The Need for Clarity and Durability to Promote Restoration and Mitigation on Public Lands

by Sara Brodnax

Context:

Restoration and mitigation are well-established processes to recover landscapes that have been degraded. Both restoration and mitigation commonly take place on private and public lands. Conservation easements, contracts, and leases are all mechanisms regularly used on private lands—and, to a more limited extent, public lands—for the purposes of supporting restoration, mitigation, stewardship, and landscape health. On federal public lands, individuals, agencies, or organizations conducting restoration work need permission in the form of contracts or agreements such as stewardship contracting. Restored, healthy lands provide benefits such as more productive soils and forage, cleaner air and water, resilience to fires and floods, and more abundant wildlife.

Prior to the publication of the Bureau of Land Management (BLM) 2024 Conservation and Landscape Health Rule, known as the Public Lands rule, the BLM had the authority to issue restoration and mitigation leases but lacked formal regulations and had only limited guidance in manuals or policies to direct BLM field offices on administration. In particular, the BLM lacked regulations specifying how to ensure durability for restoration and mitigation projects on public lands. As a result, interest in these types of projects on public lands was limited. Consequently, the impacts of development on public lands are being offset with benefits on private lands, if at all.

Conclusions:

Although Secretarial Order 3418, Unleashing American Energy (February 2025), gives direction to suspend, revise, or rescind the BLM Public Lands Rule, any such changes will most likely be subject to public comment and administrative process to determine the most appropriate path forward. Policies and mechanisms that provide durability are key to facilitating restoration and mitigation on public lands. Ensuring durability through policy and guidance could create opportunities to bring new funding, partnerships, and benefits to support the restoration of degraded public lands. This may also represent one of the few opportunities to secure additional funding for public lands outside of congressional appropriation.

Implications:

Elected officials, the BLM, state and Tribal agencies, and stakeholders should work together to ensure that durable mechanisms are available to allow for restoration and effective mitigation on public lands as currently exists on private lands. Consideration should also be given to the complementary nature of grazing leases and restoration leases, the role of balanced land use planning, and the need for approaches that bring federal, state, and local entities, resources, and planning together.

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Current context for restoration and mitigation

Restoration generally refers to ecosystem restoration, which means taking action to recover landscapes or ecosystems that have been degraded. Restoration may be needed to recover or stabilize land after either human action or natural disturbance. Restoration is generally regarded as different from reclamation, when an entity (such as a project developer) undertakes restoration for the purpose of reclaiming an area from a disturbance caused by an operation (such as a spent oil and gas well or a mine). Restoration can include many types of actions, such as actively replanting native species, changing water flows, or employing managed grazing to improve land health. Restored, healthy lands provide benefits such as more productive soils and forage, cleaner air and water, resilience to fires and floods, and more abundant wildlife.

Restoration currently takes place frequently on both private and public lands. On private lands, a conservation district, government agency or nonprofit organization might agree to fund or conduct restoration activities to reduce fire risk or improve wildlife habitat through a contract or habitat lease with a landowner who agrees in exchange to maintain those benefits for a certain period of time. Voluntary programs like the United States Department of Agriculture Working Lands for Wildlife program or the United States Fish and Wildlife Service (USFWS) Partners for Fish and Wildlife are examples of programs that provide incentives to private landowners who wish to take on restoration activities that benefit wildlife on private lands.

On federal public lands, permission in the form of a contract or agreement is needed for individuals or organizations to conduct work. For example, Good Neighbor Authority allows the United States Forest Service (USFS) or the BLM to enter cooperative agreements with state, county, or Tribal agencies to do restoration work on federal public lands. Similarly, stewardship contracting allows the USFS or the BLM to enter contracts with state or local government entities, nonprofit organizations, or individuals to conduct restoration activities that improve the resilience of federal forests or rangeland. NGOs and local government entities such as conservation districts regularly conduct work on BLM lands to remove invasive species, enhance wildlife habitat, improve forage, or otherwise take action to ensure that public lands are healthy.

