



State of Utah

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Governor

GREG BELL
Lieutenant Governor

Office of the Governor

PUBLIC LANDS POLICY COORDINATION OFFICE

KATHLEEN CLARKE
Director

December 10, 2012

VIA EMAIL, ORIGINAL MAILED: bhudgens@blm.gov

Director (210)
Attn: Brenda Hudgens-Williams
20 M Street SE, Room 2134 LM
Washington, D. C. 20003

State of Utah's Protest to Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Land Administered by the Bureau of Land Management in Colorado, Utah and Wyoming and Final Programmatic Environmental Sage-Grouse Impact Statement

Dear Ms. Hudgens-Williams:

The State of Utah ("Utah"), pursuant to 43 CFR 1610. 5-2, by and through the Director of Governor Herbert's Public Lands Policy Coordination Office, submits the following protest to the Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management ("BLM") in Colorado, Utah and Wyoming and Final Programmatic Environmental Impact Statement ("PRMP/FEIS"), Notice of Availability of which was published in the Federal Register on November 9, 2012. PLPCO makes this protest on behalf of all State agencies and the citizens of Utah.

I. Identity of Protestant

State of Utah
Public Lands Policy Coordination Office
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II. Statement of Standing to File Protest

Pursuant to 40 CFR § 1501.6, BLM requested the participation of Utah as a Cooperating Agency in the PRMP/FEIS process. Utah accepted this request and has fully participated as a

Cooperating Agency. The Preferred Alternative 2(b) identified in the PRMP/FEIS, if adopted in the subsequent Record of Decision will have an adverse effect upon the interests of Utah because it will curtail the further development of a commercial oil shale/tar sands industry in the State. Utah filed comments on the Draft Programmatic Environmental Impact Statement ("DPEIS") on May 4, 2012. Accordingly, Utah has standing to submit this protest to the PRMP/FEIS pursuant to 4C CFR § 1610.5-2.

III. Statement of Issues Being Protested

Pursuant to 43 CFR § 1610.5-2 (a) (2) (ii), the following issues are being protested:

- A. The Preferred Alternatives/Proposed Plan amendments violate the provisions of the Energy Policy Act of 2005.
- B. The BLM failed to consult with Utah as required by the Energy Policy Act of 2005.
- C. BLM's proposed change in position as reflected in the PRMP/FEIS without manifested consideration of the findings in the 2005 ROD is arbitrary, capricious and an abuse of discretion.
- D. BLM's failure to consider Utah's ongoing sage-grouse conservation program is arbitrary and capricious.
- E. BLM's exclusion of lands with wilderness characteristics from leasing for oil shale and tar sands violates the provisions of the Federal Land Policy and Management Act and is arbitrary and capricious.
- F. The PRMP/FEIS simply justifies a decision already made in violation of 43 CFR § 1502.2 (g).
- G. The PRMP/FEIS fails to adequately analyze current oil shale and tar sands technologies in violation of 40 CFR § 1502.1.

IV. Statement of Parts of the PRMP/FEIS Being Protested

Pursuant to 43 CFR § 1610.5-2 (a) (2) (iii), Utah protests the adoption or implementation of the Preferred Alternative/Proposed Plan Amendments for oil shale and tar sands appearing at paragraphs 2.3.31 (oil shale) and 2.4.3.1 (tar sands) of the PRMP/FEIS.

V. Concise Statements of Why the Preferred Alternatives/Proposed Plan Amendments Are Believed to be Wrong

Pursuant to 43 CFR § 1610.5-2 (a) and 43 CFR § 1610.5-2 (a) (2) (v), herein follow concise statements explaining why the Preferred Alternatives/Proposed Plan Amendments are contrary to law or regulation, or are arbitrary or capricious. These issues were raised and

submitted for the record during the planning process and were contained within the comments submitted by the State of Utah on May 4, 2012.

A The Preferred Alternatives/Proposed Plan Amendments Violate the Provisions of the Energy Policy Act of 2005.

Section 369 of the Energy Policy Act of 2005, ("EP2005") 42 USC 15801, *et seq* (2005), also known as the "Oil Shale, Tar Sands, and Other Strategic Unconventional Fuels Act of 2005," declares that:

"[I]t is the policy of the United States that ... oil shale, tar sands and other unconventional fuels are strategically important domestic resources... [and that] the development of these strategic unconventional fuels should occur." 42 USC 15927 (b) (2005).

