THE WILDERNESS SOCIETY

October 6, 2008

The Honorable Dirk Kempthorne
U.S. Department of the Interior
1849 C St., N.W.
Washington, DC 20240

Re: Resource Management Plan Amendments for Oil Shale and Tar Sands Leasing and Production (73 Fed. Reg. 51838-51840, September 5, 2008)
Failure to Provide Opportunities for Protests and Consistency Reviews

Dear Secretary Kempthorne:

On behalf of the undersigned organizations, we are writing to express our frustration and concern with the BLM's publication of the final Programmatic Environmental Impact Statement (PEIS) and notice of availability (NOA) of proposed amendments to Resource Management Plans (RMPs) for oil shale and tar sands leasing and production without providing the public with an opportunity to protest and without providing a specific opportunity for consistency reviews by governors of affected states, in violation of the requirements of the Federal Land Policy and Management Act (FLPMA). We are also writing to highlight some of the changes that are most inconsistent with the requirements and policy of the National Environmental Policy Act (NEPA) and FLPMA.

However, because the NOA makes it clear that there is no opportunity for continued public participation in the process, the undersigned request that the BLM withdraw the twelve RMP amendments listed below until the agency has fully complied with applicable laws.

Background

The BLM proposes to amend the following twelve RMPs to designate 2.5 million acres of federal land as available for oil shale and tar sands leasing and production:

Colorado
- Glenwood Springs RMP, as amended
- Grand Junction RMP
- White River RMP, as amended

Utah
- Book Cliffs RMP
- Diamond Mountain RMP
- Price River Resource Area MFP, as amended
- Henry Mountain MFP
- San Rafael Resource Area RMP
- San Juan Resource Area RMP

Wyoming
- Great Divide RMP
- Green River RMP, as amended
- Kemmerer RMP

A NOA of the RMP Amendments and Draft PEIS was published in the Federal Register on December 21, 2007 for a 90-day public review and comment period. 72 Fed.Reg. 72751. The comment period closed on March 20, 2008, and reopened on March 21, 2008, for an additional 30-day review and comment period, and closed on April 21, 2008. Open Houses were held during February 2008 to provide additional information on the Draft PEIS resulting in more than 5,000 comments. Comments from the public and cooperating agencies were received from over 105,000 individuals. Despite the volume of interest and comment, BLM did not make changes to the RMP amendments:

> "As a result of comments received, and upon further consideration, clarifications were made to the analysis and description of the proposed action, but proposed land use plan alternatives remained unchanged." 73 Fed.Reg. 51839

A Notice of Availability for the Final PEIS (FPEIS) was published in the Federal Register on September 5, 2008. 73 Fed.Reg. 51838. BLM stated it will wait to approve RMP amendments proposed in the FPEIS:

> "As required by the NEPA, the EPA will publish a Notice in the Federal Register announcing the availability of the FPEIS. The BLM will wait at least 60 days after the publication of the EPA's Notice before signing and issuing the Record of Decision (ROD) approving the plan amendments." 73 Fed.Reg. 51839.

There was no protest period afforded to the public or formal consistency review offered to governors of affected states.

The BLM has not provided for necessary public participation to occur prior to publishing the Record of Decision approving the RMP amendments.

On April 24, 2008 the BLM published a notice of availability of its RMP amendments in the Federal Register. 73 Fed.Reg. 51838-51840. The NOA informs the public that there is no comment period for the twelve RMP amendments. Moreover, the NOA makes it clear that the decision to amend the RMPs is not open for any public protest or other redress:

> "Because developing this and other alternative energy resources is of strategic importance in enhancing our Nation's domestic energy supplies, the Assistant Secretary, Land and Minerals Management, in the Department of the Interior is the

> responsible official for these proposed plan amendments. The Federal Land Policy and Management Act and its implementing regulations provide land use planning authority to the Secretary, as delegated to this Assistant Secretary. Because this decision is being made by the Assistant Secretary, Land and Minerals Management, it is the final decision for the Department of the Interior. **This decision is not subject to administrative review (protest) under the BLM or Departmental regulations**." 73 Fed.Reg. 51840, emphasis added.

We believe that amending twelve RMPs without affording the public the opportunity to protest is problematic and inconsistent with the law and policy governing amendment of BLM's land use plans.

Curtailing administrative review does not adhere to requirements of FLPMA.

Any policies toward the leasing and development of oil shale on federal public lands managed by the BLM must also comply with relevant aspects of FLPMA. 43 U.S.C. §§ 1701-1785. Congress enacted FLPMA "to provide guidance and a comprehensive statement of congressional policies concerning the management of the public lands . . . ." Rocky Mtn. Oil & Gas Ass'n v. Watt, 696 F.2d 734, 737 (10th Cir. 1982). FLPMA establishes a policy of "multiple use" management pursuant to which BLM must "recognize competing values," which is to be done by "using the Act's procedures in a dynamic, evolving manner to accommodate these competing demands." Id. at 738; see also 43 U.S.C. §§ 1701 and 1702(c). FLPMA directs BLM to manage public lands for multiple uses and sustained yield. 43 U.S.C. § 1732(a). The Secretary is required to "use and observe the principles of multiple use and sustained yield" in developing and revising land use plans. Id. at 1712(c)(1). The multiple use principle is applicable to all resource uses and decisions affecting BLM lands. 43 U.S.C. § 1732(b). It serves as a bedrock for all analyses in the PEIS and activities undertaken pursuant to the RMP.