Mitigation is a well-established process that prioritizes avoiding damage to lands or resources from development. When avoidance is not possible, impacts are minimized, and, if unavoidable impacts remain, then those impacts are compensated for through land offsets or other forms of compensatory mitigation. This multistep, ordered process is known as the mitigation hierarchy. Properly siting development and infrastructure, minimizing damage through best practices, and repairing any impacts that cannot otherwise be avoided protects against the loss of valuable natural resources.

Compensatory mitigation, also often referred to simply as "mitigation," is actually the final step in the mitigation hierarchy, to be undertaken when impacts cannot be avoided or minimized. Compensatory mitigation involves permitting damage to public lands and resources and then offsetting the impacts, typically by acquiring, protecting, or restoring land or resources elsewhere (usually private lands) to replace the resource values that were lost. Compensatory mitigation allows development projects to move forward in ways that provide certainty for industry and ensure the landscape remains healthy for future generations.

Federal and state agencies use mitigation and compensatory mitigation all the time. Federal laws that authorize compensatory mitigation include the Endangered Species Act (ESA), for permitting loss of endangered and threatened species and their habitats (through the USFWS), the Clean Water Act, for permitting loss of wetlands (through the Environmental Protection Agency (EPA)), and the Clean Air Act, for permitting the release of air pollutants (through the EPA). State agencies also require and implement mitigation and compensatory mitigation to meet federal requirements (such as state departments of transportation mitigating impacts to species or wetlands to meet the requirements of federal law) and state requirements (such as state wildlife agencies permitting projects in accordance with the requirements of state-level species laws).

Compensatory mitigation can also be entirely voluntary and not associated with any federal or state regulatory entity. An example of this is the voluntary standards for biodiversity offsets that the Business and Biodiversity Offsets Programme (BBOP) prepared to help developers, conservation groups, communities, governments, and financial institutions that wish to assess biodiversity offsets.

The BLM uses mitigation when authorizing infrastructure, development or extractive uses of BLM-managed lands to address the impacts of the project such as loss of habitat or wetlands. Legal opinions on the agency's authority to require mitigation continue to fluctuate with changing political administrations. For more information, see "The Bureau of Land Management's Infirm Compensatory Mitigation Policy" in the Fordham Environmental Law Review. Despite the fluctuation, the BLM has long included compensatory mitigation requirements in land use planning and management decisions. For example, mitigation was a cornerstone of the Greater Sage-Grouse plans, a landmark effort first put in place in 2015 to protect the iconic bird. The mitigation commitments in the federal plans were part of the USFWS's decision not to list the Greater Sage-Grouse as threatened or endangered under the ESA.

The need to ensure durability of restoration and mitigation on public lands

Durability, the idea that measures are designed such that benefits to a resource are lasting, is a key concept in restoration and mitigation. For compensatory mitigation in particular, measures must be in place for at least as long as the duration of the impacts that the project is designed to offset. Durability can be achieved, to varying degrees, through easements, contracts, and leasing; all three are regularly used on private lands. Leasing is the most likely mechanism to provide durability on public land.

Conservation easements are a long-established tool for durable conservation on private lands and are commonly used in combination with compensatory mitigation. Conservation easements are typically permanent in duration. Conservation banks (for species) and mitigation banks (for wetlands) generally rely on easements to ensure natural resources are protected in perpetuity. In contrast, contracts or leases, generally limited in duration, are commonly used to support restoration efforts on private lands and, in some limited circumstances, as part of compensatory mitigation strategies.

Leases provide a mechanism for ensuring conservation durability on public lands. Some states have established policies or programs that enable mitigation, restoration, or stewardship leases on state trust

lands. For example, the Colorado State Land Board undertakes ecosystem services projects on state trust lands, including mitigation markets for water and wildlife. Similarly, the BLM has used leases and rights-of-way to durably conserve public lands. For example, in 2015, the BLM put in place a Durability Agreement to support the mitigation provisions of the Desert Renewable Energy Conservation Plan (DRECP).

Prior to the publication of the BLM Public Lands rule, the BLM had the authority to issue leases for conservation but lacked formal regulations and had only limited guidance in manuals or policies for field offices on how to implement them. As a result, these types of projects were infrequent. Notably, the BLM had no established rules to ensure the long-term durability of restoration and mitigation projects on public lands. This resulted in several limitations including:

- ***Lack of commitment to long-term restoration projects:*** The BLM had no ability to commit to multiyear restoration projects on BLM-managed public lands. This was a critical gap, as many restoration efforts, such as repeated removal of invasive species removal, require ongoing work. Any entity undertaking a conservation project on public lands needed certainty that the project could continue as necessary.

