

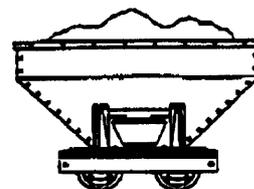
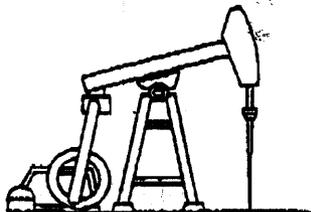
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INCOMING  
00150009  
cc: Cottonwood Tract

# UTAH STATE OFFICE

## DIVISION OF LANDS & MINERALS

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# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

Utah State Office  
P.O. Box 45155  
Salt Lake City, UT 84145-0155  
www.ut.blm.gov

IN REPLY REFER TO:

3483  
U-082996  
U-49332  
UTU-64375  
UTU-73339 (Trail Mountain LMU)  
(UT-924)

OCT 31 2003

CERTIFIED MAIL—Return Receipt Requested

### DECISION

PacifiCorp	:	Coal Leases
c/o Interwest Mining Company	:	U-082996, U-49332,
Attn: Scott M. Child	:	UTU-64375 and UTU-73339
One Utah Center	:	(Trail Mountain LMU)
201 South Main, Suite 2100	:	
Salt Lake City, Utah 84140-0021	:	

### Application for Suspension of Operations and Production Denied

On February 28, 2003, PacifiCorp filed an application for suspension of operations and production (SOP) on the above noted logical mining unit (LMU) and its individual leases. The application requested an effective date of March 16, 2001, the day after mining operations ceased within the LMU. PacifiCorp wants the suspension to last until such time as operations within the LMU can begin again following the issuance of a lease or leases and the issuance of any and all permits required to authorize the commencement of mining on the adjacent unleased State of Utah (the State) and Federal lands (commonly known as the Cottonwood Tract). PacifiCorp further alleges the Trail Mountain mine complex provides the only direct existing access to the coal in the Cottonwood Tract.

On February 26, 1991, PacifiCorp filed a lease-by-application (LBA) with the Bureau of Land Management (BLM) for the Cottonwood Tract. The initial tract consisted of approximately 8,000 acres. On March 30, 1993, BLM approved the assignments of the leases in the Trail Mountain Mine to PacifiCorp. PacifiCorp states that development of the mine and all mining operations took place with the anticipation that PacifiCorp would ultimately be able to timely acquire the right to mine coal resources to the north and west of existing mine permits (the Cottonwood Tract).

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2.

Much is made in the application of the lack of specific action taken by BLM as to lease issuance of the tract. This is untrue, since tract delineation was finalized in October, 1996, and an EIS process was begun in February, 1998. PacifiCorp participated in this process until it withdrew citing lack of progress in finalizing the EIS, and the requirement that any leasing would be done through a competitive process.

Furthermore, even if PacifiCorp's assertion of delay was correct, through the decade of the 1990s PacifiCorp had a maximum Federal lease acreage problem, thus precluding BLM from granting PacifiCorp's application at that time. While PacifiCorp's application was pending, the maximum amount of Federal acreage a coal lessee/sublessee could hold in a state was 46,080, and PacifiCorp held approximately 41,000 acres in authorized coal leases in Utah. Even if BLM had finished the EIS process and put the tract up for sale, the lease could not have been issued to PacifiCorp because it would have put them over the acreage limitation. To put such effort into a dead end would have been a misallocation of resources by BLM.

Two events solved this problem: 1) the transfer of the Cottonwood Tract to the State effective January 8, 1999, as part of the "Utah Schools and Land Exchange Act of 1998"; and 2) the relinquishment of the PacifiCorp held Garfield County Lease (U-1362) of over 18,000 acres pursuant to the agreement between the United States Department of the Interior and PacifiCorp entered into October 6, 1999. However, by the time the acreage problem was resolved, BLM no longer had jurisdiction over the Cottonwood Tract.

The State issued a coal lease to PacifiCorp, effective April 1, 1999, encompassing the Mill Fork Tract LBA. The Mill Fork Tract was also transferred to the State as part of the "Utah Schools and Land Exchange Act of 1998". The tract was awarded as a result of a competitive process. PacifiCorp did not nominate the tract and did not participate in the EIS process. (However, the transfer of the Cottonwood Tract to the State of Utah eliminated the need for an EIS, since a Federal action was no longer involved.)

