# STATE OF COLORADO

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**Bill Ritter, Jr.**
**Governor**

September 22, 2008

U.S. Department of Interior
James L. Caswell, Director (630)
Bureau of Land Management
Mail Stop 401 LS
1849 C St. NW
*Attention:* 1004-AD90
Washington, DC 20240

Re: *Proposed rule: Oil Shale Management (43 C.F.R. 3900, 3910, 3920 et al.)*

Dear Director Caswell:

On July 23, 2008, the Department of the Interior published a proposed rule that would establish a commercial leasing program for federally-owned oil shale. 73 Fed. Reg. 42926 (July 23, 2008). Oil shale development creates potential opportunities for Coloradans, and all Americans, with respect to energy security, energy affordability, and economic security. That is why I continue to support research and development efforts in Colorado. However, oil shale development also poses significant challenges around environmental protection, water resources, and socioeconomic impacts.

I am concerned that the Department of the Interior is proceeding in this Administration's waning days with premature regulations that would establish a commercial leasing program for oil shale, despite the fact that neither the Department nor the industry has a clear understanding of which oil shale technologies will prove viable and what the associated costs and impacts will be. Until these and other vitally important questions are answered, it is impossible to develop regulations that contain appropriate protections for the environment, appropriate royalty rates to ensure a fair return to the state and federal treasuries, and a financial safety net for communities.

The State of Colorado is doing its part to help the country meet its energy needs. We are issuing about 35 new oil and gas drilling permits a day. We are building a New Energy Economy that is bringing thousands of new jobs to Colorado. And our research institutions are developing cutting-edge, new energy technologies.

We will continue to look towards oil shale as we continue to diversify our energy portfolio. Northwest Colorado is home to extraordinary oil shale resources, among the richest in the world, yielding 25 gallons of oil or more per ton of rock. The area is estimated to hold nearly 500 billion barrels of proven oil shale reserves, more than double the proven reserves of Saudi Arabia. Successful development of this resource could provide a substantial new source of

domestic oil for the United States, which would have positive implications for our national energy policy and national security.

However, I believe strongly that the state and federal government must be thorough and thoughtful in our approach to oil shale, especially in light of the magnitude of such development. If the Department of the Interior were to authorize a commercial oil shale industry in Colorado, the development would constitute the largest industrial development in the State's history -- with enormous implications for all of Northwest Colorado and for the State itself.

Though remarkable, Colorado's oil shale resources have remained in the ground since their discovery over a hundred years ago. Past development attempts have failed due to a number of challenges -- technical, economic, and environmental -- that have yet to be overcome, notwithstanding billions of dollars invested by both government and industry.

Since coming into office nearly two years ago, I have carefully monitored and supported the Research, Development, and Demonstration (RD&D) process, and I look forward to continuing to work with the Administration, Congress, and the private sector to assess the results of the RD&D program. Once we understand the results, we will have a clearer understanding of which technologies can work and how we can manage and mitigate the environmental and socioeconomic impacts of such technologies. Only at that point can responsive regulations be promulgated for a commercial federal leasing program. Establishing the parameters of royalty, leasing, and environmental programs before the RD&D answers are in place would be a dangerous course, with enormous risk of unintended consequences. Such a course of action would not be in the best interest of the nation and certainly not in the interest of Colorado.

BLM has previously recognized that the RD&D projects will provide valuable information for commercial leasing regulations. In soliciting nominations for RD&D lease tracts, the BLM wrote in 2005:

> The BLM intends to initiate a phased or staged approach to oil shale development. The first step . . . is to develop a [RD&D] leasing program. BLM believes this effort will significantly enhance the collective knowledge regarding the viability of innovative technologies for oil shale development on a commercial scale. The second step BLM intends to initiate is to develop a regulatory framework for commercial oil shale leasing program to ensure that any commercial development of oil shale on BLM lands is both environmentally and fiscally responsible. . . . By initiating a [RD&D] leasing process, the BLM can provide itself, state, and local governments, and the public, with important information that can be utilized as BLM works . . . to develop strategies for managing any environmental effects and enhancing community infrastructure needed to support the orderly development of this vast resource. *This will be valuable information for a rulemaking addressing commercial oil shale leasing.*

70 Fed. Reg. 33753, 33754 (June 9, 2005) (emphasis added). Nonetheless, the BLM now proposes to adopt such regulations without availing itself of the information that will be obtained through the RD&D projects.

I have consistently supported restrictions on the promulgation of final regulations establishing a commercial oil shale leasing program prior to completion of RD&D projects, because I feel that to finalize such regulations is premature. If the Bureau of Land Management finalizes regulations for commercial oil shale leasing without the benefit of data from the ongoing RD&D projects, those regulations will be premature, not well founded, and perhaps inappropriate or incomplete. While this rush to regulation may provide certainty in some quadrants, it may also provide false signals for investments that may then require a government subsidy to maintain fiscal solvency and to recover unanticipated costs, resulting in another financial burden to the nation's taxpayers.

I urge the Department of Interior to heed the significant concerns of the State of Colorado and refrain from adopting final regulations until the RD&D projects are constructed and yield meaningful results that can be reviewed by state and federal officials and the public. To delay finalization of regulations will not slow down an oil shale industry that has not yet begun. On the contrary, it will ensure that a vibrant oil shale industry might get off the ground with adequate protections for Colorado's environment, communities, and coffers.

Attached are detailed comments from the Colorado Department of Natural Resources, Colorado Department of Public Health and Environment, and Colorado Department of Local Affairs. I hope that the Interior Department will review and consider them in detail, despite its apparent desire to adopt final regulations prior to a change in administrations.

Thank you for this opportunity to comment. We look forward to continuing to work cooperatively with BLM to ensure that the significant challenges associated with oil shale development are addressed in a thorough and protective manner.

Sincerely,

Bill Ritter, Jr.
Governor

**STATE OF COLORADO COMMENTS ON**

**Bureau of Land Management's**
**Proposed Rules for Oil Shale Leasing and Management**
**73 Fed. Reg. 42926 (July 23, 2008)**
***Proposed 43 C.F.R. Part 3900 et seq.***

## I. The BLM cannot promulgate regulations prior to completing an appropriate NEPA analysis.

The proposed regulations are designed to facilitate the implementation of a commercial oil shale leasing program. *See* 73 Fed. Reg. 42926 (July 23, 2008). If the Department of Interior promulgates the regulations and then authorizes a commercial oil shale industry in Colorado, the development would constitute the largest industrial development in the State's history. It is therefore of utmost importance to the State of Colorado that the regulations be adopted in compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332 *et seq.*

The BLM has prepared an Environmental Assessment (EA) in conjunction with the proposed regulations. *See U.S. Department of the Interior, Bureau of Land Management, Environmental Assessment WO-300-07-009.* The BLM placed the EA on file in Washington, D.C., but did not publish the EA or otherwise provide copies to Colorado, Wyoming and Utah -- the three Western states that would be directly impacted by the regulations -- until they requested it. The BLM concludes that the proposed regulations would not constitute a major federal action significantly affecting the environment. *See* EA, § 4.5, p.19; *see also* 73 Fed. Reg. at 42949. Colorado believes that the BLM's approach in reaching this conclusion and promulgating the regulations violates the National Environmental Policy Act (NEPA).

