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**BEFORE THE UTAH
DIVISION OF FORESTRY, FIRE AND STATE LANDS**

In Re: **Record of Decision Number** :
09-0406-200 00115 Relating to : PETITION FOR
Utah Division of Forestry, Fire and : CONSISTENCY
State Lands Discharge of its Planning : REVIEW
and Public Trust Obligations Relative to :
Mineral Salts Diking and Extraction on the :
Sovereign Lands of Great Salt Lake :

Pursuant to Utah Admin. Code R652-9, FRIENDS of Great Salt Lake, Utah Physicians for a Health Environment, Utah Airboaters Association, Western Wildlife Conservancy, Utah Waterfowl Association, Great Salt Lake Yacht Club, Bridgerland Audubon, Wasatch Audubon, Great Salt Lake Audubon Society, Utah Rivers Council, Utah Chapter of the Sierra Club, League of Women Voters of Salt Lake, and League of Women Voters of Utah (collectively FRIENDS) respectfully submit this Petition for Consistency Review to the Director of the Utah Division of Forestry, Fire and State Lands (Division). As specified below, through this petition, FRIENDS seeks review, for consistency with Utah's Public Trust Doctrine and with the Division's Sovereign Land Management Planning regulations (Utah Admin. Code R652-90, *et al.*), of Record of Decision Number **09-0406-200 00115** (ROD) which purports to discharge those constitutional, common law, statutory and regulatory duties relative to diking and mineral salts extraction on sovereign lands of the Great Salt Lake. Alternatively, the ROD allows leasing and development of approximately 37,000 acres of sovereign lands and the exchange of leases relative to additional sovereign lands without complying with applicable constitutional, common law, statutory and regulatory duties relative to diking, industrial development and mineral salts extraction on sovereign lands of Great Salt Lake. In addition, pursuant to Utah Admin. Code R652-9-500(2), FRIENDS respectfully requests a hearing on the issues raised and relief requested in this Petition for Consistency Review.

Statement of Service

This Petition for Consistency Review, including attachments, was hand-delivered on August 8, 2010 to:

Richard J. Buehler
Director and State Forester
Division of Forestry, Fire & State Lands
1594 West North Temple, Suite 3520
Salt Lake City, Utah 84116-3154, and

Jennifer Sullivan
Sovereign Lands Specialist
Division of Forestry, Fire & State Lands
1594 West North Temple, Suite 3520
Salt Lake City, Utah 84116-3154

and a copy mailed, via first class mail, on the same day to:

Great Salt Lake Minerals
765 North 10500 West
Ogden, Utah 84402

Agency Reference Number

This matter involves Record of Decision Number **09-0406-200 00115** (hereafter “the ROD”).

Statement of Legal Authority and Jurisdiction

FRIENDS makes this Petition for Consistency Review pursuant to § 65A-1-4(6)(a) and Rules 652-9-100 to -500. Utah Admin. Code R652-9 provides that “[f]or all division actions directly determining the rights, obligations, or legal interests of specific persons outside the division, any party aggrieved by such a division action may petition the director to review the division action for consistency with statutes, rules, and policies.” Utah Admin. Code R652-9-200(1).

FRIENDS timely filed this Petition for Consistency Review 20 days after it became aware of the ROD through a Government Records and Access Management Act request filed June 30, 2010. FRIENDS obtained documents disclosing the existence of the ROD as a result of the request on July 20, 2010, shortly after it was informed that the records were available. Utah Admin. Code R652-9-400(1) provides that a Petition for Consistency Review “shall be submitted to the director of the Division of Forestry, Fire and State Lands [and] received at the director's office within 20 calendar days of the date the record of decision was mailed as evidenced by the certified mail posting receipt (Postal Service Form 3800).” As the Division failed to mail the ROD to FRIENDS, or otherwise notify it of

the ROD, FRIENDS has met the relevant deadline as best it could by filing this petition with 20 days of becoming aware of the ROD.

Background and Failure to Notify

The Division signed the ROD on August 4, 2009, thereby granting a 10-year lease to Great Salt Lake Minerals (Mining Company) for the purposes of occupying and the mining of minerals on 37,000 acres of Great Salt Lake sovereign lands. The ROD also allows for the exchange of existing leases on sovereign lands.

One June 10, 2008, Mining Company nominated approximately 52,000 acres of Great Salt Lake sovereign lands for leasing, occupation and mining. ROD at Exhibit C-1. On December 8, 2008, the Division submitted the nomination to the Resource Development Coordinating Committee (RDCC). At the time, there was extensive media coverage of the nomination, including press release by the Mining Company and articles in the *Deseret News* and *Standard Examiner*. This media consistently called on the public to comment on the proposed lease and land exchange.

The December 8, 2008 RDCC notice alerted the public of the proposed project and provided the public with an opportunity to comment on the leasing proposal. In that notice, the Division stated:

In June 2008, [Mining Company] filed a mineral lease nomination for 52,200 acres in Gunnison Bay as part of their plans to expand production for their potash operations. . . .

A revised nomination has been received to lease 37,083 acres below the meander line on the west side of the Great Salt Lake. The intent of leasing this land is to expand solar evaporation operations for mineral extraction of brines from the water of the Great Salt Lake.

On December 30, 2008, FRIENDS and ten additional user and conservation groups filed detailed comments on the 37,000 acre proposal, including ten exhibits and expert opinions from former federal and state employees and professors at local institutions. Exhibit A, attached. The U.S. Fish and Wildlife Service also submitted comments on the proposal during the RDCC process. Exhibit B, attached.

As stated above, the Division signed the ROD on August 4, 2009. ROD at 44. The Division did not notify any of the groups which filed comments together in the FRIENDS December 30, 2008 submittal, or the Fish and Wildlife Service. Moreover, the ROD purports to act on an April 6, 2009 Mineral Lease Application (20000115), rather than on the initial lease application. The Division did not notify the public or the RDCC of this April 6, 2009 lease application. Despite the fact that the April 6, 2009 Mineral Lease Application has a different number and date than the lease application listed in the original December 8, 2008 RDCC notice, the ROD grants leases to the same 37,000 acres

of sovereign lands and approves the same lease exchange set forth in the December 8, 2008 notice.

Although the ROD purports to respond to FRIENDS comments, the Division never provided those responses to FRIENDS and the responses were not included in the record request disclosure.

Statement of Constitutional Provision, Common Law Principle, Statute and Rule with which the Division's Action is Inconsistent

The Division's action, as embodied in the ROD, is inconsistent with the Utah Public Trust Doctrine, which applies to the Division, and with the Division's Sovereign Land Management Planning regulations, Utah Admin. Code R652-90, *et al.*

The State of Utah's Public Trust Obligations

The State of Utah and each of its executive agencies have unique obligations to protect sovereign lands, such as the bed of Great Salt Lake, and the Public Trust values they support. Under Article XX § 1 of the Utah Constitution, sovereign lands are held in public trust.¹ The Utah Supreme Court has interpreted the Public Trust Doctrine, which sets forth federal and state law with regard to sovereign lands, as follows:² "The essence of this doctrine is that navigable waters should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing." Colman v. Utah State Land Board, 795 P.2d 622, 635 (Utah 1990) (citing Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 13 S.Ct. 110 (1892) as "the controlling case" on the Public Trust). The Utah Supreme Court later elaborated that "[t]he 'public trust' doctrine . . . protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large." National Parks and Conservation Ass'n v. Board of State Lands, 869 P.2d 909, 919 (Utah 1993) (citing, Colman, 795 P.2d at 635-36).

Illinois Central characterized the Public Trust Doctrine as:

¹ This constitutional provision states: "All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and, except as provided in Section 2 of this Article, are declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired."

² There is some debate as to whether the Public Trust Doctrine finds its origins in federal common law or federal constitutional law – particularly the "Equal Footing Doctrine." See Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 13 S.Ct. 110 (1892); National Parks and Conservation Ass'n v. Board of State Lands, 869 P.2d 909, 919-920 (Utah 1993). In any case, the Utah Supreme Court has found that this doctrine applies to Utah's sovereign lands.

a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.