At this time, PacifiCorp contends that to the best of its knowledge, since the initial LBA nomination was filed with the BLM, no final tract delineation has occurred, no final decision has been made with respect to the issues related to the proximity of mining to the Joe's Valley Dam, the "required" EIS has not been completed, and there is no final determination of who will issue the lease and when it will be issued.

Actually, tract delineation occurred in 1996, issues concerning Joe's Valley Dam can be addressed in the mine plan after lease issuance, an EIS is no longer required by law, the tract is administered by the State through its School and Institutional Trust Lands Administration (SITLA), and lease issuance will occur once the tract is acquired through a competitive process. Thus, all of the reasons PacifiCorp asserts for its application for suspension are invalid.

3.

PacifiCorp mentions administrative precedents for granting suspensions such as Consolidation Coal Company, 111 IBLA 381 (1989). This case dealt with granting a suspension for the duration of the EIS process on an adjacent lease. However, Consolidation Coal Company held a preference right to the adjacent lease, whereas PacifiCorp had only submitted an LBA for the Cottonwood Tract. In other words, Consolidation Coal Company had a right to its adjacent lease. PacifiCorp has no such right to the Cottonwood Tract. In addition, at this time, no law requires the preparation of an EIS on the Cottonwood Tract, since no Federal decision is involved.

PacifiCorp also mentions judicial precedent for granting a suspension such as Copper Valley Machinery Works, Inc. v. Andrus, 653 F. 2d 595 (D.C. Cir. 1981), which granted a suspension to avoid environmental harm. Also, Getty Oil Company v. Clark, 614 F. Supp. 904 (D. Wyo 1985), which emphasized the discretionary aspect in granting a suspension if a lessee is denied use of its lease. And, Hoyl v. Babbitt, 129 F. 3d 1377 (10<sup>th</sup> Cir. 1997) where the denial of a suspension was upheld, and the discretionary nature of granting a suspension was emphasized.

Furthermore, the Utah State Office of the BLM has granted suspensions through the years. Andalex, Inc. was granted a suspension for its Smoky Hollow leases while it compiled an EIS. PacifiCorp, itself, was granted a suspension for its Garfield County lease, because it contained Wilderness Study Areas. And UtahAmerican Energy, Inc. was granted a suspension for its North Block LMU because the State revoked its permit to mine due to pressure from the environmental industry.

PacifiCorp's application is readily distinguishable from these cases mentioned above, because all those suspensions were granted due to environmental concerns and/or the lessee was denied beneficial use of its leases. PacifiCorp has no valid environmental concern and has not been denied beneficial use of its leases, but has voluntarily stopped mining. For example, PacifiCorp has asked for a suspension on the Trail Mountain LMU and its leases because of the need to prepare an EIS on an unleased adjacent tract, and because it stopped mining to preserve access to that tract. The Cottonwood Tract, since it is now administered by the State and no lease has been applied for, does not legally require an EIS. Furthermore, PacifiCorp stopped mining on its own and sealed access to its workings, and thus cannot complain that it has been denied beneficial use of its leases. Therefore, PacifiCorp cannot rely on past suspensions because it cannot show an EIS is legally necessary or that beneficial use of its leases has been denied.

Finally, we turn to PacifiCorp's plan of operations. By acquiring the Mill Fork Tract in 1999, BLM believes that PacifiCorp no longer needed to immediately develop the Cottonwood Tract. Mill Fork is located north of PacifiCorp's East Mountain LMU, which is east and north of the Trail Mountain LMU. Mill Fork contains enough mineable reserves for fifteen years of mining. It appears that PacifiCorp did not want to lose its access to the Cottonwood Tract, so it made the decision to mine the northern part of its holdings, while requesting a suspension on its southern Trail Mountain LMU preserving its access to the Cottonwood Tract. As Mill Fork's reserves approach exhaustion, the company could request SITLA to put the Cottonwood Tract up for sale with its 20 plus years of reserves. The Federal guidelines do not allow for a SOP in support of a delay in the mining of reserves on a lease or LMU due to the mining sequence of an operation (Guidelines 31 B. 8.).

4.

Access to the adjacent State of Utah Cottonwood Tract is not limited to passage through the PacifiCorp Trail Mountain Mine. The following summarizes the available access routes with and without granting the suspension request.

