REPLY IN SUPPORT OF
PETITION FOR CONSISTENCY REVIEW

December 8, 2022

Joel Ferry
Executive Director
Utah Department of Natural Resources
1594 West North Temple
Salt Lake City, UT 84116

Re: *Reply in Support of Petition for Consistency Review of the Record of Decision issued by the Utah Division of Forestry, Fire & State Lands on October 27, 2022 under Record No. 22-1027 pursuant to Utah Admin. Code R652-9-200.*

Dear Mr. Ferry:

LRS's proposed Project[1] is the exact type of project contemplated by the Act. In exchange for LRS's multi-billion-dollar restoration effort, the state would convey to LRS land in and around Utah Lake. The Division plays a critical role in facilitating this exchange by assessing whether certain statutorily established factors favor this disposition and by promulgating metrics and standards to ensure the Project accomplishes the state's restoration goals.

Early on, LRS and the Division had a strong working relationship and made significant progress. Lately, however, the Project's detractors pressured the Division to styme the Project and the Division complied by cancelling the Application. This cancellation was wrong and violated the Act and the Division's own rules. On November 16, 2022, LRS submitted a Petition for Consistency Review requesting that you correct the Division's improper cancellation of the Application. LRS should be permitted to gather the requisite technical information and the Division should be directed to give the Application an honest assessment. On December 1, 2022, the Division submitted its Response to Petition for Consistency Review[2] ("**Response**") requesting that you uphold the Division's decision to deny LRS's Application.

LRS respectfully requests that you reject the arguments presented in the Response, rescind the Application's cancellation, and effectuate the legislature's intent to restore and enhance Utah Lake to be a recreational asset for enjoyment of all Utahns while providing billions of gallons of additional fresh water supply annually.

[1] Capitalized words used herein and otherwise undefined herein have the meanings provided in the Petition.
[2] The Division states that it submitted its response under Utah Code § 63G-1-301(2)(a) and pursuant to Utah's Administrative Procedures Act ("UAPA"). UAPA does not apply here as this dispute deals with a land for services exchange contract which is exempted from UAPA pursuant to Utah Code § 63G-4-102(2)(g). LRS objects to the Response in its entirety as it is not permitted under Utah Admin. Code R652-9-100 et. seq.

ANALYSIS

The Division prematurely cancelled LRS's Application and in doing so failed to comply with its own rules and other statutory requirements. The Executive Director should rescind the Division's premature and unlawful action and require that the Division comply with the statutorily required process for assessing the Application. *See* Utah Admin. Code R652-9-500(4).

The Division acknowledges that it was required to comply with its own rules and other statutory requirements while assessing the Application. The Division, however, misstates, misinterprets, and mischaracterizes the law to justify the ROD. The correct interpretation of the applicable statutes and rules demonstrates that the Division's cancellation of the Application was wrong and warrants corrective action.

1. The Division Failed to Comply with the Mandatory Provisions of Utah Code §§ 65A-15-201(2) and 65A-15-201(4) When it Cancelled the Application.

When interpreting statutes, the Executive Director should presume "that the legislature used each term advisedly." *McKitrick v. Gibson*, 2021 UT 48, ¶ 19, 496 P.3d 147. The term "shall" throughout the Utah Code "means that an action is required or mandatory." In other words, if a statute states that a division "shall" take a certain action, it has no discretion over whether it must take that action. *See John Kuhni & Sons Inc. v. Labor Comm'n, Occupational Safety and Health Div.*, 2018 UT App 6, ¶ 10, 414 P.3d 952.

Here, the Act does not provide the Division with unfettered discretion over this land exchange. Indeed, Utah Code § 65A-15-201(2) requires the Division to analyze factors prior to recommending or denying a proposed land exchange. Similarly, Utah Code § 65A-15-201(4) requires the Division to prepare standards, criteria, and thresholds for the legislature to use for assessing a restoration project. The Division has failed on both fronts.