FLPMA directs the Secretary of the Interior create and maintain land use plans. 43 U.S.C. § 1712. This authority has been delegated to the BLM in planning regulations. 43 C.F.R. Part 1600. While the delegation for this specific PEIS may have been to an Assistant Secretary, the PEIS is still conducted pursuant to FLPMA and the needs for public participation and consistency established in FLPMA still apply. Notably, the decision in the Federal Register is published by the BLM and not by the Department. The PEIS is amending numerous land use plans and BLM regulations (issued under FLPMA) require that the public have a right to protest and the governors of affected states have the right to review for consistency and then seek resolution of those concerns. 43 C.F.R. §§ 1610.5-2, 1610.3-2(e). The "technicality" relied upon by the agency (because these amendments are being done through other ultimate channels of authority) cannot excuse compliance with these requirement and should not be used as an excuse to deprive the public and the affected states of their rights to be heard before this PEIS goes into effect and makes formal changes to the management of the affected lands, which is on a very large scale.

Curtailing administrative review does not allow for meaningful consistency review by state, local, and tribal governments.

FLPMA requires that BLM land use plans be consistent with state, local and tribal government resource-related plans. 43 U.S.C. § 1712(c)(9); *see also* 43 C.F.R. § 1610.3-2; BLM Handbook H-1601-1 at II-1 ("Land use plans must be consistent with State and local plans to the maximum extent consistent with Federal law."). As part of amending land use plans, BLM regulations require that governors of affected states be given 60 days to review the amendments, identify inconsistencies with state or local plans, policies, or programs, and then propose resolution of

any such inconsistencies. 43 C.F.R. § 1610.3-2(e). This is a vital part of achieving the consistency required by FLPMA. By depriving the states of this right, the BLM is proceeding without considering how best to resolve inconsistencies that might otherwise make implementation of the PEIS impracticable.

Despite multiple examples of inconsistency with the resource management plans of other governments, the process does not allow for reconciliation or meaningful participation on the part of the public or affected governments. For example, it is the Wyoming Game and Fish Commission's policy that crucial habitat for wildlife species within the State should be managed to prevent "any loss of habitat function." *See* Wyo. Game & Fish Comm'n Policy No. VII H (April 28, 1998) at 138. Some modification of crucial habitat is permitted but only if "habitat function is maintained (i.e., the location, essential features, and species supported are unchanged)." *Id*. Pursuant to the RMP amendments proposed in Wyoming, 362,792 acres of mule deer crucial winter habitat and 262,273 acres of elk crucial winter habitat will be opened to oil shale development. *See* Western Resource Advocates et al. letter to BLM (March 21, 2008), at 16.

Also, the scenic and wilderness qualities in Wyoming's Adobe Town State Very Rare or Uncommon Area and its viewshed need to be protected from oil shale leasing in order to maintain the scenic and wilderness qualities in this area. Oil shale leasing should be precluded from this area in order to maintain FLPMA-required consistency with the state designation preventing non-coal surface mining. The Wyoming Environmental Quality Council finalized its decision on the designation of the Adobe Town area as Very Rare or Uncommon under the state Environmental Quality Act. Wyoming Env. Qual. Council (April 10, 2008). Adobe Town was so designated due to its geological, fossil, scenic, wildlife, and cultural and historical values. Non-coal surface mining (which would include oil shale) is expressly forbidden in Very Rare or Uncommon areas except in cases where surface mining would not detract from such qualities. In the case of this area, because scenic qualities are part of the designation, there is no possibility that an exemption for oil shale mining could be issued. While part of the Very Rare or Uncommon area is Wilderness Study Area which would not be made available for oil shale leasing under the DPEIS, the remainder is outside the WSA, including lands which fall within the proposed Washakie Basin leasing area. The designations proposed under this Draft PEIS must be revised to respect the Environmental Quality Council's decision.

Furthermore, BLM and state data are inconsistent on the cultural resources on Utah's West Tavaputs Plateau, a region that encompasses Nine Mile Canyon, Range Creek Canyon and Desolation Canyon, all areas of international renown for the abundance and the quality of their archaeological and historic sites. As Dr. Jerry Spangler observed in a comment letter to the BLM, the PEIS appears to dismiss impacts to cultural resources through the apparent misrepresentation of data that is clearly inconsistent with data on file with the Utah State Historical Preservation Office (SHPO). *See* Western Resource Advocates et al. letter to BLM (March 21, 2008) at 325. For example, data on file with the SHPO indicate at least 830 prehistoric sites within 1 kilometer of either side of Nine Mile Creek, and at least 100 documented historic sites. The data represented in the PEIS still understate the actual number of sites by 65 to 70 percent.