**Access with a suspension:**

1. Access by way of the existing Trail Mountain Mine workings
2. Rock slopes from an adjacent site not controlled by PacifiCorp
3. Portals from adjacent fee property

**Access without a suspension:**

1. Access by way of the existing Trail Mountain Mine workings
2. Rock slopes from an adjacent site not controlled by PacifiCorp
3. Portal access to the south of the PacifiCorp fee land
4. Portals from the adjacent fee property

Further, PacifiCorp stopped production at the Trail Mountain Mine and efforts to lease the adjacent Cottonwood Canyon Tract primarily for economic reasons. From statements made to the Public Service Commission of Utah, the commission provided a "PROCEDURAL HISTORY" as follows:

On February 7, 2001, PacifiCorp filed with the Commission an Application for an accounting order allowing PacifiCorp to defer approximately \$26.6 million in costs associated with closing the Trail Mountain Mine. For various reasons set forth in the Application, PacifiCorp contends that it became uneconomic to continue operation of the Trail Mountain Mine. Instead, PacifiCorp was able to secure a long-term coal supply contract at projected costs lower than if it continued to operate the mine. The amount requested to be deferred consists of... On July 10, 2001, PacifiCorp filed an Amendment to the Application that stated that mine closure costs of about \$19 million had not been included in the original filing, and requesting authority to defer the total costs of about \$45.8 million over a five year period. (Public Service Commission of Utah, Docket No. 01-035-02, Report and Order, Issued: April 2, 2002, excerpts from pages 1 and 2)

In addition, the "PROPOSED ORDER - SUBMITTED 4/03/02 BY...Attorneys for PacifiCorp" (Docket No. 01-035-02) states that the costs for the new coal supply contract would also be lower than the costs for coal to be produced from the adjacent "Cottonwood Lease."

Because of the recent economic environment in the Utah coal market, PacifiCorp was able to secure a favorable long-term contract with another Utah coal producer to supply the majority of the coal requirements necessary to replace the Trail Mountain coal supply. Contract terms are favorable and the delivered fuel prices are projected to be lower than the estimated costs to mine the Cottonwood Lease as an extension of Trail Mountain at this time. (Proposed Order - Submitted 4/03/02 by...Attorneys for PacifiCorp, Docket No. 01-035-02, excerpt from page 3)

5.

It also states that the acquisition of the Trail Mountain mine provided a certain "...advantageous position to acquire adjacent leases..."

In addition, the acquisition placed PacifiCorp in an advantageous position to acquire adjacent leases to the west and north under a competitive bid process, which could have further extended the life of Trail Mountain and Cottonwood Mine facilities. (Proposed Order - Submitted 4/03/02 by...Attorneys for PacifiCorp, Docket No. 01-035-02, excerpt from page 2)

Please note: Similar filings were made by PacifiCorp in other states within their service area.

The positive value of the Cottonwood Tract has been summarized in a report prepared for BLM by an independent consultant:

Based on the demand projections, Behre Dolbear believes that this property will definitely be required to meet the projected demand created by new generating units scheduled to be brought on line at the Hunter and IPP generating stations in 2008. However, as indicated in Section 5.0, Behre Dolbear believes that the proposed startup of one or both these units could be delayed as much as 2 to 4 years, and it is unlikely that both will startup in the same year. On the other hand, Behre Dolbear's cost analysis of the proposed Cottonwood Mine indicates that it should have relatively high productivity and low production costs due to the geologic conditions and the amenability of the resource to longwall mining. It also should produce a high quality compliance coal. The economic analysis of the proposed mine described in Section 11.2 indicates that it will provide an attractive rate of return at the projected future coal prices. Therefore, this tract might be of interest to mining companies that have existing contracts and need to replace either higher cost mines, or mines producing coal with higher sulfur content, in the Price area. In any event, it will require 3 to 8 years to lease and develop the mine. Based on these considerations, Behre Dolbear recommends that BLM encourage SITLA to continue its efforts to lease the Cottonwood Tract as soon as possible. (Evaluation of the East Mountain Study Area, May 2003, Prepared by: Behre Dolbear & Company, Inc., Denver, Colorado; Behre Dolbear Project 02-050, excerpt from pages 207-208)

In this same report (page 226) Behre Dolbear advises BLM to "...seek relinquishment of the Trail Mountain LMU leases to provide an alternate access for the mine and additional coal in the Hiawatha Seam..." (Referring here to "...the development of a mine in the Cottonwood tract..." in section "12.5 DEVELOPMENT OF THE Cottonwood Canyon Tract")

In summary:

No action or inaction By BLM, or any other agency, caused PacifiCorp to cease operation of the Trail Mountain mine (the adjacent Cottonwood Tract had been transferred to the State over two years prior to the closing of the mine and the State could have leased the tract at anytime to PacifiCorp, or another company. Then PacifiCorp, or another company, could have sought a mining permit for all or part of the leased tract).

