



**American Shale Oil, LLC**

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December 10, 2012

BLM Director (210)

Attn: Brenda Hudgens-Williams

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Mike Pool, Acting Director

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VIA EMAIL AND U.S. MAIL

RE: COMMENTS TO PROPOSED RESOURCE MANAGEMENT PLAN AMENDMENTS  
AND FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT



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Dear Mr. Pool:

American Shale Oil Company LLC (“AMSO”) submits the following comments on the Proposed Resource Management Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management (“BLM”) in Colorado, Utah, and Wyoming (“RMP Amendments”) and Final Programmatic Environmental Impact Statement published by the Department of Interior on November 13, 2012 (“PEIS”).

AMSO is the Lessee under the Oil Shale Research, Development and Demonstration (“RD&D”) Lease COC 69169, dated December 12, 2006, as amended by Addendum Number 1 to the Oil Shale Research, Development and Demonstration Lease COC 69169, effective January 16, 2009 (as so amended, the “Lease”). The Lease covers approximately 160 acres in Rio Blanco County, Colorado. The Lease grants AMSO an exclusive right to acquire additional acreage described in the Lease (“Preference Right Area”) upon satisfying certain terms and conditions of the Lease and the regulations found at 43 CFR Subpart 3926 (“2008 Regulations”). Pursuant to Section 3926.10 of the 2008 Regulations, a RD&D lease can be converted to a commercial lease consisting of 5,120 acres. AMSO has a vested right to convert the Lease into a commercial lease, and the RMP Amendments cannot terminate or interfere with this vested right.

### **1. The Proposed RMP Amendments and PEIS cannot terminate or interfere, directly or indirectly, with AMSO’s vested rights under the Lease.**

It is well settled that the government cannot arbitrarily impair vested contractual rights without violating the Due Process, Contract, Takings, and Equal Protection Clauses of the Constitution. See Cisneros v. Alpine Ridge Group, 508 U.S. 10, 16 (U.S. 1993); Bradley v. Richmond Sch. Bd., 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974); Coney Island Resorts, Inc. v. Giuliani, 103 F. Supp. 2d 645, 647 (E.D.N.Y. 2000). Further, every contract, whether the government is a party or not, contains an implied covenant of good faith and fair dealing, which means that there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party. See e.g., Solar Turbines, Inc. v. United States, 23 Cl. Ct. 142, 156 (Cl. Ct. 1991). A party claiming the estoppel must have relied on its adversary's conduct in such a manner as to change his position for the worse, and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading. See e.g., Heckler v. Community Health Servs., 467 U.S. 51, 61 (U.S. 1984).

#### a. RMP Amendments, Loss of Available Acreage.

If the RMP Amendments are adopted as proposed, a substantial portion of AMSO’s Preference Right Area would be withdrawn from future commercial leasing. It is AMSO’s position that the



adoption of the proposed RMP Amendments as to allowable land use will not, in fact, cannot, impair or affect in any way AMSO's right to develop the Preference Right Area granted to AMSO under the Lease. This conclusion is supported by the express language of the Lease, the Addendum and the PEIS. Based on these contractual commitments, AMSO has invested over \$60 Million dollars into developing commercially viable technologies for oil shale recovery.

b. Addendum, Predictability and the Right to Elect.

Addendum Number 1 to the Lease was executed for the "purpose of providing for the predictability of relevant procedures and responsibilities regarding the conversion of the [Lease] to a commercial lease." (Preamble). It specifically provides that AMSO could elect to be governed by the 2008 Regulations as it relates to the conversion, the expansion of the lease tract to include all of the Preference Right Area, and the commercial lease and operations (Addendum Number 1, Sections 1 and 2). Pursuant to the 2008 Regulations, AMSO has a vested right to convert its RD&D lease to a 5,120-acre commercial lease.

c. PEIS A Contradiction of Terms and Conditions

On its face, the PEIS expressly preserves AMSO's vested rights under the Lease. The PEIS itself provides that the scope of its analysis does not include review of the decisions by the Secretary of the Interior to issue the 160-acre RD&D leases and that such prior issued "RD&D leases and the conversion right to commercial operations on the preference acreage represent a prior existing right that may be exercised upon compliance with the terms of the lease." (PEIS, 1-17) (emphasis added).

