

From: <James_Kohler@ut.blm.gov>
To: "Mary Ann Wright" <MARYANNWRIGHT@utah.gov>
Date: 8/5/03 10:50AM
Subject: Re: Fwd: Re: Canyon Fuel Company "SUFCO" Mine - Mine Plan Update and Mining and Reclamation Plan Amendment

Mary Ann,

Thanks for forwarding this message. Carter Reed raises a number of issues that we believe are not valid. His issues and the BLM perspective are summarized as follows:

1. The proposal is inconsistent with the Manti-La Sal National Forest Record of Decision -The Forest Service ROD is somewhat unclear and goes beyond what is envisioned as appropriate in a consent decision. In detailing the specifics of her decision, the Forest Supervisor stated as follows: " I consent to the BLM leasing the Pines Coal Lease Tract. My consent is conditioned on inclusion of stipulations derived in part from the Forest Plan, as detailed in Appendix D of the FEIS, and upon ensuring that subsequent mining will meet the performance standards of the applicable mining regulations"(emphasis added). The forest supervisor then added "For the perennial streams in Box Canyon and the East Fork of Box Canyon, Alternative C is the selected alternative. Stipulation 9 from the Forest Plan will be implemented, thus these streams will be protected from mining that would cause subsidence". The stream reaches to be protected included drainages that do not have any perennial streams. Stipulation 9 provides, "Except at specifically approved locations, underground mining operations shall be conducted in such a manner so as to prevent surface subsidence that would: (1) cause the creation of hazardous conditions such as potential escarpment failure and landslides, (2) cause damage to existing surface structures, and (3) damage or alter the flow of perennial streams. The Lessee shall provide specific measures for the protection of escarpments, and determine corrective measures to assure that hazardous conditions are not created." Rather than precluding mining, this stipulation appears to provide a mechanism whereby subsidence could be approved, even if it would damage or alter the flow of perennial streams. BLM issued the lease with the specific terms and conditions identified in the Forest Service ROD. Based on a recent review from our Field Solicitor (copy below), BLM has a legal basis to approve the R2P2 modification. This position has been accepted by the Forest Service in the July 29, 2003, letter from the Regional Forester to the State Director (copy below).

2. The proposal, if approved, could cause functional impairment of the perennial and perennial functioning stream segments and associated aquatic/riparian ecosystem in the East Fork of Box Canyon - This assertion by the Manti-La Sal Forest is not supported by the analysis in the Pines Tract FEIS, the Technical Reports upon which this FEIS is based, or the PHC incorporated into the SMCRA permit. We have asked the Manti-La Sal to provide us with any documentation they have to support this position, and we have not yet received anything.

3. (the functional impairment of the perennial and perennial function streams would result) in a post-mining land use different from the pre-mining land use and Forest Plan goals/objections and direction - According to the Forest Plan, the management emphasis for the part of the forest is for timber and possibly range. While the Manti-La Sal has discussed the applicability of the riparian component, the riparian plan direction does not preclude impacts that could be mitigated. I would anticipate that the post-mining land use would continue to be consistent with the Timber and Range emphasis as covered in their plan. BLM is not aware of any factual basis to support this statement.

4. Approval of the proposed change could result in significant effects - In our review of the proposal, BLM prepared a Determination of NEPA Adequacy (DNA) to determine whether the environmental impacts associated with the modification have been adequately disclosed, and based on this DNA have approved the R2P2. We are aware of the statements made by the Manti-La Sal that there will be significant impacts to the stream and the ecosystem, but we have been unable to find documented support for this position in the EIS or other supporting documents.

5. Consideration of the proposal for approval would require additional public disclosure and decisions by the Forest Service and potentially OSM - The Forest Service (Regional Forester) and BLM have agreed that no further consent is needed from the Forest Service unless OSM or the State determine that the modification is significant based on existing criteria (see FS Letter below). OSM has determined that the permit change does not rise to the level of Federal Mine Plan approval, so there is no decision required from the Forest Service that would require additional NEPA or public disclosure.

BLM believes that the issues raised by the Manti-La Sal National Forest have already been addressed and resolved in discussions with the Regional Forester. In determining whether to approve or disapprove the proposed R2P2 change, BLM has revisited the NEPA documents supporting the decision to lease the lands and has determined that they adequately disclose any potential impacts associated with the subsidence of the East Fork of Box Canyon and indicate that potential impacts should be able to be mitigated. We see no basis for the position taken by the Manti-La Sal that the stream (both perennial and ephemeral) and associated ecosystem will be impacted in any significant way that cannot be mitigated.

Please let me know if you want to discuss further.

