

0019

C/007/013 Incoming  
CC: Dana  
Joe  
Lynn K. # 3253

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LAS VEGAS  
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SALT LAKE CITY  
TUCSON

April 3, 2009

*Via E-Mail and U.S. Mail*

Mr. Jim Smith  
Assessment Officer  
Utah Division of Oil, Gas & Mining  
1594 West North Temple, Suite 1210  
P.O. Box 145801  
Salt Lake City, Utah 84114-5801

**RE: Fact of Violation / Assessment Factors – NOV 10036, Horse Canyon Mine,  
Permit No. C/007/0013**

Dear Mr. Smith:

On behalf of UtahAmerican Energy, Inc. (“UEI”), and pursuant to R645-401-610, we hereby contest the fact of violation and request vacation of Notice of Violation No. 10036 (“NOV”). In the alternative, we request that any assessment herein reflect the information provided by UEI at its meeting with the Utah Division of Oil, Gas and Mining (“Division”) held on Monday, March 30, 2009, and the information further set forth herein.

**Background Facts**

1. By letter dated March 19, 2009, the Division rejected UEI’s permit revision regarding the condition for working through wildlife exclusionary periods. Rather than providing UEI with an opportunity to review and respond to the Division’s technical analysis of the permit revision, the Division immediately issued the NOV on March 19, 2009.

2. The NOV alleges that UEI failed to conduct coal mining operations in accordance with the approved Mining and Reclamation Plan (“MRP”), specifically Attachment A, Special Condition #4, Item #4. R645-300-142, 143. Further the NOV claims that UEI’s mitigation plan is incorrectly formatted. R645-301-120.

3. To abate the NOV, UEI was to address the deficiencies set forth in the Division’s Technical Analysis dated March 11, 2009 (“TA”) by Thursday, March 26, 2009. This abatement date was extended at UEI’s request to April 9, 2009.

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4. On March 30, 2009, the Division met with UEI and its counsel to review: (i) whether the mitigation plan is even required at this phase of mine construction; and (ii) the Division's TA alleging deficiencies in the mitigation plan.

**I. FACT OF VIOLATION: THE MRP DOES NOT REQUIRE A MITIGATION PLAN BECAUSE UEI HAS INITIATED CONSTRUCTION**

UEI contests the fact of violation of the NOV and requests the Division to vacate the NOV. The NOV incorrectly alleges that UEI failed to conduct its operations in accordance with wildlife exclusionary periods under the approved MRP and inappropriately requires a plan to allow work during these periods when no such plan is required.

The MRP does not impose wildlife exclusionary periods at UEI's current level of full-time construction operations. The MRP provides, "The Operator will adhere to exclusionary periods when initiating construction and final reclamation projects." Chapter 3 MRP, ¶ 7, Page 19 (emphasis added). UEI's permit was approved by the Division on May 2, 2007 and was immediately challenged by the Southern Utah Wilderness Alliance ("SUWA"). UEI defeated SUWA's attempts to stay or enjoin the MRP but these proceedings disrupted operations and caused UEI to start and stop limited construction activities at the mine site during 2008. This limited level of mine construction activities caused the Division and BLM to carefully consider whether the exclusionary periods applied to UEI's activities in 2008. By e-mail to UEI dated January 28, 2008, the Division explained that the exclusionary periods apply to limited activities but not to "continuous construction operations":

The reason for continuous construction operations is that wildlife moving into the area will be aware of the disturbance before they begin nesting or lambing. If there is a lull in the operations then the animals may not be aware of the operations. You cannot begin work before the exclusionary period starts then stop before the exclusionary period begins and then start up within the exclusionary period. The reason for beginning before the exclusionary period is so that wildlife will be aware of the human activities before they choose to stay in the area.

E-mail from Wayne Western to UEI, dated January 28, 2008, attached as Exhibit A.

