the BLM may deny permission under FLPMA to use public lands in a manner that degrades other uses, such as environmental, wildlife, or aesthetic uses, it can condition the permission it grants to private parties on their agreement to use lands to conserve or enhance other uses for current or future generations. Requiring mitigation is a longstanding tool used by land use planning and management agencies at all levels of government. Private land owners similarly require mitigation—through such legal tools as restrictive covenants—when they sell or lease property to other parties.[63] Even where government regulates the use of private property, rather than public property, it has broad authority to require mitigation.[64] As the Supreme Court has explained, "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against

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[62] *New Mexico v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009).

[63] *See, e.g.*, *Kirkley v. Seipelt*, 128 A.2d 430, 133 (Md. 1957) (upholding restrictive covenant prohibiting construction of buildings unless external designs and locations were approved by seller).

[64] In situations where federal agencies have authority to regulate private land use, the government's power to condition land use approvals on private land is not without limit. The Supreme Court has required an "essential nexus" and "rough proportionality" between the harm to the public interest associated with proposed development and conditions imposed by the government. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). That constitutional limit on government regulatory authority may apply were BLM to require mitigation in approving a project that directly impacts vested private property rights, but it is not otherwise applicable to BLM permitting decisions.

constitutional attack."[65] Mitigation requirements are also a prominent feature of other federal permitting regimes. For example, regulations implementing the Clean Water Act require permits authorizing fill of waters of the United States to include mitigation provisions.[66]

BLM exercises broader authority under FLPMA than that exercised by purely land use or regulatory agencies, such as the U.S. Environmental Protection Agency or local zoning boards. Because FLPMA vests authority in BLM to act both as a regulator and, on behalf of the United States, as a proprietor, the agency generally has the discretion not only to regulate the use of public lands and resources, but also to act as the sovereign's landlord with the authority to impose conduct or performance standards as a condition for entering onto the public lands. The BLM can appropriately incorporate mitigation into its regulations, land use plans, plan implementation decisions, or, on a case-by-case basis, into permitting decisions.[67] As 600 DM 6 specifies, mitigation consists of three general types "that form a sequence: avoidance, minimization, and compensatory mitigation,"[68] and, consistent with other legal authority, the BLM may incorporate all of these types of mitigation into its decisions.

In addressing activity on the public lands, this authority is broad enough to allow BLM to recognize financial investments and measures taken on private lands. For example, the BLM may allow a public land user to meet its mitigation obligations for activities on the public lands by engaging in mitigation partially or entirely on private lands, so long as those measures on private lands have a connection—regardless of their geographic proximity—to the impacts caused by the permitted use on the public lands. Public lands and the resources they contain exist within ecosystems and landscapes, not all of which are owned by the federal government. The interconnectedness between the natural resources on public lands and those on private lands means that mitigation on private lands may, in some circumstances, be the most efficacious means of conserving or enhancing natural resources on public lands and therefore fulfill mitigation obligations on the public lands. For example, in some circumstances, protecting or restoring habitat on private property may best address the harm that a project will cause to a sensitive species' habitat on public lands. Similarly, in some circumstances, the best way to conserve or enhance a valuable attribute of the public lands, such as wilderness characteristics, may be to allow the project applicant to purchase conservation easements over inholdings within

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[65] *Koontz*, 133 S. Ct. at 2595 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

[66] *See* 33 U.S.C. § 1344(a); 40 C.F.R. § 230.10. Section 404 of the Clean Water Act does not specifically address mitigation, but rather, authorizes the Army Corps of Engineers to issue fill permits. *See, e.g.*, *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1156 (D.C. Cir. 2011).

[67] These avenues through which BLM can address mitigation mirror the manner by which government's engaged land use planning for private lands may impose mitigation through legislation, zoning, or permitting. Federal courts have considered whether legislatively imposed mitigation should be treated differently from mitigation required on a case-by-case basis, but none have questioned the legality of either form of mitigation as a general matter. *See, e.g.*, *McClung v. City of Sumner*, 548 F.3d 1219, 1225 (9th Cir. 2008); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995).

[68] *Department of the Interior Landscape-Scale Mitigation Policy*, 600 DM at 6.4(A); *see also* BLM Mitigation Manual, MS-1794 at 1.6(A)(1)(a) (same). The Departmental Mitigation Policy describes how avoidance, minimization, and compensation compose a "mitigation hierarchy" that generally provides a sequenced approach to addressing foreseeable impacts, while recognizing that in limited situations, specific circumstances may warrant a departure from this sequence. 600 DM at 6.4(B).

public lands that possess a harmed feature or resource, rather than conducting less effective mitigation directly on the public lands.

Based on FLPMA's multiple use and sustained yield authority, compensatory mitigation may also involve a net conservation benefit, as appropriate. In other words, in appropriate circumstances, the BLM may authorize a project contingent on the applicant implementing mitigation that is predicted to improve resource conditions above the preexisting baseline conditions. Mitigation requiring a net conservation benefit is permissible because of the regulatory and proprietary authority FLPMA vests in the BLM to enhance natural resources on public lands. In the absence of other legal limitations,[69] requiring those seeking to use public lands to leave them in better condition for the benefit of future generations is a proper means of pursuing that legitimate purpose.[70] Moreover, mitigation inherently involves a degree of uncertainty. For example, one acre of habitat for a sensitive species may not be biologically equivalent to another acre, and as a result, mitigation that appears to result in no net loss of habitat may, in practice, result in net harm to the species.[71] Accounting for that uncertainty may be particularly important in circumstances involving the use of public lands in exchange for a commitment to restore other public lands, because while restoration can provide substantial benefits, it often does not result in ecological value equivalent to that provided by undisturbed lands.[72] Net conservation gain may also be justified because of a temporal lag between realization of the benefits of mitigation and the impacts of a project.[73]

2. BLM's authority to manage for multiple use and sustained yield authorizes mitigation

BLM's charge under FLPMA to manage public lands based on principles of multiple use and sustained yield supports use of mitigation. The authority to evaluate and impose mitigation arises out of the broad authority FLPMA vests in the BLM to pursue the congressional goals described above for public lands.

The BLM can evaluate and require mitigation through both the land use planning process and site-specific authorizations. In some cases, planning level decisions will provide specific standards or general guidelines to govern mitigation requirements within a planning area. Where

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[69] *See, e.g.*, *infra* Part IV.

[70] *See supra* Part III.A.1 (describing BLM's authority to enhance the public lands).

[71] Regulations implementing the Clean Water Act's permitting program for fill of waters of the United States similarly requires consideration of "the likelihood of ecological success and sustainability" in developing compensatory mitigation measures. 33 C.F.R. § 332.3(a)(1); *see also Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng'rs*, 883 F. Supp. 2d, 627, 635 (S.D.W.V. 2012) (rejecting environmental group's challenge to a 2.23:1 mitigation ratio, which was based, in part, on "recognition . . . that stream functions are complex and that quantifying those functions involves a degree of uncertainty").

[72] *See, e.g.*, NATIONAL ACADEMY OF SCIENCES, EFFECTIVE MONITORING TO EVALUATE ECOLOGICAL RESTORATION IN THE GULF OF MEXICO 8 (2016) ("Because of the complexity of the environment that restoration aims to manipulate, all restoration efforts will face some level of uncertainty and associated risk of negative or undesirable project outcomes.").

