July 15, 2013

Director (630)
Bureau of Land Management
U.S. Department of the Interior
Mail Stop 2143LM
1849 C St. NW.
Washington, DC 20240

Attention: 1004–AE28

Re: Oil Shale Management – Proposed Rule
(Federal Register March 27, 2013)

Dear Director,

The following comments are submitted on behalf of Sportsmen for Responsible Energy Development (SFRED) and its founding partners the National Wildlife Federation, the Theodore Roosevelt Conservation Partnership, and Trout Unlimited. SFRED is a coalition of more than 1200 businesses, organizations and individuals dedicated to conserving irreplaceable habitats so future generations can hunt and fish on public lands. The Colorado Wildlife Federation and the Wyoming Wildlife Federation also join in these comments.

As an organization, the National Wildlife Federation (NWF) represents the power and commitment of four million members and supporters joined by affiliated organizations in 48 states and territories. NWF and its affiliates have a long history of working to conserve the wildlife and wild places on federal public lands in the West. Many members of NWF and its affiliates use the lands and resources that could be impacted by oil shale and tar sands extraction.

The Theodore Roosevelt Conservation Partnership is a national non-profit conservation organization that is dedicated to guaranteeing every American places to hunt or fish.

Trout Unlimited (TU) is a private, non-profit conservation organization that has more than 150,000 members nationwide dedicated to conserving, protecting, and restoring North America’s trout and salmon fisheries and their watersheds. Since 1959, TU has dedicated staff and volunteers toward the protection of sensitive ecological systems necessary to support robust native and wild trout and salmon populations in their respective ranges. TU recognizes that the value of public lands is unparalleled in providing habitat to coldwater fisheries, drinking water and wildlife habitat. TU’s expanding conservation program includes a public lands initiative that recognizes the importance of protecting public lands for the survival and restoration of wildlife.
and fisheries and that actions taken on public lands are ultimately reflected in the quality of fish and wildlife habitat and populations.

In the tri-state region where oil shale and tar sands development could occur, TU has over 12,000 members who actively utilize and enjoy the resources of the Upper Colorado River basin, including the White River hydrologic basin in Colorado, the Uinta basin in Utah, and the Green River basin in Wyoming. TU believes the impacts from the development and production of oil shale and tar sands may adversely affect its members, as well as non-members, who hunt, fish, recreate, and do business in and around the Upper Colorado River basin.

The Colorado Wildlife Federation (CWF) is Colorado’s oldest statewide wildlife conservation organization, a 501(c)(3) nonprofit whose members consist of hunters, anglers and other wildlife enthusiasts. CWF’s mission is to promote the conservation, sound management, and sustainable use and enjoyment of Colorado’s wildlife and habitat through education and advocacy. CWF understands that wildlife habitat is critical to conserving Colorado’s unique wildlife, hunting and fishing heritage, and wildlife viewing opportunities. These wildlife-related recreation pursuits enrich the well-being of residents and visitors and form a substantial segment of Colorado’s economy. CWF’s members hunt, fish, and recreate on federal public lands in Colorado and elsewhere in the Rocky Mountain region that could be developed for oil shale or tar sands production.

With a membership of over 5,000, the Wyoming Wildlife Federation (WWF) is Wyoming’s oldest and largest statewide sportsmen/conservation organization. WWF works for hunters, anglers, and other wildlife enthusiasts to protect and enhance habitat, to perpetuate quality hunting and fishing, to protect citizens’ right to use public lands and waters, and to promote ethical hunting and fishing. Members of WWF use lands and resources that could be adversely impacted by oil shale and tar sands development.

Our organizations all represent individuals who hunt, fish and recreate on federal public lands in areas identified for potential oil shale leasing. Based on BLM’s analysis in the November 2012 Proposed Land Use Plan Amendments of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming and Final Programmatic Environmental Impact Statement (PEIS), it is clear that commercial oil shale development could irreparably harm fish and wildlife habitat and opportunities for outdoor recreation.

SFRED thanks the Bureau of Land Management (BLM) for its willingness to re-evaluate its regulations governing the issuance of leases for commercial oil shale development on federal lands. The federal lands are a public trust, managed for multiple uses, including the conservation of fish and wildlife habitat. BLM has a unique responsibility to ensure that activities on these lands are conducted safely and conscientiously in a manner that preserves their habitat and recreation values for all Americans.

