

original: A. L. C
CC : MAW
s/d
Graham
C/007/0013

BEFORE THE DIVISION OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF LILA CANYON : MOTION TO AMEND ORDER
EXTENSION TO THE HORSE CANYON : OF JANUARY 19, 2006
MINE, CARBON AND EMERY :
COUNTIES, UTAH : CAUSE NO. C/007/013

MOTION

Pursuant to the November 27, 2006, request of Division Director, John R. Baza, UtahAmerican Energy, Inc. ("UEI"), for the reasons set forth herein, brings this motion requesting Director Baza to revise the Amendment to Order dated January 19, 2006 ("Order") and, consistent with Utah Code Ann. § 40-10-14(1), require the Utah Division of Oil, Gas and Mining ("Division"), to issue the Mine Permit within sixty (60) days for UEI's Lila Canyon Extension to the Horse Canyon Mine, File No. C/007/013, and allow the U.S. Department of the Interior ("DOI") to complete further federal mining plan approval, if any, as the Secretary may determine.¹

BACKGROUND STATEMENT

The issue presented by this motion arose in September, 2005. At that time, the Division had reached an all important milestone in the granting of UEI's mine permit for the Lila Canyon Mine project. After a four year permitting process, in which the Southern Utah Wilderness Alliance ("SUWA") participated by raising repetitive and irrelevant objections at two informal

¹ UEI is filing this motion without waiving its rights to object to whether the motion is necessary. See Argument herein at p.7.

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DIV. OF OIL, GAS & MINING

conferences², the Division addressed the Board's Order of December 14, 2001, and found UEI's application to be technically adequate in a determination dated September 21, 2005 (“**TA Determination**”). This TA Determination, as supplemented by UEI's Class II cultural resource survey dated November 8, 2006, is the basis upon which the Division can proceed to issue a mine permit by January 22, 2007.

In the September, 2005 TA determination, the Division analyzed and made written findings that UEI's Mine Permit application was in compliance with the Utah Coal Mining and Reclamation Act and the Utah Coal Mining Rules. In this comprehensive 97 page document, the Division set forth all of the regulatory requirements for obtaining a Utah coal mining permit and determined that UEI's permit met those requirements. The TA Determination, among other findings, confirmed that the Division had consulted with the Utah State Historic Preservation Office (“**SHPO**”) and determined that UEI had provided adequate historic resource surveys and that the Lila Canyon Mine project would have “no effect” on historic resources.³ Also included with the TA determination was a 71 page Cumulative Hydrologic Impact Assessment (“**CHIA**”) which was independently prepared by the Division. The Division found that “. . . there will be no impacts to hydrologic resources and no probability of material damage for the proposed Lila Canyon Extension.”⁴

² Informal conferences held on May 21, 2002 and July 7, 2004.

³ TA Determination at p. 15.

⁴ Book Cliffs Area V CHIA for Horse Canyon Mine, Lila Canyon Extension to Horse Canyon Mine, September 16, 2005.

At this point in the permitting process, the Division should have gone into its deliberative stage and issued a permit based on its findings set forth in the TA and CHIA determinations. It did not do so. Instead, pursuant to the informal conference order issued by former Division Director Lowell Braxton, the Division took the unprecedented step of forwarding the TA Determination to SUWA for review.⁵ SUWA was provided a further opportunity for informal conference (the third such conference) which was held on November 8, 2005, before Director Baza. At this conference, SUWA once again raised many of the same issues it had presented at the previous two informal conferences.⁶ UEI responded to SUWA at the informal conference and in a letter dated November 8, 2006, stating that SUWA's issues were previously addressed and objecting to the scope of these issues which related to technical adequacy rather than to administrative completeness. Assistant Utah Attorney General Steven Alder also presented SUWA with a letter at the conference which set forth a list of issues repeatedly raised by SUWA and asked SUWA to specifically explain why the TA did not, in the opinion of SUWA, address these issues. Mr. Alder's letter is attached as Exhibit A.

At the end of the hearing, Director Baza informed the parties that the Division would close the record on the informal conference as of November 18, 2005. SUWA used this additional time to undermine the Division's TA Determination. Specifically, SUWA met with the SHPO and persuaded them to draft a letter dated November 17, 2005, limiting the scope of SHPO's "no effects" concurrence regarding historic resources. *See* letter dated November 17,

⁵ August 3, 2004, Informal Conference Findings, Conclusion and Order at pp. 3-4.

⁶ Informal conferences held on July 7, 2004 and May 21, 2002.

2005, from SHPO to Stephen Bloch, SUWA staff attorney, attached as Exhibit B. As a result, UEI has since prepared two additional cultural resource inventories, neither of which have resulted in identification of sites which are recommended for listing on the National Register of Historic Places.⁷

By letter dated November 23, 2005, following closure of the record on November 18, 2005, the Division requested UEI to provide further explanation of certain issues raised by SUWA during the November 8, 2005 informal conference. UEI responded to the Division's request with minor clarifications to the pending permit.

Thereafter, Director Baza issued an order dated December 2, 2005, which: (i) closed the informal conference record as of November 18, 2005; and (ii) set a timeframe of 60 days for the Division to issue a written decision on the permit.

Despite closure of the administrative record, at SUWA's request a meeting was scheduled with the Division on December 8, 2006, to respond to the questions raised by the Utah Attorney General's letter presented at the November 8, 2005 informal conference.⁸ At the further request of SUWA, and over the objection of UEI's counsel, the Division took the unprecedented step of excluding UEI from the December 8th meeting with SUWA. *See* letters dated November 23, 2005, and November 28, 2005, from Snell & Wilmer LLP, attached as Exhibit C. Heather Shilton, counsel to Director Baza, responded to UEI's objection by asserting that the Division

⁷ November 8, 2006, Class II Cultural Resources Inventory of the Lila Canyon Mine's Area of Potential Subsidence, Montgomery Archaeological Consultants, Inc., at p. 16.

