

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. _____

COLORADO ENVIRONMENTAL COALITION,
WESTERN COLORADO CONGRESS,
WILDERNESS WORKSHOP,
BIODIVERSITY CONSERVATION ALLIANCE,
SOUTHERN UTAH WILDERNESS ALLIANCE,
RED ROCK FORESTS,
WESTERN RESOURCE ADVOCATES,
NATIONAL WILDLIFE FEDERATION,
CENTER FOR BIOLOGICAL DIVERSITY,
THE WILDERNESS SOCIETY,
NATURAL RESOURCES DEFENSE COUNCIL,
DEFENDERS OF WILDLIFE, and
SIERRA CLUB,

Plaintiffs,

v.

DIRK KEMPTHORNE, in his official capacity as Secretary of the Department of Interior,
C. STEPHEN ALLRED, in his official capacity as Assistant Secretary for Land and Minerals,
Department of the Interior,
THE U.S. DEPARTMENT OF THE INTERIOR,
JAMES L. CASWELL, in his official capacity as Director of the Bureau of Land Management,
and
THE BUREAU OF LAND MANAGEMENT,

Defendants.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND PETITION FOR REVIEW OF AGENCY ACTION**

INTRODUCTION

1. The canyon country, mesas, and sagebrush steppe of western Colorado, eastern Utah, and southern Wyoming contain abundant natural resources including: wilderness lands; habitat for rare and imperiled wildlife; plentiful game such as deer, elk, and pronghorn; and critical watersheds that provide drinking and agricultural water for millions in one of the nation's most arid regions. Many of these lands are owned by the American people and managed by the United States Bureau of Land Management (BLM).

2. Some of these lands also contain underground deposits of oil shale, in which hydrocarbons are locked in rock. While boosters have for a century proclaimed the benefits of oil shale as a domestic fuel source, all efforts to develop it commercially have failed. In 2005, Congress sought to change that, adopting provisions in the Energy Policy Act to promote an oil shale industry on federal public lands. The Act required the Department of the Interior to evaluate the environmental impacts of commercial oil shale leasing on federal lands, and, following the completion of that review, to establish rules for managing a commercial oil shale leasing program.

3. The 2005 law prompted concern from local communities, conservationists, the Governors of Colorado and Wyoming, and members of Congress (including Senator Ken Salazar), who argued that oil shale regulations should come only after further research helped determine a cautious approach to developing a commercial oil shale industry. The stakes for the future of the West are high. It would also require massive amounts of electricity and water to produce. Those demands for power and water could foul the air, worsen global warming, and dry up streams and rivers. These potential impacts, and industry's failure to complete research

concerning how to develop oil shale, prompted Congress to temporarily de-fund agency rulemaking efforts in fiscal year 2008.

4. Despite these concerns, and following the expiration of the ban, BLM quickly adopted an oil shale management rule to spur oil shale development on federal lands. BLM proposed to do this, in part, by adopting a royalty rate much lower than that for conventional oil and gas.

5. In its haste to adopt a rule to rush development of a wholly new industry, BLM ignored statutory requirements that taxpayers receive a fair return from industry. BLM also ignored environmental law requiring the agency to complete a comprehensive environmental impact statement disclosing the significant environmental impacts likely to result from subsidizing this industry.

6. Because BLM's oil shale management rule violates federal law, it must be set aside and BLM enjoined from taking any action, including the sale of oil shale leases, that relies on the illegal rule and its inadequate environmental analysis.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action by virtue of the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and 28 U.S.C. § 1331 (federal question jurisdiction).

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because BLM has offices in this district; public lands and resources in question are located in this district; environmental harm resulting from the Defendants' actions will impact this district; and a number of Plaintiffs reside in this district.

PARTIES

9. Plaintiff Colorado Environmental Coalition (CEC) is a state-based environmental advocacy organization with two field offices in western Colorado and a main office in Denver. CEC has more than 3,000 individual members and over 90 affiliated organizations. CEC campaigns work to engage citizens in the protection of Colorado's wild places, open spaces, wildlife, and quality of life. CEC is an active participant in public lands management in Colorado, with a demonstrated interest in energy development on Colorado's BLM lands.

10. Plaintiff Western Colorado Congress (WCC) is a grassroots, democratic organization dedicated to challenging injustice by organizing people to increase their power over decisions that affect their lives in western Colorado. WCC's eight community groups and 3,000 members work together to create healthy, sustainable communities, social and economic justice, environmental stewardship and a truly democratic society. WCC has continued to be a local voice encouraging a "Go Slow" approach to oil shale development, in which impacts to communities and landscapes can be mitigated prior to their inception.

11. Plaintiff Wilderness Workshop is a non-profit advocacy organization headquartered in Carbondale, Colorado, and dedicated to conserving the natural resources and preserving the public lands of the Roaring Fork watershed, the White River National Forest, the Glenwood Springs Field Office, and adjacent public lands. To accomplish these goals, the Wilderness Workshop engages in research, education, legal advocacy, and grassroots organizing. Wilderness Workshop not only defends pristine public lands from new threats, but also helps restore the functional wildness of landscapes fragmented by human activity. Wilderness Workshop protects and preserves existing wilderness areas, advocates for expanding wilderness,

and safeguards the ecological integrity of all federal public lands in its area of interest.

Wilderness Workshop has a long history of participation in oil shale debates – commenting on proposed development at every opportunity and working to inform the people of Northwest Colorado about the impacts oil development may have.

12. Plaintiff Biodiversity Conservation Alliance (BCA) is a non-profit conservation group based in Laramie, Wyoming, with hundreds of members in Wyoming and other states. The Alliance is dedicated to protecting Wyoming's wildlife and wild places, particularly on public lands. BCA has a long record of advocating for environmentally sound energy development in Wyoming and throughout the West, and has been active in watchdogging oil shale development in Wyoming and elsewhere. BCA and their members benefit from the intact ecosystem found in the oil shale leasing area as it exists today.