Illinois Central R.R. Co. v. Illinois, 146 U.S. at 452; 13 S.Ct. at 118.

Case law in the states has uniformly required that state-owned submerged lands be alienated or encumbered only for public purposes. See Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085, 1089 (1983) (grant of public trust property must be made in the “aid of navigation, commerce, or other trust purposes.”); Morse v. Oregon Division of State Lands, 285 Or. 197, 590 P.2d 709 (1979) (fill may be for non-water-related purposes so long as public need for project outweighs interference with traditional trust purposes); State v. Public Service Commission, 275 Wis. 112, 81 N.W.2d 71, 73-74 (1957) (“In [upholding a grant of an interest in submerged lands], we attach importance to these facts: (1) Public bodies will control the use of the area. (2) The area will be devoted to public purposes and open to the public (4) No one of the public uses of the lake ... will be destroyed or greatly impaired. (5) The disappointment of those members of the public who may desire to boat, fish or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park.”); City of Berkeley v. Superior Court of Alameda County, 26 Cal.3d 515, 162 Cal.Rptr. 327, 606 P.2d 362, 373 (1980) (“[The] principle we apply is that the interests of the public are paramount in property that is still physically adaptable for trust uses”); see generally *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium*, 14 U.C.Davis L.Rev. 181 (1980).

Utah statute, which must be interpreted as consistent with Utah case law, in turn provides that the Division “may exchange, sell, or lease sovereign lands **but only in the quantities and for the purposes as serve the public interest and do not interfere with the public trust.**” Utah Code Ann. § 65A-10-1(1) (emphasis added). Utah regulation interpreting this provision states:

The state of Utah recognizes and declares that the beds of navigable waters within the state are owned by the state and are among the basic resources of the state, and that there exists, and has existed since statehood, a public trust over and upon the beds of these waters. It is also recognized that the public health, interest, safety, and welfare require that all uses on, beneath or above the beds of navigable lakes

and streams of the state be regulated, so that the protection of navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality will be given due consideration and balanced against the navigational or economic necessity or justification for, or benefit to be derived from, any proposed use.

Utah Admin. Code R652-2-200.

These provisions, understood in the context of the mandates laid down by the Utah Supreme Court, require first and foremost that sovereign lands and the values they embody – navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality – must be protected and cannot be interfered with. E.g. NPCA v. Board of State Lands, 869 P.2d at 919 (“The ‘public trust’ doctrine . . . protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large.”); Utah Code Ann. § 65A-10-1(1) (sovereign lands may be leased “only in the quantities and for the purposes as serve the public interest and do not interfere with the public trust.”). Alienation of or encumbrances on sovereign lands are only appropriate if they directly serve public purposes that enhance or aid public trust values – navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality. Illinois Central R.R. Co. v. Illinois, 146 U.S. at 452; 13 S.Ct. at 118.

Moreover, any purported benefit to the trust resources must be direct and identifiable. This means that, to be considered as a benefit to the trust, any alleged economic gain must directly benefit navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality. Economic gains to the state economy or to state coffers are not appropriately considered as a benefit to the trust.

Finally, purely private uses of the trust, essentially to the exclusion of public access use and enjoyment of public trust values, are almost certainly prohibited under Utah law. This is true even where those uses benefit the Utah economy and/or lead to royalties. Such private, consumptive uses cannot be equated with public uses of sovereign lands, and must, almost always, be rejected as an improper burden on public trust resources.

The Division’s Sovereign Land Management Planning Regulations

To help ensure that the Division manages Great Salt Lake according to its public trust responsibilities, the Division must undertake resource planning. For example, the Division’s regulations state that “[s]ite-specific planning shall be initiated either by: (a) an application for a sovereign land use, or (b) the identification by the division of an opportunity for commercial gain in a specific area.” Utah Admin. Code R652-90-300(2) (1996);³ *see also* Utah Code Ann. § 65A-2-4(1) (1994) (requiring Division to “adopt rules

³ In August 2008, the Division amended this rule to remove the requirement for site-specific planning. However, as the ROD concerns a lease application made in June, 2008, the rule in existence at the time, as quoted above, applies. Moreover, the amended rule does not apply to actions taken on Great Salt Lake, as the Comprehensive Management Plan and Mineral Leasing Plan were finalized when the rule, quoted above, was in place,

for notifying and consulting with interested parties, including the general public” on state land management plans, including site-specific plans); id. § 65A-2-4(2)(b) (requiring Division to respond to “all commenting parties” on such plans); R. at 4-5 (as part of planning process for natural and cultural resources, “Division has adopted rules allowing . . . the general public to participate and submit comments pursuant to Utah Code § 65A-2-4.”).

Site-specific planning entails, *inter alia*: “(a) a comparative evaluation of the commercial gain potential of the proposed use with competing or existing uses; (b) the effect of the proposed use on adjoining sovereign lands; (c) an evaluation of the proposed use or action with regard to natural and cultural resources, if appropriate; (d) the notification of, and environmental analysis of, the proposed use provided by the public, federal, state and municipal agencies through the Resource Development Coordinating Committee (RDCC) process; and, (e) and further notification and evaluations as required by applicable rules.” Utah Admin. Code R652-90-400 (1996).

In turn, the RDCC process “provides an environmental assessment for purposes of sovereign land management.” Utah Admin. Code R652-90-1200. Importantly, “[t]he public may comment on proposed sovereign land uses through the RDCC and other public notification processes.” *Id.* In addition, upon the completion of the site-specific planning process, the public “shall” be provided with the “Record of Decision or other document summarizing final division action and relevant facts document” Utah Admin. Code R652-90-600(3).

Finally, Rule R652-90-400(e) obligates the Division, as part of its site-specific planning, to undertake “evaluations as required by applicable rules.” This means that, as part of its planning, the agency must complete the analysis required by Utah Admin. Code R652-2-200 (“all uses on, beneath, or above the beds of navigable lakes . . . [shall] be regulated, so that the protection of navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality will be given due consideration and balanced against the navigational or economic necessity or justification for, or benefit to be derived from, any proposed use”). This means that the Division must determine the supposed value of a proposed use as well as the cost to public trust resources that would result from that use. To determine if a use is appropriate, these harms and benefits must be balanced against the ultimate requirement, under the overriding Public Trust Doctrine, that the proposed use cannot impair navigation, fish and wildlife habitat, aquatic beauty, public recreation, or water quality in the lake.

Moreover, as indicated below, the CMP and MLP promise that any particular project – particularly a proposal that requires diking – will undergo further planning. In other words, the Division stated to the public, in its public planning document, that it would undertake additional planning when it was faced with a specific plan to lease and/or

and therefore rely on that rule for the necessary site-specific planning to make decision affecting public trust, cultural and natural resources on the Lake. Finally, site-specific planning is required by statute and public trust principles. *See, i.e.* Utah Code Ann. § 65A-2-4(1); § 65A-2-4(2)(b).

use sovereign lands. As planning is necessarily a public process, and the public is necessarily a party to planning, the Division must include the public in this process, give the public notice of decisions stemming from this process and notify the public of the opportunity to appeal those decisions. Utah Code Ann. § 65A-2-4(1) (1994) (requiring Division to “adopt rules for notifying and consulting with interested parties, including the general public” on state land management plans); *id.* § 65A-2-4(2)(b) (requiring Division to respond to “all commenting parties” on such plans).

Acknowledging that there are currently 171,644 acres of the bed of Great Salt Lake under lease and development for mineral salts extraction, MLP at 20, the Division admits that

Mineral operations can have significant impacts . . . through diking projects, pollution, depletion of salts in the lake, disturbance of bird populations, and other activities. The impact of mineral operations is not systematically documented nor are parameters or indicators set up which would signal if and when and to what degree a change in leasing and regulatory policies or direction might be necessary.

MLP at 41; *see also* CMP Decision Document at 7 (“better evaluation of diking proposals is needed than has occurred in the past.”); MLP at 10 (“placement of dikes and diversions can have significant and rapid impacts on various conditions in the lake.”).

