Ecological Restoration Business Association

Growth Through Resilient Environmental Solutions

www.ecologicalrestoration.org

To: The Bureau of Land Management
From: Ecological Restoration Business Association
Date: July 5, 2023
Docket No. BLM-2023-0001-0001
RE: Proposed Rule on Conservation and Landscape Health

The Ecological Restoration Business Association (ERBA) appreciates the opportunity to provide comments to the Bureau of Land Management (BLM) regarding the Proposed Rule on Conservation and Landscape Health (the Rule). ERBA represents companies across the country that establish, monitor, and protect wetland, stream, species, water quality, and other environmental offsets under multiple federal and state compliance programs. Our members include mitigation and conservation bankers, In-Lieu Fee (ILF) program sponsors, and sponsors of restoration and ecological outcomes. We have experience delivering mitigation on public lands under public-private partnerships and providing mitigation on private lands to offset impacts on public lands. ERBA members have worked with BLM over the years under the Clean Water Act (CWA) Section 404 mitigation banking program and the Endangered Species Act conservation banking opportunities. Collectively, ERBA members successfully implement thousands of conservation projects encompassing hundreds of thousands of acres of high-quality habitat and durable ecological outcomes.

As a business association representing an industry that aligns economic with environmental incentives, ERBA recognizes first-hand the value of dedicating land toward conservation outcomes. We support BLM including conservation alongside other traditional FLPMA multiple uses for federal public lands. When included as an acceptable use in competitive bids, conservation leasing allows stakeholders to signal that restoration is the most valuable outcome for some public lands. However, for BLM to achieve their business and conservation objectives of the Rule, we urge BLM to fully leverage the expertise of our industry as a stakeholder in the rule-making process and a desired participant in the conservation leasing processes contemplated by the Rule. ERBA members are leading experts in the challenges and successes of land-based offset markets and thus can offer unique financial and environmental insights based on years of trial and error.

Conservation leasing, especially for mitigation purposes, should be subject to certain standards and processes to ensure both that i) public lands are utilized in the highest and best manner for conservation and that ii) mitigation on public lands does not inadvertently undermine existing environmental markets,

but rather expands incentives for investment in new restoration opportunities. Skewing the incentives and standards for existing investments in mitigation markets presents a concerning risk to the protected resource itself. BLM has previously addressed many of these standards in their Mitigation Handbook H-1794-1 (Handbook). At a minimum, ERBA recommends that the Rule add a provision establishing standards for public lands mitigation by incorporating aspects of the Handbook into the Rule alongside other widely-recognized and proven principles already integrated in the CWA 404 mitigation program and, to an extent, the FWS' mitigation policies as well.

Note on Equivalency Concerns

A common concern for the environmental markets community is equivalency in standards and requirements for the underlying offset, in this case mitigation. As the theme came up during our Public Lands Committee deliberations, consensus emerged around this simple principle for markets to work: all mitigation, whether on private or public lands, should meet a minimum standard of replacement for the lost ecological function and adhere to the additionality and durability principles. To fully replace lost ecological function, mitigation on public and private lands must be required to undergo a full accounting for the construction, recovery, and long term management costs necessary to restore ecological function, including accounting for land pricing. When allowing mitigation options to be developed on public lands, we recommend that BLM and (if applicable) other mitigation authorizing agency act as enforcer of this minimum standard to ensure that proposed mitigation projects are conducting full cost accounting as a key step in their mitigation plan development and approval process.

Overview of our Comment Letter:

Because of ERBA members' decades of experience delivering mitigation and building a business within a regulated environmental market context, we focus our comments on BLM's proposal to allow conservation leasing for mitigation banks (or, as we've termed it below in Section III "offset leasing"). Our comments first focus on recommendations on mitigation specific terms and concepts in the Rule. We then review in two parts key lessons learned from mitigation on private lands that should inform the broader standards and framework for mitigation that BLM codifies in the Rule. We lastly provide our perspective in response to BLM's specific questions on conservation leasing.