13. Plaintiff Southern Utah Wilderness Alliance (SUWA) is a Utah non-profit membership organization. SUWA, based in Salt Lake City, Utah, has more than 15,000 members, many of whom reside in Utah. SUWA's mission is the preservation of the outstanding wilderness at the heart of the Colorado Plateau, and the management of these lands in their natural state for the benefit of all Americans. SUWA is a founding member of the Utah Wilderness Coalition and promotes local and national recognition of the region's unique character through research and public education; supports both administrative and legislative initiatives to permanently protect Utah's wild places within the National Park and National Wilderness Preservation System or by other protective designations where appropriate; builds support for such initiatives on both the local and national level; and provides leadership within the conservation movement through uncompromising advocacy for wilderness preservation.

BLM frequently solicits SUWA's input and participation in the land use planning process for a variety of resource decisions and SUWA actively participates in all levels of BLM's decision-making process.

14. Plaintiff Red Rock Forests, based in Moab, Utah, is a non-profit organization with over 300 members, many of whom reside in Utah. Red Rock Forests' mission is the preservation of Utah's forested and desert habitats. Red Rock Forests relies on sound biological principles to guide its policy, goals, and decision-making, with a particular emphasis on conservation biology. Red Rock Forests uses citizen action, community organizing, and collaborative agreements, as well as legal challenges, to further its conservation mission. Red Rock Forests maintains a particular interest in the forested uplands and canyon country of Utah's National Forests and public lands.

15. Plaintiff Western Resource Advocates (WRA) is a non-profit environmental law and policy organization with offices in Colorado, Utah, and Nevada, and staff in Idaho and New Mexico. WRA's mission is to protect the West's land, air, water, and wildlife. WRA's lawyers, scientists, and economists: 1) advance clean energy to reduce pollution and global climate change; 2) promote urban water conservation and river restoration; and 3) defend special public lands from inappropriate energy development and other threats. WRA collaborates with conservation partners to build a sustainable future for the West. WRA's goals include protecting habitat for threatened, endangered, and sensitive plant and animal species. WRA has a long history of involvement on oil shale and tar sands issues. WRA has focused its efforts on working through government and other channels to promote informed decision-making and to protect the West's land, water, people and climate.

16. Plaintiff National Wildlife Federation (NWF) is a national non-profit organization, with forty-eight state affiliate organizations, dedicated to the protection and restoration of wildlife and wildlife habitat for this and future generations. NWF has 1.1 million members, including over 28,000 members in Colorado, 6,000 in Utah, and 2,900 in Wyoming.

17. Plaintiff Center for Biological Diversity (CBD) is a non-profit 501(c)(3) corporation with offices in California, Arizona, New Mexico, Oregon, Illinois, Minnesota, Nevada, Alaska, Vermont, and Washington, D.C. CBD works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. CBD is actively involved in species and habitat protection issues worldwide, including throughout the western United States. CBD has over 42,000 members throughout the United States and the world.

18. Plaintiff The Wilderness Society (TWS) is a nonprofit environmental organization incorporated in the District of Columbia. Formed in 1935, TWS has 310,000 members and supporters, including more than 6,500 members in Colorado. The TWS Central Rockies Office addresses public lands management issues in Colorado and Utah. TWS is devoted to preserving wilderness, forests, parks, rivers, deserts, and shorelands and is committed to fostering an American land ethic. Its mission is to protect America's wilderness and wildlife and to develop a nationwide network of wild lands through public education, scientific analysis, and advocacy. Its goal is to ensure that future generations will enjoy the clean air and water, wildlife, beauty, and opportunities for recreation and renewal that pristine forests, rivers, deserts, and mountains provide. TWS has long worked to enact legislation and policies that provide for the sound management of BLM lands.

19. Plaintiff Natural Resources Defense Council (NRDC) is a national nonprofit environmental membership organization with more than 400,000 members throughout the United States and more than 14,900 members in Colorado, Utah and Wyoming. NRDC has a long history of efforts to protect federal public lands in these three states (as well as other Western states), to require the federal government to consider environmental protection when making energy development decisions, and to support long-term solutions to America's energy problems.

20. Plaintiff Defenders of Wildlife (Defenders) is a non-profit conservation organization dedicated to the protection and restoration of native wild animals and plants. Founded in 1947 and headquartered in Washington, D.C., Defenders currently has over one-half million members, including over 29,000 in the states of Colorado, Utah, and Wyoming. Ensuring the conservation of wildlife and habitat on federal public lands is one of Defenders' organizational priorities, and has become ever more critical in the face of global warming. Defenders is committed to helping wildlife overcome the unprecedented threat of climate change, both by reducing the greenhouse gas emissions that lead to global warming, and by helping species adapt to the climate change that is already occurring.

21. Plaintiff Sierra Club is a national nonprofit organization of over one million members and supporters dedicated to exploring, enjoying and protecting the wild places of the earth; practicing and promoting the responsible use of the earth's ecosystems and resources; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and using all lawful means to carry out these objectives. The Utah Chapter of the Sierra Club has more than 6,000 members and supporters; the Wyoming Chapter has more

than 1,000 members and supporters, and the Rocky Mountain Chapter (Colorado) has approximately 20,000 members and supporters. The Sierra Club's concerns encompass the protection of wildlands, wildlife habitat, and water resources in Utah, Colorado, and Wyoming.

