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Task 0421

From: "Dragoo, Denise" <ddragoo@swlaw.com>
To: <maryannwright@utah.gov>, <pamgrubaughlittig@utah.gov>
Date: 8/28/2006 10:58:13 AM
Subject: OSM DENIAL OF SUWA PETITION RE UNSUITABILITY.pdf

Mary Ann and Pam: Attached is OSM's decision denying SUWA's petition seeking to designate lands within the Lila Canyon Permit as unsuitable for mining

Thanks, Denise

Denise A. Dragoo, Esq.
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101
Phone: 801-257-1998
Fax: 801-257-1800
E-Mail: ddragoo@swlaw.com <mailto:ddragoo@swlaw.com>

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CC: <STEVEALDER@utah.gov>

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IN REPLY REFER TO:

United States Department of the InteriorOFFICE OF SURFACE MINING
Reclamation and Enforcement
P.O. Box 46667
Denver, Colorado 80201-6667

August 24, 2006

Stephen Bloch, Staff Attorney
Southern Utah Wilderness Alliance
425 East 100 South
Salt Lake City, Utah 84111

Dear Mr. Bloch:

The Office of Surface Mining (OSM) has completed its review of the petition to designate all lands lying within the zone of subsidence of the proposed Lila Canyon Extension to the Horse Canyon Mine (Permit Area B) as unsuitable for surface coal mining operations.

Based on our review, pursuant to 30 CFR §769.14(g) OSM has determined that it will not process SUWA's petition to designate the Lila Canyon Extension to the Horse Canyon Mine as unsuitable for surface coal mining operations. The enclosed response explains our determination not to process the petition.

We thank you for the opportunity to consider the petition.

Sincerely,

James F. Fulton, Chief
Denver Field Division

Enclosure

cc w/enclosure: Al Klein, WRO
John Kunz, SOLTAKE PRIDE
IN AMERICA

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Response to Petition to Designate Lands as Unsuitable for Surface Coal Mining Operations

August 24, 2006

Introduction

On July 25, 2006, the Office of Surface Mining's (OSM) Denver Field Division (DFD) received a petition to designate all lands lying within the zone of subsidence of the proposed Lila Canyon Extension to the Horse Canyon Mine ("subject lands") as unsuitable for surface coal mining operations. The petition was submitted by the Southern Utah Wilderness Alliance (SUWA). SUWA urges the Secretary to designate the subject lands as unsuitable for surface coal mining operations because such lands are either known to contain or likely to contain a significant number of historic and prehistoric sites.

SUWA's petition covers 5,544 acres contained within six Federal leases currently held by UtahAmerican Energy, Inc. (UEI). The permit area is comprised of two permit areas: Permit Area A (the Horse Canyon Mine); and Permit Area B (the proposed Lila Canyon Extension).

Petitions for Designating Lands Unsuitable for Mining

Section 522(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) allows any person having an interest which is or may be adversely affected to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations. The specific procedures for processing such petitions are found in 30 CFR Parts 764 (State process) and 769 (Federal process).

The Federal regulations at 30 CFR §769.14(g) read as follows:

OSM may determine not to process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published. Based on such a determination, OSM may issue a decision on a complete and accurate permit application and shall inform the petitioner why OSM cannot consider the part of the petition pertaining to the proposed permit area.

This rule "...is the result of the reasonable exercise of OSM's discretion in implementing the Act," and "...will strike a fair balance between the petitioner's interest and an operator's commitment to mine." 48 FR 41333 (Sept. 14, 1983).

