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1.1 Purpose. This [DRAFT] manual section provides policies, procedures, and instructions for:

- A. Regional Mitigation Strategies.** Developing strategies that identify and facilitate mitigation opportunities at the regional scale, including mitigation opportunities on both BLM-managed public lands and non-BLM-managed lands (other Federal lands, as well as Tribal, State, and private lands);
- B. Regional Mitigation Planning.** Using the land use planning process to identify potential mitigation sites and measures (e.g., land treatments, infrastructure modification or removal) on BLM-managed lands at a regional level (including by considering and potentially incorporating any Regional Mitigation Strategies); and
- C. Mitigation Implementation.** Identifying and implementing appropriate mitigation within (onsite) or outside the area of impact for particular land-use authorizations.

This manual does not apply to authorizations under 43 CFR subparts 3809 or 3715.

1.2 Objective. The objectives of this policy are to provide guidance to the BLM on how to (1) develop Regional Mitigation Strategies, (2) incorporate regional mitigation into the land use planning process, and (3) identify and implement appropriate mitigation measures for particular land-use authorizations.

1.3 Authority. Principal authorities relating to development of Regional Mitigation Strategies, mitigation planning, and mitigation implementation are:

- A. The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 et seq.**
- B. National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 et seq.**
- C. Mineral Leasing Act of 1920, as amended, 30 U.S.C. 181 et seq.**
- D. Endangered Species Act, 7 U.S.C. 136, 16 U.S.C. 1531 et seq.**
- E. The Wyden Amendment, 16 U.S.C. 1011.**
- F. Council on Environmental Quality (CEQ) Regulations, 40 CFR 1500-1508.**
- G. Department of the Interior (DOI) NEPA Regulations, 43 CFR Part 46.**
- H. Bureau of Land Management Planning Regulations, 43 CFR Part 1600.**

1.4 Responsibilities.

A. It is the responsibility of the Bureau of Land Management (BLM) Director to:

1. Establish policies, procedures, and instruction for the use of mitigation.

B. It is the responsibility of the State Directors to:

1. Implement national policy and provide statewide program coordination and guidance for the use of regional mitigation.
2. Provide program development, technical management assistance, and support to district and field offices as required for considering the use of regional mitigation.
3. Process mitigation monies in accordance with applicable law.

C. It is the responsibility of the District Managers and Field Managers to:

1. Implement national policy.
2. Consider and analyze potential mitigation opportunities through the NEPA process.
3. Monitor the use of mitigation and make adaptive changes as necessary.

1.5 References. Principal references for this guidance are:

A. FLPMA, 43 U.S.C. 1701 *et seq.*

B. NEPA, 42 U.S.C. 4321 *et seq.*

C. MLA of 1920, as amended, 30 U.S.C. 181 *et seq.*

D. ESA, 7 U.S.C. 136, 16 U.S.C. 1531 *et seq.*

E. The Wyden Amendment, 16 U.S.C. 1011.

F. CEQ Regulations, 40 CFR 1500-1508.

G. DOI NEPA Regulations, 43 CFR Part 46.

H. BLM Land Management Planning Regulations, 43 CFR Part 1600.

I. BLM Handbook H-1601-1, *Land Use Planning.*

1.6 Policy.

A. General.

Regional mitigation is a landscape-scale approach to mitigating impacts to resources and values managed by the BLM, from authorizations approved by the BLM in order to provide for sustained yield of resources on the Public Lands. This regional approach involves anticipating future mitigation needs and strategically identifying mitigation sites and measures that can help the BLM achieve its resource and value objectives. The BLM may accomplish this through the development of regional mitigation strategies, land use planning, and implementation decisions. A regional approach to mitigation occurs across the landscape and focuses on attaining the highest mitigation benefit, regardless of land ownership. A regional mitigation approach also shifts the BLM's mitigation focus from a permit-by-permit perspective to a proactive regional-scale mitigation planning perspective. This regional-scale planning perspective will enhance the BLM's ability to mitigate resource impacts; increase permitting efficiencies; and provide greater certainty to permit applicants, partners, stakeholders, and the public.

B. Regional Mitigation Strategies.

1. General. The BLM will endeavor to take a regional (i.e. landscape-level) approach to identifying potential mitigation opportunities (including sites and measures) to promote sustained yield of resources on BLM-managed lands. This approach will enhance and streamline the BLM's consideration of appropriate project-specific mitigation measures (e.g., land treatments, infrastructure removal). The BLM will incorporate this approach using the tools identified in parts B.2, and C of this manual, and such an approach should:
 - a. Anticipate future mitigation needs and identify potential sites that could benefit from mitigation projects and measures;
 - b. Prioritize potential mitigation sites and measures that have the potential for multiple, landscape-scale benefits;
 - c. Consider evaluating potential mitigation opportunities on both BLM and non-BLM-managed lands;
 - d. Identify mitigation sites and measures that will be effective and durable over time;
 - e. Utilize high quality, scientific information when considering potential mitigation sites, projects, and measures, including science-based studies and methodologies where available (e.g., the BLM's Rapid Eco-regional Assessments or the Western Governors' Association Crucial Habitat Assessment Tool); and
 - f. Consider sites where impacts to several resources or values can be mitigated at one location.

2. Regional Mitigation Strategies. Where the BLM anticipates large-scale development projects, regional mitigation strategies can be an effective tool for preliminarily studying and allowing public input on regional mitigation opportunities.

