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The Bureau of Land Management's Infirm Compensatory Mitigation Policy

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Abstract

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Notwithstanding the aspersions the Secretary has cast, compensatory mitigation is a common-sense policy instrument that has been a mainstay of environmental and public lands policy for decades. It is a tool through which an agency authorizing private activities—drilling oil wells, filling wetlands—conditions its approval upon the implementation of measures to offset attendant environmental harms. Compensatory mitigation thereby permits economic activity to proceed while maintaining the health of public lands and the environment more generally.

This Essay examines the sparse legal analysis included in the BLM's new policy and contends that it is illogical and unsupported by precedent. While policymakers may disagree about when and to what extent compensatory mitigation is appropriate, the BLM has entirely failed to justify its new and novel legal interpretation.

THE BUREAU OF LAND MANAGEMENT'S INFIRM COMPENSATORY MITIGATION POLICY

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This Essay examines the sparse legal analysis included in the BLM’s new policy and contends that it is illogical and unsupported by precedent. While policymakers may disagree about when and to what extent compensatory mitigation is appropriate, the BLM has entirely failed to justify its new and novel legal interpretation.

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INTRODUCTION

Secretary of the Interior Ryan Zinke has described compensatory mitigation as “un-American” and “extortion.”¹ In his view, the Bureau of Land Management (“BLM”) is comparable to a criminal syndicate if it requires a company drilling for oil on public lands to offset some of the harm drilling causes. Following the Secretary’s lead, the BLM issued a new mitigation policy on July 26, 2018 (the “2018 Mitigation Policy”) disclaiming authority under the Federal Land Management and Policy Act (“FLPMA”)—the comprehensive charter for the management of public lands²—to require resource users to implement compensatory mitigation.³ This Essay contends that this new policy is based on flimsy legal support and flawed reasoning.⁴

Here is a brief illustration of compensatory mitigation to orient the discussion to come. Imagine an area contains two resources: it provides elk habitat and beneath its surface lies natural gas. Drilling for gas will destroy habitat, at least temporarily; the same acre of public lands cannot be used for both resources at the same time. If a drilling company is required to take steps to offset the habitat it

1. See Jennifer Yachnin, *Zinke vows to restore ‘breaches,’ keeps NPS despite reorg*, E&E NEWS PM, Jan. 27, 2017, <https://www.eenews.net/eenewspm/stories/1060056675/> [<https://perma.cc/JZU6-8ZWP>].

2. 43 U.S.C. §§ 1701-87. Although there is no single definition of “public lands,” this Essay uses the phrase in the manner defined by FLPMA to mean federally owned interest in land managed by the BLM. See *id.* § 1702(e).

3. See BLM, Instruction Memorandum No. 2018-93, Compensatory Mitigation (July 24, 2018), available at <https://www.blm.gov/policy/im-2018-093> [<https://perma.cc/AFT4-YSKK>] [hereinafter “IM 2018-93”]. Those unfamiliar with the administrative processes of the Department of the Interior may be unfamiliar with “Instruction Memorandum,” typically referred to as IMs. BLM explains that IMs “are directives that supplement the BLM manual section and handbooks . . . [and] contain new policy or procedures that must reach BLM employees quickly, interpret existing policies or provide one-time instructions.” *Instruction Memorandum*, BLM (last visited Dec. 19, 2018) <https://www.blm.gov/policy/instruction-memorandum> [<https://perma.cc/D6GJ-9XZF>].

4. As this Essay goes to print, Secretary Ryan Zinke has resigned from his post and his successor has not yet been named. The BLM has also released a slightly revised compensatory mitigation policy, although it has not changed in any relevant manner. BLM, Instruction Memorandum No. 2019-018, Compensatory Mitigation (Dec. 6, 2018), available at <https://www.blm.gov/policy/im-2019-018> [<https://perma.cc/ZJ2S-VXWU>].

destroys to extract natural gas, perhaps by restoring degraded habitat nearby, that would be called “compensatory mitigation.” The BLM could (and for many years did) require compensatory mitigation through a variety of decisions: an applicable land use plan, a lease offer, or a permit to drill. The 2018 Mitigation Policy rejects compensatory mitigation across the board. Drilling may still proceed, but the BLM may no longer require the driller to ameliorate negative environmental consequences.

The 2018 Mitigation Policy is bad policy.⁵ It views extraction of natural resources, such as mining for gold or drilling for oil, as the paramount use of public lands and it dismisses the possibility of requiring companies profiting from those uses to offset environmental harms. It replaces what the BLM has deemed a burden on business, with a burden on taxpayers, future generations, and the public lands themselves. Compensatory mitigation should be viewed instead as an essential tool to ensure that public lands serve the panoply of short-term and long-term interests of the American people, who, after all, own the public lands.⁶ Compensatory mitigation is also vital to ensuring that sound economic principals guide natural resources development, because it causes resources users to internalize some of the environmental costs of their activities. Used appropriately, it also can promote certainty for the business community, by reducing public opposition to projects, the potential for litigation, and the likelihood that a court will intervene should litigation occur.⁷ The 2018 Mitigation Policy will, on the other hand, lead to litigation both about the validity of the policy itself and whether in approving a project, the BLM should have imposed compensatory mitigation measures to offset environmental harm.

