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October 20, 1993

HAND DELIVEREDJohn R. Rampton, Jr.
District Chief
Administrative Law Judge
United States Department of
the Interior
Office of Hearings & Appeals
Hearing Division
6432 Federal Building
Salt Lake City, Utah 84138Re: White Oak Mining & Construction Company, Inc., v.
OSMRE, Docket No. DV 94-1 R

Dear Judge Rampton:

Enclosed for your review is a draft order in the above-entitled matter. This order vacates Cessation Order No. 93-020-244-1 effective as of 5:00 p.m. on Monday, October 18, 1993. We have faxed a copy of this letter and the draft order to counsel for OSMRE.

Thank you for your assistance and consideration in this matter.

Very truly yours,



Denise A. Dragoo

DAD/bh

cc: Via Facsimile and
First Class Mail/
John Retrum, Esq.

Enclosure

October 18, 1993

ORDER

WHITE OAK MINING & CONSTRUCTION COMPANY, INC.,	:	Docket No. DV 94-1-R
	:	
Applicant,	:	Cessation Order No.
	:	93-020-244-1
v.	:	
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (OSMRE),	:	Permit No. ACT/007/001
	:	Belina Mine
	:	Carbon County, Utah
Respondent.	:	

Cessation Order Vacated

On October 14, 1993, White Oak Mining & Construction Company, Inc. ("White Oak") filed an Application for Review, Petition for Temporary Relief and Request for Expedited Hearing from the enforcement of Cessation Order No. 93-020-244-1 issued by OSMRE pursuant to § 521(a) of the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA") and § 40-10-22(1) of the Utah Coal Mining & Reclamation Act

"UCMRA"). The Cessation Order ("CO") was issued at 10:00 a.m. on Thursday, October 14, 1993, to White Oak as designated operator of Valley Camp of Utah, Inc.'s ("Valley Camp's") Belina Mine Permit No. ACT/007/001, Carbon County, Utah. The CO was issued by OSMRE for White Oak's alleged "failure to obtain a permit issued by the regulatory authority prior to engaging in coal mining operations." Cessation of mining operations was required immediately upon issuance of the CO. On Friday, October 15, 1993, White Oak obtained a temporary restraining order in the United States District Court for the District of Utah, Central Division, Docket No. 93-C-916S ("TRO"). The TRO prevented OSMRE from enforcing, implementing or acting upon in any way the CO. The TRO was set to expire on Monday, October 18, 1993 at 5:00 p.m.

Pursuant to a Notice of Hearing issued on October 15, 1993, and faxed and mailed to the parties, a hearing was held on Monday, October 18, 1993 in Salt Lake City, Utah. Denise A. Dragoo, Esq., and Michele Mitchell, Esq., Salt Lake City, Utah, appeared for the Applicant, and John Retrum, Esq., Office of the Field Solicitor, Department of the Interior, Denver, Colorado, appeared for the Respondent.

After testimony and evidence was received, an oral decision on the record was issued vacating the CO effective at 5:00 p.m. on Monday October 18, 1993. The following restates and clarifies that order. It was found that White Oak is operating pursuant to Valley

Camp's Mine Permit No. ACT/007/001 and has submitted an application to transfer the mine permit. Valley Camp was found to be the permittee of the mine permit. White Oak's activities were found to not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air or water resources. Consequently, OSMRE should have provided a written notice to the State of Utah, giving its reasons for believing that the State's action was not appropriate and culminating in a Ten-Day Notice ("TDN") to the State and the permittee before proceeding with enforcement action. It was found that OSMRE failed to provide the State and the permittee with a TDN before taking enforcement action. Therefore, the CO was vacated.

John R. Rampton, Jr.
District Chief
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).

Distribution:

By Certified Mail:

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Surface Mining Law Summary
Attention: Marcia Smith
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EXHIBIT H

COPY -

BEFORE THE HEARINGS DIVISION
OFFICE OF HEARINGS & APPEALS
UNITED STATES DEPARTMENT OF THE INTERIOR
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

PACIFICORP, dba PACIFICORP)	
ELECTRIC OPERATIONS,)	
UTAH POWER & LIGHT COMPANY,)	NOTICE OF VIOLATION
ENERGY WEST MINING COMPANY,)	NO. 91-02-246-1
PETITIONER, UTAH DIVISION OF)	
OIL, GAS AND MINING,)	
A DIVISION OF UTAH DEPARTMENT)	
OF NATURAL RESOURCES,)	
STATE OF UTAH, PETITIONER &)	
INTERVENOR)	COAL MINING PERMIT
)	NO. ACT/015/018
V.)	
)	
OFFICE OF SURFACE MINING)	
RECLAMATION & ENFORCEMENT)	

PETITION FOR INTERVENTION

Pursuant to 43 C.F.R. Part 4.1110, the Division of Oil, Gas and Mining, a Division of the Department of Natural Resources, State of Utah, hereinafter "Division," petitions the Office of Hearing and Appeals for leave to intervene in the Petitioners' Request for Review of the fact of violation which is the subject of the Notice of Violation No. 91-02-246-1 issued on February 5, 1991. The Division, as intervenor, seeks to participate in this proceeding as a full party.