However, in what appears to be an attempt to circumvent the statement about the *prior existing right*, the PEIS incorporates conclusions that are not supported by the best available scientific research and data, imposes additional and unreasonable restrictions on the developers of the oil shale reserves and proposes more restrictive options as preferred alternatives. This approach effectively gives the BLM a green light to reject an application for conversion of RD&D lease to a commercial lease based on environmental requirements that are supported by outdated data and no longer viable scientific conclusions. Effectively, the PEIS interferes with AMSO's exercise of its vested conversion right by making it extremely difficult for AMSO to satisfy the environmental conditions of the Lease.

**2. The PEIS violates the mandate and the spirit of the Energy Policy Act, adversely impacts industry economics, and is not supported by credible scientific evidence.**

The Energy Policy Act of 2005, 42 U.S.C. §15927 (the "Act") declares that oil shale deposits 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



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imports.” Id., §15927 (b). To implement this policy, the Act directs the Secretary of the Interior to take a number of steps to establish a commercial leasing program for oil shale and tar sands, one of which is to make public lands available for conducting oil shale research and development activities. 42 U.S.C. § 15927(c).

While courts have recognized broad discretion by agencies through the regulatory process to interpret and administer congressional mandates, agencies are nonetheless prevented from ignoring policy determinations and requirements imposed by statute. See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 806 (1973) (agency’s course must be consistent with its mandate from Congress.). It is well-established that where an agency departs from its prior position, it must do so pursuant to reasoned decision making. See Dep’t of Navy v. FLRA, 962 F.2d 48 (D.C. Cir. 1992); Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, 29 L. Ed. 2d 701, 91 S. Ct. 2233 (1971). “Divergence from agency precedent demands an explanation,” Hall v. McLaughlin, 864 F.2d 868, 872 (D.C. Cir. 1989).

Since 2008, the BLM has received no new data about possible impacts of oil shale development because no such development has occurred. The PEIS incorporates and relies upon outdated scientific and technical information and conclusions that have no credible support. The BLM’s decision to dramatically reduce the amount of acreage available for commercial oil shale leasing without any reliable factual, legal, or policy justifications, is not reasoned decision making and violates the BLM’s statutory mandate.

By eliminating the vast majority of land available for commercial oil shale and tar sand leasing, the revised PEIS virtually eliminates the potential for industry development envisioned by the Act. This decision represents a radical departure from the regulatory regime under which AMSO entered into the Lease. AMSO has been developing commercially viable technologies for oil shale recovery partially with the intention of expanding into adjacent lands once the illitic shale in the R0-R1 layers are exhausted in its Preference Lease Area. However, the Proposed RMP Amendments remove a substantial portion of the lands adjacent to AMSO’s Lease available for commercial leasing. Conducting viable commercial operations on multiple odd-shapes and non-contiguous tracts will be an added hardship imposed by these new revisions. The inability to expand operations onto adjacent tracts once the Preference Right Area has been fully developed could impair AMSO’s investment of time and resources into its project, substantially reducing future prospects and adversely impacting its shareholder value.

### 3. Conclusion.

The proposed RMP amendments and the PEIS completely re-shape the existing regulatory regime applicable to oil shale development on Colorado. AMSO executed its Lease based on a concrete and immutable right to covert over to a commercial lease on its Preference Lease Area



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upon a reasonable opportunity to satisfy certain conditions. In justifiable reliance on such opportunity, AMSO has invested an extraordinary amount of time and money into the development of technologies that will allow successful commercial development of the oil shale reserves. Accordingly, the proposed changes to the PEIS must further clarify and expand on its commitment to the "prior existing rights" of RD&D lease holders with regard to conversion to commercial leases. Specifically, the revised assumptions and conclusions cannot be used to interfere with the RD&D lease holders exercise of vested conversion rights by predetermining or unreasonably burdening the satisfaction of environmental conditions for conversion. AMSO is also concerned that the proposed revisions represent a dramatic change in public policy, frustrating the development of a needed resource, and do not apply the best and current scientific standards and information available.

Respectfully Yours,

**American Shale Oil LLC**

By: 

Bruce Schlanger, Esq.

VP and Senior Commercial Counsel