Regional Mitigation Strategies can help to:

- a. Increase permitting efficiency and financial predictability for applicants by studying potential mitigation needs and opportunities on both BLM and non-BLM-managed lands, which can help to inform subsequent land-use authorization or planning decisions; and
- b. Enhance the ability of Federal and State governments, tribes, nongovernmental organizations, and resource users to invest in larger scale mitigation efforts through prioritization of investments and pooling of financial resources.

Regional Mitigation Strategies are not decisions, but are instead assessments or studies that can inform subsequent BLM planning and implementation decisions. For that reason, the BLM can develop Regional Mitigation Strategies outside of the NEPA and planning processes. The BLM can also combine its development of a Regional Mitigation Strategy with a land use planning process (see section C below).

Regional Mitigation Strategies should include:

- a. A transparent stakeholder engagement process;
- b. A description of regional baseline conditions against which unavoidable impacts are assessed;
- c. A discussion of potential regional mitigation objectives;
- d. An evaluation of appropriate mitigation sites, projects and/or measures;
- e. A discussion of potential methods for calculating mitigation fees for unavoidable adverse impacts that warrant mitigation;
- f. A discussion of a potential structure to hold and apply mitigation investment funds; and
- g. An evaluation of appropriate long-term monitoring and adaptive management to evaluate and maximize the effectiveness of mitigation projects and measures.

C. Regional Mitigation Planning. The BLM may use the land use planning process to identify potential mitigation sites and measures on BLM-managed lands. When addressing regional mitigation opportunities through the land use planning process, the BLM should:

- a. Describe regional baseline conditions against which unavoidable impacts are assessed;

- b. Establish and prioritize regional mitigation objectives for the planning area;
- c. Identify appropriate land-use allocations or areas for landscape-level conservation and management actions to achieve regional mitigation objectives (e.g., Areas of Critical Environmental Concern (ACEC) or sage-grouse priority habitat); and
- d. Develop long-term monitoring and adaptive management requirements to evaluate and maximize the effectiveness of mitigation projects and measures.

D. Mitigation Implementation – Identifying and Implementing Appropriate Mitigation for Specific Land Use Authorizations

General. The BLM cannot always mitigate the direct and indirect impacts from land-use authorizations to an acceptable level at the location of the impacts (onsite mitigation). To achieve and sustain BLM resource and value objectives, it may be appropriate to compensate for the direct and indirect impacts of a BLM authorization by conditioning that authorization on the performance of mitigation outside the area of impact. Mitigation outside the area of impact occurs by replacing or providing similar or substitute resources or values through restoration, enhancement, creation, or preservation. The BLM's policy is to consider mitigation outside the area of impact when it is not feasible or practical to mitigate impacts to an acceptable level in the same area as the use-authorization.

1. Types of Mitigation. When a resource or value will be degraded or lost due to a land-use authorization, the BLM may need to consider whether restoration, enhancement, creation, and/or preservation outside the area of impact, may be appropriate. Restoration, enhancement, creation, or preservation each has advantages and disadvantages and the value of each will vary based on many factors.
 - a. Restoration is the re-establishment or rehabilitation of resources or values with the goal of returning natural or historic functions and characteristics.
 - b. Creation is the development of a resource or value through manipulation of the physical, chemical, and/or biological characteristics of the site where the resource or value did not previously exist.
 - c. Enhancement is the heightening, intensifying, or improving of one or more resources or values.
 - d. Preservation is the permanent or long-term protection of important resources or values through the implementation of appropriate legal and physical mechanisms (i.e., conservation easements, title transfers, or land use plan decisions). This includes the reduction or exclusion of incompatible uses.
2. Mitigation as a Project Condition. When conditioning a BLM authorization on the performance of mitigation outside the area of impact, the BLM should identify a reasonable relationship between the resources and values affected by the authorization

and the resources and values benefitted by the mitigation. This relationship and the benefit to the resources and values that will be impacted must be clear in the NEPA document analyzing the land-use authorization.

The BLM may expressly condition its approval of the land-use authorization on an applicant's commitment to perform or cover the costs of mitigation, both onsite and outside the area of impact.

3. Mitigating Onsite vs. Mitigating Outside the Area of Impact. Consistent with the CEQ's definition of "mitigation" (40 CFR 1508.20) and requirement to consider appropriate mitigation for identified impacts (40 CFR 1502.14(f)), BLM policy is to place a priority on mitigating impacts to an acceptable level onsite, to the extent practical, through avoidance, minimization, rectification, or reduction of impacts over time. There are times when onsite mitigation alone may not be sufficient to adequately mitigate impacts and achieve BLM resource and value objectives. In these cases, it may be appropriate to consider mitigation outside the area of impact (e.g., compensating for the impact) to achieve BLM resource and value objectives.
4. Mitigation Priority Order. The priority order for mitigating resource impacts is to 1) avoid, 2) minimize, 3) rectify, or 4) reduce the impact over time, and if necessary, 5) mitigate outside the area of impact, preferably at regionally selected mitigation sites. However, in some cases, mitigation sites near where the resource or value impact is occurring (but still outside the area of impact), will be the most appropriate location for performing mitigation activities.

Example - Local: Some local populations of wildlife or special status plants may be dependent on the maintenance of sustainable population numbers; therefore, those locally affected populations should receive the direct benefit of mitigation outside the area of impact rather than populations farther away, or in other regions.