22. Plaintiffs Colorado Environmental Coalition, Western Colorado Congress, Wilderness Workshop, Biodiversity Conservation Alliance, Southern Utah Wilderness Alliance, Red Rock Forests, Western Resource Advocates, National Wildlife Federation, Center For Biological Diversity, The Wilderness Society, Natural Resources Defense Council, Defenders Of Wildlife, and Sierra Club (collectively "Conservation Groups"), their employees, and their members regularly use and enjoy the public lands governed by, and likely to be developed as a result of, the Oil Shale Management Rule for recreational, scientific, spiritual, aesthetic, and other purposes. They also derive recreational, scientific, spiritual, aesthetic, and other benefits from the public lands at issue in this case through wildlife observation, study, and photography. Conservation Groups and their staff and members have an interest in preserving the possibility of such activities in the future. As such, Conservation Groups, their members and staffs have an interest in advocating for the protection of these public lands and helping to ensure their continued use and enjoyment of these lands.

23. Each of the Conservation Groups commented on and was involved in BLM's oil shale management rulemaking.

24. Defendants' failure to comply with National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., in the adoption of the Oil Shale Management rule injures Conservation Groups and their members by denying them information concerning environmental impacts that NEPA requires agencies disclose and analyze prior to taking action.

25. Defendants' failure to comply with federal law requiring BLM to obtain a "fair return" and "fair market value" for leased oil shale in the adoption of the Oil Shale Management Rule injures Conservation Groups and their members by providing a financial subsidy to increase environmentally damaging oil shale development that otherwise would not occur.

26. Conservation Groups' recreational, scientific, spiritual, aesthetic, and other interests have been, are being, and, unless this Court grants the requested relief, will continue to be harmed and irreparably injured by Defendants' actions.

27. Defendant Dirk Kempthorne is sued in his official capacity as Secretary of the Department of the Interior. Mr. Kempthorne is responsible for ensuring that lands administered by the Department of Interior, including BLM lands, are managed in accordance with all applicable laws and regulations.

28. Defendant C. Stephen Allred is sued in his official capacity as Assistant Secretary for Land and Minerals, Department of the Interior. Mr. Allred is the official who, on behalf of the Department of the Interior, approved BLM's Oil Shale Management Rule, the Environmental Assessment analyzing the impact of that rule, and the Finding of No Significant Impact on the rule. See 73 Fed. Reg. 69,469.

29. Defendant the United States Department of the Interior (DOI) is an agency of the United States. DOI is responsible for oversight of several agencies managing public lands, including those lands managed by the Bureau of Land Management, and for ensuring that that management is in accordance with federal law.

30. Defendant James L. Caswell is sued in his official capacity as Director of the Bureau of Land Management (BLM). Mr. Caswell is responsible for ensuring that BLM lands are managed in accordance with all applicable laws and regulations.

31. Defendant Bureau of Land Management is an agency of the United States within the Department of the Interior. BLM is responsible for managing its lands, including the lands proposed to be commercially leased under the Oil Shale Management Rule challenged here, in accordance with federal law.

LEGAL FRAMEWORK

A. The Administrative Procedure Act

32. Because neither NEPA, nor the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq., nor the Energy Policy Act of 2005 (EP Act) include a citizens suit provision, this case is brought pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.

33. The APA allows persons and organizations to appeal final agency actions to the federal courts. 5 U.S.C. §§ 702, 704. The APA declares that a court shall hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

B. The Federal Land Policy and Management Act

34. BLM manages its lands pursuant to FLPMA. Prior to FLPMA's passage in 1976, BLM lands were governed by some 3,000 outdated and often-conflicting public lands laws, most of which were written when it was assumed that these "public domain" lands would be conveyed expeditiously to private ownership. FLPMA cleared away many of these outmoded laws and, for

the first time, provided BLM with a comprehensive, statutory statement of purposes, goals, and authority for the use and management of BLM lands.

35. In FLPMA, “Congress declares that it is the policy of the United States that ... the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute.” 43 U.S.C. § 1701(a)(9).

C. The Mineral Leasing Act.

36. The Mineral Leasing Act of 1920 (MLA) provided that the “Secretary of the Interior is hereby authorized to lease to any person ... any deposits of oil shale ... under such rules and regulations ... as he may prescribe.” 30 U.S.C. § 241(a).

D. The Energy Policy Act of 2005 (EP Act)

37. In May 2001, President George W. Bush received recommendations on energy policy from his National Energy Task Force. The President used these recommendations, prepared by the Office of the Vice President, to formulate his national energy policy. In response, BLM developed a plan containing 54 tasks designed to implement the President’s directives, including efforts to promote the development of oil shale resources on the public lands.

38. In April 2005, Bush Administration officials and oil company executives testified before the United States Senate’s Committee on Energy and Natural Resources. Administration officials argued that royalty rates should be set to encourage production, and that “various regulatory issues” discouraged the production of oil shale in the United States. S. Hrng. 109-35 at 26 (Apr. 12, 2005). Industry officials agreed. A representative of Shell Oil testified that “the time has come for the United States ... to encourage, facilitate, and accelerate the development”

of oil shale, and recommended that “the Secretary of the Interior should develop a commercial oil shale leasing program on an expedited basis.” Id. at 36. A representative of Anadarko Petroleum Corporation testified that Congress should help “make commercial oil shale production a reality within the next decade and provide the momentum needed for private enterprise to commit to domestic projects of sufficient magnitude to make this happen.” Id. at 69. He recommended that the federal government “develop[] a federal oil shale leasing program,” and “encourage[d] Congress to direct the Department of the Interior to develop regulations governing oil shale leasing and development.” Id.

39. In response, Congress enacted EP Act, which became law on August 8, 2005. Section 369 of EP Act relates to “Oil Shale, Tar Sands, and Other Strategic Unconventional Fuels.” See 42 U.S.C. § 15927 (codifying Sec. 369). That title declared it to be the United States’ policy that “oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports.” 42 U.S.C. § 15927(b)(1). Congress also directed that it be United States policy that commercial development of oil shale “be conducted in an environmentally sound manner, using practices that minimize impacts.” 42 U.S.C. § 15927(b)(2).

40. EP Act required that within 180 days DOI make land available for leasing to permit private parties to “conduct research and development activities” relating to oil shale. 42 U.S.C. § 15927(c).

