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To: "Mary Ann Wright" <maryannwright@utah.gov>
Date: 3/30/2005 2:35:33 PM
Subject: FW: Lila Canyon Mine Extension--Response to SUWA

Mary Ann:

Attached on behalf of UtahAmerican Energy, Inc. is our letter responding to SUWA's letter dated July 7, 2004, which commented on the Lila Canyon Mine Extension in connection with the Division's informal conference. This letter is provided at the request of the Division and updates UEI's comments provided in a letter dated July 7, 2004, to Director Braxton, replies to issues raised by SUWA's letter and testimony presented on that date and incorporates the Division's Technical Adequacy responses which address SUWA's concerns. We understand that the Division will issue a final decision in this matter on or before May 15, 2005.

The original of this transmission will be hand delivered to you this afternoon. Please let me know if you need anything further.

Thanks,

Denise
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CC: <pamgrubaughlittig@utah.gov>

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March 30, 2005

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Via Hand Delivery and E-Mail

Ms. Mary Ann Wright, Director
Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 1210
P.O. Box 145801
Salt Lake City, Utah 84114-5801

***RE: Response to Comments of Southern Utah Wilderness Alliance concerning the
Lila Canyon Mine Extension, Horse Canyon Permit, C/007/0013***

Dear Director Wright:

On July 7, 2004, the Utah Division of Oil, Gas and Mining ("Division" or "DOGM"), held an informal conference on the Lila Canyon Mine extension application. UtahAmerican Energy, Inc. ("UEI" or "Operator"), the Southern Utah Wilderness Alliance ("SUWA"), and Emery County, Utah, presented written comments and testimony at the hearing. On July 30, 2004, Director Lowell Braxton, as Division hearing officer, ruled that the materials submitted by the participants at the July 7, 2004 informal conference would be "considered by the Division in the normal course of its ongoing review of the new permit for the Lila Canyon extension of the Horse Canyon Mine." July 30, 2004, Order, ¶ 1 at page 3. At the request of the Division and on behalf of UEI, we hereby respond to the letter from SUWA dated July 7, 2004, regarding SUWA's comments and arguments presented at the informal conference. This response updates comments provided in UEI's July 7, 2004 letter to Director Braxton, replies to issues raised by SUWA's letter dated on July 7, 2004, and incorporates the Division's Technical Adequacy ("TA") responses which address SUWA's issues. It is UEI's understanding that the Division will incorporate this information into its final decision on the Lila Canyon Mine extension anticipated on or before May 15, 2005.

I. ACID OR TOXIC FORMING MATERIALS

1. SUWA: UEI has not provided data and analysis required under Rule 624, or information having equal value, as required under Rule 626.

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The Operator and the Division are fully aware of the pyrite contained in the coal seam as well as in the strata immediately above and below the coal seam. A complete analysis of the data has shown that when taking into consideration the neutralization potential, "Samples displayed no acid forming potential based on total sulfur."

The January 9, 2002 TA states: "The Division does not expect an acid mine drainage problem to occur at the Lila Canyon Mine because refuse will be disposed of on high ground, and the refuse will be buried below four feet of growth medium. With low precipitation (less than 13 inches annually) and four feet of soil cover, there will be limited contact between water and refuse."

The January 9, 2002 TA goes on to state: "Total sulfur in the coal is expected to be 1.1 to 1.3%, one-third of which is pyritic sulfur (Section 6.5.4.2. Analyses are provided in Appendix 6-2. If the waste is similar in sulfur content to the coal, the acid generating potential would be 1.3% Total Sulfur times 31.25 which is 40.63 Tons/1000 Tons of Waste. This potential acidity will be effectively neutralized by the soil encapsulating it since the soils in the vicinity of the refuse disposal area have a percent calcium carbonate equivalent to 200 Tons/1000 Tons of Neutralization Potential. This Neutralization Potential value (200 Tons/1000 Tons) would adequately neutralize the 40 Tons/ 1000 Tons of Potential Acidity generated by the mine waste, assuming the amount of sulfur in the mine waste is similar to the amount of sulfur in the coal."

3. SUWA: UEI proposes to use this material, the underground development waste, as structural fill for surface facilities.

UEI Response:

The R645 Regulations do not preclude the use of underground development waste as structural fill for surface facilities. The Division analyzed the use of underground development waste as structural fill and determined that using underground development waste as fill, as proposed by the Operator, was within the R645 Rules. See pages 119 and 120 of the November 29, 2004 TA.

The November 29, 2004 TA at page 120 states: "The R645 Rules require that coal mine waste be disposed of in an approved disposal area such as the refuse pile and, at a minimum, be covered with four feet of nontoxic and noncombustible material. The reclamation plan specifies four feet of subsoil and topsoil will be placed over the refuse pile, including the slope-rock underground development waste used to build the pads and left in place for final reclamation (Section 553.300, page 59; Section 731.311, page 46; Appendix 5-7, page 3)."

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II. SUBSURFACE WATER RESOURCE MAPS

SUWA: Figure 7-1 shows water levels for only a very small portion of the mine site between the three IPA wells. The area for which data exist only covers about 162 acres, which is approximately 3.5 percent of the 4,664-acre permit area.

UEI Response:

The November 29, 2004, TA at page 52 states: "The Division received comments that extrapolation of the potentiometric surface on Plate 7-1 ignored faults, ignored the car rotary dump, ignores the most recent data, and covers an unacceptably large area based on just three closely spaced data points. The Division notes that the potentiometric surface also does not extend to the 1993 BXG measurement in the Horse Canyon Mine. In spite of these limitations, the information provided is sufficient to meet the requirements of R645-301-724.100, because the potentiometric surface and the projected water-coal contact on Plate 7-1 provide a reasonable approximation of the depth to water in the coal seam and in water-bearing strata above and potentially impacted strata below the coal seam."

DOGM has determined that the information submitted by UEI was sufficient to meet the requirements of R645-301-724.100. However, Figure 7-2A has been revised to include the car rotary dump site, which is the BXG measurement, and has been expanded to include the applicable areas of the permit.

SUWA: Figure 7-2 is not a cross-section as suggested by SUWA. Rather, Figure 7-2 depicts water level changes through time, not through the permit area.

UEI Response:

Figures 7-2A and 7-2B present the seasonal fluctuations of the water levels through the permit area as contour maps and hydrographs. The Division reviewed the information submitted by UEI and has determined it to be adequate.

The November 29, 2004 TA at page 55 states: "The Division received comments that the Permittee had not described seasonal variation in ground water – especially with maps or cross sections in compliance with R645 Rules R645-301-722.100. Water levels for the IPA piezometers are tabulated in Appendix 7-1 (DOGM Data Base, And Figure 7-2B). Water levels have varied through time, but the data do not show distinct seasonal variation. Nevertheless, the Permittee has mapped a set of spring and fall water-level elevation contours on Plate 7-1 (Figure 7-1 end of Volume 6 has been changed to Figure 7-2A and moved to the end of the text in Chapter 7.), which serve to emphasize the minor seasonal effect. Figure 7-2 (Figure 7-2 has been changed to Figure 7-2B) graphically

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shows the temporal variations. Seasonal variation in springs is documented in Appendices 7-1, 7-2, and 7-6 and in data submitted to the Division's database: maps and cross sections are not amenable to showing the seasonal variation of these flows."

The November 29, 2004 TA at page 72 states: "Water-level elevation contours are on Plate 7-1 Water levels for the IPA piezometers are tabulated in Appendix 7-1, and although the data do not evidence seasonal variations, the Permittee has portrayed variations of head on a contour map in Figure 7-1 (Volume 6) (Figure 7-1 end of Volume 6 has been changed to Figure 7-2A and moved to the end of the text in Chapter 7.) and shown them graphically in Figure 7-2" (Figure 7-2 has been changed to Figure 7-2B)."

III. SURFACE WATER RESOURCES

SUWA: Rule 724.200 requires the applicant to submit information on surface water quality and quantity sufficient to demonstrate seasonal variation. The Rule further requires the collection, at a minimum, of baseline data on specified parameters for the water quality description and of baseline information on seasonal flow rates for the water quantity description. For years, the Division has interpreted this Rule to require the submission of baseline information collected quarterly for a minimum of two years prior to permit issuance.

SUWA: In addition to numerous ephemeral washes, there are six intermittent streams within the permit area: Lila Canyon, Little Park Wash, Stinky Spring Wash, IPA #1 Wash, Pine Springs Wash, and No Name Wash.

UEI Response:

SUWA has made the erroneous assumption that these washes are intermittent. Some of the above-referenced washes fit the definition of intermittent stream, i.e., they drain a watershed of at least one square mile. However, analysis of data collected by UEI has shown that the streams are actually ephemeral and not intermittent.

The November 29, 2004 TA on page 63 states: "Although some drainages are intermittent under the definitions in the R645 Rules, flow in the channels of Lila Canyon Wash, Little Park Wash, Right Fork of Lila Canyon, and Stinky Spring Wash has been determined to be ephemeral and occurs only in response to precipitation runoff or snowmelt (Section 731.220, p. 41)."

SUWA: UEI has never submitted any data on surface water quantity or quality for any of the washes. UEI and the Division know that these drainages flow only intermittently in response to snowmelt runoff and/or rainfall events.

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UEI Response:

The November 29, 2004 TA at page 63 states: "The Permittee has monitored the ephemeral washes above the permit area randomly since 1988 when access has allowed the sites to be monitored, other than during spring runoff and rain storms. This data is reported in Appendix 7-1 and the Division's coal database and without exception they have been found to be dry (Division's database)."

The November 29, 2004 TA at page 63 states: "No facilities or diversions are planned for intermittent drainages at the Lila Canyon Extension. Because of the ephemeral nature of these drainages, the probable condition is dry with occasional flow during spring snowmelt and summer thundershowers. Detailed information on water quality and time and magnitude of flow in these drainages is not needed to design, operate, or reclaim the mine, minimize disturbance to the hydrologic balance, or meet other requirements of the R645 Rules."

SUWA: UEI only reports several observations of "no flow;" however these do not provide the data required under Rule 724.200.

UEI Response:

The November 29, 2004 TA at page 63 states: "The Permittee has monitored the ephemeral washes above the permit area randomly since 1988 when access has allowed the sites to be monitored, other than during spring runoff and rain storms. This data is reported in Appendix 7-1 and the Division's coal database and without exception they have been found to be dry (Division's database)."

The November 29, 2004 TA at page 63 states: "No facilities or diversions are planned for intermittent drainages at the Lila Canyon Extension. Because of the ephemeral nature of these drainages, the probable condition is dry with occasional flow during spring snowmelt and summer thundershowers. Detailed information on water quality and time and magnitude of flow in these drainages is not needed to design, operate, or reclaim the mine, minimize disturbance to the hydrologic balance, or meet other requirements of the R645 Rules."

SUWA: UEI has never attempted to collect these data even though remote methods for collecting both water quality and flow depth are well within the state of the art, are standard practice by the U.S. Geological Survey, and have been used in the permitting of other coal mines in Utah.

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UEI Response:

Contrary to SUWA's allegations, UEI has attempted, on numerous occasions, to collect data on the ephemeral drainages. These remote locations are too dangerous to access during severe rainstorms and flash floods. UEI offers to accompany anyone, including SUWA, to any of the sampling sites at any time that these areas can be safely accessed. DOGM has determined that using remote samplers and crest stage gauges in the Lila Canyon Extension would not provide information relevant to meeting the requirements of the R645 Rules.

The November 29, 2004 TA, pages 57 and 58 states: "The Division received comments that seasonal variation of Lila Canyon and Little Park Wash must be shown, and that remote samplers and crest-stage gauges should be used to monitor the intermittent channels. . . . It is the conclusion of the Division that using remote samplers and crest-stage gauges in the Lila Canyon Extension would not provide information relevant to meeting the requirements of the R645 Rules preventing off-site impacts, facilitating reclamation, or otherwise protecting the hydrologic balance and environment."