A. The Division Failed to Analyze the Factors in Utah Code § 65A-15-201(2).

The Division has some discretion over whether it approves an exchange application but that discretion must be exercised within the bounds established by the Act. The Act requires that:

> [i]n determining whether to recommend the disposal of state land in exchange for the execution of a restoration project . . . the division shall consider:
>
> (a) the potential that the restoration project presents for additional revenue to state and local government entities;
> (b) the ability of the proposed use of the state land given in exchange for the restoration project to enhance state property adjacent to Utah Lake;
> (c) the proposed timetable for completion of the restoration project;
> (d) the ability of the person who submits a restoration project to execute and complete the restoration project satisfactorily; and

(e) the desirability of the proposed use of Utah Lake and the surrounding areas as a result of the restoration project."

Utah Code § 65A-15-201(2). The Division failed to consider these factors when it cancelled the Application. The ROD makes no reference and fails to provide any analysis as to whether these factors support the Application's recommendation or denial. The Division's failure to assess the Application under these statutorily mandated factors is grounds alone for rescission.

B. The Division Failed to Prepare the Recommendations Required by Utah Code § 65A-15-201(4).

The Act requires the Division to "prepare recommendations for standards, criteria, and thresholds to define more specifically the objectives" described in the Act's factors for assessing a proposed restoration project and "when those objectives are to be met." Utah Code § 65A-15-201(4). The legislature requires the Division to promulgate these metrics, so applicants are not left guessing as to a restoration project's requirements.

The Division has not prepared the standards, criteria, and thresholds that the Act requires. Thus, applicants, like LRS, and the legislature are left to guess how a potential project will meet the public trust factors described in Utah Code § 65A-15-201(1)(a). Notably, on August 17, 2022 and pursuant to Utah Code § 65A-15-201(4)(b), the Natural Resources, Agriculture, Environment Interim Committee invited the Division to report on the Division's efforts in creating the applicable metrics. Instead of reporting on such metrics, as was required by the Act, the Division seized the opportunity to opine as to the constitutionality of the Application and Project. While the constitutionality issue may be more interesting to the Division than standards, criteria, and thresholds, the Act requires the Division to promulgate such standards and criteria and does not authorize the Division to opine as to the Act's constitutionality. The Division erred when it cancelled the Application without first preparing the appropriate standards to assess the Application. The Executive Director should correct this error.

2. The Division Does Not Have Absolute Authority and Discretion Over a Restoration Project Application.

Utah's well-established principles of statutory interpretation conflict with the Division's claim of unfettered discretion over a restoration project application. When interpreting statues, the plain language of a statute should be read "as a whole and interpret[ed] . . . in harmony with other statutes in the same chapter and related chapters." *Monarrez v. Utah Dept. of Transp.*, 2016 UT 10, ¶ 11, 368 P.3d 846. Similarly, statutes must be read to "avoid [a]ny interpretation which renders parts or words in a statute inoperative or superfluous in order to give effect to every word of a statute." *Id.* (alteration in original) (internal quotation marks omitted).

Here, the Division has some discretion over whether to recommend a state land disposition under the Act, but that discretion must be exercised within the bounds of the Act. Specifically, the Division "may recommend the disposal of appropriately available state lands . . . if the division finds that the restoration project will enhance" the thirteen enumerated public trust benefits. *See* Utah Code § 65A-15-201(1)(a). Likewise, the Division may only make a disposal determination

after assessing the five additional factors enumerated in Utah Code § 65A-15-201(2). The Division failed to analyze these factors.

The Division excuses its lack of analysis by claiming that "the Legislature granted the Division absolute authority and discretion when evaluating applications." (*See* Response, at 3.) That position is directly contradicted by the Act. If the legislature intended that the Division had sole and absolute discretion over applications, it would not have enumerated the eighteen factors that the Division must consider in reaching a determination. Put differently, under the Division's interpretation, Subsections 1(a)(i–xiii) and 3 of the Act are inoperative and superfluous, and the only operative language is that the "division may recommend disposal." Such a reading violates Utah's well-established interpretation principles. The Division's exercise of absolute discretion over the Application was erroneous, and the Executive Director should require the Division to exercise its discretion within the confines of the Act.

