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State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

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January 31, 1994

Anne M. Shields, Deputy Solicitor
Department of the Interior
Office of Surface Mining R & E
1951 Constitution Ave., 258-SIB NW
Washington, D.C. 20240

Re: Des-Bee-Dove Federal NOV 93-020-190-05, ACT/015/017, Folder #2, Emery County, Utah

Dear Ms. Shields:

I had been hopeful that the recent problems that have arisen between the Utah Division of Oil, Gas & Mining (the "Division") and the Office of Surface Mining and Enforcement ("OSM") in enforcing the Surface Mining Control and Reclamation Act ("SMCRA") could be resolved in the upcoming meetings Al Klein has graciously coordinated. The timing of those meetings was satisfactory, based on my understanding that enforcement of the Des-Bee-Dove Notice of Violation would remain static under the Federal Administrative Law Judge's Temporary Relief Order ("TRO").

Since the entry of the TRO, however, employees of the Albuquerque Field Office ("AFO") have personally threatened the permittee with retaliatory enforcement action, have notified the permittee that OSM has appealed the TRO, and have served notices of potential personal liability upon the permittee's officers and directors. This turn of events requires that I take immediate corrective measures.

The entire course of events at the Des-Bee-Dove mine points to a continuing and fundamental misapplication of the law and regulations by the enforcement section of AFO. Let me put the recent conduct of the AFO section in context for you.

The 1991 Des-Bee-Dove Mine Ten Day Notice

The Des-Bee-Dove Mine is located in central Utah and has been in temporary cessation for a number of years. On June 5, 1991, AFO conducted a federal oversight inspection. Based on that inspection, AFO issued the state of Utah a Ten Day Notice on

Page 2
Anne M. Shields
ACT/015/017
January 31, 1994

July 17, 1991. The Ten Day Notice focused on erosion which was occurring on the outcrops of an access road which had been built on Mancos shale, a geologic unit composed primarily of fine clay materials. Mancos shale has proven extremely susceptible to erosion in Utah's dry climate, where precipitation is infrequent and occurs in large, intense events. Undisturbed slopes of Mancos shale are characterized by sparse vegetation and extensive gullying and rilling.

The 1991 State NOV

The Division subsequently issued Notice of Violation 91-20-2-1 (the "State NOV"). Based on the issuance of that NOV, OSM informed the Division, in writing, that the Division's actions were "appropriate" and that no further federal action would be taken. (Copy attached as an exhibit.)

The abatement measures required by the State NOV were based on the recommendations of a task force of soil and erosion experts. The task force was established to determine what methods could be undertaken to control erosion on Mancos shale, a substance which experience had demonstrated did not respond to normal erosion control techniques. The task force consisted of experts from the Division, the permittee's experts and independent experts from Utah State University and the Federal Soil Conservation Service. The Division requested that AFO employees attend task force meetings, but AFO chose not to participate.

The task force concluded that it was difficult to revegetate Mancos shale because of its high salinity, its extremely small clay particles, and because of its tendency to form a crust. The task force suggested that localized seed mixtures which had demonstrated an ability to germinate in high salinity clay soils might have a greater chance of successful germination on Mancos shale. The operator was directed to collect local strains of seeds and establish test plots on the outcrops of the access road. It was determined that a period of three years would be necessary to determine whether the experimental seed mixtures would prove effective.

With regard to the present control of erosion, the task force concluded that common erosion control measures such as netting or mulch would be ineffective on the Mancos shale outcrops. The task force also observed that rilling was characteristic of undisturbed slopes in the area, and concluded that filling in the rills and gullies would do nothing to prevent

Page 3
Anne M. Shields
ACT/015/017
January 31, 1994

erosion. Indeed, the task force concluded that placing mechanized equipment onto the outslope would increase surface disturbance and possibly exacerbate the problem.

The task force thus concluded that the operator should implement control measures that would prevent runoff from above from reaching the outslope. This would remove the transportation mechanism that underlies all erosion problems. Accordingly, the State NOV and a subsequent modification required the permittee to implement measures to redirect runoff away from the outslopes. To this end, the operator installed a rubber conveyor belt line along the access road guard rail. The belt line was connected from the top of the guard rail to the surface of the road. This intercepted water from above the road and directed it away from the outslope and into designed channels which report directly to a sediment pond. The operator also constructed water bars and implemented soil terracing along the access road pad area and installed a rip-rap channel and culverts to further prevent water from reaching the outslopes.