I. **Recommendations on the Rule's mitigation related terms and concepts.**

ERBA is encouraged by mitigation's inclusion in the Rule. But, as currently presented, several of the Rule's tools to implement mitigation miss a major opportunity to leverage the conservation expertise, pragmatic skills, and business efficiencies of the private sector mitigation industry. Indeed, the Rule only references the industry in one location under Section 6102.5(a) (7) stating that authorized officers must "develop and implement mitigation strategies that identify compensatory mitigation opportunities and encourage siting of large, market-based mitigation projects (e.g. mitigation or conservation banks) on public lands where durability can be achieved." We strongly support the intent of this statement and urge BLM to apply their encouragement for markets to all of the Rule's mitigation concepts to fulfill BLM's range of objectives for the Rule, from resiliency to business outcomes for BLM.

i. Revise subsections of Section 6102.5-1 to add "third party mitigation project sponsor" as a new subsection after (g) and make corresponding updates to subsections (c), (d), and (f).

To clarify the distinct roles behind different stages of a mitigation project's life cycle, we recommend reworking subsections (f) and (g), and adding a new subsection to describe the mitigation project sponsor role. The qualifying criteria and duties of a third party mitigation fund holder are currently mixed across (f) and (g). We recommend moving the list of duties for a fund holder (currently (g) (1)-(5)) up to a revised (f) that is dedicated to describing the obligations of a fund holder. Then, we recommend reserving (g) to describe the qualifications for a fund holder, both those listed in (f) (1)-(6) for non-governmental entities and (g) for governmental entities. While the qualifications enumerated are applicable for a mitigation project endowment holder, these qualifications are unnecessarily restrictive for sponsors (i.e. the fund recipients and implementers) of mitigation projects.

Critically, the qualifications appear to exclude the expertise of our industry. This exclusion is a missed opportunity to benefit from the extensive experience of private sector sponsors of mitigation—a seemingly important stakeholder community based on the Rule's objectives—and would be a loss for impacted resources that benefit from the sector's advance investments in accountable mitigation outcomes. Only allowing non-profit entities to hold funds essentially creates a monopoly for a limited category of entities to serve in that role, and will effectively dis-incentivize private sector investment and participation in mitigation and conservation outcomes on public lands.

To address this concern, we strongly recommend that the Rule be very specific on the qualifications and role of the fund holder, as we described with the re-working above, versus the mitigation project sponsor, which is a role not currently directly addressed in the Rule. Immediately following (g) we recommend adding a new subsection dedicated to describing the role and purpose of a "third-party mitigation project sponsor" as the qualified recipient of funds from the fund holder for implementation of an approved mitigation project on public lands. Among others, qualifications should encompass both private sector and non-profit organizations that have a history of successfully implementing mitigation projects in accordance with the mitigation standards established in the Rule and other pertinent mitigation authorities. Lastly, in light of these changes, we recommend also revising (c) to reference the role of project sponsors alongside fund holders and revising (d) to reference mitigation banks and umbrella mitigation banks as an existing proven tool to provide "substantial compensatory mitigation… over an extended period and involve multiple mitigation sites."

ii. Within Section 6102.5-1 describe how mitigation fund holders will apply funds towards implementation of mitigation projects on public lands, including through partnerships with the private sector.

Either within the new subsection on "third-party mitigation project sponsor" or another subsection, we recommend that BLM describe a solicitation and contracting process for third-party mitigation fund holders to select and contract with third-party mitigation project sponsors for delivery of desired mitigation outcomes on public lands. For this procurement process, we recommend BLM consider aspects of the North Carolina Department of Mitigation Services and some state Departments of Transportation procurement processes which typically include the public posting of mitigation needs once funds are collected, review of responses to the solicitation or RFP to filter out sponsors who meet the Rule's third-party mitigation sponsor qualifications, and evaluation of proposals, which may include bank credits, based on resource needs, cost, and time efficiencies. ERBA members have seen agencies particularly benefit from a contracting model commonly termed "pay for performance" under which the sponsor is only paid upon demonstrated proven performance of ecological outcomes, similar to the credit release schedule model of mitigation banks. Based on this prior success, we recommend that BLM also establish a process for third-party mitigation fund holders to enter contracts with qualified sponsors for bank credits or pay for performance delivery of the desired mitigation needs. We refer to the more detailed reports from our peer organization the Environmental Policy Innovation Center (EPIC) on pay for performance contracting for further recommendations and consideration.

iii. Incorporate and expand on aspects of Chapter 4 of the Handbook on Mitigation Strategies in a new section of the Rule.