In response to these unknown threats, the Division explicitly states that “at the time of proposed development, [it will] examine the need and/or alternatives for dikes and other structures . . . to accommodate all affected resources, economic development, water level management, wildlife, navigability and other issues.” MLP at 45. The Division also guarantees that it will “[e]valuate opportunities for trading existing leases with significant resource conflicts for the right to lease in areas with less conflict.” *Id.*

Ultimately, acknowledging that site-specific analysis of new mining proposals is necessary, the Division formally adopted the “Great Salt Lake Diking Policy.” This policy “require[s] assessment of wetland, wildlife habitat, lake level, water quality, navigation and other management impacts **for each diking proposal** [to] [i]nclude cumulative impact assessment.” Draft CMP at 167 (emphasis added); CMP Decision Document at 9 (adopting Alternative A); *Id.* at 33; *see also* *Id.* at 19 (“GSL diking policy. Given the increased appreciation for habitat-related beneficial effects of fluctuating lake levels, the objective is to ensure that on-site and off-site impacts will be taken into account when diking activity is planned.”).⁴

The ROD at issue here purports to carry out this diking policy and makes a finding that the dikes associated with the proposal will not harm public trust resources. Because

⁴ Of course, even if the Plans did not make this commitment, the Division would be obligated to undertake this analysis to comply with its planning responsibilities and to ensure that any mining activity would not interfere with public trust values. *See* Utah Code Ann. § 65A-10-1 (2008).

this is planning as required by the MLP and CMP, the public is a party to that finding – as well as other planning that the Division undertook or was required to undertake pursuant to the MLP and CMP – and therefore is entitled to notice of the culmination of that planning as well as to the opportunity to appeal that planning decision.

Past Planning Efforts

The CMP and MLP are Not Site-Specific.

The Division undertook to update its management plan for Great Salt Lake by releasing the Draft Great Salt Lake Comprehensive Management Plan (Draft CMP) on November 3, 1999. On March 1, 2000, the Division released its Great Salt Lake Comprehensive Management Plan and Decision Document (CMP Decision Document). This and related documents, such as the May 1, 2000 CMP Resource Document, were subject to public notice and comment, and the opportunity for appeal. The CMP Decision Document incorporated the June 27, 1996 Mineral Leasing Plan for Great Salt Lake (MLP) and made the decision to “open” portions of Great Salt Lake to Mineral Salts leasing and to prohibit leasing in other portions. CMP Decision Document at Exhibit 4. Leases in these open areas contain no stipulations. Id.

The Division’s own management planning regulations **require** the Division to undertake site-specific planning relative to any application “to use” sovereign lands, including Mineral Company’s application to lease and develop Clyman and exchange sovereign land leases. Utah Admin. Rule 652-90-300(2)(a) (1996) (site-specific planning shall be initiated by an application for sovereign land use). Accordingly, the Plans promise site-specific planning in response to any applications to use Great Salt Lake:

Permits, leases and other authorizations are issued following two general procedures. The first is over-the-counter transactions which are largely ministerial [sic] in nature. . . . Other actions like easements, special use leases and exchanges trigger a site-specific planning process and the preparation of a record of decision.

Draft CMP at 152. Similarly, in response to public comment, the Division states in the context of “sovereign land classifications,” that “[a]s site-specific planning is conducted in response to applications submitted that affect the development areas,” protection of wildlife values “will be taken into account.” CMP Decision Document at Record of Decision 7 (citing Alternative A, Issue 5.1, R. 931); *see also id.* (relative to “mineral leasing zones,” stating “site-specific planning may lead to revisions of the MLP” to safeguard wildlife values) (citing Alternative A, Issue 5.1 & 6.1, R. at 931-32); id. (protection of recreation opportunities to be addressed in site-specific planning.); CMP Decision Document at 18 (requiring site-specific planning relative to geologic hazards).⁵

⁵ It is indisputable that the Plans are **not** site-specific and do **not** anticipate, much less analyze, the impacts on trust resources from the industrial development of Clyman and Bear River bays. For example, the Plans assume that little or no development in Clyman Bay will occur. *See, e.g.*, CMP Decision Document at 18. As a result, the Plans do not

The CMP Identifies, but Does Not Analyze Threats Posed by Diking and Mineral Salts Extraction.

In addition, the Division concedes, in the Plans, that it lacks the information necessary to determine the extent of adverse impacts from future mining activities and promises it will acquire and consider the necessary information prior to making any decisions regarding specific proposals to dike and mine Great Salt Lake sovereign lands. Acknowledging that there are currently 171,644 acres of the bed of Great Salt Lake under lease and development for mineral salts extraction, R. 491, the Division admits that

Mineral operations can have significant impacts . . . through diking projects, pollution, depletion of salts in the lake, disturbance of bird populations, and other activities. The impact of mineral operations is not systematically documented nor are parameters or indicators set up which would signal if and when and to what degree a change in leasing and regulatory policies or direction might be necessary.

MLP at 41; *see also* CMP Decision Document, Record of Decision at 7 (“better evaluation of diking proposals is needed than has occurred in the past.”); MLP at 10 (“placement of dikes and diversions can have significant and rapid impacts on various conditions in the lake.”). In response to these unknown threats, the Division explicitly states that “at the time of proposed development, [it will] examine the need and/or alternatives for dikes and other structures . . . to accommodate all affected resources, economic development, water level management, wildlife, navigability and other issues.” MLP at 45.

Ultimately, acknowledging that site-specific analysis of new mining proposals is necessary, the Division formally adopts the “Great Salt Lake Diking Policy.” This policy “require[s] assessment of wetland, wildlife habitat, lake level, water quality, navigation and other management impacts **for each diking proposal** [to] [i]nclude cumulative impact assessment.” Draft CMP at 167 (emphasis added); CMP Decision Document, Record of Decision at 1210 (adopting Alternative A); CMP Decision Document at 33 *see also* R. at 1235 (“GSL diking policy. Given the increased appreciation for habitat-related beneficial effects of fluctuating lake levels, the objective is to ensure that on-site and off-site impacts will be taken into account when diking activity is planned.”).

consider the proposed Clyman Bay development site as a potential ponding location (MLP at 13), do not consider constraints on development of this site (MLP at 31) and do not designate the area of the proposed development as having “no apparent conflicts.” *Id.* Moreover, while the Plans do identify significant threats to public trust values from diking and mining, the Plans do **not** explore these threats generally, much less specifically with regard to the Mineral Company expansion plan. *See, e.g.*, MLP at 24 (minerals extraction increasingly in conflict with lake resources); *Id.* at 29 (increasing demands on lake resources pose potential conflicts with mineral development); *Id.* at 30 (listing potential conflicts that exist between ponding systems and trust resources); *Id.* at 33 (“Mineral development and construction of dikes would impact areas that are used by wildlife at some time during the lake’s cycle.”); CMP Decision Document at 15 (“Evaporation ponds can increase salinity to the point that shoreline habitat is lost.”); *Id.* at 20 (even minimal human presence has been shown to disrupt American white pelicans).

Importantly, the plan also dictates that the Division will “[e]valuate opportunities for trading existing leases with significant resource conflicts for the right to lease in areas with less conflict.” MLP at 45. Thus, the MLP requires, at a minimum, an examination of the environmental impacts from diking and an evaluation of opportunities to exchange leased parcels in sensitive areas.

Thus, it is wrong to argue that the Plans effectively made the decision to lease any nominated lands located in areas of Great Salt Lake open to mineral salts mining. The Plans made no such commitment, but instead identified significant conflict between mineral salts mining and the protection of public trust resources and promised site-specific planning, including a complete public trust analysis of the individual and cumulative impacts of any particular mining proposal.⁶

The CMP Fails to Consider New Information and Fails to Analyze Significant Likely Impairments to the Public Trust

New information

Since the CMP was finalized, significant new information regarding Great Salt Lake and its public trust resources has come to light. For example, federal scientists have discovered alarmingly high levels of methylmercury in the water of Great Salt Lake. These levels represent some of the highest levels of this toxin ever discovered by the U.S. Geological Survey (USGS). Toxic levels of mercury have also been found in Great Salt Lake waterfowl, such as northern shovelers and common goldeneyes, in such high concentrations that the Division of Wildlife Resources warned the public not to shoot or consume waterfowl from these two species. In addition, possible selenium contamination in the lake has prompted state and federal agencies, along with the public, to begin the extensive process of determining a lake-specific numeric water quality standard for this pollutant. At the same time, another USGS study has shown high levels of contaminants in the bed of the lake.⁷ These discoveries sound an alarm about water quality, casting serious doubt on the assumption that areas of the lake’s deep brine layer will hold contaminants and keep them inert, and suggesting that disturbing lake sediments could be significantly detrimental to water quality.

