



STATE OF UTAH

GARY R. HERBERT
GOVERNOR

OFFICE OF THE GOVERNOR
SALT LAKE CITY, UTAH
84114-2220

GREG BELL
LIEUTENANT GOVERNOR

March 7, 2013

Neil Kornze
Principal Deputy Director
Bureau of Land Management
1849 C Street NW, Rm. 5665
Washington D.C. 20240

Re: Appeal of the Denial of Recommendations by BLM
Governor's Consistency Review – 43 C.F.R §1610.3-2(e)
*Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands
Resources on Lands Administered by the Bureau of Land Management in Colorado,
Utah, and Wyoming and Final Programmatic Environmental Impact Statement.*

Dear Deputy Director Kornze:

On behalf of the State of Utah, I hereby appeal the decisions contained in correspondence from Mike Nedd, Assistant Director for the Bureau of Land Management (BLM), dated February 6, 2013. Mr. Nedd's letter addresses decisions made in response to recommendations submitted as part of a Governor's Consistency Review relative to the availability of lands to lease for oil shale and tar sands. Specific reasons for the appeal are attached for your review.

The Governor's Consistency Review is an important part of the process for the creation, revision, and amendment of the BLM's Resource Management Plans, as it represents the final opportunity to achieve a real planning and plan implementation partnership between Utah and the BLM. Utah and the BLM, through mutual respect and cooperation, have been able to achieve consistency on many planning issues in the past.

We look forward to a positive working relationship with BLM in the maintenance of a viable Consistency Review process and support for a robust oil shale and tar sands industry in Utah. Please contact Kathleen Clarke, Director of the Utah Public Lands Policy Coordination Office, at (801)537-9801 or kathleenclarke@uath.gov, to discuss any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "Gary R. Herbert".

Gary R. Herbert
Governor

**Appeal of the State of Utah
Governor's Consistency Review
Statement of Reasons for Appeal
March 6, 2013**

Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming and Final Programmatic Environmental Impact Statement.

The State of Utah hereby appeals the decisions contained in a letter from the Assistant Director for the Bureau of Land Management, Mike Nedd, dated February 6, 2013. This letter (the Decision Letter) constitutes the formal response by the Bureau to recommendations made as part of a Governor's Consistency Review submitted by letter dated January 9, 2013. The consistency recommendations concern proposed plan amendments contained within the November 2012 BLM document entitled *Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming and Final Programmatic Environmental Impact Statement*.

This appeal is made pursuant to the provisions of Code of Federal Regulations Section 1610.3-2(e). The state requests review of each and every decision contained in the Decision Letter. As the basis for its appeal, the state reiterates each and every recommendation contained in the letter of January 9, 2013, and each and every point contained in the letter of protest to the proposed plan amendments filed December 10, 2012.

The January 9, 2013 transmittal of the Governor's Consistency Review contains five recommendations for resolution of the inconsistencies identified between the proposed BLM plan amendments and state law, plans, policies and programs. These recommendations include: 1) a request for adoption of the most recent and accurate delineations of sage-grouse priority habitat; 2) a request for completion of the analysis of the effects of known oil shale and tar sands technologies upon inventories of wilderness; 3) a request for completion of the analysis of the effects of known oil shale and tar sands technologies upon existing Areas of Critical Environmental Concern; 4) a request for recognition of the jurisdictional authority of the state to make decisions concerning the effects of development upon the water resources of the state; and 5) a request for conformity with the state's Energy Plan by supporting a viable commercial leasing program for oil shale and tar sands. The Decision Letter refused to accept any of these recommendations. The state offers these additional considerations for your review as you make your final Record of Decision (ROD).

Statutory and Regulatory Framework for Consistency Review

As part of this appeal, BLM must properly complete the framework for its response to a Governor's Consistency Review, in light of congressional intent and BLM's own regulations.

The Decision Letter outlines a framework by reciting the language in the Federal Land Policy and Management Act (FLPMA) which creates the Consistency Review, and by reciting a portion of the relevant BLM regulations interpreting that law. However, the framework for the BLM's response is incomplete, as it fails to reflect the provision in the BLM regulation which provides:

The Director shall accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State's interest.

BLM's decisions in response to the Consistency Review recommendations of the Governor must be governed by this requirement, which provides that a state recommendation *shall* be accepted by the Director if the state's balance of resource use and protection is reasonable. An interpretation of the above requirement which simply holds that a state recommendation which differs from the BLM's proposed course of action is, *a priori*, inconsistent with federal law, is an interpretation which nullifies the congressional intent. BLM is required to make a determination about the balance of interests, not merely decline to accept the state's recommendations without any discussion of reasonable balance of interests.