3. The Division Erred in Determining that the Proposed Project Did Not Include "Appropriately Available State Land."

Proper statutory interpretation starts with the presumption that "the legislature chooses its words carefully requir[ing] every word of a statute to be given effect so that no part of the statute will be inoperative or superfluous." *John Kuhni & Sons Inc.,* 2018 UT App 6, ¶ 17 (alteration in original) (internal citation marks omitted). Importantly, the Executive Director is required to "resist the temptation to add language or meaning to [a statute] where no hint of it exists in the text." *Penunuri v. Sundance Partners, Ltd.*, 2013 UT 22, ¶ 33, 301 P.3d 984.

Here, the Division claims that the Act required it to make a threshold determination as to whether the Project land was "appropriately available". Based on this threshold determination, the Division then justifies its non-compliance with the Act. The Division is wrong for at least three reasons.

First, the Act does not require that the Division make a threshold "appropriate available" lands determination. Utah Code § 65A-15-201(1)(a) states that "[t]he division may recommend the disposal of appropriately available state land . . . if the division finds that the restoration project will enhance" the public benefit. The Act does not designate the Division as the party responsible for assessing whether lands are appropriate available. The Act is silent on that issue. The Division, however, improperly reads into the statute that determining whether lands are appropriate available is its responsibility. The Division erred in reading words into the statute that the legislature did not include.

Second, the Division incorrectly interprets "appropriately available state lands" to mean lands that the Division, in its sole discretion, determines are not protected under its own interpretation of the public trust doctrine. In other words, the Division's interpretation of "appropriately available" means only those lands that the Division wishes to convey. It is doubtful that the legislature's use of "appropriately available" was intended to give the Division unfettered discretion over restoration projects as such an interpretation is unsupported by any language in the Act. The Division's self-serving interpretation is wrong.

Third, the phrase "appropriately available" modifies "state lands" and expresses the legislature intent that any state lands conveyed must meet the requirements of the Act. As the Division notes, the plain meaning of "appropriately" is: "in a way that is suitable, acceptable, and or correct for the particular circumstances."[3] And "available" means "present or ready for immediate use."[4] Thus, appropriately available stand lands are state lands that are suitable, acceptable, or correct for a restoration project exchange and are immediately available. The Act provides the factors and the Division is required to supply the metrics to make this determination.

The Division improperly interpreted Utah Code § 65A-15-201(1)(a), to create a non-existent threshold issue to avoid analyzing the Application under the statutorily required factors. This was wrong and the Executive Director should correct this error.

4. The Act Expressly Contemplates the Disposition of Property in and Around Utah Lake.

The Act specifically contemplates that in exchange for a restoration proposal, the state may dispose "of appropriately available state land *in and around* Utah Lake as compensation . . . ." Utah Code § 65A-15-201(1)(a) (emphasis added). This specific statute is the final authority on the matter as there is no other specific statutory provision to the contrary.

Utah law provides that "where two statutes treat the same subject matter, and one statue is general while the other is specific, the specific provision controls. *State v. Bagshaw*, 836 P.2d 1384, 1386 (Utah Ct. App. 1992). Put differently, "[s]pecific statutes control over more general ones." *Peak Alarm Co., Inc. v. Shanna Werner*, 2013 UT 8, ¶ 19, 297 P.3d 592.

The Division asserts that "the Legislature clearly and unequivocally prohibits fee simple disposal" of lands in and around Utah Lake based on various general provisions of the Utah Code. (*See* Response, at 6.) Nothing could be further from the truth, as such a disposition was expressly contemplated by the Act. For example, the Division cites to Utah Code § 23-21-4 as an example of the legislature's intent to prohibit fee simple dispositions of sovereign lands. While Section 23-21-4 may play an important role in generally protecting the public's right to hunt and fish on sovereign lands, it is inapplicable here because it does not deal specifically with land in and around Utah Lake. Put simply, the specific provision in the Act trumps any general provision the Division may conjure up by canvassing the Utah Code. The Act expressly contemplates the disposition of property in and around Utah Lake and the Division's determinations to the contrary were erroneous.

