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FAX MESSAGE

DATE: April 9, 2001

TO: Paul Baker-UDOGM

FAX: 801-359-3940

FROM: Tom Paluso *Tom*

SUBJECT: Lila Canyon Mine MRP Changes and BLM Legal Action

NUMBER OF PAGES INCLUDING COVER SHEET: 15

Copy Paul: Dave

Shawing

2/007/013

Copy Karen, Ann, Mary Ann

(2-sided)

Attached are the corrected Table 4-2 and 4-2A as per our conversation.

I have also enclosed the BLM/IBLA latest decision. Based upon this decision and what I have heard from the BLM, the BLM will sign off on the rights-of-way needed for the Lila Canyon Mine. According to Mark Mackiewicz of the BLM, their signing could happen rather quickly.

With this in mind, it is very important that UDOGM move ahead with the Lila MRP approval as quickly as possible.

Please call me if you have any questions on this material I have sent you.

Table 4-2 Surface Ownership Permit Area Both Horse Canyon and Lila Canyon									
Township	Range	Section	State Acres		Federal Acres		Private Acres		
			A	B	A	B	A	B	
15 S	14 E								
		33					60.70 (2)		
								49.90 (1)	
		34						23.62 (2)	
									25.68 (1)
							25.20 (3)		
16 S	14 E	2	248.30	0.76					
		3			127.03		204.30 (1)		
		4					189.00 (1)		
		5					20.00 (1)		
		8					40.00 (1)		
		9					120.00 (1)		
		10				28.20	30.85 (1)	76.00 (1)	
		11				18.11	106.65	120.20 (2)	341.05 (2)
		12			40.00		600.00		
		13					640.00		
		14					640.00		
		15					157.50		120.00 (1)
		22					40.00		
		23					560.00		
24					640.00				
25					320.00				
26					120.00				
16 S	15 E	19				110.00			
		30				190.00			
			State Acres		Federal Acres		Private Acres		
			A	B	A	B	A	B	
SUB TOTAL			248.30	40.76	173.34	4124.15	909.45	537.05	
Total "A" Horse Canyon					1331.09				
Total "B" Lila Canyon					4701.96				
GRAND TOTAL					6033.05				

Please note
 (1) UEI
 (2) Eardley
 (3) Popper

Table 4-2A Coal Ownership Permit Area Both Horse Canyon and Lila Canyon									
Township	Range	Section	Federal Lease Number	State Acres		Federal Acres		Private Acres	
				A	B	A	B	A	B
15 S	14 E								
		33	SL-046512			60.70		49.90 (1)	
		34	SL-046512			23.62		25.68 (1)	
								25.20 (2)	
16 S	14 E								
		2		248.30	0.76				
		3	SL-066145			221.27		110.06 (1)	
		4						189.00 (1)	
		5						20.00 (1)	
		8						40.00 (1)	
		9						120.00 (1)	
		10	SL-066145			59.05	76.00		
		11	SL-066145			132.29	133.72		
			SL-066490				320.00		
		12	SL-066490				320.00		
			U-014218				320.00		
		13	U-0126947				320.00		
			SL-066490				320.00		
		14	SL-066145				160.00		
			SL-066490				480.00		
		15	SL-066490				80.00		
			SL-066145				120.00		
			BLM (No Coal)				77.50		
		22	SL-066490				40.00		
		23	SL-066490				560.00		
		24	SL-066490				240.00		
			SL-069291				80.00		
			U-0126947				320.00		
		25	SL-069291				160.00		
			U-0126947				120.00		
			U-014217				40.00		
		26	SL-066490				80.00		
			SL-069291				40.00		
16 S	15 E	19	U-0126947				110.00		

Table 4-2A (continued) 6115.17									
Coal Ownership Permit Area Both Horse Canyon and Lila Canyon									
		30	U-0126947				190.00		
				State Acres		Federal Acres		Private Acres	
				A	B	A	B	A	B
SUB TOTAL				248.30	0.76	496.93	4707.22	579.84	0.00
Total "A" Horse Canyon				1325.07					
Total "B" Lila Canyon				4707.98					
GRAND TOTAL				6033.05					

Please note:

- (1) UEI
- (2) Eardley
- (3) Popper

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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

SOUTHERN UTAH WILDERNESS
ALLIANCE,

Appellant.

v.