The EP2005 goes on to direct the Secretary of Interior ("Secretary") to create two separate and independent programs: one a program for research and development leasing (42 USC 15927 (c)), and one for commercial leasing (42 USC 15977 (d)). Further, the EP2005 also directs the Secretary to actually commence the commercial leasing for both oil shale and tar sands (42 USC 15927 (e)). Pursuant to these directives, BLM immediately commenced a programmatic EIS process that culminated in the issuance of a Record of Decision on November 17, 2008 ("2008 ROD"). The 2008 ROD identified in Utah 638,192 acres in Utah as most the geologically prospective oil shale areas using certain defined criteria of shale quality and thickness. The 2008 ROD also identified 656,505 acres of special tar sands areas ("STSA") in Utah. The 2008 ROD adopted the Preferred Alternatives (Alternatives for both oil shale and tar sands) set forth in the 2008 PEIS by making available for commercial leasing for oil shale in Utah 630,971 acres, and for tar sands 431,224 acres.

Citing a Settlement Agreement in a 2009 lawsuit and some alleged "new information," BLM determined that it needed to take a new "hard look" at the leasing program created by the 2008 ROD. This review has resulted in the pending PRMP/FEIS. The Preferred Alternatives/Proposed Plan Amendments of the PRMP/FEIS dramatically modify the conclusions of the 2008 ROD. Most significantly, the PRMP/FEIS drastically reduces the total acreage available for leasing, and converts the commercial programs for both oil shale and tar sands to research, development and demonstration (RD&D) programs. These changes directly violate the aforementioned provisions of the EP 2005.

In its DPEIS comments at p. 4, Utah made this very point stating that, "Congress did not ask BLM to determine if commercial leasing was appropriate or not, or to wait on a commercial leasing process in favor of some other proposal... The recent proposal does not meet those requirements and directly ignores both the mandate and timeline given to it by Congress under [EP 2005]." In response to these and similar comments, the BLM cynically States that: "Nothing in the Energy Policy Act of 2005 specified how the Secretary must establish a commercial oil shale leasing policy," but recognizes that commercial leases under the preferred alternatives could occur, "only through conversion of an RD&D lease." Comment Response Document ("CRD") p. 45. Such conflation of directives does not cure the fact that the PRMP/FEIS directly violates the commercial leasing provisions of the EP 2005.

B. The BLM Failed to Consult with Utah As Required by the Energy Policy Act of 2005.

Not only does the PRMP/FEIS fail to adhere to the commercial leasing directives of the EP 2005, BLM failed to consult with Utah to determine the level of Utah's support and interest in a commercial leasing program. The EP 2005 requires that the Secretary, "consult with Governors of the States with significant oil shale and tar sands resources on public lands.... In an effort to determine the level of support and interest in the States in the development of tar sands and oil shale resources." 42 USC 15927 (e). This directive goes on to State: "If the Secretary finds sufficient support and interest exists in a State, the Secretary may conduct a lease sale in the State under the commercial leasing program regulations." The "may conduct" language goes not to the discretion of the Secretary to refrain from commercial leasing if the requisite level of interest is there, but rather to the requirement that State support and interest exist before commercial leasing commences. The statute requires commercial leasing if the State supports it.

As pointed out in Utah's comments, and in contradistinction to the extensive consultation that occurred during the 2008 ROD process, "no such meetings have taken place with the Governor of Utah or his representative during the current PEIS effort." Comments p. 6. It was further pointed out that, "Utah advised BLM [during the 2008 process] that the level of interest in Utah was high, and that if necessary, the BLM should proceed with a commercial leasing program in Utah even if the other States were not interested." *Id.* The comments concluded by requesting the required consultations before issuance of the FEIS:

The State of Utah urgently requests meeting with the BLM which meet the letter and the spirit of the requirement of EPACT 2005 to consult with the Governors, and local government, to determine the level of support for a commercial program for the leasing of oil shale and tar sands. Only then will the BLM be able to fully analyze the social and economic impacts to the State as well as work with the State on decisions affecting a critical component of the State's economy. These meetings must include through discussion of all information and issues pertaining to a commercial leasing program, including royalty rates, the structure of the leasing program, and the availability of lands for leasing."