Example - Local: If impacts from a land-use authorization occur in land that is legally designated for conservation purposes by a presidential proclamation or congressional action (e.g., National Landscape Conservation System (NLCS) units), it may be the most appropriate for mitigation to occur in the affected conservation area.

Example - Regional: Focusing sage-grouse habitat improvement projects within core/priority habitat areas and genetic connectivity corridors, even though they may not be adjacent to the project impact.

5. Mitigation on Federal and Non-Federal Lands. Mitigation sites, projects, and measures should be focused where the impacts of the use authorization can be best mitigated and BLM can achieve the most benefit to its resource and value objectives, regardless of land ownership. The most appropriate area for mitigation projects may be on Federal lands (the BLM or another agency) or on non-Federal lands.

Example: A proposed development project on BLM-managed land will directly impact habitat for a sensitive species, yet the best opportunity to create, enhance, restore, and/or preserve habitat for the same sensitive species is on nearby private lands. In this case, the purchase of a conservation easement on private lands could provide long-term habitat protection.

The BLM should ensure adequate management, protection, and monitoring of the mitigation during the expected lifetime of the development project and its associated impacts. For management of mitigation on non-BLM-managed lands, the BLM must obtain written assurances from the relevant land management agency or surface owner and the authorization holder that mitigation conducted on those lands is agreed to and will receive adequate management, protection, and site access for monitoring during the expected lifetime of the land-use authorization and its associated impacts. These assurances should be in the form of enforceable, binding agreements between private parties and the BLM or similarly detailed commitments (e.g., memoranda of understanding, cooperative agreements) between the Federal agencies and the BLM.

6. Non-BLM Impacts - Mitigated on BLM-managed Lands. Consistent with a regional approach, mitigation projects may also occur on BLM-managed lands, when the site of the impact is located on lands not managed by the BLM. The BLM may authorize these mitigation projects and measures through a land-use authorization, which may include a cooperative agreement. The non-BLM surface owner or project proponent will be responsible for conducting the mitigation on the BLM-managed lands. In accordance with applicable law, the BLM may collect cost recovery for processing the authorizations and monitoring compliance with the agreements.

Example: Incorporating BLM-managed lands into Endangered Species Act Habitat Conservation Plans or Clean Water Act Mitigation Banks, which are created to mitigate impacts to endangered species or waterways on non-BLM-managed land.

7. Determining Whether Mitigation Outside the Area of Impact is Appropriate. Mitigation outside the area of impact may be an appropriate consideration for the BLM when:
 - a. It is expected that the direct and indirect impacts of the proposal would not be mitigated to an acceptable level onsite; and
 - b. Mitigation outside the area of impact can successfully mitigate the remaining unavoidable impacts (i.e., those not mitigated onsite) to an acceptable level.

Mitigation outside the area of impact may also be an appropriate consideration for the BLM when other land management agencies or landowners identify indirect impacts to lands they own and/or manage from a project on BLM-managed lands and the impacts cannot be adequately mitigated onsite.

8. Identifying Levels of Acceptable and Unacceptable Impacts. Although appropriate mitigation must be considered (see 40 CFR 1502.14(f)), not all adverse or unavoidable

impacts can or must be fully mitigated, either onsite or outside the area of impact. A certain level of adverse or unavoidable impact may be acceptable, and the BLM will identify these impacts during the NEPA analysis and acknowledge them in the decision document (such as a Decision Record or Record of Decision).

Adverse or unavoidable impacts may be acceptable when an appropriate level of mitigation will be conducted onsite, and the remaining:

- a. Impacts to soil or vegetation resources would not result in unnecessary or undue degradation, violate land use plan resource and value objectives, or lead to a violation of applicable laws, such as the Clean Water Act;
- b. Impacts to wildlife will not exceed established resource and value objectives for species identified as BLM-sensitive species or Endangered Species Act listed species;
- c. Noise levels will not violate local, State, or land use plan noise standards; and
- d. Impacts to air quality from emissions or dust would not contribute to violations of the National Ambient Air Quality Standards or air quality related values (e.g., visibility) for Class I designated areas as defined by the Clean Air Act.

However, under the provisions of Section 302 of FLPMA, the BLM may not authorize a proposed use that would result in unnecessary or undue degradation onsite even if mitigation conducted outside the area of impact could potentially reduce the impacts of that proposed use (see: §1.6(F)(2)).

There may be instances when impacts to BLM resource and value objectives are unavoidable and cannot be adequately mitigated, either onsite or outside the area of impact. If the applicant cannot adequately mitigate impacts from the project, and the BLM is, therefore, unable to achieve its resource and value objectives, then the BLM may deny the land-use authorization in the decision document.

9. Direct Benefit to the Resource, Not Another Authorized Resource User. Mitigation should be designed with the focus on the benefits to the resources impacted; the BLM should not design mitigation measures with the primary intent of providing direct benefits to other authorized uses or users of a resource that may be adversely affected by the action.

Example: An energy company conducting an activity that removes a large amount of vegetation would not compensate a grazing permit holder for loss of the use of the vegetation. However, the company may partially or fully mitigate for the loss of vegetation onsite by conducting interim and final reclamation of the site. In this example, the BLM may need to adjust the grazing use to reflect the loss of vegetation until the vegetation returns to pre-disturbance levels. Note, the BLM or applicant may be required to compensate the permittee/lessee for loss of authorized permanent range improvements.

