APPENDIX E

BLM INTERIM OFFSITE COMPENSATORY MITIGATION FOR OIL, GAS, GEOTHERMAL AND ENERGY RIGHTS-OF-WAY AUTHORIZATIONS

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

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To: All State Directors and Field Managers

From: Director

Subject: Interim Offsite Compensatory Mitigation for Oil, Gas, Geothermal and Energy Rights-of-Way Authorizations

Purpose: This Instruction Memorandum (IM) outlines interim policy for the use of compensatory (offsite) mitigation for authorizations issued by the Bureau of Land Management (BLM) in the oil, gas, geothermal and energy right-of-way programs.

Background: Provisions of the Federal Land Policy and Management Act (FLPMA), including section 302(b) (43 U.S.C. §1732(b)), and of the Mineral Leasing Act, including section 17(g) (30 U.S.C. § 226(g)), provide BLM the authority to require mitigation in the oil, gas, geothermal and energy right-of-way programs. Mitigation measures are actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands and protect surface resources in the approval of surface use plans. Mitigation measures are oftentimes proposed by proponents seeking BLM authorizations. These measures, as part of a proposed action, are analyzed as part of BLM's compliance with the National Environmental Policy Act (NEPA). Mitigation, as defined by the Council on Environmental Quality (CEQ) for NEPA purposes in 40 CFR 1508.20, may include one or more of the following:

> *"(a) Avoiding the impact altogether by not taking a certain action or parts of an action;*
> *(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;*
> *(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;*
> *(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and*

(e) ***Compensating*** *for the impact by replacing or providing substitute resources or environments."* (emphasis added)

This IM addresses the last category—offsite compensatory mitigation of impacts by replacing or providing substitute resources or environments. The application of this IM is further limited to the oil, gas, geothermal and energy right-of-way programs.

The last time the BLM addressed offsite mitigation in national policy was during promulgation of revisions to 43 CFR 3809-Surface Management regulations for locatable (hardrock) minerals, 65 FR 69998 (November 21, 2000). The BLM explained in the preamble that in the case of minerals, "BLM will approach mitigation on a mandatory basis where it can be performed on site, and on a voluntary basis, where mitigation (including compensation) can be performed offsite" 65 FR 69998 at 70012.

Because of recent interest expressed by cooperating agencies, State governments, and the public regarding offsite mitigation in the energy programs, the BLM is providing this policy guidance.

Attachment 1 defines terms used in conjunction with compensatory mitigation. Also, other Department of the Interior agencies have well-developed compensatory mitigation policies and procedures. A discussion of those programs is contained in Attachment 2.

Policy: The BLM will approach compensatory mitigation on an "as appropriate" basis where it can be performed onsite and on a voluntary basis where it is performed offsite. Further, this IM is not intended to establish an equivalency of mitigation policy by the BLM (i.e. acre for acre).

Since this policy generally adds a new dimension in mitigation practice for both BLM and public land users, it is being issued as interim guidance. The policy will be reviewed and updated prior to the expiration date of this IM. We anticipate both internal and external feedback that will lead to improvements and policy modification.

<u>General</u>

- This IM is applicable only to oil, gas, and geothermal authorizations and energy right-of-way authorizations granted by the BLM. Energy right-of-way authorizations include oil and gas pipelines, electric transmission lines, and wind and solar energy authorizations. The IM does not apply to any other BLM program or activity.
- When an applicant's offsite mitigation proposal is part of the plan of development for an approved permit or grant, that mitigation will pass from being a voluntary proposal to becoming a requirement of the authorization. The applicant becomes committed to the offsite mitigation component once the authorization is granted.
- Offsite mitigation may be considered after application of other forms of onsite mitigation including best management practices (see also "Limitations" section).
- The BLM continues to have an obligation to ensure that actions do not result in unnecessary or undue degradation to the public lands. 43 U.S.C. §302(b).
- Offsite mitigation is to be entirely voluntary on the part of the applicant.