"Mitigation strategies" are repeatedly referenced in the Rule as a critical concept that informs key decision-making on mitigation siting. However, the Rule currently stops short of offering detailed provisions on the process and substance of a mitigation strategy, and does not reference the Handbook's existing policies on the concept.

ERBA fully supports the concept of a mitigation strategy to establish a baseline of acceptable measures and expectations for a particular resource and/or geographic area's mitigation needs. Mitigation strategies are similar to ERBA's concept "species-specific offset standard," an idea promoted in our comments on the U.S. Fish & Wildlife Service's proposed species mitigation rule. For the reasons articulated in those comments and those identified by BLM in Chapter 4, we recommend that the Rule also dedicate a section or potential subsection of 6102.5-1 to, at a minimum, describing the purpose, scope, and components of a mitigation strategy. Building on the Handbook's option to develop mitigation strategies under and also independent of NEPA processes, we recommend that the Rule encourage BLM's widespread development of mitigation strategies in partnerships with stakeholders including mitigation sponsors.

If mitigation strategies are not developed and applied consistently across the public lands eligible for mitigation, then mitigation options not subject to a governing mitigation strategy may be held to lower standards than those governed by a mitigation strategy, resulting in inconsistent results for the resource and unfair competition between the mitigation options. To avoid this scenario, we recommend that the Rule allow for a third-party mitigation sponsor to propose a mitigation strategy to start the development process for a specific resource or geographic area when a strategy does not currently exist.

Lastly, while we appreciate the Handbook's reference that mitigation strategies should incorporate existing standards, we caution against relying on strategies on a case-by-case basis to establish a certain set of baseline mitigation standards if those standards relate to the administrative and procedural elements of implementing a mitigation project. For example, requirements and tests to meet the durability and additionality principles (e.g. real estate site protection, financial assurances) should be established in baseline standards in the Rule that are then automatically applicable to all mitigation strategies.

iv. Direct BLM authorizing officers and, if applicable, co-authorizing agencies overseeing mitigation on public lands to develop and utilize a mitigation calculator, i.e. decision tree, to guide agencies' decisions on mitigation requirements.

In the CWA 404 context, ERBA members have seen the benefits when Corps District use mitigation "calculators" to inform their mitigation decision-making. The calculator is essentially a decision tree that outlines criteria the agency should consider as they move through a series of questions to evaluate a resource's mitigation needs and compare across available mitigation options. Organizing decision-making criteria in this manner allows regulators to make informed-consistent decisions in a transparent manner on different ratios and potentially service area multipliers for the different available forms of mitigation. Learning from these benefits, we recommend that the Rule require mitigation authorizing regulators to use a decision tree to inform consistent decision-making. Ideally the decision tree should also be made publicly available so project sponsors can anticipate the needs and potential concerns of the agencies. While the concept and requirement to follow a decision tree should be established in the Rule, the decision tree could be developed as a part of step-down guidance following Rule promulgation.

II. **Lessons Learned from Mitigation on Private Lands:**

Part I, Compare & Contrast Private vs. Public Land Mitigation Experiences.

We are generally supportive of the concept of conservation leases on public lands, so long as they are subject to certain standards, especially when for mitigation, and informed by planning (e.g. mitigation strategies) that identify which public lands are most valuable for conservation purposes. We believe that allowing conservation leasing for mitigation under the Rule has the potential to open up new markets and provide great benefits for protected resources by leveraging private funding for conservation and siting conservation closer to the impact site. However, to achieve these benefits the Rule will need to build on the many lessons learned by the mitigation industry's years of trial, error, and success establishing mitigation on private land. Importantly, the Rule should aim to avoid deterring investment in mitigation on private lands, which often happens when permittees with impacts on private lands can acquire mitigation on public lands that is held to lower standards than private lands mitigation. ERBA and BLM do not want to see mitigation outcomes sink to a lower quality than mitigation is currently held to on private lands by private sponsors. Lower quality mitigation typically cannot meet the durability or additionality standards, and accordingly is usually available at a lower cost, and thus the preferred market option by permittees.