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Findings and Analysis

The preamble language to 30 CFR §§764.15(a)(7) and 769.14(g) is instructive in determining whether to process a lands unsuitable petition once a permit application has been filed and the first newspaper notice has been published. The preamble language to section 769.14(g) does not contain any instructive language per se, but refers the reader to the preamble language to Part 764. Specifically, this language states that 30 CFR §769.14(g) was "...proposed to protect the interests of operators who have invested significant expense and time in preparing and submitting extensive documentation and information required for a permit application." 48 FR 41332 (Sept. 14, 1983). Moreover, in responding to a comment that this provision (30 CFR §769.14(g)) would unjustly preclude petitioners from the petition process because of inadequate knowledge of the permit status, OSM noted that "...the provision recognizes the time after which the filing and consideration of a petition will preclude action on a permit application. The new provision will prevent the administrative processing of petitions from being used to impede surface mining operations on lands for which petitioners could earlier have filed petitions. It does not take away the right for citizen participation, but does set limits on the effects the timing of a petition filing [has] on a permit application. The petition process is more a general land-use planning tool than it is a means to make site-specific decisions * * *. Petitioners should be looking ahead to identifying areas which should not be mined, not reacting on a site-by-site basis. * * * This new rule does not mean, however, that important issues will not be considered or that the public will be excluded in the consideration of permits. The permit review process includes means for citizen input and for consideration of important issues." Id. at 41332-41333.

After reviewing all of the information made available to it, OSM finds the following:

1. UEI submitted the initial permit application on December 22, 1998.
2. A permit was subsequently issued on July 27, 2001, and Mining Plan Approval was granted in November of 2001.
3. SUWA filed an objection to the permit on September 4, 2001, and a subsequent hearing before the Utah Board of Oil, Gas, and Mining (Board) reversed the Utah Division of Oil, Gas and Mining's (Division) decision, denying the permit in December of 2001.
4. UEI resubmitted its permit application on February 11, 2002 and the Division required UEI to republish it as a new permit.
5. The Division found the application to be administratively complete on February 25, 2002, and the public notice of completeness was first published in the Sun Advocate on February 28, 2002.
6. An informal conference on the resubmitted permit application package was held on May 21, 2002 and substantial permitting activity ensued as a result.

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7. The protracted permitting activity that occurred between the earlier determination of administrative completeness prompted the Division to make a second administrative completeness determination on March 26, 2004. The public notice of completeness was first published in the Emery County Progress on April 6, 2004.
8. SUWA again requested an informal conference to discuss issues of concern regarding the Division's determination of administrative completeness for the subject permit application package. The informal conference was held on July 7, 2004.
9. Following the informal conference on July 29, 2004, the Director of the Division ordered that the materials submitted by the participants of the conference and the record created at the conference be reviewed and 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.
10. On November 9, 2005, another informal conference was held by the Division to address SUWA's concern that the Division and UEI had still not complied with the Board's 2001 ruling. Among other things, SUWA asserted that the Division had not complied with Section 106 of the National Historic Preservation Act (NHPA). Since the conference was held, DOGM has undertaken initial efforts to comply with the NHPA Section 106 process, though the process has not yet been completed.
11. Since January 13, 2006, SUWA has been actively participating as a "consulting party" in the technical adequacy review of the permit with respect to the NHPA Section 106 process.
12. Maps provided by SUWA in its petition verify that the anticipated area of subsidence lies within the footprint of Permit Area B. An administratively complete application for Permit Area B has been received by the Division and the first newspaper notice published.

The findings illustrate that SUWA has been intimately involved with the proposed Lila Canyon Extension permitting process for nearly five years. It has requested several administrative hearings, conferences, and reviews throughout the process and continues to actively monitor and participate in permitting decisions. Accordingly, SUWA's members have been afforded every opportunity to participate, provide substantial input, and consider important issues throughout the permitting process. Most importantly, however, is the fact that the Division has previously found UEI's Lila Canyon Extension Permit application to be administratively complete and the first newspaper notice has been published. 30 CFR §769.14(g) clearly allows OSM the discretion to not process a petition where an administratively complete permit application has been filed and the first newspaper notice has been published. Considering SUWA's close and lengthy involvement with the Lila Canyon Extension permitting process during the past five

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years, it has had ample opportunity to file an unsuitability petition. To accept and consider SUWA's petition more than two years after the public notice of completeness was first published would constitute an unwarranted delay of mining operations by precluding action on the permit application.

For the reasons discussed above, pursuant to 30 CFR §769.14(g) OSM has determined that it will not process SUWA's petition to designate the Lila Canyon Extension to the Horse Canyon Mine as unsuitable for surface coal mining operations.