



# United States Department of the Interior

BUREAU OF LAND MANAGEMENT  
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Lakewood, Colorado 80215-7093  
[www.blm.gov/co/st/en.html](http://www.blm.gov/co/st/en.html)



In Reply Refer To:  
1310 (CO-920)

JUN 06 2008

Colorado Oil and Gas Conservation Commission  
Attention: Patricia Beaver, Hearings Manager  
1120 Lincoln Street, Suite 801  
Denver, CO 80203

Re: U.S. Bureau of Land Management Comments on Draft Colorado Oil and Gas Conservation Commission Regulations, Docket No. 0803-RM-02

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ATTORNEY GENERAL

Dear Commissioners:

On behalf of the Bureau of Land Management (BLM), I am writing to submit comments on the draft COGCC regulations. In this letter, I describe our position regarding federal preemption, provide background on the current working relationship between BLM and the COGCC, including the 1991 Memorandum of Understanding (MOU), set forth suggested language which would address BLM concerns and restate our position regarding Indian trust lands and minerals in Colorado. For your convenience, a copy of the MOU is attached as Exhibit A.

The BLM has enjoyed a long working relationship with the State of Colorado, and we expect that relationship to continue. Our philosophy is guided by the policy of cooperative conservation, which requires federal agencies to collaborate with state and local governments in making decisions about natural resources and the environment. Although this letter outlines objections to the draft rules, the BLM is committed to the principles of cooperative conservation and will strive to maintain its productive relations with the State. We are also committed to achieving the goals of the proposed rules of mitigating the impacts of energy development and protecting wildlife and other resource values. The BLM has a long history of doing so through our planning process, our stipulations, best management practices and conditions of approval, and our coordination with other agencies.

## Preemption

BLM believes that certain draft rules would be preempted by federal law if applied to oil and gas operations on federal lands. The Property Clause<sup>1</sup> of the United States Constitution provides legal authority for federal jurisdiction over federal lands. When Congress acts on public lands under the Property Clause, and when such federal legislation conflicts with State law, federal legislation preempts State law under the Supremacy Clause.<sup>2</sup> *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *see also California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1987); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *affirmed*, 445 U.S. 947 (1980); and *State of Wyoming v. Norton*, 279 F.3d 1214 (10th Cir. 2002).

State rules conflict with federal law when such rules "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ventura County*, 601 F.2d at 1086. Under the Federal Land Policy and Management Act ("FLPMA"), the Mineral Leasing Act and other federal laws, important purposes for federal lands include the exploration, development and production of oil and natural gas. As discussed above, it is our general policy to cooperate where we can, but we lack discretion to allow the State to preempt our FLPMA and Mineral Leasing Act authorities under the Property Clause. To the extent that the COGCC final rules frustrate federal management of the federal mineral estate under these and other applicable laws, BLM intends to communicate to its lessees and the State that the rules do not apply on federal lands and minerals.

While BLM acknowledges the State's legitimate authority to regulate certain aspects of the oil and gas exploration and development process, judicial precedent establishes that State regulation is generally limited to the exercise of the State's police powers. Further, as a practical matter, BLM generally concurs in State decisions in the area of conservation such as pooling and spacing, notwithstanding the Mineral Leasing Act's express vesting of authority in BLM that requires it to expressly adopt some such decisions for them to bind federal lessees.<sup>3</sup> However, certain draft rules, if applied to the federal mineral estate, extend beyond the boundaries of traditional State police power.

Many of the participants in the technical working group sessions which preceded release of the draft rules expressed misgivings regarding the potential for conflict between federal law and the draft rules. If the COGCC adopts the draft rules unchanged, operators will be forced to evaluate potential conflicts on a case by case basis, as each State rule is applied. This potential for conflict creates uncertainty regarding the

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<sup>1</sup> The Property Clause provides that "Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, sec. 3, cl. 2.

<sup>2</sup> The Supremacy Clause provides that "laws of the United States... shall be the supreme law of the land ... with anything in the laws of any state notwithstanding." U.S. Const. art. VI, cl. 2.

<sup>3</sup> Ratification by the Secretary of the Interior is necessary for a state spacing or pooling order to affect federal leases. Compare *Kirkpatrick Oil and Gas Co. v. United States*, 675 F.2d 1122 (10<sup>th</sup> Cir. 1982) with *Texaco Oil and Gas Corporation v. Phillips Petroleum*, 406 F.2d 1303 (10<sup>th</sup> Cir. 1969).

demarcation between the respective authorities of our agencies and invites legal challenge to the regulations as applied in particular circumstances. We believe that it is in the best interests of all involved to avoid this uncertainty by addressing the preemption issue during the rulemaking process.