The proposed regulations address such critical issues as lease sizes, diligent development requirements, pre-lease exploration, leasing processes, bonding, royalty rates, fair market value, and conversion of research, demonstration and development (RD&D) leases. The regulations would thus set in place factors that will directly and significantly affect how oil shale development proceeds. For example, the level at which the royalty rate is set will have a major impact on whether and how industry moves forward to pursue development of this resource. This includes the timing, scope and parties to oil shale development.

The BLM recognizes that such development itself would have a significant environmental impact. *See Draft Oil Shale and Tar Sands Resource Management Plan Amendments to Address Land Use Allocations in Colorado, Utah and Wyoming and Programmatic Environmental Impact Statement (DES 07-60).* As such, promulgation of these leasing regulations would also constitute a major federal action significantly affecting the quality of the human environment, and requires an EIS, not merely an EA. *See* NEPA § 102(C), 42

U.S.C. § 4332(2)(C); *see also National Environmental Policy Act Handbook and Department of the Interior NEPA Guidance Manual 516, BLM Handbook H-1790-1*, at p. I-2.

The BLM views these regulations as necessary to implement the Energy Policy Act of 2005. *See, e.g.,* 73 Fed. Reg. at 42926. However, while Congress directed the BLM to publish a Programmatic Environmental Impact Statement (PEIS) and to promulgate regulations, it specifically instructed BLM to do so in compliance with NEPA. The Energy Policy Act does not waive or in any way diminish the BLM's obligations under existing environmental laws such as NEPA. Congress and the BLM have already determined that an EIS is appropriate for the BLM's proposed leasing program. Similar rationale would properly apply to the BLM's leasing regulations.

NEPA requires federal agencies to take a "hard look" at potential environmental consequences of proposed actions and disseminate the conclusions of the analysis to the public. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989). This requires that the federal agency carefully consider detailed information concerning significant environmental impacts with comprehensive up-front environmental analysis to ensure informed decision-making so that the agency will not act on incomplete information only to "regret its decision after it is too late to correct." *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1216 (9th Cir. 1998), *quoting from Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). Federal regulations require that agencies apply NEPA early in the planning process by "identify[ing] environmental effects and values in *adequate detail* so they can be compared to economic and technical analyses." 40 C.FR. § 1501.2 (emphasis added).

To purportedly comply with NEPA, the BLM is preparing an Environmental Assessment (EA). However, the term "environmental assessment" is a misnomer here, as the BLM has made no attempt to assess the environmental impacts of the proposed regulations.

The BLM has not provided the required detailed information and analysis regarding potential environmental effects of commercial oil shale development. The EA provides a brief laundry list of potentially impacted media, but lacks any substantive analysis. *See* EA at § 4.2, p.14. The EA simply states, in three short paragraphs, that the commercial oil shale leasing program will affect soil and geology, surface and ground water, and wildlife. *Id.* These broad, conclusory statements do not constitute the hard look at environmental consequences that NEPA requires. Nor does it look at the elasticity of production under different policy scenarios -- to justify this set of policy driven rules and regulations as the optimum combination of options.

Moreover, rather than conduct this analysis in the EA, the BLM simply refers the reader to the draft Oil Shale and Tar Sands Programmatic Environmental Impact Statement (PEIS). *See id.* The PEIS itself only discusses the environmental impacts of a commercial oil shale leasing program in a vague, general way that provides no useful data or analysis. *See* State of Colorado, comments on Draft PEIS (March 20, 2008). The PEIS repeatedly makes clear that due to currently missing and incomplete information, the BLM cannot adequately assess the potential impacts of commercial oil shale leasing. Even while proposing these regulations, the BLM acknowledges that the "technologies are yet to be proven, or commercially viable and their associated impacts are unknown," and that the draft PEIS "was unable to anticipate with any

certainty the effects of oil shale leasing development due to the newness of the industry." 73 Fed. Reg. at 42939. NEPA documents such as an EIS and an EA can "tier off" of previous NEPA documents in appropriate circumstances. In this case, however, the draft PEIS and EA are so devoid of substance that they cannot be used to meaningfully support any subsequent leasing decisions.

The thrust of the draft EA is that "environmental effects can result based on future decision points." EA at § 2.2.1, p.4. The EA lists five future decision points that will require further NEPA analysis: land use planning allocations; exploration licenses; lease sales; conversion of RD&D leases; and approving on-the-ground activities. EA at § 4.2, p.13. In focusing on "future decision points" the BLM wrongly concludes that no significant impacts can result from its current decisions: "These regulations are primarily procedural and do not commit any resources or authorize any BLM action that would have a direct, indirect or cumulative impact on the physical, biological or socioeconomic environment." EA at § 4.2, p.13; *id.* at § 4.6, p.19 ("The regulations themselves have no significant impact"). Colorado disagrees. *These regulations* are a critical decision point where further analysis is required. The decisions made in these regulations will help dictate the scope and pace of oil shale development. Such factors will have direct, indirect and cumulative effects on the physical, biological and socioeconomic environment in Colorado.

The regulations and EA include vague references to "additional NEPA analysis." *See, e.g.*, EA at § 2.2.1, pp.5-6; § 4.2, pp.13-16, § 4.5, p.18, and § 4.6, p.19 ("The BLM's future decision to issue leases, licenses, or approvals would be made in compliance with NEPA"). *See also* 73 Fed. Reg. at 42939 ("Additional NEPA analysis will be performed during the application and leasing process. When required by applicable law, the BLM will conduct site-specific NEPA analysis"); *id.* at 42929 ("Compliance with NEPA and land use planning is required prior to the BLM's issuing a lease or exploration license"); *id.* at 42960 (*proposed § 3900.50(b)*) (before a lease is issued, BLM or the appropriate agency must comply with NEPA); *id.* at 42965 (*proposed § 3921.20*) (before BLM offers a tract for lease sale, the BLM must prepare a NEPA analysis). Under BLM's approach, the environment would ostensibly be protected through the decisions, terms, conditions and stipulations of future land use plans and leases. *Id.* at 42929.