Id. (Emphasis on original).

BLM's failure to consult with the Governor of Utah in violation of EP 2005 renders the PRMP/FEIS insufficient to support any subsequent ROD.

Since the issuance of the 2008 ROD, Utah has taken significant steps to foster the commercial development of its oil shale and tar sands resources. In March 2011, Utah Governor Herbert unveiled his "Energy Initiatives and Imperatives: Utah's 10-Year Strategic Energy Plan, "with the goal of facilitating the expansion of responsible development of Utah's energy resources, including oil shale and tar sands." In 2012, the Utah Legislature enacted the "State of Utah Resource Management Plan for Federal Lands," UCA 63J-8-101 *et. seq.* that created the Uintah Basin Energy Zone in both Uintah and Duchesne Counties. This legislation States that

the State supports, "efficient and responsible full development of all existing energy and mineral resources located within the Uintah Basin Energy Zone, including oil, oil shale, natural gas, etc." It calls upon the federal agencies who administer lands within the Uintah Basin Energy Zone to fully cooperate with the State in the adoption of land and resource management plans which employ the State's land, and to expedite the processing, granting and streamlining of mineral and energy leases.

Yet, due to the BLM's failure to consult with Utah, neither of these State initiatives were considered or even mentioned in the PRMP/FEIS.

C. BLM's Change in Position, as Reflected in the PRMP/FEIS, Without Manifested Consideration of the Findings in the 2008 ROD is Arbitrary, Capricious and an Abuse of Discretion

Federal agency action under the Administrative Procedures Act ("APA") must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC § 706. An agency action is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [if the decision] is so implausible that it could not be ascribed to a difference in view of the product of agency expertise." *Sec Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Ins. Co*, 463 U. S. 29, 43 (1983).

As noted previously, the 2008 ROD adopted Alternative B of the 2008 FEIS by making available for commercial leasing the lion's share of the most geologically prospective oil shale areas. As its rationale for selecting Alternative B, the 2008 ROD Stated:

Alternative B for oil shale was selected as the Proposed Plan Amendment based on: 1) its consistency with the requirements of the Energy Policy Act of 2005, 2) its balanced use and protection of resources, 3) the FPEIS's analysis of potential environmental impacts, and 4) the comments and recommendations from cooperating agencies and the public.

2008 ROD p. 16.

Alternative C of the 2008 FEIS was very similar in terms of acreage exclusions to the Preferred Alternative in the current PRMP/FEIS. Alternative C of the 2008 FEIS was rejected in the 2008 ROD for the following reasons:

Alternative C was not selected as the Proposed Plan Amendment because the alternative would not make the "most geologically prospective lands in Colorado, Utah and Wyoming" as available for application for leasing. Thus it is not fully consistent with the mandate of the Energy Policy Act of 2005. Much of the geologically prospective acreage would be excluded under Alternative C; in particular areas which are in close proximity to three of the six RD&D leases would be excluded. In addition, this unreasonably fragments the area that would be available for application, resulting in parcels that are unlikely to be explored, leased, or developed. This could be an impediment to sound and rational development of the resource and can reduce the economic return to the public. If oil shale resources are by-passed because of the exclusions in Alternative C, that could

also limit the benefits to the nation from exploitation of a domestic unconventional energy source.

2008 ROD p. 22.

Notwithstanding the findings of the 2008 FEIS and the substantiation of the 2008 ROD, BLM now attempts to justify its complete about-face by simply opining that it a "fresh look" is required of the allocation of lands made available for commercial leasing, and makes reference to a Settlement Agreement that was entered into outside of the NEPA process. As noted in Utah's comments on the Draft PEIS: "Despite the adequacy and sufficiency of the previous Record of Decision and supporting documentation proposed under the provisions of the National Environmental Policy Act, the BLM has reversed the sound decision it made in the 2008 ROD." Comments at p. 2. BLM makes no attempt to explain the reversal of its 2008 conclusions that the 2008 ROD was consistent with the EP 2005, and that the more restrictive Alternative C was not. The law requires that "an agency changing its course is obligated to supply a reasoned analysis for the change." *Sec Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Ins Co. supra*. BLM's failure to adequately explain this change in course constitutes an arbitrary and capricious action in violation of the APA.