⁸ Letter dated November 8, 2006, from Assistant Attorney General Steven Alder, attached as Exhibit A.

had authority to exclude UEI, the permit applicant, from the meeting between SUWA and the Division because the matter involved “the technical adequacy of UEI's application, not its completeness.” Letter attached as Exhibit D. Following the meeting between the Division and SUWA, the Division determined that it was necessary to complete tribal consultation under the National Historic Preservation Act (“**NHPA**”) prior to issuing the permit.

Assistant Attorney General Steven Alder then notified UEI by letter dated January 12, 2006, that it was “not possible to issue a permit within the time constraints of the statute” and that UEI’s application would be denied unless UEI agreed “to extend the deadline for making a decision for such additional time as is necessary to complete tribal consultations and determinations required by the National Historic Preservation Act (“**NHPA**”).”⁹ Letter from Assistant Attorney General Steven F. Alder, dated January 12, 2006, attached as Exhibit E.

Due to the Division’s threat of permit denial and with the understanding that the tribal consultation would proceed expeditiously, i.e., within 30-60 days, the parties entered into a stipulation to amend the December 2, 2005, informal conference order to allow tribal consultation under § 106 NHPA. Prior to proposing the stipulation, the Division took the unprecedented step of requesting the federal Office of Surface Mining (“**OSM**”) to delegate to the State of Utah OSM’s federal authority to complete tribal consultation of the proposed mining

⁹ This notice was consistent with the Division’s previous actions when it was unable to complete its analysis within the 60-day permit review period. On July 19, 2002, sixty days following the Division’s Order dated July 18, 2002, (closing the May 21, 2002 informal conference), the Division made the determination to deny UEI’s permit application. UEI immediately appealed this determination to the Board of Oil, Gas & Mining (“**Board**”). Pursuant to stipulation of the parties, the Board entered an Order staying the appeal until the Division had adequate time to issue a final decision to grant or deny UEI’s permit application package. Board Order dated October 4, 2002.

project under § 106 of NHPA. Tribal consultation under § 106 NHPA is not applicable to the state mine permit process and arises only due to federal mining plan approval by the DOI, a decision which is made separately from approval of the state permit. However, to address SUWA's concern that tribal consultation be completed, the Division requested delegation of tribal consultation responsibility from the federal OSM to the State of Utah. Under the general provisions of the State-Federal Cooperative Agreement, the OSM delegated tribal consultation responsibility to the Division, although the Division had never before conducted tribal consultation under § 106 NHPA and despite the fact that the Secretary of DOI had not yet determined that a new federal mining plan was required. *See* e-mail from OSM to DOGM attached as Exhibit F.

It has now been fifteen months since the Division should have issued the permit based on the TA and CHIA determinations of September, 2005. During this time, UEI has prepared two additional cultural inventories of the Lila Canyon permit area, neither of which has resulted in the recommendation of sites for listing under the National Register.¹⁰ The Division still has yet to complete tribal consultation. Moreover, the Division has informed UEI that it is experiencing funding problems and may not be able to complete the § 106 NHPA process. *See* e-mail exchange attached as Exhibit G. As a result of these concerns, by letter dated November 21, 2006, UEI requested the Division to issue the Mine Permit as soon as possible and allow the DOI

¹⁰ Class II Cultural Resource Inventory of Lila Canyon Mine's Area of Potential Subsidence, dated November 8, 2006, revising Inventory dated September 25, 2006, and Inventory submitted to the Division on June 22, 2006.

to complete further mining plan approval, if any, as the Secretary of DOI may determine. By letter to the Division dated November 22, 2006, UEI withdrew its agreement to the Stipulation to Amend Order and requested the Division to issue UEI's mine permit within sixty (60) days, i.e., by January 22, 2006.

In response, by letter dated November 27, 2006 Director Baza requested UEI to seek a hearing to revise the Amendment to Order dated January 19, 2006. In addition, by letter dated November 27, 2006, the Division requested UEI to clarify certain issues in its permit application. Four days later, on December 1, 2006, UEI responded with a permit package addressing the Division's request for clarification. Also by letter dated December 1, 2006, counsel for UEI once again asked the Division to conclude the permit review process and issue the permit by January 22, 2007.

By letters to the Division dated December 8 and December 15, 2006, counsel for UEI requested a hearing in this matter while restating its position that the informal conference was previously closed by Director Baza's Order dated December 2, 2005. By letter to the Division dated December 19, 2006, SUWA agreed with UEI that a hearing was not needed to rescind the stipulation upon which the January 16, 2006 Order was based and then yet again took the opportunity to raise groundless objections to UEI's pending permit application. UEI addressed SUWA's objections in a letter to the Division dated December 22, 2006, and urged the Division to proceed to issue the Lila Canyon Mine Permit by January 22, 2007.

ARGUMENT IN SUPPORT OF MOTION

UEI respectfully requests Director Baza to revise the Amended Order as follows: (1) if the Division believes the informal conference is still open, by closing the informal conference; and (2) consistent with Utah Code Ann. § 40-10-14(1) by adopting a sixty (60) day deadline for the Division to issue UEI a Mine Permit for the Lila Canyon Extension to the Horse Canyon Mine, Permit No. C/007/013. Timely issuance of the Mine Permit will enable the Secretary to make a determination regarding the need for further mining plan approval.

First, as to the procedural issue, based on the Division's Orders of December 2, 2005, and January 19, 2006, there is no need to request closure of the informal conference because it was closed as of November 18, 2005. The Order of January 19, 2006, did not reopen the informal conference. It allowed the Division time to do tribal consultations and issue a permit. To the extent the Division believes that the informal conference remains open, UEI requests that it be closed as of November 22, 2006, the date UEI withdrew its stipulation in this matter.

Second, based on the facts of this Mine Permit application, the Division was premature in its request for a delegation of authority from the OSM to conduct the tribal consultation under § 106 of NHPA. UEI's permit involves the mining of federal coal reserves leased to UEI. These federal reserves fall within the jurisdiction of the Secretary of the DOI and are subject to federal mining plan approval pursuant to the Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. § 201. Although the mine permitting process for the Lila Canyon Mine project is conducted by the Division, pursuant to the State-Federal Cooperative Agreement at 30 C.F.R. § 944.30, Art.