[73] *See Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1156 (D.C. Cir. 2011) (upholding mitigation measures required under section 404 of the Clean Water Act "which will bring about a *net gain* of wood stork foraging habitat" to offset "temporal lag" (emphasis in original)).

planning level documents include such mitigation standards or guidelines, section 302 of FLPMA requires the BLM to manage those site-specific authorizations "in accordance with" adopted land use plans.

Even where land use plans do not specify mitigation standards or guidelines, BLM may impose mitigation requirements at the project level when making discretionary decisions to authorize particular uses of land. Where consistent with land use plans and applicable law, the BLM may *deny* applications for proposed discretionary land uses where the associated impacts cannot or will not be adequately mitigated. As the Tenth Circuit recognized in *New Mexico ex rel. Richardson v. BLM*,[74] a case concerning proposed oil and gas development in the Otero Mesa in New Mexico, the environmental values component of the BLM's multiple use mission allows it to prohibit development activities altogether on any particular area of public land:

> It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses. . . . BLM's obligation to manage for multiple use does not mean that development *must* be allowed on the Otero Mesa. Development is a *possible* use, which BLM must weigh against other possible uses—including conservation to protect environmental values.[75]

The court noted that FLPMA does not require development or other uses to "be accommodated on every piece of land; rather, delicate balancing is required."[76] It follows that the BLM, when undertaking this "delicate balancing," may condition discretionary authorizations for use of the public lands upon mitigation measures that provide for conservation.[77] Through the exercise of such discretion, the BLM may require public land users to avoid, minimize, or compensate for impacts from development that warrant mitigation. Moreover, just as the BLM has authority to engage in activities that enhance resources on public lands,[78] in appropriate circumstances, the BLM may exercise its discretion, and in particular its discretion to consider and promote ecological and environmental values consistent with its multiple use and sustained yield mission, to require mitigation that results in no net loss or net benefit to particular resources. For example, if the resources that would be affected by a proposed discretionary public land use are important, scarce, or sensitive—whether because of the intrinsic qualities of the resources or a historical

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[74] 565 F.3d 683 (10th Cir. 2009).

[75] *Id.* at 710 (emphasis in original).

[76] *Id.* (citing *SUWA*, 542 U.S. at 58).

[77] Courts and the Interior Board of Land Appeals have explicitly recognized the BLM's broad discretion to protect environmental values by conditioning land use authorizations, including authorizations for livestock grazing, *see, e.g.*, *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1300–01 (10th Cir. 1999) ("FLPMA unambiguously authorizes the Secretary to specify terms and conditions in livestock grazing permits in accordance with land use plans. . . . The overarching goal of the statute is to ensure that the Secretary's management of the lands is consistent with the principles of multiple use and sustained yield"); oil and gas development, *see, e.g.*, *Grynberg Petro.*, 152 IBLA 300, 306–07 (2000) (describing how administrative appellants challenging conditions of approval bear the burden of establishing that those conditions are "unreasonable or not supported by the data"); and rights-of-way, *see, e.g.*, *Lower Valley Power & Light*, 82 IBLA 216, 223 (1984) ("It is well established that BLM may use its discretionary authority to protect environmental and other land use values, including endangered and threatened species and the scenic quality of an area.").

[78] *See supra* Part III.A.1 (describing BLM's authority to enhance the public lands).

legacy of degradation—the BLM's authorization of that use in the context of its multiple use and sustained yield mission reasonably may lead it to conclude that it should authorize that use only if the use, after imposing mitigation measures, benefits, or at least does not further degrade, those resources.[79] These determinations are at their core the balancing of resource values with the long-term view that FLPMA mandates under its multiple use and sustained yield principles. FLPMA vests the Secretary and the BLM with the tools, when authorizing uses of the public lands, to decide where, when, and under what conditions to authorize such use.

3. FLPMA prescribes a land use planning process that contemplates the use of mitigation to protect resource values on the public lands

In section 202 of FLPMA, Congress directed the BLM to prepare land use plans to guide subsequent authorization decisions.[80] As the Supreme Court has recognized, "a land use plan describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps" for the BLM as it considers whether to approve on-the-ground actions.[81] All such authorizations, in turn, must be consistent with the terms, conditions, and decisions of the underlying land use plans.[82] Within this framework, the BLM uses land use planning to fulfill its statutory mission, set goals for the future and identify tools to achieve those goals, often at a broad geographic scale. Land use planning thus constitutes a "preliminary step in the overall process of managing public lands"[83] because while a plan provides a general framework for future land use authorizations, it "is not ordinarily the medium for affirmative decisions that

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[79] The BLM has long understood that its stewardship of the public lands under multiple use and sustained yield principles is consistent with efforts to improve and restore important, scarce, and sensitive resources. For example, the BLM's special status species policy provides guidance for the conservation of species listed or proposed for listing under the ESA, as well as for species that require special management consideration to promote their conservation and reduce the likelihood and need for future listing. BLM Special Status Species Management, MS-6840 at .01 (Dec. 12, 2008). For sensitive (non-listed) species, the objective of the policy is to "initiate proactive conservation measures" that reduce or eliminate threats and minimize the need for future listing. *Id.* at 0.2. The policy defines "conservation" of sensitive species to encompass the elimination or reduction of threats, as well as programs, plans, and practices to "*improve the condition* of the species' habitat on BLM-administered lands." *Id.* at Glossary, p. 2 (defining "conservation") (emphasis added). The BLM has been implementing its special status species policy continuously since 2008, before which the BLM implemented its predecessor, a 2001 policy with similar provisions. *See* BLM Special Status Species Management, MS-6840 at .01 (Jan. 17, 2001) ("Conservation of special status species means the use of all methods and procedures which are necessary *to improve the condition* of special status species and their habitats to a point where their special status recognition is no longer warranted.") (emphasis added); *see also id.* at .22 (stating that conservation of species other than under the ESA includes appropriate "conservation actions that improve the status of such species").

[80] 43 U.S.C. § 1712(a); *see also* 43 C.F.R. § 1601.0-2. On December 12, 2016, the BLM published a final rule to amend the regulations governing its land use planning process. Resource Management Planning, 81 Fed. Reg. 89,580-89,671. Under the final rule, which will become effective on January 11, 2017, the components of land use plans will remain substantially similar to those under the current regulations. The contents of the final rule do not materially change the analysis and conclusions in this Opinion.

[81] *SUWA*, 542 U.S. at 59.

[82] 43 C.F.R. §§ 1601.0-5(c), 1610.5-3.

[83] *SUWA*, 542 U.S. at 69.

implement" the goals and objectives of the plan.[84] Moreover, when the BLM makes such implementation decisions, such as whether to approve a particular project, it considers additional information specific to each such proposal, to help the agency consider additional project-specific terms and conditions.

