

025/005 Incoming



United States Department of the Interior



BUREAU OF LAND MANAGEMENT

Utah State Office

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Salt Lake City, UT 84101-1345

<http://www.blm.gov/ut/st/en.html>

AUG 17 2016

In Reply Refer To:
3425, 3432 (UT-910)

Alton Coal Development, LLC
Larry Johnson
463 N. 100 W. Suite 1
Cedar City, UT 84720

RECEIVED

AUG 22 2016

DIV. OF OIL, GAS & MINING

Dear Mr. Johnson:

In May 2016, you applied for an exception to the Secretarial Order 3338 (S.O. 3338) coal leasing pause based on an emergency lease application to mine a 640-acre Federal coal tract (referred to as "Tract I" in your application). This Tract is made up of a subset of the lands within your existing Lease by Application (LBA) (UTU-081895). The Bureau of Land Management (BLM) has reviewed your request in light of the requirements of S.O. 3338 and has determined that your application does not meet the criteria for an exception.

The S.O. directs "the BLM to prepare a discretionary Programmatic Environmental Impact Statement (PEIS) that analyzes the potential leasing and management reforms to the current Federal coal program." During the pendency of the PEIS, the Secretary has directed the BLM to place a pause on the issuance of new coal leases with limited, enumerated exemptions and exclusions (Pause). The exemptions are listed in Section 5 of the S.O., and the exclusions are listed in Section 6 of the S.O. If a LBA or a lease modification application (LMA) meets the criteria of any one of the exemptions or exclusions, then the application is excluded from the Pause and may continue to be processed through to a potential lease sale or lease modification.

Based on the information provided with your recent application, the BLM has determined that your LBA does not meet the criteria for an exception to the pause created by the S.O.; therefore, processing of the Tract I emergency application will be deferred under the terms of S.O. 3338 until the completion of the PEIS. The basis for this determination is outlined below.

As noted above, the Tract I acreage involved in the May 2016 application is a subset of a larger area for which you have a pending application for a lease. As discussed below, review of that application under the National Environmental Policy Act (NEPA), which had begun before the issuance of the S.O., is continuing. However, because of the Pause, no decision on leasing will occur until after completion of the PEIS.

Background:

In November 2004, you filed a LBA, pursuant to 43 CFR Subpart 3425, to mine federal coal near Alton, Kane County, Utah (Case Number UTU-081895). This application included 2,683 surface acres and an estimated 38 million tons of technically recoverable federal coal. Based on the identification of additional recoverable coal reserves not included in the original LBA and on additional surface acreage deemed necessary for mine operations, the BLM reconfigured the tract applied for so as to include 3,581 surface acres and 44.9 million tons of recoverable coal reserves.

On November 28, 2006, a notice of intent (NOI) to prepare an Environmental Impact Statement (EIS) for the Alton Coal Tract was published in the Federal Register, 71 Fed Reg. 68,834-35 (2006), and the 90-day scoping period closed on February 26, 2007. On November 4, 2011, a notice of availability (NOA) was published for the Alton Coal Tract LBA Draft Environmental Impact Statement (DEIS), 76 Fed. Reg. 68,501-02 (2011). After reviewing the 177,000 comments received on the DEIS expressing concerns about potential impacts to sensitive species (sage-grouse), proximity to Bryce Canyon and Zion National Parks, air quality, wetlands, and night-sky impacts, the BLM determined that a Supplemental EIS was necessary. On June 18, 2015, the BLM published an NOA for the Supplemental DEIS, 80 Fed. Reg. 34931-32 (2015).¹ Following issuance of S.O. 3338, you requested that the BLM continue the NEPA process for the original LBA consistent with Section 5(a)(ii) of the S.O. Consistent with that request and the S.O., the BLM has continued preparatory work on the Supplemental Final EIS.

While your LBA was being processed, you voluntarily undertook the development of the Coal Hollow Mine on two private lease tracts adjacent to the Federal coal reserves you had applied to lease (I refer to these private tracts as the South Private lease tract and the North Private lease tract). Surface mining operations began at the South Private lease tract in the first quarter of 2011 after you obtained the necessary approvals. In July 2015, surface mining at the South Private lease tract was terminated due to safety issues. As a result, underground mining is underway at the South Private lease tract. On March 8, 2016, you were approved by the Utah Division of Oil, Gas & Mining to initiate and have initiated surface mining at the North Private Lease tract.