By letter dated February 15, 2008, the Interagency Wildlife Buffer Team ("**Interagency Team**") acknowledged Mr. Western's e-mail as the intent of the exclusionary periods and further confirmed that UEI had started "limited construction activities" on or prior to the Golden Eagle and Rocky Mountain Sheep exclusionary periods. The Interagency Team authorized UEI to continue work under the MRP at that level of activity through the exclusionary periods. February 15, 2008 letter to UEI from the Interagency Team, attached as Exhibit B, page 1. By contrast, the Bureau of Land Management ("**BLM**") found insufficient evidence to support

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UEI's continued construction operations through the 2008 closure period. BLM required UEI to stop its limited construction activities on BLM's surface facilities right of way UTU-77122 during the 2008 closure periods. February 12, 2008 letter from BLM to UEI, attached as Exhibit C.

In December, 2008, UEI commenced full construction activities at the Horse Canyon Mine. On January 26, 2009, the "zero" portal was shot at the mine site. These blasting operations which commenced prior to the February 1<sup>st</sup> exclusionary period continued through February. By the end of February, 2009, UEI had commenced underground mining activities, including blasting operations to open Portals "zero," "one" and "two." Both BLM and the federal Mine Safety and Health Administrative ("MSHA") have recognized UEI's current activities as "mining" not as construction. By letter dated February 17, 2009, BLM notified UEI that as of January 26, 2009, when the first portal was shot, "BLM determined on that date that the mine facilities were no longer in the construction phase and are now in the mining phase." February 17, 2009, letter from BLM to UEI, attached as Exhibit D. MSHA required UEI to submit a roof control plan for these operations.

Clearly, UEI's continuous operations which commenced in full in January, 2009, were at a level that wildlife should have been aware of the activities. Consistent with the Division's position set forth in Mr. Western's January 28, 2008 communication to UEI and confirmed by the Interagency Team policy letter, the exclusionary period is not applicable to UEI's increased level of activity. The NOV was issued based on the incorrect assumption that UEI was "initiating construction." There is no definition of the term "initiating construction" to support this interpretation under the Utah Coal Mining and Reclamation Act or rules. The NOV is inconsistent with the Division's policy as confirmed by Wayne Western and adopted by the Interagency Team in February, 2008. Further, the extensive construction operations are termed mining activities by MSHA and BLM and are no longer viewed as "initial construction." Therefore, by the terms of the MRP and Division policy, the exclusionary periods no longer apply and have not been in effect since January, 2009. There is no evidence to support the fact of violation and it must be vacated.

## **II. PENALTY ASSESSMENT**

As set forth above, UEI requests that the Division vacate the NOV. However, if, over UEI's objection, the fact of violation is upheld, UEI requests that the assessment officer consider the following facts. Further, pursuant to R645-401-500, UEI asks that the assessment officer waive the penalty assessment formula, which due to the exceptional circumstances of the NOV, is demonstrably unjust.

### **A. History of Previous Violations – R645-401-311**

UEI has no previous violations at the Lila Canyon Extension, Horse Canyon Mine.

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**B. Seriousness of Violation – R645-401-312**

As discussed above, UEI's extension and full-time construction operations at the mine site clearly provided wildlife with notice of their activities. Further, Golden Eagle monitoring within the territory of the mine in 2009 has confirmed that there are no active Gold Eagle nests. Therefore, the alleged violation has caused no impact on the public or the environment.

**C. Degree of Fault/Good Faith in Addressing Compliance – R645-401-313, 314**

UEI was of the understanding that its March 2, 2009 permit revision met the Division's substantive and procedural requests for a plan to work through the exclusionary periods. By letter dated March 19, 2009, the Division rejected UEI's permit revision. Rather than providing UEI with an opportunity to review and respond to the Division's TA, the Division immediately issued the NOV on March 19, 2009. At the request of UEI, the abatement date of March 26, 2009 was extended to April 9, 2009 allow the operator an opportunity to discuss the TA with the Division. UEI promptly met with the Division on Monday, March 30, 2009, to review the alleged deficiencies. UEI will resubmit the permit revision by Thursday, April 9, 2009. The Division should award UEI the maximum credit for good faith compliance. Further, due to the Division's inconsistent policies and premature issuance of the NOV, application of the penalty formula is demonstrably unjust and should be waived.