VI.C.1. and 4.(f)¹¹, the DOI retains jurisdiction to determine the need for a new federal mining plan and tribal consultation under § 106 of NHPA. The Secretary of DOI issued federal mining plan approval for the Lila Canyon Mine in 2001 and the approval remains in effect. *See* Exhibit H. Unless and until the DOI determines that a new federal mining plan approval is required, tribal consultation under § 106 NHPA is premature.

Tribal consultation under the NHPA is triggered by a "federal undertaking." *See* 16 U.S.C. § 470(b)(6) and 36 C.F.R. Part 800. The "federal undertaking" in this case is the Secretary of the DOI's lease of coal reserves and federal mining plan approval. Because the federal mining plan primarily relates to coal leasing, the Division's issuance of the Mine Permit may not require a new mining plan approval. If the Secretary determines that the existing federal mining plan is adequate without further revision, then there will be no "federal undertaking" to trigger tribal consultation under the NHPA. If the Secretary determines that a new federal mining plan approval is necessary, the NHPA would be triggered by a "federal undertaking" and tribal consultation may be required.

Under the Utah Cooperative Agreement, following Mine Permit approval, the DOI, not the State of Utah, determines whether further mining plan approval is required. *See* Utah Cooperative Agreement 30 C.F.R. § 944.30, Art. VI.C.1, 4.(f). Section 523(a) of the Federal

¹¹ 30 C.F.R. § 944.30, Art. VI.C.4.(f) provides, "DOGM may make a decision on approval or disapproval of the permit on Federal lands in accordance with the Program prior to the necessary Secretarial decision on the mining plan, provided that DOGM advises the operator in the permit that Secretarial approval of the mining plan must be obtained before the operator may conduct coal development or mining operations on the Federal lease. DOGM will reserve the right to amend or rescind any requirements of the permit to conform to any terms or conditions imposed by the Secretary in the approval of the mining plan."

Surface Mining Control and Reclamation Act (“SMCRA”) specifically provides that: “Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the State his duty to approve mining plans on Federal lands.” Based on the MLA and SMCRA, the DOI, not the State, determines the viability of the existing federal mining plan approval once the Division has issued the Mine Permit. Furthermore, in this case, UEI’s federal leases were issued by DOI in the 1940’s and 1950’s and are recognized as valid existing rights predating enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701, et. seq., and tribal consultation under the NHPA. Therefore, UEI requests the Director to order the Division to issue a permit based on UEI’s pending application that was determined to be technically adequate as of September 21, 2005, and allow the DOI to complete federal mining approval and NHPA compliance, if any, as the Secretary may determine.

Finally, the conditions under which UEI entered into the Stipulation to amend the December 2, 2005 order have not been fulfilled by the Division. As stated above, the Order was entered pursuant to the stipulation of the parties to allow the Division additional time beyond the 60-day statutory period to complete federal consultation responsibilities under § 106 of the NHPA and 36 C.F.R. Part 800. UEI originally agreed to this extension based on its understanding that the Division would conduct the process in a timely manner. However, tribal consultation under the NHPA has yet to be completed more than one year after the informal conference was closed on November 18, 2005 and more than fifteen months after the Division’s final TA dated September 21, 2005 recommending approval of UEI’s application. Furthermore,

the Division has informed UEI that the State is experiencing a federal funding deficiency and may not be able to complete the process. In an e-mail exchange dated October 31, 2006, the Division stated, "Due to a severe upcoming funding shortage from OSM . . . OGM may be handing back the delegated authority to OGM from OSM to handle the cultural resource process." E-mail exchange attached at Exhibit G. Moreover, if a new federal mining plan is not required by DOI, tribal consultation under the NHPA may be unnecessary.

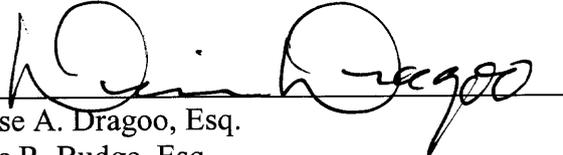
Therefore, UEI respectfully requests that Director Baza order the Division to finalize its review of UEI's Mine Permit on the basis of the Utah Coal Program criteria within the statutory 60-day timeframe and allow DOI to complete further federal mining plan approval, if any, as the Secretary may determine.

RELIEF REQUESTED

For these reasons, UEI requests Director Baza to amend the Order to: (1) close the informal conference if the Division believes it is still open; (2) consistent with Utah Code Ann. § 40-10-14(1), require the Division to issue the Mine Permit within sixty (60) days of UEI's withdrawal from the stipulation, i.e., by January 22, 2007; and (3) consistent with the Utah Cooperative Agreement, 30 C.F.R. § 944.30, Art. VI.C.4.(f), forward the State Mine Permit to OSM and allow DOI to complete any further federal mining plan approval as the Secretary may determine.

Respectfully submitted this 4th day of January, 2007.

UTAHAMERICAN ENERGY, INC.

BY 
Denise A. Dragoo, Esq.
Wade R. Budge, Esq.
Snell & Wilmer L.L.P.
Attorneys for Utah American Energy, Inc.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2007, a true and correct copy of the foregoing Motion to Amend Order of January 19, 2006, was hand delivered to the following:

Steven Alder, Esq.
Utah Assistant Attorney General
1594 West North Temple
Salt Lake City, Utah 84114

Stephen Bloch, Esq.
Southern Utah Wilderness Alliance
425 East 100 South
Salt Lake City, Utah 84111

and that a true and correct facsimile copy of the foregoing Motion was provided to the following:

Ira Hatch
c/o Ray Peterson
P.O. Box 629
Castle Dale, Utah 84513
Facsimile No. 435-636-8983



Julie McHenry

EXHIBIT A

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND HINTZE
CHIEF DEPUTY

Protecting Utah • Protecting You

KIRK TORGENSEN
CHIEF DEPUTY

November 8, 2005

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

Re: Informal Conference for Technical Analysis for Lila Canyon Extension,
UtahAmericanEnergy, Inc., Horse Canyon Mine, C/007/0013

Dear Mr. Bloch:

I am writing on behalf of the Division of Oil, Gas, and Mining to ask for clarification concerning some of the comments and issues raised by your October 11, 2005 letter. It is hoped that by providing this response in a written form you may be better able to provide the Division with the clarifications requested. I will refer to issues by the numbers used in your letter.

