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*Jowell*  
*KTD (file) Blayn*

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

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IN THE MATTER OF THE REQUEST )  
FOR AGENCY ACTION OF JACK ) DOCKET NO. 90-026  
OTANI, )  
 ) CAUSE NO. INA/007/021  
Petitioner, )

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IN re NORTH AMERICAN ) DOCKET NO. 90-044  
EQUITIES, LTD.' S )  
APPLICATION FOR REVIEW OF ) CAUSE NO. INA/007/021  
NOV-90-13-4-1 and NOV 90-28-6-1 )

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IN re NORTH AMERICAN EQUITIES, ) DOCKET NO. 90-045  
LTD' S APPLICATION FOR REVIEW )  
OF NOV 90-28-6-1 ) CAUSE NO. INA/007/021

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FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

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The above-referenced matters came before the Board of Oil Gas & Mining (the "Board") for hearing on October 17, 1990, at 10:00 a.m. The three matters were consolidated for hearing purposes only. Thomas A. Mitchell, Assistant Attorney General of the State of Utah appeared on behalf of the Division of Oil, Gas & Mining (the "Division"). Richie D. Haddock and Adam S. Affleck of Holme Roberts & Owen appeared on behalf of North American Equities, Ltd. ("NAE") Keith H. Chiara initially appeared on behalf of Jack Otani for the portion of the herein relating to Docket No. 90-045 but subsequently left the Chiara's departure, Mr. Otani was given the

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FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

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the hearing to a date when he could be represented by counsel or proceeding with the hearing and representing himself. Mr. Otani chose to represent himself in the portions of the hearing relating to Docket Nos. 90-026 and 90-044. Mr. Otani, NAE and the Division stipulated to certain procedural matters and to the factual and legal issues to be presented for decision.

Subsequent to the hearing, the Board reopened these matters for the limited purpose of receiving into the record a letter dated January 9, 1991, to Dr. Dianne R. Nielsen, Director of the Division, from W. Hord Tipton, Deputy Director, Operations and Technical Services, of the Office of Surface Mining.

Based on the testimony presented to the Board, the exhibits offered by the parties, the arguments of the parties and the pleadings filed in this matter, the Board hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

WITH RESPECT TO DOCKET NO. 90-045

1. The Blazon No. 1 Underground Coal Mine located near Clear Creek, Carbon County, Utah, produced coal from March of 1981 to January of 1982, when operations were temporarily suspended.

2. In 1985, NAE decided to permanently close the Blazon No. 1 Mine and it filed an application for a reclamation-only permit and a proposed plan of reclamation for the Blazon No. 1 Mine. Effective November 12, 1985, the Division approved NAE's application and proposed plan. The proposed plan as approved (the "Plan") was given No. INA/007/021.

3. The Plan proposed that certain areas of the Blazon No. 1 Mine, including the flat pad area upon which the mine shop was located ("the Pad Area"), would be left unreclaimed to accommodate light industrial post-mining land use by Mr. Otani.

4. In connection with its application, as evidence of landowner consent to the provisions of the Plan, NAE submitted a letter dated May 17, 1985, from William H. Haynes, Jr. as attorney-in-fact for Jack Otani, to Alan Smith, President of NAE.

5. The Division accepted the Haynes letter and did not require any further submission of written landowner consent and approved the Plan.

6. NAE has completed backfilling, grading and drainage work in accordance with the Plan.

7. On September 11, 1990, the Division issued NOV N90-28-6-1 to NAE for failure to apply for renewal of its permit and submit written landowner consent to the post-mining land use provisions of the Plan in connection with such an application.

*Also: Otani did  
not object to PMLU  
during public comment  
period.*

CONCLUSIONS OF LAW

WITH RESPECT TO DOCKET NO. 90-045

8. Utah Code Ann. Section 40-10-9 prohibits any person from engaging in "surface coal mining operations" without a permit from the Division. "Surface coal mining operations" is a defined term (Section 40-10-4(18)) which is distinguished from the term "surface coal mining and reclamation operations," which is also defined (Section 40-10-4(17)). Reclamation-only operations are not included within the former term and a renewal permit is not required for reclamation-only operations to be conducted pursuant to an approved reclamation plan.

