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cc to [unclear]  
J Helfrich*



# United States Department of the Interior

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*T Mitchell*  
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*R Daniels*  
*RRR*

April 18, 1991

CERTIFIED MAIL - RETURN RECEIPT REQUESTED  
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RECEIVED

APR 22 1991

Dr. Dianne R. Nielson, Director  
Division of Oil, Gas and Mining  
Department of Natural Resources  
3 Triad Center, Suite 350  
355 West North Temple  
Salt Lake City, UT 84180-1203

DIVISION OF  
OIL GAS & MINING

Re: Ten-Day Notice (TDN) 91-02-246-1 TV1, Deer Creek Mine

Dear Dr. Nielson:

In accordance with 30 CFR 842.11, the following is a written finding regarding the Division of Oil, Gas and Mining's (DOGM) response to the above-noted TDN.

DOGM's response to the TDN was timely. The TDN contains one alleged violation as follows:

Failure to obtain a permit from the Utah Division of Oil, Gas and Mining prior to engaging in and carrying out any coal mining and reclamation operations.

DOGM's response:

"The MRP, as approved by OSM, clearly differentiates haul roads from state highway 31 (11.1, paragraph 4)."

The Deer Creek Mining and Reclamation Plan (MRP) does not address haul roads because there are no haul roads at the Deer Creek Mine. The MRP discusses only access roads associated with the mine. The access road addressed in this TDN is the part of the paved road extending from the permit boundary to the entrance of the Huntington Power Plant.

DOGM's response:

"On pages 11.2, OSM made a finding that the applicant was in compliance with the requirements of the regulations at the time of approval. Subsequent to permit approval, this permit has undergone reviews at the mid-permit term and renewal. OSM did not object to the permit renewal."

The Office of Surface Mining Reclamation and Enforcement (OSM) made a finding that the Deer Creek Mine access road was in compliance with the regulations on January 29, 1985. However, the regulations concerning haul and access roads have changed substantially since the 1985 review of the Deer Creek Mine permit application package (PAP).

When the Deer Creek application was being reviewed, OSM's and DOGM's proposed regulations included a definition of "affected area" that excluded all public roads. On July 15, 1985, the U.S. District Court of the District of Columbia, in Permanent Surface Mining Regulations Litigation (II), determined that the part of the "affected area" definition that allowed the exclusion of public roads experiencing substantial public use, improperly excluded from regulation some public roads that are included in the statutory definition of "surface coal mining operations" (all lands affected by the construction of new roads or the improvement or use of existing roads). On December 3, 1985, OSM disapproved an amendment to the Utah State program to the extent it included such an exclusion.

On November 20, 1986, OSM suspended the definition of "affected area" to the extent that it excluded roads included in the definition of "surface coal mining operations." On November 8, 1988, OSM promulgated a new definition for "roads." The definition is currently in use in both OSM and DOGM's regulations. So, as you can see, the regulatory framework for roads has changed since 1985, and what OSM and DOGM approved as an access road exempt from regulation in 1985, can no longer be categorically excluded from regulation on the basis that it is designated as a public road.

Regarding Mr. Braxton's statement:

"Subsequent to permit approval, this permit has undergone reviews at the mid-permit term and renewal. OSM did not object to the permit renewal."

Regarding the February 7, 1991, renewal of the Deer Creek permit, DOGM did not review the PAP. The Division approved the PAP telling the permittee in a letter dated January 16, 1991, that the Division will review the application in the coming year. Following is an excerpt from that letter:

"This letter is to clarify that the reformatted application, submitted October 9, 1990, will be reviewed by the Division in the coming year. Comments from other agencies have been received at the Division (copies attached) and will be handled during the Division review of the reformatted application."

Therefore, the permit did not undergo a review by the Division when renewed on February 7, 1991. OSM did not object to the renewal because it does not review DOGM's permits immediately upon receipt, but reviews selected permitting topics throughout the year.

Utah's approved State program at R614-300-112.400 requires that all persons who engage in and carry out any coal mining and reclamation operations will first obtain a permit from the Division. At R614-100-200, the definition of "Coal mining and reclamation operations" includes "\* \* \* all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage \* \* \*." Also at R614-100-200, "road" is defined as, "The term includes access and haul roads constructed, used, reconstructed, improved or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations \* \* \*." Finally, the definition of "affected area" at R614-100-200 includes "All areas covered by new or existing roads used to gain access to, or for hauling coal to or from coal mining and reclamation operations; \* \* \*." Based on these regulatory requirements that are contained in the presently approved State program, OSM informed DOGM on March 5, 1991, that DOGM had a regulatory obligation to permit access roads. This letter also informed DOGM that Utah's policy for exemption of public roads was unacceptable to OSM.

Mr. Braxton's response addresses the emergency rulemaking for the definitions of "road" and "public road" that include a proposed policy for determining exemptions to regulations. 30 CFR 732.17(g) states that no change to laws or regulations that make up the approved State program shall take effect for purposes of a State program until approved as an amendment by OSM. The emergency rulemaking regarding the definition of "roads/public roads" has not been approved by OSM. AFO notified DOGM on March 12, 1991, that the new rule could not be used until approved by OSM. AFO believes that DOGM's charge that OSM is acting in an arbitrary and capricious manner by failing to give DOGM sufficient time to implement new rules is without foundation. OSM advised DOGM more than 5 years ago that a blanket exclusion of public roads was not acceptable. Since that time, OSM has rejected various proposals from DOGM that would continue such an exclusion. AFO notes that the latest policy statement is not substantially different from the one rejected by OSM by my letter of March 5, 1991.

Dr. Dianne R. Nielson

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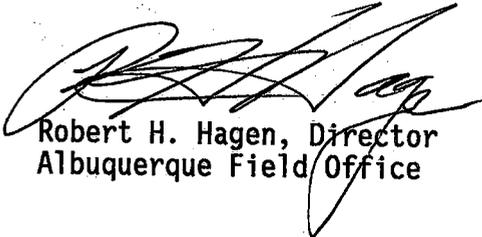
The road cited in the TDN is known as Emery County Road No. 3-04. The County road runs from State Highway No. 31 and dead ends at the Deer Creek Mine - a distance of approximately 3 miles. The Huntington Power Plant is located approximately 1.5 miles from State Highway No. 31. This first part of the County road is used for access to both the power plant and the Deer Creek Mine and is not included in the TDN. County road 3-04 continues past the power plant and dead ends at the Deer Creek Mine gate - a distance of approximately 1.6 miles. The distance from the permit boundary to the mine gate is 1 mile. The TDN addresses 0.6 miles of County road 3-04 that is measured from the power plant to the permit boundary at the line between sections 1 and 2, T17S, and R7E.

DOGM's response failed to address the use of the road or the purpose for which the road has been constructed and improved. The part of County road 3-04 addressed by the TDN provides access to the Deer Creek Mine and is used almost exclusively for that purpose. In addition, the road was improved in 1989 to facilitate that use. The improvement was necessary due to mining-related activities. The use and improvement of this road to gain access to the Deer Creek minesite meets the definitions of road, affected area, and coal mining and reclamation operations as found in the Utah approved program. The 0.6 mile part of County road 3-04 discussed above constitutes coal mining and reclamation operations which must be permitted.

DOGM's failure to require the permitting of the road constitutes an arbitrary and capricious response and is, therefore, inappropriate.

If you disagree with these findings, you may request an informal review in accordance with 30 CFR 842.11(b)(1)(iii)(A).

Sincerely,



Robert H. Hagen, Director  
Albuquerque Field Office