1. Acid- or toxic-forming materials. To what extent and in what way does the information provided in Appendix 6-2 not satisfy the requirements of the R645-30624.300 and R645-301-626?
2. Subsurface water resource maps. To what extent does the information provided in Appendices 7-1, 7-2, 7-6 and Plate 7-1 not satisfy the requirements of the R645-301-722.100? Is your objection to the amount of data used to generate the aerial and vertical descriptions or the adequacy of the description?
3. Surface water resources. What methodologies do you believe should be used to provide the seasonal flow rates and water quality information for ephemeral and intermittent streams that are dry on routine sampling visits and on all but a few days of each year? What is the potential impact from this mine on the surface flows to any of the intermittent streams?

November 8, 2005

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4. Ground water quantity. To what extent does the information provided in Appendices 7-1, 7-2, 7-6; table 7-2; and Plates 7-1, and 7-3 not satisfy the requirements of the R645-301 724.100? What specifically is missing in your opinion?
5. Ground water quality. To what extent does the information provided in Appendices 7-1, 7-2, 7-6; table 7-2; and Plates 7-1, and 7-3 not satisfy the requirements of R645-301-724.100? What specifically is missing in your opinion?
6. CoalMine waste. What do you understand to be meant by the term "end-dumping" as used by you in your comments and the rules at R645-301-536? What is the rule, guideline, or other basis for your objection to the use of coal waste as structural fill?
7. Groundwater baseline data for water monitoring plan. Is this objection based solely on the objections referred to in the objections to the surface, subsurface, and groundwater data set forth in items 2, 3, 4, and 5 above? If there are additional concerns or objections, what are they?
8. Surface water baseline data for water monitoring plan. Is this objection based solely on the objections referred to in the objections to the surface, subsurface, and groundwater data set forth in items 2, 3, 4, and 5 above? If there are additional concerns or objections, what are they?
9. The PHC is flawed. Is this objection based solely on the objections referred to in the objections to the surface, subsurface, and groundwater data set forth in items 2, 3, 4, and 5 above? If there are additional concerns or objections, what are they? Are you objecting because information was used that was collected for other applications and not solely for this permit?
10. Water consumption. What are the inconsistencies in the descriptions of the quantities of water that will be consumed by the mining operation? Are there inconsistencies in the descriptions or differences between the discussion in the amount of water use and the calculations of water loss? What are the hydrologic and geologic inconsistencies?
11. Operation plan. This objection is very general. Could you identify the local hydrologic conditions that are not considered? Does this objection refer to the impacts to the hydrology in the area of the surface facilities or to the hydrologic balance in the strata above the mine? What are the further steps that could be considered or taken to minimize the impact?

12. Cumulative Hydrologic Impact Assessment. Is this objection based solely on a continuation of the objections to the sampling methods and baseline information set forth in items 2, 3, 4, and 5 above? What are the other objections to the determination of the hydrologic boundary and the conclusions in the CHIA? What areas of concern are outside of the CHIA boundary, and how might they be affected by the mining operations?
13. Transportation facilities. Is there a legal basis in rule or statute that would require the Division to evaluate the overland conveyor or rail spur prior to receiving an application that includes plans for its construction?
14. Historic and archeological resource information. What does SUWA believe is the factual and legal basis for claiming that the MRP-B does not comply with the National Historic Preservation Act? What does SUWA believe to be the type and amount of cultural resource surveying required for protection of an area of potential subsidence? What archeological information is conflicting other than the difference between "not likely affect" and the legal determination of "no effect"?
15. Fish and Wildlife resource information. Does SUWA believe the monitoring plan for raptors as described in the TA is inadequate? If so, what is the basis for this determination and what would it recommend as a different plan? Is the potential impact to currently empty Golden Eagle nests considered a taking under 16 U.S.C. § 1532(19)?
16. Coal haul road. This is the proposed Emery County road 126. What is SUWA's response to UEI's position that the exclusion of the access road from the permit application review is an issue that was resolved by the prior Board decision and that decision is now *res judicata*? Does SUWA agree that the criteria and authority of the stipulation letter of July 3, 1995 governs the determination of the regulatory authority of the Division over the access road?
17. Air quality. Assuming the coal access road is not included in the permit, does SUWA understand that UEI intends to pave the truck loadout road (located on the permit), but not the mine facilities access road (also located on the permit)? Does SUWA find these operations to be inconsistent with the Division of Air Quality permit?

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Your careful analysis of the permit application is appreciated by the Division. We will suggest to the presiding officer that the informal conference be kept open to provide you with additional time, if needed, to provide the requested additional information.

Very truly yours,



Steven F. Alder
Assistant Attorney General

cc: Denise Dragoo
T. Ira Hatch
John Baza
Heather B. Shilton

EXHIBIT B

0049



State of Utah

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

Department of Community and Culture

YVETTE DONOSSO DIAZ
Executive Director

Division of State History / Utah State Historical Society

PHILIP F. NOTARIANNI
Division Director

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DIV. OF OIL, GAS & MINING

November 17, 2005

Mr. Stephen Bloch, Staff Attorney
Southern Utah Wilderness Alliance
425 E. 100 S.
Salt Lake City, UT 84111

Re: Proposed Horse Canyon Extension—Lila Canyon Mine

In reply please refer to case no 05—0305

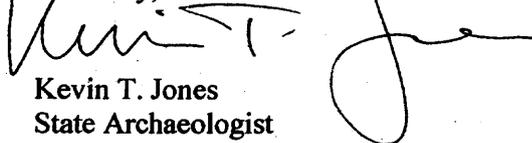
Dear Mr. Bloch:

We are in receipt of your November 8, 2005 letter regarding the proposed Lila Canyon Mine, and appreciate your effort to educate us about the National Historic Preservation Act and its implementing regulations.