Significant information relating to public trust values not analyzed

There is also significant information directly relevant to protection of the public trust values that has never been analyzed either generally as part of a mineral leasing program or on a site-specific level. In other words, information concerning a myriad of

⁶ Of course, even if the Plans did not make this commitment, the Division would be obligated to undertake this analysis to comply with its planning responsibilities and to ensure that any mining activity would not interfere with public trust values. *See* Utah Code Ann. § 65A-10-1 (2008).

⁷ Reconstructing Historical Changes in the Environmental Health of Watershed by Using Sediment Cores from Lakes and Reservoirs in Salt Lake Valley, Utah (December 2000).

issues does not appear in the CMP and related documents, or in any other report, study or planning record. This means that, to ensure the protection of navigation, wildlife habitat, aquatic beauty, public recreation, and water quality, this information must be gathered and analyzed prior to any determination of whether the diking and conversion proposal violates the public trust.

As a general matter, there is little or no information, studies, data or analysis quantifying the impacts that the construction and operation of the existing Mining Company facilities have on public trust values. Indeed, according to the MLP, there are currently ten producing mineral leases totaling 171,644 acres operating within Great Salt Lake. MLP at 20. Like the Mining Company expansion proposal, these operations involve diking and conversion of a functioning ecosystem into solar evaporation ponds and similar facilities. Yet, as the MLP admits, while “[m]ineral operations can have significant impacts . . . [t]he impact of mineral operations is not systematically documented nor are parameters or indicators set up which would signal if and when and to what degree a change in leasing and regulatory policies or direction might be necessary.” MLP at 41. This same lack of information and analysis applies to the Division’s approval of the 33,000 acre expansion proposal, as well as the proposed trench and the environmental impact of flushing Bear River Bay evaporation ponds, given that the volume of salts and water use will increase significantly with the proposed development.

Plainly, without this baseline data – without knowing if current mineral leasing is adversely impacting public trust resources – the Division is not in a position to evaluate whether expansion of these operations will negatively affect navigation, wildlife habitat, aquatic beauty, public recreation, and water quality. Moreover, given the sheer magnitude of current operations and the proposed expansion, it is almost certain that cumulatively, these diking and conversion operations are significantly impairing the public trust. This is particularly true given that, once developed, the expansion parcels are likely to remain diked and converted indefinitely, meaning that adverse impacts to public trust values will extend into the foreseeable future and will certainly have cumulative impacts over time.

4. The 2006 Division Promise to Reexamine the Mineral Leasing Plan

In 2006, the Division entered into a signed and legally binding agreement with FRIENDS and others, which stated that the Division “shall reconsider and reissue the Great Salt Lake Mineral Leasing Plan.” The Division further committed that this review would involve the public and RDCC and would include a reexamination of whether mineral leasing and development of areas of Great Salt Lake would impermissibly interfere with public trust values:

The Division shall reconsider and reissue the Great Salt Lake Mineral Leasing Plan of June 27, 1996. . . . At a minimum, the Division will determine if leasing and development of any specific area of the bed of Great Salt Lake open to leasing interferes with or served the public trust . . . recognizing that [any] permitted use cannot interfere with these resources.

Thus, in 2006, the Division has not only acknowledged that the MLP was out of date and perhaps inadequate to protect public trust values, but committed to undertaking a public process to reevaluate and reconsider the decisions made in that document, along with the analysis on which the agency relied to come to those conclusions.

The Mining Company Expansion Proposal

Currently, the Mining Company operates 43,000 acres of solar evaporation ponds on Great Salt Lake sovereign lands. According to the company, this includes 21,000 acres of salt ponds in Clyman Bay on the west side lake, a 21 mile long canal running along lake bottom from west to the east side of Great Salt Lake, and 22,000 acres of solar ponds in Bear River Bay on the east side of the lake.

To this existing 43,000 acre facility, the Mining Company plans to add 33,000 acres of industrial development. On the west side, in Clyman Bay, the company proposes to build an additional 18,000 acre solar pond, and a new 7,000 acre pond, as well as a new feed canal into the lake and a new pump station powered by a diesel engine. The company maintains that it currently leases much of the land necessary to build this 7,000 acre pond and what it does not lease is presently leased by a private individual. In 2007, the Division approved the Mining Company's application to lease approximately 23,088 acres to facilitate this expansion of the west side of the lake that is now before the RDCC. On the east side of the lake, in Bear River Bay, the company intends to build a new 8,000 acre solar pond. The Mining Company contends that it currently holds leases sufficient to construct this 8,000 acre pond in Bear River Bay.

The Army Corps of Engineers has also approved a Mining Company proposal to relocate and lengthen the southern portion of the existing inlet canal that transports water to the solar evaporation pond in Clyman Bay. In addition, the applicant proposes to deepen the canal to an elevation of 4188 so that there is continued water flow as lake levels decrease to an approximate elevation of approximately 4193 feet above sea level.

On top of all this existing and approved development, the Mining Company proposes to undertake significant upgrades of the Behrens Trench and has submitted an application to appropriate 353,000 acre feet of water annually to support its expansion. This ROD now adds an additional 37,000 acres of mining facilities on the west side of Great Salt Lake surrounding Dolphin Island. Purportedly, the Mining Company relinquished 30,000 acres of leases as part of this proposal. However, it appears that significant acreage involved in that relinquishment will remain open to mineral salts leasing and other development such as oil and gas development.

In sum, the Division has approved leases which will allow the Mining Company to expand its 43,000 acre operation by 83,000 acres on the west side of the Lake and 8,000 acres on the east side, for a total expansion of 91,000 acres. This means that the Mining Company proposes to have under development 134,000 acres or 209 square miles – only slight smaller than the land mass of Davis County (223 square miles). Because the existing and proposed development is concentrated in the north arm of the lake and in Bear River Bay, the impacts of the mining operations will be felt even more acutely in that

part of the lake. By the same token, the mining operations take place largely on mudflats and shallow waters near the shoreline of the lake. This means that the impacts of the mining operations will be concentrated in these valuable ecosystems.

Statement of Inconsistent Actions

As part of its Statement of Inconsistent Actions, FRIENDS hereby specifically references, relies on and incorporates the December 30, 2008 Comments on Nomination of 37,000 Acres for Mineral Salts Extraction and proposed land exchange. December 30, 2008 Comments, attached as Exhibit A. Importantly, as stated more specifically below, in issuing the ROD, the Division acted inconsistently with its public trust responsibilities and with its sovereign land management planning responsibilities relative to the nomination and approval of the proposed development. FRIENDS also specifically references, relies on and incorporates the relevant comments submitted by the U.S. Fish and Wildlife Service (FWS) in this matter. FWS Comments, attached as Exhibit B. FRIENDS also specifically references, relies on and incorporates the relevant comments submitted by the RDCC to the Army Corps of Engineers (ACOE) in this matter. RDCC Comments, attached as Exhibit C. Because the Division did not adequately respond to the issues raised by the December 30, 2008 Comments, the FWS comments, and the RDCC comments, and failed to analyze the issues and concerns raised therein by the public and agency experts, the comments contained in the Exhibits serve to establish specific examples of ways in which, in issuing the ROD, the Division acted in a manner inconsistent with its public trust and management planning obligations.