IV. GROUND WATER QUANTITY

SUWA: Rule 724.100 requires the applicant to submit data on the seasonal quantity of ground water. Ground-water quantity descriptions will include, at a minimum, approximate rates of discharge or usage and depth to the water in the coal seam, and each water-bearing stratum above and potentially impacted stratum below the coal seam. As with surface water, the Division's own guidance interprets this rule to require collection of baseline data quarterly for two years. UEI has failed to submit data required under this rule.

UEI Response:

The tables on #14 show that all required baseline has been completed. The requirement of two years of quarterly baseline data is found in the "Coal Regulator Program Directive" which is a guideline and has not been promulgated as a rule through the rulemaking process. The disclaimer at the beginning of the guidelines states: "This non-binding directive is intended for internal direction for the Utah Coal Regulatory Program to clarify the implementation of the Utah Coal Rules. It neither confers rights nor imposes obligations on the Division or any other party. In the case where a conflict is perceived to exist between this directive and the Utah Coal Rules, the rules prevail."

For the regional aquifer:

SUWA: UEI does not provide two years of seasonal baseline data from IPA-1, -2, and -3, or from L-16-G and L-17-G. (Table 1)

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SUWA: UEI's description of the piezometric surface is clearly flawed in that it is depicted as a uniformly dipping planar surface over the entire permit area. UEI has extrapolated a piezometric surface to the 4,664-acre permit area on the basis of water level data in the IPA wells, an area that only covers 3.5 percent of the permit area.

SUWA: UEI provides no information on the rates of discharge of ground water, the hydraulic conductivity, the recharge area, or incredibly, the discharge area.

SUWA: UEI fails to address the effect of lithology, regional structure or faults on the movement, discharge, depth, etc., of the groundwater in the regional aquifer.

UEI Response:

Since the Lila Canyon Extension does not contain a regional aquifer SUWA's comments regarding a regional aquifer are irrelevant and do not need to be addressed.

The November 29, 2004 TA at page 53 states: "The Division received the following comments concerning ground water and the existence of a regional aquifer:

- The regional aquifer is not described;
- There is no information on the discharge area and discharge rates for the regional aquifer; and
- The Permittee has not established that the saturated zone is not an aquifer.

The BLM's July 2000 EA of the Lila Canyon Project labels the "coal formation" of the Blackhawk Formation as a regional aquifer, and mentions springs issuing from the Blackhawk at lower elevations within the canyons. However, the 1985 survey of the Horse Canyon area and the 1993 - 1995 survey of the area around Lila Canyon did not identify any seeps or springs issuing from strata below the upper Price River Formation (Plate 7-1A)(12)."

The November 29, 2004 TA at page 155 states: "The Division has received comments that UEI has not identified the discharge area for the regional aquifer. The Division will consider the potential for discharge from a regional aquifer in the CHIA." The CHIA is a document prepared by the Division, not the applicant.

For the perched aquifer:

SUWA: UEI does not provide two years of seasonal baseline data from the seeps and springs (L-6-G through L-12-G).

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UEI Response:

The tables on #14 demonstrate that all required baseline data has been provided by UEI. The requirement of two years of quarterly baseline data collection is found in the "Coal Regulator Program Directive" which is a guideline and has not been promulgated as a rule through the rulemaking process. The disclaimer at the beginning of the guidelines states: "This non-binding directive is intended for internal direction for the Utah Coal Regulatory Program to clarify the implementation of the Utah Coal Rules. It neither confers rights nor imposes obligations on the Division or any other party. In the case where a conflict is perceived to exist between this directive and the Utah Coal Rules, the rules prevail."

V. GROUND WATER QUALITY

SUWA: Rule 724.100 requires the applicant to submit data on the seasonal quality of ground water. Ground-water quality descriptions will include, at a minimum, total dissolved solids or specific conductance corrected to 25 degrees C, pH, total iron and total manganese. Again, the Division's own guidance interprets this rule to require collection of baseline data quarterly for two years. UEI has failed to submit data required under this rule.

UEI Response:

The tables on #14 demonstrate that all required baseline data has been provided. The requirements of two years of quarterly baseline data collection is found in the "Coal Regulator Program Directive" which is a guideline and has not been promulgated through the rulemaking process. The disclaimer at the beginning of the guidelines states: "This non-binding directive is intended for internal direction for the Utah Coal Regulatory Program to clarify the implementation of the Utah Coal Rules. It neither confers rights nor imposes obligations on the Division or any other party. In the case where a conflict is perceived to exist between this directive and the Utah Coal Rules, the rules prevail."

For the regional aquifer:

SUWA: UEI has never collected, or attempted to collect, any water quality samples from the IPA wells.

UEI has provided some data from Redden Spring (RS-2). However, Redden Spring is in the area of the Horse Canyon mine and therefore it does not represent pre-mining baseline conditions, it is not proposed for monitoring, and there are not two years of seasonal baseline data.

UEI has provided some data from L-16-G and L-17-G. However, it is not clear, based on the information presented by UEI, whether or not these springs are connected to the regional aquifer,

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and the effect, if any, of the Central Graben Fault. In addition, there are not two years of seasonal baseline data for these springs (Table 1).

UEI Response:

Since the Lila Canyon Extension does not contain a regional aquifer, SUWA's comments regarding a regional aquifer are not relevant and do not need to be addressed.

The November 29, 2004 TA at page 53 states: "The Division received the following comments concerning ground water and the existence of a regional aquifer:

- The regional aquifer is not described;
- There is no information on the discharge area and discharge rates for the regional aquifer; and
- The Permittee has not established that the saturated zone is not an aquifer.

The BLM's July 2000 EA of the Lila Canyon Project labels the "coal formation" of the Blackhawk Formation as a regional aquifer, and mentions springs issuing from the Blackhawk at lower elevations within the canyons. However, the 1985 survey of the Horse Canyon area by JBR and the 1993 - 1995 survey of the area around Lila Canyon by EarthFax did not identify any seeps or springs issuing from strata below the upper Price River Formation (Plate 7-1A)(12)."

The November 29, 2004 TA at page 155 states: "The Division has received comments that UEI has not identified the discharge area for the regional aquifer. The Division will consider the potential for discharge from a regional aquifer in the CHIA."

SUWA: UEI has never collected, or attempted to collect, any water quality samples from the IPA wells.

UEI Response:

As stated in the BLM completion report dated December 16, 1998 "Each drill hole was completed as a monitoring well to allow collection of water-level measurements." The IPA piezometers were drilled for water level only. Pulling a water sample from 1,200 feet deep up a 2" pipe is not practical and was never the intention of UEI.

SUWA: UEI has provided some data from Redden Spring (RS-2). However; Redden Spring is in the area of the Horse Canyon mine and therefore it does not represent pre-mining baseline conditions, it is not proposed for monitoring, and there are not two years of seasonal baseline data.

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UEI Response:

Redden Spring is one of the monitoring locations specified in the Horse Canyon Permit and has been monitored continuously since 1989.

SUWA: UEI has provided some data from L-16-G and L-17-G. However, it is not clear, based on the information presented by UEI, whether or not these springs are connected to the regional aquifer, and the effect, if any, of the Central Graben Fault. In addition, there are not two years of seasonal baseline data for these springs.

UEI Response:

Since the Lila Canyon Extension does not contain a regional aquifer, SUWA's comments regarding a regional aquifer are irrelevant and do not need to be addressed.

The November 29, 2004 TA at page 53 states: "The Division received the following comments concerning ground water and the existence of a regional aquifer:

- The regional aquifer is not described;
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The BLM's July 2000 EA of the Lila Canyon Project labels the "coal formation" of the Blackhawk Formation as a regional aquifer, and mentions springs issuing from the Blackhawk at lower elevations within the canyons. However, the 1985 survey of the Horse Canyon area by JBR and the 1993 - 1995 survey of the area around Lila Canyon by EarthFax did not identify any seeps or springs issuing from strata below the upper Price River Formation (Plate 7-1A)(12)."

The November 29, 2004 TA at page 155 states: "The Division has received comments that UEI has not identified the discharge area for the regional aquifer. The Division will consider the potential for discharge from a regional aquifer in the CHIA."

For the perched aquifer:

SUWA: UEI has not submitted two years of seasonal baseline data from the seeps and springs (L-6-G through L-12-G). Table 1.

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UEI Response:

Tables on #14 demonstrate that all required baseline has been provided by UEI. The requirements of two years of quarterly baseline data collection is found in the "Coal Regulator Program Directive" which is a guideline and has not been promulgated as a rule through the rulemaking process. The disclaimer at the beginning of the guidelines states: "This non-binding directive is intended for internal direction for the Utah Coal Regulatory Program to clarify the implementation of the Utah Coal Rules. It neither confers rights nor imposes obligations on the Division or any other party. In the case where a conflict is perceived to exist between this directive and the Utah Coal Rules, the rules prevail."

VI. COAL MINE WASTE

SUWA: "Coal Mine Waste" means coal processing waste and underground development waste. Rule 528.320 requires that all coal mine waste will be placed in new or existing disposal areas within a permit area which are approved by the Division for this purpose. Coal mine waste will meet the design criteria of R645-301-536, however, placement of coal mine waste by end or side dumping is prohibited.

UEI Response:

The R645 Regulations do not preclude underground development waste from being used as structural fill for surface facilities. The Division analyzed the use of underground development waste as structural fill and determined that using underground development waste as fill, as proposed by the Operator, was within the R645 Rules. November 29, 2004 TA at pages 119 and 120.

The November 29, 2004 TA Page 120 states: "The R645 Rules require that coal mine waste be disposed of in an approved disposal area such as the refuse pile and, at a minimum, be covered with four feet of nontoxic and noncombustible material. The reclamation plan specifies four feet of subsoil and topsoil will be placed over the refuse pile, including the slope-rock underground development waste used to build the pads and left in place for final reclamation (Section 553.300, page 59; Section 731.311, page 46; Appendix 5-7, page 3)."

SUWA: UEI proposes to dump coal mine waste (underground development waste), and use it as structural fill upon which the shop and warehouse will be built. This handling of the coal mine waste is in violation of Rule 528.320. In addition, it is unclear how UEI proposes to construct the shop and warehouse on this material when it is supposed to be placed in a disposal area.

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UEI Response:

UEI's proposed handling of the coal mine waste is not in violation of Rule 528.320. UEI proposes that the coal mine waste be moved by end or side dumping and will be "placed, spread, compacted and covered in an approved manner."

VII. INADEQUATE GROUND WATER MONITORING PLAN

UEI Response:

See response numbers IV and V above.

VIII. NO BASELINE DATA FOR SURFACE WATER MONITORING PLAN

UEI Response:

See response numbers IV and V above.

IX. THE PHC IS FLAWED

SUWA: Rule 728.200 requires that the PHC determination will be based on baseline hydrologic, geologic and other information collected for the permit application. As discussed at numbers 1-5 above, there are no baseline data or incomplete baseline data upon which the PHC can include findings.

UEI Response:

See UEI's Response to I-V, above. The PHC has been revised to address the following: adverse impacts to the hydrologic balance, sediment yield, acidity, total suspended and dissolved solids, flooding or stream alteration, and ground-water and surface-water availability.

X. WATER CONSUMPTION

SUWA: The PAP does not consider all sources of water that will be consumed, and contains an error in calculating the coal moisture loss.

UEI Response:

The calculations in the PHC have been revised to account for all water that will be consumed in the mining operation. Page 15 and 16 of the PHC state: "Adding the four losses due to mining equals 70.63 acre feet which is below the mitigation level of 100 acre feet. UEI does hold 362.76 acre feet of underground water rights to offset any

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consumption. Therefore, it is the opinion of UtahAmerican Energy, Inc. that water consumption by underground coal mining operations will NOT jeopardize the existence of or adversely modify the critical habitat of the Colorado River endangered fish species.” Page 16 of the PHC shows that the water usage at the mine will be approximately 70.63 AF/year, NOT the 112 AF/yr claimed by SUWA.

XI. CUMULATIVE IMPACT AREA

SUWA: The information provided by UEI is not sufficient to allow the Division to establish a hydrologically reasonable CHIA boundary.