In a letter dated March 1, 2005, the Division of Oil, Gas and Mining (DOG M) asked the Utah State Historic Preservation Office (SHPO) for concurrence regarding the effects of the project on three archaeological sites: 42EM2255, 42EM2256, and 42EM2517. In a letter dated March 22, 2005, the SHPO concurred with a determination of No Historic Properties Affected for 42EM2255 and 2256, and with a determination of Adverse Effect for 42EM2517. DOGM stated that the information provided "... is not inclusive of all surveys in the area, but includes pertinent or current surveys," and stated that DOGM "considers that the permit should receive clearance without additional stipulations." The information provided to the SHPO was specific to the three archaeological sites only, and our concurrence was restricted to the effects of the project on those three sites, not the effects of the project in its entirety.

If you have additional questions, please contact me at 801-533-3524, or by email at ktjones@utah.gov.

Sincerely,


Kevin T. Jones
State Archaeologist

CC: D. Wayne Hedberg, DOGM

Enclosure: 3/22/05 letter

Ironing
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EXHIBIT C

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TUCSON, ARIZONA

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DENVER, COLORADO

LAS VEGAS, NEVADA

November 23, 2005

HAND DELIVERED

Mr. John Baza
Director
Utah Division of Oil, Gas & Mining
1594 West North Temple
Salt Lake City, Utah 84114

**RE: *Horse Canyon Mine, Lila Canyon Extension, C/007/013, Informal Conference-
Utah Admin. R. 645-300-123***

Dear Director Baza:

On behalf of UtahAmerican Energy, Inc. ("UEI"), applicant/permittee for the Lila Canyon Extension Coal Mining Permit ("Permit"), we request an opportunity to meet with the Utah Division of Oil, Gas & Mining ("Division") and the Southern Utah Wilderness Alliance ("SUWA") at a meeting scheduled at 1:30 p.m. on December 8, 2005. SUWA and the Division have scheduled this meeting to follow up on issues addressed at the informal conference held on November 8, 2005 regarding the Division's determination that the Lila Canyon Mine permit is administratively complete and technically adequate. Specifically, the Division has requested SUWA to respond to the issues raised in the Division's letter dated November 8, 2005, discussed at the informal conference. Although SUWA is open to considering UEI's participation, the Division has initially declined UEI's request to attend this meeting. UEI is being excluded from this discussion, despite the fact that the meeting involves issues raised at the informal conference and directly relates to UEI's pending application.

The Division's decision in this regard is contrary to the spirit and intent of Lowell Braxton's Order dated July 30, 2004 ("Order"), which provided all parties to the informal conference the opportunity to meet and address the Division's final technical adequacy determination. Order, ¶¶ 5 and 6. The follow up meeting held on November 8, 2005, at which you presided as hearing officer, was requested by SUWA and involved all parties to the original conference, including UEI. Despite your request that SUWA respond to the Division's letter by the close of the informal conference record on November 18, 2005, SUWA and the Division apparently agreed to address this letter in a separate meeting scheduled for December 8, 2005. In

Mr. John Baza
November 23, 2005
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all fairness, and consistent with the earlier Order, the applicant should be included in this meeting to complete the discussion which was initiated at the informal conference. Certainly, the applicant should have the opportunity to hear SUWA's concerns firsthand and have the opportunity to respond to the Division and SUWA at the meeting on December 8, 2005.

UEI appreciates your consideration in this matter.

Very truly yours,



Denise A. Dragoo

DAD:jmc:374493

cc: Clyde Borrell
Michael McKown, Esq.
Jay Marshall
Steve Alder, Esq.
Steven Bloch, Esq.
Heather Shilton, Esq.

file
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November 28, 2005

Via E-Mail and Hand Delivery

Director John Baza
Utah Division of Oil, Gas & Mining
1594 West North Temple
Salt Lake City, Utah 84114

RE: *Horse Canyon Mine, Lila Canyon Extension, C/007/013, Informal Conference--Utah Admin. R. 645-300-123—Response to Southern Utah Wilderness Alliance ("SUWA")*

Dear Director Baza:

On behalf of UtahAmerican Energy, Inc. ("UEI"), applicant/permittee for the Lila Canyon Extension Coal Mining Permit ("Permit"), this letter responds to SUWA's letter dated November 23, 2005. As stated in our letter dated November 23, 2005, UEI would like to participate in a meeting scheduled by the Division at 1:30 p.m. on December 8, 2005 to review SUWA's response to issues raised at the informal conference in the Division's letter to SUWA dated November 8, 2005. Contrary to the suggestion of SUWA, the issue of whether these questions should be answered in the context of the informal conference was raised directly at the hearing as follows:

HEARING OFFICER BAZA: Would you recommend that these questions be answered before we close out the informal conference?

MR. ALDER: Yes.

HEARING OFFICER BAZA: All right. Anything more?

MR. ALDER: No.

Transcript at 57-58, enclosed. This discussion between Mr. Alder and you as Hearing Officer suggests that SUWA was to respond to the Division's questions by the close of the informal conference when you later stated:

HEARING OFFICER BAZA: . . . So, Mr. Bloch, what I instruct you to do is to make whatever further analysis or comment or anything you think would add to -- value to the Division's decision making by the close of business on November 18th. And then at that point this informal conference will close and that is my decision. And, of course, the

Director John Baza
November 28, 2005
Page 2

Division should continue to communicate with the parties involved, to get answers to their questions and to insure that they've got all the information that they need to render that decision. And I think that that tries to split the baby a little bit. It is longer than five days, maybe not as much as thirty days, but it will allow this record to remain open until close of business on November 18th.

Transcript at 67-68, enclosed.

In the context of the earlier exchange between you and Mr. Alder in which Mr. Alder stated that answers should be provided by SUWA prior to the close of the informal conference, it seems clear that SUWA was to provide this response prior to November 18th. Apparently, the Division and SUWA agreed to an extension of time for SUWA to respond to Mr. Alder's letter. This extension is acceptable to UEI, assuming that UEI has an opportunity to participate in the meeting between SUWA and the Division at which SUWA's response will be addressed. Contrary to SUWA's suggestion, UEI's presence and participation should not hinder this meeting. UEI was not confrontational during the informal conference. Further, UEI plans to bring an expert hydrologist to respond to SUWA's questions which should make the meeting productive for all parties.