10. Types of Mitigation: In-kind and Out-of-kind. “In-kind” mitigation is generally preferred to “out-of-kind,” although there may be exceptions, depending on circumstances.

- a. In-kind. In-kind mitigation is the replacement or substitution of resources or values that are of the same type and kind as those impacted.

Example: For every acre of new, long-term surface disturbance in suitable sage-grouse nesting/early brood-rearing habitat in Area (A), the applicant agrees to reclaim, treat, or plant sagebrush in (X) acres of unsuitable habitat in Area (B) to create new or suitable nesting/early brood-rearing sage-grouse habitat, or purchase nearby land or obtain a conservation easement to protect (Y) acres of suitable nesting/early brood-rearing sage-grouse habitat. In these examples, the habitat type that is impacted is the same as the habitat type created over time or protected.

Example: For every mile of new transmission lines that will be constructed in suitable sage-grouse habitat in Area (A), the applicant agrees to bury (X) miles of older, existing distribution power lines; or remove old, abandoned power poles and lines so they cannot be used as hunting perches by raptors in Area (B). These are actions that could compensate for impacts to sage-grouse from the addition of the new powerlines in Area (A).

- b. Out-of-kind: Out-of-kind is the replacement or substitution of resources or values that are not the same type and kind as those impacted, but are related or similar.

Example: For every acre of new, long-term surface disturbance in suitable sage-grouse winter habitat in Area (A), (X) acres of nesting/early brood-rearing sage-grouse habitat is reclaimed, treated, or conserved in Area (B). In this example, winter habitat is lost, but new nesting habitat is enhanced or conserved. The sage-grouse habitat types are not the same, but are related in that they both are needed by sage-grouse.

Example: An operator proposes to drill an oil and gas well along a BLM backcountry byway designated for its high scenic and archaeological values. The proximity of the drilling and oil and gas production will impact the backcountry byway’s scenic values, but not the archaeological values. While proposing Best Management Practices to minimize onsite impacts to the scenic values, the applicant also agrees to construct a wayside pullout with interpretive signs at the petroglyph archaeological site 4 miles farther down the byway.

11. Considering the Degree of Impact and the Importance of the Affected Resource.

- a. General. When considering the use of mitigation, it is important to weigh the degree to which a resource or value is affected and the relative importance of the affected resource or value.
- b. The Degree of Impact. Mitigation outside the area of impact may be appropriate if the degree of impact will limit the BLM's ability to achieve its sustained-yield resource and value objectives through onsite mitigation alone.

Example: Mitigation outside the area of impact may be appropriate for addressing impacts from large development projects that have substantial undesirable cumulative effects that cannot be sufficiently mitigated onsite. These projects may include:

- i. Oil, gas, or geothermal fields, or individual wells that will constitute a large field and associated rights-of-way;
- ii. Major road, electric transmission, or pipeline rights-of-way projects;
- iii. Wind, solar, or hydropower development;
- iv. Mining operations (other than locatable minerals); and
- v. Land disposals.

Example: Mitigation outside the area of impact may be appropriate where a proposed project's impacts are of such a magnitude as to prevent the BLM from meeting its habitat condition objectives (identified in the land use plan) in an important part of a priority species' range through onsite mitigation alone.

Example: Mitigation outside the area of impact may be appropriate for smaller-scope development projects when they will be part of a larger-scope proposed use or project, such as a planned gas field.

Example: Mitigation outside the area of impact may not be appropriate for resource use or development projects when onsite mitigation is sufficient or when authorizing new, small-scale proposals that do not have an individual or cumulative impact on resources of concern.

- i. Grazing (levels of use or management would be adjusted to achieve an acceptable level of impact onsite);
- ii. Short-term events or activities that require Special Recreation Permits (rarely large, substantially displacing, or having long-term impact);
- iii. Minor rights-of-way (generally small in size, isolated); or
- iv. Small mining operations (generally small and isolated). (Note that the mitigation policy in this manual does not apply to authorizations under 43 CFR subparts 3809 or 3715.)

- c. The Relative Importance of the Affected Resource. Some resources, values, and/or areas can be viewed as having higher value than others and may make a land-use authorization's impacts unacceptable. This can be based on multiple factors such as:
- i. The legal or policy status of the resource. For example, land that is legally designated for conservation purposes by a presidential proclamation or a congressional action are considered to be of high importance, as are "BLM sensitive species" identified by BLM policy. Special land designations include, among others, the units of the NLCS (National Monuments, National Conservation Areas, Wilderness Areas, Wilderness Study Areas, Wild and Scenic Rivers, and National Scenic and Historic Trails);
 - ii. The value placed on the resource in the land use plan. For example, the BLM often designates Areas of Critical Environmental Concern (ACEC) in land use plans due to their important resources; Visual Resource Management Class II has a higher level of importance than Class III; and acre-per-acre, the BLM generally considers riparian areas to be more ecologically important than uplands, depending on the resource scarcity and values;
 - iii. The rarity of the resource. For example, BLM-sensitive species or candidate species under the Endangered Species Act. Their habitat may be important on a range-wide and inter-regional basis as well as having local importance; and
 - iv. The scientifically determined resilience, or lack thereof, of the resource in the face of changing conditions and impacts, such as development, changing climate, fire, and invasive species. For example, some animal species may acclimate fairly well to certain levels or types of development, while other species may decrease in population or temporarily or permanently abandon the area.