Colorado agrees that additional NEPA analysis is necessary. However, we have serious concerns about the BLM's actions to date, and the unspecified nature of the BLM's approach going forward. The BLM's approach leaves the door open for it to attempt to issue additional, incomplete EISs and EAs. Significantly, while the BLM claims in the PEIS that it will study the cumulative impacts of proposed oil shale development projects when it receives an application for a commercial lease, the agency's current approach would foreclose an analysis of the cumulative impacts of its leasing or land management decisions.

Northwest Colorado communities are already experiencing rapid growth and attendant socio economic challenges as a result of increased production of natural gas and other commodities. The state of Colorado has been a participant in a number of studies that flag "tipping-point" issues with regard to any added development. For example, the recent work of the Associated Governments of Northwest Colorado (BBC April, 2008) assessed the capacity of local government facilities and services to accommodate the expanding natural gas development

in the region. This report made the case that the local public finances cannot provide sufficient resources to address impacts of energy development in the region under current conditions. The report went on to conclude that, "A commercial oil shale industry will overwhelm the area's rural public infrastructure."

The BLM cannot analyze the cumulative impacts of its decisions to establish a commercial leasing program for oil shale when performing NEPA review on a project-specific, piecemeal basis in response to an individual application for a commercial lease. Historically, when a "lease by application" approach has been taken to a resource, an area-wide EIS is performed in advance so that the impacts of a specific lease in that area can be made at the time of lease application. In this case, there is no comprehensive EIS that will be the baseline for future individual lease analyses in the leasing area.

Quite simply, the BLM has failed to take the requisite hard look at the potential impacts of commercial oil shale development, and its promise to do so in the future does not provide Colorado with adequate assurances, and cannot be used as a means to avoid NEPA compliance now.

The BLM's position is that it can proceed with an oil shale leasing program and associated regulations and that detailed studies of the effects of such a program can be done later. However, such a piecemeal approach to NEPA compliance has been repeatedly rejected by the Courts. *See, e.g., National Wildlife Federation v. Andrus*, 440 F.Supp. 1245, 1252. (D. D.C. 1977). In *Andrus*, as here, the United States conceded that there would be some impacts, and argued that future studies would be used to identify such impacts in detail. The court rejected such an approach, noting that "NEPA clearly envisions that such studies should *precede* major federal actions," and that a "mere admission of some impact is [in]sufficient without supplying the detail which is required by NEPA and which is necessary for informed decision-making detailed support is insufficient under NEPA." *Id.* at 1252-53 (emphasis added).

Similarly, the Ninth Circuit has also rejected the unsubstantiated, piecemeal approach to NEPA compliance. In *Thomas v. Peterson,* 753 F.2d 754 (9th Cir. 1985) the U.S. Forest Service completed an EA for a road off of which timber harvesting leases would be sold. The EA did not include any assessment of the potential environmental effects of the timber leases themselves. The Ninth Circuit held that the U.S. improperly approached the EA in a piecemeal manner: "Not to require this [analysis of the environmental effects of timber harvesting leasing in conjunction with the building of the road] would permit dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Id.* at 758. The court went on to conclude that "[b]uilding the road swings the balance decidedly in favor of timber sales even if such sales would have been disfavored had road and sales been considered together before the road was built."

This is precisely analogous to decisions made in these regulations, such as establishing royalty rates. It is obvious that royalty rates will have a significant impact on the scope and pace of commercial oil shale development. If this were not true, why not set royalty rates at 50% or higher, to maximize the economic return to the public from oil shale development? Setting royalty rates is one key action enabling and influencing oil shale development, just like the

construction of a road is one key action enabling and influencing timber harvesting on Forest Service lands.

An EA supporting proposed commercial oil shale leasing regulations that does not consider the ultimate environmental effects of commercial oil shale leasing and development does not provide the environmental analysis needed to comply with NEPA. *See Citizens for Better Forestry v. United States Dept. of Agriculture*, 341 F.3d 961 (9th Cir. 2003) (even though chain of causation for Forest Service's national rule on land use management plans was indirect, harm was still reasonably probable since regional and site specific land use plans would follow the requirements of the national rules). Consequently, issuing oil shale leasing regulations based on an inadequate EA improperly shifts the balance in favor of oil shale development without an adequate NEPA analysis.

The EA's numerous references to future NEPA analyses is a recognition that the BLM currently lacks the basis to make informed decisions regarding potential impacts -- further confirming Colorado's contention that his action is premature. As in *Andrus*, "[t]he many references to future studies which will determine later the environmental impact of the [federal project] reflect the fact that defendants have yet to make the sort of probing determination required by NEPA." *Andrus*, 440 F.Supp. at 1252. Similarly, a "weighing of the economic benefits against environmental costs is impossible where there is only speculation and promise of future details concerning effects upon the environment." *Id.* at 1253.

The BLM's strategy in attempting to promulgate these leasing regulations effectively ignores NEPA. Recognizing that inadequate information exists to make any informed analysis of environmental impacts, the BLM charges headlong into promulgating regulations without awaiting the results of additional analysis, such as from the RD&D projects. NEPA is not designed to allow federal agencies to promulgate regulations having a major impact, and then begin analysis of the impacts of such regulations after the fact. The BLM cannot "piecemeal" the oil shale leasing and development program so that the hard look at environmental consequences that NEPA requires never takes place -- or takes place so late in the process that major federal resources have already been committed to the program or significant investments have already been made by the private sector.

Colorado continues to believe that it is appropriate to closely follow the RD&D projects so that answers to critical questions regarding the technologies to be utilized, including potential impacts to Colorado's environment, can be ascertained. Such programs could provide the necessary information upon which relevant regulations can be promulgated and commercial leases issued.

## II. The regulations lack adequate environmental safeguards.

The BLM is proposing to foster an entirely new industry that will utilize currently undeveloped technologies on a massive scale. While the exact technologies that will be used are currently unknown, they will undeniably impact Colorado's invaluable natural resources. However, the proposed regulations provide no substantive standards or specific requirements for

protection of these resources. The regulations merely state that these critical matters will be addressed later.

The proposed regulations purport to include "performance standards" for in situ operations, underground mining, and surface mining. However, the performance standards are effectively silent as to any environmental considerations, save for a generic reference (and specific only to surface mining), that the lessees shall comply with existing federal and state environmental laws. *See* 73 Fed. Reg. at 42968-69 (*proposed §§ 3930.11-13*). In the context of in situ operations (the most unproven and complex of the evolving technologies), the regulations merely have provisions relating to the use and capping of exploration drill holes. *See id.*

The regulations provide that oil shale development plans must provide for "reasonable protection and reclamation of the environment." 73 Fed. Reg. at 42970 (*proposed § 3931.10(a)*). What constitutes "reasonable protection" is undefined, and provides no guidance or clarity to affected states such as Colorado. Moreover, the regulations indicate that the BLM "will consult with any other federal, state or local agencies involved and review the [development] plan." *Id.* (*proposed § 3931.10(d)*). How such involvement and consultation is to be determined is not specified.

