0010

mine file #5
ACT/007/013

United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
SUITE 310
625 SILVER AVENUE, S.W.
ALBUQUERQUE, NEW MEXICO 87102

TAKE PRIDE IN AMERICA

In Reply Refer To:

October 3, 1989

RECEIVED
OCT 20 1989
DIVISION OF
OIL, GAS & MINING

Dr. Dianne R. Nielson, Director
Division of Oil, Gas and Mining
Department of Natural Resources
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, UT 84180-1203

Re: Ten-Day Notice 89-02-107-6

Dear Dr. Nielson:

In accordance with 30 CFR 842.11, the following is a written finding regarding the Division of Oil, Gas and Mining's (DOGM) response to the above Ten-Day Notice (TDN):

On July 27, 1989, the Albuquerque Field Office (AFO) conducted a random sample oversight inspection of the Horse Canyon Mine; the OSM inspector was accompanied by a DOGM representative. The inspection resulted in the issuance of TDN 89-02-107-5, dated August 10, 1989, which was subsequently withdrawn and replaced by TDN 89-02-107-6 on August 30, 1989. DOGM received TDN 89-02-107-6 on September 5, 1989; AFO confirmed the DOGM response to this TDN via a telephone call to Richard Smith from Stephen Rathbun on September 15, 1989. AFO will consider this a timely response to TDN 89-02-107-6.

The TDN cites Utah regulation UMC 771.11 as the regulation believed to have been violated for violation 1 of 2. The TDN states that the coal mine operator will "Obtain a valid permit; * * * No person shall engage in or carry out underground coal mining activities unless that person has first obtained a valid permit issued by the Division under an approved program:"

Your response, dated September 15, 1989, states DOGM's view that, "* * * the TDN is a request for information on the part of your office, when in simple terms your office and the OSM Western Field Office have the information on hand sufficient to demonstrate that the bankruptcy actions of Kaiser Coal have precluded permitting of this facility." Included in your TDN response are several permit action documents including: "Re: Initial Completeness Review, Horse Canyon Reclamation

and Maintenance Plan, dated October 13, 1987"; "Re: Second Completeness Review, Kaiser Coal Corporation, Horse Canyon Mine, dated May 31, 1988"; "Re: Horse Canyon Second Completeness Review, dated August 3, 1988"; "Revised Response Deadline, Horse Canyon Second Completeness Review, dated August 23, 1988"; and "Re: Extension of Deadline for Response, Horse Canyon Completeness Review of May 31, 1988, dated November 4, 1988." The November 4, 1988 letter from DOGM extends the Kaiser Coal Corporation response deadline until December 30, 1988. This last document is the most recent correspondence that AFO is aware of which provides Kaiser Coal Corporation an established deadline for submittal of adequate responses to DOGM's Second Completeness Review of the Horse Canyon Reclamation and Maintenance Plan. Kaiser did not respond by December 30, 1988, and no further action was taken by DOGM.

DOGM received notification of the bankruptcy petition during a meeting held with Kaiser Coal Corporation on February 23, 1987. Subsequently, DOGM was notified again by hand-delivered letter from Fabian & Clendenin, Attorneys at Law representing Kaiser Coal Corporation, on February 26, 1987. That letter indicates (page 2) that "The bankruptcy court cannot ignore reclamation responsibilities under State and Federal law." As you note in your response, Judge Charles E. Matheson of the U.S. Bankruptcy Court ruled on July 13, 1988, that the State of Utah is exempt under 11 U.S.C. 362 (b)(4) and (5) when enforcing its environmental laws. The record demonstrates that DOGM pursued permitting actions concerning the Horse Canyon Reclamation and Maintenance Plan until December 30, 1988, well after the filing of the bankruptcy petitions. It, therefore, is clear that DOGM did not previously consider the bankruptcy actions as precluding permitting of the Horse Canyon facility. DOGM did not follow through on its obligation to either get the mine permitted or order reclamation of the site. OSM finds DOGM's response to TDN 89-02-107-6, violation 1 of 2, to be inappropriate.

DOGM's response to TDN 89-02-107-6, violation 2 of 2, states, "I am not sure of the value of the reference to a performance standards letter written by the Division in 1986, as noted in this TDN." The purpose in referencing the April 29, 1986, letter to Kaiser Coal is because it was by that letter that DOGM notified Kaiser that it must maintain the site in accordance with permanent program performance standards. The response further states, "In the meantime, the Division will continue to inspect this site and issue appropriate enforcement actions as required." AFO also notes in correspondence from DOGM to Kaiser Coal Corporation, dated August 23, 1988 that DOGM states, "Kaiser Coal Corporation will still be responsible for maintaining compliance with the performance standards as indicated in the regulations and Division directives to date." It is clear from the correspondence that Kaiser Coal Corporation is responsible for maintaining compliance with the performance standards, and DOGM is responsible for conducting inspections and issuing appropriate enforcement actions as required by the approved Utah Regulatory Program.

TDN 89-02-107-6, violation 2 of 2, states, "Failure to conduct underground coal mining activities in accordance with the requirements of the performance standards (the requirement to comply with the Permanent Program performance standards as stated in the Division's letter to Kaiser Coal Corporation dated April 29, 1986.) The Horse Canyon Mine; including but not limited to such things as: Failure to comply with performance standards: UMC 810.11; UMC 817.41(vii); UMC 817.45(d)(e); UMC 817.43; and UMC 817.72(d)." As evidenced by the random sample inspection, violations of the performance standards exist and DOGM's failure to address these violations in accordance with the requirements of Utah's program (UMC 842.12(a)a) constitutes an arbitrary and capricious response. Therefore, OSM finds DOGM's response to violation 2 of 2 to be inappropriate.

It should also be noted that correspondence from DOGM shows that the Horse Canyon permit was placed in temporary cessation and later suspended. Neither action was appropriate because Kaiser Coal did not have a permanent program permit. Temporary cessation and suspension of permits only apply to the permanent program. DOGM's initial program did not contain provision for permitting.

If you disagree with these findings, you may request an informal review in accordance with 30 CFR 842.11(b)(1)(iii)(A).

Sincerely,

Robert H. Hagen, Director
Albuquerque Field Office