12. Long-term Durability. The BLM should ensure that mitigation conducted outside the area of impact will, at a minimum, be effective for as long as the land-use authorization affects the resources and values. This would include the time it takes to appropriately restore the affected onsite resources and values after the expiration of the land-use authorization. The land use plan may be the most effective tool for protecting important regional mitigation sites on BLM-managed lands from future impacts in order to ensure the durability of mitigation projects. The durability of particular mitigation measures depends in part on the location of the mitigation measures, the land status and ownership of the lands in that location (i.e., private, State, or Federal) and the particular legal regime governing those lands.

Example: A priority for habitat protection or enhancement efforts would be an area protected from future disturbance. An area with valid existing leases or permits may benefit from mitigation, but may not provide opportunity for

long-term protection. The land use plan may be the most effective tool for protecting important mitigation sites from future impacts.

Example: If onsite impacts will be long-term or permanent, such as for the development of an oil and gas field; wind farm; or the construction of a high use, permanent road; then the mitigation should also be effective for the life of that project, long-term or permanent. This would also include the time it takes to complete final reclamation and the restoration of lost resources or values.

13. Phasing-in Mitigation. It may be appropriate to compensate for the expected slow decline in an onsite resource or value by restoring or improving lands outside the area of impact over a period of several years. This phased-in mitigation may be appropriate where the onsite resource is important, but is not a critical or protected resource or value or is not critical to the overall functioning of that resource or value in the local area or region.

There may also be times when an applicant phases in a construction project over time, such as for a transmission line. In such cases, it may be appropriate to phase-in mitigation over time, as well.

14. Mitigating Post-Approval, but Prior to Development. It may be appropriate to compensate for the impacts of a land-use authorization in advance of those impacts occurring (but after approval of the land-use authorization). This may be necessary where any impacts would have an immediate and substantial negative impact on the achievement of BLM resource and value objectives. In these cases, the use-authorization may need to require implementation of the mitigation prior to beginning the authorized land use.

Example: The BLM predicts that an energy development or transmission project may affect a remnant population of sage-grouse. To maintain the viability of the population as a whole, it may be necessary, prior to initiating the project, to take actions to:

- i. Reduce or eliminate existing causes of direct mortality (e.g., fence collisions, predation); or
- ii. Implement habitat improvement measures that will increase population numbers elsewhere in the population range and achieve certain specified objectives.

15. Quality and Quantity. One acre of mitigation outside the area of impact may not necessarily be sufficient to compensate for one acre of direct onsite surface impact. The BLM will identify mitigation ratios through the NEPA process. Mitigation must be roughly proportional to the impact caused by the regulated activity and reasonably related to the impact.

Example: An acre of surface disturbance for a new road and its associated short- and long-term use may result in impacts such as wildlife avoidance,

direct mortality, and resulting habitat fragmentation over larger areas. It may be necessary to improve multiple acres of existing habitat at another location in order to compensate for the 1 acre of new surface disturbance (e.g., 1:3, where 1 acre of new surface disturbance equates to 3 acres of restoration).

Example: It may take multiple years for the mitigation to become fully effective. In these cases, it may be appropriate to increase the mitigation ratio to account for this delay (e.g., 1:2 becomes 1:3).

Example: An increased mitigation ratio may also be necessary for land-use authorizations in the NLCS due to its conservation, protection, and restoration mission (P. L. 111-11 § 2002).

16. Co-Benefits or Layering Mitigation. To increase efficiency and avoid duplicating mitigation efforts, consider how mitigation for one resource or value may also have the co-benefit of mitigating for other resources or values. Consider, as a part of the selection criteria, sites where impacts to several resources or values can be mitigated at one location outside the area of impact.

Example: Mitigating a loss of habitat at a solar energy site by closing and reclaiming old roads at another location may also have the co-benefit of mitigating a loss of scenic quality at the solar project site.

Example: A proposed project may warrant mitigation for impacts to three resources, such as sage-grouse habitat, a protected setting associated with a National Historic Trail, and a scarce visual resource. Selecting one mutually beneficial site to mitigate all three resources may reduce the overall cost and increase the value of the mitigation investment, provided the objectives for all affected resources are met.

17. Identifying Mitigation through the NEPA Analysis and Decision Process.

- a. General. The BLM will consider and analyze proposals for mitigation through the NEPA process. The BLM may condition approval of a project on the applicant's commitment to address avoidable impacts through onsite mitigation and unavoidable impacts through mitigation conducted outside the area of impact (e.g., at a regionally selected mitigation site). In deciding whether to authorize the land use, the BLM will consider the potential effectiveness of both the onsite mitigation and the proposed mitigation outside the area of impact (see: §1.6(D)). Considerations may include, but are not limited to, the mitigation's benefit in the local and regional context.

Prior to initiating the NEPA process, the BLM and the applicant should discuss onsite mitigation and, if appropriate, options for conducting mitigation outside the area of impact. For BLM-initiated actions, the BLM will determine whether mitigation outside the area of impact is appropriate and will design the mitigation into the project proposal. Opportunities for onsite mitigation and options for

conducting mitigation outside the area of impact that are developed prior to initiation of the NEPA process will be provided for public comment as soon as practicable within the NEPA process.

- b. **Adequacy of the Applicant's Proposal.** When the BLM expects that an applicant's initial proposal for mitigation will be inadequate to satisfactorily address impacts of the authorized use, and the BLM anticipates that mitigation outside the area of impact may be appropriate, the BLM will notify the applicant in order to provide the applicant with an opportunity to propose alternative mitigation.