Section 202 of FLPMA requires the BLM to integrate conservation into its development and revision of land use plans. It directs the BLM, when conducting land use planning, to "use and observe the principles of multiple use and sustained yield;"[85] "weigh long-term benefits to the public against short-term benefits;"[86] "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans";[87] and "give priority to the designation and protection of areas of critical environmental concern" (ACECs) where appropriate.[88] Providing for conservation through planning, including by identifying opportunities for mitigation, is fully consistent with Congress's articulation of the BLM's role as a steward and manager who balances multiple values for the sustainable existence of the public lands. This approach to planning includes "consider[ing] the relative scarcity of the values involved and the availability of *alternative means* (including recycling) *and sites* for realization of those values."[89]

The BLM has exercised its broad statutory authority[90] by incorporating in its land use planning regulations,[91] Land Use Planning Handbook,[92] Mitigation Manual, and Mitigation Handbook[93] the congressional direction to protect the longevity and resiliency of public land resources and values, including, by extension, through instituting appropriate mitigation requirements. One feature of the planning process that is directly relevant to the implementation of mitigation is that the BLM must identify desired outcomes in the form of goals and objectives for resource

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[84] *Id.*; *see also* 43 U.S.C. § 1712(e) (authorizing the BLM to "issue management decisions to implement land use plans").

[85] 43 U.S.C. § 1712(c)(1).

[86] *Id.* § 1712(c)(7).

[87] *Id.* § 1712(c)(8).

[88] *Id.* § 1712(c)(3). ACECs are "areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards." *Id.* § 1702(a); *see also* 43 C.F.R. § 1601.0-5(a). ACECs are a mechanism to protect areas of the public lands or otherwise provide for special management considerations to ensure "that the *most environmentally important and fragile lands* will be given special, early attention and protection." S. REP. NO. 94-583, at 43 (1975) (emphasis added). The ACEC mechanism is supplemental to BLM's more general land use planning authority set forth in section 202 of FLPMA. *See supra* notes 80–84; *infra* pp. 12–13.

[89] 43 U.S.C. § 1712(c)(6) (emphasis added).

[90] In addition to its general grant of authority to the BLM to manage the public lands for multiple use and sustained yield and the planning authority discussed above, FLPMA grants the Secretary broad power to promulgate and enforce regulations that carry out the purposes of the Act and other laws applicable to the public lands. *Id.* §§ 1733, 1740.

[91] 43 C.F.R. pt. 1600.

[92] BLM Land Use Planning Handbook, H-1601-1 (2005).

[93] BLM Mitigation Manual, MS-1794 (December 2016); BLM Mitigation Handbook, H-1794-1 (December 2016).

management.[94] As applied by the BLM in the context of planning, "goals" are broad statements of desired outcomes that are not usually quantifiable, such as goals to maintain ecosystem health and productivity, promote community stability, ensure sustainable development, or meet land health standards.[95] "Objectives" identify specific desired outcomes for resources, are usually quantifiable and measurable, and may have established timeframes for achievement.[96]

To achieve goals and objectives, consistent with its broad discretion under the multiple use and sustained yield mandate, the BLM incorporates mitigation standards into land use plans. The planning regulations require the BLM to establish the measures needed to achieve goals and objectives. These measures consist of "allowable uses," wherein the BLM identifies uses that are allowable, restricted, or prohibited on the public lands and mineral estate,[97] as well as "management actions."[98] Identifying "management actions" directly supports the adoption of mitigation standards, because "management actions" consist of:

> the actions anticipated to achieve desired outcomes, including actions to maintain, restore, or improve land health. These actions include proactive measures (e.g., measures that will be taken to enhance watershed function and condition), as well as measures or criteria that will be applied to guide day-to-day activities occurring on public land.[99]

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[94] 43 C.F.R. § 1601.0-5(n)(3).

[95] BLM Land Use Planning Handbook, H-1601-1 at 12. An example of a "goal" is: "Maintain healthy, productive plant and animal communities of native and other desirable species at viable population levels commensurate with the species and habitat's potential." *Id.*

[96] *Id.* An example of an "objective" is: "Manage vegetative communities on the upland portion of the Clear Creek Watershed to achieve, by 2020, an average 30 to 40 percent canopy cover of sagebrush to sustain sagebrush-obligate species." *Id.*

[97] 43 C.F.R. § 1601.0-5(n)(2); BLM Land Use Planning Handbook, H-1601-1 at 13. An example of an allocation decision is the designation of Solar Energy Zones (SEZs), variance areas, and exclusion areas for utility-scale solar energy development by the 2012 Western Solar Plan. *See Approved Resource Management Plan Amendments/Record of Decision for Solar Energy Development in Six Southwestern States* (Oct. 2012).

[98] *See* 43 C.F.R. § 1601.0-5(n)(2), (4), (6)-(8); BLM Land Use Planning Handbook, H-1601-1 at 11, 13.

[99] BLM Land Use Planning Handbook, H-1601-1 at 13. The Handbook describes how "management actions" can provide for protection and restoration of public land resources:

> While protection and restoration opportunities and priorities are often related to managing specific land uses (such as commodity extraction, recreation, or rights-of-way corridors), they can be independent of these types of uses as well. In certain instances, it is insufficient to simply remove or limit a certain use, because unsatisfactory resource conditions may have developed over long periods of time that will not correct themselves without management intervention. For example, where exotic invasive species are extensive, active restoration may be necessary to allow native plants to reestablish and prosper. In these cases, identifying restoration opportunities and setting restoration priorities are critical parts of the land use planning process.

Id. Examples of "management actions" include controlled surface use and no surface occupancy restrictions, identification and prioritization of vegetation and weed treatments, and the general requirement that mitigation provide a net conservation gain to the Greater Sage-Grouse when BLM authorizes third-party actions that result in habitat loss and degradation. *See Record of Decision and Approved Resource Management Plan Amendments for the Rocky Mountain Region, Including the Greater Sage-Grouse Sub-Regions of Lewistown, North Dakota, Northwest*

Congress's direction to prepare land use plans—through which the BLM is required by regulation to, among other things, identify goals, objectives, allowable uses, and management actions—authorizes the BLM to consider and adopt appropriate mitigation standards through the planning process.

4. The obligation to prevent unnecessary or undue degradation also supports evaluation and imposition of mitigation

In addition to its general charge that public lands be managed under principles of multiple use and sustained yield, FLPMA also requires the Secretary to "take any action necessary to prevent unnecessary or undue degradation of the lands."[100] This obligation to prevent unnecessary or undue degradation (UUD) provides an independent source of authority under FLPMA for the BLM to require mitigation to prevent this type of harm to public lands.

Courts have routinely held that this UUD provision "does not mandate specific BLM action,"[101] but instead affords the BLM "a great deal of discretion," including the discretion to deny a proposed public land use that the agency determines would cause UUD despite all available onsite mitigation measures or by exercising its "discretion to choose appropriate measures to address the environmental degradation."[102]

Mitigation is a valuable and necessary tool to prevent UUD. The court in *Mineral Policy Center v. Norton*[103] interpreted UUD as requiring the Department "to prevent, not only unnecessary degradation, but also degradation that, while necessary . . . , is undue or excessive."[104] The BLM must require public land users to mitigate impacts to the public lands that would otherwise constitute unnecessary or undue degradation of public lands, or must deny the proposed use. The BLM may conclude that by requiring mitigation—in other words, by modifying the proponent's proposal—a project will not result in undue degradation. The BLM may also reasonably assess whether the degradation of the values of the public lands that would occur, even after application of mitigation, is unnecessary.[105] This approach gives meaning to both words—"unnecessary" and "undue"—in the UUD standard.

Courts have recognized that the BLM has authority to incorporate mitigation measures into project authorizations to prevent UUD. For example, in a 2011 case, *Theodore Roosevelt*

Colorado, Wyoming and the Approved Resource Management Plans for Billings, Buffalo, Cody, HiLine, Miles City, Pompeys Pillar National Monument, South Dakota, and Worland (Sept. 2015).