Jim

(See attached file: fsletter.pdf)(See attached file: sol letter.pdf)

"Mary Ann Wright"

<MARYANNWRIGHT@utah.gov> To: <James_Kohler@ut.blm.gov>
cc: aklein@osmre.gov, <jfulton@osmre.gov>

Subject: Fwd: Re: Canyon Fuel Company "SUFCO" Mine - Mine Plan
08/04/03 05:21 PM Update and Mining and Reclamation Plan Amendment

----- Message from "Carter Reed" <creed01@fs.fed.us> on Mon, 4 Aug 2003
16:45:26 -0600 -----

To: "Carl Johnston" <CJOHNSTO@osmre.gov>, maryannwright@utah.gov

cc: pamgrubaughlittig@utah.gov

Subject: Re: Canyon Fuel Company "SUFCO" Mine - Mine Plan Update and Mining and Reclamation
Plan Amendment

We believe that the proposed change to subside the East Fork of Box Canyon submitted by Canyon Fuel Company constitutes a mine plan modification under 30 CFR 740.18 for the following reasons:

The proposal is inconsistent with the Manti-La Sal National Forest Record of Decision, 1999 regarding consent and terms and conditions for leasing the Pines Tract (Federal Coal Lease UTU-76195) by the BLM, under authority of Sections 2(3)(A)(iii) and 7(c) of the Federal Coal Leasing Amendments Act of 1975 that amended the Mineral Leasing Act of 1920. The proposal, if approved, could cause functional impairment of the perennial and perennial functioning stream segments and associated aquatic/riparian ecosystem in the East Fork of Box Canyon, resulting in a post-mining land use different from the pre-mining land use and Forest Plan goals/objections and direction.

Approval of the proposed change could result in significant effects . Consideration of the proposal for approval would require additional public disclosure and decisions by the Forest Service and potentially OSM.

Contact Aaron Howe or Carter Reed at the Forest Supervisor's Office in Price, Utah for any additional information.

Carter Reed
Forest Geologist
Manti-La Sal National Forest
Supervisor's Office
599 West Price River Dr.
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435-637-2817
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"Carl Johnston"

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 08/04/2003 09:23 <RSINGH@osmre.gov>,
 <PAMGRUBAUGHLITTIG@utah.gov>, <SHEILAMORRISON@utah.gov>
 AM Subject: Canyon Fuel Company
 "SUFCO" Mine - Mine Plan Update and Mining and
 Reclamation Plan Amendment

Attached is OSM's preliminary decision regarding the need for a Mine Plan Determination for the above subject. A signed copy will be sent to you in today's mail.

In accordance with the Federal regulations under 30 CFR 740.13(d), other Federal agencies that may have an interest in, or jurisdiction over, the above subject operation have also been notified of OSM's decision electronically.

(See attached file: SUFCO.doc)

(See attached file: SUFCO.doc)

CC: <aklein@osmre.gov>, <jfulton@osmre.gov>, <RSINGH@osmre.gov>,
 <Kent_Hoffman@ut.blm.gov>



United States
Department of
Agriculture

Forest
Service

Intermountain Region

324 25th Street
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File Code: 2820-4

Date: JUL 29 2003

UTAH STATE OFFICE STATE DIRECTOR'S OFFICE			
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	LND MIN		
	SUP SVC		

Ms. Sally Wisely
State Director
Bureau of Land Management
324 South State Street
P.O. Box 45155
Salt Lake City, UT 84145

Dear Ms. Wisely,

In a telephone call on July 21, we discussed the unresolved issues associated with the pending application before the Bureau of Land Management (BLM) regarding the Resource Recovery and Protection Plan (R2P2) modification proposed by the SUFCO mine on a federal coal lease within the Manti-La Sal National Forest. We believe that the Forest Service (FS) and BLM are in agreement on the following points:

1. The BLM is responsible for enforcing the terms and conditions of a federal coal lease and is the primary point of contact with the lessee.
2. The FS continues to have responsibilities for the management of surface resources on a federal coal lease on National Forest System lands.
3. The FS must consent to the issuance of a federal coal lease and identify conditions or stipulations that are deemed necessary to minimize impacts to surface resources and uses. Subsequent to the leasing decision, the FS must also consent to a federal coal mine plan that is approved by the Interior Assistant Secretary for Lands and Minerals as part of the Federal Mine Plan approval process through the Office of Surface Mining (OSM.)
4. The FS Record of Decision (ROD) that documents our conditional consent to lease issuance contains language that was not specifically incorporated into the lease stipulations. Forest Service special stipulation 9 addresses mining under perennial streams and provides for approval of an R2P2 modification that may affect perennial streams.

As documented in the ROD, it was the intent of the FS that consent to the coal lease was conditioned upon restrictions of mining operations under the drainage in the East Fork of Box Canyon that would cause subsidence. However, based on negotiation between the agencies, those terms were not clearly carried forward in the stipulations attached to the lease that became a contract between the United States and the lessee. We share the concerns of the Manti-La Sal National Forest that subsidence of the area could impact the stream and associated ecosystem. We also recognize that there are differing professional opinions as to the probable duration and significance of these impacts. We recognize that the BLM has the responsibility for



Ms. Sally Wisely

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administration of federal leases and as such has the authority to approve the proposed R2P2 modification as long as it is consistent with the terms of the lease.

