



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Washington, DC 20240
<http://www.blm.gov>

FEB 6 2013

The Honorable Gary Herbert, Governor
Public Lands Policy Coordination Office
5110 State Office Building
P.O. Box 41107
Salt Lake City, Utah 84114-1107

Dear Governor Herbert:

The Bureau of Land Management (BLM) has received and reviewed your January 9, 2013, Governor's Consistency Review response for the November 2012 Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land in Colorado, Utah, and Wyoming and Final Programmatic Environmental Impact Statement (PRMP/FPEIS). Your response concludes that there are "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," and makes five recommendations to resolve these inconsistencies.

I greatly appreciate your continued participation in the BLM land use planning process and your consistency review letter. I have given your comments careful consideration. Pursuant to 43 CFR 1610.3-2 (e), this letter responds to your January 9 response. As explained in more detail below, I have determined not to adopt your recommendations.

Statutory and Regulatory Framework for Consistency Review

In considering your recommendations, I am guided by the BLM's planning regulations in 43 CFR 1610.3-2. These regulations implement Section 202(c)(9) of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), 43 U.S.C. § 1712(c)(9), which states in part:

In the development and revision of land use plans, the Secretary shall...to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located...by among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical...assure that consideration is given to those State, local and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent

practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs...Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans...Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

The regulations state that Resource Management Plan (RMP) amendments “shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian Tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies, and programs of Federal laws and regulations applicable to public lands...” 43 CFR 1610.3-2(a). In the absence of such plans, RMP amendments shall “...to the maximum extent practical...” be consistent with officially approved and adopted State “resource related policies and programs...so long as the guidance and resource management plans are consistent with the policies, programs, and provisions of Federal laws and regulations applicable to public lands...” 43 CFR 1610.3-2(b). Prior to approving a proposed RMP amendment, the BLM must submit the plan to the Governor of the State involved, allowing the Governor the opportunity to identify any known inconsistencies with State or local plans, policies or programs. 43 CFR 1610.3-2(e). In turn, the Governor has 60 days in which to identify any inconsistencies and provide recommendations to the BLM. *Id.*

Below I address each of your recommendations.

Utah’s Recommendations and the BLM’s Responses

- 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.*

In March 2010, the U.S. Fish and Wildlife Service (FWS) found that the Greater Sage-Grouse (GSG) warranted protection under the Endangered Species Act (ESA), but listing at that time was precluded by the need to take action on other species. One of the primary reasons behind this FWS decision was that there was a lack of regulatory mechanisms in place within land use/management plans for assuring the long term conservation of the GSG.

In an effort to respond to this, the BLM developed a National Greater Sage-Grouse Planning Strategy in December 2011 (Instruction Memorandum No. 2012-044). In accordance with this planning strategy, the BLM is evaluating various GSG conservation measures through land plan amendments and ongoing land use plan revisions, so that regulatory mechanisms are in place

before the FWS will make a listing decision in 2015. All such land use planning decisions are expected to be completed by the end of 2014.

On December 22, 2011, the BLM issued additional direction (Instruction Memorandum (IM) No. 2012-043, Greater Sage-Grouse Interim Management Policies and Procedures). This IM provides interim conservation policies and procedures to be applied to ongoing and proposed authorizations and activities while the BLM develops and decides how to best incorporate long-term conservation measures for GSG into applicable land use plans. The policies and procedures identified in IM No. 2012-043 are designed to minimize habitat loss in Preliminary Priority Habitat (PPH) and Preliminary General Habitat (PGH) and will advance the BLM's objectives to maintain or restore habitat to desired conditions by ensuring that field offices analyze and document impacts to PPH and PGH and coordinate with States and FWS.

At the time the PRMP/FPEIS was under development, the State of Utah had not completed its State Conservation Plan or the process of identifying core or priority sage-grouse habitat. The information available from Utah at that time was a June 2011 map of occupied habitat, which was used in the development of the alternatives in the Draft PEIS, specifically the Preferred Alternative, Alternative 2(b), under which all such lands are excluded from oil shale/tar sands leasing and development. This map was updated by the State of Utah in September 2012 just after the FPEIS was sent to press, but still showed only occupied habitat.

By letters dated December 18 and 28, 2012, Utah requested that for those sage-grouse planning efforts expected to be completed in 2014, the BLM use the maps of occupied habitat to serve as PGH, and that the BLM adopt the sage-grouse habitat identified within the Sage-Grouse Management Areas identified in Utah's newly-submitted Utah Conservation Plan for GSG as PPH. Utah's recommendation, here, requests that the BLM rely on this Conservation Plan, along with the direction regarding PGH and PPH in the December 18, letter, for this oil shale/tar sands planning initiative, as well.

While we recognize that Utah has recently submitted to the BLM its Conservation Plan for GSG, until the FWS and the BLM complete their review of Utah's Conservation Plan in accordance with the BLM National Greater Sage-Grouse Planning Strategy, the State's occupied habitat map represents the best source of information regarding sage-grouse habitat. Therefore, although the occupied habitat map almost certainly represents a larger area than will eventually be designated by the State of Utah as core or priority habitat, this oil shale/tar sands planning initiative will continue to rely on Utah's occupied habitat map as a proxy for core or priority sage-grouse habitat.

