

COPY

BEFORE THE HEARINGS DIVISION  
 OFFICE OF HEARINGS & APPEALS  
 UNITED STATES DEPARTMENT OF THE INTERIOR  
 4015 WILSON BOULEVARD  
 ARLINGTON, VIRGINIA 22203

PACIFICORP, dba PACIFICORP	)	
ELECTRIC OPERATIONS,	)	
UTAH POWER & LIGHT COMPANY,	)	NOTICE OF VIOLATION
ENERGY WEST MINING COMPANY,	)	NO. 91-02-246-1
PETITIONER, UTAH DIVISION OF	)	
OIL, GAS AND MINING,	)	
A DIVISION OF UTAH DEPARTMENT	)	
OF NATURAL RESOURCES,	)	
STATE OF UTAH, PETITIONER &	)	
INTERVENOR	)	COAL MINING PERMIT
	)	NO. ACT/015/018
V.	)	
	)	
OFFICE OF SURFACE MINING	)	
RECLAMATION & ENFORCEMENT	)	

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PETITION FOR INTERVENTION

Pursuant to 43 C.F.R. Part 4.1110, the Division of Oil, Gas and Mining, a Division of the Department of Natural Resources, State of Utah, hereinafter "Division," petitions the Office of Hearing and Appeals for leave to intervene in the Petitioners' Request for Review of the fact of violation which is the subject of the Notice of Violation No. 91-02-246-1 issued on February 5, 1991. The Division, as intervenor, seeks to participate in this proceeding as a full party.

STATEMENT OF FACTS

Notice of Violation No. 91-02-246-1 (NOV) was issued by the federal office of Surface Mining and Reclamation and Enforcement (OSM) to Petitioner Utah Power and Light (U P & L) as permittee of the Deer Creek Mine, Emery County, Utah (the "Mine"). A copy of the NOV is attached as Exhibit A to Petitioner's Request for

Review. The Division is the issuing agency for mine permit No. ACT/015/018. The NOV issued by OSM alleges the following violation of Utah Admin. R. 614-303-300, "Failure to obtain prior written approval in accordance with R. 614-303-300 before transferring, assigning or sale of rights granted by a permit." (emphasis added) The required abatement includes submission of a complete and accurate application for transfer of permit No. ACT/015/018 from U P & L to Pacificorp, as permittee, and Energy West, as operator. The date for compliance requires state approval of the application by April 25, 1991.

Permit transfer was initiated by a letter dated October 12, 1990, in which Pacificorp notified the Division that effective October 1, 1990, the mine would be operated by Energy West Mining Co., a Utah corporation. Prior to October 1, 1990 operations were conducted by Utah Power and Light Mining Division, the permittee's operator. By this same letter, Pacificorp questioned whether there was a requirement of formal notice or application to the state of Utah concerning this change in operations. A copy of the October 12, 1990 letter is attached as Exhibit A to this Petition.

By letter dated October 29, 1990, the Division notified Pacificorp that the information contained in the October 12, 1990 letter required that an application for permit transfer pursuant to Utah Admin. R. 614-303-300 be submitted by November 13, 1990. A copy of this letter is attached as Exhibit B to this Petition.

By letter dated November 26, 1990 the Division acknowledged

receipt of a permit transfer application submitted November 20, 1990. Certain information required by Utah Admin. R. 614-303-300 and 614-301-100 was found to be missing. This information was required to be supplemented by December 7, 1990. This letter is attached as Exhibit C to this Petition.

By letter dated November 28, 1990, the Division required a revised bond from the former permittee, U P & L, for the applicant permittee, Pacificorp, by December 14, 1990. This letter is attached as Exhibit D to this Petition.

By letter dated December 7, 1990, the Division responded to a Ten Day Notice (TDN) # X-90-02-244-06 TV1, which was received in the Division's offices on November 30, 1990. At that time, the Division contended that permit transfer, which was the subject of the TDN, was being processed in a timely manner and as required by rule. A copy of this letter is attached as Exhibit E to this Petition.

On December 20, 1990, OSM responded with a written Finding in accordance to 30 C.F.R. 842.11 concerning the TDN. OSM, through Robert H. Hagen, Director of the Albuquerque Field Office, found that the Division's basis for not taking action on the alleged violation concerning the permit transfer was inappropriate. OSM, through the Albuquerque Field Office, (AFO) found that "Pacificorp is obligated to notify DOGM (the Division) of its intent to assume those rights and have them approved in full prior to the transfer, assignment or sale of the rights granted by the permit." A copy of this letter and Finding is

attached as Exhibit F to this Petition.

By letter dated January 7, 1991, the Division responded to the December 20, 1990 OSM, AFO Findings. By this letter, the Division called to the attention of the AFO the distinction between the sale or purchase of real property or stock and the transfer of permit rights. The Division's position being that 30 U.S.C. 1201 et seq. provides a basis for regulation of the latter but not the former. This letter is attached as Exhibit G to this Petition.