You indicated at the close of the informal conference your intent to prepare a written order regarding the proceedings. Therefore, we request that your written order clarify the record and allow UEI to participate in the meeting with SUWA and the Division currently scheduled at 1:30 p.m. on December 8, 2005.

Thank you for your consideration in this matter. I am available any time this week to discuss these issues should you decide to have a conference call to review this matter.

Very truly yours,



Denise A. Drago

DAD:jmc:374701

Enclosures

cc: Clyde Borrell (via e-mail, with enclosures)
Michael McKown, Esq. (via e-mail, with enclosures)
Jay Marshall (via e-mail, with enclosures)
Steve Alder, Esq. (via e-mail, with enclosures)
Steven Bloch, Esq. (via e-mail, with enclosures)
Heather Shilton, Esq. (via e-mail, with enclosures)

1 We did that three different times as production
2 increased, you know.

3 MR. ALDER: I guess the question is
4 whether the mine's prepared to operate at a
5 million tons if it doesn't. And, again, that's
6 just something I think maybe can be addressed in
7 a conference. So that's all I have.

8 HEARING OFFICER BAZA: Let me ask you
9 some questions about your letter by Mr. Alder.
10 Is it your opinion that you would need a response
11 from this Division to make decision on the permit
12 application?

13 MR. ALDER: Yes. And I don't think
14 that--and I appreciate the opportunity to clarify
15 that the decision on the application is not
16 constrained by 10 days or 30 days extension of
17 this informal conference. The extension on the
18 decision will take place when they think they have
19 all the adequate information has been answered and
20 we do have the 60-day constraint, but that can be
21 dealt with and has been dealt with before by
22 denying the permit in part and approving it in
23 part. It's just very awkward.

24 HEARING OFFICER BAZA: Would you
25 recommend that these questions be answered before



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1 we close out the informal conference?

2 MR. ALDER: Yes.

3 HEARING OFFICER BAZA: All right.

4 Anything more?

5 MR. ALDER: No.

6 HEARING OFFICER BAZA: Okay. Well, we
7 also have an audience here with us. And I know
8 that Mr. Petersen of Emery County has a statement
9 that you would like to make. So now is the time
10 for anyone who has public comments to make those,
11 and we'll give Mr. Petersen first crack.

12 MR. PETERSEN: Thank you, Director. I
13 would just like to read a prepared statement here.
14 It represents Emery County's position. Emery
15 County welcomes the opportunity to comment on the
16 permit application referred to about the Lila
17 Canyon extension. The area described in the
18 application permit is within the boundary of Emery
19 County as well as proposed access rights-of-way.
20 Emery County is well suited for the location of
21 this mining operation. Supported industries are
22 in place within the Carbon/Emery area. Trained
23 and available workforce is available. Emery
24 County is willing and able to participate in
25 necessary road construction to make this project



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1 I'll paraphrase what I said initially, the purpose
2 of this proceeding in my mind is to determine
3 whether the application fulfills the intent of the
4 administrative process and whether there was any
5 new information to be gained or added information
6 that could be provided during the informal
7 conference. There's been a lot of water under
8 the bridge on this. And there's been a lot of
9 effort and time put in by all the parties in
10 trying to present information. However, what I've
11 heard today doesn't necessarily indicate that the
12 informal conference needs to be continued or
13 extended. There is a process yet remaining with
14 the Division where they have to issue a permanent
15 decision within 60 days of the close of the
16 informal conference. And I would expect that the
17 parties would continue to dialogue and communicate
18 during that period of time. But in fairness to
19 Mr. Bloch and the fact that he explored our
20 record last week and was not able to find certain
21 documents that he felt would have added to his
22 presentation, I'm going to allow that this
23 informal conference will remain open, the record
24 remain open until November 18th, which is about
25 ten days from now. So, Mr. Bloch, what I'll



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1 instruct you to do is to make whatever further
2 analysis or comment or anything that you think
3 would add to--value to the Division's decision
4 making by the close of business on November 18th.
5 And then at that point this informal conference
6 will close and that is my decision. With that we
7 know that the Division will then have no more
8 than 60 days in which to render a decision on the
9 permit. And, of course, the Division should
10 continue to communicate with the parties involved,
11 to get answers to their questions, and to ensure
12 that they've got all the information they need to
13 render that decision. And I think that that
14 tries to split the baby a little bit. It's
15 longer than five days maybe not as much as thirty
16 days, but it will allow this record to remain
17 open until close of business on November 18th.
18 So, again, I thank everyone involved. I
19 appreciate you being here. Again, it has added to
20 the process to have these meetings and these
21 conferences, and we'll try to progress very
22 quickly and expeditiously from this point.

23 One more thing on the record: I think I
24 have to do a written decision, and that decision
25 will be issued within a reasonable time after the



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EXHIBIT D

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



MARK L. SHURTLEFF
ATTORNEY GENERAL

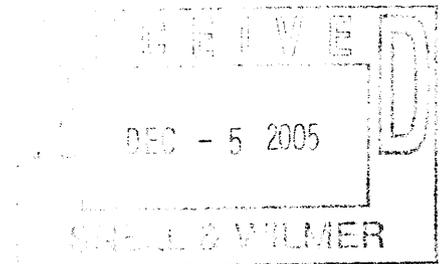
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CHIEF DEPUTY

December 2, 2005

Denise Drago
Snell & Wilmer
Gateway Tower West
15 West South Temple, Suite 1200
Salt Lake City, Utah

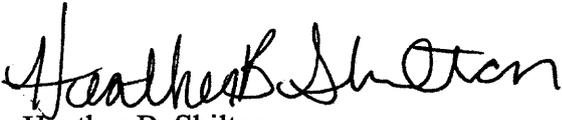


Re: Horse Canyon Mine, Lila Canyon Extension
UEI's Request to Attend Meeting Scheduled December 8, 2005

Dear Denise:

The purpose of the meeting is to discuss issues regarding the technical adequacy of UEI's application, not its completeness. Therefore, the question of whether or not UEI may attend the meeting rests with the Division, not John Baza in his role as the presiding officer over the informal conference.