9. The Utah Coal Mining Rules (the "Rules") do not and, as a matter of law, cannot require that a person obtain a renewal permit to conduct only reclamation. The federal rules expressly provide that a renewal permit is not required in such a situation. 30 C.F.R. § 773.11 (1989). Thus, our interpretation is not only consistent with the statutory definitions, it is also consistent with the requirement that the Utah rules not be more stringent than federal rules. Utah Code Ann. Section 40-10-6.5.

10. The landowner consent requirements cited in the subject NOV relate to permit renewals. Having concluded that the Utah statute and Rules do not require that NAE apply for a renewal permit, it follows that the requirement to submit

landowner consent in support of a renewal application is not applicable.

11. There was no basis in law for the issuance of NOV N90-28-6-1 and the NOV should be vacated.

FINDINGS OF FACT

WITH RESPECT TO DOCKET NO. 90-044

12. The preceding findings and conclusions are repeated and incorporated herein to the extent necessary.

13. The Division acted properly in reviewing and approving the Plan, which contemplated some retention of a highwall.

14. Mr. Otani consented to the Plan and did not withdraw that consent prior to the completion of backfilling, grading and drainage work.

15. The evidence conflicts as to the extent to which the existing highwall is that contemplated by the approved Plan or, as a result of a shortage of backfill material, is somewhat greater than that contemplated by the Plan.

16. Reclamation activities at the site have largely been completed and the stream crossing and road have been removed and reclaimed and substantial revegetation has occurred.

17. By letter dated June 4, 1990, the Division informed NAE that it had "complet[ed] the outstanding revegetation at the [Blazon No. 1 Mine] and [NAE's] five-year

liability clock has now started effective May 18, 1990." NAE has proceeded in good faith in reliance on the Division's determination.

18. The existing highwall does not present any conditions that are threatening or hazardous to human safety nor does it present any endangerment to the environment.

19. Mitigation of the existing highwall as required by NOV 90-13-4-1 would require substantial and significant disturbance of previously disturbed and successfully reclaimed and revegetated areas, including construction of one or more roads and a stream crossing.

20. Mitigation of the existing highwall as required by the subject NOV would require substantial and significant disturbance of previously undisturbed areas.

21. The available backfill material was allocated so as to eliminate and minimize the highwall in the more visible areas. The remaining highwall is similar in character to, though smaller than, others in the area.

#### CONCLUSIONS OF LAW

#### WITH RESPECT TO DOCKET NO. 90-044

22. The Division acted in accordance with its authority, the Utah Coal Mining and Reclamation Act and the Rules in approving the Plan.

23. The Division is estopped from requiring NAE to disturb previously undisturbed areas and from requiring NAE to disturb successfully reclaimed and revegetated areas.

24. NAE is entitled to Phase I bond release.

25. NOV 90-13-4-1 should be vacated.

FINDINGS OF FACT

WITH RESPECT TO DOCKET NO. 90-026

26. The preceding findings and conclusions are repeated and incorporated herein to the extent necessary.

27. On July 21, 1989, NAE filed an application with the Division for Phase I bond release pursuant to Rule 614-301-800.40. The application requested a release of 60 percent of NAE's \$48,400.00 bond.

28. Through subsequent negotiations with the Division the amount of proposed release was reduced to \$10,400.

29. Notice of the NAE's application for a \$10,400 Phase I bond release was properly published.

30. On November 3, 1989, Mr. Otani objected to NAE's application for Phase I bond release and requested an informal hearing.

31. On December 12, 1990, an informal hearing was held before Hearing Officer Barbara W. Roberts. The Division was represented by Lowell P. Braxton, Susan Linner and Randall

Hardin. Mr. Otani was represented by Keith Chiara and Duane Smith.

32. On March 19, 1990, the Hearing Officer issued an Order dismissing Otani's objections to Phase I bond release. Otani appealed the hearing officer's order to the Board.