[100] 43 U.S.C. § 1732(b).

[101] *See, e.g., W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1044 (9th Cir. 2013).

[102] *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1222 (9th Cir. 2011).

[103] 292 F. Supp. 2d 30 (D.D.C. 2003).

[104] *Id.* at 38.

[105] In 2001, Solicitor's Opinion M-37007 interpreted the terms "unnecessary" and "undue" as "reasonably viewed as similar terms . . . or as equivalents." *Surface Management Provisions for Hardrock Mining*, M-37007 (Oct. 23, 2001). The Court in *Mineral Policy Center v. Norton* criticized and rejected the reasoning of that opinion. 292 F. Supp. 2d 30 (D.D.C. 2003). To the extent the interpretation provided by M-37007 conflicts with this Opinion's conclusion that mitigation measures may be imposed to prevent either unnecessary degradation or undue degradation, that interpretation is hereby revoked.

Conservation Partnership v. Salazar,[106] the plaintiff challenged the BLM's authorization of natural gas development in the Pinedale Anticline Project Area in Wyoming, contending, among other things, that the development would cause UUD. The U.S. Court of Appeals for the District of Columbia Circuit explained that the obligation to prevent UUD must be understood in the context of FLPMA's multiple use and sustained yield mandates, which clearly allow the BLM to authorize activities that result in some level of "degradation." The court cited with approval an Interior Board of Land Appeals (IBLA) decision holding that an environmental impact may rise to the level of "unnecessary or undue degradation" if it results in "something more than the usual effects anticipated from *appropriately mitigated* development."[107] Applying that standard, the D.C. Circuit upheld the BLM's determination that there would be no UUD where the BLM adopted mitigation measures that "comport with [Wyoming Game & Fish Department] recommendations and utilize reasonably available technology."[108] The court further held the BLM reasonably could have concluded that these mitigation measures will prevent UUD by "(1) reducing the footprint and duration of human presence, (2) providing funding for and oversight of monitoring and mitigation, and (3) specifying additional mitigation measures to be implemented if further declines in wildlife populations are observed."[109] The Court thus found that the BLM's obligation to prevent UUD authorized imposition of mitigation measures.

Similarly, in the hardrock mining context, the BLM has long recognized that the UUD requirement creates a "responsibility [for the BLM] to specify necessary mitigation measures" when approving mining plans of operations.[110] The BLM has included mitigation measures in its mining plans of operations since BLM promulgated the first surface management regulations following FLPMA's enactment.[111] The BLM regulations addressing surface management of hardrock mining operations on public lands[112] have consistently included mitigation as a requirement for preventing UUD, including as part of the general performance standards in the current regulations.[113] Among "these general performance standards" is the requirement to "take

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[106] 661 F.3d 66 (D.C. Cir. 2011).

[107] *Id.* at 76 (citing *Biodiversity Conservation Alliance*, 174 IBLA 1, 5–6 (March 3, 2008) (internal quotation marks omitted and emphasis added)).

[108] *Id.* at 78.

[109] *Id.*

[110] 66 Fed. Reg. 54,834, 54,840 (Oct. 30, 2001); *see also* 64 Fed. Reg. 6,422, 6,437 (Feb. 9, 1999); 45 Fed. Reg. 78,902 (Nov. 26, 1980). The first surface management regulations adopted after the passage of FLPMA recognized the important role of mitigation, including in the definition of "unnecessary or undue degradation" that "[f]ailure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas . . . may constitute unnecessary or undue degradation." 43 C.F.R. § 3809.0-5(k) (1980).

[111] 43 C.F.R. subpart 3809 (1980).

[112] *Id.*

[113] In proposing to expressly incorporate mitigation into the regulations, in part through the inclusion of the definition of "mitigation" found in CEQ's regulations implementing NEPA (40 C.F.R. § 1508.20), the BLM noted in the preamble to the 1999 proposed 3809 regulations that the proposed provision recognized then-current BLM practice. 64 Fed. Reg. at 6,437. The BLM stated, however, that it "does not intend any portion of this [mitigation] definition, including 'avoiding the impact altogether by not taking a certain action,' to preclude or prevent mining." *Id.* at 6,428. As the BLM also later explained in response to a comment in the final rulemaking: "The mining laws do not establish an unfettered right to develop mining claims free from environmental constraints." 65 Fed. Reg. 69,998, 70,052 (Nov. 21, 2000) (final rule, later amended in part by the 2001 3809 final rule); *see also id.* at 70,092

mitigation measures specified by BLM to protect public lands."[114] In discussing the definition of mitigation, the preamble to these regulations stated: "Mitigation measures fall squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands."[115]

Thus, it is well established that the UUD provision under FLPMA provides another basis for requiring mitigation in those circumstances where impacts in the absence of mitigation would be unnecessary or undue. Although mitigation may contribute in some instances to the avoidance of UUD, in other cases, the impacts to resources may be of a nature or magnitude such that they cannot be mitigated sufficiently to prevent UUD. For example, the destruction of unique habitat in a particular place might not be adequately compensated by post-use restoration or protection of lesser habitat elsewhere. In such a case, where mitigation cannot prevent UUD, the BLM has authority to reject the application for approval of the public land use based on the proponent's inability to prevent UUD. The obligation to avoid UUD is a complementary but distinct source of authority for requiring mitigation under FLPMA.[116]

5. Other provisions of FLPMA authorize or compel the BLM to require public land users to implement appropriate mitigation

In addition to the provisions of FLPMA regarding multiple use and sustained yield, land use planning, and UUD, there are other provisions of FLPMA that can, in specific circumstances, authorize or even compel the BLM to require appropriate mitigation when authorizing public land uses.[117] For example, under Title V of FLPMA, the BLM is authorized to issue rights-of-way for various purposes, including for energy production and transmission projects. Title V,

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("The mining laws create no right in any person to violate BLM's lawfully promulgated regulations, particularly those implementing the [UUD] standard of FLPMA section 302(b), which does amend the mining laws.").

[114] 43 C.F.R. § 3809.420(a)(4).

[115] 65 Fed. Reg. at 70,012; *see also id.* at 70,052. The preamble to the 2000 final rulemaking acknowledged that sections 302 and 303 of FLPMA and the mining laws "provide BLM the authority for requiring mitigation." *Id.* at 70,012. That rulemaking also provided that section 303 and the Mining Law at 30 U.S.C. § 22, taken together, "clearly authorize the regulation of environmental impacts of mining through measures such as mitigation." *Id.* at 70,052. The general performance standard requiring mitigation, 43 C.F.R § 3809.420(a)(4), as discussed in the 2000 rulemaking preamble, remained unchanged in an amended rulemaking completed the following year. 66 Fed. Reg. 54,834 (Oct. 30, 2001). The BLM explained its decision to retain the general performance standards in sections 3809.420(a)(1) through (a)(5) from the 2000 rule: "because they provide an overview of how an operator should conduct operations under an approved plan of operations and clarify certain basic responsibilities, including the operator's responsibility *to comply with applicable land use plans and BLM's responsibility to specify necessary mitigation measures*." *Id.* at 54,840 (emphasis supplied).