While we articulate scenarios throughout this letter on when private land mitigation should be prioritized, we make all of our recommendations against the backdrop of BLM's Handbook guidance on a landscape-scale approach guidance, which we recommend codifying in the Rule. We support application of a landscape-scale approach to ensure mitigation is sited in the location most optimal for the impacted resource from an ecological perspective. Specifically, we strongly support and recommend including in the Rule, or at least referencing in the Rule preamble, BLM's position articulated in Handbook Chapter 2.1(B)(5), stating that:

> *"A landscape-scale approach also allows for identification of the most effective compensatory mitigation sites without implying a preference for siting compensatory mitigation closer to or farther away from the impacted site or implying a preference for federally managed lands. The lack of preference for federally managed lands in siting compensatory mitigation is due, in some instances, to the BLM's interest in benefiting specific impacted public land resources. The maximum benefit to the impacted resource might be achieved at a compensatory mitigation site either geographically close or geographically far from the impacted site, so long as the mitigation at that site has a reasonable relationship to benefiting the public land resources where the resource impact is expected to occur or is occurring. The site that provides the maximum benefit to the public land resources does not need to be near the site where the resource impact occurred."*

With this context, we believe that many of the private land mitigation lessons learned could be addressed through two direct revisions to the Rule:

1. A clear preference statement in the Rule that conservation leasing for mitigation on public lands should be prioritized for offsetting impacts on public versus private lands, unless overriding the preference is justified based on resource needs under the landscape scale approach. To implement this preference, the agency requiring mitigation and weighing mitigation options on public lands should consider looking at existing examples of service area multipliers or ratios for

"out of kind" offsets (e.g. using public lands mitigation for private land impacts). Conservation planning and mitigation strategies will be key to implementing this preference. For range-wide protected species that are habitat limited, ERBA recommends development of a species specific conservation strategy. These strategies may even identify instances when mitigation of private land impacts should occur on public land, in which case there might be lower or no mitigation ratios necessary. This preference and potential application of ratios and multipliers should be included in the decision tree recommended above to guide regulator's implementation of the preference.

2. Requirements in the Rule that reflect lessons learned on the elements needed for successful mitigation on private lands. Enforceable requirements informed by existing policies and experiences will ensure that the standards for public lands mitigation are equivalent to the standards for private lands mitigation. The following chart outlines a few of the notable and concerning differences between private and public lands mitigation that ERBA members have seen in the field.

Lessons Learned from the Private Lands Context
To Identify Gaps and Inform Requirements for Public Lands Mitigation:

Principle[1]	Element	Mitigation on Private Lands	Mitigation on Public Lands
Additionality & Equivalency	Permissible Mitigation Actions	Conservation uplift typically via perpetual conservation of land based assets to provide the species with permanent habitat to offset permanent habitat loss.	Prior practices allowed certain actions (e.g. signage or relocation of individual animals) and research to qualify as an offset for permanent loss of habitat. Such approaches, while beneficial as a supplemental offset action, are not alone commensurate to the permanent loss of habitat. "Mitigation strategies," in their discussion of mitigation measures, should confirm that non-habitat based actions are never alone sufficient to offset permanent habitat loss. Because public lands are already protected to an extent in perpetuity, additionality analyses must be a prerequisite to siting mitigation on public lands.

[1] Principles correspond to those outlined in ERBA's enclosed May 2021 Principles for Ecological Restoration report, and apply across several different elements.

Durability	Real estate site protection	Typically a recorded conservation easement that provides legal real estate site protection in perpetuity.	Conservation lease, however, habitat protection is limited by the lease term, or conservation land use agreement that may be later altered depending on changes to the party government agency. These tools' limitations are problematic if the habitat loss is permanent versus temporary. Generally, because of the nature of public lands, public lands mitigation does not benefit from real estate site protection instruments equivalent to those available for private lands.
Durability & Risk Reduction	Financial assurances & long-term management funding	Non-governmental third-party sponsors of mitigation have more financial tools available to ensure short and long term financial assurances are in place via either a letter of credits, escrow account, surety bond, or insurance policy, and long term endowment fund for maintenance of the mitigation site in perpetuity. Besides just the tools available for financial assurances, third-party sponsors of mitigation on private lands are also required to "show their work" via full cost accounting calculations that cover the cost of all inputs for the life of the project. This accounting requirement ensures that the amount of financial assurances	Government agencies are subject to the annual appropriations whims of their governing legislature. This circumstance can result in a shortfall of funding needed to implement and oversee mitigation projects on public lands both in the short and long term. If there is a performance issue at a mitigation site on public lands and the government agency wants to call upon a financial assurance to apply funds towards corrective action, the agency is prohibited by the Miscellaneous Receipts Act from directly receiving the funds and must instead work through a third party entity to ultimately direct application of funds towards corrective action. Further, full cost accounting is more difficult for mitigation on public lands because costs inputs may change over time