- When offsite mitigation is being considered as a design feature of the applicant's submission, BLM NEPA analysis should: 1) evaluate the need for offsite mitigation, 2) consider the effectiveness of offsite mitigation in reducing, resolving, or eliminating impacts of the proposed project(s), and 3) comparatively analyze the proposal with and without the offsite mitigation.
- The BLM may identify other offsite mitigation opportunities to address impacts of the project proposal, but is not to carry them forward for detailed analysis unless volunteered by the applicant.
- When applying offsite mitigation, it must be implemented in a timely manner and generally for the same or similar impacted species or habitats (for example, sagebrush/grassland for sagebrush/grassland).
- Offsite mitigation need not be permanent but should be of duration appropriate to the anticipated impact(s) being mitigated.
- This IM does not establish an equivalency requirement for offsite mitigation (no 1:1 compensation ratio).
- Any existing mandatory offsite mitigation programs used by Field Offices are to be reviewed in light of this national policy, and modified as appropriate.
- Offsite mitigation that has resulted from a formal Section 7 or Section 106 consultation is not affected by this IM.
- In cases where offsite mitigation is applied to an authorization to reduce impacts to less than "significant" for NEPA purposes the offsite mitigation must be committed and a condition of approval in the authorization issued.
- Offsite mitigation must not infringe on or affect other property rights including those of any mineral lessee of the offsite tract without agreement of affected parties.
- Offsite mitigation associated with a split estate lease must be in agreement with IM 2003-131 Permitting Oil and Gas on Split Estate Lands and Guidance for Onshore Oil and Gas Order No. 1.

Resource Management Plans

Older land use plans may not mention compensatory or offsite mitigation. Omission of such discussion does not prohibit consideration of offsite mitigation in accordance with this IM.

Endangered Species Act Section 7 Consultation

As mentioned earlier, any consultation with the U.S. Fish and Wildlife Service is subject to the applicable regulations and procedures for Endangered Species Act (ESA) consultation efforts. Any mitigation measures developed as a result of ESA consultation are not affected by the policies and procedures for use of offsite mitigation outlined in this IM.

National Historic Preservation Act Section 106 Consultation

Application of this policy to cultural resources must be consistent with the BLM's National Historic Preservation Act (NHPA) Section 106 responsibilities and individual BLM/State protocols under the BLM National Programmatic Agreement (PA). This includes any required coordination with the State Historic Preservation Office, tribes and the Advisory Council on Historic Preservation (ACHP). There are inherent limitations to the applicability of offsite mitigation to resolution of adverse effects under Section 106 of the NHPA. Cultural resources are non-renewable and may be unique, and it may not be appropriate to mitigate loss of such resource values by attempting to identify and preserve an alternative equivalent one. This is particularly true when data recovery is used as mitigation for loss of a site important for its data value, since it may result in the destruction of two sites. There are exceptions; for instance, where treatment onsite is technically impossible and an offsite resource is also at risk, or where offsite data recovery is part of an established research design and management strategy that will include onsite work.

Livestock Forage Mitigation

Impacts to livestock forage as a result of energy development are typically addressed through onsite mitigation using direct reclamation or rehabilitation techniques to re-establish the lost vegetation.

Financial Contributions toward Mitigation

In some circumstances, BLM may accept volunteered monies to pay for a larger effort to mitigate the impact of multiple actions when it is infeasible to require individual applicants to manage specific mitigation efforts. Such monies are to be used for on-the-ground projects. In order to qualify as offsite mitigation, the funds collected must be identified for specific types of mitigation projects and either the BLM or other parties may be identified as responsible for implementation of the project(s). However, it is not BLM policy to waive or forego onsite mitigation of impacts through payment of monies.

Where the effectiveness of mitigation will depend on future contributions from other applicants, such contributions cannot form the basis for a Finding of No Significant Impact or compliance with a legal limitation on effects, such as those in the Clean Air Act.

Whenever monies are handled either directly or indirectly by the BLM, pursuant to section 307(c) of FLPMA, a signed cooperative agreement will be required before any funds can be received or transferred. If a third-party organization agrees to accept voluntary funds from an applicant for funding of mitigation projects, the affected BLM office will enter into cooperative agreements with the affected parties (see BLM Manual 1511 and Manual Handbook 1511-1). The parties to the agreement must include the cooperators and the party or parties responsible for project implementation.