Greater Sage-grouse Habitat Data

The state has been working diligently, over the past 15 years, to understand the conservation and habitat needs of the greater sage-grouse. The state formed Local Working Groups as early as 1996 to focus on each of the populations in Utah, and the BLM has been a great partner in this effort from the program's inception. The state has sponsored a great deal of fundamental research into the yearly life-cycle needs of the species in Utah. As a result, the state is the entity with the greatest knowledge about the year-round habitat needs of the greater sage-grouse in Utah. This data has been continuously refined over the years, and went into a further review and refinement phase as a result of the initiation of a concentrated effort in 2012 by the state, the BLM and others to respond to the greater sage-grouse listing decision issued in March 2010 by the U.S. Fish and Wildlife Service.

During 2012, the state and its local working-group scientists and land managers, spent a substantial time and effort refining and clarifying earlier approximations of sage-grouse habitat. In order to address the threats postulated in the Fish and Wildlife Service listing decision, state biologists carefully examined and delineated year-round habitat types, including nesting, brood rearing and winter habitat, in lieu of previous habitat delineations based on more generalized vegetation mapping. The state and its partners also examined each of the discontinuous bird populations in Utah, and looked at the probability of persistence for each, in order to make a reasoned determination for the location of priority habitat. BLM was fully aware of and participated in this work.

The state provided this more accurate delineation of preliminary priority habitat and preliminary general habitat to BLM in September of 2012, and formally asked BLM to conform to these delineations in the December 18, 2012 letter to Juan Palma. By letter dated January 18, 2013, the Utah BLM responded, and indicated that the BLM team working on the plan amendments for greater sage-grouse had been directed to employ the state's Conservation Plan within one of the

alternatives of the environmental impact statement. This response did not fully address the state's earlier request, so the state reiterated this request to conform to the best data available by letter to Utah State Director Juan Palma dated February 26, 2013.

The maps of these delineations constitute the most accurate representation of preliminary priority habitat to date, and will no doubt be further adjusted or refined as additional review is completed. This refined data is also part of the fundamental dataset used to generate the state's delineation of crucial habitat and wildlife corridors which comprise Utah's Crucial Habitat Assessment Tool (CHAT). BLM has agreed to employ the data used in the CHATs of the various states pursuant to BLM's Instructional Memorandum No. 2012-39.

In contrast, the BLM's interest in the terms "preliminary priority habitat" and "preliminary general habitat" is driven by Instruction Memorandum (IM) 2012-43. IM 2012-43 states, for example, that the Utah BLM's response to ongoing and proposed actions within "Preliminary Priority Habitat (PPH) and Preliminary General Habitat (PGH)" shall be governed by its provisions. The IM identifies preliminary priority habitat as those areas which have the "highest conservation value" for the maintenance of sustainable populations, including "breeding, late brood-rearing, and winter concentration areas." The IM further requires this these data and maps be generated through a "collaborative effort" between the BLM and the state, that the mapped areas are "science-based," "provide for sustainable populations," and are to be generated using "the best-available data, and that the data *may change as new information becomes available.*" (Emphasis added.) The IM requires any such changes to be science-based and coordinated with the state so that the final delineation provides for sustainable populations.

The BLM's process for the identification of preliminary priority and preliminary general habitat is governed by this collaborative process with the State of Utah, and clearly envisions that maps of the respective habitats may change as better data is obtained. Yet the BLM, in the Decision Letter, refuses to conform the greater sage-grouse habitat data used in the oil shale and tar sands planning initiative to the more accurate representations now available, apparently basing its decision on the BLM's National Greater Sage-Grouse Planning Strategy, of which IM 2012-43 is an integral and very fundamental part. Contrary to the Decision Letter, the very National Planning Strategy identified as a bar to use of the state's data, at its core, embraces the state's data, as well as changes to that data.

The State of Utah has completed its Conservation Plan for Greater Sage-Grouse, and has begun implementation of the Plan. The state's interest is in fostering the use of the most accurate habitat data available for greater sage-grouse, and has respectfully requested the BLM to conform to its delineation of priority and general habitat for all purposes, including this RMP/EIS process. Instead, the BLM continues to rely on older, less representative and less-accurate data "as a proxy for core or priority sage-grouse habitat."

For purposes of a Consistency Review, and the recommendation concerning sage-grouse habitat made in the January 9, 2013 Consistency Review letter, the state's interest is in working with the BLM and other conservation partners to identify the best delineation of the yearly sage-grouse habitat needs and population persistence possibilities, thereby defining priority habitat. BLM's statement of the national interest, as found in the Decision Letter, results in the

promotion and use of less-accurate proxy data. In this case, the state's recommendation provides for the more reasoned balance.

The state requests the BLM Director set aside the portion of the Decision Letter concerning habitat for greater sage-grouse, and direct BLM to employ the more accurate data for all purposes within the final decision for the allocation of oil shale and tar sands by adopting the first Recommendation listed in the January 9, 2013 Consistency Review letter.

