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*Copy from Austin,
Steve Alder's
fax*

FAX TRANSMISSION

**UNITED STATES DEPARTMENT of the INTERIOR
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May 7, 2004

To: Steve Alder

Subject: Lodestar - letter to Judge Howard (final version)

FAX Number: 801-538-7440

From: John Austin

Message: Please see the attached copy of my letter to Judge Howard. Please contact me if you have any questions.

2 Pages to Follow

*John
5/7/04*



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May 7, 2004

The Honorable William S. Howard
Judge of the United States Bankruptcy Court
Eastern District of Kentucky
300 Community Trust Building
100 East Vine Street
Lexington, Kentucky 40507

Sent via Federal Express

Re: status of the mediated settlement in the Lodestar Energy, Inc. bankruptcy

Dear Judge Howard:

I am writing on behalf of my client agency, the Office of Surface Mining Reclamation and Enforcement, to express our high level of frustration. It appears that the deal you mediated into existence on March 1 is being changed substantially by the "drafting" process. That process has turned into much more than mere creation of a document the mediation parties can sign. Terms are being altered and conditions are being added that will significantly affect OSM's enforcement of the Surface Mining Control and Reclamation Act of 1977 in Utah, Kentucky and West Virginia.

The exposure to liability under SMCRA of the Renco Group, Wexford and Congress is not a claim in bankruptcy. It appears, however, that Congress and the Renco Group are attempting to inextricably link their mediated agreement to fund reclamation with bankruptcy issues that will take many months or years to resolve. The Deep Pockets may not prevail against Lodestar's creditors when those issues are contested in the bankruptcy proceedings. Therefore, the reclamation agreement that is being created may ultimately be unenforceable against Congress and the Renco Group. For those and other reasons, tying Kentucky's reclamation fund to the uncertain outcome of complicated bankruptcy litigation is legally and strategically objectionable to OSM.

OSM reiterates its commitment to the mediated agreement of March 1. However, OSM is not inclined to agree that the agencies' ability to enforce the state and federal laws and regulations can be impaired by that or any other contract. My client also is unwilling to agree that the obligations of the owners and controllers of Lodestar are "claims" under the bankruptcy code, especially when those owners and controllers have not filed personal bankruptcy petitions. The continued insistence on the part of the Renco Group and Congress that the regulators accept terms and conditions contrary to law will not produce an agreement that I can recommend to OSM.

Adding to OSM's frustration is the disproportionate effect of the "stand still" admonition that

you gave to the parties prior to March 1. OSM has adhered to that admonition and so have the state regulatory agencies. The Deep Pockets have benefitted from the admonition, but the regulatory agencies have not.

For example, OSM and the state regulatory authorities have not issued written findings of control to several individuals and entities because there is no specific timetable for doing so under state or federal law. Findings of control thus fall under your admonition. Issuance of ownership and control findings by the Utah regulatory authority was imminent when you requested that all parties "stand still" and OSM's issuance of its findings likely would not have been far behind. Similarly, OSM and the Utah regulatory authority have not assessed individual civil penalties against the controllers of the Whiskey Creek Mine because there is no strict timetable for making such assessments. Likewise, there is no timetable for filing alternative enforcement complaints. None of the regulatory agencies have filed suit against individuals to cause Lodestar's violations to be abated, although all have the present ability to do that under the state-law counterparts to 30 U.S.C. § 1271(c), and the holding in *United States v. Dix Fork Coal Co.*, 692 F.2d 436 (6th Cir. 1982) and its state-law progeny.

The Deep Pockets have been shielded by the stand still admonition. Some of them have obtained SMCRA permits that likely would not have been approved had Utah or OSM issued ownership and control findings. No one has been forced to litigate with the state or federal agencies over their individual liability for abating Lodestar's violations, or over their liability for individual civil penalties. The Deep Pockets might not act like the proverbial immovable objects during the document drafting process if the regulatory agencies are allowed to resume being irresistible forces.

Accordingly, I request that OSM be released from your stand still admonition so that we can take any and all actions as may be necessary under SMCRA to cause Lodestar's numerous violations of state and federal law to be abated. OSM also requests your immediate intervention in the process of drafting our mediated agreement. The glacial pace of the drafting process has already cost the regulatory agencies at least half a growing season. Moreover, the cost of abating Lodestar's violations increases daily, making the pace and tenor of this drafting process even more intolerable.

Sincerely,



JOHN AUSTIN

Staff Attorney

CC via fax only:

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