5. The Division Failed to Follow Its Own Rule When It Cancelled the Application.

When analyzing an exchange application, the Division must assess whether the exchange is "in the best interest of the public trust as documented in a record of decision by the division." Utah Admin. Code R652-80-200(2). Rule 652-80-200(2) provides five factors that "[t]he record

[3] *See* Appropriate Definition, Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/present.
[4] *See* Available Definition, Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/present.

of decision shall address" in making an exchange determination. *Id.* The Division failed to address those factors in the ROD. This alone is grounds for the Executive Director to rescind the Division's cancellation of the Application.

The Division excuses its failure to analyze the Application under Rule 652-80-200(2) by claiming—only recently—that the Application is not an exchange application as defined by Rule 652-80-200(2). This is wrong. The Division always treated the Application as an exchange application until the Petition notified the Division of its failure to review the Application under Rule 652-80-200(2). For example, the ROD characterizes the Application as "an application for a land exchange" (*see* ROD, at 2), acknowledged that the Division advertised an "exchange offering" pursuant to Rule 652-80-400, (*see* ROD, at 2), and accepted the Application as an "Exchange Application" on May 2, 2017 (*see* ROD, at 2, Ex. F.) All parties relied on and treated the Application as an exchange application, and it is unfair for the Division to now claim it is not an exchange application so it can skirt around Rule 652-80-200(2). The Division's recently adopted position is disingenuous.

By way of background, LRS submitted an exchange application pursuant to Rules 652-80-100 et seq. While Rule 652-80-200(2) appears to contemplate exchanges of land for other land or assets, the Act introduced a new form of exchange where the state could exchange land for restoration services. The Division never updated its rules to accommodate such an exchange, so LRS was directed to file a standard exchange application, which the parties have, until very recently, treated as an exchange application under Rules 652-80-100 et seq. As such, the Application should have been analyzed under Rule 652-80-200(2), and the Division's failure to do so was wrong.

Finally, the Rule 652-80-200(2) factors apply equally to an exchange of land for services as they do for an exchange of land for land or other assets. The purpose of these factors is to assess whether exchanges are "in the best interest of the public trust" and includes assessments of whether the exchange is financially beneficial, improves commerce and navigability, or impairs the public's interest in remaining waters and lands. Each of these factors could have been analyzed within this specific land exchange context.

6. The Legislature and Governor are the Responsible Parties for Determining Whether the Application is Constitutionally Sound.

The Division has routinely acted where it lacks statutory authority to do so and has failed to act when such action was statutorily required. The Division's opinions regarding the constitutionality of the Act and Application are a textbook example of the Division acting without statutory authority.

It is worth repeating that "when the legislature elects not to include certain language in a statute . . . [courts] seek to give effect to that decision by presuming all omissions to be purposeful." *John Kuhni & Sons Inc.*, 2018 UT App 6, ¶ 17 (internal citation marks omitted). Likewise, if the legislature "includes particular language in one section of a statute but omits it in another . . . it is generally presumed that [the legislature] acts intentionally and purposefully in the disparate

inclusion or exclusion." *Alliant Techsystems, Inc. v. Salt Lake Bd. of Equalization*, 2012 UT 4, ¶ 23 n.27, 270 P.3d 441 (ellipses and alterations in original).

The Act expressly contemplates that "[t]he legislature and governor" may authorize the disposition of state lands in exchange for a restoration project if: 1) the Division recommends the disposal; 2) the disposition accomplishes the Acts purposes; and 3) the disposal is "constitutionally sound and legal." Utah Code § 65A-15-201(3). The legislature could have, but elected not to, request the Division's opinion about whether a project is constitutionally sound and legal. Instead, the legislature reserved that task to itself and the governor. This omission and express reservation in the legislature's favor should be deemed purposeful and dispositive on the issue.

The Division, once again, looks outside of the Act for statutory authorization to deny the Application on constitutional grounds. Specifically, the Division claims that its general authority to manage sovereign lands under Utah Code § 65A-1-4(1)(b) somehow gives it authority over assessing the Application's compliance with the constitution. As discussed above, the specific provision of the Act prevails over the more general delegations found scattered throughout the Utah Code. *See Peak Alarm Co., Inc. v. Shanna Werner*, 2013 UT 8, ¶ 19, 297 P.3d 592 ("[s]pecific statutes control over more general ones"). The Division's grasp at statutory authority to justify its actions runs afoul of basic interpretation principles.