Oil Shale and Tar Sands Technologies

The Consistency Review letter dated January 9, 2013 contained two recommendations for adjustments to the proposed plan amendments which concerned the effects of known oil shale and tar sands technologies upon the environment. In the letter, the state recommended the BLM conform with the Goals found within Utah's 10-Year Strategic Energy Plan, and the state law creating the Uintah Basin Energy Zone,¹ which provisions encourage energy independence, access to our own resources, the development of cutting-edge energy technologies, and the like. This conformance would involve the completion of a determination of the effects of existing technologies upon the environment. The two recommendations are tied to inventories of wilderness and the existence of Areas of Critical Environmental Concern. BLM refused to accept either of these recommendations. Again, this refusal was not accompanied by a discussion of the balancing of state and national interests, just a cursory reference to a state law, and a perfunctory statement identifying disagreement over the maturity of the oil shale and tar sands industry.

The state's interest is in the full examination and analysis of currently available information in order to determine the effects of existing oil shale and tar sands operations upon the environment. The existing oil shale and tar sands operations are well-known, and their environmental effects relatively easy to discern. Indeed, the state has already performed some of the required analysis in the issuance of water quality permits for one company's operations. Each existing ACEC is managed according to a previously-identified set of provisions found in the Resource Management Plans, and the easily-discerned effects of the known operations can be quickly analyzed for effects on each ACEC's management provisions. This is especially true given the programmatic basis of the current oil shale and tar sands allocation planning initiative. Certainly, if such an analysis shows minimal impacts to wilderness inventories or minimal or no impact to the specific resources which form the basis of each existing ACEC, a different allocation decision might be appropriate.

In contrast, the national interest, as set out by BLM, is to reduce the availability of lands for commercial leasing of oil shale and tar sands, due to an alleged paucity of environmental effects information caused by the relative newness of the oil shale and tar sands industries, which industries BLM defines as "nascent." Specifically, BLM argues that, despite the state's plans and policies emphasizing the continued availability of lands for commercial leasing of oil shale and tar sands, as expressed in its 10-Year Strategic Energy Plan and the creation of the Uintah Basin Energy Zone, BLM believes a measured approach to commercial oil shale and tar sands leasing is necessary. This measured approach, in turn, requires changes to existing Resource

¹ Utah Code Section 63J-8-105.5.

Management Plans, which changes specifically involve the removal of vast tracts of land from the availability for commercial leasing. The lands to be removed are areas defined as habitat for greater sage-grouse (discussed above), lands which are part of wilderness inventories, and lands within existing ACECs. Finally, BLM specifically ties the necessity for these proposed reductions (the measured approach), to the “nascent character” of the oil shale and tar sands industries in Utah, which phraseology implies a paucity of information. Therefore, BLM is refusing to conform to state laws, plans, policies and programs supporting the commercial development of the oil shale and tar sands industries due to BLM’s inability to determine the environmental effects of existing, known operations, and apply those effects to previously established and published management provisions for existing ACECs, and to inventories of lands for wilderness.

The balancing of interests in this case requires weighing the state’s interest in a full and complete examination of the impacts of the existing industries, which are ready for commercial production and therefore commercial leasing opportunities, against the BLM’s refusal to engage in the environmental analysis based on a perceived lack of information. The information on the existing operations is relatively easy to acquire, therefore the analysis relatively easy to complete, especially in light of the programmatic nature of the current effort. The balance of interests should favor a full and complete analysis upon which to base the final allocation decision.

The state requests the BLM Director set aside the portion of the Decision Letter concerning the removal of lands from availability due to inventories of wilderness and existing ACECs, and direct BLM to complete the requested analysis as part of the decision-making process for the allocation of oil shale and tar sands by adopting the second and third Recommendations listed in the January 9, 2013 Consistency Review letter.

Support for a Commercial Leasing Program

Finally, the State of Utah fully supports a commercial leasing program for oil shale and tar sands, as evidenced by its 10-Year Strategic Energy Plan and the Uintah Basin Energy Zone legislation, among others. For this reason, the state requested the BLM retain the current allocation of availability for leasing. Yet the Decision Letter continues to ironically argue that the current proposed amendments, which 1) reduce the availability of lands, and 2) eliminate the commercial program in favor of a research and development program, fully support a commercial program. Again, the BLM argues that until the environmental effects of the existing operations are known, the BLM must pull back into reliance on a research and development program.

The state’s interest is in providing a regulatory program for oil shale and tar sands which can then be used with certainty by the industry and the capital investment markets. BLM did so in 2008, and should stay the course in 2013. The national interest, as set forth by BLM, is in eliminating the current certainty of the commercial program, in favor of a never-ending cycle of study. Because it is easy to retain the current structure, as no action is required, and no further action would be required in the future to initiate a commercial leasing program, the state’s interests are the more reasoned balance.

The state requests the BLM Director set aside the portion of the Decision Letter concerning the elimination of the framework for the existing commercial leasing program, and direct BLM to retain the existing program as requested in the fifth Recommendation listed in the January 9, 2013 Consistency Review letter.

Authority of State Programs

The state also requests the BLM Director set aside the portion of the Decision Letter concerning the authority and jurisdiction of state water and air quality programs, and direct BLM to modify its proposed amendments to remove any barriers to the allocation of oil shale and tar sands resources to a commercial leasing program, as listed in the fourth Recommendation listed in the January 9, 2013 letter.