

**From:** Susan White  
**To:** Joe Helfrich; Pam Grubaugh-Littig; Steve Fluke; Wayne Hedberg  
**Date:** 2/8/2005 11:12:58 AM  
**Subject:** Genwal FS NEPA decision

**CC:** Alison Garner; Lucia Malin



United States  
Department of  
Agriculture

Forest  
Service

Intermountain Region

324 25<sup>th</sup> Street  
Ogden, UT 84401

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**File Code:** 1570-1  
#05-04-00-0015  
**Date:** February 4, 2005

Kevin Mueller  
Utah Environmental Congress  
1817 South Main, Suite #10  
Salt Lake City, UT 84115

CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED

Dear Mr. Mueller:

In accordance with 36 CFR 215.18, I have reviewed the appeal record, Environmental Assessment (EA), Decision Notice and Finding of No Significant Impact (DN/FONSI) for the Genval Resources Modification of Federal Coal Lease UTU-68082 project.

My review focused on the project documentation and the objections raised in the appeal you filed. I have also considered the recommendations of the Appeal Reviewing Officer regarding the disposition of your appeal. A copy of that recommendation is enclosed.

**APPEAL DECISION**

I am affirming the decision by Manti-La Sal Forest Supervisor Alice Carlton.

I find that the activities documented in the EA, DN/FONSI, and the project record are in compliance with applicable laws, regulations, and policy. A more detailed explanation of the response to the appeal is enclosed.

This constitutes the final administrative determination of the United States Department of Agriculture under 36 CFR 215.18(c).

Sincerely,

/s/ Joseph W. Kennedy  
JOSEPH W. KENNEDY  
Appeal Deciding Officer

cc:  
Manti-LaSal Forest Supervisor (Alice Carlton)



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**Modification of Federal Coal Lease UTU-68082, Crandall Canyon Mine**  
**Appellant: Utah Environmental Congress**  
**Appeal #05-04-00-0015**

**APPEAL ISSUE 1** : The Manti-LaSal National Forest (Forest) violated the National Environmental Policy Act (NEPA) by failing to make the Environmental Assessment (EA) available for public review before the Decision Notice and Finding of No Significant Impact (DN/FONSI) was approved and circulated. Further, the Forest included mitigation measures in the final decision that were not described in the original proposed action.

**RESPONSE** : NEPA, and the corresponding Council on Environmental Quality (CEQ) regulations do not require agencies to distribute an EA prior to making a decision (40 CFR 1500-1508). Forest Service regulations provide the Responsible Official with discretion to determine the most effective time for providing an opportunity for public comment on a proposed action (36 CFR 215.5).

The Forest initially published a Legal Notice of Proposed Action on May 4, 2004, with a 30-day comment period. Due to an incorrect legal description, the Forest published a corrected notice on June 8, 2004, and extended the comment period an additional 30 days. These notices were published in both the Sun Advocate and Emery County Progress. In addition, on May 10, 2004, the Forest Supervisor sent personal letters to 77 groups and individuals, informing them of the proposed action and opportunity to comment. This letter contained the correct legal description. Utah Environmental Congress (UEC) was one of 77 recipients of this letter.

Stipulations and mitigations had not been identified at the time of public notification of opportunity to comment on the proposed action. Issues raised during the comment period are the basis for the NEPA analysis of the proposed action and subsequent development of alternatives, mitigation measures, and stipulations where appropriate. The comments UEC made during the comment period about impacts on surface resources from subsidence associated with coal mining was the primary reason for development of the Supplemental Forest Service Stipulation No. 1. This stipulation specifies that full extraction mining will not be authorized, where the fracture zone created by subsidence is projected to reach the surface. This stipulation became the basis of Alternative 3 analyzed in the EA and is the only difference in that alternative from the original proposed action. The Forest Supervisor selected Alternative 3 in the DN/FONSI.

The Forest provided notice of the decision on November 30, 2004, and mailed a copy of the DN/FONSI to the appellant on the same day. A copy of the completed EA was sent to UEC around December 2, 2004 (Dale Harber, Record of Conversation with UEC, January 21, 2005).

The Forest provided appropriate opportunities for public comment and used comments received in completing the environmental analysis.

**APPEAL ISSUE 2** : The Forest violated the National Forest Management Act (NFMA) requirements for Management Indicator Species (MIS) and diversity monitoring. The Forest

failed to determine the relationship between management activities and population trend changes.