[116] Indeed, the responsible management of the public lands under a stewardship ethos can, in some instances, help to avoid approaching impacts that would constitute UUD, a goal that is consistent with the congressional declaration of policy that public lands be managed, among other things, to protect "the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" and, where appropriate, "preserve and protect certain public lands in their natural condition." 43 U.S.C. § 1701(a)(8).

[117] This Opinion focuses on the Secretary's and the BLM's authority under FLPMA to require mitigation as a condition of public land use authorizations. Depending on the circumstances, other sources of law and their implementing regulations may enhance, otherwise be relevant to, or inform the exercise of that authority to identify and implement appropriate mitigation. *See infra* section IV.

however, further requires each right-of-way to contain terms and conditions in order to "carry out the purposes" of FLPMA and to "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment."[118] It directs the Secretary to include such other terms and conditions in rights-of-way that she "deems necessary" to "protect Federal property and economic interests," "protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence," and "otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto."[119]

These FLPMA provisions require the BLM to determine what mitigation measures are necessary to protect the public interest and environment as a condition of issuance of a right-of-way. Indeed, in the process of analyzing the potential environmental impacts of granting such right-of-way applications in accordance with NEPA,[120] the BLM typically considers alternative locations for rights-of-way, consistent with its statutory discretion to select a location "that will cause least damage to the environment, taking into consideration feasibility and other relevant factors."[121] Locating a project to avoid environmental damage is a form of mitigation. In addition to considering site alternatives, the Secretary and the BLM have interpreted their statutory authority by adopting regulations requiring right-of-way holders to "[r]estore, revegetate, and curtail erosion or conduct any other rehabilitation measure BLM determines necessary" and control and prevent damage to "scenic, aesthetic, cultural, and environmental values, including fish and wildlife habitat."[122] These right-of-way terms and conditions have included the implementation of appropriate compensatory mitigation, such as in the case of solar energy authorizations in the Dry Lake Solar Energy Zone, which were conditioned on each grantee's payment of a per-acre mitigation fee to address certain residual impacts through the implementation of offsite compensatory mitigation.[123]

Similarly, Title III of FLPMA requires the Secretary, "[i]n managing the public lands," to "regulate . . . the use, occupancy, and development of the public lands" "through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate."[124] Congress envisioned that use, occupancy and development of the public lands would proceed only "under such terms and conditions as are consistent with" FLPMA and other law.[125] As with Title V rights-of-way, such terms and conditions for authorizations under Title III

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[118] 43 U.S.C. § 1765(a)(i), (ii) (emphasis added).

[119] *Id.* § 1765(b)(i), (iv), (vi).

[120] 42 U.S.C. §§ 4321–4370h; 40 C.F.R. §§ 1502.14(a), (f) (directing agencies to evaluate reasonable alternatives, including appropriate mitigation measures), 1508.20 (defining aspects of mitigation).

[121] 43 U.S.C. § 1765(b)(v); *see also e.g.*, BLM Instruction Memorandum No. 2011-061, *Solar and Wind Energy Applications – Pre-Application and Screening* (Feb. 7, 2011) (establishing pre-application requirements, including consideration of "potential alternative site locations," and identifying screening criteria to prioritize solar and wind right-of-way applications based on the potential for resource conflicts).

[122] 43 C.F.R. § 2805.12(i)(1), (3). Similar provisions can be found in the original post-FLPMA right-of-way regulations adopted in 1980. *See* 45 Fed. Reg. 44,518, 44,528–29 (July 1, 1980).

[123] *See* Decision Records for the Playa Solar Project, Harry Allen Solar Energy Center Project, and Dry Lake Solar Energy Center (June 27, 2015).

[124] 43 U.S.C. § 1732(b).

[125] *Id.*

may include measures designed to mitigate the impacts of the use, occupancy, or development on resource values of concern to the BLM. This interpretation is consistent with the regulations governing the BLM's authorization of leases, easements, and permits under Title III, which direct the BLM to include terms and conditions that appropriately "[m]inimize damage to scenic, cultural and aesthetic values, fish and wildlife habitat and otherwise protect the environment," "[r]equire compliance with air and water quality standards," "[p]rotect the interests of individuals living in the general area of the use who rely on the fish, wildlife and other biotic resources of the area for subsistence purposes," "[r]equire the use to be located in an area which shall cause least damage to the environment," and "[o]therwise protect the public interest."[126]

In sum, through various implementation tools, such as rights of way and permits, the BLM can require appropriate mitigation to fulfill its statutory role and responsibility to manage the public lands with a long-term view.

C. The legislative history of FLPMA reflects Congress's intent to provide BLM with broad authority to manage public lands for future use

1. Congress intended for BLM to address historic degradation of public lands and to safeguard public resources for future generations

The legislative history of FLPMA underscores Congress's intention that BLM act to ensure that current and future generations would enjoy the benefits of public lands. No longer would public land management focus on short-term considerations—e.g., "transfer[s] out of Federal ownership by means of grants to States and railroads, sales to private owners, homestead acts, and various other disposal methods."[127] It would instead be motivated by an ethic of enduring public stewardship.[128]

In enacting FLPMA, Congress was mindful of the long history of degradation of the public lands, and it acted, in part, out of a desire to protect, mend, and heal these areas. For example, when introducing Senate Bill 507, which became FLPMA, Senator Floyd Haskell stated:

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[126] 43 C.F.R. § 2920.7(b)(2)-(3), (c)(4)-(6). Similar provisions can be found in the predecessor regulations for subpart 2920. *See* 46 Fed. Reg. 5,772 (Jan. 19, 1981).

[127] 122 CONG. REC. 1,231 (1975) (statement of Sen. Haskell); *see also id.* at 1,242 (statement of Sen. Jackson) (describing the "vast number of outmoded public land laws which were enacted in earlier periods in American history when disposal and largely uncontrolled development of the public domain were the dominant themes.").

[128] *See* S. REP. NO. 94-583, at 35 (1975) ("Among the principal goals and objectives are retention of [public lands] in Federal ownership and management of these lands under principles of multiple use and sustained yield in a manner which will assure the quality of their environment for present and future generations."). This commitment is also reflected in Congress's decision to update the definition of "multiple use" then found in the 1960 Multiple-Use Sustained-Yield Act to direct the Secretary to consider and give weight to environmental quality when authorizing uses of the public lands:

> the words "quality of the environment" are added so as to require multiple use management decisions which will not result in permanent impairment of the quality of the natural environment. This would meet the recommendation (no. 16) of the Public Land Law Review Commission that "environmental quality should be recognized by law as an important objective of public land management."

Id.

> For over a century and a half this vast land mass [the public lands] was woefully neglected. The General Land Office [the BLM's predecessor]. . . defined its primary responsibilities to be the surveying and the conveying of the land. Over 1 billion acres were transferred out of Federal ownership. . . . The land which remained lacked any consistent management with the inevitable result that vast acreages suffered extensive damage from overgrazing of livestock and wasteful settlement and farming practices—and, even today much of that damaged land has yet to benefit from natural or man-aided restorative processes.[129]

Senator Haskell continued:

> In the vacuum created by the absence of [coherent land management] authority, the unnecessary waste and destruction of our country's most valuable resource—its land—is almost awesome in its dimensions. Vast areas are eroding from vehicular overuse and misuse[;] priceless petroglyphs and other archeological treasures are dug up or literally blasted off of rock walls and carted off for sale . . . ; BLM facilities are defaced, burned, or dynamited; . . . destruction of the land and its facilities by users occurs without any requirement that those users restore them or post a security sufficient to insure their restoration.[130]

Legislation was needed, Senator Haskell said, because "these and other examples of the degradation of our public domain land" are "due to the fact that the BLM lacks an adequate statutory base" to safeguard public land resource values for future generations.[131] The Nation needed a public land management regime—FLPMA—that embraced an ethic of enduring public stewardship.