5. See Justin R. Pidot, *Opinion Contribution: Interior Department will no longer require industry to offset damage to public lands*, THE HILL, (July 26, 2018), <https://thehill.com/opinion/energy-environment/399093-interior-department-will-no-longer-require-industry-to-offset> [<https://perma.cc/7DXS-SBZP>].

6. As the Supreme Court explained in 1890 “[a]ll the public lands of the nation are held in trust for the people of the whole country.” *United States v. Trinidad Coal Co.*, 137 U.S. 160, 170 (1890).

7. See, e.g., Justin R. Pidot, *Public-Private Conservation Agreements and the Greater Sage-Grouse*, 39 PUB. LAND & RES. L. REV. 161, 186–88 (2018) (discussing increased certainty resources users can obtain where compensatory mitigation measures are implemented).

The primary purpose of this Essay, however, is not to join a debate over the best policy for managing public lands. Rather, this Essay challenges the new legal interpretation embedded in the 2018 Mitigation Policy: that FLPMA “cannot reasonably be read to allow BLM to require mandatory compensatory mitigation for potential temporary or permanent impacts from activities authorized on public lands.”⁸ In other words, BLM has now determined that compensatory mitigation is not only inconsistent with the Trump Administration’s policy preferences, but it is also unlawful, a startling pronouncement given the BLM has long included compensatory mitigation requirements in a host of land use planning and management decisions.⁹ If the BLM’s new interpretation is correct, then FLPMA forecloses the use of compensatory mitigation as a tool in public lands management, and public lands will gradually degrade as environmental impacts occur without correlative efforts to offset them.

To reveal unsound legal basis for the 2018 Mitigation Policy, Part I of this Essay provides a brief overview of FLPMA. Part II provides a full description of the policy itself and two documents it references in support of the legal interpretation it embraces. Part III seeks to divine legal principals from those documents, a challenging task given

8. *See* IM 2018-93, *supra* note 3.

9. *See, e.g.*, BLM, NEVADA AND NORTHEASTER CALIFORNIA GREATER SAGE-GROUSE APPROVED RESOURCE MANAGEMENT PLAN AMENDMENT 1–9 (Sept. 2015) (amending resource management plan to require compensatory mitigation for disturbance of greater sage grouse habitat); GOVERNMENT ACCOUNTABILITY OFFICE, IMPROVED COLLECTION AND USE OF DATA COULD ENHANCE BLM’S ABILITY TO ASSESS AND MITIGATE ENVIRONMENTAL IMPACTS 15 (identifying a BLM office that requires compensatory mitigation to offset impacts associated with approving an exception to lease or permit stipulations). Requiring compensatory mitigation is not a new phenomenon. A policy issued by the Wyoming BLM office in 1995, cited in the 2018 Mitigation Policy, explained that at that time some believed “that BLM considers compensation mitigation as routine standard operating procedure.” BLM Wyoming, Instruction Memorandum No. WY-96-21 at 1 (Dec. 14, 1995) (hereinafter “IM WY-96-21”). The BLM website does not include a copy of IM WY-96-21. A copy of it can be found in Justin R. Pidot, *The Bureau of Land Management’s Infirm Compensatory Mitigation Policy – Addendum*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3307224, and is also on file with author. While the Wyoming policy dictates that compensatory mitigation should not “be a routine operation of BLM in Wyoming,” it demonstrates that the Wyoming BLM relied upon compensatory mitigation prior to 1995 and it envisions continued use of the tool in “rare circumstances.” *Id.* at 3.

BLM's paucity of explanation, and explains that each discernable principal is fatally flawed. Part IV discusses the procedural irregularity of embedding a radical reinterpretation of FLPMA in the 2018 Mitigation Policy.

A final caveat: This Essay focuses on the 2018 Mitigation Policy and argues that it fails to provide a plausible rationale for narrowly construing FLPMA to preclude all mandatory compensatory mitigation. It does not look beyond the Policy to discuss the affirmative case in favor of an alternate reading of FLPMA.¹⁰ Such an affirmative case, however, is unnecessary to understand that the BLM has provided no sound legal justification for its decision to disclaim authority to require resource users to offset the environmental harms they cause through compensatory mitigation measures. BLM has thus failed to meet the basic administrative law requirement that agencies show their work and provide reasoned explanation for their decisions.

I. FLPMA AND PUBLIC LANDS MANAGEMENT

Congress enacted FLPMA in 1976 to govern the Department of the Interior's management of public lands, defined to include "any land and interest in land owned by the United States . . . and administered by the Secretary of the Interior through the Bureau of Land Management."¹¹ FLPMA includes both substantive principles to govern public land management and a procedural framework to implement those principles.