		required is commensurate to the project's needs and risk.	or be difficult to predict for public lands subject to many variables outside of the sponsor's control. Likely due to these challenges, it is ERBA members' experience that full cost accounting is currently a missing practice for most public lands mitigation.
Advance, Risk Reduction, and Additionality	Monitoring and reporting	Periodic monitoring reports due on a periodic basis under the terms of the mitigation instrument. If monitoring indicates that an ecological performance standard is not met or not on track to be met, then agencies and sponsor can work together to implement corrective action. Private sector bank sponsor retains liability for site performance through the life cycle of the project.	Roles on monitoring and corrective action enforcement are more blurred. May have an agency self-regulating their own mitigation project's performance. As government agency roles and resources shift, the responsible party for continued success of the mitigation project may not be clear, which makes it difficult to timely implement needed corrective action.

Part II: Principles for Mitigation on Private Land that should also apply on Public Lands.

The Rule has several mentions to mitigation as an option for entities seeking a conservation lease on public lands, and references to mitigation concepts (e.g. mitigation hierarchy, compensatory mitigation, third party mitigation fund holder, mitigation strategies). While BLM's IM 2021-046 and accompanying Manual Chapter 2.9 describe BLM as mitigation policy implementer and enforcer, the Rule is not as clear on the exact role that BLM versus (or in partnership with) other co-authorizing mitigation agencies will play. Is BLM primarily authorizing officers' development of mitigation strategies? What standards will BLM require when they are the sole agency requiring compensatory mitigation for actions on public lands? What role does BLM play when another federal agency is requiring mitigation and considering options on public lands? To answer these questions ERBA recommends adding clarifying references throughout the Rule to the specific actions BLM will take to facilitate the different mitigation concepts.

As a threshold matter, ERBA recommends that BLM add a new section to the Rule (or opening subsection of Section 6102.5-1) outlining the requirements for permissible mitigation on public lands. Based on our experience with mitigation markets under the CWA 404 program, ESA conservation banking program, and

other federal and state offset programs, we strongly recommend that these requirements establish standards for:

a. **Durability.**[2] Qualifying mitigation mechanisms must all be durable, which necessitates requirements for i) perpetual site protection that prohibits incompatible uses for the species (e.g. conservation easement), ii) long term management plans for perpetual site stewardship, and iii) full funding of a long-term management endowment or equivalent mechanism sufficient to assure management, repair, and monitoring expenses in perpetuity. Regarding site protection, the mitigation measures on specific property parcels must remain in place for at least as long as the associated take of that species or community. In most cases this means perpetuity, but in limited cases it may be temporary, so long as the mechanisms are backed by sufficient legal and financial assurances. ERBA appreciates BLM's prior policy work on this topic and the three requirements we outlined above in Section D. of Chapter 2 of the Handbook, and urges BLM to elevate the importance of the principles expressed there by now including them in the Rule.

   Several site protection instruments have inherent challenges for meeting a durability standard of perpetual site protection. Lease agreements, conservation management agreements, and other variations of public lands agreements by definition do not qualify as permanent. Public lands agreements can also be subject to existing older leases and other withdraw/mineral extraction rights such as a held by production clause. Without a formal withdrawal on these lands, or designation as a wilderness area by Congress, users can still locate mining claims in a newly designated mitigation area under the Mining Law of 1872. These uses may conflict with conservation uses and purposes, limiting the scope of public lands compatible for conservation leasing of mitigation banks. In the Rule, BLM should directly address how lands subject to existing mining claims or held by production clauses will be handled for purposes of conservation and mitigation activities. Specifically, BLM should consider provisions on how to address conflicting plans of operation, testing, drilling, and casual use rights. BLM contemplated some of these limitations and potential conflicts in Chapter 2.6 Sections (D) and (E), which should be revisited for potential Rule inclusion now.