Example: To avoid or minimize the need for conducting mitigation outside the area of impact, the applicant may offer a proposal for reducing surface disturbance or adjusting the pace or location of oil and gas development.

The BLM should notify the applicant about the potential need for mitigation outside the area of impact as early as possible, optimally during the pre-application phase of initial project planning. The expectation is that the applicant and the BLM will discuss appropriate mitigation, outside the area of impact or otherwise, prior to the BLM deciding on appropriate mitigation and taking final action on an authorization application. The BLM will decide to approve the authorization, deny it, or approve it with modifications (including project mitigation).

- c. **If the BLM and the Applicant Cannot Reach Agreement.** If the BLM anticipates that mitigation may be necessary outside the area of impact and the BLM and the applicant cannot reach agreement on the mitigation, the following may occur:
 - i. The applicant may withdraw or amend the project proposal to present an alternative siting proposal or mitigation strategy.
 - ii. The BLM may evaluate the need for additional mitigation and identify acceptable forms of mitigation in the NEPA document as an alternative to the applicant's proposed action (see §1.6(D)(4)(a)).
 - iii. The authorized officer may deny the application and provide an explanation for the denial to the applicant. The applicant may be able to appeal the denial to the Interior Board of Land Appeals or, in certain instances, directly to Federal district court. The BLM should consult with the Solicitor's Office before denying an application in cases where, due to existing contractual or property rights, a holder or applicant may raise a takings or breach-of-contract claim.
- d. **NEPA Analysis Process.** When considering mitigation outside the area of impact, it should be examined as a feature of one or more of the alternatives in a NEPA

document, such as a project-level environmental assessment (EA) or an environmental impact statement (EIS), or when applicable, a resource management plan (RMP)/EIS revision, or RMP amendment EA/EIS.

- e. Alternatives. When an applicant's proposed action includes a proposal for conducting mitigation outside the area of impact, the BLM will analyze a reasonable range of alternatives to the applicant's proposal.

When mitigation outside the area of impact may be necessary, but the applicant proposes none, the BLM will analyze the applicant's proposed action and the proposed action with mitigation, in separate alternatives.

If the applicant proposes specific mitigation measures as a feature of its proposed action and the BLM believes the proposed mitigation may be inadequate, then the BLM will identify and evaluate in the NEPA document an alternative(s) to the applicant's proposal.

If evaluating mitigation that would occur outside the area of impact through a NEPA document without the applicant's full agreement on the type and/or degree of the mitigation, the BLM should limit consideration to in-kind mitigation on BLM-managed lands or monetary contributions that would directly benefit the resource or value subject to impacts on BLM-managed lands.

- f. Feasibility and Effectiveness. The BLM will analyze the need, feasibility, and effectiveness of the proposed mitigation (e.g., how the proposed mitigation will actually mitigate the impacts). The BLM will also disclose the impacts and expected outcomes of the mitigation.
- g. Monitoring. The BLM should address the long-term project monitoring and maintenance responsibilities in the decision document, if applicable, including performance objectives, methods for measuring effectiveness/success, reporting requirements, funding source, and responsible parties. Monitoring plans should reference and comply with BLM monitoring principles described in the BLM's *Assessment, Inventory, and Monitoring Strategy (AIM)*.
- h. Decision. Once the BLM analyzes the proposed mitigation in the NEPA document and records its conclusion in the decision document, the BLM may incorporate the mitigation into the final use authorization where it will then become a requirement of the approved authorization.

The BLM may be able to approve mitigation for a new authorization without detailed analysis in a new NEPA document if the BLM has adequately evaluated the mitigation in an existing NEPA document, such as a land use plan/EIS or programmatic NEPA document. (See BLM NEPA Handbook H-1790-1, Chapter 5, Using Existing Environmental Analyses).

18. Managing Mitigation Outside the Area of Impact.

- a. **Implementation Monitoring.** The BLM's decision document that identifies mitigation requirements for the authorization holder should also identify the monitoring that the BLM, another agency, or authorization holder will take to ensure the mitigation is implemented as designed and remains effective.¹
- b. **Implementation Tracking.** The BLM's decision should identify how tracking of the mitigation will occur.
- c. **Responsible Party and Oversight.** The BLM's decision should identify whether the BLM, another agency, or the authorization holder is responsible for monitoring the effectiveness of mitigation and whether the BLM must receive monitoring reports. If the authorization holder is responsible for the project's monitoring, the BLM or other agency should provide oversight inspections to ensure the responsible party has implemented and maintained the projects as designed.
- d. **Performance Bonding.** For mitigation projects implemented by the authorization holder, the applicant must provide the BLM with an adequate performance bond expressly covering the approved mitigation, monitoring, and foreseeable follow-up actions. For example, statewide or nationwide bonds covering only oil and gas operations are not adequate to assure compliance with approved mitigation that occurs outside of the lease.
- e. **Implementation and Monitoring Plan.** For mitigation projects implemented by the authorization holder, the BLM may condition the authorization with a requirement for a Mitigation Implementation and Monitoring Plan. The plan will be subject to the BLM's review and approval prior to the authorization holder receiving a "notice to proceed" from the BLM. The plan should address long-term project monitoring, adaptive management (e.g., corrective actions), and maintenance responsibilities, if applicable, including performance objectives, methods for measuring effectiveness/success, reporting requirements, funding source, and responsible parties.
- f. **Enforcement.** If the authorization holder does not satisfy any mitigation requirements in accordance with the authorization, the BLM may suspend or terminate the authorization or the holder may forfeit or relinquish the

¹ For additional guidance on monitoring, refer to: Executive Office of the President, Council on Environmental Quality *Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact* January 14, 2011 (http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf).

authorization. If operations have already begun, but mitigation has not been undertaken in accordance with the authorization, the BLM will initiate an appropriate enforcement action, such as a “notice of noncompliance,” giving the holder a specific time to come into compliance. In appropriate circumstances, the BLM could pursue penalties for violations, including cancellation of the authorization. In appropriate circumstances, the BLM may also attach (access) the project or authorization bond if one exists.