2. The recommendations of the Public Land Law Review Commission also support interpreting FLPMA to provide BLM with authority to enhance the environmental values on public lands

In enacting FLPMA, Congress also considered the findings and recommendations of the bipartisan Public Land Law Review Commission (Commission), which it established in 1964 to evaluate public land laws and make recommendations to improve them.[132] The Commission was needed, Congress explained, "[b]ecause the public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other" and which divide land management responsibility "among several agencies of the Federal Government."[133] The Commission was directed to prepare "a comprehensive review"

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[129] 122 CONG. REC. at 1,231 (statement of Sen. Haskell).

[130] *Id.* at 1,232 (statement of Sen. Haskell).

[131] *Id.; see also id.* at 7,583 (1976) (statement of Rep. Skubitz) (expressing support for the House bill that became FLPMA, H.R. 13777, in order to strike "a satisfactory balance between the desire to develop publicly owned lands in the United States and the need to preserve their environmental integrity.").

[132] Act of Sept. 19, 1964, Pub. L. No. 88-606, § 2, 78 Stat. 982.

[133] *Id.*

of public land laws, make findings about their shortcomings, and identify ways that Congress could ameliorate those shortcomings.[134]

The Commission labored on this task for six years. In 1970, it completed its work and issued a report to Congress and the President. That report, *One Third of the Nation's Land* (Commission Report), addressed all facets of public land law: forestry, livestock grazing, mineral development, realty, fish and wildlife habitat, recreation, and issues pertaining to the outer continental shelf. The Commission Report recommended improvements to public land laws, most of which Congress carried forward in the legislation that would become FLPMA.[135]

The Commission Report devoted an entire chapter to the promotion of environmental quality on the public lands, urging Congress to endow land management agencies with broad discretion to preserve *and enhance* resource values for future generations.[136] Enhancing environmental quality, the Commission noted, meant more than merely avoiding "impairment of the productivity of the land" and giving some consideration to ecology.[137] While "these are necessary and important expressions of concern for some aspects of environmental quality,"[138] these expressions of concern did not go far enough. "[W]e also believe," the Commission asserted, that "that public land laws should require the consideration of all such aspects and that environmental quality on public lands be enhanced or maintained to the maximum feasible extent."[139] The Commission recognized that this authority was needed to address the degraded state of the public lands:

> Past activities on the public lands have resulted in lowered environmental quality in many places. As indicated above, there have been many causes for the degradation. It is impracticable, except where contract provisions have been violated, to try now to seek out those responsible and ask them to effect rehabilitation. *Nonetheless, it is essential that*

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[134] *Id.*

[135] 122 CONG. REC. 1,242 (1975) (statement of Sen. Jackson) ("The [Commission] report contains 137 numbered, and several hundred unnumbered, recommendations designed to improve the Federal Government's custodianship of the Federal lands. The legislation we introduce today is in accordance with over 100 of these recommendations"); S. REP. NO. 94-583, at 35 (1975) (same); *see Yount v. Salazar*, 933 F. Supp. 2d 1215, 1222 (D. Ariz. 2013) ("Congress enacted the FLPMA in response to the Commission's findings and recommendations."); *see also* John A. Carver, Jr., *Federal Land Policy and Management Act of 1976: Fruition or Frustration*, 54 DENV. L.J. 387, 397 (1977) (noting that "[t]he drafters of the Federal Land Policy and Management Act of 1976 must have attempted to articulate goals, objectives and guidelines which paralleled those stated by the Commission . . . [because] virtually all of the recommendations contained in the [Commission Report's] introductory summary are treated in the congressional declarations of policy").

[136] *See* PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 67 (1970) ("This Commission shares today's increasing national concern for the quality of our environment. The survival of human civilization, if not of man himself, may well depend on the measures the nations of the world are willing to take in order to preserve and enhance the quality of the environment.); *id.* at 68 ("The Federal policy structure for maintaining and enhancing environmental quality on the public lands is uneven and contains broad gaps.").

[137] *Id.* at 70.

[138] *Id.*

[139] *Id.*

> *damage to the environment be corrected, and we recommend that actions be taken to restore or rehabilitate such areas.*[140]

These findings and statements of principle culminated in a recommendation to amend public land laws so that the federal government would strive not only to maintain, but also to enhance environmental quality:

> [W]e propose that the enhancement and maintenance of the environment, with rehabilitation where necessary, be defined as objectives for all classes of public lands. This proposal goes beyond the existing statutes by giving environmental quality a status equivalent to those uses of the public lands which now have explicit recognition, and by indicating that through design and management, environmental quality can be improved as well as preserved.[141]

This recognition of the integral role of public land management in promoting environmental quality more broadly was repeated in Recommendation 23. In that recommendation the Commission called for public land agencies "to condition the granting of rights or privileges to the public lands or their resources on compliance with applicable environmental control measures governing operations off public lands which are closely related to the right or privilege granted."[142] "This recommendation is premised," the Commission Report explained, "on the conviction that the granting of public land rights and privileges can and should be used, under clear congressional guidelines, *as leverage to accomplish broader environmental goals off the public lands.*"[143] Congress considered these Commission recommendations relating to environmental quality and the long-term conservation of resources on the public lands and they shaped the interlocking provisions that Congress ultimately enacted.[144]

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[140] *Id.* at 86 (emphasis in original).

[141] *Id.* at 70 (emphasis in original). In formally articulating this recommendation (as Recommendation 16), the Commission emphasized that maintaining and enhancing environmental quality on public lands was an integral part of maintaining environmental quality generally: "Environmental quality should be recognized by law as an important objective of public land management, and public land policy should be designed to enhance and maintain a high quality environment both on and off the public lands." *Id.* at 68.

[142] *Id.* at 81.

[143] *Id.* (emphasis supplied). The Commission recognized that there should be a nexus between the public land use and the environmental objective: "We recommend that the activities against which such indirect leverages should be employed ought generally to be limited to those that bear a close relationship to the use of the public lands and that would have an adverse effect on the environment off the public lands." *Id.* at 82.

[144] For example, the Senate Committee on Interior and Insular Affairs' section-by-section analysis of S. 507 describes how, under principles of multiple use and sustained yield, public lands must be managed to, among other things, "assure the environmental quality of such lands for present and future generations," provide for "habitat for wildlife, fish and domestic animals," "include scientific, scenic, historical, archeological, natural, ecological, air and atmospheric, water resource, and other public values," "contain certain areas in their natural condition," and "balance various demands on those lands consistent with national goals." S. REP. NO. 94-583, at 39 (1975). "Virtually all of these policies," the section-by-section analysis explains, "are found in various recommendations of the Public Land Law Review Commission." *Id.* at 40.