Monetary compensation can be made directly to the BLM in accordance with a formal cooperative agreement and with prior approval of the appropriate State Director. Compensation also must be properly recorded on Form 4120-9 ("Proffer of Monetary Contributions") and deposited in the appropriate 7100 (usually 7122) account for redistribution for offsite activities to offset adverse impacts for a particular action or class of actions. These accounts 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.

Cooperative agreements must also address the following items:

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

Field Offices are required to use a cooperative approach in approving projects where compensation funds are involved. It is usually appropriate to involve cooperators (e.g., State Game and Fish agencies) and any other directly affected parties in determining the specific mitigation projects. It is never appropriate for third parties to make these determinations without direct, local BLM involvement in the specific mitigation project. In undertaking cooperative efforts, the BLM needs to ensure compliance with the Federal Advisory Committee Act (FACA), if applicable.

Should the mitigation program provide for public input on offsite mitigation projects or the application of funds, Field Offices should be certain to comply with FACA when establishing a committee to provide it advice as a group, as opposed to the views of individual participants.

Attachment 3 is a list of "frequently asked questions" and appropriate responses for implementing this policy.

Limitations

Even with the most effective, state-of-the-art onsite mitigation, oil, gas, geothermal and energy right-of-way authorizations can result in impacts to the environment. The BLM will mitigate onsite impacts to the maximum extent practicable. Offsite mitigation is only appropriate when the specific conditions of a proposed project make such mitigation appropriate.

While the voluntary application of offsite mitigation is the general rule, there are circumstances where negotiation would be appropriate. In cases where one or more applicants in a specific geographic location have volunteered to perform offsite mitigation, it could be appropriate for other applicants in the same area to apply the same or similar offsite mitigation.

Timeframe: This IM is effective upon issuance. In instances where NEPA documentation is near completion for an action (e.g., preliminary Draft Environmental Impact Statement (EIS) is in the final stages of review), implementation of this policy may be modified to fit the specific circumstances so as not to delay publication of the EIS and approval of the project(s).

Budget Impact: None at this time.

Energy Impact: This IM may result in some increased costs to oil and gas and geothermal lessees, permittees, and operators and energy right-of-way holders. Because these parties would usually enter into offsite mitigation agreements voluntarily and with full knowledge of associated costs, it is unlikely that this policy would have any material adverse impact on energy supply, distribution, or use.

Manual/Handbook Sections Affected: None.

Coordination: Preparation of this IM was coordinated with WO-200, WO-300, WO-310, WO-350 and the Office of the Solicitor.

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Signed by:
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3 Attachments
1 - Definitions (1 p)
2 – Departmental Compensatory Mitigation Programs (1 p)
3 - Frequently Asked Questions (4 pp)

Definitions

Compensatory Mitigation: As defined by CEQ, this means compensating for the impact by replacement or providing substitute resources or environments. This offsite mitigation can be immediately adjacent to the area impacted but can also be located anywhere in the same general geographic area. It does not have to be juxtaposed.

Mitigation: The CEQ defines mitigation to include: (a) avoiding; (b) minimizing the impacts by limiting the magnitude or degree; (c) rectifying the impact by repairing, rehabilitating, or restoring; (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and (e) compensating for the impact by replacing or providing substitute resources or environments.

In-lieu-fee Mitigation: Payment of funds to a natural resource management entity (e.g., an agency or third-party organization) for implementation of specific projects designed to replace or substitute resources impacted by an authorized project. For the purposes of this Instruction Memorandum, its use would always require a formal agreement among affected parties and BLM.

In-kind Compensatory Mitigation: Replacement or substitute resources that are of the same type and kind as being impacted. For example, replacement with sagebrush habitat of the same general quality and species compensation as is being impacted by the project.

On-site mitigation: Mitigation of the actual area affected by the action causing the impact. For a comparative example, the reclamation of an abandoned well pad is onsite mitigation; compensatory mitigation in another area to offset the loss of vegetation during the life of that same well pad is defined as offsite mitigation.