6.

The mine was closed for economic reasons: "For various reasons set forth in the Application, PacifiCorp contends that it became uneconomic to continue operation of the Trail Mountain Mine. (cited above)

PacifiCorp can or could have resumed operation of the Trail Mountain Mine at any time, and can seek or could have sought a lease from the State of all or part of the Cottonwood Tract.

Retention of the Trail Mountain leases would continue to provide PacifiCorp a business advantage without PacifiCorp meeting the Federal requirement of continued operation: "...the acquisition placed PacifiCorp in an advantageous position to acquire adjacent leases to the west and north under a competitive bid process..." (cited above).

The Cottonwood Tract has significant business value: "...Behre Dolbear's cost analysis of the proposed Cottonwood Mine indicates that it should have relatively high productivity and low production costs due to the geologic conditions and the amenability of the resource to longwall mining. It also should produce a high quality compliance coal." (cited above)

Therefore, granting a suspension would provide "...an advantageous position..." to PacifiCorp and negate the built-in protection provided by the Federal continuing operations requirement. Granting a suspension would promote land/mineral speculation which is not allowed under the Federal Coal Leasing Amendments Act of 1976. [See H.R. Rep. No. 94-681 at 13 (1975)]

By the provisions of the Memorandum of Understanding (MOU) between the Utah School and Institutional Trust Lands Administration (SITLA), the United States Department of Agriculture, and the United States Department of the Interior, the State is due certain considerations under the MOU's reversion section as it affects the Cottonwood Tract. They are summarized as follows.

The coal mineral interest in the Cottonwood Tract reverts to the United States after SITLA receives \$13,006,105 in royalty and rental income.

\$13,006,105 is an amount that SITLA is entitled to above what the State would have received under the provisions of 30 U.S.C. 191 had the Cottonwood Tract been leased by the United States. Therefore, the reversion will occur after SITLA receives \$26,012,210 in rental and royalty income.

To compensate SITLA for the time value of the money until it receives the additional \$13,006,105 under the Agreement, interest will be calculated at the end of each month on the average daily remaining principal balance for that month (which starts at \$13,006,105). The interest rate will be the rate for a five year Treasury Note on the last business day of that month. Interest will be calculated as simple interest and will begin accruing January 8, 1999.

7.

Reversion of the Cottonwood Tract to the United States will occur after SITLA receives rental and royalty income totaling \$26,012,210 plus the amount of accrued interest. (MOU, Section D.4.)

Currently interest is accruing at a rate of over \$400,000 per year. Therefore, the longer PacifiCorp is able to delay the leasing of the Cottonwood Tract, the longer the United States has to wait for the reversion of the Cottonwood Tract from the State. It is in the best interest of the United States to have the Cottonwood Tract leased. Granting SOP would encourage a delay in leasing this tract.

The suspension of operations and production is denied and the terms and conditions of the Trail Mountain LMU and Federal leases U-082996, U-49332, and UTU-64375 remain as is. Accordingly, coal must be produced in commercial quantities between October 1, 2003, and September 30, 2004, and every continuing operation year thereafter until the coal is fully mined, or the LMU will be terminated causing the individual leases to revert to their individual terms and conditions.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4, and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days after receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

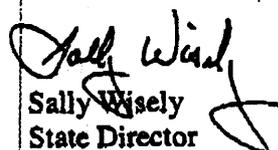
If you wish to file a petition (pursuant to regulation 43 CFR 4.21)(58 FR 4939, January 19, 1993) (request) for a stay (suspension) of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed in this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

8.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) Whether the public interest favors granting a stay.

  
Sally Wisely  
State Director

**Enclosures**

1. Form 1842-1 (1 p)
2. Application for Suspension of Operations and Production (15 pp)
3. Tract Delineation Review Report (7 pp)

cc: W.O. 320 (w/encl)  
Price Coal Office (w/encl)  
Steel Rives LLP, Attn: John S. Kirkham, 201 S. Main Street, Suite 1100, SLC, UT 84111  
(w/encl)  
Field Solicitor, Attn: Jared Bennett, Ste. 6201, Federal Building, 125 South State Street,  
Salt Lake City, Utah 84138 (w/encl)