In addition to the inconsistent actions identified in the comments, the following actions undertaken by the Division are also inconsistent with the agency's legal obligations under the federal and Utah constitutions, federal and state common law, and Utah statute and regulation:

Regarding the Public Trust Doctrine

The Division is acting inconsistently with its legal obligations when it states that one of the factors it must consider under the Public Trust Doctrine is the "economic uses" of Public Trust resources, and then undertakes to conduct management planning and public trust analysis on the basis of this mistaken premise.

As detailed above, understood in the context of the mandates laid down by the Utah Supreme Court, the Public Trust Doctrine protects sovereign lands and the values they embody – navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality. These trust resources and values must be protected and cannot be interfered with. *E.g. NPCA v. Board of State Lands*, 869 P.2d at 919; Utah Code Ann. § 65A-10-1(1) (sovereign lands may be leased "only in the quantities and for the purposes as serve the public interest and do not interfere with the public trust."). Economic use, by itself,⁸ is **not** a Public Trust value and does not serve the purposes of the Trust. Therefore,

⁸ Arguably, economic uses that benefit navigation, for example, may be permissible, but only if they do not interfere with other public trust values.

economic use may not interfere with Public Trust resources. Moreover, an encumbrance on sovereign lands, such as the diking and conversion of the bed of Great Salt Lake into giant, essentially sterile evaporation reservoirs, is only permissible under the Public Trust Doctrine if it serves public purposes that enhance or aid Public Trust values – navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 452; 13 S.Ct. at 118. If the Division’s planning analysis is contrary to settled law, then any decision based on this incorrect analysis is inconsistent with the agency’s Public Trust responsibilities.

Importantly, state and federal constitutional and common law, as well as state statute, establish that no use of sovereign lands can be contrary to the public interest and no use of sovereign lands may interfere with public trust values. *E.g.* Utah Code Ann. § 65A-10-1(1) (sovereign lands may be leased “only in the quantities and for the purposes as serve the public interest and do not interfere with the public trust.”). Because the Division is reading its own rule inconsistently with these legal mandates, the Division is acting contrary to its legal obligations. Because it bases its decision on this incorrect analysis, the Division is also acting inconsistently with its legal obligations.

Similarly, the Division is acting inconsistently with the Public Trust Doctrine when it states that “multiple-use, sustained-yield principles” guide the management of sovereign lands. According to state and federal law, what ultimately guides the management of sovereign lands is the Public Trust Doctrine. The Public Trust Doctrine dictates that uses of sovereign lands may not interfere with the public trust values – navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality. This doctrine always trumps any multiple-use principles. Thus, the Division is interpreting Utah Admin. Code R652-90-200 illegally in a manner that conflicts with state statute as well as the Public Trust Doctrine. Furthermore, as applied to this case, Utah Admin. Code R652-90-200, applying multiple-use principles to sovereign lands, is illegal because it conflicts directly with Utah Code Ann. § 65A-10-1(1) and the Public Trust Doctrine. *E.g. NPCA v. Board of State Lands*, 869 P.2d at 919. On its face, Utah Admin. Code R652-90-200 is unconstitutional and otherwise illegal as it directly conflicts with these legal mandates.⁹

Regarding Site-Specific Planning

The Division is acting inconsistently with its legal obligations where it relied upon the CMP in determining that it should allow the diking and conversion of huge segments of the North Arm into evaporation ponds. The CMP is not site-specific and raises, but fails to address, many issues critical to determining the Division’s Public Trust obligations relative to development of the North Arm and Bear River Bay. By relying on the CMP for its analysis and Public Trust finding, the Division has violated both the Public Trust Doctrine and its management and planning obligations.

⁹ Likewise, Utah Admin. Code R652-2-200, to the extent that it states, or is interpreted to state, that anything other than the primacy of protection of Public Trust values governs the Division’s management and planning responsibilities related to sovereign lands is illegal and unconstitutional.

Analysis of the Division's statements in the ROD underscores the fallacy of the agency's reliance on the CMP for its Public Trust analysis. The Division states that the CMP and the MLP are sufficient to satisfy the agency's management planning obligations of these leases, and therefore no further planning was undertaken. ROD at 31. According to the Division, agency personnel toured the site on January 22, 2009, and made other observations in the context of potential impacts of the development on Public Trust resources. Id. at 29. The Division then purportedly considered whether new information necessitated additional planning or amendment of existing plans and concluded that nothing presented throughout the Division's analysis and conformity review suggested that the measures outlined in the CMP and MLP were insufficient to protect Public Trust resources as they related to the leasing of the 37,000 acres. ROD at 30-31. The Division also states that its decision is in keeping with the diking policy outlined in the CMP/MLP. Id. The Division purportedly conducted a diking analysis of the proposed area and found it to be in keeping with the Public Trust values in the areas nominated. Id.

No mention is made in the ROD of the appropriateness of visiting the site in the dead of winter and how such a visit informs the Division of the wildlife values of this area. There is also no mention of the many comments submitted in July, 2009 related to either the Army Corps of Engineers Public Scoping process, or Mining Company's application to appropriate 353,000 acre feet of water needed to support, at least in part, these leases. Clearly, the extensive comments submitted to the ACOE and the State Engineer in July, 2009, should have given the Division pause in its deliberations of whether to approve these leases, and should have been accounted for in the ROD. That they were not shows a total disregard for the Division's Public Trust responsibilities.

For instance, on July 7, 2009, a full month before the Division issued its ROD, the RDCC submitted to the ACOE detailed comments on Mining Company's proposed expansion. Exhibit C, attached. The RDCC comments note the concerns expressed by State agencies regarding the proposed expansion, namely, *inter alia*: impacts of wildlife in the North Arm, and Bear River Bay, *id.* at 2-3; impacts on air quality, *id.* at 7; long-term impacts to water quality and salinities; *id.* at 7-8; impacts on water circulation patterns; *id.* at 8; impacts to specific bird species; *id.*; cumulative impacts associated with oil and gas leases; *id.*; the impact of removal of salts in the North Arm on brine shrimp, *id.*; impacts of the dikes on submergent vegetation, *id.* at 9; impacts to vegetation communities, *id.*; and, impacts of the increasing number of dikes on nesting birds, *id.*. A critical part of those comments related to the significant decrease in Lake level – approximately 2' at current elevations – that will result from this proposal. *Id.* at 5-6. Such a drop in Lake elevation will significantly impact Public Trust resources throughout the Lake – not just in the remote regions of the North Arm – yet these impacts were not considered at all, let alone in any detail, in either the ROD or the CMP/MLP. For the Division to state that, in light of this information, no further planning was required is a clear violation of its Public Trust obligations.

The Division is acting inconsistently with its legal obligations when it allowed Mining Company to submit a no-bid lease application before it completed its public trust

analysis and issued its ROD. ROD at Exhibits B-1, C-4 & C-7a. This is because the CMP envisions adequate analysis at the nomination stage for “identifying special concerns, determining lease stipulations in response to those concerns, and making the stipulations known at the time the lease is offered for competitive bid.” CMP at 19. On the other hand, if the Division had concluded its Public Trust and environmental analysis prior to allowing Mining Company to submit a no-bid lease nomination, the agency could decide not to offer the lands for leasing if no stipulations could adequately protect the Public Trust resources associated with those lands. In allowing bidding to proceed without first completing this analysis, the Division has failed both its Public Trust and management planning obligations. Essentially, the Division retroactively justified a decision it had already made – giving Mining Company the exclusive right to lease these lands – rather than waiting until its review was complete to make an informed decision as to the appropriateness of its actions relative to the Public Trust Doctrine.