Out-of-kind: Replacement or substitute resources that, while related and of a different quality, species mix, or even species type, are of equal or greater overall value to the ecology of the impacted species or ecological region. Example: Replacement of lost sagebrush with improved grazing practices on related habitat but not of the exact type and species mix. The net ecological values may be the same or better, but the acreages and species composition of the habitat would be substantially different.

Departmental Compensatory Mitigation Programs

Within the Department, the Fish and Wildlife Service (FWS) developed a formal mitigation policy as published on January 23, 1981, in the Federal Register (46 FR 7656). Compensatory mitigation is an integral part of that policy primarily as a means of habitat replacement, enhancement of in-kind habitats, or any combination of these and other impact-mitigating measures. Compensation of impacts can be either on- or off-site. The authorities for this policy span numerous Acts and Executive Orders, including mineral development statutes such as the Mineral Leasing Act of 1920, the Geothermal Steam Act of 1970 and the Surface Mining Control and Reclamation Act of 1977.

To address wetland impact mitigation through a structured program commonly referred to as "wetland banking," the Department promulgated "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks" on November 28, 1995, in the Federal Register (60 FR 58605). This policy was developed in cooperation with the Environmental Protection Agency (EPA), Natural Resources Conservation Service (NRCS), and the National Oceanic and Atmospheric Administration (NOAA) to address wetland impact mitigation through a structured program commonly referred to as "wetland banking." It represents a rather extensive means of onsite, offsite, in-kind and out-of-kind mitigation, as well as in-lieu-fee mitigation arrangements, all designed to compensate unavoidable wetlands losses.

Frequently Asked Questions

Q. "Can you provide an example of how compensatory mitigation could be applied to oil and gas operations?"

Response: A small oil and gas field has been operating for 20+ years without much change. However, over the next 10 years it is expected to expand several times its current size with many more wells, roads, and related infrastructure and with an increase in vehicular use (both public and private). Major residual impacts to crucial wildlife winter range are expected to remain even after best management practices are implemented.

Some compensatory mitigation options could include any combination of the following:

- A mitigation fund could be established in which all operators contribute. This fund could be held by the BLM or another party to be later used for specific on-the-ground mitigation projects. The projects could take several forms and include, for example, habitat enhancement in the same or general area. These projects could be located on public, private or State lands. (Note: This would require prior State Director approval before implementation.)
- Operators could choose to develop and implement offsite projects on their own, after BLM has determined that they in fact accomplish the needed mitigation.
- Critical habitats could be purchased and managed for the species of concern. These purchases could be made directly by the operators or by BLM using a mitigation fund.

Q. "How could compensatory mitigation apply to a wind energy right-of-way project on public lands?"

Response: A wind energy project is proposed on public lands that involves numerous wind turbines in excess of 200 feet in height along an exposed ridgeline, with access roads, electric transmission lines, and support facilities. Residual impacts to wildlife habitat from surface disturbance related to the facilities and visual resource impacts from the wind turbines are expected to remain even after best management practices are implemented.

Some compensatory mitigation options could include any combination of the following:

- The right-of-way holder could develop and implement offsite wildlife habitat improvement projects with the approval of BLM.
- Critical habitats or conservation easements could be purchased and managed for wildlife species of concern. These purchases could be made directly by the right-of-way holder or by BLM using contributed funds.
- The right-of-way holder could pursue rehabilitation, reclamation, or removal of existing disturbances or visual intrusions in the landscape setting to reduce the overall cumulative visual resource impacts in the area. This could involve the reclamation of existing unnecessary roads in the area, removal of abandoned buildings or other structures, cleanup of illegal dumps or trash, or the rehabilitation of existing erosion or disturbed areas.

- A mitigation fund could be established by the right-of-way holder for use by the BLM or the State game and fish department for on-the-ground wildlife habitat improvement projects in the general area. These projects could be located on public, private, or State lands. A formal cooperative agreement is required between the parties and must be approved by the State Director.

Q. "If an applicant submits a permit or right-of-way application, can he or she offer to pay a "damages" fee, and then proceed with the project as planned?"