Since BLM first issued the existing commercial leasing regulations in November 2008, oil shale extraction technologies have not advanced sufficiently to ensure that BLM has the information it
needs to ascertain whether such development can be done without undue impact to human health and the environment. For that reason, we believe it is necessary for the agency to have clear regulatory authority to deny development proposals based on the unacceptable environmental impacts those projects may have. It also remains imperative that companies seeking commercial development leases provide both extensive details on the technologies they propose to employ and quantifiable data on potential impacts to fish and wildlife populations and habitat as well as other environmental effects, including the quantity of water required to produce oil from oil shale.

If adopted, BLM’s proposed changes to the leasing regulations, along with those additions included in these comments, take an important step towards ensuring that commercial oil shale development will only occur with adequate measures in place to conserve other important public lands resources, including fish and wildlife populations and their habitats.

I. **DETERMINING AN APPROPRIATE ROYALTY RATE**

Under both the Energy Policy Act of 2005 (EPAct)\(^1\) and the Mineral Leasing Act of 1920 (MLA),\(^2\) establishing an appropriate royalty rate is fundamental to ensuring that the federal taxpayer is compensated for private use of and damage to public resources. The royalty rate must also be adequate to discourage speculative leasing which encumbers other uses of federal public lands. We therefore strongly support BLM’s decision to revoke the unreasonably low royalties adopted in 2008 and encourage BLM instead to designate 12.5%, the same royalty applicable to other oil products extracted from federal lands, as a floor for oil shale leases. By adopting Option #4, BLM would level the playing field for traditional and unconventional oil and gas industries, including oil shale developers.

As Taxpayers for Common Sense makes clear in its December 2012 report, *Oil Shale: Failing Taxpayers for Decades*, the history of oil shale is a history of subsidies. There is no compelling reason why BLM should continue this failed policy of subsidizing oil shale development through the adoption of sub-par royalty rates.\(^3\)

If BLM later determines that the rate, consistent with the MLA, should be higher, Option #4 also provides a mechanism for the public to contribute to the agency’s ultimate decision. This approach would ensure the public’s ability to participate in actions governing public lands resources and is consistent with the Federal Land Policy and Management Act (FLPMA).

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\(^1\) Pub. L. 109–58, Section 369.


\(^3\) The history of oil shale in this country has been marked by government subsidies that resulted in very little return. See [http://www.taxpayer.net/library/article/subsidizing-oil-shale-tracing-federal-support-for-oil-shale-development](http://www.taxpayer.net/library/article/subsidizing-oil-shale-tracing-federal-support-for-oil-shale-development).
We believe that environmental and financial considerations require a higher royalty rate. Royalties are central to ensuring that the producers pay some of the “external costs” of their operations. Such funds can help off-set impacts to fish and wildlife habitat, local infrastructure, water quality, and air quality. Without sufficient funds, taxpayers, either directly or indirectly through their federal and local governments, will be required to meet these costs, providing yet another subsidy to the oil shale industry.

Much is still unknown about the full impacts of oil shale development. However, based on the information that is contained in the PEIS, oil shale and tar sands development poses a huge threat to fish and wildlife, including species that already are on the verge of disappearing. Hundreds of thousands of acres of vital wildlife habitats may be “occupied” by oil shale and tar sands projects to the exclusion of all other uses, including fish and wildlife, for generations. Reclamation does not address this loss because habitat functions will not be restored for decades.

Without setting a minimum rate, federal and local governments relying on royalties to mitigate some of the impacts of this development will be unable to forecast the funds available to them. Options #1 and #2 fail to provide any certainty for impacted communities and fish and wildlife.

II. ADDITIONAL PLAN OF DEVELOPMENT REQUIREMENTS

We support the BLM’s proposed expansion of Section 3931.11 to require additional reporting by lessees. This is an important first step toward ensuring that the agency has adequate information upon which to base decisions authorizing Plans of Development (PODs). SFRED encourages BLM to adopt these additional provisions to better define the type of information a lessee should provide prior to permitting PODs.

A. Watershed And Groundwater Protection Plan

Since the BLM issued the commercial leasing regulations in November 2008, additional information about water demands associated with oil shale development have come to light. For example, according to the State of Colorado’s 2010 Statewide Water Supply Initiative (SWSI) report, municipal and industrial demand (M&I) in Colorado is projected to increase by 538,000 AF/yr to 812,000 AF/yr (55% to 83%) over 2008 baseline demand. The SWSI report makes clear that Colorado faces huge increases in water demands and must make significant changes in the way water is used just to meet projected population growth. Utah faces similar challenges. In 2003, Utah projected that statewide municipal and industrial demand would increase from 904,000 AF/yr in 1995, to 1,951,000 AF/yr in 2050, a 115% increase. With conservation, the State hopes to reduce the 2050 demand to 1,550,000 AF/yr, but none of these plans accounts for potential oil shale development.