STATEMENT OF FACTS

Notice of Violation No. 91-02-246-1 (NOV) was issued by the federal office of Surface Mining and Reclamation and Enforcement (OSM) to Petitioner Utah Power and Light (U P & L) as permittee of the Deer Creek Mine, Emery County, Utah (the "Mine"). A copy of the NOV is attached as Exhibit A to Petitioner's Request for

Review. The Division is the issuing agency for mine permit No. ACT/015/018. The NOV issued by OSM alleges the following violation of Utah Admin. R. 614-303-300, "Failure to obtain prior written approval in accordance with R. 614-303-300 before transferring, assigning or sale of rights granted by a permit." (emphasis added) The required abatement includes submission of a complete and accurate application for transfer of permit No. ACT/015/018 from U P & L to Pacificorp, as permittee, and Energy West, as operator. The date for compliance requires state approval of the application by April 25, 1991.

Permit transfer was initiated by a letter dated October 12, 1990, in which Pacificorp notified the Division that effective October 1, 1990, the mine would be operated by Energy West Mining Co., a Utah corporation. Prior to October 1, 1990 operations were conducted by Utah Power and Light Mining Division, the permittee's operator. By this same letter, Pacificorp questioned whether there was a requirement of formal notice or application to the state of Utah concerning this change in operations. A copy of the October 12, 1990 letter is attached as Exhibit A to this Petition.

By letter dated October 29, 1990, the Division notified Pacificorp that the information contained in the October 12, 1990 letter required that an application for permit transfer pursuant to Utah Admin. R. 614-303-300 be submitted by November 13, 1990. A copy of this letter is attached as Exhibit B to this Petition.

By letter dated November 26, 1990 the Division acknowledged

receipt of a permit transfer application submitted November 20, 1990. Certain information required by Utah Admin. R. 614-303-300 and 614-301-100 was found to be missing. This information was required to be supplemented by December 7, 1990. This letter is attached as Exhibit C to this Petition.

By letter dated November 28, 1990, the Division required a revised bond from the former permittee, U P & L, for the applicant permittee, Pacificorp, by December 14, 1990. This letter is attached as Exhibit D to this Petition.

By letter dated December 7, 1990, the Division responded to a Ten Day Notice (TDN) # X-90-02-244-06 TV1, which was received in the Division's offices on November 30, 1990. At that time, the Division contended that permit transfer, which was the subject of the TDN, was being processed in a timely manner and as required by rule. A copy of this letter is attached as Exhibit E to this Petition.

On December 20, 1990, OSM responded with a written Finding in accordance to 30 C.F.R. 842.11 concerning the TDN. OSM, through Robert H. Hagen, Director of the Albuquerque Field Office, found that the Division's basis for not taking action on the alleged violation concerning the permit transfer was inappropriate. OSM, through the Albuquerque Field Office, (AFO) found that "Pacificorp is obligated to notify DOGM (the Division) of its intent to assume those rights and have them approved in full prior-to the transfer, assignment or sale of the rights granted by the permit." A copy of this letter and Finding is

attached as Exhibit F to this Petition.

By letter dated January 7, 1991, the Division responded to the December 20, 1990 OSM, AFO Findings. By this letter, the Division called to the attention of the AFO the distinction between the sale or purchase of real property or stock and the transfer of permit rights. The Division's position being that 30 U.S.C. 1201 et seq. provides a basis for regulation of the latter but not the former. This letter is attached as Exhibit G to this Petition.

By letter dated February 4, 1991, OSM, through W. Hord Tipton, Deputy Director of Operation and Technical Services, responded to the Division's January 7, 1991 request for review of OSM's Finding of an inappropriate response. OSM, by that letter, took the position that under Utah Admin. R. 614-303-310, and its federal counterpart at 30 C.F.R. 774.17, the Division was required to "take appropriate enforcement action in situations where an unapproved entity is found to be engaged in surface coal mining operations until such time as a transfer, assignment, or sale of permit rights has been approved by your agency." This letter is attached as Exhibit H to this Petition.

