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January 9, 2013

Mr. Mike Pool
Acting Director
Bureau of Land Management
1849 C Street NW, Rm 5665
Washington, D.C. 20240

Re: Governor's Consistency Review
Proposed Land Use Plan Amendments
Allocation of Lands for Leasing of Oil Shale and Tar Sands
Programmatic EIS published November 8, 2012

Dear Acting Director Pool,

The State of Utah has reviewed the *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 Impact Statement*, published November 8, 2012, and submitted to the state for a 60-day Governor's Consistency Review.¹

This enclosed response identifies several points of inconsistency between the proposed plan amendments and state laws, plans, policies, and programs related to the responsible development of oil shale and tar sands resources. Additionally, this response continues with recommendations designed to achieve consistency. Pursuant to the Federal Land Policy and Management Act (FLPMA), and BLM regulations, BLM is required to accept the recommendations if they "provide for a reasonable balance between the national interest and the State's interest."²

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 the state and the BLM. The state and the BLM, through mutual respect and cooperation, have been able to achieve consistency on many planning issues in the past.

¹ 43 C.F.R Section 1610.3-2.

² 43 C.F.R Section 1610.3-2(e).

Previous Considerations Concerning Oil Shale and Tar Sands

The current effort repeats an identical review of the allocation of federal lands for oil shale and tar sands leasing undertaken and completed by the BLM in November, 2008. The BLM's records will reflect that the November 2008 Record of Decision approved land use plan amendments which were determined to be consistent with Utah law, plans, policy and programs. In concert with the accompanying BLM regulations³ for a commercial oil shale leasing program, the BLM and the state achieved in 2008 a partnership for the development of the vast oil shale and tar sands resources within Utah. The industry and the financial markets, based on this regulatory certainty, began to develop the means for commercial production, a process which continues today. Yet, despite this response from innovative companies, the BLM is now proposing land use plan amendments which are a complete about-face from the earlier decisions, with no significant new information to support the alterations. Matched with the uncertainty caused by the review of the royalty rates, the entire established structure for commercial oil shale and tar sands leasing is in complete shambles.

The BLM admits the current review is simply a reconsideration of the 2008 allocation decision, and that this reconsideration is occasioned by the settlement of a lawsuit. The BLM also attempts to bolster the reconsideration by postulating "new information which has emerged since the 2008" decision.⁴ BLM further identifies this new information as 1) a United States Geological Survey in-place assessment of oil shale resources, 2) the March, 2010 U.S. Fish and Wildlife Service listing decision concerning the greater sage-grouse, and 3) an "updated" inventory of lands with wilderness characteristics.⁵

Additional Planning Actions Connected to the Current Allocation Analysis

The State of Utah does not view this proposed decision on the allocation of lands in isolation, but has instead reviewed the proposed plan amendments in light of many other BLM planning and regulatory requirements. As mentioned, the 2008 Record of Decision was also accompanied by the contemporaneous creation of the regulatory structure for an oil shale leasing program. The creation of this regulatory program was accompanied by extensive consultation with the Governors of the states involved, as required by federal law. The current BLM review has not been accompanied by similar consultation about the leasing regulations, and therefore attempts to impermissibly isolate the specific leasing program provisions from the decisions concerning the availability of lands. The intent of Congress was to create a robust commercial leasing program, and both the availability of lands and regulatory certainty are necessary to accomplish this purpose.

In addition, the BLM also completed Resource Management Plans for the Vernal, Price, Moab, Monticello and Richfield Field Offices in late 2008. These RMPs did not address the allocation of lands for oil shale and tar sands leasing in deference to the specific contemporaneous BLM effort underway at the time, but did consider and make choices concerning all other resource issues, including protection of greater sage-grouse and the

³ 43 C.F.R Subpart 3900, *et. seq.*, published at 73 FR 69414, November 18, 2008.

⁴ Final OSTs PEIS, ES-1.

⁵ Final OSTs PEIS, p. 1-5

management of lands identified in wilderness inventories. Each of the RMP revisions was found to be consistent with Utah law, plans, policies and programs, as required by FLPMA.