- ***Unclear mechanisms for managing restoration and mitigation funds:*** There was no clear guidance on how to receive or manage funds for restoration or mitigation. This was particularly important because financial assurances, such as bonds, may be needed to guarantee project continuity. The BLM lacked a consistent framework to determine whether entities were qualified to hold and manage such funds.

- ***No obligation to maintain project benefits:*** There was no requirement to sustain the benefits of a restoration or mitigation project for any defined period. If a government agency, nonprofit organization, or industry developer invested in improving a site on public lands, there was no mechanism to ensure those improvements would be preserved. Further, there was no protection against future incompatible development at the same location, meaning mitigation or restoration investments could be lost. In cases where a site was used as a mitigation offset for a permitted project, this lack of durability could even expose developers to legal risks if the mitigation benefit was later negated.

For all of these reasons, without mechanisms to ensure durability, interest in conservation projects on public lands was limited. Oil and gas development, mining, and other land uses that have permanent and compounding impacts on the landscape continued to be authorized to move forward, yet there was no comparable mechanism in place to ensure lasting benefits for wildlife and natural and scenic values. The lack of certainty for public land that is intact and resilient presents unacceptable risks to irreplaceable resources and ecosystems that are essential to overall ecological health, wildlife migration, recreation and cultural practices.

Consequently, the lack of mechanisms to ensure durability on public lands has pushed restoration and compensatory mitigation efforts onto private lands. This means that the impacts from development on public lands are being offset with benefits on private lands, if at all. This can be an issue especially in places where there are a limited number of private lands available in proximity to where an impact has occurred. This issue is especially problematic in states with state-run mitigation programs that rely on compensatory

mitigation for project permitting but have limited acres of privately-owned lands available. For example, in Nevada, where over 85% of the land is federally managed, opportunities for mitigation on private lands are constrained. Expanding mitigation options to include public lands would not only help state-run programs and developers by addressing supply limitations and reducing costs, but would also allow for restoration and mitigation efforts to take place where degradation is occurring – on the public lands themselves.

Lack of interest in these types of projects is also a lost opportunity for much-needed funding. Federal funding constraints are a persistent challenge for public land management, which operates on tight agency budgets, faces ongoing budget cuts, and has limited resources for conservation and restoration. Many BLM-managed public lands require significant investments in infrastructure and restoration, including fire mitigation and invasive species removal. Restoration and mitigation leases present a rare opportunity to secure new funding for public lands beyond congressionally designated appropriations, helping to address critical needs.

Leasing for durable restoration and mitigation on public lands

The BLM Public Lands Rule aimed to address the durability question by establishing mechanisms for restoration and mitigation leasing and providing guidance to ensure their lasting impact. Under that guidance, restoration leases would have a durability of up to 10 years with potential for renewal if the restoration continues, and mitigation projects must be in place for the life of the project. The rule also provided direction on ways to manage funding and ensure that benefits to the resource would be maintained and continue into the future.

Leasing offers this while leaving current uses unaffected. Under the BLM's authority under FLPMA, a restoration or mitigation lease cannot be used to remove grazing or other valid existing uses of the land. The BLM must ensure that such leases align with the applicable land use plan, are compatible with existing valid uses, and have the agreement of any current permit or lease holders before moving forward.

With this type of guidance, a range of stakeholders could invest in restoration and mitigation projects by funding a lease. Nonprofit organizations, foundations, and corporations working to improve public lands, natural areas, and wildlife habitat for public benefit would have a clear pathway to contribute. Recreational users, such as hunters or fishers, would benefit from improved natural resource and wildlife values on public lands. Additionally, industry or government agencies seeking mitigation projects to advance permitting for development could securely fund restoration and mitigation projects by purchasing a lease.

