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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

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File
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MAY 14 1981

MEMORANDUM

To: Donald Crane, Regional Director
Office of Surface Mining, Region V

Through: Donald R. Tindal, Associate Solicitor
Division of Surface Mining *DT*

From: Suellen T. Keiner, Assistant Solicitor
Regulatory Programs, Division of Surface Mining

Subject: Sage Point - Dupont Canyon Mine

We have received your March 17, 1981, request for an opinion on whether the Sage Point - Dupont Canyon Mine would "interrupt, discontinue, or preclude farming" on an alluvial valley floor. This office has recently responded to an oral request from Mike Bishop of your staff on (we believe) the same alluvial valley floor question. See attached memorandum from Suellen T. Keiner to John Hardaway dated March 3, 1981. Please let me know if the attached memorandum is not fully responsive to your question.

Attachment

cc: John Hardaway
Mike Bishop

MEMORANDUM

To: John Hardaway, Assistant Regional Director,
Division of Technical Analysis and Research
Office of Surface Mining, Region V

From: Suellen T. Keiner, Assistant Solicitor,
Regulatory Programs
Division of Surface Mining

Subject: Mine permit applications: Diversion of water by a
proposed surface mining operation.

Issue

Mike Bishop of your staff requested that this office prepare a brief memorandum advising you whether a proposed surface mining operation, which has acquired an operating farm's water rights to a stream that irrigates alluvial valley floor lands of that farm may divert such water to its own use during the life of the mining operation.

Conclusion

Yes, the proposed operation could obtain a permit in compliance with the Surface Mining Act. The mere acquisition of a superior water right does not, however, relieve the surface mining operation from requirements of the Act or State law. The Act (Section 510(b)(5)(B)) still requires an operator to demonstrate that the hydrologic balance of the downstream alluvial valley floor (AVF) will be preserved.

Discussion:

- a) General hydrology requirements under the Act and its regulations.

Based on the information provided to this office, it appears that an existing farm located on an AVF in a western State has transferred its stream water rights to a proposed surface mining operation located upstream from the farm.

The preamble to the Department's rule states that mining would be permitted if the operator can show that, "in the case of alluvial valley floors outside the permit area, the hydrologic balance of the valley floor will not be materially damaged during or after mining" (emphasis added). 44 F.R. 15094, March 13, 1979. This position was implemented in the permanent program rules at 44 Fed. Reg. 15376, and codified at 30 C.F.R. 785.19(e)(1)(ii)(B):

No permit ... shall be approved ...
unless:

(e)(1)(ii) The proposed operations would not materially damage the quantity and quality of water in surface and underground water systems that supply those alluvial valley floors that are -

...

(B) Outside the permit area of an existing or proposed surface coal mining operation.

This regulation, although generally upheld in litigation, has been remanded to the Department by the U.S. District Court for the District of Columbia for revision to exempt from its requirements undeveloped range lands and small farm acreage. In Re: Permanent Surface Mining Regulation Litigation, C.A. 79-1144 (D.D.C., February 26, 1980). The court found that the Secretary exceeded his statutory authority by not allowing the alluvial valley floor hydrology of undeveloped rangelands and small farm acreage outside the permit area to be damaged, just as it could be damaged inside the permit area. Slip op. at 53. In your review of mine plans and permit applications, you should be mindful, therefore, that interruption of small farm acreage and undeveloped rangelands on AVFs can be allowed as an exemption from the requirements of 30 C.F.R. 785.19(e)(1)(ii)(B).

In practical terms, this rule provides that, if the operator can demonstrate that the diversion will not affect ongoing or prospective agricultural activities which are significant to farming on AVF lands (except undeveloped rangelands and small farm acreage), then the operation may obtain a permit. If any ongoing or prospective agricultural activities on the AVF are not dependent on the diverted water or will not be impacted because of the development of alternative water sources, then the operation can also obtain a permit.

On the other hand, the Act still does not allow a mining operation to impair permanently the hydrologic balance of downstream areas, even undeveloped rangelands and small farm acreage. Section 515(b)(10)(F) of the Act requires operations to:

[preserve] throughout the mining and reclamation process the essential hydrologic functions of alluvial valley floors in the arid and semi-arid areas of the country.

The water resource performance standards that implement Section 515(b)(10)(F) are generally found at 30 C.F.R. 816.41 - 816.57. These require, inter alia, the planning of mining activities "to prevent long-term adverse changes in [the prevailing hydrologic balance] that could result from those activities." 30 C.F.R. 816.41(a). Thus, any permit issued to the proposed operation "shall require that such surface coal mining operation will meet [these] applicable performance standards. ..." SMCRA Section 515(a). A careful and critical scrutiny of the hydrologic protection provisions contained in the mine plan and permit application is, therefore, advisable.

b) Relationship of hydrology requirements to State water law.

Mr. Bishop apparently had been advised that, in accordance with the applicable state law, the farm's transfer of its water rights to the proposed operation has created a priority or superior water right in the proposed mining operation. Although a priority right was created, this does not grant the operation the unlimited use of the water. Limitations to that use will depend on the individual State's water law. In Colorado, for example, certain limits may be placed on the priority user's water rights consistent with decreed rights of the District Water Court. See 45 Fed. Reg. 82181, December 15, 1980. Thus, Section 717(b), which requires the replacement of water supplies affected by a surface coal mine operation, "does not protect water users from the determination of their rights" in accordance with State water law. Ibid. Irrespective of the protections provided in the performance standards of the Act and the Department's regulations, actual diminution of water supply becomes a matter to be decided between users under State law, as provided in Section 717(a) of the Act.

Consequently, transfer of priority water rights to the proposed surface mining operation does not relieve that operation from the requirements and limitations of the Act and State water law. The permit applicant must still meet all applicable statutory and regulatory requirements. If problems of water supply (diminution, etc.) develop between the senior and junior water users, however, these become a matter to be determined through the application of State water law.

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SUBJECT

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