

AUG 3 1984

DIVISION OF OIL
GAS & MINING

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

In the Matter of the Petition)	
of Utah Power & Light Company)	
for Review of a Decision of)	
the Division of Oil, Gas and)	
Mining in Connection with the)	PETITION
Issuance of Coal Mining Permit)	
ACT/015/019 (Federal Permit)	
UT-001) for Wilberg Mine,)	
Emery County, Utah.)	
_____)	

Utah Power & Light Company, a Utah corporation "petitioner," pursuant to Part UMC 787, Utah Coal Mining and Reclamation Permanent Program Regulations, hereby appeals from the decision of the Division of Oil, Gas and Mining, through its Director, dated July 6, 1984, a copy of which is annexed hereto. By said decision, petitioner was granted a Permanent Coal Regulatory Program Permit for the Wilberg Mine. Such permit was issued in conjunction with the Federal Permit UT-001 issued by the United States Office of Surface Mining on June 8, 1984.

This appeal relates only to two conditions, Special Conditions No. 2 and 9, contained in the federal permit and incorporated by reference into the above permit.

As grounds for its appeal, petitioner states that Special Condition No. 2 of said permit purports to require petitioner to--

. . . replace any water demonstrated to have been lost or adversely affected by mining operations with water from an alternate source in sufficient quantity and quality to maintain the rights of present users and current and post-mining land uses.

It is petitioner's position that there is no legal basis in the Utah Coal Mining and Reclamation Act, the Surface Mining Control and Reclamation Act or elsewhere authorizing the Utah Division of Oil, Gas and Mining or the Office of Surface Mining to impose such a condition. In fact, a regulation requiring underground mining operators to replace the water supply of a landowner in the case of contamination, diminishment or interruption has been suspended by a United States district court. A similar Utah regulation was consequently disapproved by the Office of Surface Mining and is not in effect. A Utah statute, Section 40-10-29, U.C.A., 1953 (as amended), is not applicable. Petitioner believes a requirement that it assure sufficient quantity and quality of water to maintain post-mining land uses would be extremely onerous and burdensome and could serve to deprive petitioner of its property without due process of law.

Finally, petitioner contends that such requirement is in conflict with state water law which places exclusive authority in the Utah State Engineer to adjudicate water

rights between opposing claimants and users. Inasmuch as there is no federal statute pre-empting state water law, in this regard it should control.

The Office of Surface mining cites as authority for such condition stipulations contained in three federal coal leases issues to appellant, as well as several regulations contained in Utah regulations pertaining to surface effects of underground coal mining activities. No cited authority, however, supports such requirement. The coal leases referred to are of a much more restrictive nature and provide only that petitioner will replace water necessary to meet livestock and wildlife requirements--a condition to which petitioner has agreed. Nor do the state regulations cited in the permit support the requirement of water replacement. Thus, UMC 784.14(a) merely requires that the mining plan contain a detailed description of the measures to be taken to protect the rights of present users to surface and ground water. The plan submitted by petitioner clearly satisfies that section. Again, UMC 784.20(c) requires only a detailed description of the measures to be taken to mitigate the effects of any material damage to or diminution in value of lands and allows several alternatives to meet that requirement. Petitioner's permit application

complies with all requirements of said section. Similarly, UMC 817.41 requires that the underground coal mining activities be planned and conducted to minimize the changes in the hydrologic balance so that changes in water quality and quantity shall be minimized. There is nothing in the section which remotely suggests that petitioner be required to guarantee in perpetuity the replacement of water for both present users and post-mining land uses.

Finally, the permit cites Section 508(a)(13) of the Surface Mining Control and Reclamation Act. This language is basically identical to UMC 784.14(a) and pertains to the requirements of the reclamation plan. It does not require replacement of water.

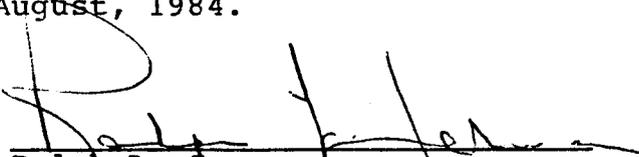
In summary, Special Condition No. 2 purports to require petitioner to make a commitment for the replacement of water which cannot feasibly be made and cannot legally be required. No one can reasonably see the extent or nature of post-mining land uses in the area of the Wilberg Mine and hence it is open-ended both in amount and time.

Special Condition No. 9 provides that applicant shall participate in the USFWS study program relating to "Recovery of Endangered Fishes of the Upper Colorado Basin" if determined necessary by the Endangered Species Office.

Petitioner does not necessarily object to this requirement if its obligations thereunder are to be reasonable in amount. The way it is written, however, petitioner has no way of knowing what its obligations thereunder might be in the future. It is assumed that participation referred to shall be of a monetary participation, but even this is not defined. At the very least, the type of participation and the amount should be spelled out with a definite and moderate limitation.

Petitioner has filed with the Office of Hearings and Appeals, United States Department of Interior, a similar appeal. It believes that the Office of Surface Mining has ultimate authority for permitting in this instance and that the decision of the Administrative Law Judge for the Office of Hearings and Appeals will control. It is, however, filing this petition to protect its rights in the matter.

DATED this 2nd day of August, 1984.


Ralph L. Jerman
Attorney for Petitioner
UTAH POWER & LIGHT COMPANY
1407 West North Temple
Salt Lake City, UT 84116
Telephone: 535-4254

I certify mailing a true and correct copy of the foregoing to each of the following, postage prepaid, this 2 day of August, 1984:

Dianne R. Nielson, Director
Division of Oil, Gas and Mining
4241 State Office Building
Salt Lake City, UT 84114

Barbara Roberts
Assistant Attorney General
State Capitol Building
Salt Lake City, UT 84114

Herm Olsen, Esq.
Hillyard, Low & Anderson
175 East First North
Logan, UT 84321

A handwritten signature in cursive script, appearing to read "Hillyard, Low & Anderson", is written over a horizontal line.