UEI Response:

The Division, not the Operator is responsible for preparing the CHIA pursuant to R645-301-719.101. The Operator has provided to the Division with sufficient data as required by the R645 Regulations, to allow the Division to prepare the CHIA.

XII. OPERATION PLAN

According to Rule 731, the permit application will include a plan, with maps and descriptions, specific to the local hydrologic conditions. It will contain the steps to be taken during coal mining and reclamation operations through bond release to minimize disturbance to the hydrologic balance within the permit and adjacent areas, to prevent material damage outside the permit area, and to support approved post mining land use.

SUWA: The plan submitted by UEI fails to minimize disturbance to the hydrologic balance with regard to subsidence impacts.

UEI Response:

UEI has clearly shown the maximum extent of subsidence on Plate 5-3 (Subsidence Control Map). Section 525 discusses subsidence and mitigation in detail.

SUWA: UEI proposes to conduct mining operations within 100 feet of the Lila Canyon channel. UEI has not provided sufficient baseline data under R731.610 to support a decision by the Division to authorize mining within the stream buffer zone.

UEI Response:

Rules 731.610 and 611 refer to perennial or intermittent streams. UEI has demonstrated that all drainages within the MRP are either ephemeral or ephemeral acting. Ephemeral and ephemeral acting channels are not regulated under the 610 and 611 regulations.

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XIII. THE PAP LACKS REQUIRED SURVEY DATA

SUWA: The PAP fails to contain certain survey data required by R645-301-131 and 132.

UEI Response:

SUWA appears to have assumed that all data within the MRP is technical data collected by the Operator. The permit includes collected technical data as well as information generally available. Any surveys conducted by UEI or UEI's consultants include the data required by R645.301-131 and 132.

XIV. VEGETATION SURVEY IS NOT ADEQUATE

SUWA: The PAP fails to include a description of the vegetative communities and productivity throughout the affected area adequate to predict the potential for reestablishing vegetation. R645-301-321; - 323.

UEI Response:

The Range Creek and Price River drainages are not within the affected area and do not need to be surveyed. Plate 3-2 and Appendix 7-7 provide adequate information to satisfy the requirements of R645-301-321; - 323. All surveys were conducted at the appropriate times with DOGM's prior notice and in most cases with their participation.

XV. SITE -SPECIFIC RESOURCE INFORMATION IS NOT ADEQUATE

SUWA: The PAP does not contain the site-specific information required by the rules, and the information presented is not sufficient to design a protection and enhancement plan. R645-301-322.

UEI Response:

The Operator is not aware of any amphibians which are listed as a threatened or endangered species or even as sensitive species which require a formal inventory. The Mexican Spotted Owl survey inventory plan has been revised. Section 301-131, 132 has been revised to address Raptor survey concerns. Since the Price River and Range Creek will not be affected, SUWA's concerns about Southwest Willow Flycatcher in Range Creek and the Price River are moot. Sensitive Plant Species were re-inventoried. Furthermore, Dr. Kass's letter dated November 29, 2001 is no longer relevant. Information provided by UEI in Appendix 7-7 and 7-8 is adequate to satisfy R645-301-333.

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XVI. SUBSIDENCE IMPACT TO PLANTS AND ANIMALS ARE NOT ADEQUATELY ASSESSED

SUWA: The PAP fails to include information on subsidence adequate to assess impacts to plants and wildlife species. R645-301-322; -358.

UEI Response:

UEI has shown the maximum extent of subsidence on Plate 5-3 (Subsidence Control Map). Section 525 discusses subsidence and mitigation in detail.

XVII. IMPACTS TO FISH AND WILDLIFE ARE NOT ADEQUATELY ASSESSED

SUWA: The PAP fails to include information necessary to adequately assess impacts to fish and wildlife and related environmental values, including sensitive fish species identified by the U.S. Fish and Wildlife Service. R645-301-333; -358.

UEI Response:

The November 29, 2004 TA at page 49 states: "The Division received comments that there is not sufficient resource information to allow determination of the Probable Hydrologic Consequences (PHC). There was particular concern that there is not sufficient resource information for Range Creek drainage to evaluate the potential for adverse impacts. Plates 7-1A and 7-1 B, geologic map and cross-sections now include Range Creek drainage. The geology of the Range Creek drainage, as it relates to the Lila Canyon Extension, is discussed in Chapter 7 and the PHC (Appendix 7-3). Plate 7-1-B, shows no potential contact between the Sunnyside Coal seam and the stream channel in Range Creek. The PHC concludes that there will be no probable impacts to Range Creek."

The November 29, 2004 TA at page 59 states: "Information on geology and hydrology is adequate to prepare the PHC. Maps and cross-sections that include the Range Creek drainage have been added to the MRP, and a discussion of the Range Creek drainage has been added to Section 724.200 (p. 23) and Appendix 7-3 (pp. 9-10) to help clarify in the public record why regional impacts, particularly adverse impacts to Range Creek drainage, are not expected."

The November 29, 2004 TA at pages 60-61 states: "The Division has determined that it is reasonable not to include the Range Creek drainage in the PHC determination because adverse impacts to resources in Range Creek drainage are not reasonably expected. To clarify for the public record why Range Creek drainage will not be adversely impacted, the Division has required that the Permittee augment geologic and other resource information in the MRP to include the Range Creek drainage. Chapter 7 contains a

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geologic map and cross-section (Plates 7-1A and 7-1 B) that include Range Creek drainage, and the geology of the Range Creek drainage is discussed in Chapter 7 and the PHC. The PHC includes an evaluation of why adverse impacts to the Range Creek drainage are not probable.”

The PHC at pages 15 and 16 states: “Adding the four losses due to mining equals to 70.63 acre feet which is below the mitigation level of 100 acre feet. UEI does hold 362.76 acre feet of underground water rights to offset any consumption. Therefore, it is the opinion of UtahAmerican Energy, Inc. that water consumption by underground coal mining operation will NOT jeopardize the existence of or adversely modify the critical habitat of the Colorado River endangered fish species. Page 16 of the PHC clearly shows that the water usage will be approximately 70.63 Acre feet per year, NOT the 112 claimed by SUWA.”

The PHC at pages 4 and 5 states: “Concerns have been raised that there might be impacts of increased salinity from the solution of salts from the Mancos Shale. While it is likely that a small increase in TDS from salts picked up from the Mancos Shale, this is not expected to be a significant problem. Appendix 7-9 includes a calculation of how far mine discharge of 500 gpm would be expected to flow. This flow rate is thought to be higher than the expected discharge amount, but it does provide a worse case estimate. Because of infiltration, evapotranspiration, and diversion runoff from the channel to which the mine discharges to a stock pond, the mine discharge is not expected to reach the Price River. Therefore, it is not expected that any salinity increase would affect downstream waters.”

XVIII. DISTURBANCE, MONITORING, AND PROTECTION OF HABITAT

SUWA: The PAP fails to comply with the rules requiring the Operator to avoid disturbance of wildlife habitats and fails to describe how wildlife will be monitored and protected from hazardous materials. R645-301-358.400; 530; - 526.222.

UEI Response:

The November 29, 2004 TA at page 59 states: “Information on geology and hydrology is adequate to prepare the PHC. Maps and cross-sections that include the Range Creek drainage have been added to the MRP, and a discussion of the Range Creek drainage has been added to Section 724.200 (p. 23) and Appendix 7-3 (pp. 9-10) to help clarify in the public record why regional impacts, particularly adverse impacts to Range Creek drainage, are not expected.”

The November 29, 2004 TA at pages 60-61 states: “The Division has determined that it is reasonable not to include the Range Creek drainage in the PHC determination because

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adverse impacts to resources in Range Creek drainage are not reasonably expected. To clarify for the public record why Range Creek drainage will not be adversely impacted, the Division has required that the Permittee augment geologic and other resource information in the MRP to include the Range Creek drainage. Chapter 7 contains a geologic map and cross-section (Plates 7-1A and 7-1 B) that include Range Creek drainage, and the geology of the Range Creek drainage is discussed in Chapter 7 and the PHC. The PHC includes an evaluation of why adverse impacts to the Range Creek drainage are not probable.”

Appendix 3-5 of the MRP documents that since the period of continuous raptor surveys from 1998 to 2003, there have been NO tended nests in the immediate or general vicinity of the Lila Canyon surface facilities.

XIX. LAND USE CAPABILITY IS NOT ACCURATELY DESCRIBED, THE RECLAMATION PLAN IS NOT ADEQUATE, AND THE AREA IS UNSUITABLE FOR MINING

SUWA: The PAP fails to include information that accurately describes the capability of the land affected by coal mining and reclamation operations, fails to demonstrate that land be returned to its pre-mining land use. The BLM 1999 Wilderness Inventory demonstrates land within the mining area to have wilderness characteristics. R645-301-411.100 – 411.120; - 412; -414; R645-301-115.

UEI Response:

As set forth in UEI’s letter and testimony presented to the Division on July 7, 2004, the MRP adequately addresses land use. This issue was decided in favor of UEI in the December 14, 2001 Ruling of the Board of Oil, Gas & Mining in *SUWA v. DOGM*, Docket No. 2001-027, Findings of Fact, Conclusions of Law and Order. SUWA failed to timely appeal this ruling and is now barred from raising this issue. The MRP accurately describes the pre-mining land uses and sets forth a complete reclamation plan. The Utah Coal Program Rules require each permit application to include “a description of existing land uses and land-use classifications” (R645-301-411.130) and a plan to ensure that the postmining land use will be restored to “[t]he uses they were capable of supporting before any mining; or [h]igher or better uses.” See R645-301-413.100, -.120. The MRP meets these legal requirements.

The MRP discloses that the pre-mining land uses in the permit area, as determined by the Bureau of Land Management’s (“BLM”) Price River Management Framework Plan (“MRP”), are grazing, wildlife habitat, coal mining, and limited recreation. See Appendix 4-2. UEI has committed in the MRP to perform reclamation to restore the land to its premining land uses. The legal requirement is for an applicant to “demonstrate that the

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land will be returned to its premining land-use capability.” R645-301-414. The land manager of the federal lands involved, BLM, has identified the uses of “wildlife habitat, grazing and incidental recreation” as being the uses to which the land must be restored after operations. *See* MRP, Appendix 4-2. BLM has identified the post mining land uses and UEI’s reclamation plan thoroughly details how UEI will restore the project area to a condition that will support the uses identified.

UEI holds valid existing rights under federal coal leases to be developed under the MRP and the land is suitable for mining, consistent with the Price River MFP. The BLM has specifically determined that the Lila Canyon Mine Project “is in conformance with the objectives and recommendations of the Price River Area Management Framework Plan approved 1983 as amended.” BLM FONSI/Record of Decision at 9.

In September, 2004, the Interior Board of Land Appeals (“IBLA”) upheld, over SUWA’s challenge, BLM’s FONSI and Record of Decision granting UEI rights of way on public lands for surface facilities associated with the Lila Canyon Mine, the mine access road, a telephone line and a 46 kV power line. *Southern Utah Wilderness Alliance*, 163 IBLA 142 (Sept. 22, 2004), copy attached. The IBLA determined that BLM had taken a “hard look” at the environmental impacts of the Project on two wilderness inventory units (“WIUs”) proposed in the 1999 Utah Wilderness Reinventory, Desolation Canyon Inventory Unit 8 and Turtle Canyon Inventory Unit 4, as well as impacts to the Turtle Canyon Wilderness Study Area (“WSA”). 163 IBLA 142, 149. Notably, IBLA specifically quotes Stipulation No. 4 of *Utah v. Norton*, No. 96-C-870-B (D. Utah Apr. 14, 2003) which confirms that “[t]he 1999 Utah Wilderness Inventory shall not be used to create additional WSAs or manage public lands as if they are or may become WSAs.” 163 IBLA 142, 148 (emphasis added). On the basis of this stipulation, IBLA concluded that the WIUs are not subject to the restrictions on surface-disturbing activities afforded to WSAs under the non-impairment mandate of the Federal Land Policy and Management Act (“FLPMA”). 163 IBLA 142, 148. Therefore, SUWA’s suggestion in its July 7, 2004 letter that wilderness reinventory areas must be managed as though capable of supporting wilderness has been specifically overruled by the IBLA.