PRICE FIELD OFFICE
BUREAU OF LAND MANAGEMENT,

Respondent.

In the matter of the Decision of the Price
Field Office Finding No Significant Impact
for the Lila Canyon Coal Mine Proposal,
EA No. UT-070-00-22

Docket No. IBLA 2001 - 57

ANSWER OF THE BUREAU OF LAND MANAGEMENT TO APPELLANT'S
STATEMENT OF REASONS

I. BACKGROUND

UtahAmerican Energy, Inc. (UEI) holds valid existing rights to Federal and State coal leases in Emery County, Utah: Federal leases SL-066145 (issued 6-19-45), SL-066490 (issued 12-31-47), and SL-069291 (issued 4-1-50), and State of Utah leases U-0126947 (issued 12-1-47), U-014217 (issued 2-1-55), and U-014218 (issued 2-1-55) (the coal leases).

In February of 1998, UEI submitted a request for a right of way to the BLM for the construction, operation, and maintenance of a coal haul access road, power line, and mine-related surface facilities necessary for the development of these leases. UEI's request was made pursuant to § 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §1761, and the right of way regulations at 43 CFR Part 2800.

The lands encompassed by the above described coal leases were found in the 1999 wilderness re-inventory to contain wilderness values. Plate IV to the EA, graphically illustrates this.¹ In response to its responsibilities under §102 (2) (C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C § 4332 (2) (C), the BLM undertook a two year study of the affects of the proposed action on the human environment. In the NEPA process, BLM received comments from the public which it considered, as well as input from a number of State and Federal agencies with expertise in this

¹ It is questionable whether BLM should have included the areas covered by UEI's coal leases as containing wilderness characteristics in the first place, as BLM records indicated that this area was covered by coal leases which were valid existing rights far before the passage of FLPMA.

matter, including the U.S. Fish and Wildlife Service, the Office of Surface Mining, and the Utah Division of Oil, Gas and Mining. In addition BLM's own experts in mineral development, wildlife management, archeology, and hydrology contributed. Appellant, SUWA, has presented no professional evidence to support their claims, but merely asserts them through the opinions of their attorneys. Perhaps the most telling example of this is appellant's assertion of the impacts on the big horn sheep in which they refer to a newspaper article which indicates that populations of desert big horn sheep in the Moab area are lower than biologists would prefer. As pointed out by the intervener, UEI, in its Petition for Intervention of Utah American Energy, Inc. Response to Notice of Appeal in Opposition to Petition for Stay, at 4-5, the big horn sheep in the Lila Canyon area are not desert big horn sheep as were discussed in the newspaper article, but were instead rocky mountain big horn sheep which are certainly not threatened or endangered and which had been introduced into the Lila Canyon area. In addition BLM, and UEI have agreed to mitigation which would insure the continuing health of these rocky mountain big horn sheep through guzzlers and other means.

II. ARGUMENT

A. THE BLM ENVIRONMENTAL ASSESSMENT TOTALLY SUPPORTS ITS FINDING OF NO SIGNIFICANT IMPACT.

The BLM prepared an Environmental Assessment (EA) identified as No. UT-070-99-22, for the proposed action by UEI to develop its coal leases described above, all of which were issued prior to 1960, and are valid existing rights, for the issuance of rights of way to develop these valid existing rights. The conclusion of BLM from the EA was that the proposed action, as mitigated by agreement between BLM and UEI, would not have significant

impacts to the quality of the human environment, and issued a Finding of No Significant Impact (FONSI). The FONSI was based upon the fact that although the acreage contained in the UEI's leases is quite large, UEI was willing to develop its mine with a minimum of impact to the area involved. As indicated in the EA, no surface disturbance to the wilderness study area will occur except for the possibility of some subsistence which would be substantially unnoticeable. EA at 54 - 55 Approximately 25 acres of lands within the re-inventory areas found to have wilderness characteristics in the 1999 re-inventory might be affected by the proposed action. It is also indicated in the EA at 54 that the majority of the re-inventory areas are at least 1,500 feet above the underground workings and that therefore no significant impact to wilderness values on the surface would occur.