Specifically, the following draft rules may be preempted: Rule 513 (Geographic Area Plans), Rule 1000 Series (reclamation), Rule 1208 (Wildlife Timing Restrictions), and Rule 1209 (Restricted Surface Occupancy Areas). For example, requiring facility consolidation through Geographic Area Plans could directly conflict with BLM's land use planning decisions. State permit requirements that regulate land use planning on federal lands are preempted under *Ventura County*, 601 F.2d 1080, and as supported by *Granite Rock*, 480 U.S. 572. To the extent reclamation requirements reflect determinations as to the best future use of BLM lands, State regulations could also represent an attempt to engage in land use planning which is the responsibility of the BLM. Wildlife timing and surface occupancy restrictions that go beyond similar BLM requirements and impede the ability of operators to operate on federal lands would "stand as an obstacle" to the accomplishment of federal objectives, specifically the exploration, production and development of natural gas and oil on federal lands. We continue to review the draft regulations and may identify additional rules with preemption potential.<sup>4</sup>

As drafted, the above mentioned rules attempt to impose State surface regulatory objectives on mineral lands owned and managed by the federal government. Should the draft rules be imposed on the federal mineral estate, even where federal interests underlie privately owned surface, application of these rules may impermissibly impede access to the dominant federal mineral estate. This interference frustrates the purposes of the Congress for federal lands and the federal mineral estate, but also creates unnecessary uncertainty for federal lessees.

#### BLM-COGCC MOU and Alternative Proposals

The COGCC may avoid the preemption problems discussed above by adding language to the draft rules which acknowledges that COGCC regulations do not apply to federal lands and minerals absent BLM concurrence. We therefore propose that federal lands and minerals be explicitly exempted from the COGCC regulations, with the exception of those traditional exercises of the State's police power in which the BLM has concurred. The exemption of federal lands and minerals from the draft rules is the most expedient way to address preemption issues. It would provide certainty and clarity to those operators active on federal property.

The draft rules may be improved further by adding language acknowledging the mechanism by which our agencies exercise their respective authorities in harmony with one another, currently outlined in the 1991 MOU. The MOU requires the COGCC to provide notice to the BLM of all hearings which "in any manner relate to or involve

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<sup>4</sup> We further note that the draft regulations set out a procedure to "harmonize" State and local regulations through Memoranda of Agreement (Rule 521). Oddly, the draft regulations contain no such procedure for the federal government, the largest landowner in the State.

federal/ Indian lands." Additionally, under the MOU BLM is entitled to submit objections to proposed conditions imposed by the COGCC. If BLM's conditions are not incorporated into the COGCC order, the COGCC "shall relinquish jurisdiction to the Colorado BLM over the matter insofar as it relates to federal/Indian lands." Because we believe the MOU is effective in balancing federal and state regulatory interests that provide clear notice to operators of the scope of our respective authorities, we again advocate its incorporation into the draft rules.

In our May 7, 2008 letter, we described the history of the BLM's working relationship with the COGCC and noted that the MOU has served our agencies well for the past seventeen years. We also acknowledged our surprise that the draft rules do not recognize that longstanding relationship. We recounted our meeting on February 22, 2008, with Acting Director Neslin, during which he proposed a series of BLM-DNR meetings. In our letter, we reiterated our interest in meeting with DNR specialists to discuss and hopefully resolve preemption issues. Those meetings still have not taken place, nor has BLM received a reply to its May letter.

We renew our request to meet with DNR to discuss the draft regulations and the MOU. A starting point for our discussions could focus on the inclusion of the following language in the COGCC rules:

These regulations shall not apply to federal lands and minerals unless the BLM concurs in their application. In the event of BLM's concurrence, the applicability of these regulations to federal lands and minerals shall be governed by the terms of the MOU between the Colorado BLM and the Colorado Oil and Gas Conservation Commission.

At this time, we believe the core principles of the current MOU are sound and should remain intact. However, given the State's interest in managing surface impacts and imposing wildlife mitigation associated with oil and gas development, we would expect amendments which could broaden our existing relationship and could include other federal land management agencies, among other matters.

We believe that the above proposals will satisfy BLM's preemption concerns and respect the unique status of federal lands and minerals. These interests are owned by and managed for the benefit of the people of the United States. It is clearly in the best interest of the American public to avoid uncertainty and potential jurisdictional conflicts by specifically exempting federal lands and minerals from the COGCC rules.

#### Indian Trust Responsibilities

The United States is a trustee for Indian trust lands and minerals. Federal agencies, including the BLM, act as trustees with respect to operations involving Indian trust lands and minerals. It is our position that State oil and gas regulations do not apply to Indian trust lands and minerals. The State has traditionally recognized the exception for Indian trust lands and minerals, but the draft regulations contain no such language.