Regarding the Division’s Analysis

Initially, the Division is acting inconsistently with its management planning and Public Trust obligations when it essentially puts the burden on the ACOE to complete an environmental analysis of this expansion proposal. ROD at 32. In addition, the Division also acted inconsistently with those responsibilities when it depends on comments from agencies such as DWR and the U.S. Fish and Wildlife Service, and from the public, to establish that the proposed expansion projects will harm Public Trust resources. Rather, it is the clear obligation of the Division to protect Public Trust values from interference. Therefore the onus is on the Division to conduct sufficient analysis to establish that the conversion of these sovereign lands serves a public interest and does not interfere with any Public Trust value. It is the duty of the Division to investigate fully the concerns commentors raise before making uninformed decisions to allow development of sovereign lands – including the July, 2009 comments made to the ACOE. The Division cannot abdicate its responsibilities by simply stating that it was not aware of the RDCC comments, because it was not copied on them. The Division was fully aware that the ACOE was conducting an environmental review of the expansion proposal, and the Division was, or should have been, aware that public comments were due to the ACOE a full month before it issued its ROD. Therefore, given the potentially significant impacts on Public Trust resources outlined in the RDCC comments, the Division should have fully considered those potential impacts prior to issuing the ROD. Because the Division did not adequately fulfill its management planning and Public Trust responsibilities, the agency has acted inconsistently with the law.

The Division is further acting inconsistently with its management planning and Public Trust obligations because it failed to analyze adequately the impacts from the proposed diking and conversion on Public Trust values and therefore failed to make a reasoned decision relative to its Public Trust obligations. ROD at 27-31. The Division failed to adequately address the issues and concerns raised by the public and agency experts, failed to gather the information necessary to undertake its Public Trust obligations, failed to base its decision on adequate data collected in a scientifically sound manner, and failed to review the impacts of the proposed development on a sufficiently

site-specific basis. Making an uninformed decision is arbitrary and an abuse of the Division's discretion.

- The Division is acting inconsistently with its legal obligations when it fails to apply Utah's narrative water quality standard in its assessment of impacts to water quality, fails to assess impacts to Great Salt Lake's designated beneficial uses, fails to quantify and assess impacts of the proposed development in potentially exacerbating the significant mercury contamination of the lake, and fails to respond to the expert concerns FWS raised relative to water quality. ROD at 28. The Division failed to give even a cursory consideration to water quality issues, instead making a blanket statement that all Public Trust resources – including water quality – were given due consideration. *Id.* The Division is acting inconsistently with its legal obligations when it fails completely to analyze the water quality impacts of current mineral salts extraction and the flushing of evaporation ponds, and to apply this analysis to its review of the current proposal.
- The Division is remiss in its failure to develop a comprehensive water quantity and quality budget relative to the existing and proposed evaporation ponds, especially in light of the potential impact to Lake level and salinity balance in comments submitted to the ACOE by the RDCC. *See* July 2009 RDCC comments, Exhibit C at 5-7. Such a budget would necessarily consider how much water these facilities use and evaporate, how dikes and canals disrupt flow of birds, the impacts on elevation caused by the sequestration and evaporation of this water, and the impacts these water use has on navigation and bird use. This budget should consider these issues in the context of drought, as well as non-drought years. Without this information, the Division cannot make a well-informed decision that adequately protects Trust values. *See* MLP at 33 (“To the extent that dikes or canals isolate flow of brines or create areas of salinity, distribution of brine shrimp and other biological resources are affected. The [CMP] directs agencies to consider the impact of dikes and structures on changes in salinity patterns on the lake.”); *id.* at 46 (directing that a study be undertaken to determine impact of dredging, cause and diking operations on the lake's brine system). FWS Comments, Exhibit 2 at 2-3.
- The Division is acting inconsistently with its legal obligations when it relies on only limited, anecdotal and incomplete evidence to assert that recreational use of the North Arm is limited. ROD at 33. The Division offers no credible evidence to support its conclusion that public usage of the North Arm of the Lake is “minimal, sporadic, restricted, and limited. *Id.* Moreover, the Division ignores that it is the State's own actions, in allowing the construction of the Lucin Cutoff causeway to impede navigation on Great Salt Lake, that led to obstructing access to the North Arm. The Division wrongly reasons that once the State prevents ready access to a portion of the lake, it then can allow activities which further serve to restrict navigation. Moreover, it is wrong to assume that navigational opportunities will not be improved as demand for these opportunities increases. This repeated and compounded impediment to navigation – the core public trust value – violates the Public Trust Doctrine.

- The Division is acting inconsistently with its legal obligations when it relies on only extremely limited, anecdotal and incomplete evidence to assert that the diking of Clyman Bay will not harm public trust values. ROD at 29. The agency purports to address the concern that diking obstructs navigation, considerably alters the natural ecosystem to the detriment of ecosystem function, impedes water flow, destroys aquatic beauty, fragments habitat, contributes to cumulative adverse impacts on public trust values, increases evaporation from the lake and has other adverse impacts on Public Trust values. *Id.* The agency does so by merely stating that it analyzed the “value” of leasing against Public Trust values in the nominated areas. *Id.* However, the agency’s failure to analyze these impacts adequately violates its management and public trust obligations.

- The Division is acting inconsistently with its legal obligations when it ignores its own CMP and the expert concerns of DWR and FWS that the North Arm of Great Salt Lake becomes critical to migratory and other waterbirds during high water years. Rather than addressing this issue, the Division arbitrarily and capriciously seems satisfied to make a general statement that protection of fish and wildlife habitat “has been given due consideration.” *Id.* at 28. In addition, the Division is ignoring its own conclusions that “areas of particular concern,” where conflicts with mineral salts extraction exist, “are Gunnison Island used for nesting by the American [w]hite [p]elican (threatened status) and mudflats along the north and west sides of Great Salt Lake used by the [s]nowy [p]lover (sensitive status).” MLP at 34; *see also id.* at 33 (“[D]uring the high water years from 1983 to 1987, there were increase populations of brine shrimp in the north arm as salinity decreased [and] . . . eared grebes followed the brine shrimp into the north arm, abandoning sites along the Antelope Island causeway. . . . Mineral development and construction of dikes would impact areas that are used by wildlife at some time during the lake’s cycles.”); December 24, 2008 Letter from Don Paul to Mr. Styler and Mr. Buehler at 2, Exhibit 1, Tab F (“During the infrequent periods when GSL elevation is over 4208’ asl, Gunnison Bay becomes the primary foraging and resource area for these birds. During this period of high water, and thus mineral dilution of Gilbert Bay brines, brine shrimp and brine fly populations diminish as the lake ecology shifts from saline to freshwater, dropping out the important brine shrimp and brine fly food resource that these birds rely on. At this point in of diminishing aquatic food resources in Gilbert Bay, the salinities in Gunnison Bay, by contrast, reach optimum condition for brine shrimp and brine fly production.”).¹⁰

¹⁰ Mr. Paul also states: “This shifting of primary foraging location was observed happening during the high-water lake years, from approximately 1983-1988. Migratory populations of Phalaropes and Eared Grebes were largely reliant upon Gunnison Bay for the food and energy reserves needed to complete their annual winter migrations, which sometimes exceeds 2,000 miles. Much of these species’ foraging took place then, and will likely take place again in similar conditions, along the west shorelines of Promontory Point, around Gunnison Island and west toward the Hogup Mountains, where Great Salt

The Division's incomplete observations also ignore its own conclusions that there is bird use of the North Arm, including the Clyman Bay area, on a regular basis. *E.g.* MLP at 34 (identifying as an area "of particular concern," where conflicts with mineral salts extraction exist, "mudflats along the north and west sides of Great Salt Lake used by the [s]nowy [p]lover (sensitive status)"). Certainly, a tour of the area in the middle of January is insufficient to inform the Division of the typical use by wildlife of this area, given that little to no food sources are available to birds anywhere on the Lake that time of year. By the same token, the Division's perfunctory dismissal of potential conflicts between the proposed development and waterbirds directly conflicts with the statements of DWR, FWS and other experts such as Dr. Cavitt. See July 18, 2007 Letter from Dr. Cavitt to Lynn de Freitas, Exhibit A, Tab H ("It is my judgment that additional survey data are required to ensure that the proposed activities will not remove critical habitat for this species of conservation concern. Snowy Plover, other shorebirds and waterbirds may utilize this area of the lake during the early spring and fall migrations as well as in other breeding seasons when lake levels are closer to the long-term average."); December 24, 2008 Letter from Don Paul to Mr. Styler and Mr. Buehler at 2, Exhibit A, Tab F ("Thus, Mining Company's proposed expansion will severely impact and limit this necessary foraging habitat [within the North Arm], such as during high lake levels, sensitive species including Phalaropes and Eared Grebes will be deprived of food and resources.").