D. BLM's Failure to Consider Utah's Ongoing Sage Grouse Program in Drawing its Commercial Leasing Availability Decision Is Arbitrary and Capricious

BLM's Preferred Alternative in the PRMP/FEIS excludes certain of the lands within the areas potentially available for commercial leasing for both oil shale and tar sands based upon core or priority sage-grouse habitat. In doing so, BLM admits that it has not taken into consideration Utah's historical and ongoing efforts to protect and enhance sage-grouse habitat and sage grouse. This failure to consider information that is readily available is both arbitrary and capricious.

Utah's comments addressed at length its efforts, "to determine the elements of plans, conditions or stipulations, along with other mechanisms, to preserve the sage-grouse while allowing economic development and growth to occur." Comments at pp. 10-12. As noted therein, Utah had been sponsoring programs to protect sage-grouse for years. More recently, Utah is conducting an ongoing sage-grouse initiative in response to the March 2010 decision of the U.S. Fish and Wildlife Service (FWS) concerning the potential listing of the sage-grouse under the provisions of the Endangered Species Act ("ESA"). These efforts are in the forefront of the efforts of the BLM and the US Forest Service ("USFS") to amend various RMPs and Land Use Plans in response to the FWS decision. The State of Utah is leading the charge to protect sage-grouse and sage-grouse habitat in Utah and BLM and the USFS are partners in this effort.

In response to the Notice of Intent to Prepare an Environmental Impact Statement ("NOI") issued by BLM and the USFS, Utah provided comments asserting that the sage-grouse populations in Utah, due to the State's ongoing efforts in habitat protection, are in good condition and requesting that BLM and the USFS "review and fully analyze" the available evidence made available.

In addition, Governor Herbert has created a Sage-Grouse Working Group "to provide recommendations for the protection of sage-grouse, while continuing to provide for a healthy economy and protecting private property rights. This Working Group includes representatives of BLM, USFS, FWS and the National Resource Conservation Service, along with representatives of State and local government, industry and environmental organizations. This Working Group has been meeting regularly since January 2012, and has issued its final recommendations to the Governor. These recommendations, are now being translated into a Conservation Plan for Sage-grouse in Utah. BLM is fully aware of the provisions of this Plan, and is moving to incorporate its provisions into the RMP amendment effort now underway in all the western states with sage-grouse habitat. The Plan sets forth conservation goal and objectives, identifies Sage-grouse Management Areas, portrays pertinent scientific information and studies, provides maps of existing habitat and land ownership, and sets forth management protocols and mitigation that will ensure protection of sage-grouse habitat and populations. The State has made the request to the BLM to adopt its Sage-grouse Management Areas as the "priority" habitat used in the BLM RMP amendment effort, and to consider other sage-grouse habitat to be identified general habitat. This delineation is directly related to the exclusions under discussion in the current oil shale FEIS. This directly violates the provisions of BLM Instructional Memoranda and planning instructions.

BLM, through its active participation on the Working Group, is intimately aware of the information, evidence, conclusions and sage-grouse protections that are under discussion and consideration. Yet the PRMP/FEIS fails to consider the fruits of this substantial and ongoing effort, and is, therefore, arbitrary and capricious.

Recognizing this deficiency, and acknowledging that, "the 2012 OSTs ROD is likely to be inconsistent with the results of the State process in Utah,"(PRMP/FEIS p. 2-81), BLM suggests that the matter can be cured down the road by subsequent RMP amendments. This is wholly insufficient, and violates the BLM planning criteria. NEPA requires that all pertinent and available information be considered in the FEIS, including subsequently prepared or identified information. Accordingly, the PRMP/FEIS needs to be amended to reflect the imminent Utah Conservation Plan and supporting information, and the allocation of lands available for lease need to be adjusted accordingly.

E. BLM's Exclusion of Lands With Wilderness Characteristics From Leasing For Oil Shale and Tar Sands Violate the Provisions of the Federal Land Policy and Management Act and is Arbitrary and Capricious.