The Bureau of Land Management has determined the Lila Canyon Leases as suitable for coal development and that coal development within the Lila Canyon Project is in conformance with the Price River Management Framework Plan. The MFP remains in effect during amendment of the BLM’s land use plan by the pending Price River Resource Management Plan. BLM Handbook H-1601-1, § VII.E at p. 3 (Nov. 22, 2000) (existing decisions remain in effect during the amendment or revision process); *see* BLM Instruction Memo 2001-191, Aug. 6, 2001 (leasing decisions remain in effect during the amendment process).

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XX. CULTURAL RESOURCES HAVE NOT BEEN ADEQUATELY SURVEYED AND PROTECTED

SUWA: The PAP fails to include information from a complete cultural resource survey which includes Range Creek. R645-301-911.140-144.

UEI Response:

The April 8, 2003 TA at pages 60-61 states: "The Division has determined that it is reasonable not to include the Range Creek drainage in the PHC determination because adverse impacts to resources in Range Creek drainage are not reasonably expected. To clarify for the public record why Range Creek drainage will not be adversely impacted, the Division has required that the Permittee augment geologic and other resource information in the MRP to include the Range Creek drainage. Chapter 7 contains a geologic map and cross-section (Plates 7-1A and 7-1 B) that include Range Creek drainage, and the geology of the Range Creek drainage is discussed in Chapter 7 and the PHC. The PHC includes an evaluation of why adverse impacts to the Range Creek drainage are not probable."

XXI. SUBSIDENCE CONTROL IS NOT ADEQUATELY ADDRESSED (STATE-APPROPRIATED WATER SUPPLIES)

SUWA: The PAP fails to include information needed to assess the quality and quantity of all State-appropriated water supplies affected by subsidence. R645-301-525.130. – 400, 480, 510; 731.530.

UEI Response:

The November 29, 2004 TA at page 87 states: "Any State-Appropriated water supply that may be damaged by mining operations will either be repaired or replaced. As soon as practical, after proof of damage by mining in Lila Canyon, of any State-Appropriated water supply, UEI will replace the water. Water replacement may include sealing surface fractures, piping, trucking water, transferring water rights, or construction of wells. The preferable method of replacement will be sealing of surface fractures affecting the water supply. As a last resort, UEI will replace the water by transferring water rights or construction of wells.

The Division concurs with the water replacement program proposed by UEI. The first option should be to restore any water lost. UEI proposes to do that by sealing cracks, piping, or trucking water. When repairs are not possible, UEI commits to replacing water either by drilling wells or, as a final option, transferring water rights."

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XXII. THE COAL HAUL ROAD MUST BE INCLUDED AS PART OF THE PERMIT AREA

SUWA: The PAP must include the coal haul road within the “affected area.” R645-100-200.

UEI Response:

The Utah Board of Oil, Gas & Mining has previously upheld DOGM’s determination under its July 18, 2001 Analysis and Findings that the Lila Canyon County Road No. 126 is a public road which should not be included in the permit. *SUWA v. DOGM*, Docket No. 2001-027, Findings of Fact, Conclusions of Law and Order, dated December 14, 2001 at 19-20 (“Board Order”), copy attached. SUWA’s argument that the Lila Canyon Road is a public road, and must be included within the permit area, was specifically rejected by the Board Order. The Board applied the criteria under the “Carter letter” which defines the Division’s policy concerning the definition of “surface coal mining operations” as applied to roads as follows:

1. Was the road constructed, reconstructed or used exclusively for coal mining and reclamation activities: i.e., a multiple use, open access, public road?
2. Was the road acquired by a governmental entity and not deed to avoid regulation?
3. Is the road maintained with public funds or in exchange for taxes or fees?
4. Was the road constructed in a manner similar to other public roads of the same designation?
5. Are the impacts from mining on the road insignificant under Utah’s definition of “affected area” and “surface coal mining operations?”

With respect to each criteria, the Board found the Division’s July 18, 2001 Findings and Analysis to be reasonable and supported by substantial evidence in the record and specifically rejected SUWA’s efforts to include County Road No. 126 from the permit. *Id.* at 20; *see* July 18, 2001 Analysis and Findings, attached.

Contrary to the allegations of SUWA, the Lila Canyon County Road has been found to be a “public road” exempt from the “affected area” definition set forth at R645-100-200. The Division’s Analysis and Findings dated July 18, 2001 acknowledges that Emery County plans to make improvements to County Road No. 126. Further, contrary to SUWA’s allegations, the road improvements do not disqualify the road from being a public road owned and maintained by Emery County. Notably, Criterion No. 5 of the

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Carter letter specifically addresses this issue and the Board Order upheld the Division's finding that impacts from mining on the road are insignificant. The Board Order upholds this finding, SUWA did not appeal this finding and it is *res judicata* and binding as the law of this case.

XXIII. THE PROPOSED LILA CANYON MINE MUST BE APPLIED FOR, NOTICED AND PROCESSED AS A NEW PERMIT

SUWA: The proposed mine must be processed and approved as a new permit. R645-303-222.

UEI Response:

DOGM is properly processing the MRP as a Permit Extension under R645-303-220 and R645-303-226. As a significant permit revision, this extension is processed as provided in R645-303-224 and approval under essentially the same requirements as those of a new permit. See R645-300-100, 300-200, R645-301 and R645-302.

Please let me know if the Division needs any further information in response to SUWA's comments.

Very truly yours,



Denise A. Drago

DAD:jmc:340973.4

Enclosures

cc: Jay Marshall (via e-mail, without enclosures)
Clyde Borrell (via e-mail, without enclosures)
Michael McKown, Esq. (via e-mail, without enclosures)
Michael Gardner, Esq. (via e-mail, without enclosures)

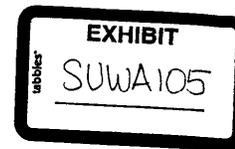
ATTACHMENTS



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July 18, 2001

TO: Internal File

FROM: Mary Ann Wright, Associate Director, Mining *M.A. Wright*

RE: Analysis and Finding on the Lila Canyon Road, Utah American Energy, Inc., Horse Canyon Mine, C/007/013

Following is a finding and analysis of the road leading to the Lila Canyon Mine Facility which is proposed to be constructed in conjunction with the Horse Canyon Mine. This analysis and findings takes into account the regulations and policy under the Utah Coal Regulatory Program (UCRP) in regards to the "Permitting of Roads". This document will accompany and become part of the permit findings for the Lila Canyon Revision to the Horse Canyon Mine permit issued by the UCRP.

SUMMARY

Presently, there are two access routes to the proposed Lila Canyon Mine area. One route starts near the Horse Canyon Mine and extends south following the Book Cliffs escarpment. The second route heads east from U. S. Highway 191/6, passes the proposed Lila Canyon site, and eventually connects to the first route. Both of these routes, constructed in the early 1940's, have generally been called the Lila Canyon Road and have had little if any maintenance over the years. The southwestern portion of the Lila Canyon Road (from US 191/6 to the proposed mine site), is presently claimed as part of the Emery County road system (Lila Canyon Road #126) and is planned to be upgraded to provide better access to the mine as well as other multiple use activities. Emery County plans to realign and improve the Lila Canyon Road #126, from its current condition to an engineered and upgraded condition. Emery County will be responsible for the alignment, construction and maintenance of the road which will total approximately 4.8 miles in length. There are no plans to alter the road that leads from the Horse Canyon Mine to the Lila Canyon Mine although the County may choose to conduct maintenance on the road consistent with its RS2477 designation. After the Lila Canyon Mine opens, the Lila Canyon Road #126 will remain a public road, allowing access by multiple purpose users up to, and ending at, the proposed disturbed area boundary (mine surface facilities area). The Lila Canyon Road #126 up to the mine disturbed area boundary is found under this analysis to be

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exempt from regulation according to the State of Utah Coal Mining Rules, R645, et seq. and the Utah Division of Oil, Gas and Mining (UDOGM) July 3, 1995, policy on roads.

POLICY

This analysis implements the July 3, 1995, permitting policy on roads (see Reference #1 of the attached Reference List). In deciding to exempt the Lila Canyon road from regulation, UDOGM herein makes written findings as to whether:

1. The road was properly acquired by the governmental entity and not deeded to avoid regulation;
2. The road is maintained with public funds or in exchange for taxes or fees,
3. The road was constructed in a manner similar to other public roads of the same classification; and
4. Impacts from mining on the road are not significant under Utah's definitions for "affected area" and "surface coal mining operations".

ANALYSIS AND FINDINGS

The following analysis and information is made from existing documents (see attached Reference List) and designated in the text as follows:

1. July 3, 1995, Letter from James Carter to Rick Seibel Re: Permitting of Roads.
2. UtahAmerican Energy, Inc.'s Permit Application Package (PAP),
3. Decision Record, Environmental Assessment UT-070-99-22, Bureau of Land Management.
4. Agreement between Emery County and UtahAmerican Energy Inc., October 19, 1999.
5. February 27, 2001 letter from Emery County to Lowell P. Braxton in regards to Lila Canyon Road.
6. Utah R-645 et seq. Coal Mining Rules, and
7. December 15, 1997 Interior Board of Land Appeals decision (IBLA 94-366).

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Analysis #1:

- UtahAmerican Energy Inc.'s (UEI) Lila Canyon Permit Application Package (PAP) was found "Administratively Complete" on February 26, 1999, and is currently still under technical review. The PAP contains a copy of an agreement entered into between UEI and Emery County which recognizes that UEI requires extensive use of the Lila Canyon Road (#126) and that the county will improve the road to meet UEI's needs. The county will perform the upgrade and charge the operator a toll for use of the road.(2)
- The approximate description of the county road to be upgraded is as follows: The road will start from U. S. Highway 6 located in the west half of Section 6, T. 17 S., R. 14 E. and proceed northeasterly to the NE 1/4 NE 1/4 of Section 32, T. 16 S., R. 14 E. The road will then proceed to the NW 1/4 of Section 28 and then to the NE 1/4 NE 1/4 of Section 21. The road finally abuts the Lila Canyon Mine surface facilities in the SW 1/4 of Section 15. The total length of this road would be approximately 4.8 miles.(5)
- Emery County has asserted its claim on the Lila Canyon Road as a county road and has designated it Lila Canyon Road No.126. The assertions were indexed and submitted to the Bureau of Land Management (BLM) on January 8, 1993. (4)
- The surface land ownership for the Lila Canyon Road #126 is the BLM and Utah School and Institutional Trust Lands Administration (SITLA). Emery county will control all necessary rights of way for this road. (5)

Finding #1:

The Lila Canyon road has historically existed since the 1940's or earlier. Emery County asserts that it had jurisdiction over the road prior to the implementation of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), and has maintained this jurisdiction to the present. The Lila Canyon road right-of-way crosses a mix of federal and SITLA lands. The mixed land ownership that is crossed by the Lila Canyon Road #126 precludes the possibility of UtahAmerican Energy, Inc., a predecessor, or successor from deeding the right-of-way to Emery County to avoid regulation under the UCRP. Thus, the road was properly acquired by the governmental entity and was not deeded to avoid regulation.