41. EP Act required the Interior Secretary, “in accordance with” NEPA, to prepare a “programmatic environmental impact statement [PEIS] for a commercial oil shale and tar sands

leasing program on public lands, with an emphasis on the most geologically prospective lands” in Colorado, Utah and Wyoming. 42 U.S.C. § 15927(d)(1). The Secretary was given 18 months to complete the PEIS. Id.

42. EP Act also required that the Interior Secretary promptly follow the completion of the programmatic EIS with regulations establishing an oil shale leasing program. See 42 U.S.C. § 15927(d)(2) (“Not later than 6 months after the completion of the [PEIS] under this subsection, the Secretary [of the Interior] shall publish a final regulation establishing such [commercial oil shale and tar sands leasing] program.”)

43. EP Act directed the Interior Secretary to establish “royalties, fees, rentals, bonus, or other payments for leases that shall (1) Encourage development of the oil shale and tar sands resources; and (2) Ensure a fair return to the United States.” 42 U.S.C. § 15927(o).

44. EP Act also made numerous amendments to the Mineral Leasing Act to facilitate oil shale leasing. 42 U.S.C. § 15927(j).

E. The National Environmental Policy Act

45. Congress enacted NEPA to, among other things, “encourage productive and enjoyable harmony between man and his environment” and to promote government efforts “that will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321.

46. To fulfill this goal, NEPA requires federal agencies to prepare an environmental impact statement (EIS) for all “major Federal actions significantly affecting the environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The agency should describe “any adverse environmental effects which cannot be avoided should the proposal be implemented.” 42 U.S.C. § 4332(C)(ii). Overall, an EIS must “provide [a] full and fair discussion of significant impacts”

associated with a federal decision and “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

47. If an agency is not certain as to whether its action may significantly affect the human environment, it must prepare an environmental assessment (EA). Id. § 1501.4(b). An EA must provide sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact. 40 C.F.R. § 1508.9. If the agency determines, based on the EA, that no EIS is needed because its action will not have a significant effect on the human environment, it may then prepare a “finding of no significant impact” (FONSI). Id. §§ 1501.4(e), 1508.13. Otherwise, it must prepare an EIS.

48. NEPA requires federal agencies, including BLM, to include within an EIS “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is the “heart” of a NEPA document, and the statute’s implementing regulations emphasize an agency’s duty to “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.16. NEPA also requires EAs to explore and evaluate all reasonable alternatives. Id. § 1508.9(b).

49. Both EAs and EISs must disclose the environmental effects or impacts of the proposed action and alternatives. 40 C.F.R. § 1592.2(b) (EISs); id. § 1508.9 (EAs); id. § 1508.8 (defining “impacts” as synonymous with “effects”). “Effects” that must be analyzed and disclosed include those that are direct, indirect, and cumulative. 40 C.F.R. § 1508.8. “Indirect effects” are those “caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Cumulative effects are “the impact on

the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

STATEMENT OF FACTS

A. Oil Shale Development and Its Potential Impact in Colorado, Wyoming, and Utah

50. The term “oil shale” generally refers to any sedimentary rock that contains a solid material called “kerogen” that is released as a petroleum-like liquid when the rock is heated. Theoretically, oil shale can be mined and processed to generate oil similar to that pumped from conventional wells. However, extracting kerogen and producing oil from oil shale is much more complex and expensive than conventional oil recovery. It requires, among other things, huge amounts of energy and water to essentially bake the rock to release the kerogen.

51. While oil shale is found in many places worldwide, the largest deposits on earth are found in the United States in the Green River Formation of Colorado, Utah, and Wyoming. The RAND Corporation estimated in 2005 that there could be between 500 billion and 1.1 trillion barrels of oil in the Formation, although none of it is now commercially recoverable.

52. Despite its potential, the complexity and expense of oil shale development has rendered its commercial exploitation a tantalizing prospect always just out of reach. After a hundred years of research and promotion, commercial development of oil shale occurs nowhere in North America. Previous attempts to exploit oil shale have caused environmental damage and social dislocation, but produced little if any marketable oil. For example, in the late 1970s,

bolstered by high oil prices and federal subsidies, Exxon and other companies invested billions of dollars in speculative oil shale technologies on Colorado's West Slope. When oil prices dropped and subsidies lagged, Exxon locked the gates of its "Colony" project and fired 2,000 workers on May 2, 1982. This day – remembered on the West Slope as "Black Sunday" – signaled the dramatic bust of the early 1980s oil shale boom, and caused economic disruption across Colorado.

53. More than 70% of the oil shale acreage in the Green River Formation – including the richest and thickest oil shale deposits – lies beneath federally owned and managed lands. As a consequence, the federal government directly controls access to much of the potentially commercially attractive portions of the oil shale resource.

54. Currently, the millions of acres of federal public lands in Colorado, Utah and Wyoming overlying the Green River Formation provide numerous benefits to residents, visitors, and wildlife. The area's streams and rivers, which drain to the Colorado River, provide drinking water and agricultural water, and support recreation for millions of people across the West. These lands are home to some of the nation's healthiest elk herds, rare plants, and more than a dozen species protected as threatened or endangered by the federal Endangered Species Act. The imperiled sage grouse, whose dwindling numbers may require that it be listed as an endangered species, has numerous breeding grounds (or "leks") within these basins. These lands also include tens of thousands of acres of lands that qualify as wilderness; that is, pristine roadless lands unfettered by human development. Thousands of hunters, anglers, hikers, bird-watchers and others enjoy these lands every year.