Please feel free to contact me if you have any questions.


Heather B. Shilton
Assistant Attorney General

cc: Steve Alder, Esq.
Steven Block, Esq.

EXHIBIT E

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



MARK L. SHURTLEFF
ATTORNEY GENERAL

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CHIEF DEPUTY

January 12, 2006

Denise Dragoo
Snell & Wilmer
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1547

Re: Continuation of Technical Analysis for Lila Canyon Extension, UtahAmerican Energy, Inc., Horse Canyon Mine, C/007/0013

Dear Denise:

I am writing on behalf of the Division of Oil, Gas, and Mining in order to agree on an extension of the time limit provided by Utah Code §40-10-14(1) which requires the Division to issue written findings granting or denying the permit in whole or in part within 60 days of the informal conference concluded November 18, 2005. We believe that an extension of this time limit will provide the most efficient means of completing review of the application, and is in the best interests of all of the parties.

As you are aware, as a result of comments received at the informal conference and further inquiries, the Division has determined that Tribal Consultation as required by Section 106 of the National Historic Preservation Act (NHPA) pursuant to 36 CFR Part 800 has not been completed and must be done as part of the permit review process. This consultation has been delegated to the Division by OSM pursuant to 36 CFR 800.2(a). The time required to complete this consultation and make a finding as required by the NHPA will extend the process for at least 60 days. The actual amount of time will depend on the nature of the responses.

Also, in response to the comments received at the informal conference, the Division has requested supplemental information from UtahAmerican Energy Inc., to further address specific requirements for the permit. The requested information that has been submitted by UEI was only recently received in a format that permits its accurate evaluation. Until the Division has time to review this information it can not make an accurate estimate of

the additional time needed to make a final decision, but it is reasonable to expect that the time needed to evaluate this information and respond with a written decision will also exceed the current deadline, set to expire on January 17, 2006.

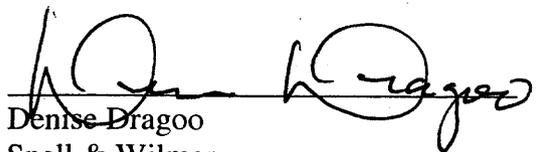
As a consequence, it will not be possible to issue a decision approving the permit within the time constraints of the statute. A decision based on incomplete analysis and prior to completion of the Section 106 consultation, would at best be a partial approval and a partial denial, or require a modification of the permit application. Proceeding with such a partial decision would put all parties to the burden of filing appeals and then either proceeding to appeal the partial actions, or stipulate to holding the appeal of the decision in abeyance pending complete evaluation of the application. Rather than go down that road again, it is proposed that we agree to extend the deadline for making a decision for such additional time as is necessary to complete the tribal consultations and determinations required by NHPA prior to issuing a permit.

Instead of preparing a separate stipulation, will you please indicate your agreement with an extension for the time and conditions described by signing and returning a copy of this letter to me. The order from the informal conference will be amended to provide that this extension is not inconsistent with that order.

Sincerely yours,



Steven F. Alder
Assistant Attorney General
Attorney for Utah Division of Oil, Gas and Mining



Denise Dragoo
Snell & Wilmer
Attorney for Utah American Energy, Inc.

cc: Stephen Bloch
Attorney for SUWA

EXHIBIT F

Dragoo, Denise

From: Dragoo, Denise
Sent: Monday, January 09, 2006 1:50 PM
To: R. Jay Marshall
Cc: Borrell, Clyde
Subject: OSM's 106 consultation delegation to Utah

Attachments: Jan3letLilaTribalNotif.doc



Jan3letLilaTribalNoti
f.doc (24...

Jay: Set forth below is the e-mail from Pete Rutledge with the federal OSM delegating to the State of Utah the responsibility for tribal consultation under Section 106 NHPA. Also attached is the draft tribal consultation letter which the State of Utah has prepared on the Lila Canyon Extension. As we discussed, UEI has been requested to confirm that the acreage referenced in this letter as 4700 acres reflects the correct acreage of the legal description accompanying the public notice for the Lila Canyon Mine Extension. A larger tract of 5,605.66 acres is referred to in the Purpose and Need Section 1.1 of the September 2000 Lila Canyon Project EA and in the legal description of the federal leases forwarded by OSM to Pam Littig. See e-mail forwarded by Pam Littig and Mary Ann Wright on Friday, January 6, 2006. As we discussed, the larger area appears to apply to the entire leasehold of the Horse Canyon Mine, not just to the Lila Canyon extension. We should encourage the State to attach the correct legal description to the tribal consultation letter. Thanks again, Denise

-----Original Message-----

From: Steve Alder [mailto:stevealder@utah.gov]
Sent: Monday, January 09, 2006 10:19 AM
To: Dragoo, Denise
Subject: Fwd: Re: 106 consultation delegation

>>> Pam Grubaugh-Littig 01/04/06 10:39 AM >>>

Thanks, Pete.... Here's the draft tribal letter to date.... it is still in draft. Any suggestions? Thanks again... Pam

>>> "Pete Rutledge" <PRutledge@osmre.gov> 1/4/2006 10:29 AM >>>

Pursuant to 35 CFR 800.2 and in keeping with the intent of the Utah Cooperative Agreement as set out in 30CFR 944.30 Article I:B. the Utah Division of Oil, Gas And Mining is delegated authority to conduct the 106 consultation process for the Lila Canyon mining plan and permitting process.

EXHIBIT G

Dragoo, Denise

From: Mary Ann Wright [maryannwright@utah.gov]
Sent: Tuesday, October 31, 2006 4:47 PM
To: Dragoo, Denise; Pam Grubaugh-Littig
Cc: Jay Marshall; Steve Alder; Dave Shaver
Subject: RE: Lila Canyon Mine: Section 106 NHPA Tribal Consultation

Will do.