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Analysis # 2:

- Emery County is and will be responsible for the alignment, construction (upgrading) and maintenance of the Lila Canyon Road #126. (4) and (5)
- Emery County is responsible for all environmental issues relating to the alignment, and construction (upgrading) of the Lila Canyon road. (4) and (5)
- The maintenance for the Lila Canyon road will be performed by Emery County. Emery County will be responsible for funds to improve and maintain the Lila Canyon Road No.126. It is recognized that UEI and Emery County have an escrow agreement whereby contributions for the construction of the road may be made by UEI, however, it is also acknowledged that said contribution does not in any manner constitute participation by UEI in the design, construction, maintenance or operation of the road. The road will remain a county network road entirely under the authority of Emery County. The maintenance schedule will be the same as other similar Class "B" roads in Emery County. Examples of such roads: Cottonwood Canyon road No. 506 (Trail Mountain Mine), Deer Creek Road No. 304 (Deer Creek Mine), Bear Creek Road No. 305 (Bear Canyon Mine), C Canyon Road in Carbon County (West Ridge Mine). (4) & (5)

Finding # 2:

Emery County has established its jurisdiction over the alignment, maintenance, construction and environmental aspects of this road. The road is to be maintained with public funds or in exchange for taxes or fees.

Analysis # 3:

- Emery County supports the responsible development of its natural resources which is consistent with it's Comprehensive Master Plan. Emery County proposes to upgrade the Lila Canyon Road #126 to meet existing county, state and federal specifications. The road will be improved according to the plans and specifications as approved by Johansen & Tuttle Engineering, Inc., as Emery County's engineers of record. Emery County will oversee the upgrade of the Lila Canyon road. (4) & (5)
- The Lila Canyon Road #126 will be built and maintained the same as other similar Class "B" roads in Emery County, such as the Cottonwood Canyon Road No.506, the Deer Creek Road No. 304, and the Bear Creek Road No. 305.

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Finding #3:

Emery County will use established professional association and state guidelines to align and surface the road as it does for other Class 'B' roads. Thus, the road was and will be constructed similar to other public roads of the same classification.

Analysis # 4:

- The Lila Canyon Road #126 is and will be a public and multiple purpose road. It is currently used by stockmen, sightseers, hunters, and mineral developers. (3) & (5)
- The Lila Canyon Road #126 is and will be a part of the Emery County road system and public use will not be denied to any portion of the road. (4) and (5)
- In order for a road to be permitted under the UCRP, the road must meet the test of being a "coal mining and reclamation operation", and fall within the UCRP's definition of "roads." Activities occurring on the Lila Canyon Road are similar to activities occurring on public roads of the same classification throughout the State. No coal mining operations are occurring that would require special jurisdiction or regulation of the road under the UCRP. (4), (5) and (6)
- A recent Interior Board of Land Appeals (IBLA) decision states the following, "*We find nothing in section 701(28)(B) of SMCRA, or its legislative history, which expressly provides that transportation facilities, especially ones that carry processed coal to a remote point of sale/use, should generally be considered "surface coal mining operation," subject to regulation under SMCRA... Congress made no specific provision for regulating the transportation of processed coal, even though that activity is itself a "major industrial sector," which encompasses railroads, barges, trucks, and pipelines "that collectively stretch over thousands of miles throughout the nation."... The fact that it did not, strongly indicates that Congress did not intend to regulate the transportation of processed coal under SMCRA, presumably leaving it to regulation pursuant to other Federal and state laws.*" (7)

Finding #4:

The uses of the Lila Canyon Road are considerably greater than the narrow, regulated activities of providing access to coal mining and reclamation operations. In addition, the environmental impacts to the Lila Canyon Road caused by coal truck traffic will not differ from the environmental impacts of other trucks of similar weight operating on this road. The trucks being used for transporting coal are licensed commercial haulers which are legal to operate on public roads of the same classification throughout the state.

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The mine is not conducting any coal mining and reclamation operation on the public portion of the Lila Canyon Road that would require any special regulation under SMCRA or the UCRP. Impacts from mining on the road are not significant under Utah's definitions for "affected area" and "surface coal mining operations".

CONCLUSION

The Lila Canyon County Road #126 leading from State Highway 6 up to the Lila Canyon disturbed area boundary does not need to be included in the permitted area for the Horse Canyon Mine, and is thus exempted from the jurisdiction of the Utah Coal Regulatory Program.

UEI has no plans for upgrading, hauling coal or storing equipment on the existing Lila Canyon Road segment that stretches from the Horse Canyon Mine to Lila Canyon. As such, there is no requirement to permit this road under the Utah Coal Regulatory Program. Should UEI decide to conduct coal mining and reclamation operations that involve the alternative road from Horse Canyon to the Lila Canyon facilities, analysis and findings will need to be made in regards to its permitted status under the Utah Coal Regulatory Program.

sm
cc: Clyde Borrell, Utah American Energy, Inc.
Rex Funk, Emery County
James Fulton, OSM
O:\007013.HOR\DRIFTroadfind3.wpd

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REFERENCE LIST

1. July 3, 1995 letter from James W. Carter, Director of Utah Division of Oil, Gas, & Mining to Rick Seibel, Regional Director and to Jim Fulton Denver Field Office Division Chief, U.S. Dept. Of Interior, Office of Surface Mining. RE: Utah Section 733 Letter, Permitting of Roads.
2. Utah American Energy, Inc.'s Permit Application Package (PAP),
3. Decision Record, Environmental Assessment UT-070-99-22, Bureau of Land Management.
4. Agreement between Emery County and UtahAmerican Energy Inc., October 19, 1999.
5. February 27, 2001 letter from Emery County to Lowell P. Braxton in regards to Lila Canyon Road.
6. December 15, 1997 Interior Board of Land Appeals decision (IBLA 94-366) finding that a railroad and pipeline used to transport coal from surface mines are not regulated by the federal Surface Mining Control and Reclamation Act.
7. Utah R645 et. seq. Coal Mining Rules, especially definition of the terms "Affected Area", "Coal Mining and Reclamation Operations", and "Road".

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United States Department of the Interior

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SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 2001-57

Decided September 22, 2004

Appeal from a Decision Record/Finding of No Significant Impact of the Acting Field Manager, Price, Utah, Field Office, Bureau of Land Management, approving the granting of public-land rights-of-way in connection with the Lila Canyon Coal Mine Project. EA No. UT-070-99-22.

Affirmed.

1. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Rights-of-Way--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Rights-of-Way: Applications

A BLM finding of no significant impact (FONSI) for a grant of public-land rights-of-way for surface facilities, access road, telephone line, and power line in connection with underground coal mining operations based on an analysis set forth in an environmental assessment will be upheld when the record reveals that BLM has taken a hard look at the environmental impacts and establishes a rational basis for the FONSI.

APPEARANCES: W. Herbert McHarg, Esq., Southern Utah Wilderness Alliance, Salt Lake City, Utah, for the Southern Utah Wilderness Alliance; Denise A. Dragoo, Esq., Erik G. Davis, Esq., and George Tsiolis, Esq., Salt Lake City, Utah, for UtahAmerican Energy, Inc.; David K. Grayson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

IBLA 2001-57

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Southern Utah Wilderness Alliance has appealed from an October 27, 2000, Decision Record/Finding of No Significant Impact (DR/FONSI) of the Acting Field Manager, Price, Utah, Field Office, Bureau of Land Management (BLM), deciding to grant to UtahAmerican Energy, Inc. (UEI), rights-of-way on public lands for surface facilities associated with an underground mine, a mine access road, a telephone line, and a 46 kV power line. The rights-of-way are intended to facilitate UEI's proposed underground coal mining operation, known as the "Lila Canyon Coal Mine Project" (Project), situated in central Utah. The Project is expected to involve mining from 1.5 to 4 million tons of coal annually over the 20-year life of the Project from reserves underlying about 5,605 acres of Federal, State, and private land in the Book Cliffs coal field leased to UEI.^{1/}

In deciding whether to approve the granting of public-land rights-of-way in connection with the Project, BLM, as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000), and its implementing regulations (40 CFR Chapter V), prepared an Environmental Assessment (EA) (No. UT-070-99-22). The EA was initially issued in July 2000, and then, following a 30-day public comment period, was revised and finalized in September 2000. Citations to the EA are to the final EA, except in the case of the various maps (plates) which are appended to the July 2000 version of the EA. The EA analyzed the environmental consequences of the proposed right-of-way grants and the rest of the Project (Alternative B) and a no action alternative (Alternative A). The FONSI concluding there is not likely to be any significant impact which would require preparation of an environmental impact statement (EIS) is based on the analysis in the EA.

In connection with the Project, UEI's predecessor-in-interest applied for three rights-of-way pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (2000), and its implementing regulations, 43 CFR Part 2800. Each of the rights-of-way would be issued for a term of 30 years, subject to renewal. (DR at 1.)

The first right-of-way (UTU-77122) would encompass mine-related surface facilities which would be constructed in connection with underground mining operations. The facility area would include approximately 39.6-acres with on-the-

^{1/} A motion to intervene in this case has been filed by UEI. As the proponent of the action approved by BLM, UEI is a party to the case which will be affected by any decision by the Board in this appeal and, hence, has standing to intervene. Accordingly, the motion to intervene is granted.

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ground disturbance impacting close to 35 acres of public land located along the bottom of a narrow part of Lila Canyon. (EA at 19.) Such facilities would provide access to and ventilation for the mine, convey coal to the surface for crushing, stockpiling, and loading on trucks; and also include a sediment pond, storage sheds and warehouse, and administrative and other offices and buildings. The facilities would be utilized for the life of the Project and then removed, and the lands rehabilitated.

In order to provide appropriate access to its proposed mining operations, for coal hauling and other purposes, UEI proposed a second right-of-way (UTU-76617). This right-of-way would authorize the public land segment (about 600 feet) of an upgrade of 2.8 miles of the existing two-lane graveled "Lila Canyon Road," as well as public land segments (3.54 miles) of a new 4.7-mile long two-lane paved road which would be used as a haul road. The roads would access the mine site from the northwest (County Road 125) and the southwest (U.S. Highway 191/6), respectively. (EA at 9-11.) About 600 feet of the existing road and 3.54 miles of the new road would cross public land, with the remainder crossing private and/or State land. The area of public land disturbed by UEI's road upgrading/construction activity would total 43.59 acres (0.69 acres of existing road and 42.90 acres of new road). The upgraded Lila Canyon Road will be used only during construction of the proposed surface facilities and of the new road, and then gated. In addition, UEI would be authorized to run a buried telephone line, serving the proposed mine, along the access road, within a right-of-way corridor which would be fenced on both sides of the roadway.

UEI also seeks a third right-of-way (UTU-76614), which would authorize the construction of a 1.3-mile long 46 kV power line running across public land, in order to provide electrical power to the mine and related facilities. Such activity would include the erection of power poles and cross arms, suspension of electrical lines, and installation of a switching station, metering station and substation, which would disturb a total of 15.76 acres, during construction, and 12.61 acres, following construction and rehabilitation of the disturbed lands.

Based on the EA, the Acting Field Manager issued his October 2000 DR/FONSI, adopting a modified Alternative B, thus approving the granting of public-land rights-of-way in connection with the Project, subject to various mitigating measures. Since he also found that no significant environmental impact was likely to result from proceeding with the right-of-way grants, the Acting Field Manager held that no EIS was required, thus rendering a FONSI. However, he provided that no construction, operation, and maintenance could take place in conjunction with the right-of-way grants until the State approved the mining permit for the Project, making approval of each of the right-of-way grants "contingent upon mine plan

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approval." (DR/FONSI at 1, 2.) The Acting Field Manager thus stated:
"Implementation [of BLM's decision] may begin upon approval of the mine plan for
the [P]roject." Id. at 7.

At the time of BLM's preparation of the EA and the Acting Field Manager's October 2000 DR/FONSI, UEI was in the process of seeking approval by the Utah Division of Oil, Gas and Mining (UDOGM) of its plan for underground coal mining operations and related surface activity in connection with the Project, and then reclaiming the affected lands. Primary responsibility for administration of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (2000), is committed to UDOGM.^{2/} See 30 CFR Part 944. By decision dated July 27, 2001, following the Acting Field Manager's October 2000 DR/FONSI, UDOGM approved UEI's application for a surface coal mining permit, pursuant to the State surface mining law. Appellant appealed that decision to the Board of Oil, Gas and Mining (BOGM), which, on December 14, 2001, reversed UDOGM's July 2001 decision and remanded the case to UDOGM. BOGM did so because of errors in the permit approval process, principally relating to deficiencies in UDOGM's analysis and supporting data concerning the anticipated impacts of mining on surface and groundwater quality and quantity, which was deemed to be specifically violative of the State surface mining law and its implementing regulations. We have not been advised further by the parties of the status of the permit application.