The PRMP/FEIS removes from possible oil shale and tar sands leasing, "all areas that the BLM has identified or may identify" as lands with wilderness characteristics ("LWC"). BLM conducted inventories of lands for the presence of wilderness characteristics prior to the 2008 RMP for the Vernal, Price, Moab and Richfield Offices, and, therefore, the 2008 Oil Shale EIS. No inventories for wilderness characteristics have been conducted since that time. As part of the 2008 RMP decision process, the State commented on management prescriptions for the lands identified, in whatever manner, as possessing the characteristics of wilderness. At the time, the State informed BLM as follows:

"The State of Utah has reviewed BLM's inventory of and proposed management for lands identified as possessing wilderness characteristics. The State does not believe that BLM has the authority to create a category of management based solely on the characteristics of wilderness. The characteristics of wilderness, or their constituent elements, were first recognized by the Wilderness Act of 1964 and passed to the BLM within the provisions of Section 603 or the Federal Land Policy and Management Act of 1976. The authority within Section 603 has now expired by its own terms. The State recognized that recent court decisions have affirmed BLM's authority to inventory for wilderness characteristics, and have required the BLM to consider new information about these characteristics in its documents prepared under the National Environmental Policy Act. These decisions do not, however, consider or affect the BLM's statutory authority for management policies on the BLM lands. The State cautions BLM against an overly broad reading of these decisions. Management authority must be derived solely from the specific provisions of the Federal Land Policy and Management Act, (e.g. Areas of Critical Environmental Concern) or other specific federal legislation, and it is incumbent upon the BLM to carefully define its detailed legal rationale and reasoning for its proposed management policies, provisions and categories."

(Emphasis in original)

The PRMP/FEIS does not contain any such analysis of its authority to manage for wilderness characteristics. In addition, the PRMP/FEIS does not contain any new information on inventories for lands contained within inventories for wilderness characteristics. All inventories in the areas of concern in the PRMP/FEIS were completed prior to 2008. Because the BLM presents no new information regarding new inventories that would indicate the reasons for an increase, decrease or adjustment, related to the management of lands with wilderness characteristics, the BLM must carry forward the decisions made in the 2008 oil shale EIS and the 2008 RMP's for lands managed for wilderness characteristics. A decision containing new management prescriptions for lands with wilderness characteristics would be contrary to the decisions in the 2008 ROD and would, therefore, be arbitrary and capricious, as it would not be supported by any significant new information.

Since 2008, the State of Utah has passed several laws which have bearing on this decision regarding the protection of lands with wilderness characteristics. First, Utah Code Section 63J-8-103 (4) provides that the public lands should not be "segregated into geographical areas for management that resembles the management of wilderness, wilderness study areas, wildlands" and the like. Instead, State law indicates the need for BLM to simply adhere to the normal management standard of preventing unnecessary and undue degradation to the land.

In addition, Senate Bill 83, passed in the 2012 General Session of the Utah Legislature, provides that certain areas of Uintah, Duchesne and Daggett Counties are designated as an Energy Zone, and managed for the primary purpose of the production of energy.

BLM must give the provisions of this law full consideration based upon respect for the authority of the State to provide for the general welfare of the citizens of the State and must review and analyze the purpose and effect of the law in the FEIS.

In addition, because the BLM does not possess any new information about lands with wilderness characteristics from that available in 2008, a change in any type of management for the lands, from that finalized in the 2008 RMP's and the 2008 Oil Shale EIS as is proposed in the PRMP/FEIS, would constitute an improper use of Secretarial Order 3310, issued December 23, 2012. Secretarial Order 3310 was defunded by Congressional action, which required that no funds may be used to implement or enforce the Order. In this case, the BLM is proposing to restrict the availability of these lands for the commercial leasing of oil shale and tar sands based solely upon the existing, older inventory for the presence of wilderness characteristics. This clear expression of intent to manage for wilderness is the functional equivalent of the creation of wild lands as proposed within the Secretarial Order. Because the Congressional action clearly stated that the BLM may not implement or enforce Secretarial Order 3310, the PRMP/FEIS is contrary to law.