These control measures have been extremely successful in preventing further accelerated erosion. As the Division's soil expert testified at the TRO hearing, these control measures have substantially prevented all runoff from reaching the access road outslopes.

The 1993 Federal Notice of Violation

On December 2, 1993, two years after OSM had informed the Division that its actions were "appropriate," AFO conducted a federal oversight inspection of the Des-Bee-Dove Mine. Based solely upon the presence of erosional features which had existed since before 1988, AFO's Inspector, Tom Wright, issued Federal Notice of Violation X93-202-190-05 for "failure to control or prevent erosion on the outslopes of the mine haul road" (the "Federal NOV"). Significantly, the Federal NOV omits the rest of the cited rule, which provides "...in accordance with current, prudent engineering practices" R645-301-752-210. The permittee appealed the Federal NOV, and applied for temporary relief from the order of abatement. The hearing was held on January 14, 1994 before Administrative Law Judge John R. Rampton, Jr. Notwithstanding the pendency of the hearing and a timely request by the permittee for an extension of the abatement period, AFO issued a Failure to Abate Cessation Order on January 13, 1994.

At the hearing, inspector Wright testified that: 1) He did not take any measurements of the rills or gullies, and 2) he did

Page 4
Anne M. Shields
ACT/015/017
January 31, 1994

not make any independent attempts to determine whether erosion had continued or increased since implementation of the erosion control measures in 1991. AFO failed to inquire about or evaluate the erosion control efforts the permittee had undertaken at the Division's direction. AFO director of enforcement Steve Rathbun testified at the TRO hearing that it was not in his job description to be aware of an operator's mining and reclamation plan, or of plans to abate notices of violation.

OSM made no contact with the Division prior to issuing the Federal NOV. No Ten Day Notice was issued. No written finding was made that the Division had acted in an arbitrary and capricious manner, nor did OSM ever retract its earlier determination that the Division had taken appropriate action.

The evidence adduced at the hearing was that accelerated erosion was not occurring on the outslope, and that the erosion control measures implemented were in accordance with current, prudent engineering practices. Judge Rampton entered a TRO based on the finding that the permittee was substantially likely to prevail on its appeal on the merits.

The Meaning of Primacy

The actions of AFO's enforcement section in the Des-Bee-Dove matter are just one example of its total disdain for the concept of State primacy as defined by federal case law and OSM itself. OSM has specifically acknowledged that "Congress clearly envisioned a regulatory structure in which states would bear the primary responsibility for enforcing the law [and] . . . [t]hat [federal] oversight must be based on respect for the role of the states." 53 F.R. 26731 (July 14, 1988). The Court of Appeals for the District of Columbia has also confirmed that "the state regulatory agency plays the major role, with its greater familiarity with local conditions. It exercises front line supervision, and the Secretary will not intervene unless its discretion is abused." In Re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 518, 523 (D.C. Cir. 1981).

OSM's own regulations provide for considerable deference to a primacy state's determinations in enforcing its program. This deference is articulated in OSM's regulations to provide that OSM will make a "written finding that a state has failed to take appropriate action to cause a violation to be corrected or has failed to show good cause for its failure to do so, before ordering a federal inspection that could lead to direct federal enforcement against an operator in a primacy state." 53 F.R.

Page 5
Anne M. Shields
ACT/015/017
January 31, 1994

26732 (July 14, 1988). See 30 C.F.R. § 842.11(b)(1)(ii)(B)(1). OSM's regulations also provide that "an action by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion shall be considered 'appropriate action' to cause a violation to be corrected or 'good cause' for failure to do so. See 30 C.F.R. § 842.11(b)(1)(ii)(B)(2).¹

AFO complied with neither requirement before issuing the Federal NOV. AFO made no written finding that the Division's abatement measures were arbitrary and capricious. To the contrary, Steve Rathbun testified that he was not interested reviewing state mining and reclamation plans. AFO never made a written finding that contradicted OSM's earlier finding that the State's actions were appropriate.