The BLM is proposing to include regulatory components that may be found in other BLM leasing programs. However, Colorado submits that as a new industry with unproven technologies, oil shale is uncommon. *See Foundation on Economic Trends v. Heckler,* 756 F.2d 143, 160 (D.C. Cir. 1985) ("[F]ederal development of a new technology with unknown environmental consequences is the action in which programmatic considerations are particularly important."). Indeed, the BLM concedes that "[t]he possible oil shale technologies are very different from conventional mining methods associated with other BLM minerals programs as are the impacts associated with each. The technologies under research and development are yet to proven commercially and their associated impacts unknown." EA at § 2.2.1, p.6. Accordingly, the BLM cannot simply rely on other programs in crafting such a significant new program.

In order to assure adequate protection of the environment and public health, § 3931.11 should at a minimum require that the following be included in a plan of development:

***1. Watershed Protection Plan***

*The operator/lessee shall prepare a Watershed Protection Plan. The Watershed Protection Plan shall include the following elements:*

- *Characterization of baseline water quality within the portion of the watershed potentially impacted by the proposed oil shale operations;*
- *Identification of any public water systems with water diversions or intakes located within 15 miles downstream of the proposed oil shale operations;*
- *Identification of best management practices and other measures to be undertaken to avoid adverse water quality impacts from the proposed oil shale operations,*

*including any measures to assure compliance with source water protection plans for any identified downstream public water systems;*

- *Emergency response procedures and contingency plans to address potential water quality impacts from any spills or releases from the operations;*
- *Notification procedures to assure timely communication with potentially affected downstream public water systems in the event of a release;*
- *Identification of reclamation plans to assure the protection of water quality, including protection of identified downstream public water systems, following the completion of oil shale development operations; and*
- *Documentation that the operator/lessee has consulted with identified downstream public water systems and watershed stakeholders in the development of this Watershed Protection Plan.*

### 2. ***Airshed Review and Report***

*The operator/lessee shall prepare a comprehensive Airshed Review and Report for the proposed lease activity. The Airshed Review and Report shall include:*

- *An assessment of cumulative air emissions from all emissions sources associated with a particular proposed lease, including support or collateral facilities that enable the full lease proposal to be implemented; such support or collateral facilities would include, but not be limited to, emissions from mobile sources (e.g., truck and train emissions, emissions from roads, etc.) and stationary sources (e.g., power plants, liquids pipelines, etc.), whether or not such sources are owned or operated by the entity receiving the lease.*
- *A quantification and estimate, to the best of the leasing entity's ability, of emissions from similar leases that are likely to be issued within five (5) years of the construction of the proposed leasing activity, including support and collateral facilities. Such assessment shall use appropriate air quality evaluation tools, including all available relevant monitoring information, appropriate comprehensive air quality modeling tools, and shall include relevant background air quality data (current and projected; in-state, and in-bound from out of state).*
- *These assessments shall use appropriate air quality evaluation tools, including all available relevant monitoring information, appropriate comprehensive air quality modeling tools, and shall include relevant background air quality data (current and projected; in-state, and in-bound from out of state).*
- *Monitoring information, modeling tools and background data that shall be selected following consultation with the relevant state air quality agency.*
- *An evaluation of local and regional effects on National Ambient Air Quality Standards for Criteria Pollutants under the Clean Air Act, visibility impairment for all Class I airsheds in the state, other relevant air quality-related values, and Increment Consumption under the Prevention of Significant Deterioration Program (Clean Air Act) unless such is deemed not necessary by the relevant state air quality agency after consultation.*
- *An Airshed Protection Plan identifying measures, technologies, practices, and operations, as appropriate, to mitigate identified air quality impacts, which shall*

*be implemented through the formal lease approval documents, air quality permits as relevant, or other appropriate legally enforceable instruments.*

*The Airshed Review and Report shall be reviewed and approved by the relevant state air quality agency prior to the submittal of any application for an applicable state or federal air emissions permit(s) related to the proposed leasing activity.*

### *3. Integrated Waste Management Plan*

*The operator/lessee shall prepare an Integrated Waste Management Plan. The Integrated Waste Management Plan shall include:*

- *Identification of the types of solid and hazardous waste to be generated;*
- *Estimated volumes of each type of solid and hazardous waste generated;*
- *The type and capacity of waste storage facilities required;*
- *The type and capacity of waste treatment facilities required;*
- *The type and capacity of waste disposal facilities required; and*
- *The available waste management capacity and potential deficiency of such capacity for the waste storage, treatment and disposal needs listed above.*

*The Plan shall also assess the lead time required for completion of the permitting for any additional waste management capacity that may be needed and specify the actions planned to assure that the needed capacity will be available in time for the proposed oil shale operations.*

### *4. Environmental Protection Plan*

*The operator/lessee shall prepare an Environmental Protection Plan that is consistent with that required for a Designated Mining Operation Mined Land Reclamation Permit. The Plan should be designed to protect areas affected by designated chemicals, acid and toxic forming materials, and acid mine drainage. The Plan shall include:*

- *Information on leach facilities or heap leach pads; tailings, storage, or disposal areas; impoundments; waste rock piles; other stock piles, temporary or permanent; and land application sites.*
- *The following elements must be included in the Plan: maps, other permits and licenses; designated chemical evaluation; designated chemical handling; facilities evaluation; groundwater information; groundwater quality data; surface water control and containment; surface water data; water quality monitoring plan; climate data; geochemical data and analysis; construction schedule; plant growth medium (soils) information; wildlife protection; and disposal of tailings and sludge in mine workings; and*
- *A Quality Assurance/Quality Control Plan.*

The inclusion of these requirements in the leasing regulations is essential in view of: (1) the new oil shale development technologies likely to be employed, that may have uncertain

environmental consequences; (2) the extensive scope of potential oil shale development anticipated by BLM; and (3) the lack of substantive, quantified environmental impact analysis in the NEPA documents prepared by BLM to date.

## III. Comments on Policy Provisions in the BLM's Proposed Rule

Colorado believes that the BLM is prohibited from adopting final regulations without further review of the environmental impacts of doing so as required by NEPA. Colorado also believes that finalizing regulations prior to analysis of the RD&D projects is imprudent.

It is thus too early for BLM to adopt regulations establishing a commercial leasing program for oil shale. However, in the event that BLM does move to finalize rules, the state offers the following comments on provisions contained in the BLM's proposed rules. Given the absence of comprehensive economic, technological, and environmental information, this list is provided for illustrative purposes only. It should by no means be construed as a comprehensive listing had more precise information been available.