55. Commercial development of oil shale on federal lands overlying the Green River Formation would have significant and damaging environmental consequences. Currently proposed technologies would require that vast natural areas be strip-mined so that the kerogen-infused rocks could be baked off-site, or that similarly vast natural areas be turned into a maze of industrial facilities that would allow the rock to be baked below ground (a process known as “in situ retorting”). Because the kerogen-bearing shale must be baked to hundreds of degrees for long periods, development of oil shale would require massive amounts of electricity. A RAND Corporation study found that an oil shale industry producing an equivalent of 1 million barrels of oil a day would require about 12 gigawatts of dedicated electric generating capacity, more than likely from coal-fired power plants - the equivalent output of roughly 25 power plants the size of the current Hayden Generating Station in Routt County, Colorado. The power plants needed to develop oil shale would foul the region’s air and pump huge amounts of carbon dioxide and other climate-change-inducing greenhouse gasses into the atmosphere. Studies also predict that oil shale development in this arid region could dry up many streams and rivers – including the Colorado River – for weeks at a time. BLM estimates that three gallons of water or more may be needed to produce a single gallon of oil from shale. Air and water pollution and toxic waste resulting from the development of an oil shale industry may also threaten human health in nearby communities.

56. As the oil shale boom of the late 1970s and early 1980s began to go bust, BLM proposed a rule to establish “policies and procedures ... for the management of Federally-owned oil shale resources,” and to “establish a competitive leasing system” for oil shale. 48 Fed. Reg. 6,510 (Feb. 11, 1983). At that time, BLM stated that the rulemaking “constitutes a major Federal

action significantly affecting the quality of the human environment” requiring the preparation of a full environmental impact statement (EIS) pursuant to NEPA. 48 Fed. Reg. 6,511. BLM completed a draft EIS which it circulated for public review and comment. Id. In 1985, however, BLM withdrew the rulemaking, stating: “since the publication of the proposed rulemaking, market conditions have changed dramatically and there appears to be little or no interest in the development of oil shale resources.”

B. Development of BLM’s Oil Shale Management Regulations

57. Following EP Act’s adoption in August 2005, BLM took the first step towards adopting regulations to promote oil shale development. The agency announced its intent to prepare the precursor PEIS for commercial leasing of oil shale and tar sands in three states on December 13, 2005. 70 Fed. Reg. 73,791 (Dec. 13, 2005). Two years later, BLM completed its draft PEIS. 72 Fed. Reg. 72,751 (Dec. 21, 2007). The draft PEIS purported to analyze the impacts of opening lands to oil shale leasing and the potential development of those lands. It did not purport to analyze the impacts of oil shale management regulations.

58. In 2006, BLM announced its intent to prepare oil shale management regulations. 71 Fed. Reg. 50,378 (Aug. 25, 2006). Underscoring the connection between the PEIS and the proposed regulations, BLM stated that “[c]omments received on the [proposed oil shale management rulemaking] and the PEIS will be considered in shaping the rule as well as land use planning decisions.” Id. at 50,379.

59. Following EP Act’s enactment, significant public controversy arose concerning EP Act’s rushed schedule for finalizing oil shale management regulations. Numerous town, county, and state elected officials in Colorado expressed concern that the EP Act’s deadlines for

oil shale regulations and commercial leasing were unreasonably short. A thoughtful approach to regulation, they argued, could only occur after BLM gleaned information from proposed oil shale research and development projects, and after completion of thorough studies of the potential economic, social, and environmental costs of oil shale development.

60. These concerns led to action in the U.S. Congress. A bill to extend the deadline for preparing the rule was introduced in the U.S. House of Representatives in May 2007. H.R. 2337, Sec. 104 (110th Congress, 1st Sess.). Shortly thereafter, the House passed a provision barring the use of Department of the Interior funds in fiscal year 2008 “to prepare or publish final regulations regarding a commercial leasing program for oil shale resources on public lands pursuant to section 369(d)” of EP Act, codified as 42 U.S.C. § 15927. Cong. Rec. H7243, H7260 (June 26, 2007). That provision ultimately became law. See Pub.L. 110-161, 121 Stat. 2152 (Dec. 26, 2007).

61. Colorado elected officials led the effort to win the funding moratorium. House sponsor Rep. Mark Udall criticized EP Act’s hurried schedule, stating:

Current law requires BLM to issue [oil shale] regulations, and to move to a full-scale commercial leasing program, on a crash basis and under a tight deadline. I think that is a mistake I have been concerned, as many people have in Colorado, that [EP Act’s deadlines] would bring a rush to commercial development before the Interior Department knows enough to do it right and before Colorado’s communities have had a chance to prepare for what it will bring.

Cong. Rec. H7243-7244 (June 26, 2007). United States Senator Ken Salazar called adoption of the moratorium a “victory for the communities of Colorado’s Western Slope,” and hoped that it would lead BLM to use a more “thoughtful and deliberative approach to oil shale

development.” Press release, “Senator Salazar Lauds Oil Shale Limitations in Omnibus Bill” (Dec. 17, 2007).

62. In 2008, legislative efforts to slow the rush to release oil shale regulations continued, with Senator Salazar introducing legislation to delay issuance of the regulations and to give governors in the affected states more time to analyze BLM’s proposals in May. S. 3019 (110th Congress, 2nd Sess.). Senator Salazar explained that: “Rather than rushing ahead with a commercial leasing program, we need a framework for developing such a program in a sensible way.” Press release, “Sen. Salazar Heads Committee to Discuss an Orderly and Thoughtful Future to Oil Shale Development in Colorado and the West” at 2 (May 15, 2008).

63. Despite Congress’s barring the use of federal funds “to prepare or publish” final oil shale management regulations, BLM moved ahead and issued a draft rule on July 23, 2008. 73 Fed. Reg. 42,926 (July 23, 2008). BLM labeled the proposed regulation a “significant rule” that would “have an affect of \$100 million or more on the economy” and that could result in billions in profits to oil shale developers. *Id.* at 42,945-46. BLM also admitted that “there could be significant environmental and socioeconomic costs and benefits” associated with oil shale development. *Id.* at 42,946.