Primacy is meaningless if an OSM inspector is allowed to write a federal violation based solely on his admitted "unexpert" opinion that erosional features are present, when a primacy state has made findings supported by the collective judgment of an independent task force of experts that all prudent erosion control measures have been implemented. AFO failed to even investigate the Division's actions, let alone weigh those actions under the "arbitrary and capricious" standard. Indeed, it would seem difficult for a field office of OSM to conduct any meaningful review of a state's actions when its head of enforcement testifies under oath in front of a federal administrative law judge that it is not within his job description to review a state's mine files prior to taking federal enforcement action.

We have no doubt that a federal judge will find that the Division has acted appropriately and that the AFO enforcement

¹ The arbitrary and capricious standard was added to the Code of Federal Regulations in 1988. In addition to adding the standard to reflect the Congress's view of State Primacy, the standard was also added to prevent "coal mine operators [from] being caught in the middle in disagreements between state and federal authorities." 53 F.R. 26731 (July 14, 1988). Indeed, OSM predicted that with the passage of the arbitrary and capricious standard, "the likelihood of operators being given conflicting orders from state and federal officials should decrease without hampering federal oversight of state implementation of the regulatory programs." Id. The problems of unwarranted intervention by Albuquerque are causing the exact problems the rule was intended to resolve.

Page 6
Anne M. Shields
ACT/015/017
January 31, 1994

section has acted in direct violation of SMCRA's provisions regarding federal enforcement.

Inappropriate Behavior During and After the Temporary Relief Hearing

Perhaps of greatest concern to me is the unprofessional retaliatory behavior of AFO enforcement personnel after Judge Rampton issued his order. Immediately after Judge Rampton announced his decision, AFO employees made personal threats to the representatives of the operator, stating that AFO would be taking a close look at possibly improvidently issued permits and other potential violations. They also informed the permittee that it "would be seeing a lot of OSM" in the future. (see attached affidavit)

Approximately two weeks later, AFO apparently made good on its threats. Even though Judge Rampton had entered the TRO based on the substantial likelihood that the permittee would prevail on the merits, AFO served Notices of Potential Liability on the officers and directors of the operator, some of whom are no longer associated with the company. The Notices indicated that the cessation order had been issued because the erosion condition existing on site was creating a "significant, imminent environmental harm to the land, air or water resources." Only thirteen days earlier, these same AFO employees had testified that the Federal NOV was a "non-imminent harm situation," an admission seconded by their solicitor.

In addition to placing AFO in contempt of Judge Rampton's order, AFO's actions are in direct violation of OSM's own rules. See 30 C.F.R. § 846.12(b). I am unable to see AFO's recent actions as anything other than retaliation for the permittee's exercise of its statutorily mandated appeal rights, and for prevailing before the Department of Interior's own judge.

The Division's Request for Action

The State of Utah, the Division, and I are committed to working within the regulatory framework of SMCRA to insure that the precepts of that law are carried out to the fullest extent. I also sincerely hope that the Division and OSM can develop a cordial and effective working relationship in the future. Unfortunately, AFO's disregard of the rules of the OSM/State relationship and its apparent attempts to drive coal regulatory policy through the issuance of federal enforcement actions has created a situation in which the Division is no longer able to

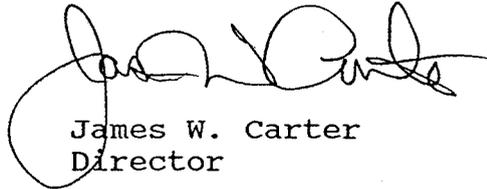
Page 7
Anne M. Shields
ACT/015/017
January 31, 1994

effectively manage the State Coal Program.

If the enforcement section of AFO is unwilling to follow the law and OSM's own rules and policies and OSM is unable or unwilling to require it to do so, the Utah Division will be forced to commence litigation in federal court in each instance in which AFO usurps state primacy. If OSM does not vacate the Federal NOV and retract the Notices of Individual Civil Penalties issued to the permittee's officers and directors, the Division will intervene in the administrative litigation and seek to have the case dismissed on jurisdictional grounds. The State is also exploring possible remedies in federal court in the form of an action in mandamus to require AFO to comply with the provisions of SMCRA and its own regulations. Utah is not alone in its frustration with the enforcement activities of AFO.

It is my sincere desire to work with OSM to effectuate a smooth functioning relationship between our two agencies. However, until the Albuquerque Field Office feels constrained by its own rules and policies, attempts to resolve our differences will be fruitless.