With these important caveats in mind, Colorado requests the inclusion of elements that would:

1) Defer determination of certain elements until likely costs and recovery rates for proposed technologies are determined, including:
   - Production royalties, including royalty rates and chargeable production;
   - Minimum bonus bids; and
   - Diligent development requirements (minimum production levels, payments in lieu of production, and milestones.

2) Provide stronger reclamation bonding requirements;

3) Amend provisions for converting RD&D leases to ensure compliance with NEPA and protection of the environment and communities; and

4) Provide for state consultation on commercial leasing and require findings of sufficient support and interest before a lease sale is held.

Further comments on these and other subjects set out in the proposed rules include the following.

### A. The BLM should defer determination of several elements until more is known about the costs and benefits of developing federal oil shale resources.

#### 1. Royalty Rates and Chargeable Production

The BLM proposes two possible royalty rate structures for incorporation into commercial oil shale leases.[1] 73 Fed. Reg. at 42962 (*proposed § 3903.52*). The first would provide for a

[1] The preamble to the proposed rules describes a third option -- a sliding scale royalty structure, whereby the rate would increase as the price of crude oil increases, to a maximum of 8%. *See* 73 Fed. Reg. at 42933. The BLM,

royalty rate of 5% of the amount or value of production. The second would provide for a 5% royalty on the first 30 million barrels of oil equivalent produced from the lease, and a 12.5% royalty on the amount or value of production thereafter.[2] The BLM claims to base these figures on a calculation that "adjusts" the rate for shale oil based on "estimated shale oil production costs per barrel." *See* 73 Fed. Reg. at 42933. The agency, however, provides no support for the cost estimates that it uses in this calculation. As a result, Colorado questions the usefulness of these estimated costs. Moreover, while BLM notes the mitigating effect of the "greater geographic concentration of oil shale resources" as compared to crude oil, it fails to reflect this mitigating factor in its royalty rate adjustment. For all of these reasons, Colorado does not find the BLM's reliance on arithmetic to calculate an "adjusted royalty for rate shale oil" compelling.

Because the BLM cannot reliably say what the costs of shale-development technologies are, and because it provides no estimate of recovery rates (or subsequent income to a lessee), neither of the proposed royalty options is acceptable to Colorado. Colorado hereby requests that the BLM defer a determination as to the royalty rate until it has reliable information concerning the costs, recovery rates of the technology to be used on a lease, and the value of the product produced.

In the event that BLM does adopt a particular royalty rate for oil shale leases -- action that the State of Colorado opposes -- Colorado hereby requests that it be set at 12.5%. The Energy Policy Act (EPAct) contained a provision directing the Interior Department to establish royalties, rentals, and other fees at a level that would encourage development of the resource while ensuring a fair return to the United States. *See* 42 U.S.C. § 15927(o). The current royalty rate for a conventional oil and gas lease under Section 17 of the Mineral Leasing Act is 12.5%. *See* 30 U.S.C. § 226(b). Specifically, the MLA says that the royalty is to be "not less than 12.5 percent in amount or value of the production removed or sold from the lease." The MLA gives the Interior Secretary the authority to reduce, suspend, or waive royalties when he or she determines that it is necessary to do so in order to promote development or if the lease cannot be "successfully operated" under the current lease terms. *Id.* at § 209. A provision of the MLA specifically addressed to oil shale leasing authorizes the Interior Department to waive the payment of any royalty and rental altogether during the first five years of any lease, "[f]or the purpose of encouraging the production" of oil from shale. *Id.* at § 241(a)(4).

In the months following passage of EPAct, Congress considered and rejected attempts to disturb the EPAct's bi-partisan balance with regard to royalties by either mandating a particular royalty rate for oil shale leases or directing a particular royalty structure. For example, Section 6401 of the House Resource Committee's Print for Budget Reconciliation in late 2005 would have repealed the EPAct royalty provisions and in its place mandated that royalties would be between 1 and 3 percent during the first ten years of shale oil production, and then between 6 and 9 percent of the gross value of production thereafter. This bill also would have mandated that

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however, failed to provide regulatory language setting out this option. Because Colorado has concluded that the BLM should defer determination of a royalty rate or, absent that, adopt a 12.5% royalty rate, it does not provide specific comment on the preamble's description of a sliding scale royalty regime.

[2] For each of these, the BLM would provide authority to waive, suspend, or reduce the royalty for the first five years of a lease, and the proposed rules set out certain information requirements. *See* 73 Fed. Reg. at 42692 (*proposed § 3903.54*).

royalties be reduced by 10% if the price of oil dropped below $50 per barrel in 2005 dollars, and by 80% of oil dropped below $30 per barrel. Congress rejected this measure.

In mid-2006, Congress considered a provision of H.R. 4761, a bill related to outer-continental shelf leasing, that would have directed the Interior Secretary to model the royalty structure for federal oil shale and tar sands resources on the program in place for tar sands in Alberta, Canada. The oil sand royalty program in Alberta currently collects only a 1% royalty on tar sands production until "project payout," which is generally defined as recovery of 100% of capital development and operating costs. After "project payout" is reached in Alberta, a 25% royalty is enforced on net project revenue. These royalty measures were enacted by Canada in 1996 in response to record-low oil prices -- a far cry from the skyrocketing oil prices of today. Canadians found that the 1% royalty structure is a powerful incentive to reinvest profits into expansion of operation, which further delays revenue collection under the 25% provisions. Though H.R. 4761 would have provided that a portion of a state's share of royalties would go to local communities, adoption of a royalty regime modeled on that used in Alberta for tar sands would significantly delay disbursement of any meaningful sums to communities dealing with the effects of the new development. As above, these provisions in H.R. 4761 have not been enacted into law.

Congress' rejection of these royalty measures is implicit direction that they are disfavored interpretations of the direction provided in the Energy Policy Act of 2005. Because Congress rejected royalty reductions for oil shale, BLM should likewise reject any such measures.

Regulations applicable to leasing of federal oil and gas resources currently provide for reduction of MLA royalty rates in certain circumstances. If the Interior Secretary determines "that it is necessary to promote development or that the leases cannot be successfully operated under the terms" of a lease, he or she may "waive, suspend, or reduce" minimum royalties for all or part of a lease. 43 C.F.R. § 3103.4-1(a). Requests for a 'hardship' royalty reduction or waiver must be accompanied by a detailed statement showing expenses and costs of operating the entire lease, the income from the sale of any production, and "all facts tending to show whether the wells can be successfully operated upon the fixed royalty or rental." *Id.* at § 3103.4-1(b)(2)-(3). As in the case for coal hardship reduction requests, such a statement should include technological, geological, transportation, and marketing factors.

