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# United States Department of the Interior

OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENT  
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ALBUQUERQUE, NEW MEXICO 87102



J. Helfrich  
In Reply Refer To:  
J. Mitchell  
AKW

April 19, 1991

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CERTIFIED MAIL-RETURN RECEIPT REQUESTED  
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DIVISION OF  
OIL GAS & MINING

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

Re: Ten-Day Notice (TDN) 91-02-116-3 TVI, Cottonwood/Wilberg 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 first obtain a permit from the Division (DOGM) prior to engaging in and carrying out any coal mining and reclamation operations. Location: Cottonwood/Wilberg haul road from present permit boundary (former guard shack location) approximately 13 miles south to the receiving scale of the Hunter Prep. Plant. Regulation citation: R614-300-112.400.

DOGM's response:

"On page 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 Cottonwood/Wilberg haul road was in compliance with the regulations on May 16, 1984 (Technical Analysis). However, the regulations concerning haul and access roads have changed substantially since the 1984 review of the Cottonwood/Wilberg permit application package (PAP).

When the Cottonwood/Wilberg PAP was being reviewed, OSM's rules 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, 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, 1986, 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 1984, and what OSM and DOGM approved as an access/haul road exempt from regulation in 1984, 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."

The Cottonwood/Wilberg mid-term permit review was completed by DOGM on January 15, 1988. The permit was subsequently renewed by DOGM on July 6, 1989. OSM did not object to either action because it does not review DOGM's permits immediately upon receipt, but reviews selected permitting topics throughout the year. AFO notes the permit renewal package does not contain a letter of concurrence from OSM.

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, including use by coal hauling vehicles leading to transfer, processing, or storage access \* \* \*." 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 and haul roads. This letter also informed DOGM that Utah's policy for exemption of public roads was unacceptable to OSM (copy enclosed).

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 (copy enclosed), 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 in my letter of March 5, 1991.

The road cited in the TDN is classified as State Highway 57. The highway runs south from the Cottonwood/Wilberg permit boundary (approximately at former guard shack location). Approximately 5 miles south of the permit boundary, Highway 57 intersects State Highway 29, which provides access east to Orangeville, Utah and west to Joe's Valley Reservoir. It is approximately 8 miles farther south on Highway 57, from the Highway 29 intersection, to the gravel road spur east of Highway 57 which leads to the receiving scale for the Hunter Preparation Plant. The 5 mile section of Highway 57 north of the Highway 29 intersection is used almost exclusively for coal haulage and providing access to the mine. The 8 mile section south of the intersection receives light use from access to the local farming, recreation, and power plant activities; however, its primary use is to facilitate coal haulage to the Hunter Preparation Plant. The primary access to the power plant is via State Highway 10. The sections of Highway 57 described above were originally constructed in 1977 and 1978 for the specific purpose of providing a direct transportation route from the mine to the power plant. State Highway 57 was designed at that time to facilitate coal haulage, the primary use. The highway received a heat/scarifying treatment from mile marker 5, south of State Highway 29, to the minesite during 1987. The entire Highway 57 surface received a slurry seal during 1989. Both these improvements were necessitated by impacts from the primary road use, coal haulage. The use and improvement of this road to facilitate coal haulage from the Cottonwood/Wilberg Mine to the Hunter Power Plant and Coal Preparation Facility, meets the definitions of road, affected area, and coal mining and reclamation operations as found in the Utah approved program. The approximately 13 miles of State Highway 57, from the Cottonwood/Wilberg

Dr. Dianne R. Nielson

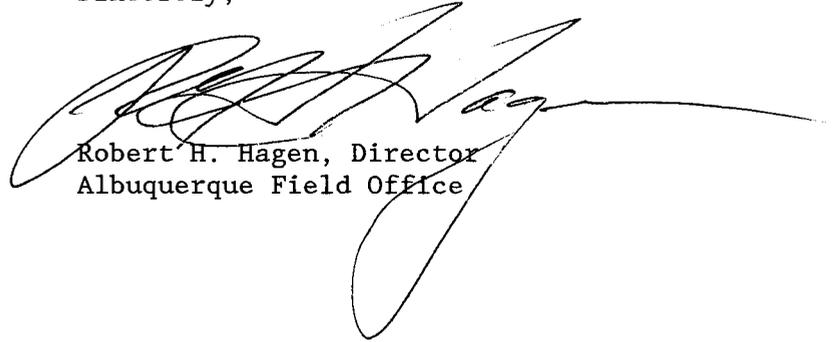
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permit boundary to the receiving scale of the Hunter Coal Preparation Facility discussed above, constitutes coal mining and reclamation operations which must be permitted.

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)(i)(iii)(A).

Sincerely,

A handwritten signature in black ink, appearing to read "Robert H. Hagen", is written over the typed name and title. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert H. Hagen, Director  
Albuquerque Field Office

Enclosures