33. The Hearing Officer correctly concluded that Otani's objections were ill-founded.

34. The letter dated May 17, 1985, from William H. Haynes, to Alan Smith of NAE constituted the consent of Mr. Otani to the Plan. The letter was signed by Mr. Haynes as attorney-in-fact for Mr. Otani and Mr. Otani received a copy of the letter. He did not object to the letter at the time.

35. The May 17, 1985 letter was referred to in the Plan as written evidence of landowner consent to the light industrial post-mining land use proposed by the Plan and was attached as an exhibit to the Plan.

36. Mr. Otani had notice of the Plan and did not object to any aspect of the Plan at the time notice of the Plan was given or prior to the Division's approval of the Plan.

37. Keith Chiara was Mr. Otani's attorney in November 1987 for purposes of pursuing certain claims against NAE and communicating with the Division concerning reclamation at the Blazon No. 1 Mine.

38. On November 24, 1987, Keith Chiara wrote a letter on behalf of Mr. Otani to Lowell Braxton of the Division which included the following statement:

By 1985, although Smith was still trying to sell the mine, the parties (including DOGM), discussed the idea of NAE only doing partial reclamation, with ~~the~~<sup>many</sup> of the improvements remaining on the surface acreage and becoming the property of Mr. Otani as compensation for not demanding full reclamation. Such a plan was agreed to, with the approval of DOGM, and in November 1985, notice of the partial reclamation plan was placed in the newspaper.

39. Mr. Otani's petition in this matter also admits that the post-mining land use set forth in the Plan was the post-mining land use intended by the parties when the Plan was approved.

40. The May 17, 1985 letter from William H. Haynes to Alan Smith, the November 24, 1987 letter from Keith Chiara to Lowell Braxton and Mr. Otani's petition constitute admissions that Mr. Otani consented to the post-mining land use provisions of the Plan. In light of the facts and circumstances of this case, the written landowner request requirement of Utah Code Ann. Section 40-10-17(5)(a) has been satisfied.

41. In 1988, the Plan was amended with respect to certain matters unrelated to the highwall. The Division acted properly in reviewing and approving the 1988 amendments to the Plan.

42. NAE performed reclamation work in reliance on Mr. Otani's consent to the post-mining land use provisions of the Plan.

43. Mr. Otani visited the site on numerous occasions while reclamation work was performed by NAE at the Blazon No. 1 Mine.

44. Mr. Otani never objected to NAE about retention of the Pad Area prior to completion of backfilling and grading work at the Mine.

45. Mr. Otani has commenced a civil action against NAE in the Seventh Judicial District Court for Carbon County (the "Otani Lawsuit").

#### CONCLUSIONS OF LAW

#### WITH RESPECT TO DOCKET NO. 90-026

46. Mr. Otani consented to the Plan, including its post-mining land use provisions.

47. Even if Mr. Otani had not admitted that he consented to the post-mining land use provisions of the Plan, he would now be estopped by his conduct from denying that he gave such consent.

48. Mr. Otani argues that his consent has been nullified because NAE has not given him the consideration allegedly promised for such consent. This Board has no jurisdiction to grant such rights and remedies as Mr. Otani may have with respect to his consideration argument. Rather, such rights and remedies should properly be pursued in the Otani Lawsuit or other lawsuit as Mr. Otani may determine.

49. The Division's determination approving Phase I bond release was proper.

50. NAE is entitled to Phase I bond release.

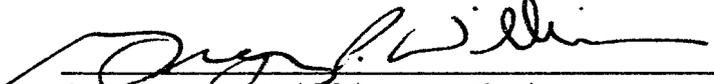
ORDER

Based on the foregoing findings and conclusions, it is hereby ordered as follows:

1. NOV 90-13-4-1 is vacated.
2. NOV 90-28-6-1 is vacated.
3. Mr. Otani's objections to NAE's application for Phase I bond release are denied.
4. NAE's bond is hereby partially released to the extent of \$10,400, leaving NAE's total bond to be \$38,000.

DATED this 28<sup>th</sup> day of February, 1991.

THE BOARD OF OIL, GAS & MINING

  
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Gregory P. Williams, Chairman