



BLM Justifies Mitigation Requirements on Federal Land Through Solicitor's Opinion

By: [Michael Cross](#)

A last-minute U.S. Department of the Interior (Interior) Solicitor's Opinion gives the Bureau of Land Management (BLM) authority to require compensatory mitigation for impacts to the environment on federal lands.

The Solicitor's Opinion, issued on December 21, 2016, relies on the Federal Land Policy and Management Act (FLPMA) as giving the BLM authority to require mitigation. Under FLPMA, BLM manages public lands through the principles of multiple use and sustained yield for current and future generations. However, the Solicitor's Opinion far exceeds the statutory parameters of FLPMA and its implementing regulations, as well as pre-Obama Administration historical practice.

In attempting to justify that BLM has the authority to require mitigation as a condition for use of public lands, the Solicitor oversteps the statutory contours of FLPMA, opining that BLM actually has authority to require public land users to "leave the public lands in better condition than they found them." Solicitor's Opinion, *BLM's Authority to Address Impacts of its Land Use Authorizations through Mitigation* at 6 (Dec. 21, 2016) available [here](#). Specifically, the Solicitor's Opinion states that "[m]itigation 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." *Id.* at 13. The Solicitor's Opinion identifies FLPMA's grant of authority to promulgate and enforce regulations in support of the agency's authority to require never-before required compensatory mitigation.

Notably, the Solicitor's Opinion provides no specific legal support justifying BLM's imposition of a net conservation benefit standard or compensatory mitigation requirements.

BLM's regulations specifically state that the bureau may require stipulations or other "reasonable measures . . . to minimize adverse impacts to other resource values." 43 C.F.R. § 3101.1-2. The stipulations in BLM's oil and gas lease form also require that lessees "conduct operations in a manner that *minimizes* adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users." BLM Form 3100-11, Lease Terms § 6.

BLM has not, however, promulgated any regulations that require more than "minimizing" impacts, let alone improving the condition of the land and requiring compensatory mitigation. Moreover, regulatory definitions of mitigation do not require improvement of the land. *See* 40

C.F.R. § 1508.20 (definition of mitigation under the Council on Environmental Quality's regulations implementing the National Environmental Policy Act).

The Solicitor's Opinion is an after-the fact justification of BLM's imposition of compensatory mitigation requirements and a net conservation benefit standard in the Records of Decision and Approved Resource Management Plan Amendments for Greater Sage-Grouse in the Rocky Mountain Region and Great Basin Region. The Solicitor's Opinion's conclusion that BLM has the authority to require compensatory mitigation and net conservation benefit is simply not supported by law.

This Solicitor's Opinion is binding on "all Departmental offices and officials," 209 DM 3, and can only be rescinded by the Solicitor, a Deputy Secretary, or Secretary of the Department of the Interior. 209 DM 3.2(A)(11).

For more information on the Solicitor's Opinion on mitigation standards and its implications, please contact [Bret Sumner](#), [Theresa Sauer](#), or [Mike Cross](#).