Very truly yours,



James W. Carter
Director

jbe
Attachments
L:UP&L



bill notebook

United States Department of the Interior
OFFICE OF SURFACE MINING
Reclamation and Enforcement
WASHINGTON, D.C. 20240

*very angry for
cc SKA
L. Bratton*

TAKE PRIDE IN AMERICA

*cc Pam
Bill*

Dianne R. Nielson, Ph.D.
Director, Division of Oil, Gas
and Mining
3 Triad Center, Suite 300
355 West North Temple
Salt Lake City, Utah 84180-1203

SEP 5 1991

Dear Dr. Nielson:

This is in response to your August 5, 1991, letter in which you ask that ten-day notice (TDN) No. 91-02-370-004 (Des-Bee-Dove Mine) be vacated.

You explain that your agency's response to the TDN did not include issuance of an enforcement action because your inspector was given the impression during and after the joint inspection of this mine that the Federal inspector concurred with the course of action proposed by your agency to abate the erosion problem. You argue that since your agency issued a violation notice subsequent to being notified by the Albuquerque Field Office (AFO) that your TDN response was inappropriate without such action, your TDN response should now be considered appropriate and the TDN vacated.

Although there may have been some misunderstanding between our inspectors during the course of the inspection, the AFO takes issue with your contention that it left your agency with the impression that enforcement action would not be necessary in addressing the erosion problem noted at the mine. Indeed, issuance of the TDN after the inspection would indicate that the AFO expected your agency to issue an enforcement action since under the Utah program an enforcement action is required for any violation observed. The fact that a violation was observed during the time of the joint inspection was acknowledged by your agency through the eventual issuance of a violation notice.

While I agree that your agency has now taken appropriate action to resolve the TDN issue without the need for Federal intervention, taking such action after the statutory TDN response period does not strike the validity of either the TDN or the AFO determination that your agency did not take appropriate action with respect to your initial TDN response. Since TDN's (and ten-day letters) are communication mechanisms used to notify States that the Office of Surface Mining Reclamation and Enforcement has reason to believe that a violation of a State program exists, they cannot be vacated, but rather, terminate once a State takes and follows-up with appropriate enforcement action or shows good cause for not doing so (e.g. the violation is shown not to exist).

Sincerely,

Nina Rose Hatfield

for W. Hord Tipton
Deputy Director
Operations and Technical Services

RECEIVED

SEP 09 1991

DIVISION OF
OIL GAS & MINING

cc: Robert H. Hagen
Director, Albuquerque Field Office

Nina Rose Hatfield
Assistant Deputy Director
Operations and Technical Services

Raymond Lowrie
Assistant Director, Western Service Center

JAN 17 1994

Division of
OIL, GAS & MINING

AFFIDAVIT OF J. BLAKE WEBSTER

COUNTY OF SALT LAKE)
 : ss.
STATE OF UTAH)

J. Blake Webster, being first duly sworn, deposes and says:

1. I am a resident of Davis County, State of Utah.

2. I am currently Permitting Administrator for Interwest Mining, a wholly-owned subsidiary of PacifiCorp, an Oregon corporation, doing business in the State of Utah.

3. The following is an account of events I witnessed immediately after the January 14, 1994 hearing before Administrative Law Judge John R. Rampton, Jr. I wrote these observations down that day while these events were all fresh in my mind.

4. I documented these events because they caused me concern.

5. The behavior of Office of Surface Mining personnel, mainly Steve Rathbun and the Solicitor, Jon Johnson, were the most disconcerting. Some of their specific statements led me to question their personal intentions with regard to the enforcement actions.

6. In the courtroom following the hearing, Mr. Rathbun made the following statements to the best of my recollection either directly to me or to his inspectors in a voice loud enough for me to hear:

a. "I guess we'll be seeing a lot of you guys in the future";

b. "Well we didn't get them on this. We'll try something else like construction standards on the road or lands unsuitable.

This may be a lands unsuitable issue";

c. "We'll just keep coming at them. They've got to give up some time."

7. Mr. Johnson made physical gestures and said distinctly, "I'm tired of taking these god-damned cases!"

8. Mr. Johnson showed disrespect to Judge Rampton. He treated the Judge as if the Judge had no authority to make the decision he did.



J. Blake Webster

SUBSCRIBED AND SWORN to before me this 31 day of January, 1994.

