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Norman H. Bangerter
Governor

Dee C. Hansen
Executive Director

Dianne R. Nielson, Ph.D.
Division Director

State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5340

October 16, 1989

CERTIFIED RETURN RECEIPT REQUESTED
No. P 075 063 266

Mr. Robert H. Hagen, Director
Albuquerque Field Office
Office of Surface Mining
Reclamation and Enforcement
Suite 310, Silver Square
625 Silver Avenue, S.W.
Albuquerque, New Mexico 87102

Dear Mr. ^{RH}Hagen:

Re: TDN X89-02-107-6TV2, Horse Canyon Mine, PRO 007/013, Carbon County, Utah

Pursuant to provisions enumerated in Section (3) (b) of OSM Directive INE 35, the Division disagrees with the finding, as made by the OSM Albuquerque Field Office October 3, 1989, that the Division's response to parts 1 and 2 of the above-referenced TDN is inappropriate. The Division hereby initiates a request for an informal review and appeal of this finding.

First, please note this clarification with respect to response deadlines. You indicated in a telephone conversation on October 6, 1989, that a determination of inappropriateness had been mailed October 3. When this had not been received by October 11, Lowell Braxton called your office and was provided a fax copy on that date. I ask that the response provisions of INE 35 consider October 11 the receipt date for OSM's October 3 letter. You might wish to consider sending future correspondence of this nature to the Division Certified Return Receipt Requested.

In considering the appeal, the Deputy Director is asked to review the language of number 1 of 2:

"Failure to obtain a valid permit; ...no person shall engage in or carry out underground coal mining activities on nonfederal or non-Indian lands within the state, unless that person has first obtained a valid permit issued by the Division under an approved program. Location: Horse Canyon Mine, UMC 771.11."

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Both the Division and the AFO agree that a Mining and Reclamation Plan (MRP) is required for the Horse Canyon site. When Kaiser declared bankruptcy, the Division and Kaiser Coal were pursuing approval of a MRP, as is substantiated in Division files and information submitted to the AFO in the Division's TDN response. When the successor to Kaiser acquires the property, the Division will require that entity to resume the permitting responsibility for the property and to post appropriate reclamation surety or, as an alternative, secure approval of a reclamation plan and initiate reclamation. At the time Kaiser filed for bankruptcy, I discussed options for ensuring responsibility for the Horse Canyon property within the Coal Regulatory Program with Bob Hagen and other representatives of OSM's management. Subsequent to that discussion, the Division kept OSM informed on developments regarding the bankruptcy and acquisition of properties, and these discussions continue to this time.

In review of the Division's September 15, 1989, response to the TDN, OSM references the series of correspondence between the Division and Kaiser concerning the permitting effort. The Division appreciates OSM's notation of correspondence verifying the ongoing effort to permit the Horse Canyon Mine. In fact, OSM was aware that the Division received and responded to Completeness Reviews through May 31, 1989 and that after August 3, 1988, the Division extended deadlines for responses to deficiencies, pending finalization of the sale to the Intermountain Power Agency (IPA). OSM did not object to these delays. IPA initiated discussions with the Division in 1988 concerning the bonding and permitting of the Horse Canyon Mine. The bankruptcy court approved the IPA sale on February 15, 1989. The closing has been delayed pending resolution of a challenge by the United Mine Workers.

In the Division's consideration, issuance of an NOV or CO for failure to permit would not hasten the permitting action by Kaiser. Nor did the company have the ability to reclaim the property, short of the bankruptcy court allocating the money to complete a technically adequate plan and perform the work. Furthermore, it is inconsistent to expect the Bankruptcy Court or the Division to on the one hand support the sale of the property to a responsible party who would post the bond and complete the permit, while on the other hand forcing the seller to initiate reclamation or complete permitting on a property it would no longer control. At this point, issuance of the NOV serves only to complicate the sale and subsequent permitting.

The Deputy Director should consider in the appeal the language stated in number 2 of 2:

"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, UMC 810.11."

"The Horse Canyon Mine; including but not limited to such things as: Failure to selectively place and seal acid-forming and toxic-forming materials: Exposed coal at the Woodard Canyon portals, UMC 817.41(vii)."

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"Failure to divert runoff away from disturbed areas, failure to divert runoff using protected channels or pipes through disturbed areas so as not to cause additional erosion. Location: The Solid Waste landfill, UMC 817.45(I)(e)."

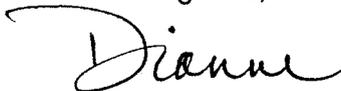
"All surface drainage from the area above the coal processing waste and from the crest and face of the waste disposal area shall be diverted in accordance with UMC 817.83. Location: Road Junction refuse excepting the prelaw parts of the refuse, UMC 817.72(d)."

Again, the Division's position is that by maintaining an inspection frequency appropriate to the level of activity at this site (quarterly, based on suspension of operations), and issuing violations against performance standards where appropriate, that the Division's programmatic requirements are met. The Division does inspect against performance standards to the extent that such inspections can be done without the specificity of a permit to inspect against. Many of the specific regulations cited in the TDN require approval of designs with subsequent construction before a finding can be made that a performance standard is fully met. Recognizing that there is no permit, this argument becomes circular. None the less, Notices of Violation issued by the Division have been appropriately responded to by the operator in the past, and the operator has maintained the site. The real issue in this case is lack of a permit against which to validate achievement of performance standards, and lack of an operator with full fiscal capability to finance the permit.

At no point prior to issuance of the TDN did either of the above-referenced OSM offices ever indicate that an enforcement action against Kaiser was warranted, our routine discussions of the bankruptcy notwithstanding. Withdrawal of the numbers 1 and 2 portion of this TDN will not obviate the Division's responsibility for continued permitting, given an operator capable of consummating a MRP. However, a finding of an arbitrary and capricious action on the part of the state will require a federal action against a bankrupt mine operator that may cloud the eventual sale of this property to a responsible entity. Based on the above, I appeal the facts and circumstances of parts 1 and 2 of this TDN, and ask that they be withdrawn.

Thank you for your consideration of this appeal.

Best regards,



Dianne R. Nielson
Director

vb
cc: L. Braxton
R. Smith
J. Helfrich
Price Field Office
MI78/42-44