



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JUN 30 2017

M-37046

Memorandum

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

From: Principal Deputy Solicitor appointed as Acting Solicitor

Subject: Withdrawal 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,” including, “in certain circumstances, mitigation that results in a net conservation benefit.” 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. For the reasons set forth below, I now revoke and withdraw M-37039.

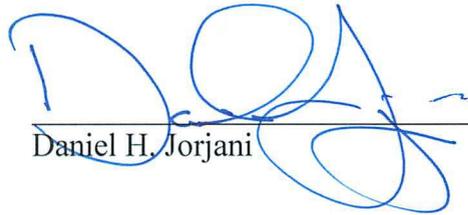
M-37039 was primarily issued to assist BLM in implementing Secretary’s Order 3300 (S.O. 3300), Improving Mitigation Policies and Practices of the Department of the Interior.¹ On March 29, 2017, S.O. 3300 was revoked by Secretary’s Order 3349 (S.O. 3349), American Energy Independence, and all implementing actions, including those of the BLM, are currently undergoing review and, if appropriate, revision or revocation as directed by S.O. 3349. Given that S.O. 3300 has been revoked and the BLM is reviewing whether and how to revise its Mitigation Manual and Handbook, the need for issuing M-37039 has been eliminated and its withdrawal is therefore appropriate. At the completion of the review and revision process envisioned by E.O. 3349, this office will determine whether a new M-Opinion is needed to assist BLM or other Bureaus in implementing any revised policies.

Withdrawal of M-37039 is also appropriate because it attempted to answer an abstract question – whether BLM generally has authority to require mitigation when authorizing uses of the public lands – without the context of specific factual circumstances or application of specific statutory

¹ See M-37039, Part I. Pursuant to the direction of S.O. 3300, a Departmental Mitigation Policy was published as a chapter of the Department Manual, 600 DM 6. The BLM developed a Mitigation Manual, MS-1794, and Mitigation Handbook, H-1794-1, to provide BLM-specific policy guidance implementing the Departmental Mitigation Policy. M-37039 was issued to assist BLM in implementing its new Mitigation Manual and Handbook

and regulatory provisions governing a particular authorization or *type* of authorization. As the opinion recognizes,² BLM's authority to implement a particular type of mitigation is dependent on the factual circumstances and the legal and regulatory authority for a specific authorization. For example, BLM's authority to place terms and conditions on rights-of-way issued under Title V of FLPMA, 43 U.S.C. §§ 1761-1771, is different than its authority to condition oil and gas development under the Mineral Leasing Act, 30 U.S.C. §§ 187-287. Especially in the latter circumstance, BLM's authority may differ depending on whether it seeks to place conditions on such development during the leasing stage or condition applications for permits to drill on an existing lease. *See* 43 U.S.C. § 1701 notes (a), (h) (providing that FLPMA shall not be construed as terminating a valid lease or other land use right or authorization existing on the date of the approval of FLPMA and that all actions by BLM under FLPMA are subject to valid existing rights).

Given the numerous fact-specific factors that influence BLM's authority to implement mitigation measures, M-37039's general analysis does not provide practical, specific legal guidance that BLM can meaningfully apply to specific factual and legal circumstances. Accordingly, I hereby withdraw the opinion. 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.



Daniel H. Jorjani

² *See* M-37039, Parts III.B.5 and Part IV.