Setting royalties for oil shale development at the same level as for conventional oil and gas is not without precedent. The leasing program initiated by Secretary Udall in 1968 also fixed royalties for *in-situ* operations at 12.5%. OTA Vol. II at 23 (1980).[3] In addition, the 1968 oil shale leasing program imposed minimum royalties of between $10 and $50 per acre to be collected after the eighth anniversary of the lease. *Id.* at 24.

The Interior Department proposed regulations for oil shale leasing in 1983 that were never finalized, *see* 48 Fed. Reg. 6510 (Feb. 11, 1983). Review of these proposed regulations is instructive in identifying issues and possible approaches for their resolution.

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[3] For above-ground retorting, royalties were to be calculated on a sliding scale, with a royalty of $0.14/ton of shale mined imposed for shall yielding 30 gallons of oil per ton. OTA Vol. II at 23 (1980).

The 1983 proposed regulations also imposed a 12.5% royalty on the value of the shale after extraction and before processing. *See id.* at 6516 (*proposed § 3923.5(a)*). The proposed rules also allowed for a reduction to a lesser rate "if the lessee satisfactorily demonstrates to the Secretary that conditions beyond the lessee's control warrant such a reduction," and "if it is determined that such a reduction is in the public interest." *Id.* (*proposed § 3923(5)(d)*).

If the BLM refuses to defer setting a royalty rate, it should at least follow historical precedent and set royalty rates in its proposed oil shale regulations at 12.5%, as provided for in the Mineral Leasing Act, regulations regarding oil and gas resources and many other federal commodities, as well as the 1983 proposed oil shale rules. *See* 43 C.F.R. § 3103.3-1(a). The point of royalty determination should be easy to calculate, collect, and audit. The complexity of the existing federal coal royalty system should not be duplicated on oil shale.

Royalty reductions could be provided for by regulation in order to encourage development of the resource, but the regulations should make clear that 'hardship' reductions should be granted sparingly and only upon an objective showing of good cause, upon findings that a reduction is necessary to encourage resource recovery and that it is in the public interest. A lessee's request for royalty reduction, as well as all supporting documentation, should be made available to the public for review, and the public should be given the opportunity to comment on the royalty reduction. The requirement that operators pay full royalties is essential to ensure diligent development of the leases as well as to ensure an adequate return for loss of federal resources. Any final decision by the Secretary should have the concurrence of the Governor of the state in which the lease lies, since any change will affect revenues to the state.

The BLM also proposes to charge royalties only on "products of oil shale" that are sold from or transported off of the lease, 73 Fed. Reg. at 42962 (*proposed § 3903.52*), thereby exempting from chargeable production any oil or gas produced on the lease that is used on the lease. According to Shell's public estimates, approximately 1/3 of the product of its shale-oil development process is likely to be natural gas. The company has also publicly stated that it would attempt to use that natural gas as an energy source to heat shale on subsequent plots. The BLM's proposed regulation exempting from royalties any oil or gas used on the lease thus effectively subsidizes Shell's considerable energy needs, giving the company valuable natural gas without a royalty charge. This is contrary to the public interest and would shortchange federal and state citizens from a reasonable return on development of public resources -- regardless of how those resources are used. Colorado opposes such a provision.

Because BLM lacks reliable, independent data on the costs of shale development technologies, the likely recovery rates, or the value of production, Colorado opposes both of the royalty provisions in the proposed rules. Colorado hereby requests that the BLM refrain from adopting royalty rates until it has this information.

### 2. Minimum Bonus Bids

The BLM proposes a rule providing that the BLM "will not accept any bid that is less than the [fair market value]," and that in no case will the minimum bid be less than $1,000 per acre. 73 Fed. Reg. at 42966 (*proposed § 3923.10*). Because the BLM has not determined the

costs or recovery rates of shale-development technologies, Colorado requests that the agency defer a determination as to minimum bonus bids, as such information is vital to ensure that bonus bids provide a fair rate of return for the right to develop federal resources.

The narrative standard proposed by BLM for establishing minimum bonus bids -- fair market value -- will prove entirely useless in guiding the agency's decision whether to accept a bonus bid for a tract of federal oil shale resources. The agency would likely be precluded from rejecting a bid on the grounds that it does not reflect the fair market value, as this is an unreasonably vague standard. It is only marginally more enlightening than Congress' admonition in the EPAct directing DOI to adopt bonuses that encouraged development of the resources and ensured a fair return to the United States. *See* 42 U.S.C. § 15927(o).

Should the BLM persist in adopting rules that contain a minimum bid provision -- a course of action that Colorado opposes -- the proposed regulations should expand on the statutory direction, not merely restate it in different words. With more information about the costs and recovery rates of development technologies, BLM could more likely determine, objectively, a minimum bonus bid level that would both encourage development and ensure a fair return to the country's citizens. Without that information, however, such an analysis is impossible. The proposed regulation's reliance on the concept of "fair market value" provides no guidance on whether or not a bonus bid should be accepted.

The BLM's proposal that the agency would be precluded from accepting a bonus bid that is less than $1,000 per acre is inadequate. This could result in a 5,760-acre oil shale lease being sold for bonus bid of $5.76 million. In the 1974 Prototype Leasing Program, however, bonuses paid by winning lessees for the two 5,120-acre Colorado tracts were $210 million and $118 million. The BLM's proposal that it be required to sell a lease for a bonus bid that represents approximately 3% of what a lease was worth 35 years ago is unacceptable. The BLM's proposed regulations must establish a methodology that ensures at least comparable bonuses or equivalent payments in the future, adjusted for inflation.

Minimum bonus bids must reflect the true value of the federal resource that would be conveyed in a commercial oil shale lease. The danger of establishing minimum bonus amounts before having reliable estimates of the recovery rate and costs of proposed activities on a lease is that the BLM risks either stifling leasing or giving away public resources. If shale oil development is cheaper than expected, then releasing federal reserves for a low minimum bonus amount would amount to a massive giveaway to the oil companies. If the economics are marginal, then the oil companies might buy up the leases to prevent others from entering into the field, thereby discouraging competition. If costs are too high, then leasing would be of no value because shale oil would not be produced for years, if at all.

Accordingly, Colorado requests that the BLM defer adopting regulatory provisions that set minimum bonus bids until more is known about the costs, value, and benefits of developing federal oil shale resources.

### 3. Diligent Development: minimum production levels, payments in lieu of production, and milestones

The BLM proposes a rule providing that each lease must have a "minimum annual production amount of shale oil" or make a payment in lieu of production of at least $4.00 per acre, which would begin with the 10th lease year. 73 Fed. Reg. at 42962 (*proposed § 3903.51*).