**RESPONSE:** The EA, Wildlife Resources Report, and the Biological Evaluation/Biological Assessment (BE/BA) provide detailed analyses that support the conclusions made for wildlife species (EA, pp. 19-25; Wildlife Resources Report, pp. 1-13; and BE/BA, pp. 1-15). These analyses reference pertinent surveys and literature to support conclusions.

Two MIS species, the spotted bat and macro invertebrates, were identified as having the potential to be affected by proposed activities (Wildlife Resources Report, pp. 7-9). However, further analysis determined there would be no effects to these species or their habitat (Wildlife Resources Report, pp. 10-11). Since the project will not affect these species or habitat, the population trend for these MIS will not be affected.

**APPEAL ISSUE 3:** The Forest violated NEPA by failing to prepare an adequate analysis of the cumulative impacts (effects). The project lacks a meaningful analysis of cumulative impacts by failing to disclose, list and describe how the effects of each past, present and foreseeable project may or may not contribute to the current degree of effects that cumulatively may be significant. The Forest failed to adequately catalogue the past, present and reasonably foreseeable impacts, describe the current effects from each, and then evaluate the cumulative effects of each of these other activities in a meaningful way. In particular, the Forest should have responded to the following point raised in appellant's comments:

"Subsidence of the surface may disrupt the soils, hydrology, and physiological integrity of the plants that comprise the mixed conifer forest on the surface, making the forest more susceptible to insect and disease. Stressed and insect-infested coniferous forests may or may not present greater risk of wildfire (in terms of ignitability and intensity of burn). These cumulative effects should be disclosed and analyzed" (Emphasis added by appellant).

**RESPONSE:** NEPA requires analysis of the cumulative effects of the proposed action in consideration of past, present, and reasonably foreseeable future actions in the analysis area; and disclosure of the environmental impacts of the alternatives in terms of direct and indirect effects and their significance (40 CFR 1502.16). Agencies have discretion to determine the significant issues to be analyzed in depth and to identify and eliminate from detailed study issues that are not significant (40 CFR 1501.7 (3-4)).

The Forest analyzed the direct, indirect, and cumulative impacts in the EA (pp. 29-35). Additional analysis is found in the associated specialist reports (Wildlife Resources Report, pp. 1-13; and BE/BA, pp. 1-15). The Forest developed Alternative 3 with specific mitigation to minimize the impacts. Based on the analysis, the Forest Supervisor determined that an Environmental Impact Statement (EIS) was not needed for implementation of Alternative 3 (DN/FONSI, p. 4).

Chapter 2 of the EA (pp. 11) states, "The cumulative effects for each resource category are addressed under each alternative in Chapter 4. Estimates of residual, current, or anticipated

effects are discussed. The sum of the effects, in addition to the anticipated direct and indirect effects of the proposed action, will form the basis for the cumulative effects analysis.”

Chapter 4 analyzed cumulative effects by resource. The introduction to Chapter 4 (pp. 29) informs the reader “Activities on East Mountain that could add incrementally to the impacts of the proposed lease modification are included in Appendix A.” Appendix A catalogs the dates and residual effects of past, present, and reasonably foreseeable future actions in the area.

Cumulative impacts, including associated subsidence related impacts, for the coal area were addressed in the 1986 Manti-LaSalle National Forest Land and Resource Management Plan Final Environmental Impact Statement (FEIS). Cumulative effects for oil and gas projects were addressed in the 1992 Oil and Gas FEIS, in the EA for the original lease to be readjusted, and the EA for the adjacent Mill Fork Tract (Crandall Canyon Mine EA, September 1997; and EA, p. 38).

In response to the cited comment from the appellant, the Forest explained that the vegetation in the proposed coal lease modification is not mixed conifer as described by UEC, but is 86 acres of aspen and 34 acres of grassland and mountain big sagebrush (EA p. 40, paragraphs 5 and 6). This is also illustrated in Figure 4 of the EA (p. 26). Monitoring of the Deer Creek Mine revealed only one small failure (subsidence), which damaged some trees and vegetation. “This is the only evidence of subsidence on the ground surface and no impacts have been discovered by monitoring” (EA, Appendix A, p. 60).