19. Types of Contributions. In addition to onsite mitigation, the applicant may agree to perform mitigation outside the area of impact by implementing mitigation projects and measures directly (labor), purchasing private land or conservation easements, and/or contributing financially to a mitigation fund.

Financially contributing to a mitigation fund involves one or more payments to a natural resource management agency, foundation, or other appropriate organization for performance of mitigation that addresses the impacts of the land-use authorization. As with all forms of mitigation outside the area of impact, the BLM must identify a reasonable relationship between the resources and values affected by the authorization and the resources and values benefitted by the mitigation (here, a financial contribution).

20. The BLM’s Acceptance of Monetary Contributions. Subject to the requirements of part a., below, the BLM may accept an offer of monies from an applicant to fund specific mitigation projects, either on or off BLM-managed lands. The BLM may also accept an offer of monies from individual applicants for pooling funds towards completion of larger mitigation efforts. This is especially efficient for mitigating the impact of multiple actions when it is not feasible to require individual applicants to manage their own mitigation projects. The BLM will not, however, allow unnecessary or undue degradation onsite even if mitigated through payment of monies.

The BLM may use monetary contributions for implementing mitigation projects and measures (including purchases of land and conservation easements), associated monitoring, adaptive management (e.g., corrective actions), and administrative costs. In order to qualify, the funds collected must be identified for specific mitigation projects. The decision document must be specific regarding what types of mitigation projects and measures the BLM will fund and how the projects will contribute to BLM resource and value objectives.

- a. Managing Monetary Contributions. When the applicant makes monetary contributions directly to the BLM, a formal agreement is necessary and must have the prior approval of the BLM State Director.
 - i. BLM-managed Lands. The BLM may receive, manage, and expend funds for mitigation measures taking place on public lands under the authority of FLPMA Section 307(b), which provides the authority to enter into contracts and cooperative agreements, and FLPMA Section 307(c), which provides the authority to accept contributions or donations of money for management and

protection of the public lands. The BLM also has authority to enter into certain cooperative agreements for mitigation measures under the Wyden Amendment.² The mitigation measures for which the BLM may expend contributed funds under the Wyden Amendment are limited to activities involving the protection, restoration, and enhancement of fish and wildlife habitat and other resources or for the reduction of risk of natural disaster where public safety is threatened that also benefit resources on public lands within the watershed.

Example: Based on the expected need for native plant materials, the applicant may contribute funding to support the BLM's Native Plant Materials Development Program, or provide for the collection and long-term storage of rare plant species in the Center for Plant Conservation's National Collection of Endangered Species.

- ii. Non-BLM-managed Lands. In more limited circumstances, the BLM may also receive and manage funds for mitigation activities on non-BLM lands (including other Federal, Tribal, State, or private lands. Before accepting money intended for expenditure on non-BLM lands, managers must confirm that they have sufficient authority to accept and expend funds in the proposed manner. This authority may be found in the Wyden Amendment in combination with the BLM's authority to accept contributions or donations of funds under Section 307(b) of FLPMA. Absent additional specific legislative authority, when accepting funds intended for activities that will take place on non-BLM-managed lands, the BLM's authority is limited to the scope of activities authorized by the Wyden amendment, as listed in E.(5)(a) above. There must be an agreement reflecting the assent of necessary parties to the proposed mitigation, which must include the non-Federal landowner (if applicable) and the State or Federal agencies with regulatory responsibility for the affected resource.
- iii. Form 4120-9. The funds to perform mitigation measures must be properly recorded on Form 4120-9 ("Proffer of Monetary Contributions") and deposited into the appropriate 7100 account

² The Wyden Amendment, 16 U.S.C. 1011, provides: "For fiscal year 1997 and each fiscal year thereafter appropriations made for the Bureau of Land Management ... may be used by the Secretary of the Interior for the purpose of entering into cooperative agreements with the heads of other Federal agencies, Tribal, State, and local governments, private and nonprofit entities, and landowners for the protection, restoration, and enhancement of fish and wildlife habitat and other resources on public or private land and the reduction of risk from natural disaster where public safety is threatened that benefit these resources on public lands within the watershed."

(usually 7122) for redistribution for activities on BLM or other lands to offset adverse impacts for a particular action or class of actions.

- iv. Project Codes. Accounts for mitigation measures require assignment of specific project codes to track the contributions and subsequent expenditures. State office budget staff can provide assistance in establishing the project codes.