Proposed Plan Inconsistencies Identified by the State and the BLM

The State of Utah has participated in good faith in the preparation of this repetitive PEIS for the allocation of oil shale lands, and submitted comments in May 2012 in response to the Draft PEIS, which comments are incorporated into this Consistency Review.⁶ Those comments referenced a great deal of information about the companies operating on oil shale and tar sands properties in Utah today, all of which are ready to begin commercial production of liquid product. The May 2012 comments also identified state law, plans, programs and policies which differed from the BLM's draft proposals, and requested BLM adjust its proposals to achieve consistency. Fundamentally, the intent of the state's laws, policies, plans and attendant programs, is to achieve the necessary regulatory framework, and availability of resource, to induce a robust and viable commercial production of liquid fuels product from oil shale and tar sands resources in Utah. The achievement of this goal is a part of the state's 10-Year Strategic Energy Plan, adopted in March, 2011.⁷

In response, your November 8, 2012 letter of transmittal, which identifies the timeframe for the Governor's Consistency Review, acknowledges inconsistencies between the proposed plan amendments and state law, plans, programs and policies, as does the narrative within Appendix M. However, BLM identifies only two areas in which the proposed amendments are inconsistent with Utah law. These two areas concern 1) the management of lands identified in wilderness inventories, and 2) Utah law concerning the establishment of the Uintah Basin Energy Zone, with its attendant prioritization of energy development in the Uintah Basin.

BLM Response to Identified Inconsistencies

BLM is required, pursuant to the provisions of FLPMA,⁸ to assist in the resolution of these identified inconsistencies. However, rather than offering substantive terms to assist in resolution, BLM merely states

*To the extent the Final PEIS/Proposed Plan Amendment is inconsistent with state ... plans, policies, or programs, the BLM nevertheless believes that because of the nascent character of the oil shale and tar sands technologies, a measured approach should be taken to oil shale and tar sands leasing and development.*⁹

BLM's response to the inconsistency between the BLM proposal and the identified laws, plans policies and programs of the State of Utah is therefore to ignore the inconsistencies because of the alleged "nascent character" of the technologies involved. BLM then attempts to obfuscate any further discussion about the connection between the nascent character of the technologies and a robust commercial leasing program by stating

⁶ Letter from Kathleen Clarke, Director of Utah Public Lands Office, May 4, 2012.

⁷ Energy Initiatives and Imperatives, *Utah's 10-Year Strategic Energy Plan*, March 2, 2011.

⁸ 43 U.S.C. Section 1712(c)(9).

⁹ Final OSTIS PEIS, p M-4

There may be different views as to whether the nascent character of the technologies argues for more land to be open, so that more lands may be available for [research and development projects], or whether fewer lands should be open...¹⁰

BLM must not simply propose the current state of affairs in oil shale and tar sands technologies, nascent or not, as the resolution for identified inconsistencies. Instead, BLM must explain, in detail, the nature of the technologies involved, and their effects on the ecological, social and economic environments in Utah. BLM is fully aware of these details, as the state, local government, and the industry itself has submitted them to BLM as part of this PEIS process. In contrast to the BLM's characterization of the technologies as nascent, or in BLM's view, uncertain or unknowable, the state believes the industry has advanced, through innovation, to a point where the effects on the ecological, social and economic environments can be determined, and resource allocation decisions be made accordingly.

BLM's Characterization as of the Technologies as Nascent

BLM ties this entire set of proposed plan amendments to the fact that the oil shale and tar sands technologies are either not yet fully developed (as in Colorado), and, by virtue of the definition of the word "nascent," only recently have come into use, as those in Utah have. BLM generally compares the relative newness of the oil shale and tar sands technologies with the now fully developed technologies of the oil and gas industry, which were nascent themselves in the early 20th century. Unfortunately, it would appear BLM's receptiveness to American innovation and inventiveness, through the creation of new technology to develop these resources, is to create regulatory and market uncertainty. Fundamentally, BLM is proposing, in Utah, to restrict the newer industry from seeking the means to mature. BLM's response to these newer technologies is to retreat into unnecessary analysis, in contrast to the historical development of the oil and gas industry, which had the freedom to fully develop on non-federal lands. BLM is again choosing to throw obstacles in the way of reasonable development of vital natural resources.

The State of Utah, local government, and the companies ready to do business in Utah have each submitted a great deal of information to the BLM upon the nascent, yet developed, technologies in Utah, and their environmental effects. These companies are ready to take the next step into full maturity, much of which will require connections with the rest of the liquid fuels refining and transportation industries. Refining capacity must be secured, and transportation by truck or pipeline arranged. These developments require access to capital markets, which, in turn, require the surety of the availability of the product. This translates directly into certainty about royalty rates, the availability of lands for lease, and all the attendant provisions found, for example, in the now mature oil and gas industry. BLM's 2008 decisions provided that certainty, which BLM is now vitiating based upon inaccurate information and analysis.

¹⁰ Final OSTSFPEIS, Comment Responses, p 45.