The vagueness of this provision demonstrates that the BLM is unable to adopt meaningful regulations without substantially more information. Colorado opposes a provision allowing companies to hold leases without either producing or making payments in lieu of production for 10 years. Such a provision has the potential to unnecessarily tie up substantial valuable oil shale acreage for a decade. Colorado also believes that a regulatory minimum payment in lieu of production of $4.00 is too low. This would allow a company to sit on oil shale resources for ten years at no cost, and thereafter at a cost as low as $23,040.00 per year.

Such a provision is contrary to the direction in EPAct to designate work requirements to ensure the diligent development of the lease. *See* 42 U.S.C. § 15927(f). Since this is essentially a holding cost to the federal government and potential lost revenue (certainly as it relates to the time value of money), perhaps the minimum annual payment should be based on a percentage of the value of the resource in the lease.

The BLM also proposes a rule that would set out "diligent development milestones," such as requiring the lessee to submit an initial plan of development (POD) before the end of year 2 of the lease, submit a final POD before the end of year 3, apply for all required permits and licenses within 2 years after BLM approval of the POD, begin installation of infrastructure before the end of year 7, and begin production of shale oil before the end of year 10. 73 Fed. Reg. at 42969 (*proposed § 3930.30*). This rule also states that the lease will provide for minimum production, which must be met by the end of the 10th year.[4] *Id.* (*proposed § 3930.30(d)*). The minimum production that must be met "will be based on the BLM's estimate of the extraction technology to be used, the recoverable resources on the lease, expected life of the operation, and other factors the BLM considers." *Id.*

Initially, Colorado notes that it is unclear how this provision relates to proposed Sec. 3930.40, discussed above, regarding minimum production and payments in lieu of production. Regardless, Colorado believes that the public interest is ill-served by speculative leasing, wherein a company might seek to obtain rights to federal resources but not to develop them. It is in neither the BLM's nor the government's interest to allow a company to lock up federal resources away from competition.

The vagueness of proposed Sec. 3930.30 demonstrates that the BLM lacks sufficient information to fully define the parameters of a commercial leasing program at this time. Deferring minimum production levels fails to satisfy the direction in EPAct to "designate [by regulation]. . . milestones to ensure the diligent development of the lease." Accordingly, Colorado requests that the BLM defer development of diligent development milestones until RD&D projects yield meaningful information concerning the recovery rates for proposed shale

[4] Colorado notes that this seems to be in conflict with "Milestone 5," which only requires the lessee to begin oil shale production before the end of year 10. *See* 73 Fed. Reg. at 42969 (*proposed § 3930.30(a)(5)*).

development technologies. As written, the regulation provides no safeguard to ensure that adequate production.

In the alternative, Colorado requests that the rules provide that the POD include minimum production levels to which the company commits. These minimum production levels should be set out in the notice of lease offer and in the lease in order to inform the public of the scale of development to which a company commits as well as the royalty amounts that can reasonably be expected. Additionally, Colorado requests that the regulations provide that payment of minimum royalty will be granted only upon written request by the lessee, upon the lessee's demonstration that it has taken diligent efforts toward production levels, and with the Governor's concurrence. Since the production timeline would be outlined in the lease document, any deviation from that timeline that would replace production with minimum payments should be handled as a modification to the lease, subject to the same public comment afforded the original lease. These minimum royalties should be based on the royalty rate as applied to the minimum production level contained in the lease.

To protect the public trust and the government interest in diligent development of oil shale resources, lessees should be required to either produce minimum amounts or pay minimum royalties reflecting the full value of the minerals under lease. Such provisions would discourage speculative leasing by imposing substantial costs on the privilege of holding federal oil shale leases. If the company is unable to attain minimum production levels at the end of the 10-year lease, the lease should be subject to cancellation by the BLM.

### B. Stronger Reclamation Bonding Requirements

In 2006, the State BLM Office met with the Division of Reclamation, Mining and Safety (DRMS) to discuss three levels of bonding: leasehold bonds, mined land reclamation bonds, and water quality bonds. The state requires mined land reclamation bonds, but does not bond for water quality. The leasehold bond is a federal tool, not a state tool.

Reclamation bonding is required for oil shale extraction involving BLM surface and/or mineral to comply with BLM and DRMS permitting requirements. Both agencies require reclamation bonding; however, BLM and DRMS coordinate to ensure that adequate bond is provided without the potential for duplicate or redundant bonding. This is accomplished as outlined in a Memorandum of Understanding between the BLM and the DRMS (formerly the Division of Minerals and Geology) dated December 18, 2002. The Memorandum was further clarified by Memorandum from the BLM Chief, Branch of Solid Minerals and the DRMS Minerals Program Supervisor dated May 8, 2003.

After BLM review of the state reclamation bonding model, the two agencies agreed that DRMS would be the lead agency for mind land reclamation bond calculations. There would not be duplicative reclamation bonding by the agencies; however, BLM did reserve the right to add to the bond amount if there were federal requirements for bonding beyond state statute. The required reclamation bond will be issued in the name of the State of Colorado, DRMS and the Department of the Interior, BLM.

The May 8, 2003, memorandum indicates that the BLM is required to hold a bond for the total reclamation liability for mining of Leasable Minerals, such as oil shale. Therefore, BLM may prefer to be the custodian of the actual bond instrument. DRMS and BLM will always coordinate regarding bond calculation, bond submittal verification, regulatory compliance, and any bond release or bond forfeiture activities to ensure that reclamation is properly bonded and completed.

The BLM's proposed rules discuss bonding for water quality. The requirements of a Colorado Mined Land Reclamation Permit and a Notice of Intent require restoration of the hydrologic balance, but there is no specific reference in BLM's proposed rules to including bonding for water quality directly. Rather than change Colorado statute, the BLM regulations should require a bond to assure water quality restoration to the applicable guidelines and standards. Some of the proposed technologies will require substantial disturbance of the ground water regime. A failure at the site could affect the environment and other water users.

The options are limited if a failure occurs and the bond is inadequate. If extensive clean-up and remediation are required, the only alternatives are the State Hazardous Substance Response Fund which is allocated to other sites, or some form of a Superfund designation which also has funding limitations. If permanent water treatment is required, the state may be responsible for on-going O&M in the out years. Accordingly, BLM should include the requirement to bond for water quality.

### C. Conversion of RD&D Leases

The proposed rules contain a single section detailing the conversion of an RD&D lease into a commercial lease. *See* 73 Fed. Reg. at 42967 (*proposed § 3926.10*). Because nearly 25,000 acres in Colorado are already within the preference right area of an RD&D lease, the subject of conversion of an RD&D lease into a commercial lease is of great interest to the State. It is premature to promulgate rules that would identify the conditions for and terms of conversion of RD&D leases, until significantly more is known about the technology and its costs, recovery rates, and potential impacts. Nonetheless, Colorado notes that it has several concerns with the language of the proposed rule. BLM has failed to comply with NEPA with regard to allowing the conversion of RD&D leases to commercial leases. Accordingly, Colorado requests that the BLM refrain from adopting rules addressing conversion of RD&D leases until it has addressed our concerns and complied with NEPA.