7. The Division is not the Final Arbiter of the State and Federal Constitutions.

The Act requires the legislature and governor (not the Division) to preliminarily assess whether the Application is constitutionally sound and legal, but even they do not have the final say. "It is the duty of the judicial branch of government to interpret the Constitution." *Alpine Homes, Inc. v. City of West Jordan*, 2017 UT 45, ¶ 25, 424 P.3d 95 (citing *Marbury v. Madison*, 5 U.S. 137, 178–80 (1803). The judiciary, not the Division, has "been entrusted with the overarching power of judicial review, and that power rests in us the final word on the interpretation and application of the constitution." *Utah Transit Auth. v. Local 382 of Amalgamated Transit Union*, 2012 UT 75, ¶ 26, 289 P.3d 582.

As discussed above, the Division lacked any statutory authority to analyze the Application's constitutional soundness as that task was reserved to the legislature and governor. Likewise, the Division lacked any inherent authority to analyze the Application's constitutional soundness as that task is reserved exclusively to the judiciary. Thus, the Division erred in taking upon itself the duty to assess the Application's constitutionality when that duty was reserved elsewhere.

The Division claims that LRS is effectively "asking the Division to approve all land exchanges, even if they are obviously illegal and/or unconstitutional." (*See* Response, at 8.) This statement is especially telling of the Division's fundamental misunderstanding of its role within the Act. First, the Division does not approve land exchanges under the Act, because final authorization is expressly reserved for the legislature and governor. *See* Utah Code §65A-15-201(3) ("The Legislature and governor may . . . authorize the disposal of state land in and around Utah Lake . . . ."). Second, the legality and constitutionality of restoration project exchange will be preliminarily assessed by the legislature and governor, but ultimately determined by the

judiciary. The Division has no inherent or statutory authority to make a constitutionality determination and other parties will ensure the Project is constitutional. The Division erred in taking this responsibility upon itself.

8. The Division Misapplied the Public Trust Doctrine[5].

Even if the Division was responsible for assessing the Project's constitutionality, the Division's public trust analysis was wrong. *Illinois Central Railroad Co. v. State of Illinois* supports the Application's approval.

Illinois Central Railroad Co., establishes two categories of public land dispositions under the common law public trust doctrine. Permissible dispositions include "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." *See Illinois Central Railroad Co. v. State of Illinois,* 146 U.S. 387, 452 (1892). These permissible dispositions must "enhance the public's use and enjoyment of the property" and help the public enjoy the "navigation of the waters, carry on commerce over them, and have liberty of fishing therein." *Utah Stream Access Coalition v. VR Acquisitions, LLC*, 2019 UT 7, ¶ 75, 439 P.3d 593. Conversely, impermissible disposition would include dispositions that substantially impair the public interest in the lands and waters remaining and do not enhance the public's overall use and enjoyment of the property. *See id.* ¶¶ 74–75.

In applying *Illinois Central Railroad Co.*, courts have routinely upheld land dispositions that are substantially similar to this one. For example, in *Treuting v. Bridge & Park Comm'n of City of Biloxi*, the court upheld a disposition by the Mississippi state legislature of submerged lands to private parties to develop Deer Island in exchange for the private parties enhancing the remaining public lands. *See* 199 So.2d 627, 633–34 (Miss. 1967). There, the court concluded that dredging to enhance Deer Island would improve navigation, reduce wave action, and improve an existing harbor. *Id.* at 631. Thus, the land disposition to private owners ultimately benefitted public use, navigation, commerce, and recreation. *Id.* at 633–34. Other courts have reached similar conclusions. *See, e.g., City of Berkeley v. Superior Court*, 606 P.2d 362, 366–67 (Cal. 1980) (concluding that the state could "dispose absolutely of title to tidelands to private persons if the purpose of the conveyance was to promote navigation and commerce."); *River Place Condo. Ass'n at Ellenton, Inc. v. Benzing*, 890 So.2d 386, 389 (Fla. 2004) (upholding the constitutionality of a state statue to dispose of state lands because the lands had "marginal value to the State and would be more valuable if placed on the tax rolls."); *Greater Providence Chamber of Commerce v. Rhode Island*, 657 A.2d 1038, 1043–44 (R.I. 1995) (upholding the fee simple disposition of a harbor dredged and filled by an electric company and gas company).