64. BLM issued a 20-page EA evaluating the potential environmental impacts of the proposed regulations, on which it solicited public comments. *See* 73 Fed. Reg. 42,949. The EA contended that the proposed regulations would not have a significant impact on the human environment, directly contradicting statements BLM made in the preamble to the draft regulations.

65. On September 5, 2008, BLM published the final PEIS required by EP Act, and proposed to make approximately two million acres of federal lands available for application for commercial oil shale leasing. 73 Fed. Reg. 51,838-40. As noted, supra ¶ 57, the final PEIS did not purport to analyze the impacts of the oil shale management regulations. Senator Salazar condemned the release of the final programmatic EIS: “the Administration seems bent on tuning out the voices of Coloradans, ignoring the BLM’s own conclusions about oil shale, and rushing ahead with a last minute fire sale of commercial oil shale leases at any cost.” Press release, “Sen. Salazar’s Statement on Administration’s Latest Step Toward Last Minute Oil Shale Leasing” (Sept. 4, 2008).

66. On September 30, 2008, the rulemaking moratorium expired after President Bush threatened to veto legislation adopting the moratorium for fiscal year 2009. Senator Salazar, Rep. Udall, and Rep. John Salazar jointly denounced the veto threat and the lapsing of the moratorium, stating:

it is clear that the Bush Administration is clueless about the realities of oil shale development. By rushing ahead toward commercial leasing, they are putting at risk the very objective we hope to achieve - responsible oil shale development - by heightening the chance of another devastating bust. The White House’s approach is foolhardy and their ‘my way or the highway’ tactics deplorable. We have fought hard to extend the current funding limitation, which prevents the issuance of commercial oil shale leases, because we need to continue with an orderly process that allows necessary research and development to be completed first.

Press release, “Sen. Salazar, Cong. Salazar, Cong. Udall: ‘Bush Administration Runs Roughshod over Colorado on Oil Shale’” (Sept. 24, 2008).

67. After the expiration of the moratorium, the Chair of the Senate Energy and Natural Resources Committee, Senator Jeff Bingaman, joined Senator Salazar in writing DOI

Secretary Kempthorne to voice “serious reservations about the issuance of any final regulations that would establish ground rules for commercial oil shale leasing.” Letter of J. Bingaman & K. Salazar to D. Kempthorne (Oct. 2, 2008). The senators expressed particular concern that the “issuance of the commercial leasing regulations at this juncture may result in a failure to ensure a fair return to the public.” Id.

68. Following expiration of the moratorium, and with less than 70 days left in President Bush’s term, BLM issued its final rule on oil shale management. 73 Fed. Reg. 69,414 (Nov. 18, 2008). The regulations are codified at 43 C.F.R. Parts 3900, 3910, 3920, and 3930, and go into effect on January 17, 2009. Prior to publishing the final rule, BLM finalized a 31-page EA purporting to analyze the environmental effects of the final rule, and a 3-page FONSI. BLM, Environmental Assessment WO-300-07-009, Final Rule (Oct. 2008) (“Final EA”); BLM, Finding of No Significant Impact, Final Rule/Decision Record, Oil Shale Management (Oct. 2008) (“BLM FONSI”); see 73 Fed. Reg. at 69,452.

69. Senator Salazar called the regulations “premature and flawed” and argued that “rather than completing the necessary research and development, the Bush Administration is rushing ahead with rules for a development process they know little about.” Press release, “Sen. Salazar: ‘Final Oil Shale Regulations Premature, Sell Colorado Short’” (Nov. 17, 2008).

C. BLM’s November 2008 Oil Shale Management Rule and Environmental Assessment

1. Royalties and Fair Market Value

70. In preparing the oil shale management rule, BLM acknowledged the EP Act and FLPMA mandates that BLM obtain fair market value and a fair return for leases, rentals and other payments. 73 Fed. Reg. at 69,437; see ¶¶ 35 & 43, supra. BLM interpreted the term “fair

return” in EP Act to be synonymous with the term “fair market value” in FLPMA. 73 Fed. Reg. at 69,437.

71. The oil shale management rule defines “fair market value” (FMV) to be “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.” Id. at 69,470; 43 C.F.R. § 3900.2 (effective Jan. 17, 2009).

72. The oil shale management rule also sets minimum lease rates, minimum bonus bids, and royalty rates on production from the leases that it asserts will result in fair return to the American people, who own the oil shale. With respect to royalties on production the rule sets “an initial rate of 5% through the first five years of commercial production [which will] increase by 1% annually beginning in the sixth year of production until a maximum rate of 12.5% is reached in the 13th year.” 73 Fed. Reg. at 69,428.

73. The 5% royalty rate for oil shale the first six years adopted in the oil shale management regulations is significantly lower than the current royalty rate for either conventional oil and gas or tar sands, which is set at 12.5%. See, e.g., 43 C.F.R. § 3141.5-3(a) (tar sands). It is also significantly lower than the flat 12.5% royalty rate for oil shale proposed by the Reagan Administration in its draft oil shale management regulations in 1983. See 48 Fed. Reg. at 6,516.

74. BLM alleges that the royalty rate adopted in its 2008 oil shale management regulations rate will result in a “fair return” to the American taxpayer despite the fact that BLM has virtually no information as to:

- the type of process industry will use to produce petroleum from oil shale and the nature of costs each process may entail;
- what type of product(s) those processes may produce;
- what types of infrastructure demands (e.g., water, power, processing facilities, and pipelines) each process may entail; or
- what type of mitigation measures may be necessary to protect the environment and local communities, and what financial costs these measures may add to the costs of production.

In short, BLM's determination concerning "fair return" or "fair market value" is based on ignorance.

75. BLM frankly admits its ignorance. The agency repeatedly states that there is no existing industry, that BLM can only speculate what types of processes may be used and what types of products might be sold:

"Because the oil shale industry is still in the research and development phase, it would be speculative to predict whether the industry as it matures will predominantly sell from the leases it mines solid oil shale, shale oil, synthetic petroleum, shale gas, natural gas, or products in several different forms or stages of processing. It is also difficult to predict whether or when multi-buyer/multi-seller markets will develop that would provide FMV pricing for products of oil shale." 73 Fed. Reg. at 69,424.