The Forest analyzed the direct, indirect, and cumulative effects relative to the issues of the project. The Forest Supervisor found that “the potential adverse effects of the proposal are effectively mitigated” (DN, p. 8, paragraph 6). Attachment 2 lists the Standard Bureau of Land Management (BLM) and Special Forest Service Coal Lease Stipulations (DN, pp. 12-15). The Forest Supervisor chose Alternative 3 because it offers environmental protection of National Forest System resources (DN, p. 3).

**APPEAL ISSUE 4** : The Forest violated the Appeals Reform Act by failing to provide opportunity to comment on fundamental components of the proposed action, or comment on the selected action.

**RESPONSE** : The proposed action, and the selected action, is the 120-acre expansion of a subsurface coalmine. The legal notices and letter from Supervisor Carlton invited comments on this expansion (Legal Notice, June 8, 2004, Sun Advocate Newspaper; Legal Notice, June 8, 2004, Emery County Progress Newspaper; and Interested Party Letter, May 10, 2004). The appellant provided a six-page comment letter detailing their concerns. Three other entities also provided comments. The Forest considered these comments, and developed an alternative that responded to the concerns raised by appellant. This alternative was the selected alternative (EA, pp. 36-44).

The selected alternative differed from the proposed action only in the addition of a mitigation measure designed to lessen environmental impacts. This stipulation was immediately responsive

to the appellants concern, expressed during the comment period, that subsidence of the surface may disrupt the soils, hydrology and physiological integrity of plants (EA, Appendix C and Comment Letter 1).

The Appeals Reform Act and 36 CFR 215 regulations require that a proposed action be made available for comment, not the selected action. The Forest complied with the requirements.

**APPEAL ISSUE 5**: The Forest violated the Administrative Procedures Act because, 1) the New Notice, Comment and Appeal Regulations at 36 CFR 215 are illegal; and 2) determinations leading to and the decision signed by Supervisor Carlton are inconsistent with 36 CFR 215.

**RESPONSE**: The Forest Service is required to comply with the current regulations at 36 CFR 215. Those regulations provide that the Responsible Official has the discretion to determine the most effective timing for publication of the legal notice that establishes the 30-day comment period on the proposed action (36 CFR 215.5). Documentation of the rationale for when to publish the notice is not required.

The Forest Supervisor complied with the regulations by providing two legal notices seeking public comment. In addition, she sent a letter directly to interested citizens seeking public comment. The notices were appropriately provided after formulation of the proposed action and prior to completion of the EA.



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324 25<sup>th</sup> Street  
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**File Code:** 1570-1

**Date:** February 3, 2005

**Route To:**

**Subject:** Reviewing Officer Recommendation, Modification of Federal Coal Lease UTU-68082 Crandall Canyon Mine, Appeal #05-04-00-0015.

**To:** Appeal Deciding Officer, Joe Kennedy

This is my review and recommendation on the disposition of the following appeal on the Modification of Federal Coal Lease UTU-68082 Decision Notice and Finding of No Significant Impact (DN/FONSI).

There was one appeal filed on this project; Kevin Mueller filed the appeal on behalf of the Utah Environmental Congress.

### **Project Background**

The project is located on the Manti-LaSal National Forest. The Environmental Assessment is a joint analysis between the Manti-LaSal National Forest and the Bureau of Land Management (BLM). The Office of Surface Mining Reclamation and Enforcement (OSM) participated as a cooperating agency. The location of the project is in Emery County, Utah, adjacent to the east side of UTU-68082, an existing federal coal lease.

The proposed action is for the BLM to modify Federal Coal Lease UTU-68082 by adding 120 acres to the existing lease. The Forest Service proposes to consent to the modification, subject to all lease terms, conditions, and stipulations contained in the original lease, and any additional stipulations needed to address surface effects in the modification area consistent with Forest Plan direction. The action would enable Genwal Resources Inc. (Genwal) to economically recover the available coal reserves within the proposed lease modification area and is in keeping with the BLM and FS missions of providing the opportunity to recover leasable minerals on National Forest System Lands, consistent with requirements for managing other resources.

The coal reserves of the proposed 120-acre lease modification would be approached from the south or west through existing underground mine workings in the Crandall Canyon Mine. No roads or portal facilities would be constructed for this project. The proposed lease modification area is an isolated area adjacent to the current lease. The proposed action would not lead to other future mining actions.