   ERBA supports mitigation on public lands in the following instances: i) when used to offset an impact on public lands and the durability and additionality principles are sufficiently met, and ii) to offset impacts on private lands if prescribed under a landscape scale approach and in resource specific conservation or mitigation strategies (e.g. a specific identified tract of public land offers a scientifically-verified unique habitat value to the subject resource such as a certain flyway habitat for migratory birds or a species' last remaining population located on public lands). Even in these circumstances, durability concerns should prevail as a deciding factor; while a tract of public land may offer a unique resource habitat, that value is diminished if the land cannot be adequately protected for the life of the impact to satisfy the durability principle.

   Intrinsic to these durability requirements is that mitigation is land-based, meaning that permissible mitigation mechanisms provide a direct, quantifiable conservation benefit for the resource within a specified land area. Durability as a mitigation qualification narrowly limits some actions currently accepted as mitigation and raises the bar on other practices. Unless outlined in public conservation

[2] While a potential start, this Rule cannot address all durability concerns. Legislation is needed to authorize the concept of patenting mitigation lands, similar to mineral patents currently allowed under long-standing mining laws, to: i) identify the resource, 2) prove up the resource, 3) come up with a Plan of Operation and restoration plan, 4) implement the plan, 5) patent the land to the mitigation sponsor (or a third-party non-profit) for perpetual protection.

strategies or planning documents for the resource, measures that are not habitat-based should not be accepted as mitigation. Research and non-land based actions generally should not act as a qualifying mitigation substitute for the establishment, preservation, or improvement of on-the-ground ecological uplift. Research should only be a component of mitigation if pursued in conjunction with and complementary to land-based mitigation activities or in other special, limited circumstances (e.g. certain known disease in a species) that are again acknowledged in a public conservation strategy or planning document.

b. **Equivalency.** Equivalency is an essential principle for investment in an environmental market. Investment is hampered by inconsistent application of regulatory requirements and standards across mitigation mechanisms and mitigation lands. Investors seek marketplace fairness where all conservation sponsors and project forms are treated with equal application of law and policy for predictable outcomes. Equivalency helps to create clarity and consistency for mitigation providers and thus incentivizes investment in high quality mitigation by alleviating potential competitive disadvantages based on higher risk mitigation projects.

   Almost invariably in compliance markets, developers (including government-funded projects) prefer the fastest and lowest-cost offsets available, which often have the greatest ecological risk. Applicants' preference for the lower cost option can lead to lower-standard programs dominating a given market, potentially slowing progress towards conservation of a resource and discouraging private investment. In the public lands context, mitigation typically costs the sponsor less when sited on public lands than on private lands, especially if the sponsor is a public agency with access to the public land at a lower cost than the market price of private land. Rather than trying to create equivalency in the costs of mitigation on public versus private lands, we recommend that the Rule focus on ensuring equivalency via enforcement of the same standards and performance metrics for ecological outcomes on public lands as private lands, especially for additionality and durability standards. ERBA recommends that the Rule establish requirements for all mitigation projects to have a real estate site protection instrument, short-term and long-term financial assurances, and adaptive and long-term management planning memorialized in an instrument between the mitigation sponsor and authorizing agencies. The instrument's provisions on financial assurances should be required to include a full accounting of costs to implement and maintain the ecological performance of the mitigation site.

   To ensure the proposed Rule requires consistent application of equivalent standards across all forms of compensatory mitigation on public lands, ERBA recommends that i) the Rule's provisions on mitigation strategies (see our recommendation in Section I(iii) above) emphasize adherence to established standards for the subject resource being mitigated (e.g. the 2008 Rule at 33 CFR 332 for CWA 404 mitigation and species-specific conservation strategies and standards for ESA protected species) and the Rule's general standards/requirements for all mitigation forms, and ii) that the Rule require an instrument (i.e. agreement between the sponsor, fund holder, and authorizing agency) of any mitigation project on public lands to ensure equal enforcement of requirements and standards across mitigation mechanisms, and iii) a preference for the most advance mitigation option available for the resource.

c. **Additionality.** Mitigation must add a quantifiable conservation benefit beyond the identified baseline. When identifying a resource's baseline, the determining agency should look at the resource's status at the time of proposal for compensatory mitigation and the resource's status prior to a force majeure type event such as disease (e.g. white-nose syndrome in bats), drought, a manmade event, etc. Incorporating an analysis on additionality into the forthcoming Rule will reward and incentivize mitigation in locations that offer resources the greatest conservation benefit. In short, an additionality

test for mitigation mechanisms may be summarized as an analysis on whether the mechanism provides a measurable benefit that would not have been generated but for the ecological outcomes that result from the mechanism.