Land Use Plan Amendments Proposed by the BLM

Specifically, the plan amendments proposed by the BLM (Preferred Alternative) would reduce the acreage available for application for leasing from 630,971 acres to 357,000 acres in Utah for oil shale, and from 431,224 acres to 129,567 acres for tar sands. In addition, the proposed amendments would remove all lands from availability for commercial leasing, and instead make the lands available only for Research and Development proposals. By the very terms of these proposed amendments, no lands in Utah would be available for commercial oil shale leasing. Instead, industry would be shackled indefinitely to a Research and Development structure.

In light of the BLM's negative characterization of the oil shale and tar sands technologies as nascent, which in Utah actually means new and innovative, the BLM has declined to engage in any meaningful analysis of the effects of the new technologies upon the ecological, social, and economic environment, as required by the provisions of the National Environmental Policy Act.¹¹ Instead, the BLM is proposing to remove lands from availability, eliminate the commercial leasing program, and, in a connected action, consider eliminating a reasonable royalty rate for oil shale and tar sands leasing. BLM is proposing to eliminate the following categories of lands:¹²

1. Core or Priority greater sage-grouse habitat;
2. Lands identified in inventories for wilderness conducted by BLM; and
3. Areas of Critical Environmental Concern as finalized in BLM's Resource Management Plans

Habitat for the Greater Sage-grouse

BLM proposes to exclude core or priority habitat for the greater sage-grouse from availability for oil shale or tar sands leasing. This decision is not based upon an analysis of the conservation needs of the birds. None of the recent work by the state or the BLM in Utah is considered in an effects impact analysis. In fact, BLM is apparently proposing to defer to the work underway in a connected exercise, wherein BLM, the U.S. Forest Service, and the states are also engaged in a contemporaneous effort to review protections for greater sage-grouse in each of the eleven western states which contain habitat. That effort will also propose Resource Management Plan amendments which may be determined to be necessary. This BLM sage-grouse plan effort is a much more detailed examination of the effects of many human and natural factors upon the needs of the species, and should be the focal point of the BLM's analysis of oil shale and tar sands activities. Any decisions related to the needs of the greater sage-grouse should not be concluded at this time, but should await the results of this more complete analysis. The State of Utah is also participating in the BLM greater sage-grouse analysis as a Cooperating Agency.

Utah has been in the process of drafting and finalizing a Conservation Plan for the greater sage-grouse. This Conservation Plan identifies eleven areas which will form the focal points for

¹¹ 42 U.S.C. Chapter 55.

¹² Final OSTS PEIS, p 2-36.

the conservation of the species, which are identified as Sage-Grouse Management Areas (SGMAs). The state's Conservation Plan has been in preparation throughout 2012. By letter dated December 18, 2012, the state formally asked the BLM to adopt habitat areas, as defined within the state's Sage-Grouse Management Areas, as BLM preliminary priority habitat, and all other habitat within Utah, as defined by other state data, as BLM preliminary general habitat.

Supplemental Information Concerning Sage-grouse

These defined areas embody the areas contemplated in the proposed exemption from availability for oil shale and tar sands leasing. This is new information which must be included within the OSTs Final PEIS, as it has a significant direct impact upon the results of the OSTs analysis. In addition, BLM is further required to make use of state data used in the preparation of the state's Critical Habitat Assessment Tool (CHAT), of which the SGMA data is a significant part, pursuant to BLM's Instructional Memorandum No. 2012-039. In this IM, BLM has recognized the expertise of the state with respect to the identification and mapping of wildlife which are the subject of state management, and correctly required its use in all BLM planning activities, such as the current one.

Finally, BLM has already recognized the need for local solutions to the determination of management provisions for the greater sage-grouse. Within the current analysis, BLM recognizes that, in Wyoming, core habitat was determined by the state. BLM proposes to adopt the Wyoming determinations, and, in addition, adopt Wyoming's management criteria for the areas, acknowledging that the Wyoming plan does not preclude mining in core areas, but requires mitigation.¹³ Utah requests equivalent treatment for the provisions of its Conservation Plan for Greater Sage-grouse.

Lands Identified in Wilderness Inventories

BLM has recognized the inconsistency between state law concerning the management of lands identified in wilderness inventories and the proposed plan amendments. The removal of these areas from availability for leasing because of an inventory for wilderness is inconsistent with this law. Moreover, this proposed amendment also violates other Utah plans, as discussed below. BLM has not identified any new information about these inventories beyond that employed in both the 2008 Oil Shale Record of Decision and the 2008 Records of Decision adopting the Resource Management Plans. In each of the 2008 decisions, BLM made management choices based upon an existing set of inventories. BLM must now demonstrate new information upon which to base a different conclusion. The alleged nascent character of the oil shale and tar sands technologies does not constitute the required new information. BLM has been made aware of sufficient information to evaluate the environmental effects of these technologies. The information available to BLM both in the 2008 process, and that submitted as part of this current reconsideration, fully supports and reconfirms the decisions made in the various 2008 Records of Decision, and is consistent with state law, plans, policies and programs.