F. The PRMP/FEIS Simply Justifies a Decision Already Made in Violation of 43 CFR § 1502.2 (g).

BLM States that its "fresh look" at the leasing decisions of the 2008 ROD was necessitated by a Settlement Agreement and resultant court order in a lawsuit brought initially in early 2009 by a coalition of environmental organizations. *Sec Colorado Environmental Coalition, et. al. v. Salayar, et.al, Case No. 1:09-cv-00091 (D. Colo)*. This lawsuit challenged the 2008 ROD and the OSTs FEIS upon which it was based. The Settlement Agreement, a binding land use measure negotiated entirely outside of any NEPA or RMP amendment process, required that BLM, within a period of 15 months, initiate a NEPA process proposing to amend the 2008 ROD. Although the Settlement Agreement speaks in terms of the "discretion" of BLM to propose amendments, it lists several specific "changes to the environmental protection requirements applicable to oil shale commercial leasing." These "proposed" changes were required to include a provision, "Expressly stating that BLM will consider issuing a commercial oil shale lease only upon application of an RD&D lessee to convert its RD&D least to a commercial lease, or after BLM issues a call for expression of leasing interest." The effect of this provision is to artificially minimize the expression of interest in the leasing of oil shale.

Of course, left unsaid in any public document issued by BLM is the fact that, between the issuance of the 2008 ROD and the initiation and settlement of the lawsuit, the administration of the public lands had been passed to a newly-elected national administration which has a more liberal attitude in favor of environmental interests and a more restrictive view of multiple use of the public lands.

43 CFR § 1502.2 provides that: "Environmental impact Statements shall serve as the means of assessing the environmental impact of a proposed action, rather than justifying decisions already made." Certainly with regard to the conversion from a commercial leasing program to an RD&D program (as discussed herein in subpart A), and perhaps with respect to many of the other proposed changes from the 2008 ROD, the PRMP/FEIS is a rather thinly-veiled effort on BLM's part to justify decisions already made to more accurately reflect the policies of the new administration. NEPA review is not the vehicle for such political shifts in policy. Rather, NEPA review must be objective and based upon empirical evidence of

environmental impacts of proposed federal actions. To the extent that the PRMP/FEIS is the justification of decisions already made, it is in violation of 43 CFR § 1502.2.

G. The PRMP/FEIS Fails to Adequately Analyze Current Oil Shale and Tar Sands Technologies in Violation of 40 CFR § 1502.1

40 CFR § 1502.1 requires that an environmental impact Statement "shall be supported by evidence that the agency has made the necessary environmental analyses." Necessarily, the most current technologies must be analyzed to determine environmental reports.

As pointed out in Utah's comments to the DPEIS at pp. 19-22, the PRMP/FEIS relies heavily on outdated information regarding oil shale and tar sands development technologies and in doing so, fails to provide the kind of comprehensive information required by NEPA for proper decision making.

CEQ regulations are quite clear about the standards required under NEPA for EISs. According to Sec.15001 (b): "...Information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."

Because an EIS is used to plan actions and make decisions and must be supported by evidence that the agency has made the necessary environmental analyses, it must contain the most accurate, up-to-date information available. Based on Utah's extensive discussions with oil shale and tar sands industries, the PRMP/FEIS is clearly deficient and shows little to no coordination with industry.

The BLM admits that "some of the information on the environmental consequences of oil shale development... is based on past oil shale developments. For purpose of this analysis, in the absence of more specific information of the oil shale technologies to be implemented in the future and the environmental consequences of implementing those technologies, information derived from other types of development ... was used"

Consultation and coordination with industry by the BLM is critical to the effective and unbiased analysis of the environmental consequences as well the economic benefits of oil shale and tar sands development. Based upon the previous decisions of the BLM, companies have invested hundreds of millions of private capital in technology, permitting, construction, and processing of oil shale and tar sands. The willingness of the State and private landowners to encourage this development in Utah has produced a highly sophisticated, successful, privately funded and well-capitalized oil shale and tar sands industry in the State.