Based upon the Division's decision not to take the requested enforcement action, OSM conducted a federal inspection at the mine and issued the Federal NOV.

Since the issuance of the NOV, OSM has issued two additional Ten Day Notices to the Division concerning other mining and reclamation permits held by Pacificorp.

ARGUMENT

1. The Division should be granted leave to intervene

43 C.F.R. Part 4.1110(c) provides that the State shall be allowed to intervene where; 1) the state had a statutory right to initiate the proceedings in which it wishes to intervene; or 2) has an interest which is or may be adversely affected by the outcome of the proceedings.

The state of Utah, through the Division, clearly had the right to initiate the proceedings within its state regulatory program. Further, the state's ability to administer its program under its rules and approved statutory authority will be affected by any interpretation of the rule and statute. Therefore, the Division should be granted the right to intervene in this matter.

2. The Division's determination that there was no violation of the act was appropriate.

The state statutory counterpart to § 506 of the Surface Mining Control and Reclamation Act of 1977, PL 95-87-August 3, 1977 91 Stat. 4. may be found at Utah Code Ann. § 40-10-9(2) (1953 as amended.) This statute provides:

(2) All permits issued pursuant to the requirements of this chapter shall be issued for a term not to exceed 5 years; but if the applicant demonstrates that a specified longer term is reasonably needed to allow the applicant to obtain necessary financing for equipment and the opening of the operation and if the application is full and complete for the specified longer term, the Division may grant a permit for the longer term. A successor in interest to a permittee who applies for a new permit within 30 days after succeeding to the interest and who is able to retain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until the

successor's application is granted or denied. Utah Code Ann. § 40-10-9(2) (emphasis added)

The Division's determination that the application for a new permit by the operator was timely is based upon the above quoted language of the state statute. Utah Admin. R. 614-303-310 must be interpreted in light of the enabling statute. It is clear that the October 1, 1990 change of operatorship from Utah Power & Light Mining Division to Energy West Mining Company involved a successor in interest who was able to retain the bond coverage of the original permittee. Therefore, the question revolves around the timeliness of the application for approval of the transfer, assignment or sale of the permit right. In as much as the rules do not address timeliness of application for transfer, and cannot be construed to be in conflict with the enabling legislation, the standard for determining whether or not Pacificorp's application was timely must be tied to the 30-day period granted by § 506(b) of the Surface Mining Control and Reclamation Act of 1977 and Utah Code Ann. § 40-10-9(2).

In this case, the October 12, 1990 letter had the effect of beginning the permitting process by seeking a determination from the Division prior to the expiration of 30 days as to whether or not a permit transfer would be required. Prior to the end of the 30-day period, running from October 1, 1990, the Division set a deadline for November 13, 1990, some two weeks after the Division's determination of the requirement of transfer application.

The Division has consistently taken the position that no

transfer, assignment or sale of the rights granted by a permit were accomplished by the transfer of stock ownership and assets in the merger of U P & L and Pacificorp. This issue has been addressed by the Petitioners.

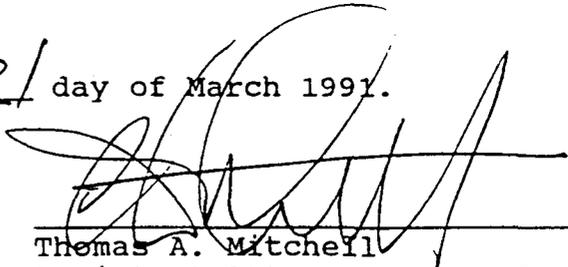
The only way in which the statute and relevant rule can be reconciled is to recognize the difference between the successor in interest in terms of ownership, and a successor in interest in terms of transfer, assignment or sale of rights granted by a permit.

CONCLUSION

The Division should be allowed to intervene both as a matter of right and because of its interest in interpreting the state of Utah's statute and rule in a coherent fashion.

The distinction between transfer of stock and transfer of permit rights should be upheld and that distinction as reflected in both the federal and state statute concerning successors in interest and the 30-day window in which to apply for a new permit should be upheld.

DATED this 21 day of March 1991.



Thomas A. Mitchell
Assistant Attorney General
Attorney for Intervenors
355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing PETITION FOR INTERVENTION to be mailed by certified mail, postage prepaid, the 21st day of March 1991 to:

Denise Dragoo
Fabian & Clendenin
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Salt Lake City, Utah 84111

Assistant Regional Solicitor for Surface Mining
United States Dept. of the Interior
P O Box 25007
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Denver, Colorado 80225-007


Lynda S. Jenson

Dated this 21st day of
March 1991.