Like the projects identified in *Treuting*, *City of Berkeley*, *River Place Condo. Ass'n*, and *Greater Providence Chamber of Commerce*, the Project will significantly enhance the public's use

[5] Ironically, the Division repeatedly touts its stewardship duties over Utah Lake and asserts that its primary concern is Utah Lake's preservation for the public benefit. At the same time, the legislature has acknowledged, and few would disagree, that Utah Lake "faces serious challenges." *See* Utah Code § 65A-15-103(1). Perhaps the Division—who has overseen Utah Lake's decay—should be mindful of being overly critical of private investment seeking to remedy the Division's Utah Lake problem.

and enjoyment of Utah Lake. For example, the Project improves commerce thereon, preserves and enhances water availability and quality, enhances navigability, and increases recreational opportunities such as fishing and boating.

In contrast to *Illinois Central Railroad Co.*, and its progeny, the Division seems to have adopted a categorical rule that if, in the Division's sole discretion, a restoration project even slightly imposes upon the public's access to state lands, it violates the public trust. The issues stemming from such a rule are self-evident—the rule shifts all control over state lands to the Division regardless of what the legislature may dictate otherwise. Utah's public trust doctrine is not predicated on whether the Division believes a disposition is "a large development" that "does not align" with the Division's subject belief as to the intent of "the framers of the Utah Constitution." (*See* Response, at 10.) The Division's public trust analysis was erroneous, and its cancellation of the Application based on such faulty reasoning should be reversed.

REQUEST FOR RELIEF

The Division irreparably harmed LRS when it canceled the Application because it forced LRS to pause the EIS process and caused LRS to lose millions of dollars it invested in the Project. The Division mischaracterizes the harm LRS has suffered because of the improper cancellation.

Throughout the application process, LRS has reasonably relied on the Division's representations. For example, the Division represented to LRS that the Application could and should be supplemented by information gathered by the Corps during the EIS process. LRS spent millions of dollars on the Division's representation that relying on the EIS process for supplementary information was proper. Only recently has the Division changed its tune and claimed that using the EIS data to supplement the Application is inappropriate. At this stage, LRS cannot undo what has already been done. While it is true that the Corps Permit Application was paused before the Division cancelled the Application, LRS continued to work with the Corps to ensure the EIS's processing continued. The Division's cancellation is the sole reason why the EIS remains paused. Rescinding the cancellation would remedy the harm LRS has suffered and permit the Corps and LRS to complete the EIS.

In addition to the specific harm to LRS, the Division's action is also prejudicial to the beneficiaries of the public trust—the citizens of Utah. The Act intends that private investment will fund the restoration efforts at Utah Lake. By cancelling the Application without undertaking the analysis required by the Act, the Division jeopardizes billions in private funding and risks placing the financial burden of restoring Utah Lake on taxpayers. Contrary to the Division's assertion, waiting to assess the Application until after receiving and evaluating a completed EIS from the Corps is not prejudicial to other potential solutions to restore Utah Lake. Notably, no other restoration projects have even been proposed. Holding the Application open allows LRS to gather the data needed to support the Application and preserves its relationships with key lenders, underwriters and investment banks who can fund the desired restoration efforts.

LRS respectfully requests that the Division's action be rescinded, and that the Executive Director remand the Application with instructions that the Division (i) evaluate the Application as required by Utah Admin. Code R652-8-200(2) and Utah Code § 65A-15-201; (ii) promulgate the

standards, criteria, and thresholds required by statutory injunction in Utah Code § 65A-15-201(a); and (iii) refrain from cancelling the Application until receiving and evaluating a completed EIS from the Corps.