

December 29th, 2005

Utah Division of Oil, Gas, and Mining
1594 West North Temple, Suite 1210
Salt Lake City, Utah 84114

Incoming
12/15/05

RE: Pacificorp Deer Creek Mine Permit Renewal Application Request for Informal Conference

To Whom It May Concern:

This request for an informal conference is being filed on behalf of Utah Environmental Congress for the above permit renewal. Utah Admin. Code R645-300-123. It is being filed concurrently with UEC's formal objection that will form the basis of issues to be discussed during informal conference. These issues are outlined in UEC's objection and include but is not limited to the issue of Forest Service authority to authorize measures designed to protect the surface environment and the points raised in UEC's appeal filed to the U.S. Forest Service. It is attached to UEC's objection. UEC hopes to discuss several of the terms of the agreement that the UEC signed with the U.S. Forest Service.

UEC would prefer to have the conference located in Salt Lake City as opposed to the locale of the coal mine in question. However, UEC would request that the U.S. Forest Service and Alice Carlton attend the conference. UEC does not oppose the conference being held in Price since this is where the Manti La Sal National Forest is located and is proximate to the mine in question.

Sincerely,

Joel Ban
Wildlaw (on behalf of UEC)

RECEIVED

DEC 29 2005

DIV. OF OIL, GAS & MINING

1817 S. Main Street; Suite 10
Salt Lake City, UT 84115
801-474-2626

Mine # C/015/0018
File Incoming
Record # 0155
Doc. Date 12/29/05
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December 29th, 2005

Utah Division of Oil, Gas, and Mining
1594 West North Temple, Suite 1210
Salt Lake City, Utah 84114

RE: Pacificorp Deer Creek Mine Permit Renewal Application Objection

To Whom It May Concern:

This objection is being filed on behalf of the Utah Environmental Congress (UEC) for the above referenced project located on the Manti-La Sal National Forest. Utah Admin. Code R645-300-122. We are concurrently filing a notice for request of an informal conference. Utah Admin. Code R645-300-123. It is our hope that UEC's objection to the currently proposed project can be resolved through such a conference. Our objection mainly pertains to the points raised in the negotiated agreement UEC reached with the Manti-la Sal National Forest, by and through its Forest Supervisor Alice Carlton. Attached. However, there are a number of other violations that the UEC has identified associated with this project. UEC also believes that UDOGM and some other federal agencies misinterpret applicable statutes and regulations related to this project, and it is our sincere hope that all parties can resolve these disputes through an informal conference.

Some preliminary interpretations of the extent of UDOGM's authority to implement NEPA are at issue. Within the Deer Creek EA it states that OSM has delegated the preparation of the EA to DOGM with OSM assistance where appropriate. EA, p. 4. The regulations allow UDOGM authority to prepare an EA, but explicitly state that OSM will continue to be responsible for NEPA responsibilities in the following areas:

- i. Determining the scope, content and format and ensuring the objectivity of NEPA compliance documents;
- ii. Making the determination of whether or not the preparation of an environmental impact statement is required.
- iii. Notifying and soliciting views of other state and federal agencies, as appropriate, on the environmental effects of the proposed action;
- iv. Publishing and distributing draft and final NEPA compliance documents;
- v. making policy responses to comments on draft NEPA compliance documents;
- vi. independently evaluating NEPA compliance documents; and
- vii. Adopting NEPA compliance documents and determining federal actions to be taken on alternatives presented in such documents. 30 C.F.R. §740.4(c)(7).

It appears that the responsible agencies were not in compliance with this particular provision. With respects to the 1st point from the above regulation UEC received scoping notices from the Forest Service and UDOGM for this project, but never from OSM as the regulation requires. For the 2nd point above the decision to not prepare an EIS appears to have been made by the Forest Service, but not UDOGM or OSM. This would seem to violate the above regulation. The fourth requirement from the above regulation would seem to require OSM to circulate the draft NEPA document, however this was never done. For the other requirements pursuant to the above regulation it is unclear whether OSM complied with these provisions as UEC does not sufficient information to evaluate compliance. This is not an authoritative analysis of UDOGM'S role in the NEPA process vis a vis other agencies. If other statutes/regulations clarify this issue please provide the relevant citations so this issue can be resolved for future projects.

On page 4 of the EA it also states that based on section 523(c) of SMCRA UDOGM is permitted to regulate surface coal mining operations and surface effects of underground mining. It is UEC's belief that the primary agency charged with protection of surface resources is the Forest Service since they are the federal land management agency in this case. Furthermore, this section of SMCRA does not charge UDOGM with authority to regulate activities pertaining to surface effects on Forest Service land.

Under section 523(c) of SMCRA, a State with an approved State program may enter into a cooperative agreement with the Secretary of the Interior (hereinafter referred to as the Secretary) to provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State.