The BLM qualifies its analysis of oil shale and tar sands technologies by stating that the information on these technologies is presented for the purposes of general understanding and doesn't define the range of possible technologies that might emerge in the coming years. This reflects a lack of due diligence on the part of the BLM. There is information available on newer, cutting-edge technologies that have moved from the RD&D phase into commercial scale development. BLM's reliance on outdated or general descriptions of the technology and its environmental impacts when there is ample information available on the newest developments in the industry contravenes NEPA's implementation requirements for EISs. While past experience

may be useful for the analysis of the impacts of oil shale technologies, it is also important to include analysis of the innovative technologies currently in use that seek to resolve some of the environmental concerns raised by these earlier projects. Relying on technological examples in any industry (e.g. computing for example) from years back, simply does not meet the requirement of NEPA to consider the best information available. This is true especially in the oil and tar sands industries present in Utah today.

The companies referenced in Utah's comments report that their new technologies use less water and result in fewer environmental impacts than the process technologies of the 1980s. For example, the EcoShale technology utilizes low temperatures for heating and does not require process water. The Enefit140 retort process, currently in use in its Estonian facilities and the predecessor to the Enefit280, uses no water, runs on organic waste, and emits significantly lower CO2 emissions. While the BLM acknowledges that these two companies are planning commercial production in the Uintah Basin in the near future, BLM fails to examine these technologies in any detail or evaluate their assertions of reduced environmental impacts. The agency instead relies on assumptions based on old data and tired ideas.

This omission is serious. According to regulations for the implementation of NEPA: "If a draft Statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion." 40 CFR § 1502.9 (a)

BLM's failure to include any kind of meaningful consideration of current oil shale and tar sand technologies and their environmental impacts is a serious breach of its responsibility to provide thorough, unbiased in its EISs. CEQ regulations are very clear that EISs shall serve as the means for assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

VI. Conclusion and Remedies

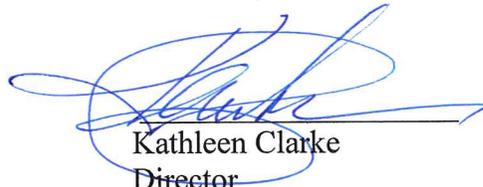
Utah submits that the cumulative effect of the PRMP/FEIS is to signal a significant diminishment in federal resource and regulatory support for a commercial oil shale and tar sands industry in contradiction of the letter and the spirit of the Energy Policy Act of 2005. The lessons of history have shown that the financial investment necessary for the scale-up from prototypical R & D facilities to commercial scale demonstration facilities is enormous, with some estimates in the range of \$5-\$7 billion for surface retorts. See CRS Report, *Oil Shale: History, Incentives, and Policy* (April 2006.) p.16. The risks associated with such an investment are both significant and unpredictable. Fluctuating conventional oil prices and resource availability, multiple-year construction periods and political shifts in policy all contribute to investment risk. Fluctuation's in policy contributes greatly to the perception of risk as well. Further, the uncertainty inherent in multiple levels of regulatory permitting and environmental review magnify this risk. EP 2005 requires the BLM to minimize this policy and regulatory risk by mandating a clearly defined commercial leasing program.

Industry lived through the reality and consequences of those perils in the early 1980's when, due primarily to reductions in the world price of conventional oil brought about by OPEC pricing, the bottom fell out of the fledgling synfuels industry, and the development of

commercial scale technologies was curtailed. Exxon alone left in excess of \$1 billion on the ground at its Colony Project in western Colorado. *Id* at p. 10 Having once been burned, major industry investors are necessarily leery of making the investments required to move from RD&D to commercial scale facilities without a demonstration of robust federal resource and regulatory support. The emasculation of the 2008 ROD that is reflected in the pending PRMP/FEIS sends entirely the wrong message to potential industry investors. The dramatic reduction in available lands, the conversion from a commercial program to an RD&D program and a three-tiered NEPA review process as recommended in the PRMP/FEIS does not constitute the required level of federal support. A shift in federal leasing policy alone will have a chilling effect upon potential investment. Utah submits that this is not the way to realize a much needed unconventional source of energy, and is inconsistent with Congressional intent behind the Energy Policy Act of 2005. The preferred alternative set forth in the PRMP/FEIS both disregards and contravenes governing law.

For the reasons set forth herein, Utah asks that the Preferred Alternative in the PRMP/FEIS be amended to designate the No Action Alternative, thereby restoring the 2008 ROD. and robust commercial leasing program Further, the PRMP/FEIS must be amended to reflect the findings and recommendations of the Utah Sage-grouse Working Group.

Very truly yours,



Kathleen Clarke
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