**Conclusion**

In sum, UEI requests the Division to vacate the NOV and confirm that, at UEI's current level of full-time construction, no mitigation plan is required to allow UEI to work through the wildlife exclusionary periods. In the alternative, consistent with R645-401-500, UEI requests the Division to waive the penalty amount formula and/or significantly reduce the penalty. Under the exceptional circumstances of this case, a penalty is demonstrably unjust. UEI is in compliance with the Division's 2008 policy regarding wildlife exclusionary periods and should not be penalized for the Division's unsupported change of policy under the NOV.

We appreciate your consideration in this matter.

Very truly yours,



Denise A. Drago

DAD:jmc  
Enclosures  
cc: Bruce Hill  
Jay Marshall  
Michael McKown, Esq.

## Dragoo, Denise

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**From:** Marshall, Jay [jmarshall@coalsource.com]  
**Sent:** Thursday, April 02, 2009 8:25 PM  
**To:** Dragoo, Denise  
**Subject:** FW: Warning Exclusionary Period (This May Help)

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

From: Wayne Western [mailto:waynewestern@utah.gov]  
Sent: Monday, January 28, 2008 10:23 AM  
To: Marshall, Jay  
Cc: Angela Nance; Daron Haddock; Jerriann Ernstsens; Pam Grubaugh-Littig; Pete Hess  
Subject: Warning Exclusionary Period

Jay,

This email is to remind you about the exclusionary periods for the Lila Canyon extension of the Horse Canyon Mine. See the MRP - Part B, Section 330, page 20.

From what I understand, UEI began on the groundwork and then stopped. After reviewing the commitment list in the MRP, I am of the opinion that work on the ground needs to be ongoing before Feb. 1, 2008 or you will have to suspend construction until after the exclusionary period.

The reason for continuous construction operations is that wildlife moving into the area will be aware of the disturbance before they begin nesting or lambing. If there is a lull in the operations then the animals may not be aware of the operations.

You cannot begin work before the exclusionary period starts then stop before the exclusionary period begins and the start up within the exclusionary period. The reason for beginning before the exclusionary period is so that wildlife will be aware of the human activities before they choose to stay in the area.

Wayne



JON M. HUNTSMAN, JR.  
Governor

GARY R. HERBERT  
Lieutenant Governor

**State of Utah**  
**DEPARTMENT OF NATURAL RESOURCES**  
**Division of Oil, Gas & Mining**

MICHAEL R. STYLER  
Executive Director

JOHN R. BAZA  
Division Director

February 15, 2008

Jay Marshall, Resident Agent  
UtahAmerican Energy, Inc.  
P.O. Box 986  
Price, Utah 84501

Subject: Exclusionary Periods and Construction Activity, Lila Canyon Extension to the Horse Canyon Mine, UtahAmerican Energy, Inc. (UEI), Horse Canyon Mine, C/007/0013, Outgoing File

Dear Mr. Marshall:

On January 16, 2008, the Interagency Wildlife Buffer Team (Team) discussed construction efforts at the Lila Canyon Mine. The Bureau of Land Management (BLM) stated that the work at the site was minimal and sought clarification of the intent and details of the exclusionary periods. The Team discussed certain details and BLM mentioned that they would contact you to discuss the concern of stopping and restarting or increasing the level of activity during exclusionary periods. In addition, on January 28, 2008, Wayne Western from the Utah Division of Oil Gas and Mining (Division) sent you an email that provided his understanding of the intent of exclusionary periods. This letter and "Implementation Plan" (Plan) is a follow-up to the on-going effort to provide a clear explanation of what is expected by the Division concerning commitments on wildlife exclusionary periods.

The United State Fish Wildlife Service, Utah Division of Wildlife Resources, and Division biologists have been working diligently to develop a plan that addresses the comments made during the Interagency Wildlife Buffer Team meeting. The attached Plan considers the entire level of work that is currently being conducted at the Lila Canyon Mine and the Best Management Practices for protecting golden eagles and Rocky Mountain sheep.