Substantively, FLPMA directs the BLM to manage public lands for "multiple uses" encompassing a myriad of diverse uses of land—from resource extraction, to environmental protection—that "will best meet

10. In future work, I plan to demonstrate that multiple provisions of FLPMA vest the BLM with authority to require compensatory mitigation, including the requirement to manage under principles of multiple use and sustained yields, the obligation to engage in land use planning, and the prohibition on unnecessary and undue degradation of the land.

11. 43 U.S.C. § 1702(e) (1976). Many FLPMA provisions identify the Secretary of the Interior as the relevant decisionmaker, but as envisioned in FLPMA, see *id.* § 1731(a), the Secretary has delegated that authority to the BLM. See Dep't of the Interior, Departmental Manual, 235 DM 1.1(A) (hereinafter "DOI Manual"). To avoid confusion, this Essay describes FLPMA as directly vesting the BLM with authority.

the present and future needs of the American people.”¹² The BLM must also manage public lands for “sustained yields,” meaning that future generations will enjoy the same benefits from renewable resources enjoyed today.¹³ Finally, FLPMA requires the BLM to “take any action necessary to prevent unnecessary or undue degradation of the lands,” one of the few substantive provisions of FLPMA that applies to hard rock mining activities conducted under the 1872 Mining Law.¹⁴ FLPMA includes numerous other provisions, such as specific requirements for granting rights-of-way, but the multiple use and sustained yield mandate and the prohibition on unnecessary or undue degradation of the lands are two of the most important and broadly applicable.

Procedurally, FLPMA creates a land use planning framework to govern management of public lands. It directs the BLM to inventory public lands and the varied resources they contain.¹⁵ The BLM must then develop and revise land use plans through procedures the agency develops, providing opportunities for public involvement.¹⁶ The BLM refers to its primary land use plans as Resource Management Plans (“RMPs”) and it sometimes develops subordinate plans for specific uses, such as travel management plans.¹⁷ Finally the BLM must manage public lands in conformity with applicable RMPs; any decision to authorize a non-conforming use must be accompanied by a RMP amendment.¹⁸

II. THE 2018 MITIGATION POLICY AND THE DOCUMENTS IT INCORPORATES

For an agency upending a long-standing interpretation of its governing statute, the 2018 Mitigation Policy is remarkably coy.

12. 43 U.S.C. § 1702(c).

13. *Id.* § 1702(h).

14. *Id.* § 1732 (b).

15. *Id.* § 1711(a).

16. *Id.* § 1712(a).

17. 43 C.F.R. § 1601.0-5(n) (1983); BLM, MANUAL, MS-1626, TRAVEL AND TRANSPORTATION MANAGEMENT 4-1 (2016). The BLM refers to subordinate plans like travel management plans as implementation decisions, *id.*, a designation that has consequences for administrative appeals within the agency. *See* BLM, LAND USE PLANNING HANDBOOK, H-1601-1, App. E at 1 (2005).

18. 43 C.F.R. §§ 1610.6-3(a), 1610.5-5 (1983).

Statutory interpretation ordinarily involves a close reading of text, explication of statutory purpose, and a review of legislative history and subsequent implementation.¹⁹ The 2018 Mitigation Policy rests instead on what amounts to rumor and innuendo. The 2018 Mitigation Policy refers to “concerns” raised in a 1995 policy issued by the BLM’s Wyoming Office (“1995 Wyoming Policy”).²⁰ That document also includes little legal analysis, and in turn references and attaches a draft legal opinion written by a regional solicitor in 1991 (“1991 Draft Regional Solicitor’s Opinion”).²¹ This draft opinion, the keystone of the BLM’s new legal interpretation of FLPMA, includes roughly one page (of its fifteen) addressing one specific compensatory mitigation program in one specific context.²² The sections that follow describe the contents of those three documents.

A. 2018 Mitigation Policy

As a set of instructions transmitted to BLM personnel, it makes some sense that the operative sections of the 2018 Mitigation Policy are directive, rather than analytic. Most are prohibitory: BLM will not require compensatory mitigation, will “not accept any monetary payment to mitigate the impacts of a proposed action,” and will not generally analyze compensatory mitigation as part of the environmental review process required by the National Environmental Policy Act (“NEPA”).²³ There are limited exceptions. The policy does permit the BLM to allow project proponents to engage in voluntary compensatory mitigation, so long as such mitigation is “free of coercion or duress, including the agency’s withholding of

19. *See, e.g.*, LARRY M. EIG, CONGRESSIONAL RESEARCH SERVICE, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2014).