On March 14, 2016, you submitted an application to the BLM for an exception to the Pause through an emergency lease application to mine a 640-acre Federal coal tract. On May 19, 2016, you submitted the application at issue here, entitled "Modification of Alton Coal Tract Lease by Application, UTU 081895," withdrawing your previous emergency lease application and replacing it with this modification that includes the proposed Tract I emergency lease area. Tract I lands are in between the North Private lease tract and the South Private lease tract in the northern portion of the existing LBA tract. In your application, you assert that your application

¹ The BLM worked with Federal, State, and county partners in developing the Supplemental DEIS to address the concerns that gave rise to the Supplement and to identify additional design features and mitigation measures for the Project, such as lumens cap and requiring off-site mitigation for sage grouse impacts. The Supplemental DEIS also explained BLM's determination that the Alton Coal Lease Tract is unsuitable for surface mining under Coal Unsuitability Criterion 15 (43 CFR 3461.5(o)) based on the presence of sage-grouse leks and priority habitat on and around the proposed tract. The BLM is continuing to evaluate the tract for leasing, however, because Criterion 15 also provides that a lease may be issued "if, after consultation with the state, the surface management agency determines that all or certain stipulated methods of coal mining will not have a significant long-term impact on the species being protected."

meets the criteria for an exception to the pause as an emergency lease because (1) “the Emergency Lease Tract would be developed as part of the Coal Hollow Mine,” (2) based on your current average annual production rate, the Federal coal is needed within 3 years to “to maintain the existing Coal Hollow Mine operation at its current average annual level of production needed to meet [your] existing coal supply contracts,” (3) your need for the federal coal reserves “results from the Secretarial Order issued on January 15, 2016 which was beyond the control of Applicant and could not have reasonably been foreseen,” and (4) the “Emergency Lease Tract contains 8 years of recoverable reserves at the projected production rate of 850,000 to 1 million tons per year.” Alton Coal Development, LLC, *Modification of Lease by Application for Alton Coal Tract*, pg. 12-14 (May 19, 2016).

Determination:

Based on the information that you submitted in your May 2016 application, as well as information found in the LBA UTU-081895 case file, the BLM has determined that your recent request does not qualify for an exception to the pause as an emergency lease because it does not satisfy all of the emergency leasing requirements at 43 CFR § 3425.1-4. An applicant must satisfy all of those requirements, which include, among other things, that

...the need for the coal deposits shall have resulted from circumstances that were either beyond the control of the applicant or could not have been reasonably foreseen and planned for in time to allow for consideration of leasing the tract under the provisions of § 3420.3 of this title.

43 CFR § 3425.1-4(a)(2). In promulgating this section of the regulations, the BLM “adopted a policy to discourage a company very strongly from opening a mine which has insufficient reserves to operate successfully unless it subsequently obtains a Federal coal lease[.]” 44 Fed Reg. 42,594 (1979) (“[a]ll potential lessees of Federal coal should be aware that attempts to pressure the Department to lease by opening a mine with insufficient reserves will be unsuccessful.”). The BLM reaffirmed this policy in the 1982 preamble to the regulation amendments by stating that “[n]o operator who opened a mine with insufficient reserves in the expectation of acquiring a Federal lease would be considered to have a legitimate need for the coal.” 47 Fed. Reg. 33,124 (1982). In explaining these requirements, the BLM emphasized that “the emergency leasing provisions will not be used to evade or frustrate the normal leasing process under subpart 3420.” 44 Fed. Reg. 42,594 (1979).

Your application states that it satisfies 43 CFR § 3425.1-4(a)(2) because your “need for the federal coal reserves from the Emergency Lease Tract (Tract I) results from the Secretarial Order issued on January 15, 2016 which was beyond the control of Applicant and could not have been reasonably foreseen.” Alton Coal Development, LLC, *Modification of Lease by Application for Alton Coal Tract*, pg. 14 (May 19, 2016). While the BLM recognizes that the issuance of the S.O. could not have reasonably been foreseen, in the case of your application the “emergency” justifying the application is a direct result of circumstances unrelated to the S.O.: circumstances that were directly in your control and were foreseeable at the time you opened the Coal Hollow Mine. While your original LBA (UTU-081895) was still in the early stages of being processed and before a DEIS had even been released, you began mining on the South and North private lease tracts, which you appear to have acquired after submitting the lease for the federal coal

tract. As explained above, those tracts are situated immediately north and south of the Federal coal reserves covered by LBA UTU-081895. It is also apparent that you took these steps on the private tract with the expectation that BLM would lease the larger federal tract under LBA UTU-081895, as that tract forms a bridge between the two private lease tracts.