Response: The short answer is "no." The BLM will not accept direct cash payment as a replacement of on-the-ground mitigation of impacts. However, Departmental policy does allow for collection of funds where those funds are used to improve, restore, or replace like habitats as part of a formal, structured agreement to implement a mitigation strategy determined effective in a NEPA document. The BLM has mandatory fiduciary requirements for the collection and use of such received funding (see Manual Handbook 1511-1).

Q. "As follow up to the above question, can the BLM accept an applicant's voluntarily proposed damage payments rather than do on-the-ground mitigation as is sometimes done on private lands?"

Response: No. The BLM always requires onsite mitigation of impacts using best management practices to the extent practicable. Cash payments to avoid onsite mitigation are not to be accepted and are not in accordance with Departmental or Bureau policy. However, in-lieu fee payments into a fund for mitigation projects can be an approved mechanism of compensatory mitigation. This would require a series of prior steps to be approved. As a minimum, the impact mitigation would have to be analyzed in a NEPA document; a cooperative agreement would have to be established between the BLM and affected parties; and a clear procedure developed for the use of such funds for on-the-ground development of compensatory mitigation projects directly related to cumulative or individual project impacts.

Q. "Does this compensatory mitigation policy apply to range projects developed by the BLM and funded by the 8100 accounts?"

Response: No. Range projects and other Bureau programs are not subject to this compensatory mitigation policy IM.

Q. "Does this policy apply to special recreation permits or other authorizations not related to oil and gas, geothermal, or energy rights-of-way?"

Response: No. At the current time, this policy only applies to oil, gas, or geothermal authorizations or energy rights-of-way. Expansion of the policy to other programs may be considered in the future.

Q. “How does the compensatory mitigation policy apply to impacts to cultural sites?”

Response: Consultation with the State Historic Preservation Officer and/or the Advisory Council on Historic Preservation guides any possible use of compensatory mitigation. Those consultation efforts will determine if and when compensatory mitigation is to be considered.

Q. “Does the BLM anticipate this new policy will result in a structured policy similar to the wetlands banking process?’

Response: No.

Q. “How does this policy IM apply to replacement habitat off site?”

Response: When selecting lands or resources as replacement or substitute, the lands must be located so as to protect, restore, or enhance the impacted resources. To protect any investments made as a compensatory mitigation measure, the land ownership (including lease rights) must be generally sufficient for the term of the impact and free from encumbering prior rights. It is very important that lands selected not become encumbered by a compensatory mitigation measure that would preclude or substantially affect existing rights. When compensatory mitigation occurs on non-Federal land, there must be a legally enforceable method to assure that mitigation measures would remain in place and that mitigation measure effectiveness would not be compromised until the mitigation objectives are reached. This latter point may require binding agreements with the parties involved to avoid loss of impact mitigation.

Q. “How does compensatory mitigation apply to Visual Resource Management (VRM)?”

Response: Compensatory mitigation can be considered when it is not possible to design or mitigate a project sufficiently to meet VRM classes. This could take the form of actual rehabilitation of existing disturbance or development where such remedial actions would reduce the overall cumulative impacts to the visual resources of a particular setting.

Q. “Does off-site mitigation affect the unnecessary and undue degradation provision of FLPMA?”

Response: While the offsite mitigation proposal may be used for NEPA analysis, BLM still has an obligation to ensure that an approved action does not result in unnecessary or undue degradation of public land resources.

Q. “Does compensatory mitigation include direct payments or compensation to the livestock permittee for loss of grazing uses on a grazing permit?”

Response: No. The BLM and Federal courts have consistently held that livestock grazing is a privilege and not a right. When a grazing permit or lease is reduced for whatever reason, no monetary compensation is provided by the BLM or any other BLM permittee. The only time compensation is referenced at 43 CFR 4120.3-6(c), which states in part:

"Whenever a grazing permit or lease is cancelled…the permittee or lessee shall receive from the United States reasonable compensation for the adjusted value of their interest in authorized permanent improvements placed or constructed by the permittee or lessee on the public lands covered by the cancelled permit or lease. The adjusted value is to be determined by the authorized officer. Compensation shall not exceed the fair market value of the terminated portion of the permittee's or lessee's interest therein."