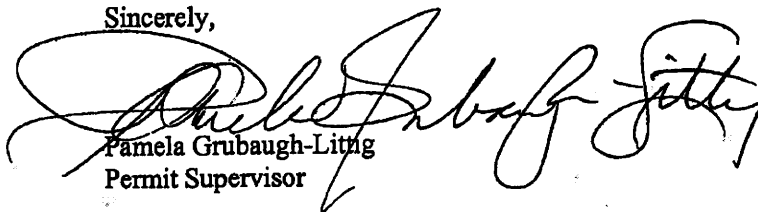
Previously, the Division believed that when UEI received the Permit for the Lila Canyon Extension to the Horse Canyon Mine, full construction would begin, as stated during the Board hearings on the Lila Canyon Mine issues. UEI did start construction (albeit limited construction activities) on or prior to the golden eagle and Rocky Mountain sheep exclusionary periods. UEI may continue work at the current level of activity.

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Jay Marshall  
February 15, 2008

It is important to stress that execution of the attached Plan is required **ONLY** if the Permittee decides to increase construction activity at the Lila Canyon Mine site. Furthermore, restrictions on increased construction activity will apply only if ground surveys (following the protocol in the Plan) definitively show that the nests are active or if increased efforts would disturb Rocky Mountain sheep.

Please refer to the attached Plan and call me at (801) 538-5268, Daron Haddock at (801) 538-5325, or Jerriann Ernstsén at (801) 538-5214 if you have any questions.

Sincerely,



Pamela Grubaugh-Littig  
Permit Supervisor

an

cc: Betsy Herrman, FWS  
Nathan Darnall, FWS  
Leroy Mead, DWR  
Tony Wright, DWR

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**Golden Eagle and Rocky Mountain Sheep  
Exclusionary Period Implementation Plan  
For  
Lila Canyon Extension to the Horse Canyon Mine**

February 15, 2008

**Introduction**

The United State Fish Wildlife Service (USFWS), Utah Division of Wildlife Resources (DWR), and Utah Division of Oil Gas and Mining (Division) biologists developed this Implementation Plan (Plan) for the Utah American Energy Inc. (UEI) Lila Canyon Extension to the Horse Canyon Mine (aka Lila Canyon Mine). The Plan is intended to provide a clearer explanation of what is expected by these agencies concerning commitments on wildlife exclusionary periods. The Plan includes a summary of a recent DWR visit to the site, exclusionary provisions for the golden eagle (GE) and Rocky Mountain sheep (RMS), GE biology and survey considerations, USFWS/Division survey requirements, and Division inspection intentions.

**DWR Update**

On February 8, 2008, DWR visited the Lila Canyon Mine site. DWR reported that the area was under light snow cover, which should not have significantly prohibited construction up to the visit date. Construction was not occurring the morning of the February 8, 2008 visit. UEI had previously cleared approximately 3-4 acres of vegetation and boulders, but had not started leveling the surface. The equipment that was currently there was assessed as being incapable of doing the work necessary to develop the site. Furthermore, DWR estimated that at the present rate of work, it would take months to just level the site.

DWR observed GEs and unidentified raptors both perched and flying, but they were all around 4 miles from the mine site and near the highway (US-6).

DWR considered that disturbance to GE would depend on the level of excavation. Current excavation activity was very minimal. DWR considered that disturbance to the birds in the future would depend on the level of increased construction activity. DWR observed only 2 pieces of large equipment: probably a D8 bulldozer (or smaller) and a medium sized trackhoe.



## GOLDEN EAGLES

### 2007 Fly-over Raptor Survey Results and Estimations of Distances

| Golden Eagle Nest # | Notes of 2007 fly-over survey  | Est of distances between nest and closest reach of disturbed area (2640'=0.5mile)* |
|---------------------|--|--|
| 456                 | Inactive   | 465'   |
| 455                 | Inactive   | 808'   |
| 719                 | Could not spot (DWR ground truthed site and found location, but only a few twigs remain) | 1040'  |
| 946                 | Not found  | 1156'  |
| 947                 | Inactive   | 1389'  |

\*UEI could take the opportunity to correct these estimations and provide an updated Plate to the MRP. UEI should include the horizontal and vertical distance to provide the most accurate accounting of the distance between each nest (5 nest/locations) to the nearest point of planned disturbance (as shown in existing Plates in the MRP).