If the BLM approves the proposed R2P2, appropriate monitoring requirements and implementation of mitigation to ensure protection of the perennial stream in the East Fork of Box Canyon and the associated ecosystem should be incorporated into any subsequent modification/revision of the mining and reclamation plan and/or permit. If the State or OSM determines the modification to be significant based on their existing criteria, FS concurrence would be required.

We appreciate your willingness to discuss this situation and share your willingness to continue to work through issues associated with coal resources underlying National Forests. We fully support the ongoing discussions among our agencies and the State of Utah to develop a more definitive process to facilitate cooperation and collaboration in the coal program and to clarify agency roles and responsibilities which will help prevent similar situations in the future.

Sincerely,


JACK G. TROYER
Regional Forester



United States Department of the Interior

OFFICE OF THE SOLICITOR
 SUITE 6201, FEDERAL BUILDING
 125 SOUTH STATE STREET
 SALT LAKE CITY, UTAH 84138

June 26, 2003

Memorandum

To: Deputy State Director, Land & Mineral Resources, Bureau of Land Management

From: Emily Roosevelt, Attorney-Adviser, Office of the Field Solicitor *ER*

Subject: R2P2 modification of coal lease on lands administered by the Forest Service

This memorandum documents this office's advice to Jim Kohler and Stan Perkes regarding the proposed resource recovery and protection plan (R2P2) modification submitted by Canyon Fuel Company for the SUFCO mine.

As we understand the facts, the coal lease is under surface lands administered by the United States Forest Service, and the lease itself is administered by BLM under the regulations at 43 C.F.R. Parts 3470 and 3480. The Forest Service issued a record of decision (ROD) consenting to the leasing of the subject land, known as the Pines Tract, on the condition that a certain perennial stream would be protected from mining that would cause subsidence. It appears that the Forest Service intended the stipulation referred to as Stipulation 9 in its ROD to be the vehicle by which the protection of the perennial stream would be carried forward into the lease.¹ BLM has acknowledged that, at the time of leasing, it understood the Forest Service's intent to protect the perennial stream through Stipulation 9, and BLM included that stipulation in the lease when it was issued.

In its R2P2 modification application, the Company requested specific approval under the stipulation to mine in an area that would cause subsidence to a perennial stream. While the Forest Service apparently thought that the stipulation absolutely precluded mining that would cause subsidence in the subject area, the Company apparently views the stipulation as allowing BLM (as the agency administering the lease and its stipulations) to specifically approve mining that could cause subsidence that would damage or alter perennial streams.

¹ The stipulation provides, in pertinent part: "Except at specifically approved locations, underground mining operations shall be conducted in such a manner so as to prevent surface disturbance that would . . . damage or alter the flow of perennial streams." This stipulation is identified as Stipulation 13 in the relevant federal coal lease, U-044076.

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There is a reasonable legal basis to accept the Company's view. First, the Company's lease rights are construed based on the lease terms and stipulations and other applicable law; and BLM, as the agency which administers coal mining, production, and resource recovery and production operations on federal coal leases, has the responsibility and authority to apply a lease stipulation. See generally 43 C.F.R. 3400.0-5(b) & (mm).

Moreover, in carrying forward its intent to protect the resource, the Forest Service arguably should have removed from the stipulation the language providing for specific approval of subsidence that would damage or alter a perennial stream. Alternatively, the Forest Service could have provided an additional stipulation to the lease that would have explicitly prevented mining that would cause subsidence to the identified perennial stream. See generally 43 C.F.R. §§ 3400.3-1, 3420.4-2.

Finally, the Forest Service ROD apparently identified a stream or a portion of a stream as perennial in a manner that was inconsistent with both the identification of the perennial stream in the accompanying environmental impact statement and the generally accepted definition of a perennial stream.

For these reasons, BLM has a legally defensible basis on which to approve the R2P2 modification despite the Forest Service's attempt in its leasing ROD to prevent mining that would cause subsidence to the perennial stream.² However, reasonable minds may disagree, and if the issue is litigated, a federal court could find against BLM. Regardless of BLM's final decision, it must carefully and thoroughly document its rationale in the administrative record.

The Field Solicitor has reviewed and concurs in the conclusions of this memorandum.

² BLM must confer with the Forest Service as soon as possible to prevent this type of disconnect between the Forest Service's consent to leasing and the lease stipulations from occurring again. BLM should be aware there is a compelling counter argument that the Forest Service's ROD clearly informed BLM of the terms and conditions of the Forest Service's consent and that BLM had an obligation to translate those terms and conditions into lease stipulations.