



United States Department of the Interior  
OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

April 15, 2022

M-37075

Memorandum

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

From: Solicitor

Subject: Withdrawal of M-37046 and Reinstatement of M-37039, “The Bureau of Land Management’s Authority to Address Impacts of its Land Use Authorizations Through Mitigation”

On December 21, 2016, the Solicitor issued M-37039, which concluded that the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701–1787, provides the Secretary and the Bureau of Land Management (BLM) with authority to “identify and require appropriate mitigation,” and that “[s]uch mitigation may . . . consist of compensatory mitigation on either public lands or private lands having a connection to resources on public lands—regardless of their geographic proximity with public lands—so long as such mitigation on private lands occurs with the consent of the property owner.”<sup>1</sup> On February 6, 2017, the Acting Secretary suspended and temporarily withdrew that opinion pending a review by the new administration and a determination as to whether the opinion should be reinstated, modified, or revoked.<sup>2</sup> On June 30, 2017, the Solicitor issued M-37046 that revoked and withdrew M-37039.<sup>3</sup> For the reasons set forth below, I now revoke the Jorjani M-Opinion and reinstate the Tompkins M-Opinion.

The Jorjani M-Opinion revoked and withdrew the Tompkins M-Opinion for two reasons. First, the Jorjani M-Opinion explained that there was no longer a need for the Tompkins M-Opinion, as it had been issued primarily to assist the BLM in implementing Secretary’s Order (S.O.) 3330, *Improving Mitigation Policies and Practices of the Department of the Interior* (Oct. 31, 2013), which had been revoked by a subsequent Secretary’s Order, S.O. 3349, *American Energy Independence* (Mar. 29, 2017). Now, *American Energy Independence* has itself been revoked. Additionally, on January 20, 2021, the President issued Executive Order (E.O.) 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, which, among other things, establishes a policy for Federal executive departments and

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<sup>1</sup> Solicitor’s Opinion M-37039, *The Bureau of Land Management’s Authority to Address Impacts of its Land Use Authorizations through Mitigation* (Dec. 21, 2016) (“Tompkins M-Opinion”).

<sup>2</sup> *Temporary Suspension of Certain Solicitor M-Opinions Pending Review*, 2017 WL 7805658 (Feb. 6, 2017).

<sup>3</sup> Solicitor’s Opinion M-37046, *Withdrawal of M-37039, “The Bureau of Land Management’s Authority to Address Impacts of its Land Use Authorizations through Mitigation,”* 2017 WL 9288208 (Jan. 30, 2017) (“Jorjani M-Opinion”).

agencies “to improve public health and protect our environment,” and directs them to immediately review and, as appropriate and consistent with applicable law, take action to promote the objectives in E.O. 13990. It is therefore necessary to clarify the BLM’s authority to address impacts of its land use authorizations through mitigation.<sup>4</sup>

Second, the Jorjani M-Opinion asserted that it was appropriate to withdraw the Tompkins M-Opinion “because it attempted to answer an abstract question – whether BLM generally has authority to require mitigation when authorizing uses of the public lands” – and therefore its “general analysis and conclusion does not provide practical, specific legal guidance that the BLM can meaningfully apply to specific factual and legal circumstances.” But Solicitor’s Memorandum Opinions exist across a range of generality depending on the approach the issuing Solicitor determines is appropriate to the needs of the client. Without expressing any view as to their merits or conclusions, some examples of Memorandum Opinions that address general legal questions include: M-36984 “Excess Reserves Under the Mining Law” (Mar. 22, 1996); M-37008 “Authority for the Bureau of Land Management to Consider Requests for Retiring Grazing Permits and Leases on Public Land” (Oct. 4, 2002, clarified May 13, 2003); M-36987 “BLM’s Authority to Recover Costs of Minerals Document Processing” (Dec. 5, 1996).

Notwithstanding the Jorjani M-Opinion’s description of the Tompkins M-Opinion as offering a general analysis, the Jorjani M-Opinion expresses no views regarding the merits of the legal analysis or conclusions contained in the Tompkins M-Opinion, which I now reaffirm as correct for the reasons stated therein.<sup>5</sup> Indeed, the Jorjani M-Opinion concurs with the Tompkins M-Opinion to the extent that both opinions recognize that the “BLM’s actual authority to implement mitigation – or a particular type of mitigation – is dependent on the factual circumstances and the legal and regulatory authority for a specific authorization.”

In view of the continuing validity of these principles, and to assist the BLM in reviewing and implementing actions consistent with E.O. 13990, I hereby revoke and withdraw the Jorjani M-Opinion and reinstate the Tompkins M-Opinion. Because other laws may import yet other considerations to the BLM’s management of the public lands, should 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 context with appropriate assistance from the Solicitor’s Office.

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Robert T. Anderson  
Solicitor

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<sup>4</sup> The scope of the BLM’s authority under FLPMA to condition its authorizations – including to require mitigation – arises in the normal course of the BLM’s management of the public lands independent of applicable Secretary’s Orders or other guidance. This is especially so when the BLM evaluates reasonable mitigation measures, as required by the Council on Environmental Quality’s regulations implementing the National Environmental Policy Act. 40 C.F.R. § 1502.14(e). Accordingly, legal guidance regarding the scope of that authority is appropriate even in the absence of applicable Secretary’s Orders or other policies regarding mitigation.

<sup>5</sup> See also Justin R. Pidot, *Compensatory Mitigation and Public Lands*, 61 B.C. L. REV. 1045, 1110 (2020) (explaining how compensatory mitigation “fits comfortably within the authority that FLPMA delegates to the BLM”).