>>> "Dragoo, Denise" <ddragoo@swlaw.com> 10/31/2006 4:30 PM >>>
Mary Ann, thanks for the update...sounds grim. Let me know if we can do anything to help move the process along. UEI could retain Montgomery Archeological and Dr. John Fritz to complete the Section 106 process.
Another option may be to have the Division issue a new technical adequacy document without addressing the Section 106 NHPA process and let the Department of Interior or OSM address tribal consultation at the federal mine plan approval stage. Let me know how you would like UEI to proceed! Dee

-----Original Message-----

From: Mary Ann Wright [mailto:maryannwright@utah.gov]
Sent: Tuesday, October 31, 2006 4:11 PM
To: Dragoo, Denise; Pam Grubaugh-Littig
Cc: Jay Marshall; Steve Alder; Dave Shaver
Subject: Re: Lila Canyon Mine: Section 106 NHPA Tribal Consultation

Dee - OGM is in the process of focusing our time on core mission tasks due to a severe upcoming funding shortage from OSM (UMA has been briefed). What that translates to is that OGM may be handing back the delegated authority to OGM from OSM to handle the cultural resource process. We will know more by our meeting on Nov 8 and will keep you informed. That is really all I can tell you at this point.

>>> "Dragoo, Denise" <ddragoo@swlaw.com> 10/31/2006 3:17 PM >>>
Mary Ann and Pam, pursuant to UEI's meeting with the Division on October 3, 2006, Jay Marshall followed up with the BLM and requested them to forward to you the Memorandum of Agreement on the Freemont Rock Shelter.
We understand that the MOA was sent to you yesterday by the BLM. We also understand that the Division has drafted the Programmatic Agreement on the Lila Canyon site and that this PA is in the final stages of review.
Once the PA and the MOA are completed in draft form, the Division has agreed to forward these documents and Montgomery's final cultural survey to the SHPO. Can you update us on where the Division is in this process?
Will the PA be completed in draft form shortly and sent on to the SHPO?
Thanks for your assistance! Denise

Denise A. Dragoo
Snell & Wilmer L.L.P.

15 West South Temple
Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1547
Phone: (801) 257-1998 (direct)
Fax: (801) 257-1800
(Assistant is Julie McKenzie, 801-257-1959 or
jmckenzie@swlaw.com)
www.swlaw.com <<http://www.swlaw.com/>>

Note: This communication is intended only for the designated recipients, and may contain confidential or privileged information.

If
you are not a designated recipient, please disregard this communication, and contact the

EXHIBIT H

UNITED STATES
DEPARTMENT OF THE INTERIOR

This mining plan approval document is issued by the United States of America to:

UtahAmerican Energy, Inc.
P.O Box 187
St. Clairsville, Ohio 43950

for a new mining plan for Federal leases SL-066145, SL-066490, U-014218, U-0126947, SL-069291, and U-014217 at the Horse Canyon Mine. The approval is subject to the following conditions. UtahAmerican Energy, Inc. is hereinafter referred to as the operator.

1. Statutes and Regulations.--This mining plan approval is issued pursuant to Federal leases SL-066145, SL-066490, U-014218, U-0126947, SL-069291, and U-014217; the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 et seq.); and in the case of acquired lands, the Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351 et seq.). This mining plan approval is subject to all applicable regulations of the Secretary of the Interior which are now or hereafter in force; and all such regulations are made a part hereof. The operator shall comply with the provisions of the Water Pollution Control Act (33 U.S.C. 1151 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and other applicable Federal laws.
2. This document approves the new mining plan for Federal leases SL-066145, SL-066490, U-014218, U-0126947, SL-069291, and U-014217 at the Horse Canyon Mine and authorizes coal development or mining operations on the Federal leases within the area of mining plan approval. This authorization is not valid beyond:

T16S R14E

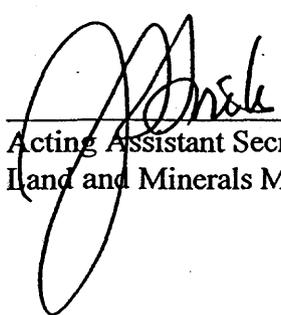
Section 10: Portions of SE1/4
Section 11: E1/2, Portions of W1/2
Section 12: All
Section 13: All
Section 14: All
Section 15: E1/2SE1/4, N1/2NE1/4, SE1/4NE1/4
Section 22: NE1/4NE1/4
Section 23: N1/2, SE1/4, E1/2SW1/4
Section 24: All
Section 25: N1/2
Section 26: N1/2NE1/4, SE1/4NE1/4, T16SR15E
Section 19: W1/2SW1/4, SE1/4SW1/4, S1/4NE1/4SW1/4
Section 30: NW1/4, SW1/4NE1/4, S1/4NW1/4NE1/4

These lands encompass 4626.1 acres and are found on the map appended hereto as Attachment A.

Section 26: N1/2NE1/4, SE1/4NE1/4
T16S R15E
Section 19: W1/2SW1/4, SE1/4SW1/4, S1/4NE1/4SW1/4
Section 30: NW1/4, SW1/4NE1/4, S1/4NW1/4NE1/4

These lands encompass 4626.1 acres and are found on the map appended hereto as Attachment A.

3. The operator shall conduct coal development and mining operations only as described in the complete permit application package, and approved by the Utah Division of Oil, Gas, and Mining, except as otherwise directed in the conditions of this mining plan approval.
4. The operator shall comply with the terms and conditions of the leases, this mining plan approval and the requirements of the Utah Permit No. C/007/013 issued under the Utah State program, approved pursuant to the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.).
5. This mining plan approval shall be binding on any person conducting coal development or mining operations under the approved mining plan and shall remain in effect until superseded, canceled, or withdrawn.
6. If during mining operations unidentified prehistoric or historic resources are discovered, the operator shall ensure that the resources are not disturbed and shall notify Utah Division of Oil, Gas, and Mining and the Office of Surface Mining Reclamation and Enforcement (OSM). The operator shall take such actions as are required by Utah Division of Oil, Gas, and Mining in coordination with OSM.
7. The Secretary retains jurisdiction to modify or cancel this approval, as required, on the basis of further consultation with the U.S. Fish and Wildlife Service pursuant to section 7 of the Endangered Species Act, as amended, 16 U.S.C. " 1531 *et seq.*


Acting Assistant Secretary,
Land and Minerals Management

Nov. 5 '01
Date