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The State of Utah recognizes the challenge of balancing population needs with energy needs. As the State concluded in its March 2011 10-year energy study:

Given Utah’s population growth and projected economic growth over the next decade, the possibility of increased drought and with limited new water resources available, water consumption of energy resources should be given careful consideration. … As an arid state, an energy portfolio that encourages low water-use technologies should be considered.5

Water for oil shale would require difficult and perhaps untenable tradeoffs, especially if large-scale commercial production becomes reality. A detailed watershed protection plan can help water providers, agricultural interests, municipalities and others to assess the potential impacts of diversion of large quantities of water for oil shale development. Of particular concern to SFRED, this information will better enable federal and state agencies to evaluate impacts on in-stream flows and conservation of fish populations and habitat.

In addition to water quantity, a key component of the proposed watershed and groundwater protection plan is defining anticipated water quality impacts. This proposed requirement is an important addition to the leasing regulations and we strongly support its inclusion in the final regulations.

Requiring companies to include a watershed and groundwater protection plan as part of their plan of operations is strong public policy. We support the proposed additions to Section 3931.11.

B. Environmental Protection Plan

SFRED also supports BLM’s proposal to require companies to include an “environmental protection plan” in any development application. This plan would require companies to develop strategies to minimize adverse impacts on other public lands resources, to monitor the effectiveness of these strategies, and to adapt mitigation methods as necessary. The public lands made available for oil shale development include areas that provide important habitat for fish and wildlife. Conservation of these public resources must be a required component of any private development permitted. Predicting impacts to fish and wildlife, however, is not always an “exact science.” Adaptive management, including careful monitoring of success or failure of mitigation efforts, is essential to ensuring the long-term sustainability of fish and wildlife populations in landscapes impacted by development.

III. VESTING DISCRETIONARY AUTHORITY IN BLM

In the draft revisions to the existing regulatory framework, the BLM proposes clarifying language preserving agency discretion to deny leases based on a finding of unacceptable impacts to the environment. We strongly support the addition of these provisions.

A. BLM Should Adopt the Unacceptable Environmental Risk Standard

The BLM has asked parties to comment on the appropriate standard the agency should employ when exercising its discretion to deny oil shale development proposals. We believe Unacceptable Environmental Risk (UER) is the appropriate standard and urge BLM to adopt it.

One of the most glaring gaps in the PEIS is BLM’s failed effort to examine the cumulative impacts of its leasing program for the purposes of NEPA compliance. BLM has acknowledged this shortcoming, most recently in the March 2013 Record of Decision:

[T]he PRMP/FEIS presents a preliminary, qualitative, analysis of the impacts of leasing and development of these resources to assist in informing the land use planning decision. This analysis of potential direct, indirect, and cumulative impacts associated with oil shale and tar sands development is based on currently known technologies. However, the level and degree of the potential impacts of future development could not be quantified because this would require making many speculative assumptions regarding potential, unproven technologies, project size, and production levels.  

Given the uncertainties regarding the potential impacts of oil shale development and the adequacy of mitigation measures to address those impacts, we strongly support the need for the BLM to retain its authority to deny permits in order to protect public land and natural resources.

Examination of the agency’s discussion of the proposed changes to the regulations indicates that the UER standard gives BLM broader latitude to protect public health and the environment from the adverse impacts of oil shale development. This aligns with our understanding of the plain language of UER versus an Unacceptable Environmental Consequences (UEC) standard. For these reasons, we strongly support the adoption of UER over UEC. In either case, one of these two standards should be included in the final regulations.

Finally, both the March 2013 Federal Register notice and the economic analysis supporting the draft regulations provide that the proponent, not BLM, must prove that the activity can occur without UER or UEC. This approach should be adopted as part of the final regulations.

6 BLM, Oil Shale and Tar Sands Record of Decision, March 2013, pages 63-64.

7 These uncertainties also support the need for completion of full environmental impact statements (EISs) rather than environmental assessments (EAs) before the issuance of commercial leases, including the conversion of RD&D leaseholds.
B. “Other Resource Considerations” And Other Provisions Maintaining Discretionary Authority In The BLM

We also strongly support the BLM’s decision to deny leasing applications for “environmental or other resource considerations” and to otherwise change language from “will” to “may.” As BLM states in the Federal Register notice, these changes align the proposed leasing regulations with Secretarial discretion established by Congress in both MLA and FLPMA.