Given their location, you should have reasonably known when opening the mines on the South and North private lease tracts that you would have had to acquire a Federal lease to continue your operations there. Thus, the current "emergency" identified in your application is a direct result of your own act of opening those private tracts with insufficient reserves to operate successfully without subsequently obtaining a Federal coal lease.

The BLM addressed precisely this kind of self-induced emergency in the preambles to the regulations promulgated in 1979 and 1982. In both instances, the BLM reaffirmed its position that "[n]o operator who opened a mine with insufficient reserves in the expectation of acquiring a Federal lease would be considered to have a legitimate need for the coal," 47 Fed. Reg. 33,124 (1982), warranting issuance of an emergency lease. Accordingly, your application does not fulfill the requirements with respect to emergency leasing at 43 CFR § 3425.1-4(a)(2).²

In addition to this threshold question, you have not made the factual showing required by the emergency leasing regulations, which specify, among other things, that

[t]he extent of any lease issued under this section shall not exceed 8 years of recoverable reserves at the rate of production under which the application qualified in paragraph (a)(1) of this section.

43 CFR § 3425.1-4(b). Your application states that it qualifies for an emergency lease because the "Emergency Lease Tract contains 8 years of recoverable reserves at the projected production rate of 850,000 to 1 million tons per year." Alton Coal Development, LLC, *Modification of Lease by Application for Alton Coal Tract*, pg. 14 (May 19, 2016). The current annual rate of production you supplied for 3425.1-4(a)(1) is 670,000 tons. Per the regulations, you are required to use the current annual rate of production (670,000 tons) and not the projected production rate (850,000 to 1 million tons) to show that the emergency lease will not exceed 8 years of recoverable reserves. See 43 CFR § 3425.1-4(b). However, in your application you use your projected production rate of 850,000 to 1 million tons to attempt to satisfy the § 3425.1-4(b) requirement.

By relying on the currently projected rate of production, instead of your current average annual level of production, you did not provide adequate data to demonstrate that the emergency lease would not exceed 8 years of recoverable reserves. Therefore, the request does not satisfy 43 CFR

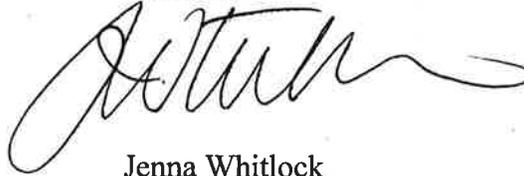
² This finding is not altered by the fact that you could not have foreseen issuance of S.O. 3338. As explained above, at the time you started operations on the private leases bracketing the coal tract cover by your LBA your application for a federal coal lease was still in the early stages of processing. A determination whether to offer a federal coal lease for competitive sale in response to an LBA is a discretionary act and should not be presumed to occur. Your action to open the private tracts prior to a final decision by the BLM reflects such a presumption and is inconsistent with the policies underlying the emergency leasing regulation.

§ 3425.1-4(b), and would not be eligible for an emergency lease under that criteria either.

This is a decision only on the availability of an exception to the pause in leasing created by S.O. 3338, and does not address the substantive question of availability of federal leases in the area of your LBA. As stated, the area covered by the emergency leasing application is a subset of the acreage currently under review in connection with your earlier filed LBA. The NEPA analysis of that larger application is ongoing.

I welcome the opportunity to discuss the status of your earlier filed LBA and look forward to working with you further on it. If you have any questions, please contact Mr. Kent Hoffman, 801-539-4063.

Sincerely, ^

A handwritten signature in black ink, appearing to read 'Jenna Whitlock', with a large, sweeping flourish extending to the right.

Jenna Whitlock
Acting State Director

Cc: John Baza, Director
Utah Division of Oil, Gas and Mining