### **Appellant's Request for Relief**

The appellant requests relief in the form of a reversal of the decision made on November 23, 2004 DN/FONSI signed by Supervisor Carlton. The appellant believes this project cannot be considered legal due to violations of Federal laws, regulations, and the Forest Plan.



### Appeal Summary

The appellant asserts that the Manti-LaSal National Forest has violated the National Environmental Policy Act (NEPA), the Appeals Reform Act (ARA), the National Forest Management Act (NFMA), and the Forest Plan as well as the Administrative Procedures Act (APA). Specifically, the following appeal issues were raised which I have summarized below:

- (A) NEPA was violated by failing to make a summary of scientific analysis of the effects of the range of alternatives available for public review and comment before the decision was made including comment on integral components of the proposed action (stipulations); and failure to provide the EA until half a month after the FONSI was circulated.
- (B) The Forest violated the National Forest Management Act (NFMA) requirements for Management Indicator Species and diversity monitoring.
- (C) The Forest violated NEPA by failing to prepare an adequate analysis of the cumulative effects.
- (D) The Forest violated the Appeals Reform Act by failing to provide opportunity to comment on fundamental components of the proposed action, or comment on the selected action.
- (E) The June 2003, Notice, Comment and Appeal Regulations at 36 CFR 215 are illegal.

### Findings

As Appeal Reviewing Officer, my role is to review the substantive quality and correctness, or appropriateness of the project decision with respect to clarity, comprehension, effectiveness of public participation, and requested changes. My findings are based on my review of the decision and project record, in accordance with 36 CFR 215.19.

#### **1. Clarity of the Decision and Rationale**

The Responsible Official's decision is clearly described in the DN/ FONSI and is well reasoned. The decision document describes the selected alternative, the rationale, and what was considered in making this decision. Stipulations to eliminate significant impacts and minimize non-significant impacts were incorporated in the decision as well as implementation of the Surface Mining Reclamation and Control Act and the State of Utah Federal Coal Mining and Reclamation Regulatory Program.

Each alternative is clearly articulated in the Environmental Assessment (EA) and Decision Notice/FONSI. The decision is consistent with the stated Purpose and Need.

#### **2. Comprehension of Benefits and Purpose of the Proposal**

The Purpose and Need and the Decision Framework are clearly stated within the EA, DN and FONSI. The economic benefits to Emery County are clearly described in the Decision Notice. The EA, DN and FONSI describe the consequences of the alternatives.

### **3. Consistency of the Direction with Policy, Direction, and Supporting Information**

I find the decision is consistent with agency policy, direction and procedures for completing the EA, DN and FONSI. The EA, DN and FONSI and the record for this project adequately disclose the environmental effects and provide sufficient evidence and analysis to make a reasoned choice.

### **4. Effectiveness of Public Participation Activities and Use of Comments**

The Forest conducted scoping and public involvement through two legal notices and a scoping letter. The public involvement process included the following:

- Legal Notices in the Sun Advocate & Emery County Progress on May 4, 2004.
- Corrected Legal Notices posted in the Sun Advocate & Emery County Process on June 8, 2004, correcting the Township/legal description printed in the May 4, 2004 notices.
- A May 10, 2004 scoping letter sent to 77 groups/individuals/agencies (including UEC) with the correct Township listed in the Scoping Letter.

The record is clear that substantive comments received through scoping and on the Proposed Action were addressed. These included effects to wildlife and cultural resources, as well as concerns with surface water and subsidence.

### **5. Requested Changes and Objections of the Appellant and Interested Party**

The appellant requests reversal of the decision due to violations of laws and regulations. In my review of the appeal I did not find that the appellants presented a compelling argument in contrast to the information the Responsible Official had to make her decision. I feel the decision and record adequately address and refute the appellant's rationale for reversing the decision.

### **Recommendation**

One of the main appeal points is that the Forest violated the Administrative Procedures Act and NEPA because the June 2003, Notice, Comment and Appeal Regulations (under 35 CFR 215) are illegal. For the purposes of this appeal, the regulations are binding. Based on my review of the EA, DN and FONSI, and supporting documentation in the project record, I recommend that the decision made by Forest Supervisor Alice Carlton be affirmed.

*/s/ Faye L. Krueger*

Faye L. Krueger  
Appeal Reviewing Officer