



southern
utah
wilderness
alliance

VIA FIRST CLASS MAIL

February 10, 2006

Mary-Ann Wright
Utah Division of Oil, Gas and Mining
1594 West North Temple
P.O. Box 145801
Salt Lake City, Utah 84114

M. Wright
2/10/06

Re: Consulting Party Letter
Horse Canyon Mine, Lila Canyon Extension C/007/013

Dear Mary Ann:

Southern Utah Wilderness Alliance (SUWA) appreciates the opportunity to participate in the Division of Oil, Gas, and Mining's (DOGM) review of the proposed Horse Canyon Mine, Lila Canyon Extension as a consulting party. Per your request in a letter dated January 13, 2006 SUWA is pleased to provide the following timely information regarding this undertaking: Jerry Spangler, *A Class 1 Analysis of Previous Archaeological Research, Lila Canyon Area, Emery County, Utah* (Nov. 2005). In addition, SUWA offers the following comments on the steps that DOGM must take to comply with Section 106 of the National Historic Preservation Act (NHPA).

- The NHPA prohibits agencies from approving any "undertaking," including the issuance of any license, permit, or approval unless the agency takes into account the effects of the undertaking on historic properties that are include in or eligible for inclusion in the National Register of Historic Places. 16 U.S.C. §§ 470(f) and 470(w)(7). The NHPA's implementing regulations, 36 C.F.R. Part 800, detail the process for full compliance with Section 106.
- DOGM must determine whether this action is an "undertaking," and if so, whether it has the potential to cause effects to historic properties. See 36 C.F.R. § 800.2.
- DOGM must identify appropriate participants in the Section 106 process. See 36 C.F.R. § 800.2.
- DOGM must identify other consulting parties, plan to involve the public, identify appropriate Indian tribes, and, involve local government and the project applicant. See 36 C.F.R. § 800.3. DOGM must also gather information from Indian tribes. See 36 C.F.R. § 800.4.

FEB 14 2006

425 East 100 South
Salt Lake City, Utah 84111
Phone: 801-486-3161
Fax: 801-486-4233
Website: www.suwa.org

- DOGM must determine and document the project's "area of potential effects." See 36 C.F.R. § 800.4; *id.* § 800.16(d).
- DOGM must identify historic properties, evaluate their historical significance, and, determine whether the proposed undertaking may have an adverse effect on those properties. See 36 C.F.R. §§ 800.5 and 800.6.

SUWA is concerned that DOGM has gotten off on the wrong foot in its initial contact letter to various Indian tribes and other consulting parties. Specifically, the sample letter included in your January 13th letter to SUWA does not fully explain the nature or extent of the proposed undertaking. For example, the letter misleadingly implies that only 42 acres in the larger 4660 permit area will be impacted by the proposed Lila Canyon mine:

The Lila Canyon extension covers about 4660 acres. Forty-two (42) acres of this entire acreage will be subject to ground disturbance and have a Class III cultural survey done on them. The remaining areas overlay proposed underground mining and are not subject to direct surface disturbance. These areas have been partially surveyed.

To the contrary, and as SUWA has pointed out before, a majority of the permit area may be subject to significant ground disturbance related to subsidence (i.e., subsidence fractures over 3 feet wide and several hundred feet in length). See e.g., Plate 5-3 (project map depicting maximum extent of subsidence). See also 43 C.F.R. § 800.16(i) (defining "effect"); *Id.* § 800.5(a)(1) & (2)(i-vii) (defining criteria of adverse effect, explaining that direct and indirect effects must be taken into account, and providing non-exclusive examples of what constitutes an adverse effect); Advisory Council on Historic Preservation: Protection of Historic Properties; Final Rule, 65 Fed. Reg. 77,698, 77,720 (Dec. 12, 2000) (explaining definition of adverse effects). By misrepresenting this critical fact, DOGM has failed to fully inform Indian tribes and others about the full extent of the undertaking's potential effects on historic properties. See Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995). To correct this flaw, DOGM should reinstate consultation with tribes and others and fully explain the potential for subsidence and other mine operations to affect historic properties.

In addition, DOGM's letter does not explain what it considers to be the area of potential effects, though it could be reasonably inferred that DOGM incorrectly believes the APE to be limited to the 42 acres of direct surface disturbance. Thus, echoing the point raised above, Indian tribes and others may be unable to effectively participate in the Section 106 process because DOGM has not delineated the area of potential effects. The remedy for this error is for DOGM to reinstate consultation and detail the APE for the proposed undertaking.

Finally, DOGM should require that the project proponent conduct a Class III survey for all lands that may be subject to subsidence or other project related surface disturbance (direct or indirect). See 36 C.F.R. §§ 800.4 and 800.5. This would include, but not be limited to, all the lands identified in Plate 5-3.¹ Without having this basic information at hand, it was premature for DOGM to contact Indian tribes and other consulting parties and it is certainly premature for

¹ If DOGM believes that less than this area may be surveyed and still meet the requirements of Section 106, SUWA would be willing to discuss this with Division staff.

*Southern Utah Wilderness Alliance Consulting Party Letter
Horse Canyon Mine, Lila Canyon Extension C/007/013
February 10, 2006*

DOGM to cut-off contact with any tribe or consulting party based on their non-response to DOGM's flawed letter.

Per 36 C.F.R. §§ 800.5 and 800.6, SUWA looks forward to reviewing DOGM's findings regarding the effects of the proposed undertaking on historic properties. Feel free to contact me with any questions regarding the Class I Analysis attached hereto or SUWA's analysis of Section 106's requirements: 486-3161 x.3981.

Sincerely,

A handwritten signature in black ink, appearing to be "S. Bloch", enclosed within a hand-drawn oval. A horizontal line extends from the right side of the oval.

Stephen Bloch
Staff Attorney

cc: Advisory Council on Historic Preservation
State Historic Preservation Office
National Trust for Historic Preservation