IV. Mitigation under FLPMA and compliance with other laws

When exercising its authority under other applicable statutes, the BLM simultaneously may exercise its authority under FLPMA to require implementation of appropriate mitigation. For example, the BLM authorizes oil and gas and coal leasing and development on public domain lands under the Mineral Leasing Act of 1920 (MLA),[145] which "granted rather sweeping authority" to the BLM.[146] Through the MLA's delegation of "broad authority,"[147] Congress empowered the Secretary to impose "exacting restrictions and continuing supervision" over companies developing oil and gas, and to issue "rules and regulations governing in minute detail all facets of the working of the land."[148] Under the MLA, the Secretary oversees the development of natural resources on public lands to ensure the avoidance of waste[149] and compliance with safety protections.[150] As amended, the MLA requires oil and gas operators to comply with a surface use plan of operations approved for BLM-managed lands by the Secretary of the Interior or for national forest lands by the Secretary of Agriculture.[151] The regulations implementing the MLA authorize the BLM to ensure that all operations protect "other natural resources and the environmental quality."[152] The MLA also grants significant authority to the Secretary regarding the suspension or extension of leases "in the interest of conservation of natural resources."[153] Courts have held consistently that the conservation of natural resources referenced in the MLA includes the "prevention of environmental damage."[154]

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[145] 30 U.S.C. §§ 181–287.

[146] *Indep. Petroleum Ass'n of Am. v. DeWitt*, 279 F.3d 1036 (D.C. Cir. 2002).

[147] *NRDC v. Jamison*, 815 F. Supp. 454, 456 (D.D.C. 1982).

[148] *Boesche*, 373 U.S. at 477–78; *see also* 30 U.S.C. § 189 (stating the Secretary is authorized to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of [the MLA]").

[149] 30 U.S.C. §§ 187 (requiring leases to include a provision "for the prevention of undue waste"), 225 (stating that a lessee must use "all reasonable precautions to prevent waste").

[150] *Id.* § 187 (requiring that leases executed under the MLA contain specific "rules for the safety and welfare of the miners . . . as may be prescribed by [the Secretary]").

[151] *Id.* § 226(g). The section also requires the appropriate Secretary to regulate all surface-disturbing activities and to determine reclamation "and other actions as required in the interest of conservation of surface resources." *Id.*

[152] 43 C.F.R. §§ 3161.2 (stating the BLM is authorized to "require that all operations be conducted in a manner which protects other natural resources and the environmental quality"), 3162.5-1(a) ("The operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality").

[153] 30 U.S.C. § 209.

[154] *Copper Valley Mach. Works, Inc. v. Andrus*, 653 F.2d 595, 600 (D.C. Cir. 1981); *accord Hoyl v. Babbitt*, 129 F.3d 1377 (10th Cir. 1997) (noting that courts have "construed the phrase 'in the interest of conservation of natural resources' to . . . prevent environmental harm"); *see also Getty Oil v. Clark*, 614 F. Supp. 904 (D. Wyo. 1985) (holding that the Secretary's authority under 30 U.S.C. § 209 includes "power to grant, deny or mandate a suspension of operations in the interest of conserving the environmental values of the leased property"); *Carbon Tech Fuels, Inc.*, 161 IBLA 147 (2004) (noting that the reference to conservation in 30 U.S.C. § 209 has been construed by the IBLA to include the prevention of damage to the environment); *Nevdak Oil & Expl.*, 104 IBLA 133, 138–39 (1988) (citing *Copper Valley* for the proposition that "the term 'conservation' in section 39 of the Mineral Leasing Act [30 U.S.C. § 209] is to be given its 'ordinary meaning' and includes 'prevention of environmental damage'").

In this regard, the MLA is compatible with FLPMA's multi-faceted balancing of resources and consideration of long-term protection and preservation of the public's resources. Thus, when the BLM authorizes activities on public lands under a particular statute, such as the MLA,[155] the BLM may also exercise its general authority under FLPMA to apply appropriate mitigation to avoid, minimize, or compensate for impacts.[156]

Similarly, BLM's consideration and application of appropriate mitigation under FLPMA may promote Congress's policy objectives under other laws, and in some instances, may

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[155] BLM has long identified and required appropriate mitigation, consistent with the MLA, when authorizing oil and gas development. For nearly 100 years, every version of the federal oil and gas regulations has required operators to avoid damaging surface and subsurface resources. 1920 I.D. Lexis 47, at *2-6 (§§ 1-13); 30 C.F.R. § 221.24 (1938); 30 C.F.R. § 221.32 (1982); 43 C.F.R. § 3162.5-1 to .5-2 (1983 & 2014); *see also* 30 C.F.R. §§ 221.5-221.6, 221.9, 221.14 (1938); 30 C.F.R. §§ 221.5, 221.8-221.9, 221.18, 221.21, 221.23 (1982); 43 C.F.R. §§ 3162.3-2, 3162.4-2 (1983 & 2014); Onshore Order 2, § III.B, 53 Fed. Reg. at 46,808–09. In 2004, the BLM issued a nationwide Instruction Memorandum providing guidance to "mitigate anticipated impacts to surface and subsurface resources" from onshore oil, gas, and geothermal operations. BLM Instruction Memorandum No. 2004-194, *Integration of Best Management Practices into Application for Permit to Drill Approvals and Associated Rights-of-Way* (June 22, 2004). The IM described how best management practices (BMPs) "are applied to management actions to aid in achieving desired outcomes for safe, environmentally sound resource development, by preventing, minimizing, or mitigating adverse impacts and reducing conflicts." *Id.* at 1. The IM provided further direction to field offices to incorporate appropriate BMPs into proposed Applications for Permits to Drill (APDs) by the oil and gas operator to help ensure an efficient and timely APD process. The IM also noted that BMPs not incorporated into the permit application by the operator "may be considered and evaluated through the NEPA process and incorporated into the permit as APD Conditions of Approval or right-of-way stipulations." *Id.* at 3. In 2005, the BLM issued an IM describing how the BLM "will approach compensatory mitigation on an 'as appropriate' basis where it can be performed onsite and on a voluntary basis where it is performed offsite." BLM IM No. 2005-069, Interim Offsite Compensatory Mitigation for Oil, Gas, Geothermal and Energy Rights-of-Way Authorizations (Feb. 1, 2005). In 2007, the Department issued an Onshore Oil and Gas Order that described how the BLM:

> may require reasonable mitigation measures to ensure that the proposed operations minimize adverse impacts to other resources, uses, and users, consistent with granted lease rights. The BLM will incorporate any mitigation requirements, including Best Management Practices, identified through the APD review and appropriate NEPA and related analyses, as Conditions of Approval to the APD.

Onshore Oil and Gas Order No. 1, 72 Fed. Reg. 10,329, 10,334 (March 7, 2007). *See also infra* note 157.

