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OK Incoming C/025/0005

From: "Dragoo, Denise" <ddragoo@swlaw.com>
To: <daronhaddock@utah.gov>, <keith_rigtrup@blm.gov>
CC: <cmccourt@etv.net>, <johnbaza@utah.gov>, <danadean@utah.gov>, <priscilla...
Date: 5/27/2008 5:05 PM
Subject: Objection to SUWA's Request for "Consulting Party" under Section 106 of NHPA
Attachments: ALTON LTR TO BLM AND DOGM.PDF

Daron and Keith:

Attached on behalf of Alton Coal Development, LLC, is our objection to SUWA's May 22, 2008 request to be designated as a "consulting party" under Section 106 of the National Historic Preservation Act. The original letter is being mailed today.

Thanks,

Denise Dragoo

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May 27, 2008

Mr. Daron Haddock
Utah Division of Oil, Gas and Mining
1594 West North Temple
Salt Lake City, Utah 84114

Mr. Keith Rigtrup
Bureau of Land Management
Kanab Field Office
318 North 100 East
Kanab, Utah 84741

RE: Alton Coal Development, LLC – Coal Hollow Mine Application, C/025/0005; Alton Coal Tract Federal Lease by Application

Dear Mr. Haddock and Mr. Rigtrup:

On behalf of Alton Coal Development, LLC ("**Alton Coal**"), we object to the May 22, 2008 request of the Southern Utah Wilderness Alliance ("**SUWA**") to be designated as a "consulting party" under Section 106 of the National Historic Preservation Act ("**NHPA**") and 36 C.F.R. § 800.2(c) (5) regarding State coal mine permit application C/025/0005 and the Alton Coal Tract federal lease by application ("**LBA**"). Alton Coal has undertaken cultural resource inventories of the areas affected and is working with the State Historic Preservation Office and the Utah State Public Lands Policy Coordination Office to prepare a cultural resource management plan and data recovery plan consistent with Utah Code Ann. § 9-8-404.

However, the pending Coal Hollow Mine Permit is located entirely on private land and does not involve a federal undertaking pursuant to Section 106 NHPA. In *National Mining Assoc. v. Fowler,* 324 F.3d 752, 759 (D.C. Cir. 2003), the D.C. Circuit Court confirmed that Section 106 NHPA does not apply to undertakings that are subject to state or local regulation administered pursuant to a federally delegated program. On July 6, 2004, the Advisory Council on Historic Preservation promulgated amendments to rules regarding Section 106 NHPA to reflect the court's ruling in *NMA v. Fowler*. The preamble to the Advisory Council's rulemaking confirms that a state mine permit issued by a state pursuant to a federally delegated program, such as the Surface Mining Control and Reclamation Act ("**SMCRA**"), does not trigger Section 106 of the NHPA. *See* 69 Fed. Reg. 40444 at 40546 (July 6, 2004). In this case, the mine permit application is subject to the Utah Coal Program which is a State-delegated program under

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SMCRA and the State permit is not a federal undertaking under Section 106 of the NHPA. Therefore, SUWA should not be designated as a "consulting party" regarding the 106 process which is not applicable to the pending State mine permit application.

In addition, the federal Bureau of Land Management ("**BLM**") should deny SUWA's request for Section 106 "consulting party" status regarding the pending Alton Coal Tract LBA. SUWA has failed to show an adequate legal or economic relation to the proposed Alton Coal Tract as required pursuant to 36 C.F.R. § 800.2(c) (5). SUWA is not an Indian tribe, a State Historic Preservation Office, or a Tribal Historic Preservation Office but rather describes itself as "an environmental organization dedicated to the preservation of Utah's wild lands." May 22, 2008 letter at page 1. SUWA's report cited to evidence its standing in this process is entitled "Preserving Pre-History" and is merely a general public relations piece regarding the Red Rock Wilderness Act proposal and cultural resources which does not specifically address the Alton Coal Tract. Nor is SUWA's general statement of familiarity with historic and cultural properties in this area adequate to demonstrate a legal or economic relationship to the leasing area as required by the Advisory Council's regulations. Therefore, we request BLM to deny SUWA "consulting party" status regarding the pending leasing decision.

We appreciate your consideration in this matter. Please contact me if you have further questions.

Very truly yours,

Denise A. Dragoo

DAD:jmc
cc: Chris McCourt (via e-mail)
John Baza (via e-mail)
Dana Dean (via e-mail)
Priscilla Burton (via e-mail)
Kim Kohler, BLM (via e-mail)
Steve Alder, Esq. (via e-mail)