20. IM 2018-093, *supra* note 3.

21. IM WY-96-21, *supra* note 4, at 2.

22. Draft Memorandum from Regional Solicitor, Rocky Mountain Region to the State Directors for BLM’s Colorado and Wyoming Offices, Conditions of Approval for Granting Applications for Permission to Drill 12–13 (1991) [hereinafter “1991 Draft Regional’ Solicitor Opinion”]. Like the 1996 Wyoming IM, the BLM website does not include a copy of this draft memorandum. A copy of it can be found in Justin R. Pidot, *The Bureau of Land Management’s Infirm Compensatory Mitigation Policy – Addendum*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3307224, and is also on file with author.

23. This section discusses IM 2018-93, *supra* note 3, which is un-paginated on the BLM’s website.

authorization for otherwise lawful activity, or the suggestion that a favorable outcome is contingent upon adopting a compensatory mitigation program,” and the BLM may incorporate voluntary compensatory mitigation in its NEPA analysis.²⁴

The policy defines compensatory mitigation as “[a] project proponent’s activities, monetary payments, or in-kind contributions to conduct offsite actions that are intended to offset adverse impacts of a proposed action onsite.”²⁵ And it states that “[c]ompensatory mitigation cannot prevent what would otherwise constitute [unnecessary or undue degradation of the land].”²⁶

The final section of the 2018 Mitigation Policy, titled simply “background,” articulates a new, unequivocal interpretation of FLPMA: “While FLPMA in some instances may be interpreted to authorize various forms of the mitigation hierarchy, such as avoidance and minimization, it cannot reasonably be read to allow BLM to require mandatory compensatory mitigation for potential temporary or permanent impacts from activities authorized on public lands.”²⁷ In other words, FLPMA does not authorize compensatory mitigation.

To support that interpretation, the Policy offers a single sentence about the statute it interprets, stating “FLPMA does not explicitly mandate or authorize the BLM to require public lands users to implement compensatory mitigation as a condition of obtaining authorization for the use of the public lands.”²⁸ Having disposed of textual analysis, the policy identifies a collection of other policies issued by President Trump and Secretary Zinke directing agencies to eliminate burdens to energy production. It then describes the 1995 Wyoming Policy and 1991 Draft Regional Solicitor’s Opinion as “rais[ing] serious concerns” about compensatory mitigation. It also expresses the view that compensatory mitigation, “is particularly ripe for abuse” because it “does not directly avoid or minimize the potential impacts” of projects. This abuse apparently arises because “[a]t times, the nexus between a proposed land use and compensatory mitigation requirements is far from clear.”²⁹

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

B. 1995 Wyoming Policy

The BLM is subdivided into state offices that manage public lands in their respective states. Substantial authority has been delegated to these state offices, but they are subsidiary to the national BLM and its director. The 2018 Mitigation Policy relies on a policy issued by BLM's Wyoming State office in 1995, which applied only to public lands within Wyoming and was set to expire by its own terms two years after it was issued.³⁰ The 1995 Wyoming Policy “conveys the position that compensation, as a form of off-site mitigation, is *not* to be a routine operation of BLM in Wyoming.”³¹ It raises a few concerns about the use of compensatory mitigation, although generally not about the BLM's statutory authority to require it. For example, the policy worries that compensatory mitigation could create administrability problems because every resource user could be required to compensate for harms to every resource: “Conceivably, we could have a string of ‘compensations’ running parallel to, and outside of, the normal land use planning system.”³² The 1995 Wyoming Policy doesn't consider whether compensatory mitigation requirements could be incorporated into the land use planning process itself, nor does it explain why use of compensatory mitigation in some circumstances would necessitate its use in all circumstances.

The 1995 Wyoming Policy includes not independent legal analysis of FLPMA but quotes the 1991 Draft Regional Solicitor's Opinion.³³ Generalizing from the specific context addressed in the draft opinion, the policy concludes that “[t]he Solicitor felt mandatory compensation was a form of ‘fund raising’ that was probably beyond the BLM's legal authority.”³⁴

C. 1991 Draft Regional Solicitor's Opinion

Just as the BLM is comprised of state offices, the Solicitor's Office, which is the legal office for the Department of the Interior and whose head is the Department's third ranking political appointee, is subdivided into regional offices. The Solicitor issues legal opinions,

30. IM WY-96-21, *supra* note 4, at 1.

31. *Id.* at 3.

32. *Id.* at 2.

33. *Id.*

34. *Id.*

referred to as M-Opinions, that bind all components of the Department and can be overridden only by the Secretary, Deputy Secretary, or a subsequent M-Opinion.³⁵ Regional solicitors, who oversee regional offices, also issue opinions, but these are not binding in the manner of M-Opinions, but rather provide advice to field offices for the various components of the Department.