In any case, the law regarding valid existing rights within WSAs, and by necessary implication, within areas identified by an inventory as having wilderness characteristics, is clear. Where a valid existing right is concerned, within a WSA, BLM should consider whether the valid existing right could be allowed to be reasonably enjoyed without impairing the area's suitability for wilderness. If it could not, then the holder of the valid existing right should be allowed to take action which might impair the area's suitability for wilderness, subject to the requirement that no activity be allowed that would have an unnecessary or undo impact on the land and its resources, §603 of FLPMA, 43 U.S.C. §1782, it should be noted that the concept of impairment as contained in §603 of FLPA, 43 U.S.C. §1782, relates to impairment that would prevent the Congress from designating a entire WSA as a formal wilderness area. There is no indication that potential subsistence from this mine under the WSA will necessary occur, or even if it does, that it would constitute impairment of even that

part of the WSA, let alone the entire WSA. It would not disqualify the Turtle Canyon WSA from consideration by Congress of this area for wilderness designation.

Regarding the lands found to have wilderness characteristics in the 1999 re-inventory, as indicated above, it is questionable whether the areas included over these coal leases, which are valid existing rights, should have been included in the re-inventory at all, as they were identified as valid existing rights in the BLM records. In any case, the results of inventories or re-inventories of public lands do not change the way in which such lands are managed.

As the Tenth Circuit stated in State of Utah v. Babbitt, 137 F3d 1193, 1208-09 (10th Cir. 1998):

The public participation requirements of § 202 apply only when the Secretary is making decisions regarding land use plans, i.e., when the Secretary is making decisions directly affecting the actual management of the public lands. Section 202's requirements do not apply when the Secretary is merely conducting an inventory of public lands under the authority of Section 201, an inventory which, according to the plain language of Section 201, shall not affect the management or use of the public lands. (Emphasis added)

Policy for managing such lands is explained in an April 15, 1999 memorandum from the Solicitor to the Utah State Director, a copy of which is enclosed. Of course, this policy deals with applications for new rights or privileges on these lands, and not with valid existing rights.

B. THE EA ADEQUATELY CONSIDERED ALL REASONABLE ALTERNATIVES

Appellant asserts that the BLM EA is inadequate because it failed to consider the alternative of suspending the coal leases. First, it is questionable whether BLM has authority to suspend these leases on the basis of the wilderness inventory. BLM can only suspend a coal lease on the basis of a finding that it would be in the interest of conservation. 30 U.S.C. § 209.

Second, even if BLM has the authority to suspend these leases pending a determination as to their status as wilderness, either by congress in the case of the WSA, or initially by the Department in the case of the land included in the 1999 re-inventory and found to have wilderness characteristics, the fact is that these coal leases remain valid existing rights and ultimately UEI is entitled to develop them whether they are considered WSA's or even if Congress were to put these areas in official wilderness status, unless Congress chose at some future date to compensate UEI for them in the form of a taking.

It has been two decades now since Congress received the Department's recommendations as to the suitability or non-suitability of whether WSAs should be legislated into official Wilderness Areas or not. It is not reasonable to essentially suspend these leases for a totally indefinite period pending the outcome of the land use planning process as to the 1999 inventory areas and for both those areas and the WSA for an unknown and indefinite period as to when Congress may chose to act on the inclusion or non-inclusion of these areas in the official Wilderness System.

Suspension of these leases pending final resolution of their land status as to wilderness is simply not a viable alternative. When the Department or Congress ultimately decides their status as wilderness or not wilderness they will still be subject to these coal leases which are valid existing rights.

C. THE PROPOSED ACTION WILL NOT HAVE SIGNIFICANT IMPACTS THAT REQUIRE AN EIS

This section of appellant's Statement of Reasons (SOR) is confusing. It seems to be merely repetitive of what they have already said. In any case we believe that our analysis in

section A of this Answer adequately addresses this assertion regarding significant impacts, including no significant impacts on either the WSA or the 1999 re-inventory areas found to have wilderness characteristics.