In conjunction with its appeal, appellant petitioned for a stay of the effect of the Acting Field Manager's October 2000 DR/FONSI, pending our final decision in its appeal, pursuant to 43 CFR 2804.1(b). In view of our disposition of this appeal on the merits in this decision, appellant's stay petition is denied as moot.^{3/}

In its statement of reasons (SOR) for appeal and other filings, appellant principally contends that BLM failed, in its EA, to adequately consider the potential environmental impacts of approving the right-of-way grants for the Project, and should have prepared an EIS since "substantial questions" have been raised regarding whether the Project is likely to significantly impact the human environment, citing Foundation for North American Wild Sheep (Wild Sheep) v. U.S. Department of Agriculture, 681 F.2d 1172, 1178 (9th Cir. 1982).)

^{2/} Although the Lila Canyon Mine is an underground coal mine, the definition of surface coal mining operations regulated under SMCRA includes "surface operations and surface impacts incident to an underground coal mine." 30 U.S.C. § 1291(28)(A) (2000).

^{3/} In accordance with the terms of the DR, approval is not effective until the mine plan is approved. (DR at 6-7.)

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Appellant is particularly concerned that BLM failed to adequately consider the likely impacts of underground coal mining and related surface activities associated with the Project on Lila Canyon and surrounding areas, which it characterizes as a "defacto wilderness." (SOR at 2) It asserts that the Project is likely to have significant adverse impacts on BLM-designated wilderness study and inventory areas, and their wildlife populations including Rocky Mountain bighorn sheep (Ovis Canadensis Canadensis), mule deer, and elk.

[1] A BLM decision to proceed with a proposed action, absent preparation of an EIS, will be upheld, as being in accordance with section 102(2)(C) of NEPA, where the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982); Nez Perce Tribal Executive Committee, 120 IBLA 34, 37-38 (1991). An appellant seeking to overcome such a decision must carry its burden to demonstrate, with objective proof, that BLM failed to, or did not adequately, consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. Southern Utah Wilderness Association, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993); Red Thunder, 117 IBLA 167, 175, 97 I.D. 203, 267 (1990); Sierra Club, 92 IBLA 290, 303 (1986).

Appellant argues as an initial matter that BLM was required by section 102(2)(C) of NEPA, and, specifically, BLM's own internal policy guidance to prepare an EIS before approving the right-of-way grants at issue here. It cites section 11.4(A) of Title 516 of the Departmental Manual (DM) ("Department of the Interior NEPA Revised Implementing Procedures"), to the effect that an EIS is normally required for "[a]pproval of any mining operation where the area to be mined, including any area of disturbance, over the life of the mining plan is 640 acres or larger in size." (SOR at 5 (quoting from 65 FR 52212, 52231 (Aug. 28, 2000)).) Appellant asserts that the Project "far exceeds the 640[-]acre threshold, as [UEI's mining] plan anticipates mining 1.5 million to four million tons of coal per year from a total of 5,605.66 acres of [F]ederal and State of Utah coal reserves." (SOR at 5-6.)

Appellant fails to recognize, in arguing that BLM was required to prepare an EIS here, that BLM is not approving any mining operations. Thus, UEI asserts that the policy guidance cited by appellant concerns BLM's authorization of a mining plan of operations under the surface management regulations governing hardrock mining claims (43 CFR Subparts 3802 and 3809), rather than surface coal mining operations regulated under SMCRA, which are generally subject to regulation by the UDOGM subject to the oversight jurisdiction of OSM. (Answer at 5; compare 516DM

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11.4(A)(7), 65 FR 52231 (BLM) with 516 DM 13.4.A(4)(b), 65 FR at 52237 (OSM.) Approval of surface coal mining operations is committed to the State permitting authority (UDOGM), which is acting pursuant to the State's approved program under SMCRA and the State-Federal cooperative agreement regarding surface coal mining operations on Federal lands. 30 CFR 944.10, 944.30. UDOGM has primary regulatory authority over underground coal mining operations and related surface activities with respect to State and private lands, and also with respect to Federal lands, by virtue of a delegation of that authority by the Secretary of the Interior. See 30 CFR Part 944. Thus, UDOGM would, for the most part, make the final permitting decision, approving most of UEI's PAP, subject to OSM oversight. (DR/FONSI at 5.) Not included would be approval of UEI's mining plan, since that authority was retained by the Secretary, under 30 CFR 745.13, and delegated to the Assistant Secretary, Lands and Minerals. (DR/FONSI at 5-6; see 30 CFR 746.13.) We recognize that underground mining operations and related surface activity would not occur but for BLM's granting of a right-of-way for surface facilities necessary to the processing and transportation of mined coal after it exits the mine portal. (EA at 8; UEI Opposition to Petition for Stay, dated Dec. 8, 2000, at 10 ("[D]evelopment is impossible until BLM grants the rights-of-way".)) However, while the siting of such facilities on public land is wholly dependent on UEI having the necessary BLM right-of-way, the approval of mining operations, which would result in the actual operation of the mine, rests with UDOGM. (EA at 3 ("UDOGM issues the applicant a permit to conduct coal mining operations".)) Thus, we are not persuaded that BLM is required by section 11.4(A) of Title 516 of the DM to prepare an EIS before granting the right-of-way for surface facilities, since it is not approving any mining operations.

Appellant further argues that BLM failed to take a hard look at the environmental impacts of the Project on public lands within two wilderness inventory units (WIU) of the 1999 BLM wilderness inventory, Desolation Canyon Inventory Unit 8 and Turtle Canyon Inventory Unit 4, which BLM has been studying for their wilderness characteristics and which have generally been found to have retained their natural character. See EA at 45-46. Impacts to the Turtle Canyon wilderness study area (WSA) found to possess wilderness characteristics upon inventory pursuant to section 603 of FLPMA, as amended, 43 U.S.C. § 1782 (2000), are also cited by appellant in challenging the EA. Appellant states that the WIU's and WSA have all, at one time, been proposed for designation as wilderness areas to be managed pursuant to the Wilderness Act, 16 U.S.C. §§ 1131-1136 (2000), in a bill submitted to Congress, "America's Redrock Wilderness Act, H.R. 1732." (SOR at 13.)

Appellant states that BLM failed to appreciate the fact that Project activities are incompatible with outstanding opportunities for solitude and primitive, unconfined recreation, and other wilderness characteristics. It specifically notes that the surface facilities, covered by BLM's proposed right-of-way grant UTU-77122,

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would be constructed "within" the Desolation Canyon WIU. (NA/Petition at 3.) It asserts that the resulting "clear[ing]" of trees, shrubs, and other vegetation and "scrap[ing] away" of soil over an area of close to 35 acres, will, along with day-to-day operations and related truck and other traffic, "destroy[] the wilderness character" of part of this WIU. *Id.* Appellant also argues that the underground mining operations will cause the "surface subsidence" of close to 2,000 acres of public land within the two WIU's and the WSA. (NA/Petition at 3.)

As a threshold matter, a distinction must be recognized between WSA's designated pursuant to the review of roadless areas of 5,000 acres or more disclosed during the inventory conducted pursuant to section 603 of FLPMA, 43 U.S.C. § 1782 (2000), and areas found to possess wilderness characteristics as a result of subsequent inventories. In this regard, we noted in Southern Utah Wilderness Alliance, 158 IBLA 212, 214-15 (2003):

[A]s we have stated on a number of occasions, final administrative decisions relating to the designation of land as WSA's in Utah were completed in the 1980's. Southern Utah Wilderness Alliance, 123 IBLA 13, 18 (1992); Southern Utah Wilderness Alliance, 122 IBLA 17, 21 n.4 (1992). The lands in question were not included in a WSA. Therefore, BLM may administer them for other purposes, including the approval of drilling for oil and gas. *Id.*

Southern Utah Wilderness Alliance, 128 IBLA 52, 65-66 (1993) (footnote omitted); quoted in, Southern Utah Wilderness Alliance, 151 IBLA 338, 341-42 (2000); see State of Utah v. Babbitt, 137 F.3d 1193, 1208-1209 (9th Cir. 1998). In the Babbitt case involving a legal challenge to a 1996 re-inventory of public lands in Utah which had not been included in WSA's as a result of the earlier review of roadless areas under section 603 of FLPMA, the court rejected the Department's claim that section 603 provided authority for the later re-inventory. 137 F.3d at 1206, n. 17. In finding plaintiffs lacked standing to challenge the re-inventory itself, the court noted that an inventory of the public lands under the authority of section 201(a) of FLPMA, 43 U.S.C. § 1711(a) (2000), shall not affect the management or use of the public lands. 137 F.3d at 1208-1209; see 43 U.S.C. § 1711(a) (2000). Upon remand, the district court approved a stipulated settlement which provided in part that "[t]he 1999 Utah Wilderness Inventory shall not be used to create additional WSAs or manage public lands as if they are or may become WSAs." Utah v. Norton, No. 96-C-870 B (D. Utah Apr. 14, 2003) (Stipulation No. 4). Thus, the WIU's are not subject to the restrictions on surface-disturbing activities afforded WSA's by the non-impairment mandate of section 603(c) of FLPMA and do not affect the management or use of the public lands involved.

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BLM noted that no surface facilities or activities authorized by its rights-of-way, and thus no surface manifestations of the Project, would be located within or even impact the Turtle Canyon WSA (or the 7,300-acre Turtle Canyon WIU). (EA at 45-46, 56, Plate IV; DR/FONSI at 6.) It thus concluded that there would be no impairment of naturalness, outstanding opportunities for solitude and primitive, unconfined recreation, and other wilderness characteristics of the WSA (or the WIU), and thus no significant impact. (EA at 56-57; DR/FONSI at 6, 8.)

BLM, however, acknowledged that the Project would, during its 20-year life, directly affect 8 acres of public land within the 48,900-acre Desolation Canyon WIU, due to the construction, operation, and maintenance of mine-related surface facilities (not including the access road, telephone line, and power line). (EA at 45, 56, Plate IV; DR/FONSI at 6.) It also noted that such facilities (and the road) would, given the existing topography, indirectly affect an additional 25.12 acres of public land in the WIU, within Lila Canyon. (EA at 56; DR/FONSI at 6.) Nonetheless, BLM concluded that the activities associated with such facilities would not violate Departmental policy concerning the management of WIU's and would not impair the wilderness character of the WSA, and thus would not be significant. (DR/FONSI at 6, 8.) Further, BLM found that the proposed action is in conformance with the BLM land use plan^{4/} for the area. *Id.* at 6.

Appellant asserts that BLM's conclusion regarding the insignificance of the Project's impacts on the WIU's and WSA suffers from the fact that BLM did not take into consideration

547 coal haul truck and 175 personal and delivery vehicle round-trips per day on a 24 hour/7 day schedule, and operation of heavy equipment including loaders, crushers, a 2,000-ton per hour conveyor, and a 1,000[-]horsepower mine [fan]. [^{5/}]

^{4/} Appellant also argues that the Project "does not conform with the land[-]use plan" (Price River Resource Area Management Framework Plan (Price River MFP)), since it does not ensure the "maintenance of undeveloped recreation resources," particularly the outstanding opportunities for primitive, unconfined recreation recognized by BLM in designating the two WIU's and WSA. (SOR at 21 (citing Price River MFP at R-8).) BLM specifically determined that the Project would conform with the MFP objective to maintain undeveloped recreation resources. (EA at 1-2.) Appellant provides no evidence that such resources will not be adequately maintained generally in the Project area, consistent with the MFP. Nor does it otherwise rebut BLM's conformance determination. (EA at 1-2; DR/FONSI at 7.)

^{5/} Appellant also argues that BLM failed to take into account the construction,
(continued...)