IV. ADDITIONAL CLARIFYING CHANGES

A. BLM Should Redefine “Commercial Quantities” to Include Consideration of Environmental Costs

As described in its March 2013 Record of Decision for the oil shale and tar sands PEIS, BLM will issue commercial oil shale leases only when a lessee satisfies the conditions of its Research, Development and Demonstration (RD&D) lease and the conversion regulations. Pursuant to 43 C.F.R. § 3926.10(c)(1), BLM may only approve the conversion application if “there have been commercial quantities of shale oil produced from the lease.” SFRED encourages BLM to revise the definition of “commercial quantities” to include an explicit consideration of environmental costs.

Currently, “commercial quantities” is defined in 43 C.F.R. § 3900.2 as follows:

Commercial quantities means production of shale oil quantities in accordance with the approved Plan of Development for the proposed project through the research, development and demonstration (R, D and D) lease, based on, and at the conclusion of 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.

The “costs of production” are defined as “(1) the extraction of shale oil, shale gas, or shale oil by-products through surface retorting or in situ recovery methods; or (2) [t]he severing of oil shale rock through surface of underground mining methods.” (43 C.F.R. § 3900.2)

BLM should revise the definition of “commercial quantities” to include the specific consideration of environmental costs in its determination of whether the oil shale operation will provide a “positive return.” Examples of costs that should be incorporated into BLM’s criteria include: the cost of environmental permitting and enforcement, mitigation costs, reclamation costs, rehabilitation costs, and the cost of compliance with all applicable federal and state laws.

8 BLM, Oil Shale and Tar Sands Record of Decision, March 2013, A-4.
This suggested revision would better align the regulatory framework for RD&D leases with the regulations found at 43 C.F.R. § 3930.20, which govern the operation of commercial scale operations. Under 43 C.F.R. § 3930.20, all mining and in situ development and production operations must be conducted in a manner to yield the Maximum Economic Return (MER) of the oil shale deposits, consistent with the protection and use of other natural resources, the protection and preservation of the environment, including, land, water, and air, and with due regard for the safety of miners and the public” (emphasis added). This provision requires BLM to consider environmental costs in its evaluation of the economic return of all commercial operations. It would increase the consistency – and therefore the efficiency – of the regulatory framework for BLM’s evaluation of whether an RD&D leaseholder has achieved “commercial quantities” to also include explicit consideration of environmental costs in that determination.

B. BLM Should Define Research, Development, And Demonstration

BLM should amend 43 C.F.R. § 3900.2 to include a definition of RD&D. This definition should include, but is not limited to, a description of the acreage involved in an RD&D lease, the purpose of the RD&D program, and a statement distinguishing RD&D operations from the broad-scale development intended to occur subsequent to conversion.9

V. CONCLUSION

We thank BLM for the opportunity to comment on its proposed rules. SFRED supports the responsible development of energy resources on our nation’s public lands. We understand that energy is vital to America and that, given the volatility of global markets, it is imperative that we reduce our reliance on foreign sources. However, because other important values are also at stake, such as fish, wildlife, and water, BLM must ensure that its decisions regarding the use of

9 See BLM, Oil Shale and Tar Sands Record of Decision, March 2013, A-4 (“[the RD&D first requirement] is intended to ensure that commercial viability is proven, and the environmental consequences of these technologies known before any commitment to broad-scale development.”)
public lands are responsible and undertaken with a level of care commensurate with the trust that has been placed in its hands.

Sincerely,

Kate Zimmerman  
Policy Director – Public Lands  
National Wildlife Federation  
Rocky Mountain Regional Center  
2995 Baseline Road, Suite 300  
Boulder, Colorado 80303  
303-441-5159  
Zimmerman@nwf.org

Edward B. Arnett, Ph.D.  
Certified Wildlife Biologist®  
Director, Center for Responsible Energy Development  
Theodore Roosevelt Conservation Partnership  
1660 L Street NW, Suite 208  
Washington, D.C., 20036  
(540) 520-5252  
earnett@trcp.org

Brad Powell  
Senior Policy Director  
Sportsmen Conservation Project  
Trout Unlimited  
1300 North 17th Street, Suite 500  
Arlington, VA 22209-2404  
928-300-5451  
BPowell@tu.org

Suzanne B. O’Neill  
Executive Director  
Colorado Wildlife Federation  
1410 Grant Street, C-313  
Denver, Colorado 80203

Joy Bannon  
Field Director  
Wyoming Wildlife Federation  
309 Main Street  
Lander, Wyoming 82520