¹³ Final OSTs PEIS, p 2-38.

Additional Inconsistencies with Utah Law, Plans, Policies and Programs

In addition to the inconsistencies identified by the BLM, the state has identified inconsistencies with the following state plans, policies and programs:

1. State of Utah Conservation Plan for the Greater Sage-Grouse (discussed above);
2. Energy Initiatives and Imperatives, *Utah's 10-Year Strategic Energy Plan*, March, 2011;
3. State of Utah Water Appropriation Program, State Engineer's Office
4. State of Utah Water Quality Permit Program, Division of Water Quality

Utah's 10-Year Strategic Energy Plan

Utah's Ten Year Energy Plan recognizes the necessary partnership among the state, the federal agencies, and industry, stating that Utah must work with "federal agencies to navigate the balance between economic and environmental sustainability."¹⁴ In relevant part, the 10-Year Plan identifies the following principles (policies), among others:

- a. Utah's economy is dependent upon responsible energy development...[D]evelopment of all energy resources...[will occur by] allowing the free market to drive while the state provides appropriate legislative and regulatory oversight.
- b. Energy development...will carefully consider the impacts to human health, environmental impacts and impacts on wildlife habitat. An effort to avoid, minimize or mitigate these impacts will be made regardless of energy resource.
- c. Through expanding Utah's energy independence and providing export opportunity, Utah can stabilize its economy and provide for further economic expansion.

To implement these policies, the Plan outlines the following Goals,¹⁵ among others;

- a. Ensure Utah's continued economic development through access to our own clean and low-cost energy resources;
- b. Develop the best new cutting edge technologies, particularly those that enable us to utilize precious natural resources with an elevated environmental consciousness;
- c. Facilitate the expansion of responsible development of Utah's energy resources, including traditional, alternative and renewable resources;
- d. Pursue opportunities for Utah to export fuels...to regional and global markets;

Unconventional fuels, such as oil shale and tar sands, are specifically mentioned in the Energy Plan, as is the newer (nascent), yet sufficiently-known technology developed by Red Leaf Resources, Inc.¹⁶ The 2008 Record of Decision for the allocation of oil shale and tar sands land, in association with the BLM's existing leasing program, is consistent with Utah's Energy Plan for energy and economic development in the energy industry, which is part of a balanced economic plan for the state. A major component of the state's Energy Plan is to foster the growth of unconventional fuels through innovative technologies, which then develop

¹⁴ Energy Initiatives & Imperatives, *Utah's 10-Year Strategic Energy Plan*, p 6.

¹⁵ *Id.*, at p 3.

¹⁶ *Id.*, at pp 14 and 20.

connections to the refining and transport industries for liquid fuels. The proposed amendments are directly contrary to this Plan because they inhibit the growth of the newer technologies without a rational and fully analyzed basis. BLM has the information available to it to make the necessary analysis, and support a commercial leasing program in Utah, and should do so in order to achieve consistency with the state's energy plan.

Water Allocation and Pollution Control Programs of the State

Utah has fully developed programs for the allocation of water resources, and the prevention of pollution of water sources. These programs are administered by the Utah State Engineer's Office and the Division of Water Quality respectively. In the discussion of the possible effects of the oil shale and tar sands technologies, BLM continues to assert that is unable to determine the effects of technology upon natural resources such as water. This is factually incorrect. The water engineer is the entity vested with jurisdiction to appropriate water, and the State Engineer's appropriation process fully considers the environmental effects of an appropriation or change application. BLM's proposed amendments are not consistent with this state program and authority, as the amendments do not properly defer these questions to the state engineer.

Similarly, questions about the need for a water pollution permit are vested with the state pursuant to federal law. The Division of Water Quality is the entity which evaluates the effects of a proposal upon the water resources of the state. In fact, the Division recently made such a determination with respect to an oil sands operation in the Uintah Basin. In such situations, BLM is fully capable of raising its concerns about any particular operation within the state's approval process. BLM's proposed amendments are not consistent with the state's fully operational and effective program to control water pollution, because the proposed amendments do not recognize the state's program as the controlling entity in these matters.

In addition, the BLM, the state, and the oil and gas industry are all participating in a study of the effects of operations upon air quality in the Uintah Basin. This type of partnership is the appropriate path to resolution of these issues, and promotes conservation and development. BLM should follow this path with respect to the known oil shale and tar sands technologies and their effects upon the ecological, social and economic environments, by fully recognizing state authority in the appropriate arenas.