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(SOR at 13.) It also notes that the Project may entail "five core drilling and sampling sites" within the WIU's and WSA, which will themselves have significant impacts. (Id. at 14.)

The record discloses BLM took cognizance of all aspects of the proposed surface activities associated with the Project, including all of those cited by appellant. (EA at 8-9, 11, 23-25.) This included consideration of possible future exploratory drilling, although no such drilling was proposed or anticipated: "Based on current conditions, exploratory drilling would not be expected to be required for the development of the coal lease." (EA at 8; see EA at 9, 26-27; UEI Answer at 22 (citing EA at 61) ("[UEI] has not determined the time, the place, or even the necessity of any such drilling".)) Further, we think that the record is clear that BLM took all these aspects into account when finding that the Project will not significantly impact the wilderness characteristics of the two WIU's and WSA at issue here. (EA at 56-57, 62; DR/FONSI at 6, 8.)^{5/}

^{5/} (...continued)

operation, and maintenance of additional ventilation structures within the WIU's and WSA. (SOR at 14-15.) Such structures were not part of the proposed action approved by the Acting Field Manager, in his October 2000 DR/FONSI: "[N]o such ventilation structures * * * have ever been proposed, they are not part of the mine plan, and there is no foreseeable need for any such structures." (UEI Answer at 23; see DR/FONSI at 1 ("It is the decision of the Price Field Manager * * * to select Alternative B outlined in the referenced environmental assessment with modification"); EA at 23, 27.)

^{6/} Appellant also argues that BLM failed to take into account the significant cumulative impacts "to wilderness values" generated by the Project together with the "Blue Castle Mine," "within" the Desolation Canyon WIU. (SOR at 14.) UEI, however, asserts that the Blue Castle Mine, a proposed 132.57-acre surface gold-mining operation, is "approximately 2.5 miles away from the westernmost boundary of [the WIU], the nearest Wilderness Inventory Unit." (Answer at 23.) This is borne out by the record. (EA at 61, Plate IV.) Further, while it is expected that this mine would add, on a daily basis, "[a]s many as 85 vehicles" to traffic on the new access road, the section of the road likely to experience cumulative traffic is located a comparable distance west of the WIU. (EA at 61.) BLM did not report any likely cumulative impact to wilderness values in the WIU. Appellant doesn't provide any evidence that the Blue Castle Mine is itself likely to impact "wilderness values," or that, by virtue of their geographic proximity or any other factors, the two mines are likely to interact in a manner which may generate cumulative impacts to "wilderness values," or that any such impacts might be significant. See Wyoming Outdoor Council, 147 IBLA 105, 109 (1998). Further, appellant hasn't demonstrated

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In assessing impacts, BLM also determined that use of longwall mining to mine the underground coal seam may cause as much as 6 feet of subsidence in overlying formations, but found that the presence of a thick overburden dampens the impact of subsidence leading to low to nonexistent subsidence on the surface. (EA at 50, 56.)

It noted that only portions of the WIU's and a small part of the WSA would be subject to potential subsidence as a result of such operations. (EA at 56, Plate IV; DR/FONSI at 6.) Further, BLM concluded that the depth of mining operations, at least 1,500 feet below the surface, would minimize any surface impacts from subsidence, throughout most of the WIU's and the WSA: "[S]ubsidence should be low to nonexistent at the surface." (EA at 50; see id. at 56; DR/FONSI at 6.) It thus held that naturalness, outstanding opportunities for solitude and primitive, unconfined recreation, and other wilderness characteristics would not be generally diminished or degraded, especially since the surface manifestations of subsidence "would not appear different from the surrounding geology." (EA at 56.) Thus, BLM specifically held that subsidence would not impair the wilderness characteristics of the WSA or render it unsuitable for designation as wilderness. Id. at 56-57.

Appellant argues that subsidence, to the extent that it occurs within the WSA, may be precluded by BLM's "Interim Management Policy for Lands Under Wilderness Review" (IMP), since it constitutes a new disruption of soil and vegetation which must be reclaimed. (SOR at 14, citing BLM Handbook H-8550-1 (Rel. 8-67 (July 5, 1995))^{Z/}.) It appears from the analysis that any subsidence will be so minor as to not entail disruption of soil or vegetation. However, because the development of pre-FLPMA coal leases is normally necessary to the exercise of such valid existing rights, underground mining and any surface effects, should they occur, are generally "except[ed]" from the IMP preclusion of new surface disturbances. (BLM Handbook H-8550-1 at 9.)^{S/}

^{S/} (...continued)

that any cumulative impacts are likely to result from the Project, together with other specific past, present, and/or reasonably foreseeable future actions, or, if they are likely, were not adequately considered by BLM. See EA at 61-64.

^{Z/} This Handbook, along with numerous others, was deleted effective Aug. 23, 1996. (BLM Instruction Memorandum (I.M.) No. 96-147 (July 22, 1996)). The deletion of this Handbook did not purport to change the BLM policies set forth in the Handbooks. See I.M. No 96-147 at 2.

^{S/} All of UEI's Federal coal leases at issue here pre-date enactment of FLPMA on October 21, 1976, pursuant to which the Desolation Canyon WSA was designated. They thus afford UEI "valid existing rights," which are not generally subject to the non-impairment mandate of section 603(c) of FLPMA. Sierra Club v. Hodel,

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Ultimately, appellant provides no independent evidence that Project activities are likely to significantly impact the wilderness characteristics of the WIP's and WSA, or that it is necessary to mitigate any significant impacts by eliminating all or part of the Project, in order to render them insignificant.^{8/} Further, appellant has not demonstrated that, in making its FONSI regarding potential impacts to wilderness or other resource values, BLM relied upon any mitigation measure which was not likely, for any reason, to be effective in reducing a significant impact to insignificance. (SOR at 23.)

Appellant also asserts that Project activities will significantly affect visual resources in the Project area, since they will violate the visual resource management (VRM) classification (VRM-III) for that area, because such activities, which will convert the area from one which has wilderness character into an "industrial zone," will not only be seen, but also "dominate the landscape." (SOR at 15.)

BLM analyzed the visual impacts of the Project, taking into account the VRM-III classification of the Project area, established in the Price River MFP. (EA at 42.) Among other things, BLM provided for minimizing visual impacts of all surface facilities by having them painted a BLM-approved "flat grey color, developed to reduce line and form contrast with the existing environment." (EA at 30.) Based on its analysis, BLM concluded that the Project facilities and activities will not violate the VRM-III classification of the Project area. (EA at 54-55.)

Appellant takes issue with BLM's conclusion, arguing that BLM "peer[ed] into the [P]roject [area] only from limited 'Key Observation Points' (KOP's) near the intersection of mine access roads and a highway [and county road]." (SOR at 15; *see* EA at 42.) Appellant is correct that BLM focused on the visual impacts of the Project

^{8/} (...continued)

848 F.2d 1068, 1086-88 (10th Cir. 1988).

^{9/} Appellant also argues that the impacts of the Project on the wilderness characteristics of the Project and surrounding areas, as well as on other aspects of the human environment, are likely to be significant since the Project is "highly controversial because of its size and location." (SOR at 11, citing 40 CFR 1508.27(b)(4).) Whether a proposed action is likely to have a significant impact, thus requiring an EIS, is determined, in this respect, by considering "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 CFR 1508.27(b)(4). Thus a proposed action can be considered "highly controversial" when "a substantial dispute exists as to the size, nature or effect of the * * * [F]ederal action." *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973); *see Wild Sheep*, 681 F.2d at 1182. Appellant provides no evidence of the existence of such a dispute.

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at KOP's. However, BLM's VRM policy requires BLM to assess the visual resource impacts of proposed actions "from the most critical viewpoints," or KOP's, "usually along commonly traveled routes or at other likely observation points." (BLM Handbook H-8431-1 (Rel. 8-30 (1/17/86)), at 2.)¹⁰ The KOP's at issue here were clearly selected by BLM as a way of assessing the visual impacts of the Project from locations around the Project area likely to be accessed most often by members of the public, since they were along roads, and which also afforded a view of the "characteristic landscape of the [P]roject area" and the proposed mine-related surface facilities, road, telephone line, and power line. (EA at 42 noting that County Road 125 has an annual average daily traffic volume of 280 vehicles and U.S. Highway 191/6 has an "overall traffic rate of as many as 10,600 vehicles per day".) This conforms to relevant BLM policy concerning the selection of KOP's:

[Visual contrast rating] is usually [done] along commonly traveled routes or at other likely observation points. Factors that should be considered in selecting KOP's are:] angle of observation, number of viewers, length of time the project is in view, relative project size, season of use, and light conditions * * *. Linear projects such as powerlines should be rated from several viewpoints representing:

- Most critical viewpoints, e.g., views from communities, road crossings.
- Typical views encountered in representative landscapes, if not covered by critical viewpoints.
- Any special project or landscape features such as skyline crossings, river crossings, substations, etc. [Emphasis added.]

(BLM Handbook H-8431-1 (Rel. 8-30 (1/17/86)).)

In its analysis, BLM reported that the intersection of the proposed new access road and the highway was the particular KOP concerning the mine site, and related surface facilities, since it was most likely to be seen by many members of the public from that point. (EA at 54.) Generally, BLM found the mine facilities unobtrusive, stating: "Since the mine surface facility would be located within the narrow Lila Canyon, visibility of the facility from any KOP would be minimal." *Id.*

Appellant provides no argument or supporting evidence demonstrating that BLM's selection of KOP's violated its policy declarations. Further, we are not

¹⁰ This Handbook was also deleted effective Aug. 23, 1996. (BLM Instruction Memorandum No. 96-147 (July 22, 1996)). See note 7, *supra*.

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persuaded that BLM was required to select KOP's "within Lila Canyon," or other areas within the two WIU's or WSA, because they afforded "[t]ypical" views available to many members of the public. (SOR at 16.) Appellant has not shown that the mine site is even likely to be visible from anywhere except right inside the narrow canyon, or indeed from anywhere in the WIU's or WSA, which are situated mostly to the east above the canyon rim or escarpment, which separates the mine site from the rest of the Project area. (EA at 39 ("The mine site is at the toeslope of the Book Cliffs and has mostly a southwest aspect"), 42 ("[T]he proposed mine surface facility [is] located along the broken sloping pinyon-juniper benches below the Book Cliffs"), Plates II-A and V; Ex. D (Photographs) attached to Appellant Response.)

Looked at from these KOP's, BLM concluded that the Project would not violate the VRM-III classification, since while Project facilities could be seen, they would not dominate the landscape when viewed from these vantage points. (EA at 42, 54-55.) Appellant provides no evidence to the contrary.

Appellant also asserts that Project activities will significantly affect Rocky Mountain bighorn sheep, which number 15 to 25 year-round in Lila Canyon, and other wildlife and vegetation throughout the Project and surrounding areas, since underground mining operations are expected to "dewater" and/or pollute numerous springs and seeps, and related surface waters. (NA/Petition at 3; see SOR at 16-22.)

In the EA, BLM found that surface waters consist of occasional runoff in drainage channels of Lila Canyon, which has no perennial water flow, and regular discharge from 19 springs and seeps in and around the Project area, which generally flow at a rate of from 1 to 10 gallons per minute (gpm), both of which eventually enter the Price River. (EA at 40, Plate IV.) It found that mine dewatering and subsidence might alter the water flow of springs and "augment" water flows in existing channels, thereby contributing to additional erosion and an increase in total dissolved solids (TDS) and total suspended solids (TSS) in receiving waters, were the flows to reach them. (EA at 52.) However, BLM did not find that mining operations were likely to completely dewater all, or even any, existing springs and seeps, and thus eliminate all, or any, surface waters, or pollute any such waters. In particular, BLM noted that "a complete Sedimentation and Drainage Control Plan to control and contain off-site discharge of water from the mine site as required by UDOGM and OSM is included in the MRP." Id.