- The Division is acting inconsistently with its legal obligations when it relies on, without basis in the record, the so-called "multiplier" effect to calculate the economic return from the proposed development. Initially, under the Public Trust Doctrine, economic benefits to the state economy are irrelevant to public trust analysis – as are supposed revenue benefits. In addition, the notion of "multiplier" benefits from a commercial operation has long ago been debunked by regional economists. Essentially, the "multiplier" benefits notion suffers from the incorrect assumption that investment opportunities such as labor and capital would sit idle but for that commercial operation. Actually, these opportunities would be utilized by another commercial operation.

Statement of Consistent Action

To be consistent and in compliance with the federal and Utah constitutions, federal and state common law, and Utah statute and regulation, the Executive Director of the Department of Natural Resources must order the Division to:

- Correctly restate and apply the Public Trust Doctrine described above. Because the agency relied on an improper formulation of its public trust responsibilities, it must redo a site-specific analysis sufficiently detailed to ensure protection of

Lake Mineral Company ("Mining Company") proposes its industrial diking and ponding site expansion."). *Id.*

public trust values on the Clyman Bay proposal and by virtue of the lease exchange. In carrying out its responsibilities, the Division must ensure that it allows only public uses of sovereign lands that aid or benefit trust values and that no proposed uses of sovereign lands interfere with public trust values. As it is almost certain that no development can occur on all these leases that is in keeping with the public trust, the Division may be required to preclude surface development such as diking, dredging and filling these parcels.

- Rectify the deficiencies in its public trust and management planning efforts as described above. To fulfill its public trust and management planning obligations, the Division, at a minimum must, relative to the lease proposal and land exchange: 1) investigate and gather and analyze information relative to the issues, comments and concerns raised by the public and the expert agencies; 2) determine the water quality, wildlife habitat, navigational, recreational, and scenic impacts of existing mineral salts extraction facilities and apply this information to the present inquiry; 3) based on accurate surveys covering more than one year as well as future projections, perform adequate surveys for bird and recreational use of the North Arm, taking into consideration the importance of this area during high water years and the impact that the causeway has on recreational use of the area; 4) undertake adequate cumulative impact analysis; 5) properly consider the impacts of diking on all public trust values; 6) complete a thorough analysis of the potential impacts of current and proposed mineral salt extraction on water quantity and water quality that includes consideration of water use, pond flushing and the interruption of flows, as well as other relevant factors; 7) determine the potential impacts of the proposed development on scenic and aquatic beauty; 8) consider the role of the cutoff causeway in restricting access to the north arm and preventing its full utilization by waterbirds and other wildlife; 9) based on expert analysis, determine the impacts of the proposed diking, construction and maintenance on the pelicans of Gunnison Island and the birds of Dolphin Island; and 10) gather and review any and all information necessary to determine accurately and to mitigate completely any impairment or interference which may stem from the almost permanent diking and conversion of the 37,000 acres of the North Arm.

- Meaningfully and adequately notify the public of any and Division actions impacting sovereign lands, including final decisions such as Records of Decisions, and of the public's opportunity to appeal, administratively and/or judicially any such action. The Division should also be ordered to notify the public adequately of proposals impacting sovereign lands in a way that allows the public a meaningful opportunity to participate in and comment on those proposals.

FRIENDS also respectfully requests a hearing on the issues raised and relief requested in this Petition.

Statement of Injury Specific to the Petitioners

The Organizations and their Staff and Members

The failure of the Division to carry out its Constitutional, common law, statutory and regulatory duties with regard to protecting the public trust values of Great Salt Lake injures FRIENDS' environmental, aesthetic, scientific, educational, and spiritual interests in Great Salt Lake and its procedural interests relating to participation in agency decision that affect the lake.

For example, **FRIENDS of Great Salt Lake** has, as its mission, the preservation and protection of the Great Salt Lake ecosystem and seeks to increase public awareness and appreciation of the lake through education, research, and advocacy. The organization has long been involved in the protection and restoration of Great Salt Lake and its ecosystems, advocating for ways in which the public may enjoy these resources by fishing, birdwatching, boating, photographing, hiking and studying these natural areas. On behalf of its members, FRIENDS of Great Salt Lake frequently participates in agency processes related to the management of the lake, including taking part in scoping and submitting comments on the development of the Great Salt Lake Comprehensive Management Plan, submitting comments to the Sovereign Lands Advisory Committee on proposed use of exposed lake bed by off-road vehicles, seeking agency review of management decisions relating to oil and gas development and making comments to the Division of Water Quality on proposed changes in the description of the beneficial uses of Great Salt Lake. FRIENDS considers this participation to be critical to its mission and to be valuable as a means of influencing the administration of the lake and of protecting and preserving the lake ecosystem and opportunities for recreation that depend on the health of that ecosystem.

FRIENDS of Great Salt Lake has staff and members who regularly use and enjoy and will continue to use and enjoy regularly Great Salt Lake for bird-watching, boating, photographing, hiking and studying natural areas. Indeed, some of these members use and will use in the future Clyman Bay and Bear River Bay – the exact areas the Division purported to assess and those the Division failed to assess in the ROD and to which the Division failed to apply properly the Public Trust Doctrine – for these very purposes. FRIENDS, its staff and its members are harmed and will be harmed by the Division's failure to comply with the Public Trust Doctrine and its planning and management obligations, thereby allowing the compromise of and substantial harm to the public trust values of Great Salt Lake by an activity that does not benefit Great Salt Lake or the public at large in the way mandated by the Doctrine. FRIENDS will be harmed because the organization and its staff and members were not permitted to participate in agency decision making that was based on adequate analysis of public trust impacts, because the Division failed to carry out its constitutional, common law, statutory and regulatory obligations, and because, in doing so, the Division has allowed an activity that will compromise the public trust values of Great Salt Lake and that does not benefit Great Salt Lake or the public at large in the way mandated by the Doctrine in a way that will significantly impair FRIENDS staff and members' use and enjoyment of the lake by harming navigation, fish and wildlife habitat, aquatic beauty, recreation and water quality and their ability to enjoy and participate in these activities.

Three local chapters of the **Audubon Society, Bridgerland Audubon Society, Great Salt Lake Audubon Society, and Wasatch Audubon Society** (collectively

“Audubon”) have similar missions. The mission of Audubon is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth’s biological diversity. The mission of the local chapters of Audubon is to conserve and enhance Utah’s natural environment with special emphasis on birds and their habitat, for the benefit of humanity and the biological diversity of the Earth. Great Salt Lake Audubon is dedicated to protecting and enhancing habitat for wildlife, plant and animals, particularly birds, and to maintaining health and diverse environments for wildlife and people throughout the Utah. The mission of Bridgerland Audubon Society is to conserve, enhance, and enjoy the natural environment with special emphasis on birds and their habitats for the benefit and education of humanity and for the biological diversity of the Earth. The Wasatch Audubon Society is an association of people who share an interest in birds, all natural things, and Utah’s varied habitats.

Recognizing the unparalleled national and international significance of Great Salt Lake, these organizations have long been involved in the protection and restoration of the lake, its wetlands and its ecosystems. On behalf of its members, Audubon frequently participates in agency processes related to the management of the lake. Audubon considers this participation to be critical to its mission and to be valuable as a means of influencing the administration of the lake and of protecting and preserving the lake ecosystem and opportunities for recreation that depend on the health of that ecosystem.

Specifically, National Audubon owns and manages the more than 1,400 acre Gillmor Sanctuary on the south shore of Great Salt Lake, works to monitor and conserve the five major bays of Great Salt Lake that have been announced as Important Bird Areas, and participates in Great Salt Alliance efforts to address numerous issues on the Great Salt Lake such as selenium, mercury, water levels, water quality, wildlife habitat and funding for sovereign lands. Great Salt Lake Audubon Society conducts numerous field trips to Great Salt Lake, participates in the Great Salt Lake Alliance and comments on action that may affect the lake and its wildlife.