### Exclusionary Provisions for GE

Since UEI has already started construction on or prior to the GE and RMS exclusionary periods, UEI may continue at the current level of construction effort. If UEI decides to increase efforts, however, UEI will need to contact the Division and comply with this Plan or request a meeting with the Division to present alternative Best Management Practices. It is important to stress that execution of this Plan is required **ONLY** if UEI decides to increase construction efforts at the Lila Canyon Mine site.

Furthermore, restrictions on increased construction activity will apply only if ground surveys (following the protocol in this Plan) definitively show that the nests are active or if increased efforts would disturb RMS.

UEI may conduct work activities during the Feb 1 - July 1 nesting season only if work activity has been initiated prior to and up through February 1. The work activities conducted during the nesting season (Feb. 1 – July 1) must be at an equivalent or lesser level of intensity than the activity that occurred prior to and up until Feb. 1. The "level of intensity" takes into account: days per week, hours per day, and noise/disturbance level of the work activities.

### GE Biology and Survey Considerations

Jim Parish (DWR) and Nathan Darnall (USFWS):

- ❖ Need to determine which nest within the territory the birds are tending or laying eggs.
- ❖ Peak GE egg laying occurs last week of February to first week of March, but ranges from January through April. The birds at Lila may have already laid their eggs or may not start for another month or more, if conditions are suitable.
- ❖ It will be very important to record behavior at the nest to clearly determine if the pair has laid their eggs.

- ❖ GE are more likely to abandon eggs than chicks, so the most critical time for the birds are during the egg laying periods and approximately 17 days into the incubation period.
- ❖ GE are secretive and can easily leave a nest without being seen. They also do not typically call near the nest. Unless the observation point allows one to see into the nest, a quick visit would not suffice to determine whether a nest is active or if there are eggs.
- ❖ Approximate critical periods depending on elevation:
  - Egg laying period: Jan 1 to mid April  
(mean February 27 through March 9 for Central Utah\*; for the pair at Lila the laying may be around Mid March\*\*).
  - Hatching period (42 day incubation period): Feb 24 to mid May  
(mean April 9 to April 19 for Central Utah\*; for the pair at Lila the hatching may be around May 5\*\*).
  - Fledging period: May 4 to July 20  
(mean June 17 to June 27 for Central Utah\*; for the pair at Lila fledging may be around July 14\*\*).

\*Kent Keller (2007) Golden Eagle Nesting Survey Report For The Central Utah Study Area February – July 2007.

\*\*Leroy Mead (2007) DWR observations during 2007 fly-over survey.

#### USFWS/Division Survey Requirements

- ❖ Biologist must be knowledgeable in raptor behavior and habitat.
- ❖ Contracted biologist should be accompanied by a representative from DWR depending on DWR's time availability or DWR may plan independent visit(s).
- ❖ Biologist(s) will determine
  - Line-of-sight for all 5 nest/habitat locations
  - Whether GE are present
  - Whether GE are exhibiting nesting and other notable behavior
  - Which, if any, nest within the territory is being tended or is active
  - Whether GE are tending eggs
- ❖ Surveys must be conducted by the following protocol to confirm a nesting pair
  - At least 4 times between last week of Feb through first week of April
  - At 2-3 week intervals
  - At dawn plus four hours for each survey, unless available observations show without doubt the stage of nesting, or if it is possible to see into the nest
  - In a sensitive manner to not disturb the GE
  - With scopes and binoculars
  - To include, records in writing, the details of behavioral observations including times associated with the behaviors (e.g., minutes bird was in nest).
- ❖ If, by end of the first week of April, there are no GE nesting, then UEI will be cleared for increased construction activity (after consideration of RMS).
- ❖ If GE are nesting at any time during the exclusionary period, then UEI must follow the provisions described above in "Exclusionary Provisions".
- ❖ Division must receive a verbal report within 24 hours of each survey.
- ❖ Division must receive a final written report for all the nests within 45 days of the last survey.