Conditions Differing Among the States of Utah, Colorado and Wyoming

The State of Utah recommends the issues raised by its Protest Letter dated December 10, 2012 and this Consistency Review be segregated from similar reviews in Colorado and Wyoming. The facts concerning the lands in each state, and the technologies employed in each area, are distinctly different, and support a separate evaluation. Each area identified in a wilderness inventory, and each ACEC adopted by BLM, have distinct requirements for review pursuant to the planning requirements of the BLM in each state, and may result in specific, localized recommendations for management. The state formally requests the oil shale and tar sands decisions in Utah be handled based on Utah regulatory, ecological, social and economic conditions, and not compared to non-analogous conditions in the other states.

Standard of Review for Consistency

Consistency review is one of the fundamental requirements of FLPMA. Consistency with state law, plans, policies and programs is a statutory requirement of equal stature or weight to all of the other planning requirements, including the management requirement to employ the principles of multiple-use and sustained yield, and the ecological requirement to evaluate the need for Areas of Critical Environmental Concern. The federal courts have consistently held that all congressional legislative language has meaning, and that no language is superfluous. As a result, the BLM is required to become aware of state laws, plans, and programs and policies, to assist with the resolution of any identified inconsistencies. At the conclusion of this process, the BLM is required to make land use plans

Consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

These statutory requirements do not mean that BLM is free to make such decisions as it may choose despite state plans to the contrary. Instead, BLM must bring its plans into consistency with the state plans, unless the state plan is directly inconsistent with federal law, including FLPMA. The federal laws involved in this case are FLPMA and the Energy Policy Act of 2005 (EPACT) and its directives concerning oil shale and tar sands. Nothing in the state's laws, plans, policies or programs identified in this process is fundamentally inconsistent with EPACT or FLPMA, as BLM specifically recognized in its 2008 decisions.

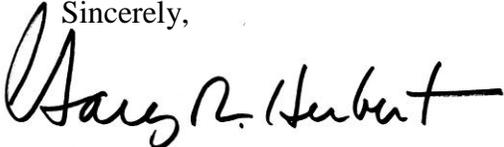
Recommendations for the Resolution of Inconsistencies

Based upon the above, in order to assist the BLM in altering its proposed amendments in order to become consistent with state law, plans, policies and programs, the State of Utah recommends and requests the BLM undertake the following:

1. BLM must adopt the new information concerning habitat for greater sage-grouse, as identified in Utah's Conservation Plan for Greater Sage-grouse, and as specifically requested identified in the state's letters to the Utah State BLM Director, Juan Palma, dated December 18 and 27, 2012. The state recommends and requests the BLM adjust its definitions of core and priority habitat to conform to the state's plan, and make adjustments to the proposed land amendments accordingly.
2. BLM must identify the new information concerning inventories of wilderness, and must specifically analyze the effects of any such new information upon the known environmental effects of the oil shale and tar sands technologies in Utah. The proposed amendments must be adjusted to consider only exclusions based upon the known environmental effects of the technologies with respect to the lands within the post- 2008 inventories, and be consistent with state law concerning the management of lands identified in inventories for wilderness.

3. BLM must explain the rationale for exclusion of any established ACECs from the availability for commercial leasing based upon the known environmental effects of the technologies employed in Utah. An evaluation based upon the simple, self-effectuating characterization of these technologies as recent, or nascent, does not constitute a detailed review of the information submitted to the BLM. BLM must adjust its proposed amendments to consider only the results of this detailed analysis.
4. BLM must specifically recognize that decisions concerning the effects of the appropriation of water are vested with the Utah State Engineer's Office, and that the protection of water quality is entrusted to the state's Division of Water Quality. Any discussions otherwise which are used to support the proposed plan amendments must be adjusted to reflect this allocation of authority. Lacking authority to make such conclusions, BLM must remove any of these considerations as a barrier to the allocation of oil shale and tar sands resources to a commercial leasing program.
5. Utah laws, plans policies and programs fully support a commercial leasing program. BLM must adjust its proposed amendments to retain the commercial program, and not focus solely on a Research and Development program.

Thank you for the opportunity to submit this Consistency Review. The state is fully prepared to resolve the identified inconsistencies with the BLM, as required by federal law and regulation. Please contact Kathleen Clarke, Director, Utah Public Lands Policy Coordination Office, at 801-537-9801 or kathleenclarke@utah.gov with any questions or concerns.

Sincerely,

Gary R. Herbert
Governor