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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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March 27, 1974

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The Honorable Charles A. Vanik
House of Representatives

Dear Mr. Vanik:

Your letter of March 6, 1974, requests our response to several questions concerning an agreement between the Secretary of the Interior and officials of the State of Utah signed on February 22, 1974.

As part of its Federal Prototype Oil Shale Leasing Program, the Department of the Interior is preparing to sell oil shale leases for two tracts of land in the State of Utah. Bids for the first Utah tract were opened on March 12, and bids on the second tract are scheduled to be opened on April 9.

These two tracts of land, among other tracts, are subject to indemnity selections by the State of Utah pursuant to 43 U.S.C. 851-852, which are now pending before the Interior Department. 43 U.S.C. 851-852 provides for selections by certain States of public lands in order to indemnify such States for the loss of other specified public land sections originally granted to them for school purposes upon their admission to the Union.

Utah's selections, including the two tracts here involved, were submitted to the Interior Department over a period of time from 1965 to 1971. While the lands to be selected have been withdrawn from appropriation by past Executive orders, the Secretary of the Interior is authorized under section 7 of the Taylor Grazing Act, 43 U.S.C. 315f, to classify such lands for indemnity grants and to effect their transfer to the State. The Secretary has not yet acted upon Utah's selections. We understand that the Interior Department is presently considering whether the selections can or should be approved in view of the fact that the lands selected are considerably more valuable than the lost school sections upon which the State's indemnity entitlements are based.

The instant agreement between the Secretary of the Interior and the State of Utah states in paragraphs (1) and (2) that the Department may

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proceed with the lease offers under the prototype leasing program, and that the Secretary may determine in his sole discretion whether to issue leases.

Paragraph (3) states that if, as a result of action by the Secretary, court order or otherwise, the State of Utah acquires any rights or interest in these tracts or minerals within the tracts to be leased, the State will be bound by all terms and conditions of any such leases as fully as the United States.

Paragraph (4) of the agreement recites that the State of Utah claims to be entitled to the lands concerned as well as all lease rentals and bonus funds which the Secretary may receive from any leases; but that the United States denies the validity of such claims. Paragraph (4) further recites that the State of Utah intends to seek judicial enforcement of its alleged rights. Finally, paragraph (4) states: "The execution of this agreement in no way recognizes, validates, waives, releases or in any way affects the legal rights, claims or respective positions of the parties thereto."

You specifically request our views on whether this agreement appears to be legal and proper, and whether there exists authority and precedent to accomplish such an agreement. You also ask whether there are likely complications to such an agreement.

While we are unaware of any specific authority or precedent for this agreement, it does not appear to be objectionable from a legal viewpoint. The only operative provisions of the agreement are that the Department may proceed with its prototype leases and that the State of Utah will fully honor the terms and conditions of any such leases if its indemnity selections prevail. The agreement refers to the respective legal position of the State and the Department; however, it expressly disclaims having any effect upon them. In sum, the agreement does not appear to compromise or forego any rights or interests on the part of the Federal Government. It is essentially a neutral factor in terms of the State's claims to the lands involved and to any lease proceeds received.

In view of the limited effect of the agreement, it seems unlikely that complications will arise from the agreement as such. However, we might offer several observations concerning the possible consequences upon any prototype leases, and the proceeds thereof, if Utah's indemnity claims prevail, either through approval of the State selections by the Secretary of the Interior or as a result of litigation.

Under the agreement, the State of Utah would assume administration of any prototype leases if its indemnity claims prevail. At the same time the prototype leases would cease to be a Federal undertaking. The State has agreed to honor the terms and conditions of the prototype leases as fully as the United States as lessor would be bound. The State would, in any event, be bound by operation of 43 U.S.C. 852(a)(5), discussed infra, to honor all rights of the lessees. Nevertheless, the State and the lessees would normally be free to change any terms or conditions of the leases by their mutual agreement. It appears that paragraph (3) of the agreement is intended solely to preserve the rights of lessees, and thus would not preclude the State and the lessees from changing any terms or conditions of a lease by their mutual agreement. Also, the fact that the Department of the Interior would cease any further involvement in the leases would mean that any statutory or other requirements and restrictions applicable only to Federal agencies, such as the National Environmental Policy Act, would have no continued application to these leases.

Several provisions of 43 U.S.C. 852 appear of interest in terms of Utah's proposed selection of lands subject to prototype oil shale leases.

It might be noted that 43 U.S.C. 852(a)(3) in effect precludes State selection of lands subject to a mineral lease or permit if any such lands are in a "producing or productible status." The Attorney General has held that lands subject to a lease are in a "producing or productible status," and thus exempt from selection, only if they actually are sustaining, or can sustain, commercial operations. 42 Op. Att'y Gen. No. 10 (February 7, 1963). It seems clear that the lands to be leased under the prototype oil shale program will not achieve this status for several years. Accordingly, the existence of prototype leases would not of itself prejudice Utah's indemnity selections.

With reference to Utah's claims to the proceeds of prototype leases, consideration must be given to 43 U.S.C. 852(a)(5), which provides:

> "If a selection is consummated as to all of the lands subject to any mineral lease or permit or if, where the selecting State has previously acquired title to a portion of the lands subject to a mineral lease or permit, a selection is consummated as to all of the remaining lands subject to that lease or permit, then and upon condition that the United States shall retain all rents and royalties theretofore paid and that the lessee or permittee shall have and may enjoy under and with respect to that lease or permit all the rights, privileges, and benefits which he

> would have had or might have enjoyed had the selection not been made and approved, the State shall succeed to all the rights of the United States under the lease or permit as to the mineral or minerals covered thereby, subject, however, to all obligations of the United States under and with respect to that lease or permit."

This section by its terms appears to require that the Federal Government retain all proceeds received under a lease prior to the time at which the State succeeds to such lease.

In view of the foregoing, it appears that the Federal Government must retain any bonus payments, rents and royalties which it receives under the prototype leases prior to the time, if at all, that Utah's selections are "consummated." Of course, Utah will in any event be entitled to 37-1/2 percent of the proceeds received by the Federal Government from any oil shale leases on lands located within the State. See 30 U.S.C. 191.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States