The proposed rule provides that applications to convert RD&D leases (including preference right areas) into commercial leases are subject to other proposed regulations concerning general matters, exploration licenses, and leasing, except leasing regulations that call for notifying Governors of expressions of leasing interest, competitive leasing, and tract delineation. *See id.* (*proposed § 3926.10(a)*). Application for conversion of the RD&D lease to a commercial lease must be submitted within 90 days of the lessee's "commencement of production in commercial quantities," which is defined to be the point at which "there is a reasonable expectation that the expanded operation would provide a positive return after all costs of production have been met, including the amortized costs of the capital investment." *See* 73 Fed. Reg. at 42957 (*proposed § 3900.2*). The lessee must include documentation that

commercial quantities have been produced from the lease, documentation that the lessee has "consulted" with state and local officials on socioeconomic mitigation, a bid payment that meets the regulatory minimum and that is "equal to the FMV of the lease," and a bond. 73 Fed. Reg. at 42967 (*proposed 3926.10(b)*). The proposed rule then states that the BLM will approve the conversion up to a total of 5,120 acres if it determines that the lessee has produced commercial quantities, the bid payment met or exceeded FMV, the lessee consulted with state and local officials, the bond is in compliance, and operations can be conducted without "unacceptable environmental consequences." *Id.* (*proposed 3926.10(c)*). Finally, the proposed rule states that the lease must contain terms consistent with provisions of the regulations and "stipulations developed through appropriate NEPA analysis." *Id.* (*proposed 3926.10(d)*).

Colorado has several significant concerns with the conditions of conversion. First, the proposed rule would require the lessee to demonstrate that it has "consulted" with state and local governments, but it fails to provide guidance as to the form or result of this consultation. Colorado believes that development of a plan to mitigate socioeconomic impacts is of utmost importance when contemplating conversion of RD&D leases to commercial leases. This is one of only five preconditions for issuance of a 5,120-acre commercial lease to develop valuable oil shale resources, and the proposed rule should require the lessee to do more than simply document that consultation has occurred. The rule should require submittal of a detailed socioeconomic mitigation plan before conversion of an RD&D lease is contemplated.

Another of the conditions for conversion is payment of a bid that meets the regulatory minimum of $1,000 per acre and that is "equal to FMV." FMV is defined in another rule to mean "the monetary amount for which the oil shale deposit would be leased by a knowledgeable owner willing, but not obligated, to lease to a knowledgeable purchaser who desires, but is not obligated, to lease the oil shale deposit." 73 Fed. Reg. at 42957 (*proposed § 3900.2*). Colorado is concerned that the BLM will have no way to assess whether the bid payment is equal to FMV in the absence of a competitive leasing process for the preference right area. Fair market value is determined by the value of a commodity on the market, but BLM's proposed rule fails to provide such a mechanism for assessing whether or not to accept a bid. In the absence of a competitive element or other way to determine what value the market would support, the BLM's rule is unacceptable because it is subject to arbitrary application.

The final condition for BLM approval of the conversion application is a determination that commercial scale operations may be conducted "without unacceptable environmental consequences." 73 Fed. Reg. at 42967 (*proposed 3926.10(c)(5)*). Colorado notes that the term "unacceptable environmental consequences" is contained in the RD&D leases, yet it remains undefined in the proposed rules. This lack of specificity, again, demonstrates that the BLM does not have sufficient information to fully define a commercial leasing program at this time. As written, the BLM's rule is meaningless and subject to arbitrary application.

Colorado also has concerns with the proposed rule's reference to stipulations "developed through appropriate NEPA analysis." *Id.* (*proposed 3926.10(d)*). The rule should specify that conversion will only take place following preparation of a site-specific analysis of impacts and a range of reasonable alternatives in compliance with NEPA. As written, the lessee could point to stipulations developed in a different NEPA process -- a programmatic EIS broadly covering the

area, for example, or an EIS prepared for a Resource Management Plan revision -- and claim that it is "appropriate." BLM should eliminate the uncertainty in this regard and require site-specific analysis pursuant to NEPA prior to making a decision to convert the RD&D lease into a commercial lease that could include the preference right area.

Finally, Colorado has serious concerns that the proposed rule grants an RD&D lessee a right to obtain a commercial lease that includes the preference right areas, even though the agency has never performed a NEPA analysis of the decision to grant such a right. The proposed rule states that the BLM "will approve the conversion application" if the applicant satisfies five conditions. *See id. proposed 3926.10(c)*). In the EAs for the RD&D leases, the BLM explicitly deferred consideration of the impacts of or alternatives to a decision to grant preference rights to obtain a commercial lease. Nonetheless, in the proposed rule the BLM states that conversion *will* be done if five conditions are met. The BLM has thus removed its discretion to deny the conversion request, and this irretrievable commitment of resources must be preceded by compliance with NEPA. The proposed rule thus violates NEPA. The BLM must either modify the introduction of the rule to say that the agency "may" approve the conversion, or it must add an additional condition: compliance with NEPA and signing of a record of decision.

### D. State Review of Lease Sales

A provision in EPAct gave the State of Colorado a unique role with regard to commercial leasing. It provided that prior to holding a lease sale, the Secretary must consult with the Governors of affected states, local government officials, interested Indian tribes, and other stakeholders "to determine the level of support and interest in the State in the development of. . . oil shale resources." 42 U.S.C. § 15927(e). Only if the Secretary finds sufficient support and interest is the agency authorized to conduct a lease sale. *Id.*

The proposed rule is silent as to the consultation process called for in the EPAct. In its place, the rule provides that Governors, local governments, and Indian tribes would be notified of responses to its call for expressions of interest and given a 60-day period to submit comments. *See* 73 Fed. Reg. at 42964 (*proposed § 3910.32*).

This is contrary to EPAct. In recognition of the potentially significant impact oil shale development could have on state, local, and tribal governments, Congress called for "consultation with" these parties, not simply the opportunity to submit comment. Congress also prohibited the BLM from conducting a lease sale unless sufficient support for and interest in oil shale development was found in a state. Because the BLM's proposed rules fail to provide for the consultation and findings called for in EPAct, they do not comply with the law.

## Conclusion

For all of the above reasons, the State of Colorado requests that the Department of Interior and BLM refrain from adopting final regulations until the RD&D projects yield meaningful results that can be reviewed by state and federal officials.