If UEC is incorrect in this interpretation of this section of SMCRA please provide the specific portion of SMCRA or the Mineral Leasing Act (MLA) that allows state regulators like UDOGM to regulate surface effects on lands managed by the U.S. Forest Service. Regulations under the (MLA) require that leases be issued only with the consent of the agency that has jurisdiction over the lands that contain the coal deposits. 43 C.F.R. §3400.3-1. These leases are also subject to certain conditions that the federal land management agency may prescribe for the protection of those lands. Id.

The federal land management agency, in this case the U.S. Forest Service is responsible for:

1. Determining post-mining land uses;
2. Protection of non-mineral resources. 30 C.F.R. §740.4(e).

The rights of the U.S. Forest Service were affirmed in a letter dated December 1st, 2005 from Alice Carlton, Forest Supervisor of the Manti-La Sal National Forest to Mary Ann Wright, Associate Director of Mining at UDOGM. A copy of this letter is attached for easy reference to the letter's main points. UEC and the Manti-La Sal National Forest made fruitful efforts to work together and agreed to take certain measures to protect the surface environment in November of this year. The parties agreed to protect the surface environment through macroinvertebrates monitoring and maintenance of a BCI level for macroinvertebrates. In addition, the parties agreed that the 200 acres of timber would not be harvested. It is our understanding that based on objections from UDOGM and the permittee the agreement was breached by Alice Carlton on

November 28th. It is UEC's belief that its appeal raised several viable appeal points, and that the Forest Service was well within its authority to take these reasonable measures to protect the environment. If UDOGM disagrees that the Forest Service was within its authority in reaching this agreement please provide explanation based on applicable statutes and regulations. UEC was willing in the past to make further concessions in this agreement; however these attempts were apparently rejected by some interested parties. It is our hope that this objection process will allow the relevant parties to resolve some of these unresolved points.

Of course UEC's attempts to resolve this appeal are based on apparent violations of law outlined in its appeal. Some of violations of law are based on the National Environmental Policy Act (NEPA), and I would refer you to the attached appeal for a detailed discussion of those violations. Needless to say it appears that the Forest Service's Finding of No Significant Impact (FONSI) is not based on sufficient evidence.¹ Many federal courts have held that an agency must produce a convincing and well-supported document that supports a FONSI.² The EA failed to do this. Impacts from the road, road construction, and water and aquatic habitat quality suggest there will be significant impacts to the environment.

The EA states there will be impacts to the Management Indicator Species (MIS) and Forest Service Sensitive species Golden Eagle. The EA notes on page 34 how the project could cause the eagle to abandon its territory. The Manti La Sal National Forest Plan prohibits activities that could cause abandonment of active nests. Plan, III-20. How the impacts to big game MIS such as deer and elk are insignificant is unknown as well. Elk will incur direct/indirect effects for 30 years, and are also like to suffer due to the cumulative effects of future management activities.

Additionally, it appears that the EA failed to analyze the impacts from the change in right of way, additional traffic on highway U-31, and the other projects associated with water drilling in Rilda Canyon. These actions, left analyzed, leave the agencies unable to determine whether there will be significant impacts to the environment.

The applicable agencies clearly violated NFMA and the Manti-La Sal National Forest Plan by failing to monitor the population trends of MIS goshawk, elk, mule deer, macroinvertebrates, and golden eagle. Please see UEC's appeal on this issue located on page 11 of the appeal. Additionally, Forest Plan standards for macroinvertebrates are not being met and will not be met for the diversity index (DAT) or Biotic Condition Index (BCI).

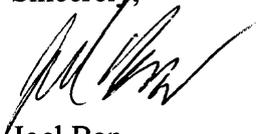
The EA does not mention or discuss the direct and indirect effects of the proposed "mitigation" to log 200 acres as a part of this project. Under NEPA the direct and indirect effects of a project must be analyzed. 40 C.F.R. §1508.7 §1508.8. It is hard to understand how such an activity will mitigate environmental damage as opposed to being the cause of environmental damage. An EA must provide a detailed analysis of proposed mitigation measures. O'Reilly v. U.S. Army Corps of Engineers, 2004 WL 1794531 (E.D.La.,2004). This is a fundamental flaw and should be dropped as a component of the project.

¹ It is unclear if UDOGM also intends to issue a FONSI as the Forest Service did.

² See Pac. Marine Conservation Council v. Evans, 200 F. Supp. 2d 1194, (D. Cal. 2002); Sierra Club v. United States DOT, 243 U.S. App. D.C. 302, (D.C. Cir., 1985) Makua v. Rumsfeld, 136 F. Supp. 2d 1155, (D. Haw., 2001).

Please consider these issues carefully so that the informal conference is as constructive as possible. Also please don't hesitate to contact me with any questions. Thank you and please consider the attachments to this objection as well.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joel Ban', written in a cursive style.

Joel Ban
Wildlaw (on behalf of UEC)

Attachments

Letter from Alice Carlton to Mary Ann Wright 12/1/05

Appeal Resolution between UEC and the Manti La Sal National Forest 11/4/05

UEC Administrative Appeal to the Manti La Sal National Forest