The 1995 Wyoming Policy, and by extension the 2018 Mitigation Policy, rely on a draft opinion written by the Rocky Mountain Regional Solicitor in 1991. The 1991 Draft Regional Solicitor's Opinion offers *no* general analysis of BLM's authority to require compensatory mitigation.³⁶ Instead, the draft addresses a specific and narrow context: BLM's authority to impose new environmental protective conditions when granting applications for permission to drill to companies that already hold oil and gas leases.³⁷ This context matters a great deal because, as a 2017 M-Opinion (which will be discussed in greater detail in Part V) explains "BLM's authority [to require compensatory mitigation] may differ depending on whether it seeks to place conditions on . . . development during the leasing stage or condition applications for permits to drill on an existing lease."³⁸ In other words, the draft analyzed the BLM's authority when it arguably is at its nadir, and offers no view related to compensatory mitigation requirements incorporated into other decisions.

Even with respect to the decisions it addresses, the draft opinion indicates that the BLM has broad authority to impose new environmentally protective conditions—it focuses on seasonal operating restrictions to protect wildlife—on companies seeking permission to access resources they have already leased.³⁹ So long as

35. DOI Manual, *supra* note 11, at 209 D.M. 3.2(A)(11).

36. The regional solicitor who circulated this draft opinion may be surprised indeed that it has been thrust into the spotlight to justify BLM's new interpretation of FLPMA as disallowing all compensatory mitigation. The opinion was, after all, never finalized, addressed only a single factual context, and generally viewed FLPMA as granting the BLM broad authority to impose conditions even at the APD stage.

37. 1991 Draft Reg'l Solic.'s Op., *supra* note 22, at 1.

38. U.S. Dep't of the Interior, Off. of the Solic., Withdrawal of M-37039, "The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations Through Mitigation," M-Opinion 37046, at 2 (June 30, 2017) [hereinafter M-37046].

39. 1991 Draft Reg'l Solic.'s Op., *supra* note 22, at 1–2.

such conditions do not prevent companies from reasonably accessing their leased resources, the BLM may impose conditions because: “it could not be more clear under pertinent statutory authority and case law that the Secretary acting through the BLM has all the authority necessary to protect wildlife on Federal oil and gas leases no matter how old those leases may be.”⁴⁰

Seasonal restrictions are not, of course, compensatory mitigation; the draft turns to that subject on page twelve. Specifically, the regional solicitor considers a specific compensatory mitigation mechanism under which the BLM would release companies from seasonal restrictions it otherwise would impose if the company paid money into a BLM habitat restoration fund. The draft expresses the view that “[t]his kind of ‘fundraising’ is probably beyond the BLM’s authority. First, it appears to be an unauthorized tax or an equally unauthorized attempt to augment BLM’s existing appropriations. Second, it strikes the subjects of the ‘contribution’ as little more than thinly disguised blackmail. Third, the courts tend to find such matters very offensive to fundamental notions of fairness and administrative law.” The draft opinion then discusses one case to support its view, the Supreme Court’s decision in *Nollan v. California Coastal Commission*.⁴¹ It concludes that “if the fund would be used off [] lease or for a different species than those affected by the drilling, the proposed fund may well be inappropriate.”⁴²

III. THE (NON) LEGAL THEORY OF THE 2018 MITIGATION POLICY

Divining a legal theory from the 2018 Mitigation Policy is difficult. It is a document of assertion, rather than analysis. It clothes a radical new interpretation of FLPMA as mere background information, and its clearest articulation of animating legal principals occurs in a quotation drawn from the 1994 Wyoming Policy that is itself quoting the 1991 Draft Regional Solicitor’s Opinion. Charitably read, the document *could* invoke four lines of reasoning: (1) the courts could have rejected compensatory mitigation; compensatory mitigation could be either (2) government-sponsored blackmail or (3) unsanctioned fundraising; or (4) compensatory mitigation could be inconsistent with the BLM’s

40. *Id.* at 4.

41. *Id.* at 12 (discussing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987)).

42. *Id.* at 13.

obligation to prevent unnecessary or undue degradation of the land. This Part explains why each of these lines of reasoning, even if they had been more fully elucidated in the 2018 Mitigation Policy, would be hopelessly flawed.

A. Has Compensatory Mitigation Been Disavowed by the Courts?

Let's begin with the most legal sounding justification. Has the Supreme Court directly, or even implicitly, rejected compensatory mitigation? To the contrary. The decision cited in the 1991 Draft Regional Solicitor's Opinion has virtually no direct application to public lands management, and to the extent that it does, it supports the use of compensatory mitigation to require resource users to offset their environmental impacts.

The *Nollan* case represents the first in a line of cases in which the Supreme Court reviewed the constitutionality of land use agencies conditioning "the approval of a land-use permit on the owner's relinquishment of a portion of his [private] property."⁴³ It, and the Court's decision in *Dolan v. City of Tigard*,⁴⁴ establish a test for such land-use "exactions" that is a common component of first year law school curricula there must be a "'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use," or else the government has violated the protection that the Takings Clause of the Fifth Amendment affords to private property.⁴⁵ In the Supreme Court's words, a demand for property lacking in nexus and proportionality "is not a valid regulation of land use but an out-and-out plan of extortion."⁴⁶

While some questions linger as to the precise bounds of the *Nollan/Dolan* test,⁴⁷ one thing is an absolute certainty. The test is predicated on government regulation of the use of private property. It applies, at most, to compensatory mitigation by analogy. Public lands are public property, not private property. Most of the time users of

43. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013).

44. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

45. *Koontz*, 570 U.S. at 599.

46. *Nollan*, 483 U.S. at 838.

47. See Justin R. Pidot, *Fees, Expenditures, and the Takings Clause*, 41 *ECOLOGY L.Q.* 131, 135–38 (2014).

public lands lack any property right to engage in a desired use.⁴⁸ *Nollan* cannot, therefore, justify narrowly reading FLPMA to generally prohibit compensatory mitigation.

Even by analogy *Nollan* validates, rather than undermines, appropriate compensatory mitigation. While some exactions exceed constitutional bounds, “[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy.”⁴⁹ That’s just what compensatory mitigation does.

B. Does Compensatory Mitigation Amount to Blackmail?

The notion that compensatory mitigation is “thinly disguised blackmail,” or extortion in Secretary Zinke’s words, also holds no water. Not every demand constitutes blackmail. Instead, blackmail entails “[t]he crime of making one or more threatening demands without justification.”⁵⁰

Compensatory mitigation is not “without justification.” By definition, it imposes an obligation on a resource user precisely because of the harm it causes. Through the use of compensatory mitigation, the BLM does not behave like a mobster demanding protection money, but rather like a store proprietor requiring a clumsy customer to proffer payment for a broken item.

The Supreme Court has even questioned whether *any* demand made by the government for the benefit of the public can constitute extortion. In *Wilkie v. Robbins*, the Court rejected claims brought against BLM officials alleged to have engaged in a campaign of harassment to induce a property owner to give the government a right-of-way easement.⁵¹ The Court explained that while “public officials were not immune from charges of extortion at common law, . . . extortion focused on the harm of public corruption, by the sale of public favors

48. *See, e.g.*, 43 U.S.C. § 315b (“[T]he issuance of a [grazing] permit shall not create any right, title, interest, or estate in or to the lands”); *Colvin Cattle Co., Inc. v. United States*, 67 Fed. Cl. 568, 570 (Fed. Cl. 2005) (“[A] grazing permit does not rise to the level of a protectable property interest”). There are exceptions in which the *Nollan/Dolan* test could apply to a compensatory mitigation requirement, for example, if related to a valid claim to hard rock minerals under the 1872 mining law. *See Skaw v. United States*, 740 F.2d 932, 935 (Fed. Cir. 1984).

49. *Koontz*, 570 U.S. at 605.

50. *Blackmail*, BLACK’S LAW DICTIONARY (10th Ed. 2014).

51. *Wilkie v. Robbins*, 551 U.S. 537, 551–54 (2007).

for private gain, not on the harm caused by overzealous efforts to obtain property on behalf of the Government.”⁵² Even if demands by the government for the benefit of the public sometimes could be extortionate, *Wilkie* strongly suggests that such circumstances are rare.

To give the regional solicitor his due, his comment about blackmail, replicated in the 2018 Mitigation Policy, makes some intuitive (if not legal) sense in the context he addressed. Recall that his opinion discussed the BLM’s authority to attach environmentally protective conditions to permissions granted to companies to drill for oil resources for which they previously acquired leases through the Mineral Leasing Act’s oil and gas leasing process.⁵³ In other words, the conditions the BLM sought to impose were not contained in the applicable resource management plan, in any stepped down planning document, or in the lease itself. While “a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals,”⁵⁴ the holder of a mineral lease has expectations about the development of their resources different than those who have not acquired (but hope to) a lease in the future.

As resource users have more concrete, reasonable expectations to carry out proposed activities, equitable considerations suggest that appropriate compensatory mitigation should be more closely connected to the specific harm threatened. Compensatory mitigation can be implemented through other mechanisms, however, where a resource user lacks any specific legally cognizable expectation. A company acquiring an oil lease that includes a compensatory mitigation stipulation, or within an area governed by an RMP including compensatory mitigation requirements, has no equitable argument to make. They acquired the lease knowing full well what would be expected and whatever price they paid would presumably have reflected that obligation.

In any event, equitable considerations do not relate to the BLM’s legal authority under FLPMA, but rather should be reflected in fine-tuned, fact-specific policy judgments about when and to what extent

52. *Id.* at 564.

53. *See* 30 U.S.C. § 226(b) (requiring leasing for certain public oil and gas resources through competitive bidding process); 43 C.F.R. § 3120.5-1 (providing for an in-person or online auction).

54. *Boesche v. Udall*, 373 U.S. 472, 478 (1963).

compensatory mitigation should be required. This is the thrust of the 1991 Draft Regional Solicitor's Opinion. On the other hand, the 2016 Mitigation Policy almost casually drops the word "blackmail" to justify a radical constriction of BLM's authority, and in that context, the word amounts to mere propaganda, not colorable legal analysis.