## **ROCKY MOUNTAIN SHEEP**

### **Exclusionary Provisions for RMS**

The exclusionary periods for RMS are

- ❖ Winter range: Dec 1 – April 15
- ❖ Parturition: May 1 – June 15

If UEI determines that he would like to request consideration for approval to increase construction activity between February 1 – April 15 and May 1 - June 15, then UEI must contact the Division. The Division will contact the involved agencies and may facilitate a meeting with UEI to discuss the request. The provisions to increase activity may include (but not limited to) conducting a series of surveys conducted by biologists.

UEI may conduct work activities during these sensitive periods only if work activity has been initiated prior to and up through February 1. The work activities conducted during the sensitive season must be at an equivalent or lesser level of intensity than the activity that occurred prior to and up until Feb. 1. The "level of intensity" takes into account: days per week, hours per day, and noise/disturbance level of the work activities.

### **Division Inspections**

- ❖ Will conduct inspections of the Lila Canyon Mine project area
- ❖ Will assess
  - Level of operations
  - UEI work log for Lila Canyon Mine
  - Footprint of operations

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**United States Department of the Interior**

**BUREAU OF LAND MANAGEMENT**

Price Field Office  
125 South 600 West  
Price, Utah 84501  
<http://www.blm.gov/utah/price/>



**FEB 12 2008**

In Reply Refer to:  
UTU-77122  
2800  
(UT-070)

CERTIFIED MAIL 7004 2510 0005 4743 5465  
RETURN RECEIPT REQUESTED

R. Jay Marshall  
UtahAmerican Energy, Inc.  
P.O. Box 986  
Price, Utah 84501

Re: Lila Canyon Mine Facility

Dear Mr. Marshall:

On February 11, 2008, we received your request for an exception to the raptor stipulation for the above-mentioned right-of-way UTU-77122, to continue construction of the Lila Canyon Mine Facility. The project is located in an area where construction activities are prohibited from February 1 to July 15 for the protection of raptor nesting areas.

The BLM finds insufficient evidence to support continued construction activities through this closure period. Therefore your request for exception to the raptor stipulation is hereby denied.

It is our understanding your company has had ongoing activities on the subject right-of-way beyond the February 1 restriction date. As such, your company is in non-compliance with the terms and conditions set forth in the right-of-way grant. The BLM requests that all construction equipment and personnel be removed from the site within 24 hours of the receipt of this letter or subsequent action will be taken to remediate this situation.

If you have any questions, please contact Mike Robinson, Realty Specialist, at the above address or call (435) 636-3630.

Sincerely,

Michael Stiewig  
Associate Field Manager



**United States Department of the Interior**

**BUREAU OF LAND MANAGEMENT**

Green River District-Price Field Office

125 South 600 West

Price, Utah 84501

(435) 636-3600 Fax: (435) 636-3657

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**FEB 17 2009**

IN REPLY REFER TO:  
2800 (UTU-77122)  
UTG020

Jay Marshall  
UtahAmerican Energy, Inc.  
P.O. Box 986  
Price, Utah 84501

Re: Lila Canyon Mine Facilities

Dear Mr. Marshall,

As detailed in the enclosed e-mail, right-of-way UTU-77122 for the Lila Canyon Mine Facilities would be determined to be in mining operations upon commencement of "underground advancement into the rock slope for accessing the coal seam." As one of the portals was shot January 26, 2009 and excavation was underway for further shots, the BLM determined on that date that the Mine Facilities were no longer in the construction phase and are now in the mining phase.

If you have any questions, please contact Mike Robinson, Realty Specialist, at the above address, e-mail [Mike\\_Robinson@blm.gov](mailto:Mike_Robinson@blm.gov) or call (435) 636-3630.

Sincerely,

Michael Stiewig  
Field Manager

Enclosure

cc:

Daron Haddock, Coal Program Manager  
Utah Division of Oil, Gas, and Mining  
1594 West North Temple, Suite 1210  
P.O. Box 145801  
Salt Lake City, Utah 84114-5801