Further, BLM provided for mitigating the elimination of any springs or seeps in Lila Canyon, by requiring UEI to place two water catchments or guzzlers "in suitable locations along the cliff-talus habitat south of the Lila Canyon area," thus "avoid[ing]" the displacement of sheep which are concentrated in the canyon and dependent on these water sources: "UEI would be required to provide two guzzlers

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to benefit bighorn sheep populations and habitat because of the potential loss of seeps. (EA at 27, 59; DR/FONSI at 3; see EA at 53, 58, 59.) BLM also provided for mitigating or avoiding the detrimental effects of mine dewatering on surface waters, by discharging all water derived from mining operations into a sedimentation pond, where it would be treated, in order to comply with State and Federal laws, before being allowed to flow into existing drainages. (EA at 20-21, 28-29, 52.) BLM thus anticipated no significant impact. (DR/FONSI at 8.)

Appellant provides no evidence contradicting BLM's analysis, and demonstrating that any springs or seeps are likely to dry up or that any surface waters are likely to become contaminated, to any degree, as a result of any Project activities, including dewatering and subsidence resulting from underground mining operations. Appellant provides, with its Response to Answers (filed June 14, 2001) a May 29, 2001, declaration (Ex. C) of Dr. Elliott W. Lips, a professional geologist who, at one time, studied the potential hydrologic impacts of underground mining operations in Lila Canyon. Dr. Lips does not assert that the Project will or is even likely to dry up any seeps or springs in the Project area. Based upon his own knowledge of the area and reviewing the EA, he does say that not enough is known about hydrologic and geologic conditions underlying the Project area for BLM to draw any conclusions regarding the likely impacts of mining on seeps and springs. (Ex. C at 2-3.)

UEI reports that BLM's knowledge of hydrologic and geologic conditions underlying the Project area was based on "detailed hydrologic studies from the [nearby] Horse Canyon Mine, three monitoring wells, and seep and spring inventories within the proposed mine site." (Answer at 26.) This is borne out by the record. (EA at 40-41.) Appellant has not shown that available information was not sufficient for BLM to be able to reasonably assess the likely hydrologic impacts of the Project, consistent with NEPA and its implementing regulations. Further, BLM is not precluded from proceeding in the face of some uncertainty regarding such impacts, and thus may grant the rights-of-way, facilitating the Project, especially where it has taken this uncertainty into account, and provided for mitigating the impacts caused by the loss of any seeps or springs. Powder River Basin Resource Council, 144 IBLA 319, 323-25 (1998). Thus, appellant fails to show that there are likely to be adverse consequences for bighorn sheep, or any wildlife, vegetation, or other downstream resources or to demonstrate that any impacts are likely to be significant.

Appellant does not provide any evidence that the habitat afforded by the placement of water guzzlers near Lila Canyon will not be utilized by bighorn sheep, or that such habitat "will [not] accommodate [the] vitality and growth of the herd." (SOR at 19.) Rather, it simply asserts that BLM failed to demonstrate the effectiveness of guzzlers: [T]he instant EA does not even provide specific locations

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for such guzzlers and an analysis of their effectiveness in those locations, but merely speculates that such guzzlers will be effective. (Response at 9-10.) BLM is committed to place the guzzlers in "suitable locations" to benefit bighorn sheep. (EA at 27; DR/FONSI at 3.) Appellant's doubts fail to rebut the reasonableness of the BLM mitigation in that the creation of any water source in the Project area, which is admittedly located in an arid region with little available surface water, will likely be used by sheep and other wildlife, and thus compensate for the loss of water anywhere else in the immediate area. (EA at 37, 40; UEI Answer at 28 ("BLM's experience has shown that recent additions of guzzlers to similar habitat areas * * * have resulted in increased use").) Further, such mitigation, which would place guzzlers "along the upper cliff tiers away from mining disturbance" was considered "appropriate" by the Utah Division of Wildlife Resources (UDWR). (Letter to BLM from Regional Supervisor, UDWR, dated Aug. 14, 2000.) Appellant fails to carry its burden to show that such mitigation will be ineffective in reducing any impact to insignificance. Oregon Natural Resources Council, 116 IBLA 355, 362 n.7 (1990).

We find this case to be distinguishable from the Wild Sheep case, 681 F.2d at 1172, cited by appellant. See Appellant Response to Answers at 7-10. What was particularly at stake in the Wild Sheep case was one of a few areas used by "one of the few remaining herds of Desert Bighorn Sheep (Ovis Canadensis Nelsoni)," a State and Federally-protected species, for "lambing" and rearing of its young," through which would pass a proposed mine access road. 681 F.2d at 1175, 1176. The court described the importance of that area to the sheep as follows:

The Bighorn require a finely tuned ecological balance for their "lambing" and rearing functions and * * * "[a]ny disturbance of these [lambing] areas would be a catastrophe to the sheep as the ecosystems needed for lambing are extremely limited in this area." * * *

Thus, it appears that the continued use of the lambing area through which Road 2N06 passes is essential to the continued productivity of the herd at issue here. [Emphasis added.]

Id. at 1180. The road was proposed for reconstruction and use, under a Forest Service (FS) special use permit, in conjunction with nearby tungsten mining.

The court concluded that FS had failed to demonstrate, in its EA, that closing the road during the three-month "lambing" season, which was designed to mitigate adverse impacts, would be effective in reducing potential impacts to the sheep to insignificance. It noted that FS had failed to provide any evidentiary basis for its "assumption that the sheep would return to the area to perform their most sensitive function after that area had been invaded by man for nine months," especially where

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FS had failed to assess the likely volume of traffic on the road, and the corresponding impact on the sheep, given their inability to tolerate human intrusion. 681 F.2d at 1181. The court thus held that FS had not demonstrated that the planned mitigation would avoid significant impacts to the sheep, which would be caused by their permanent displacement from the area, thus supporting its decision not to prepare an EIS. *Id.* at 1181. Rather, it stated that "substantial questions" remained unanswered, requiring preparation of an EIS. *Id.*

Since the Project area at issue here has not been shown to be critical, or even important, to the survival or life cycle of bighorn sheep, which have considerable habitat extending west and south of the area, the Project does not, in BLM's estimation, pose a comparable threat to any sheep which might be displaced from the impacted area. (EA at 58-59, Plate IX.) Appellant provides no evidence to the contrary. We note that the Lila Canyon road would be closed (gated) following construction of the mine surface facilities and the haul road. We do not find that substantial questions have been raised by appellant regarding the effectiveness of relocating the water source, through the placement of guzzlers, or any other measure designed to mitigate impacts to the sheep, or that the potential unmitigated impacts are similar to those at issue in *Wild Sheep* or, most importantly, likely to be significant. Hence, we do not think that the court's holding and analysis requires preparation of an EIS here.

Appellant also asserts that Project activities will significantly affect a "Fremont Rock Shelter" (Site No. 42EM2517), which is eligible for listing in the National Register of Historic Places and is adjacent to and visible from the proposed mine and Lila Canyon Road. (SOR at 6; *see* EA at 48.)

BLM noted, in its EA, that the Fremont Rock Shelter, which had "intact cultural remains" in the form of charcoal and oxidized rocks, was eligible for listing in the National Register "based on its potential for contributing significant data relative to * * * chronology, site function, technology, subsistence, seasonality of occupation, social organization, and extra regional relationships." (EA at 48.) BLM concluded that Project activities would not directly disturb the particular site, since it is situated outside the area of authorized surface-disturbing activities, but recognized that the site might be subject to "[v]andalism," by virtue of the new accessibility to the area afforded by the Project. *Id.* at 60. It thus required UEI, as a prerequisite to granting the rights-of-way, to enter into and implement a "data recovery plan," approved by BLM, under a programmatic agreement with the Utah State Historic Preservation Office, which would fully preserve the research values of the cultural resources at the site. (EA at 60; DR/FONSI at 3.) BLM, thus, concluded that any impact to the site would be reduced to insignificance. (DR/FONSI at 8.) Appellant provides no

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evidence that the Project is likely, despite the required mitigation, to significantly impact the shelter.

Appellant also contends that BLM failed to consider "reasonable alternatives" to the proposed right-of-way grants and the Project. (SOR at 7.) It asserts that BLM focused only on the "extreme ends of the spectrum of reasonable alternatives," either approving the right-of-way grants (thus allowing the Project to go forward) or not approving the grants (thus preventing the Project from going forward). *Id.* at 9. Appellant argues that BLM thus failed to consider the "suspension of approval" of the right-of-way grants until the wilderness status of the two WIU's and WSA is finally determined by the Secretary and/or Congress.^{11/} *Id.* In support of its assertion that BLM should have considered the alternative of suspension pending resolution of the wilderness status of the lands, appellant references an unpublished interlocutory order^{12/} of the Board relying upon the precedent of Southern Utah Wilderness Association, 127 IBLA 331, 100 I.D. 370 (1973). The latter case applied the Interim Management Plan (IMP) provisions applicable to management of lands within a WSA to adjudication of an APD for an oil and gas well and associated road right-of-way within a WSA which would impair wilderness characteristics. Finding that the Secretary was authorized to direct a suspension of operations even with respect to a pre-FLPMA oil and gas lease pending a final determination of the wilderness status of the lands, we remanded the case to BLM to consider that alternative. We find this precedent to be distinguishable from the present case. The lands which would be impacted by surface improvements authorized by the DR are all within WIU's and are

^{11/} Appellant argues that BLM should have also considered the alternative of locating the mine portal and other surface facilities outside the WIU. (SOR at 9.) BLM briefly considered such an alternative, which would have used the existing portal of the "abandoned" Horse Canyon Mine, located close to two miles north of the Project area, but did not analyze it in detail. (EA at 35.) BLM noted that this alternative required extensive rehabilitation of the "old mine works," in order to render them safe, and, given the 2.65-mile distance to the Lila Canyon coal reserves, the construction of "as many a[s] five new surface entries," in order to provide adequate ventilation, thus making the Project economically "infeasib[le]," and causing a greater environmental impact. (EA at 35, 36.) Absent any evidence to the contrary, we find no violation of NEPA. A reasonable range of alternatives embraces alternatives which are feasible and would fulfill the purposes of the project. Valley Citizens for a Safe Environment v. Aldridge, 886 F.2d 458, 461-62 (1st Cir. 1989); Howard B. Keck, Jr., 124 IBLA 44, 53-54 (1992), *aff'd*, Keck v. Haste, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993).

^{12/} Unpublished orders may not generally be relied upon as precedent against a party adversely affected. 5 U.S.C. § 552(a)(2) (2000); Kentucky Resources Council, 137 IBLA 345, 351 n. 5 (1997).

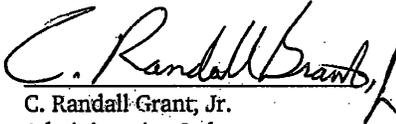
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not within a WSA. As noted above, the WIU's shall not be used to create additional WSA's and do not affect the use or management of the public lands. While a small fraction of the coal lease lands which would have underground workings lies under the WSA, the record indicates that impacts which would affect the WSA are not anticipated.

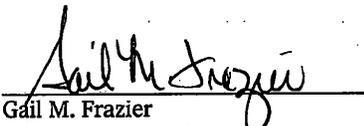
Under section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2000), BLM is required to consider a reasonable range of alternatives which includes the no-action alternative. Defenders of Wildlife, 152 IBLA 1, 9 (2000); Southern Utah Wilderness Alliance, 122 IBLA 334, 338-40 (1992). Such alternatives should be reasonable alternatives to the proposed action, which will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser or no impact. 40 CFR 1500.2(e); 46 FR at 18027; Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990); Howard B. Keck, Jr., 124 IBLA at 53-54. Suspension of the right-of-way applications in the context of this case has not been shown to be a reasonable alternative in that it would make development of intervenor's coal leases unfeasible. Accordingly, we reject appellant's contention that BLM was obligated to consider the alternative of suspension.

To the extent they have not been expressly or impliedly addressed in this decision, all other errors of fact or law raised by appellant are rejected on the ground that they are contrary to the facts or law, or are immaterial.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.


C. Randall Grant, Jr.
Administrative Judge

I concur:


Gail M. Frazier
Administrative Judge