Additionality concerns are typically met when mitigation results in the placement of the following specific assurances on private lands with conservation value: an easement prohibiting incompatible uses with the protected resource, a management plan with established stewardship obligations, and a long-term land management fund, such as an endowment. Depending on the conservation needs of the resource, both preservation and restoration projects may comply with additionality tests if these assurances are in place. BLM should consider the respective roles of restoration and preservation in the mitigation and conservation strategies for the protected resource. ERBA recommends that preservation should never supplant a needed restoration component without use of a ratio or other adjustment metric so as to not undercut investment in more expensive offset endeavors that establish new habitat in priority regions.

The private land base is diminishing each year, which shrinks the availability of private lands for conservation purposes and in turn increases the value of private lands for species' conservation once that private land is dedicated under a conservation easement. However, public lands specifically designated to generate revenue like the land under BLM's management can sometimes also offer value for conservation similar to private lands. Considering the often greater value private lands offer for conservation outcomes, the Rule should require that BLM and/or co-authorizing agency conduct a rigorous publicly available analysis on the eligibility of public lands for mitigation offsets prior to approving an offset project sited on public lands; this analysis could be incorporated into the mitigation calculator/ decision tree concept recommended earlier in this letter. If public documentation identifies habitat loss as a major threat, then the agencies with jurisdiction over the impacted resource should incentivize mitigation located on lands that are threatened with development risk and thus offer a high conservation value over mitigation proposed on land with a low development threat. A development threat analysis is an especially relevant analysis for projects that are largely preservation in their approach. This concept could be implemented through a default preference for impacts to private lands offset on private lands versus public lands, which, again, should always be informed by planning or a mitigation strategy for the resource that was developed under a landscape-scale approach (e.g. policy preference for mitigation in an imperiled resource's last stronghold of habitat within a rapidly developing region versus a mitigation option in a more rural region not subject to development pressures (many public lands regions)).

d. **Advance.** Advance offsets eliminate temporal loss, reduce risk of project failure, increase certainty that ecological performance standards will be met, and allow maximum time for planning and compliance with performance standards. For these reasons, when habitat/land is the limiting factor for a protected resource, BLM should give preference to conservation leasing for mitigation that is implemented in advance of actions that adversely impact protected resources. As we've seen in the CWA mitigation market, clear preferences for advance mitigation incentivize significant private investment in conservation projects that meet regulatory objectives ahead of anticipated needs.[3]

[3] See §332.3; see also Doyle, Martin. "This Little Known Industry Restores Our Environment and Bolsters Our Economy." Inside Sources, Sept. 10, 2020. Available at: https://www.insidesources.com/this-little-known-industry-restores-our-environment-and-bolsters-our-economy/. Recent interviews of a sample of leading industry firms reveals that they collectively invested more than $1B over the past 5 years in restoration projects.

III. **Recommendations on Conservation Leasing.**

1. *Is the term "conservation lease" the best term for this tool?* When referring to leasing for mitigation purposes, ERBA strongly recommends distinguishing the mitigation or offset purpose from the traditionally understood conservation leasing term via use of a separate term such as "offset lease." An offset lease should be defined to include reference to leasing for mitigation projects that are held to higher standards and requirements under a more rigorous approval process than conservation leasing alone.

2. *What is the appropriate default duration for conservation leases?* For offset leases, as we've defined above, the duration of the lease must match the life of the impact and corresponding impact liability to satisfy the durability requirement. For permanent impacts, ERBA recommends a minimum of a 99-year lease with renewal option for offset/mitigation purposes. Even with a 99-year lease in place for mitigation, all public lands are still vulnerable to mineral claims under the Mining Act; to reduce the risk of these claims to the maximum extent possible, BLM should require sponsors to pursue diligence measures similar to those that sponsors currently pursue in other mineral rich legal settings, such as mineral assessment reports, remoteness opinions, or a surface agreement. In Texas, mitigation and mineral rights land uses successfully co-exist with certain safeguards in place, such as requirements that the mineral owner reasonably accommodate the surface owner's use, which may be mitigation or conservation, including the mineral owner avoiding, minimizing, and mitigating for any unavoidable impacts to the surface mitigation project (see mitigation bank instruments in the Fort Worth District for example language). For temporary impacts, the offset lease duration may be shorter to be commensurate with the project impact. Considering these durability challenges in the public lands leasing context, public lands may be less suitable for permanent impacts than temporary impacts, and if used to offset permanent impacts may be subject to a discount factor. The decision tree in Appendix I also highlights these concerns and recommendations.