In turn, a variety of entities could be compensated for undertaking restoration or mitigation efforts. Grazing permit holders, for example, could be compensated for stewardship activities, such as adopting outcome-based grazing practices to improve land health alongside invasive species removal. State agencies, conservation districts, nonprofits or other entities with experience in land restoration could also participate, applying their expertise to improve land conditions. Additionally, mitigation bankers, land trusts, or others with experience in the mitigation industry or contracts could play a key role in implementing and managing these projects.

Restoration and mitigation are well-established industries with significant economic impact. According to Zion Market Research, the global mitigation banking market size was valued at around USD 9.1 billion in 2022 and is projected to reach USD 23.3 billion by 2030. Allowing for restoration and mitigation leases could help capture a portion of this growing market, directing valuable investment toward public lands.

Conclusions and policy implications

Elected officials, the Bureau of Land Management, state and Tribal agencies, and stakeholders should work together to:

Ensure that durable mechanisms are available to allow for restoration and effective mitigation on public lands as currently exists on private lands. For these mechanisms to function effectively, clear policies and guidance are needed to establish durability, such as through restoration and mitigation leases. This includes the need for consistency across political administrations. Although Secretarial Order 3418, Unleashing American Energy (Feb 2025) gives direction to suspend, revise, or rescind the BLM Public Lands Rule, public comment and administrative process will play a key role in determining how to best address this shift in administrative policy.

For BLM-managed lands, mechanisms to ensure durability must be consistent with BLM authorities, and it is essential to clearly define and communicate what these tools do and don't do. Policies and guidance that support restoration and mitigation leasing create opportunities to bring new funding, foster partnerships, and deliver benefits for restoring degraded public lands. Additionally, these mechanisms provide an opportunity to even the balance of impacts to public lands with stewardship on public lands.

Look at the complementary nature of grazing leases and restoration leases, and the durability of both. Grazing permit holders could be compensated for contributing to restoration efforts, such as using outcome-based grazing alongside invasive species removal to restore native species and sustain land health. A closer look could consider whether permits or leases are the right approach for both uses. Currently, grazing permits do not convey any long-term assurances, as they lack a guarantee of renewal and offer limited protection against incompatible development. It's possible that a conservation lease paired with a grazing permit could increase the durability of the grazing by ensuring a longer-term commitment to use that land for both of those purposes. Strengthening durability remains desired. Compensation for grazing permittees willing to engage in a restoration lease could also extend beyond monetary incentives to include non-monetary benefits, such as flexibility in the grazing permit terms.

Ensure that land use planning balances development with natural, wildlife, recreational, and cultural values. BLM land use planning is meant to allocate resources, determine compatible multiple uses, and provide a strategy to manage and protect resources. Effective land use planning is a key step in managing multiple uses while ensuring durable conservation of natural resources, wildlife, and cultural resources.

Restoration and mitigation efforts must be sited in alignment with the underlying land use plan. More specifically, restoration or mitigation activities should occur in places like National Conservation Areas

identified through resource planning for their exceptional natural resource and cultural values. Restoration efforts should focus on established priority landscapes rather than being implemented as isolated, ad hoc efforts. Similarly, development should be directed toward already degraded areas that lack significant cultural, ecological or recreational values.

To achieve this balance, effective land use planning must be supported by clear BLM rules and guidance, as well as meaningful engagement with states, Tribes, and stakeholders. The Desert Renewable Energy Conservation Plan is often cited as a successful example of a multiyear, multi-stakeholder land use planning process that led to lasting allocations of lands for focused development, recreation, conservation—and mitigation.

Consider approaches to bring federal, state, and local entities, resources, and planning together ("All lands, All hands"). The establishment of priority landscapes for restoration through collaborative land use planning is one way to address this need. The BLM Public Lands Rule included direction on ways to conduct landscape assessments and establish priority landscapes, offering a potential framework for uniting multiple partners in coordinated planning efforts.

A strong example of landscape-scale collaboration is the Wyoming Lands Conservation Initiative, a long-term effort to conserve and enhance fish and wildlife habitats while facilitating responsible development through local partnerships. Investments in public lands restoration should be designed to attract new funding rather than increasing competition for, or diverting, existing, limited resources. In other words, land use planning and land condition assessments should complement, rather than compete with, established local efforts like the Wyoming Lands Conservation Initiative.