Audubon has staff and members who regularly use and enjoy and will continue to use and enjoy regularly Great Salt Lake for bird-watching, boating, photographing, hiking and studying natural areas. Indeed, some of these members use and will use in the future Clyman Bay and Bear River Bay – the exact areas the Division purported to assess and those the Division failed to assess in the ROD and to which the Division failed to apply properly the Public Trust Doctrine – for exactly these purposes. Audubon, its staff and its members are harmed and will be harmed by the Division’s failure to comply with the Public Trust Doctrine and its planning and management obligations, thereby allowing the compromise of and substantial harm to the public trust values of Great Salt Lake by an activity that does not benefit Great Salt Lake or the public at large in the way mandated by the Doctrine. Audubon will be harmed because the organization and its staff and members were not permitted to participate in agency decision making that was based on adequate analysis of public trust impacts, because the Division failed to carry out its constitutional, common law, statutory and regulatory obligations, and because, in doing so, the Division has allowed an activity that will compromise the public trust values of Great Salt Lake and that does not benefit Great Salt Lake or the public at large in the way mandated by the Doctrine in a way that will significantly impair Audubon staff and

members' use and enjoyment of the lake by harming navigation, fish and wildlife habitat, aquatic beauty, recreation and water quality and their ability to enjoy and participate in these activities.

The **Utah Chapter of Sierra Club** has as its mission to explore, enjoy and protect the planet. Recognizing the unparalleled national and international significance of Great Salt Lake, the organization has long been involved in the protection and restoration of the lake, its wetlands and its ecosystems. On behalf of its members, Sierra Club frequently participates in agency processes related to the management of the lake, including taking part in all public processes related to the Legacy Parkway, as well as participating in agency decisions relating to oil and gas development on the lake and to various Kennecott discharge permits. Sierra Club considers this participation to be critical to its mission and to be valuable as a means of influencing the administration of the lake and of protecting and preserving the lake ecosystem and opportunities for recreation that depend on the health of that ecosystem.

The Utah Chapter of the Sierra Club has staff and members who regularly use and enjoy and will continue to use and enjoy regularly the lake for bird-watching, boating, photographing, hiking and studying natural areas. The Sierra Club, its staff and its members are harmed and will be harmed by the Division's failure to comply with the Public Trust Doctrine and its planning and management obligations, thereby allowing the compromise of and substantial harm to the public trust values of Great Salt Lake by an activity that does not benefit Great Salt Lake or the public at large in the way mandated by the Doctrine. The Sierra Club will be harmed because the organization and its staff and members were not permitted to participate in agency decision making that was based on adequate analysis of public trust impacts, because the Division failed to carry out its constitutional, common law, statutory and regulatory obligations, and because, in doing so, the Division has allowed an activity that will compromise the public trust values of Great Salt Lake and that does not benefit Great Salt Lake or the public at large in the way mandated by the Doctrine in a way that will significantly impair Sierra Club members' use and enjoyment of the lake by harming navigation, fish and wildlife habitat, aquatic beauty, recreation and water quality and their ability to enjoy and participate in these activities.

The Mission of **The Utah Airboat Association** (aka Utah Airboat Incorporated) is dedicated to the support, well-being and benefit of the airboaters of the State of Utah. The mission of **Utah Physicians for a Healthy Environment** is to protect the health and well-being of the citizens of Utah by promoting science-based education and interventions that result in progressive, measurable improvements to the environment. The mission of **Western Wildlife Conservancy** is to preserve and protect wildlife native to the Intermountain West through research, education and advocacy. The mission of **Great Salt Lake Yacht Club** is to further its members interests in boating activities on the Great Salt Lake. The mission of **League of Women Voters of Utah** and **League of Women Voters of Salt Lake** is to encourage and inform active participation in government through increased understanding of major public policy issues and to influence public policy through education and advocacy. The mission of the **Utah Waterfowl Association** (UWA) is to preserve Utah's waterfowl, waterfowl habitat, and rich waterfowling heritage. To that end, the UWA will work towards providing a voice in the political and regulatory

arena to Utah's more than 24,000 waterfowlers. The **Utah Rivers Council** protects Utah's rivers and clean water sources for today's citizens, future generations, and wildlife. The organization implements this mission through grassroots organizing, direct advocacy, research, education, community leadership, and – when absolutely necessary – litigation on the behalf of rivers and people.

These organizations have staff and members who regularly use and enjoy and will continue to use and enjoy regularly Great Salt Lake for bird-watching, boating, hunting, photographing, hiking and studying natural areas. Indeed, some of these members use and will use in the future Clyman Bay and Bear River Bay – the exact areas the Division purported to assess and those the Division failed to assess in the ROD and to which the Division failed to apply properly the Public Trust Doctrine – for exactly these purposes. These organizations, their staffs and their members are harmed and will be harmed by the Division's failure to comply with the Public Trust Doctrine and its planning and management obligations, thereby allowing the compromise of and substantial harm to the public trust values of Great Salt Lake by an activity that does not benefit Great Salt Lake or the public at large in the way mandated by the Doctrine. The organizations will be harmed because they, their staffs and their members were not permitted to participate in agency decision making that was based on adequate analysis of public trust impacts, because the Division failed to carry out its constitutional, common law, statutory and regulatory obligations, and because, in doing so, the Division has allowed an activity that will compromise the public trust values of Great Salt Lake and that does not benefit Great Salt Lake or the public at large in the way mandated by the Doctrine in a way that will significantly impair these organizations members' use and enjoyment of the lake by harming navigation, fish and wildlife habitat, aquatic beauty, recreation and water quality and their ability to enjoy and participate in these activities.

Particularized and Specific Injuries

The statements above establish that, by virtue of the injuries that have been suffered and will be suffered by their staff and members, the organizations have realized injuries particular and specific to them and arising from the Division's actions. The Utah Supreme Court has determined that allegations by organization members that an agency action will harm their health, their families' health, their livelihoods, their property values and their recreational activities were particularized harms. *Utah Chapter of the Sierra Club v. Sevier Power Co.*, 2006 UT 74, ¶¶ 22-26, 148 P.3d 960, 968. In a companion case, the Utah Supreme Court explained that because Sierra Club members alleged that the agency's action would harm them, these injuries were particularized, even though they were shared by many members of the public:

While, as in that case, the affiants' concerns may be shared by many who live near Delta or who participate in recreational activities around the Colorado Plateau, the affiants 'have not complained about the impact of the plant's emissions on the community in general, but have claimed that the emissions will directly affect them and their families. That others may also share their concerns and be subject to the same specific, individualized injuries does not make the potential harms any less personal' to the affiants in this case.

Utah Chapter of the Sierra Club v. Intermountain Power Service Co., 2006 UT 73, ¶ 15, 148 P.3d 975, 980 (quoting *Sierra Club v. Sevier Power Co.*, ¶ 24). Because members and staff of the organizations seeking this Petition for Consistency Review have likewise alleged that the Division's failure to comply with its public trust obligations and management planning responsibilities, and failure to protect public trust resources will harm them personally, the injuries they allege arising from the Division's actions and inactions are particular to them.

Request for a Hearing

As stated above, pursuant to Utah Admin. Code R652-9-500(2), FRIENDS respectfully requests a hearing on the issues raised and relief requested in this Petition for Consistency Review.

Rule R652-9-400

Pursuant to Utah Admin. Code R652-9-400(3), if the Division determines this Petition for Consistency Review is incomplete, the agency must return this petition with written notice of the deficiencies in the petition. FRIENDS respectfully requests that the Division follow this rule with regard to this petition.

Notification

Please put FRIENDS and Joro Walker and Rob Dubuc of Western Resource Advocates on any mailing list and/or email list and provide us with notice of sovereign land management and planned related to Great Salt Lake. Specifically, we request notice related to any action related to any portion of the Mining Company expansion proposal or any current Mining Company operations, and keep us informed on any steps you take relative to this Petition for Consistency Review.

Conclusion

Based on the above, FRIENDS respectfully submits this Petition for Consistency Review and requests the relief it seeks herein, as well as hearing on its request.

Dated this 9th of August, 2010.



JORO WALKER
ROB DUBUC
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