"The lack of a domestic oil shale industry makes it speculative to project the demand for oil shale leases, the technical capability to develop the resource, and the economics of producing shale oil. Projections that have been prepared vary significantly in not only the potential volume of shale oil that could be produced, but also the assumptions used to generate those projections." Id. at 69,449.

"Because no other country has yet achieved successful commercial oil shale operations and because of the wide variety of oversight and revenue structures employed in each country, the BLM's review of these systems did not identify a useful model for a royalty system to be used for oil shale development on Federal lands in the United States." Id. at 69,420.

“BLM recognizes the difficulty in determining a value for oil shale, a resource that has tremendous potential, but has not yet proven to be economic to develop.” Id. at 69,440.

76. Many other agencies warned BLM that potential impacts of oil shale development could not be determined given the current speculative nature of the industry. As BLM stated in the draft PEIS, “many of the cooperating agencies commented that the lack of information about specific technologies and their impacts caused BLM’s analysis to be too speculative at this time to support a decision to issue any leases.” Draft PEIS at ES-2 – ES-3.

77. Despite its ignorance, BLM refused to postpone a determination of fair return until it could learn from industry’s experience with BLM’s experimental oil shale “research, development and demonstration” (RD&D) program. Prior to EP Act’s enactment, BLM had initiated the RD&D leasing program by soliciting nominations of 160-acre parcels of public land to be leased in Colorado, Utah, and Wyoming for testing oil shale recovery technologies. See 70 Fed. Reg. 33,753 (June 9, 2005). BLM developed the RD&D program to “significantly enhance the collective knowledge regarding the viability of innovative technologies for oil shale development on a commercial scale” as a first step prior to developing a commercial leasing program. Id. BLM has thus far obtained no data from the program – because no RD&D project has progressed to a point where meaningful information could be gathered and analyzed. Rather than wait and act upon facts to help estimate a “fair return,” BLM chose to proceed without information on which to base its decision.

78. While the final rule sets a royalty rate of 5% on production for the first six years, BLM fails to set a method for determining the value of the product of which it will receive a 5% return. BLM explicitly pushes that determination off to another day, stating:

This final rule establishes a royalty rate for Federal oil shale leases; however, the Department is not proposing corresponding MMS [Minerals Management Service] valuation regulations at this time. Because the oil shale industry is still in the research and development phase, it would be speculative to predict whether the industry as it matures will predominantly sell from the leases it mines solid oil shale, shale oil, synthetic petroleum, shale gas, natural gas, or products in several different forms or stages of processing. It is also difficult to predict whether or when multi-buyer/multi-seller markets will develop that would provide FMV [fair market value] pricing for products of oil shale.

.... The MMS will promulgate royalty valuation regulations [not now, but] before oil shale leases are required to begin paying production royalties under this rule.

73 Fed. Reg. 69,424. BLM thus certifies that a 5% production royalty is a “fair return” without having any idea what the product will be, let alone how it will determine the value of the product.

79. Given the agency’s utter lack of information and knowledge, BLM’s certification that the royalty rates it set will ensure that the United States receives a “fair return” on or “fair market value” for production on oil shale leases has no support in the record.

2. Impacts of, and NEPA Analysis of, the Final Rule

80. In its EA, BLM identified the purpose and need for the oil shale management rule as follows: “Congress mandated the Secretary to establish a regulatory framework for an oil shale and tar sands commercial leasing program to increase domestic energy production from strategic unconventional fuels.” Final EA at 1 (emphasis added).

81. The Final EA examined the required “No Action” alternative, the proposed rule, and an alternative similar to the proposed rule that would add “increased bonding and full application of environmental best management practices (BMPs) provisions.” *Id.* at 2-3.

82. The Final EA concludes that the oil shale management rule will have no environmental impacts whatsoever, arguing that impacts will not occur until BLM makes

additional decisions. “These regulations are largely 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. Any commitment of resources or approval of exploration, development, or production activities will be based on future decisions made in compliance with the BLM’s land use planning and NEPA procedures.” Id. at 12.

83. BLM’s FONSI similarly concludes that neither of the alternative regulatory schemes, including that adopted by the agency, could impact the environment. “The alternatives are largely 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. Specifically, the alternatives in the EA do not commit the BLM to a particular course of action or authorize any ground-disturbing activities.” BLM FONSI at 3. The FONSI further states: “There are no significant impacts resulting from promulgating the regulations because the Secretary could lease Federal oil shale without the regulations; the regulations are not causing any tract to be leased or to be developed. The alternatives do not require the BLM to commit any resources or authorize any action, such as holding a lease sale or identifying a specific area for lease.” Id.

84. The conclusions in the Final EA and FONSI that the oil shale management rule can have no environmental effect are contradicted by the purpose of the rules, the preamble to the rules, previous BLM conclusions about the impact of similar rules, and common sense.

85. First, the Reagan Administration determined in 1983 that a similar proposed rule to regulate oil shale leasing and “establish a competitive leasing system” for oil shale “constitutes a major Federal action significantly affecting the quality of the human environment”

requiring the preparation of a full environmental impact statement (EIS) pursuant to NEPA. 48 Fed. Reg. 6,510-11.

86. Second, oil shale industry officials sought the changes mandated by EP Act – a federal leasing program with a favorable royalty rate, as opposed to ad hoc leasing solely under the authority of the MLA – precisely in order to assist the development of their industry on federal lands. See ¶ 38, supra.