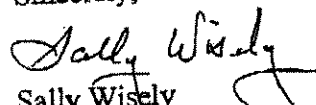
We were assured by Acting Director Neslin at our February 2008 meeting that the new regulations would not apply to Indian trust lands and minerals, but we have not received confirmation of that understanding. We cannot rely on verbal assurances and we suggest that the regulations specifically exempt Indian trust lands and minerals. The final rules should contain the following language:

These regulations shall not apply to Indian trust lands and minerals.

We note that the Southern Ute Indian Tribe is participating in the rulemaking process as a party. The Southern Ute Tribe filed a Final Prehearing Statement that outlines its position that the COGCC regulations do not apply to tribal trust lands and minerals. The Final Prehearing Statement and supporting materials set forth in some detail the legal basis for the Tribe's conclusion. We concur with the Tribe's conclusion that the regulations do not apply to Indian trust lands and minerals.

The BLM appreciates the opportunity to participate in the State's rulemaking process. While the BLM takes issue with the current scope of the State's rules, we remain optimistic that utilizing the existing MOU will result in a mutually beneficial outcome. We look forward to strengthening and clarifying our relationship with the State.

Sincerely,

  
Sally Wisely  
Colorado State Director, BLM

Enclosure (1)

cc: David Neslin, Acting Director, Colorado Oil and Gas Conservation Commission  
Kelly Rees, Assistant Attorney General

## EXHIBIT "A"

**Memorandum of Understanding  
Between The Colorado Bureau of Land Management  
And The Colorado Oil and Gas Conservation Commission**

**A. Introduction**

For many years there has been a spirit of cooperation, communication, and trust between the Colorado Oil and Gas Conservation Commission (COGCC) and the Colorado Bureau of Land Management (BLM) in the management of lands in the state of Colorado and the development of our nation's oil and gas resources. Each agency's mission and staffing levels have grown during these years to the point where we believe it is important to formalize our excellent working relationship, as well as define each agency's role and responsibilities in our overlapping jurisdictions.

**B. Purpose**

Most of our operations occur on adjacent lands or on the same lands, and it is important that both agencies provide oil and gas lessee/operators with consistent policy and procedures (including statewide oil and gas orders) on federal/Indian lands as well as nonfederal lands.

**C. Objectives**

This memorandum of understanding (MOU) between the Colorado BLM and the COGCC is intended to (1) avoid duplication of effort by the responsible oil and gas permitting agencies and (2) clearly define jurisdictional authority.

**D. Authorities**

The authorities for this agreement are the Mineral Leasing Act of 1920; the Interior Department Secretarial Order No. 3087, as amended; Title 34, Article 60, of the Colorado Revised Statutes; and 25 CFR Part 211. These agreements shall not supersede existing law, rule, or regulation of either party, nor require commitments of manpower or funds beyond legal authority or appropriation.

**E. Definitions**

1. COGCC actions shall mean those actions taken by the COGCC to establish pooling, spacing, and other orders (field rules) to govern operations in specific fields.
2. Colorado BLM actions shall mean actions taken by the Colorado BLM in accordance with federal regulations (i.e., Application for Permit to Drill approvals, plugging orders, etc.).
3. For purposes of this agreement, the term "Indian lands" shall mean those lands located within the exterior boundaries of the Southern Ute Indian reservation, including allotted Indian lands, in which the legal, beneficial, or restricted ownership of the underlying oil, gas, or coal bed methane or of the right to explore for and develop the oil, gas, or coal bed methane belongs to or is leased from the Southern Ute Indian Tribe or allottee. This includes allotted Indian lands. The Colorado BLM will act in the same manner for actions involving Ute Mountain Ute land as for Southern Ute land.

## Memorandum of Understanding

4. Protest shall mean any objection to a proposed determination. A protest by the Colorado BLM to the COGCC shall be furnished in writing so as to be received by the COGCC at least three working days prior to the hearing or any appearance at the hearing. On Indian lands, the Colorado BLM will notify the COGCC in writing of protest or concurrence so as to be received by the COGCC at least three working days prior to the hearing or any appearance at the hearing. However, should the Colorado BLM fail to protest, and at a later date wish to protest, the Colorado BLM has the right to request that specific orders be reviewed.

## F. Responsibilities

The Colorado BLM and the COGCC agree as follows:

### 1. Designated Official

Each party shall appoint a designated official to receive notices hereunder and to facilitate communication and coordination in implementing this agreement.

### 2. Coordination Meetings

Semiannual coordination meetings will be held to discuss orders, policies, and procedures. This MOU will be reviewed and updated, if necessary, at the first coordination meeting of every year. Prior to the meeting, each agency's respective staffs will identify issues that will be discussed/resolved at the meeting. An agenda will be prepared and distributed prior to the meeting. Other agency staff and/or interested parties may be included in these meetings, as agreed upon by the agencies. Any decisions and agreements reached as a result of these discussions will be addenda to this agreement, as appropriate.