C. Can Compensatory Mitigation Be Viewed as Improper Fundraising or Taxation?

Concerns about "improper fundraising," "unauthorized tax[es]," or "attempt[s] to augment . . . appropriation" also don't justify reading FLPMA to prohibit compensatory mitigation.⁵⁵ For one thing, those phrases all suggest monetary payments to the government, and compensatory mitigation doesn't necessarily require any money to change hands. Often, a resource user can offset its environment impacts through action, not payment.

Moreover, there is nothing inherently untoward about using impact fees as a means to offset environmental harms. Returning to the Supreme Court's exactions jurisprudence, the Court distinguishes between taxes and user fees, on the one hand, and requirements for funds to offset the negative externalities caused by land uses, on the other.⁵⁶ The former are general fundraising tools, the latter are not.

That appropriate compensatory mitigation can appropriately be implemented through impact fees does not mean that the BLM has a limitless ability to demand money from resource users. Labeling something compensatory mitigation, whether involving payments or otherwise, does not evade the administrative law prohibition on arbitrary and capricious decision-making.⁵⁷ To make that concrete, consider a hypothetical version of the program addressed by the regional solicitor: Suppose that big horn sheep browse in the vicinity of a planned oil well during the summer months, and that restricting well operations to non-summer months will reduce impacts on the sheep. A compensatory mitigation program requiring drillers to fund restoration of habitat to serve as alternate summer forging grounds would seem a non-arbitrary means to offset the harm attendant to year-round well operations. The BLM would face a more difficult time

55. IM 2018-93, *supra* note 3.

56. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 616 (2013).

57. 5 U.S.C. § 706(2)(A) (1966).

justifying as compensatory mitigation a requirement that the driller fund activities across the country to benefit unrelated species. And it's hard to imagine any court buying an argument in favor of a compensatory mitigation requirement directing the driller to refurbish the local BLM office.

The BLM's assertion that compensatory mitigation constitutes unauthorized fundraising, if true, would also have dramatic—and probably unconsidered—implications government wide. Compensatory mitigation is a central component of an array of environmental programs; the wetlands program of the U.S. Army Corps of Engineers, which relies heavily on credits derived from wetlands banks, is a leading example.⁵⁸ If the BLM cannot require compensatory mitigation because it is an unauthorized tax or fee, can any agency?

D. Is Compensatory Mitigation Unrelated to Unnecessary and Undue Degradation of Land?

The final argument gestured at in the 2018 Mitigation Policy is significantly more limited than the others, but no more availing. The Policy asserts that “[c]ompensatory mitigation cannot prevent what would otherwise constitute [unnecessary and undue degradation of the land].”⁵⁹ Even if true, this proposition would only bar compensatory mitigation in connection with rights to hard rock minerals under the 1872 Mining Law, because those rights are exempted from many other provisions of FLPMA.⁶⁰ In any event, the proposition is both unsupported by legal citation and logically unsound.

In support of its view, the BLM offers an unremarkable truism that the obligation to prevent unnecessary and undue degradation implies that “a certain level of impairment may be necessary and due under a multiple use mandate.”⁶¹ True, but this is both insufficient and over broad. It is insufficient because the premise that some impairment can occur does not lead to the conclusion that impairment need never be compensated. Why is degradation that can easily be offset the type to

58. See James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 611–12 (2000).

59. IM 2018-93, *supra* note 3.

60. 43 U.S.C. § 1732(b) (1976).

61. IM 2018-93, *supra* note 3.

which FLPMA impliedly refers? It is over broad because the premise equally relates to mitigation other than compensatory mitigation. If FLPMA bars compensatory mitigation by dint of its allowance of some land degradation, why could the BLM even require resource users to take steps to avoid or reduce environmental impacts?

A hypothetical example reveals that the BLM's view not only fails as a matter of logic but leads to absurd results. Imagine an elk herd migrates from its summer to winter range through a narrow valley. A neighboring valley once served as an alternate migration route, but debris from wildfires blocked the valley's spring, and without a water supply, the elk can no longer use the valley. A company holds leases to oil resources lying under the first valley and has sought authorization from the BLM to build a series of well pads. The well pads will make the valley unusable as a migration corridor. Without a migration route, the elk herd will die, disrupting the ecology of their summer and winter range, eliminating hunting and other recreational opportunities, and otherwise dramatically affecting both the health of the relevant public lands and a multitude of uses. Constructing the well pads, in other words, would seem to cause undue degradation of the land by resulting in the extermination of the resident elk. The oil company could, however, implement a compensatory mitigation measure to restore the spring in the second valley, making it once again useable by the elk and fully ameliorating effects to the elk herd. This hypothetical is, of course, a simplified version of use conflicts—here, use for wildlife habitat or for oil drilling—but it demonstrates that the benefits provided by compensatory mitigation can be integral to avoiding unnecessary and undue degradation of the land.