87. Third, Congress stated that the purpose of EP Act was to develop a domestic oil shale industry, and directed BLM to establish royalties and other payments for oil shale leases that “shall ... [e]ncourage development of the oil shale and tar sands resources.” 42 U.S.C. § 15927(b)(1) and (o). The Final Rule reflects this Congressional mandate. BLM repeatedly states that the rule’s purpose is to “encourage” development and “spur investment” in oil shale development on its lands, and admits that the royalty rate set in the regulations is meant to effect the amount of commercial oil shale development:

“BLM believes that an initial lower royalty rate on oil shale would be beneficial in spurring investment in developing the resource, consistent with the EP Act’s direction.” 73 Fed. Reg. at 69,428.

“BLM recognizes that encouraging oil shale development presents some unique challenges compared to BLM’s traditional role in managing conventional oil and gas operations.” Id. at 69,419.

“... [E]stablishing a royalty rate early in the life of the oil shale industry [as proposed by BLM] provides the oil shale industry with the level of certainty necessary to obtain the capital investment required for oil shale development. “... [D]elaying the establishment of a royalty regime ... would not attract investment for oil shale development.” Id. at 69,428.

“Defining milestones this way is logical because the steps are necessary to begin production and the BLM believes the requirements will encourage development.” Id. at 69,442.

88. Fourth, BLM concludes that the regulation is a “significant rule” that “will have an effect of \$100 million or more on the economy.” 73 Fed. Reg. 69,448. BLM explains:

The regulations have the potential to generate net economic benefits to the United States by allowing for the development of our vast domestic oil shale resources, though there is substantial uncertainty about the magnitude and timing of these benefits. The most substantial direct benefit of this regulatory action is to provide a vehicle for the leasing and development of Federal oil shale resources. Operators will have the opportunity to obtain leases with the right to develop the oil shale and ultimately produce shale oil in an environmentally sound manner.

Id. BLM’s economic analysis concludes that the regulations could facilitate up to \$50 billion in oil shale production between 2007 and 2035. Id. at 69,449. The EA fails to address or even mention this economic analysis.

89. Fifth, BLM admitted that the rule could have significant environmental impacts. In assessing the rule’s costs and benefits in its preamble to the draft rule, BLM stated:

In addition to these monetary costs and benefits associated with potential oil shale development, there could be significant environmental and socioeconomic costs and benefits. These potential costs and benefits could affect a wide range of resources, including groundwater quality and quantity, air quality, cultural resources, wildlife habitat, competing land uses, and local employment and infrastructure.

73 Fed. Reg. 42,946 (emphasis added). Without explanation, BLM expunged this admission from the preamble to the final rule.

90. Finally, the Final EA itself “incorporates by reference” Chapter 4 of the final PEIS. Final EA at 12. That PEIS chapter concludes that oil shale development in the Green River Formation may have significant impacts to a variety of resources, including: displacing recreation users; long-term displacement of deer, elk, and pronghorn from crucial habitat; destroying vegetation; causing soil erosion; depleting flows of rivers and streams; undermining protection for threatened aquatic species; and significantly changing employment, traffic, local

economic development, among other impacts. Final PEIS Chapter 4. The EA and FONSI nonetheless conclude that the oil shale rule has no environmental effects.

FIRST CLAIM FOR RELIEF

Violation of FLPMA and EP Act:
Failure to Ensure the United States Receives “Fair Return” on or “Fair Market Value” for
Production on Oil Shale Leases

91. The allegations in paragraphs 1-90 are incorporated herein by reference.

92. FLPMA requires that “the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute.” 43 U.S.C. § 1701(a)(9). The EP Act similarly requires the Interior Secretary to establish “royalties, fees, rentals, bonus, or other payments for leases that shall ... [e]nsure a fair return to the United States.” 42 U.S.C. § 15927(o).

93. BLM fails to justify its determination that its chosen production royalty rate will ensure a “fair return” to the United States as required by EP Act, or that the United States will receive “fair market value” on oil shale leases as required by FLPMA. BLM’s failure to ensure that the United States receives “fair return” or “fair market value” violates FLPMA and EP Act and is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF

Violation of the National Environmental Policy Act:
Failure to Complete an Environmental Impact Statement

94. The allegations in paragraphs 1-90 are incorporated herein by reference.

95. NEPA and its implementing regulations require federal agencies to prepare an environmental impact statement (EIS) for all “major Federal actions significantly affecting the

environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. If an agency is not certain as to whether an agency action may significantly affect the human environment, it must prepare an environmental assessment (EA). Id. § 1501.4(b). An EA must provide sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact. 40 C.F.R. § 1508.9. If the agency determines, based on the EA, that no EIS is needed because its action will not have a significant effect on the human environment, it may then prepare a “finding of no significant impact” (FONSI). Id. §§ 1501.4(e), 1508.13.

96. BLM concluded that the oil shale management rule would have no environmental impact, despite the fact that the rule’s purpose and intended effect is to encourage oil shale development, and despite the fact that BLM concluded the rule was a “significant” one that could cause up to \$50 billion in economic activity.

97. BLM’s failure to adequately justify its FONSI violates NEPA and its implementing regulations, and is arbitrary and capricious, or an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that BLM violated the EP Act and FLPMA by failing to ensure that its lease production royalty rate will ensure that the United States receives a “fair return” on or “fair market value” for oil shale;
2. Declare that BLM failed to comply with the NEPA and implementing regulation in its preparation of an EA and FONSI for the agency’s oil shale management regulation, promulgated November 18, 2008;

3. Order BLM to comply with the requirements of EP Act, FLPMA and NEPA, including by preparing a legally valid rule, environmental assessment, and if necessary, an environmental impact statement.

4. Issue an injunction setting aside BLM's oil shale management regulation, promulgated November 18, 2008;

5. Enjoin BLM from implementing or relying upon the oil shale management regulation promulgated November 18, 2008, including the issuance of any commercial or RD&D leases pursuant to the regulation;

6. Grant such restraining orders and/or preliminary and permanent injunctive relief as Plaintiffs may request;

7. Award Plaintiffs their reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

8. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted January 16, 2009.

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