### 3. Procedural Format

It is agreed that all matters which would require COGCC approval (whether administrative or COGCC decision) involving nonfederal minerals shall initially be submitted to the COGCC even if federal/Indian minerals are partially involved. All matters which would require COGCC approval (whether administrative or COGCC decision) where federal/Indian minerals are entirely involved shall be initially submitted to the COGCC. Both types of matters shall be heard and decided by the COGCC, subject to the conditions set forth below.

The COGCC shall furnish the Deputy State Director, Mineral Resources, in the Colorado BLM with notices of all requests for hearings which in any manner relate to or involve federal/Indian lands. As an additional courtesy, the COGCC will send notices of all requests for hearings to the Colorado BLM District Offices. The Colorado BLM shall be entitled to present expert testimony with respect to such determinations and hearings, and shall be informed in writing of any dispositions. If the Colorado BLM should desire to protest any requested determination, it shall do so by written protest delivered to the COGCC within three working days prior to the hearing or appearance at the hearing. Any such protest shall specify the Colorado BLM objections and the conditions, if any, under which the Colorado BLM will accept the relief requested. The COGCC shall either issue its order incorporating the conditions of the protest or shall relinquish jurisdiction to the Colorado BLM over the matter insofar as it relates to federal/Indian lands. Failure to object to any determination, and failure to appear and protest (either by witness or in writing) at any hearing, shall be construed as

concurrency by the Colorado BLM, with the exception of Indian lands. On Indian lands, the Colorado BLM will notify the COGCC of concurrence within three working days prior to the hearing or appearance at the hearing. Failure to concur shall cause the hearing for that issue to be postponed until the following month or until concurrence is obtained. Consistent with the terms of this agreement, all existing decisions of the COGCC involving federal and Indian minerals will remain in effect, subject to the right of the Colorado BLM to request that any specific orders be reviewed, rescinded, or modified.

G. Special Provisions

1. Confidentiality

Each agency will abide by the proprietary and confidential data requirements of its own laws and regulations, in accordance with 43 Code of Federal Regulations 3162.8 and Rule 306 of the Colorado Rules and Regulations, Rules of Practice and Procedure (as amended), and Oil and Gas Conservation Act.

2. Access to Records

Each agency will provide for public access in accordance with its own rules.

3. Information Sharing

Each agency will provide the other with courtesy copies of all regulation changes and Instruction Memoranda that deal with common or pertinent issues.

4. Jurisdiction of the COGCC

a. Federal lands – In the event any matter is submitted to the COGCC for decision or other order, and the Colorado BLM does not object to the COGCC order as provided in Section F, the COGCC shall exercise its jurisdiction over all private parties holding interests in federal oil and gas leases jointly with any nonfederal interests, other than Indian interests.

b. Indian lands – The Southern Ute Indian Tribe does not concur with the exercise of jurisdiction by the COGCC over Indian lands. The Tribe does, however, concur with the exercise of limited authority by the COGCC, but only with the concurrence of the BLM over certain aspects of oil and gas activities on tribal lands. Specifically, the Tribe and the BLM have entered into a separate MOU which secures to the Tribe the independent right to participate and concur through the BLM in any proposed COGCC action affecting tribal lands prior to said action becoming effective. The BIA and the BLM have entered into a separate interagency agreement which sets out procedures for allotted Indian participation through BLM in any proposed COGCC action affecting allotted Indian lands prior to said action becoming effective.

Should the COGCC render a decision or order after the parties have followed the approved procedures contained in this agreement, said COGCC decision shall be deemed by the parties hereto to be a decision of the BLM. Any interested party shall have the same opportunity to appeal or challenge such decision as if said decision had been rendered exclusively by the BLM, Colorado State Director, through the State Director Review process

Memorandum of Understanding

outlined in 43 CFR 3165.3.

H. Affect on Prior Agreements

This agreement will supersede the previous agreement signed September 4, 1986, and incorporate the previous amendment signed September 22, 1989.

I. Administration

This agreement shall become effective upon the date of execution by the last signatory party.

This agreement may be amended by mutual consent of the parties.

Termination of this agreement may be effected by either party upon 60 days written notice to the other party. Termination of this agreement may be effected at any time by mutual written consent of the parties.

This agreement shall terminate when no longer authorized by the U.S. Department of the Interior, by federal or state law, or if determined to be unenforceable by any court having jurisdiction over the parties.

Signed by:

Dennis R Bicknell  
Director Colorado Oil and Gas Conservation Commission  
August 22, 1991

Bob Moore  
State Director  
Bureau of Land Management, Colorado State Office  
August 22, 1991