A potential response to the hypothetical is this: restoring the second valley could be recast as a minimization measure, rather than a compensatory measure. After all, it reduces the harm imposed to the elk herd. But if accepted, this rejoinder scuttles the 2018 Mitigation Policy in its entirety. Any measure to compensate could be reframed as a measure to minimize: Requiring a company to compensate for destroying an acre of sage brush in one place by restoring sage brush elsewhere could be viewed as a measure to minimize harm to sagebrush-dependent wildlife. Requiring a company to construct an acre of wetland for every acre filled could be viewed as a measure to minimize flood risk. The 2018 Mitigation Policy plainly does not envision such

semantic gamesmanship, adopting a broad definition of compensatory mitigation that includes any offsite obligation.⁶²

IV. THE IRREGULARITY OF THE 2018 MITIGATION POLICY

The BLM's reinterpretation of its legal authority is not only baseless, but also procedurally unusual. The Solicitor is the Department's primary legal officer, and the Secretary has delegated to that office the authority to issue M-Opinions to provide "final legal interpretations . . . on all matters within the jurisdiction of the Department."⁶³ A new legal interpretation seismically reshaping a bureau's legal authority would ordinarily be set forth in an M-Opinion. Indeed, the current Solicitor issued an M-Opinion inviting the BLM to seek guidance about its authority to require compensatory mitigation under FLPMA.⁶⁴ Instead, the BLM issued the 2018 Mitigation Policy under the signature of the BLM's Deputy Director for Policy and Programs.⁶⁵

The Solicitor's invitation to BLM to seek guidance on compensatory mitigation arose from a shift in position that, at least by implication, undercuts the BLM's legal interpretation. A 2016 M-Opinion designated as M-37039 concluding that FLPMA *did broadly authorize* compensatory mitigation.⁶⁶ In 2017, after the administration changed, the Acting Solicitor issued a new M-Opinion designated as M-37046 to withdraw M-37039, explaining that it "was primarily issued to assist BLM in implementing" policies that had been revoked and because it had "attempted to answer an abstract question – whether BLM

62. *Id.*

63. DOI Manual, *supra* note 11, at 209 D.M. 3.2(A)(11).

64. M-37046, *supra* note 38, at 2.

65. IM 2018-93, *supra* note 3. IM 2018-93 does indicate that it was reviewed by the Solicitor's Office. Solicitor's Office personnel routinely review policies and other decisions made by the BLM and other components of the Department to provide advice about potential legal risk, but such review does not constitute a "final legal interpretation" of the Solicitor. *See* DOI Manual, *supra* note 11, at 209 D.M. 3.2(A)(11).

66. U.S. Dep't of the Interior, Off. of the Solic., The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations Through Mitigation, M-Opinion 37039 at 3 (Dec. 21, 2016).

generally has authority to require mitigation when authorizing uses of the public lands.”⁶⁷

The second reason provided by M-37046 strongly suggests that, contrary to the BLM’s newly announced view, compensatory mitigation is authorized and appropriate in certain factual contexts. The opinion explains that the “BLM’s authority may differ depending on whether it seeks to place conditions on [oil and gas] development during the leasing stage or condition applications for permit to drill on an existing lease.”⁶⁸ It also notes that “[s]hould the BLM have questions regarding the limits of its authority to condition the authorizations it administers, those questions should be evaluated in their specific factual and legal contexts with the appropriate assistance from the Solicitor’s Office.”⁶⁹

Why then did the BLM unilaterally reinterpret FLPMA without asking for new guidance from the Solicitor? One could infer that the Solicitor does not share the BLM’s crabbed view of FLPMA.

CONCLUSION

Compensatory mitigation provides the BLM with an important tool to address conflicts among potential uses of public lands. It is a tool that has been used for decades. The BLM can reasonably reach differing policy judgments about when, if, and to what extent, a land use plan, lease, permit, or other authorization should include a requirement that resource users compensate for the harms they cause. Its new policy, however, ignores all nuance, and advances a new, unsupported legal interpretation about the extent of the BLM’s statutory authority based upon what amounts to soundbites about extortion and unauthorized taxation. This glib disclaimer of authority smacks of a results-oriented give away to extractive industry, rather than a cogent exercise in statutory interpretation. Nonetheless, this Essay has attempted to take the BLM’s terse justifications seriously and invest them with detail far beyond that which the agency has proffered. They fare no better upon close inspection. The 2018 Mitigation Policy is insufficient, unsound, and illogical. It should be

67. M-37046, *supra* note 38, at 1.

68. *Id.* at 2.

69. *Id.*

withdrawn, and if the BLM persists on this course, a court should (and likely will) intervene. If that occurs, the BLM will likely fare poorly with the result that the reviewing court will relegate this ill-conceived and poorly reasoned policy to the dustbin of history.