[156] Section 701(a) of FLPMA provides that nothing in the Act shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization on the date of the approval of the Act. 43 U.S.C. § 1701 note (a). FLPMA also provides that "[a]ll actions by the [BLM] under this Act shall be subject to valid existing rights." *Id.* note (h). Identifying the scope of valid existing rights involves, among other things, evaluation of the terms of existing leases. BLM regulations in effect at the time of the issuance of the lease are relevant, but are not necessarily determinative because most of the BLM's oil and gas leases, for example, require compliance with all existing and future regulations. Land use manuals or plans that include terms related to environmental protection may also be instructive to the extent that they provide notice of best management practices or conditions of approval that the BLM will consider in reviewing permits to drill. Under existing regulations, for example, the BLM may require an oil and gas operator to move the proposed location of a drilling pad for reasons such as safety or effects on wildlife. *Yates Petroleum Corp.*, 176 IBLA 144 (2008) (upholding denials of APDs because of steep slopes, proximity to sage-grouse leks, and failure to provide for adequate reclamation).

simultaneously constitute an exercise of authority under those laws. In addition to the MLA,[157] those laws include: NEPA, which requires adequate evaluation and disclosure of the impacts of the proposed action, reasonable alternatives, and consideration of mitigation alternatives where appropriate;[158] the Endangered Species Act (ESA), which directs federal agencies to protect listed species and designated critical habitat;[159] the National Historic Preservation Act (NHPA), which directs federal agencies to consider and seek to minimize impacts to historic properties;[160] the Paleontological Resources Preservation Act (PRPA), which provides that federal agencies

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[157] When the BLM approves conventional energy projects on the public lands under FLPMA and the MLA, the MLA provides additional authority for the BLM to identify and require appropriate mitigation measures. For example, when authorizing pipeline rights-of-way under the MLA, the BLM can identify appropriate stipulations to promote "restoration, revegetation, and curtailment of erosion of the surface of the land," "protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes," and control or prevent "damage to the environment (including damage to fish and wildlife habitat)." 30 U.S.C. § 185(h)(2)(A), (C), (D). Similarly, when the BLM issues oil and gas leases under the MLA, it can include stipulations to mitigate environmental impacts. *Id.* § 226(e); 43 C.F.R. § 3101.1-3. After the BLM issues a lease, when processing an Application for Permit to Drill (APD), the BLM can embed additional mitigation measures in its authorization. 30 U.S.C. § 226(f), (g); 43 C.F.R. § 3162.3-1(h)(1) (authorizing the BLM to "[a]pprove the application as submitted or with appropriate modifications or conditions").

[158] While NEPA does not constitute a source of authority for BLM to require mitigation, *see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989), requiring mitigation under FLPMA advances NEPA's goals, which include the promotion of efforts that will prevent or eliminate damage to the environment. 42 U.S.C. § 4321. NEPA also requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *Id.* § 4332(2)(E). The CEQ regulations implementing NEPA require the BLM and other federal agencies, when preparing an Environmental Impact Statement (EIS), to evaluate the impacts of proposed actions and consider appropriate mitigation measures. *See, e.g.*, 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1505.2(c), 1508.25(b)(3). An EIS's discussion of mitigation measures "must include such things as design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, Question and Answer 19(a) (Mar. 23, 1981). NEPA documents should consider mitigation measures even "for impacts that by themselves would not be considered 'significant.'" *Id.* Question and Answer 39 (describing how agencies should consider mitigation measures in Environmental Assessments). When the BLM issues a Record of Decision, it must also "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." 40 C.F.R. § 1505.2(c).

[159] Under section 7 of the ESA, the BLM must consult with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) to ensure that proposed agency actions are not likely to jeopardize the continued existence of any listed species or cause the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). Through the consultation process, FWS or NMFS might issue a biological opinion with an incidental take statement identifying reasonable and prudent measures to minimize the impacts of any anticipated take on a listed species.

[160] Under the NHPA, the BLM must consider the effects of proposed undertakings on historic properties, 54 U.S.C. § 306108, and consult with states, tribes, and other interested parties to identify and resolve any adverse impacts. *See* 36 C.F.R. § 800.2(c) (identifying consulting parties). *See generally id.* §§ 800.3 to 800.7 (describing the processes for the identification of historic properties, determination of adverse impacts, and consultation to try to resolve adverse impacts). The NHPA also requires that the BLM "to the maximum extent possible . . . minimize harm" to National Historic Landmarks. 54 U.S.C. § 306107; 36 C.F.R. § 800.10.

"shall manage and protect paleontological resources on Federal land using scientific principles and expertise,"[161] and the National Landscape Conservation System (NLCS) organic act, which directs the BLM to manage and protect qualifying resources on National Conservation Lands.[162] Because each of these statutes provides direction for the consideration and protection of resource values, the BLM can, in some instances, streamline its permitting processes and expedite approvals to use the public lands by identifying and requiring appropriate mitigation—particularly when implemented at a landscape scale.[163]

V. Conclusion

Based on the foregoing, the BLM generally has the authority and discretion to identify and require appropriate mitigation when authorizing uses of the public lands. This authority derives from FLPMA's overarching direction that the public lands be managed under principles of multiple use and sustained yield, which, as discussed above, includes ecological and environmental values. The statute itself, as well as FLPMA's overall structure and legislative history, demonstrate that Congress intended to provide for the long-term management and stewardship of the public lands, and that Congress sought to achieve this goal by granting the BLM broad discretion when managing the public lands. In addition, several specific sections of FLPMA, such as section 302(b), which requires the BLM to take any action necessary to prevent UUD, and Title V, which requires mitigation when the BLM grants rights-of-way across the public lands, also provide authority for BLM to require the implementation of appropriate mitigation. Consequently, the BLM can exercise that broad discretion by requiring public land users to implement appropriate mitigation, including requiring them to achieve a net conservation gain to resource conditions that the Secretary and the BLM have chosen to enhance in furtherance of the multiple use and sustained yield mission.

In all instances, BLM decisions should be mindful of the Administrative Procedure Act, which instructs federal courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[164] In general, an agency decision will be deemed to be arbitrary or capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

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[161] 16 U.S.C. § 470aaa-1. In areas determined to have high or undetermined potential for significant paleontological resources, the agency must implement an appropriate program for mitigating the impact of development, including surveys, monitoring, collection, identification and reporting, and other activities required by law. *Id.*

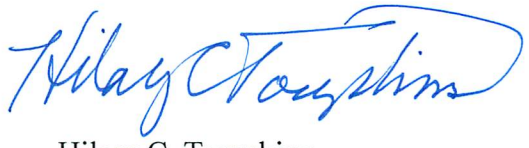
[162] Under the NLCS organic act, the BLM must manage lands within the NLCS "in a manner that protects the values for which the components of the system were designated." 16 U.S.C. § 7202(c)(2). Congress established the NLCS "to conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations." *Id.* § 7202(a).

[163] As discussed in a 1998 Solicitor's Opinion, the BLM also has discretion to consider the public interest when deciding whether to deny (or approve with protective stipulations) applications for mineral exploration activities on acquired federal lands where such exploration might lead to leasing and mining activities that could adversely affect areas of the National Park System. *See Options Regarding Applications for Hardrock Mineral Prospecting Permits on Acquired Lands Near a Unit of the National Park System*, M-36993 (Apr. 16, 1998).

[164] 5 U.S.C. § 706(2)(A).

expertise."[165] As with all agency decisions, the BLM should ensure that decisions that condition land use authorizations on the implementation of mitigation (avoidance, minimization, and compensation) meet that standard. When the BLM requires a public land user to implement mitigation it should identify the impact that requires mitigation and memorialize the reasons for requiring a particular mitigation measure to address that impact.

This Opinion supersedes all previous Solicitor's Office opinions[166] to the extent that they conflict with this Opinion.[167]



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[165] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

[166] This includes the Solicitor's Opinion M-37007 that interpreted the terms "unnecessary" and "undue" as "equivalents." *See supra* note 105.

[167] This Opinion was prepared with the substantial assistance of Gregory Russell, Aaron Moody, and Laura Brown in the Division of Land Resources; and Deputy Solicitor for Land Resources Justin Pidot.