D. BLM'S EA TOOK A HARD LOOK AT THE IMPACT OF THE PROJECT TO ALL SIGNIFICANT RESOURCE VALUES

As the courts have stated regarding compliance with NEPA, the purpose of an EA is to determine whether or not an Environmental Impact Statement (EIS) is needed because of significant impacts to the quality of the human environment, or whether a finding of no significant impact (FONSI) is justified. Sierra Club v. Hodel, 848 F2d 1068, 1091 (10th Cir. 1988). As the board has indicated in a number of cases, a BLM EA and FONSI will be affirmed when BLM has taken a hard look at the environmental consequences of its decision and when an Appellant has failed to demonstrate that BLM takes inappropriate action upon the discovery of a substantial environmental problem of material significance. Emerald Trail Riders Association, 152 IBLA 210 (2000); Southern Utah Wilderness Alliance, 152 IBLA 216 (2000); Defenders of Wildlife, 152 IBLA 1 (2000); Bales Ranch, Inc., et al., 151 IBLA 353 (2000); Wyoming Outdoor Council, et al., 147 IBLA 105 (1998). Clearly in this case, BLM has taken a hard look at the environmental consequences of approving UEI's application.

The rest of Appellant's points raised in there SOR have either already been addressed or are opinions by SUWA attorneys unqualified to make them. We will therefore discuss that issue in the following section of our answer.

E. THE BOARD HAS CONSISTANTLY RULED THAT IT WILL NOT SUBSTITUTE THE OPINION OF A APPELLANT FOR THAT OF THE BLM UNLESS THE BLM IS CLEARLY SHOWN TO BE WRONG; THIS MUST BE PARTICULARLY TRUE

WHERE THE BLM OPINIONS ARE MADE BY BLM SCIENTISTS AND SUPPORTED BY OTHER GOVERNMENTAL AGENCY SCIENTIFIC EXPERTS, AND THE OPPOSITION OPINIONS ARE MADE BY THE ATTORNEYS, WITH NO SUPPORT FROM SCIENTIFIC EXPERTS.

Under FLPMA, the Secretary of the Interior is charged with managing the public lands for multiple use purposes. He does this through the BLM. BLM, in conducting its duties as outlined by FLPMA, employs a vast array of professional people who together, as an interdisciplinary team, make decisions regarding management of public lands. Regarding the Lila Canyon right of way situation, and the EA which was prepared for that, the BLM employed reality specialists, wilderness specialists, hydrologists, and riparian area specialists, wildlife biologists, vegetation specialists and recreation specialists as well as archeological and paleontological specialist and ecological specialists.

Appellant's assertions in section D of their SOR are simply opinions by attorneys concerning a great number of scientific areas where BLM has reached professional conclusions from professionals qualified to make them. As the Board has indicated in a great many cases, differences of opinion between an appellant and the BLM simply do not cut it. Southern Utah Wilderness Alliance, 152 IBLA 216 (2000), and cases cited therein. This case goes well beyond that in that SUWA would have the Board substitute the judgement of their lawyers for that of the BLM and other professionals. This is simply not acceptable. This case does not even rise to the status of a difference of opinion between professional scientists, it is merely a difference of opinion by SUWA attorneys, who have a political agenda, against the professional judgments of the BLM scientists. We would also point out that other scientists in other agencies such as the U.S. Fish and Wildlife Service do not oppose this decision. The

Utah Division of Oil, Gas and Mining (UDOGM), with their team of geologists, who must also approve this plan, as SUWA points out, before it could be implemented. But that does not mean that the BLM cannot approve the necessary rights of way subject to that approval.

III. CONCLUSION

The BLM's EA totally supports its FONSI, concluding that no full-blown EIS was required for this project.

BLM's conclusion that the proposed action would not cause impairment to the Turtle Canyon WSA, or to the areas identified as having wilderness characteristics in the 1999 re-inventory was totally justified.

Appellant's arguments come down to a difference of opinion between Appellant's attorneys, and BLM's experts and other Federal and State experts on the public land resource issues involved. This being the case, IBLA clearly should uphold the BLM decision, and dismiss Appellant's appeal.

WHEREFORE, the Bureau of Land Management requests the Interior Board of Land Appeals to uphold the decision of the Bureau of Land Management which is here under appeal.

RESPECTFULLY submitted this 30th day of March, 2001.



David K. Grayson
Counsel for the Bureau of Land Management

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2001, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing ANSWER OF THE BUREAU OF LAND MANAGEMENT TO APPELLANT'S STATEMENT OF REASONS to the following:

Distribution by Certified Mail:

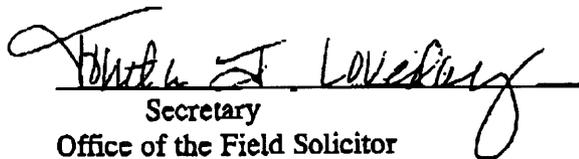
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