By letter dated February 4, 1991, OSM, through W. Hord Tipton, Deputy Director of Operation and Technical Services, responded to the Division's January 7, 1991 request for review of OSM's Finding of an inappropriate response. OSM, by that letter, took the position that under Utah Admin. R. 614-303-310, and its federal counterpart at 30 C.F.R. 774.17, the Division was required to "take appropriate enforcement action in situations where an unapproved entity is found to be engaged in surface coal mining operations until such time as a transfer, assignment, or sale of permit rights has been approved by your agency." This letter is attached as Exhibit H to this Petition.

Based upon the Division's decision not to take the requested enforcement action, OSM conducted a federal inspection at the mine and issued the Federal NOV.

Since the issuance of the NOV, OSM has issued two additional Ten Day Notices to the Division concerning other mining and reclamation permits held by Pacificorp.

## ARGUMENT

1. The Division should be granted leave to intervene

43 C.F.R. Part 4.1110(c) provides that the State shall be allowed to intervene where; 1) the state had a statutory right to initiate the proceedings in which it wishes to intervene; or 2) has an interest which is or may be adversely affected by the outcome of the proceedings.

The state of Utah, through the Division, clearly had the right to initiate the proceedings within its state regulatory program. Further, the state's ability to administer its program under its rules and approved statutory authority will be affected by any interpretation of the rule and statute. Therefore, the Division should be granted the right to intervene in this matter.

2. The Division's determination that there was no violation of the act was appropriate.

The state statutory counterpart to § 506 of the Surface Mining Control and Reclamation Act of 1977, PL 95-87-August 3, 1977 91 Stat. 4. may be found at Utah Code Ann. § 40-10-9(2) (1953 as amended.) This statute provides:

(2) All permits issued pursuant to the requirements of this chapter shall be issued for a term not to exceed 5 years; but if the applicant demonstrates that a specified longer term is reasonably needed to allow the applicant to obtain necessary financing for equipment and the opening of the operation and if the application is full and complete for the specified longer term, the Division may grant a permit for the longer term. A successor in interest to a permittee who applies for a new permit within 30 days after succeeding to the interest and who is able to retain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until the

successor's application is granted or denied. Utah Code Ann. § 40-10-9(2) (emphasis added)

The Division's determination that the application for a new permit by the operator was timely is based upon the above quoted language of the state statute. Utah Admin. R. 614-303-310 must be interpreted in light of the enabling statute. It is clear that the October 1, 1990 change of operatorship from Utah Power & Light Mining Division to Energy West Mining Company involved a successor in interest who was able to retain the bond coverage of the original permittee. Therefore, the question revolves around the timeliness of the application for approval of the transfer, assignment or sale of the permit right. In as much as the rules do not address timeliness of application for transfer, and cannot be construed to be in conflict with the enabling legislation, the standard for determining whether or not Pacificorp's application was timely must be tied to the 30-day period granted by § 506(b) of the Surface Mining Control and Reclamation Act of 1977 and Utah Code Ann. § 40-10-9(2).

In this case, the October 12, 1990 letter had the effect of beginning the permitting process by seeking a determination from the Division prior to the expiration of 30 days as to whether or not a permit transfer would be required. Prior to the end of the 30-day period, running from October 1, 1990, the Division set a deadline for November 13, 1990, some two weeks after the Division's determination of the requirement of transfer application.

The Division has consistently taken the position that no

transfer, assignment or sale of the rights granted by a permit were accomplished by the transfer of stock ownership and assets in the merger of U P & L and Pacificorp. This issue has been addressed by the Petitioners.

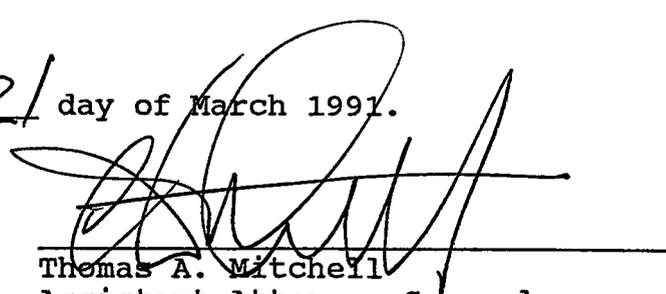
The only way in which the statute and relevant rule can be reconciled is to recognize the difference between the successor in interest in terms of ownership, and a successor in interest in terms of transfer, assignment or sale of rights granted by a permit.

CONCLUSION

The Division should be allowed to intervene both as a matter of right and because of its interest in interpreting the state of Utah's statute and rule in a coherent fashion.

The distinction between transfer of stock and transfer of permit rights should be upheld and that distinction as reflected in both the federal and state statute concerning successors in interest and the 30-day window in which to apply for a new permit should be upheld.

DATED this 21 day of March 1991.



Thomas A. Mitchell  
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Attorney for Intervenors  
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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing PETITION FOR INTERVENTION to be mailed by certified mail, postage prepaid, the 21<sup>st</sup> day of March 1991 to:

Denise Dragoo  
Fabian & Clendenin  
215 South State  
Salt Lake City, Utah 84111

Assistant Regional Solicitor for Surface Mining  
United States Dept. of the Interior  
P O Box 25007  
Denver Federal Center  
Denver, Colorado 80225-007

  
Lynda S. Jenson

Dated this 21<sup>st</sup> day of  
March 1991.