3. *Should the rule constrain which lands are available for conservation leasing? For example, should conservation leases be issued only in areas identified as eligible for conservation leasing in an RMP or areas the BLM has identified (either in an RMP or otherwise) as priority areas for ecosystem restoration or wildlife habitat?* For offset leases, the Rule should limit the lands eligible for mitigation to those lands where a mitigation project sponsor can implement a project that will meet the additionality and durability standards. For example, if the project would encounter conflicts with incompatible land uses that cannot be addressed through the measures discussed in Item 2 above, then that specific land area likely should not be available for offset leasing. If a mitigation strategy is available for a certain geographic area or resource, then BLM should defer to the strategy's directions and limitations on where permissible mitigation for the subject area or resource may be sited.

4. *Should the rule clarify what actions conservation leases may allow?* Yes, particularly for offset leases, the Rule should clarify that only actions meeting the mitigation standards established in the Rule and mitigation strategy, if available, are permissible (see Sections I(iii) and II, Part II of this letter for further discussion).

5. *Should the rule expressly authorize the use of conservation leases to generate carbon offset credits?* We would only recommend the use of offset leases, held to higher standards than conservation leases, for generation of carbon offset credits. If carbon credits can be developed in accordance with and meet the same standards and requirements as those for other

mitigation/offset purposes, including the additionality principle, plus relevant leading national standards uniquely applicable to carbon, then carbon credits should not be precluded from potential public lands offset markets. Based on our limited experience to date with carbon offset markets and understanding of prior pitfalls, we emphasize the importance of a carbon project sponsor adequately demonstrating additionality prior to project approval, including consideration of whether the subject public land would likely otherwise be leased for a public use that would increase versus reduce carbon stores.

IV. **ERBA Recommendations in Summary**

Thank you for your consideration of ERBA's comments. We value BLM's leadership and work over the years on public lands mitigation policies to create more opportunities for environmental markets and outcomes on public lands. We urge BLM to leverage the expertise of the private sector ecological restoration industry as an essential stakeholder in the rule-making process and implementation of the Rule's mitigation concepts and objectives. In summary, ERBA primarily recommends the following changes to the Rule:

i. Add a provision establishing standards for public lands mitigation by incorporating aspects of the Handbook into the Rule and ERBA's Principles Report (based on lessons learned in the private lands mitigation context; see Appendix I), especially on durability, additionality, equivalency, and advance, alongside other widely-recognized and proven principles integrated in the CWA 404 and ESA mitigation programs.

ii. Revise subsections of Section 6102.5-1 to add "third-party mitigation project sponsor" as a new defined term and role, clarify the duties and qualifications of "third-party mitigation fund holders," and add a subsection on how fund holders will solicit and contract with sponsors for the funding and delivery of mitigation projects on public lands.

iii. Incorporate and expand on aspects of Chapter 4 of the Handbook on Mitigation Strategies in a new section of the Rule.

iv. Direct BLM authorizing officers and, if applicable, co-authorizing agencies overseeing mitigation on public lands to develop and utilize a mitigation calculator, i.e. decision tree, to guide agencies' decisions on mitigation requirements.

v. Distinguish between conservation leasing and conservation leasing for mitigation purposes, and corresponding different standards and requirements, through introduction of a new term, "offset lease."

ERBA welcomes the opportunity for further discussion on the recommendations presented throughout this letter. These comments were developed through careful deliberations of ERBA's Public Lands Committee, which comprises mitigation and conservation bank sponsors, consultants, and other stakeholders with perspectives from across the country. Please do not hesitate to reach out to sjohnson@ecologicalrestoration.org with any questions, comments, or requests for additional information and perspective from the committee or ERBA membership.

Sara Johnson, Executive Director
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Preston Smith, Chair, Public Lands Committee

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Enclosures:
Appendix I - ERBA's May 2021 Principles for Ecological Restoration & Compensatory Mitigation