Curtailing administrative review does not adhere to applicable regulations and agency guidance for amending RMPs.

BLM's regulations require that those who have participated in the amendment process be given an opportunity to protest. 43 C.F.R. § 1610.5-2. The protests then provide the agency with

another chance to consider whether decisions comply with agency procedures, considered relevant information, and are consistency with applicable law and policy. *See*, BLM Land Use Planning Handbook, H-1601-1, Appendix E. By circumventing this process, the BLM is depriving the public and the agency of the important issues that can be identified and resolved.

One of the fundamental principles governing the development of and amendments to RMPs is to "identify the actions needed to achieve desired outcomes, including actions to restore or protect land health." *See* BLM Handbook H-1601-1 at II-4. Those actions are not identified in the PEIS and, as discussed above, mitigation measures are largely undefined and speculative. Without this information, it is impossible to determine whether the other management goals set forth in each RMP can be met.

In amending the RMPs through the PEIS, the BLM is circumventing agency policy. BLM policy provides that in order to amend RMPs to allow for oil shale development, the agency must identify the following:

1. Areas open to leasing, subject to existing laws, regulations, and formal orders, and the terms and conditions of the standard lease form.
2. Areas open to leasing, subject to moderate constraints such as seasonal and controlled surface use restrictions. (These are areas where it has been determined that moderately restrictive lease stipulations may be required to mitigate impacts to other land uses or resource values.)
3. Areas open to leasing, subject to major constraints such as no-surface-occupancy stipulations on an area more than 40 acres in size or more than 0.25 mile in width. (These are areas where it has been determined that highly restrictive lease stipulations are required to mitigate impacts to other lands or resource values. This category also includes areas where overlapping moderate constraints would severely limit development of fluid mineral resources.)
4. Areas closed to leasing. (These are areas where it has been determined that other land uses or resource values cannot be adequately protected with even the most restrictive lease stipulations; appropriate protection can be ensured only by closing the lands to leasing.) Identify whether such closures are discretionary or nondiscretionary; and if discretionary, the rationale.
5. Resource condition objectives that have been established and specific lease stipulations and general/typical conditions of approval and best management practices that will be employed to accomplish these objectives in areas open to leasing.
6. For each lease stipulation, the circumstances for granting an exception, waiver, or modification. Identify the general documentation requirements and any public notification associated with granting exceptions, waivers, or modifications.
7. Whether the leasing and development decisions also apply to geophysical exploration.
8. Whether constraints identified in the land use plan for new leases also apply to areas currently under lease.
9. Long-term resource condition objectives for areas currently under development to guide reclamation activities prior to abandonment. *Id*. at H-1601-1, Appendix C at 23-24.

Despite this requirement, there is no discussion in the PEIS as to whether the proposed RMP amendments are consistent with the resource management goals of the impacted states, local governments or tribes.

Curtailing administrative review does not adhere to requirements and purposes of NEPA.

The CEQ regulations implementing NEPA state that federal agencies, to the fullest extent possible, should "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(d). Accordingly, NEPA directs federal agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6. NEPA also recognizes that "public scrutiny" is "essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

The BLM, by issuing RMP amendments without the required public protest and consistency review periods, has deprived the public of an opportunity to provide meaningful comment on the numerous areas included in the PEIS, including but not limited to the manner in which the agency considered impacts on the environment, the public's ability to participate in the agency's analysis of environmental impacts, the resulting decisions about our public lands, and the logic of proceeding toward leasing and developing a resource that that yield fuels that generate upwards of 50 percent more global warming emissions than conventional oil. The requirements of the BLM regulations taken in conjunction with those of NEPA, underscore the importance of providing a meaningful protest and consistency review period provided prior to issuing the ROD approving the amendments to the RMPs in question.

Conclusion

Following the BLM's current course, the proposed RMP amendments to designate lands available for oil shale and tar sands leasing and production will be approved without an adequate review of the local consequences of such amendment. The BLM originally began the PEIS process with the intent of performing a programmatic review of the environmental consequences of developing a commercial leasing program for oil shale and tar sands, the agency changed course upon recognizing that too little information is currently available to perform a sufficient analysis of commercial leasing. Nevertheless, perhaps in an effort to take *some* action despite the lack of relevant information—and perhaps bowing to pressure to assuage industry boosters within the Administration and the Congress—the BLM shifted the focus of the PEIS to purportedly consider the environmental impacts of amending 12 RMPs to allow for commercial leasing. The PEIS does not contain any specific analysis or reasoning to support the amendment of protective land management provisions in RMPs originally enacted pursuant to detailed, local NEPA analysis.

The undersigned are submitting this comment letter in hopes that the BLM will take our concerns seriously and engage in a meaningful public process to ensure that the amendments to the twelve RMPs in question are consistent with the purposes and requirements of FLPMA and NEPA – not just to meet the legal requirements but also to develop good policy and ensure responsible stewardship of the public lands.

We would appreciate a prompt response to this letter.

Very truly yours,

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