The BLM recognized in the PEIS that the Record of Decision (ROD) for this targeted planning process is likely to be inconsistent with the ultimate results of the State process in Utah regarding sage-grouse habitat protection. As explained in the PEIS, there will be ample opportunity for plans to be amended in the future to make changes in allocation decisions, if appropriate.

The consistency review regulations limit the BLM's ability to adopt recommendations that are not consistent with "the purposes, policies, and programs of Federal laws and regulations applicable to the public lands." As noted, review by the FWS and the BLM of the information in

Utah's Conservation Plan for Greater-Sage Grouse has not yet been completed in accordance with the BLM National Greater Sage-Grouse Planning Strategy, which represents the agency's approach to preventing listing of the GSG under the ESA. Therefore, the BLM declines to adopt Utah's recommendation with respect to the adoption of the information in Utah's Conservation Plan for Greater Sage-Grouse.

- 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.*

Although these recommendations are unclear, we interpret the first as recommending that the BLM should not exclude from oil shale and tar sands leasing lands BLM identifies as having wilderness characteristics and that the PRMP/FPEIS be consistent with State law that provides that the public lands "should not be segregated into separate geographical areas for management that resembles the management of wilderness, wilderness study areas, wildlands, lands with wilderness characteristics, or the like." (Utah Code Section 63J-8-103(4)). The second appears to object to exclusion of development of these resources in ACECs based on disagreement with the BLM's characterization of oil shale and tar sands technologies as "nascent."

The present planning initiative is a targeted plan amendment process, addressing only the management of oil shale and tar sands resources, and does not address all activities that can take place on these public lands. Therefore, this plan decision is not inconsistent with the quoted Utah Code Section.

The BLM 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 resources leasing and development. To the extent Utah takes issue with the BLM's characterization of the oil shale and tar sands industries as "nascent," this concern is unrelated to any potential inconsistencies between the PRMP/FPEIS and State or local plans, policies or programs.

The BLM declines to adopt Utah's recommendations to adjust its proposed amendments.

- 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.

The States have a vital role in managing water resources. The BLM is not purporting to regulate water in derogation of the authority of the States; rather, under FLPMA's multiple use mandate, the BLM must take into account water resources, as well as other resource values, in making decisions regarding the public lands.

Also, under the National Environmental Policy Act, the BLM is responsible for disclosing effects to water resources from its proposed actions, as well as for considering ways in which adverse effects from its proposed actions may be mitigated. Therefore, the PEIS describes the existing groundwater and surface water resources, water quality, current water uses, and resource constraints within each oil shale basin, and with respect to tar sands, to the extent this information is available, and assists in decision making regarding land use allocation. These factors are not inconsistent with State appropriative or water quality responsibilities.

The BLM declines to adopt Utah's recommendations regarding water resources.

- 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.*

The BLM fully supports a commercial leasing program for oil shale and tar sands, consistent with Section 369 of the Energy Policy Act of 2005. The BLM respectfully disagrees with Utah's characterization of the PRMP/FPEIS as focusing "solely on a Research and Development program." As explained in Section 2.3.3.1 of the PRMP/FPEIS, it is precisely because the BLM is interested in the success of its commercial leasing program that it is taking a measured approach by requiring, in the case of oil shale, that those potential commercial developers of this resource first prove the commercial viability of the technologies they intend to use. This approach is intended to ensure that commercial viability is proven, and the environmental consequences of these technologies known before any commitment is made to broad-scale development. In addition, as explained in Section 2.3.3.1 of the PRMP/FPEIS, the RD&D first requirement is intended to promote access by innovative small companies to the Federal oil shale resource, thereby increasing the likelihood that a robust commercial program can emerge.

The BLM declines to adopt Utah's recommendations to adjust its proposed amendments.

Conclusion

The Governor's Consistency Review process is intended to highlight specific inconsistencies between proposed BLM land use plans and officially approved or adopted State resource related plans, policies, and programs. After careful consideration, and for the reasons outlined above, I am declining to adopt your recommendations.

I appreciate your comments and thank you for your participation in the land use planning process for the Oil Shale and Tar Sands PEIS. This type of collaboration between the BLM and the State

of Utah is important to me, to the success of our land management efforts and to the future of Utah. I hope that I have adequately addressed your concerns and that we will continue to communicate and cooperate on future issues.

Please note that you have the opportunity to appeal this response to the Director of the Bureau of Land Management pursuant to 43 CFR 1610.3-2(e). Such appeal must be filed within 30 days of your receipt of this letter. If you have any questions, please feel free to contact me or your staff may contact Mitchell Leverette, Division Chief, Solid Minerals, at 202-912-7113, or Sherri Thompson, Project Manager, at 303-239-3758.

Sincerely,



Mike Nedd,
Assistant Director
Minerals and Realty Management