21. Financial Contribution Agreements.

- a. Mitigation or financial contribution agreements must address the following items:

- i. Authority to enter into an agreement;
- ii. Disposition of excess funds, if any;
- iii. Project codes and tracking of funds incoming and outgoing (especially in the case of multiple contributors);
- iv. Administrative surcharges;
- v. Other agency rules and requirements for agency cooperators; and
- vi. Adequacy of funds for specific mitigation projects.

- b. Agreements may also address:

- i. Identification of specific projects or types of projects;
- ii. Project implementation commitments and timelines; and
- iii. Project progress reports.

22. The Role of Agency Cooperators. It is usually appropriate to involve cooperating agencies (such as State fish and wildlife agencies) and other interested parties in planning and implementing specific mitigation projects. However, the BLM must retain decision-making authority for projects conducted on BLM-managed public lands. In undertaking cooperative efforts, the authorized officer must ensure compliance with the Federal Advisory Committee Act (FACA), if applicable. (For additional information, refer to Appendix B of the BLM *Land Use Planning Handbook* (H-1601-1).)

23. Non-Federal Parties Managing Mitigation on Non-Federal Lands. Non-Federal parties may carry out mitigation on non-Federal lands when the resource impact is on lands managed by the BLM. In such circumstances, the BLM's role is to consider the proposed mitigation in its authorization decision, as well as to ensure the non-Federal party informs the BLM on the progress and/or completion of proposed mitigation measures and the effectiveness of the measures over the life of the project.

- a. Third-Party Fund Management. A third party, such as a State natural resource management agency, foundation, or other appropriate organization, may hold or manage funds for mitigation on non-Federal lands. The applicant should enter into an agreement with the third-party recipient and the relevant regulatory agency(s) documenting the purposes for which the funds will be used. The

applicant must include a copy of the agreement with the project application for the BLM's approval.

Example: The applicant may make payment to a BLM-approved organization based on the number of acres of sage-grouse habitat that will be disturbed in exchange for a commitment from the recipient to apply the funds toward appropriate sage-grouse core habitat protection or restoration projects.

- b. **The BLM's Role.** The BLM will not assume, by agreement or otherwise, control over the use of such funds. This includes direct control, such as by the controlling vote in a decisionmaking group, or constructive control, such as by having the power to veto an expenditure decision. The BLM may participate, however, in decisions as to their use, so long as the BLM does not have ultimate decisionmaking authority. The purpose of this restriction is to ensure that such funds do not inadvertently become Federal funds and thereby subject to Federal rules governing their expenditure.

E. The BLM's Mitigation Authority.

1. **General.** The intent of this manual section is to provide guidance regarding the planning and implementation of mitigation conducted outside the area of impact, and in particular, planning and implementing a regional approach to mitigation. In addition to the guidance provided herein, the BLM must consider individual projects or authorizations in the context of the particular law, regulation, and policy applicable to that project or authorization. The applicable law, regulation, or policy may provide additional or different authority for the consideration and use of mitigation.
2. **Federal Land Policy and Management Act of 1976.** The BLM's authority to address the mitigation of impacts on public lands associated with a use authorization issued by the BLM derives from FLPMA. In FLPMA, Congress declared that it is the policy of the United States that "management be on the basis of multiple use and sustained yield" FLPMA §102(a)(7), and "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource and archeological values..." (FLPMA §102(a)(8), 43 U.S.C. 1701(a)(8)). The development and revision of land use plans also includes the consideration of "...the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;" (FLPMA §202 (c)(6)). In addition, the use, occupancy, and development of public lands must be regulated by the Secretary, subject to other applicable laws, through easements, permits, leases, licenses, or other instruments (FLPMA §302(b), 43 U.S.C. 1732(b)). The laws governing specific uses of the public lands such as the Mineral Leasing Act of 1920, as amended, contain additional authority.

Note: The FLPMA requires the BLM to take action "...to prevent unnecessary or undue degradation of the lands..." (FLPMA Section 302(b), 43 U.S.C. 1732(b)). The BLM does not allow unnecessary or undue degradation on the public lands and it, therefore, must either deny authorization for a project that will result in unnecessary

or undue degradation or require onsite mitigation such that the proposal will no longer cause unnecessary or undue degradation. Because mitigation that is conducted outside the area of impact does not directly mitigate impacts onsite, mitigation outside the area of impact may not be used to compensate for unnecessary or undue degradation onsite.

3. Limitations on the Use of this Guidance. This guidance may supplement, but does not replace, mitigation requirements that may result from formal consultation under law or regulation, such as Section 7 of the Endangered Species Act, the National Historic Preservation Act, or wetlands mitigation requirements available to other agencies under the Clean Water Act.

In instances related to development of minerals where ownership of the surface and minerals estates are split (i.e., split estate), it is BLM policy to provide for reasonable onsite mitigation to reduce impacts to non-Federal surface resources. However, the guidance in this manual section for mitigation outside the area of impact does not apply in split estate situations unless the non-Federal surface resource is also closely associated with the management of the same resource on nearby BLM-managed surface lands. An example would be the interdependence of wildlife populations and habitat across private and Federal surface lands that are in close proximity.

Because the BLM has limited discretion to disapprove proposed plans of operation or proposed use or occupancy under the Mining Law of 1872 that will not cause unnecessary or undue degradation, the mitigation policy in this manual section does not apply to authorizations under 43 CFR subparts 3809 or 3715. However, mining claimants may voluntarily commit to mitigation projects and measures outside the area of impact, and these commitments will receive appropriate analysis.

1.7 File and Records Maintenance.

[Reserved]