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**Date:** 10/17/03 7:14AM  
**Subject:** UEC Lawsuit for East Fork of Box Canyon, SUFCO

The attached .pdf files contain the lawsuit recently filed by the Utah Environmental Congress against BLM for our approval of the R2P2 that allowed undermining the East Fork of Box Canyon. UEC alleges that BLM violated NEPA by not preparing an environmental assessment and relying on the Documentation of NEPA Adequacy (DNA). UEC is also seeking an injunction and a temporary restraining order against mining until their lawsuit is heard.

Jim

(See attached file: UEC TRO.PDF)(See attached file: UEC Lawsuit.PDF)(See attached file: UEC Exhibits.PDF)



Preservation Act (NHPA), the Mineral leasing Act, and other laws and their implementing regulations. Plaintiff has presented evidence showing a strong likelihood of their prevailing on the merits.

A hearing on this request for a TRO was held before the Court on \_\_\_\_\_. The Court finds that the claims and request of the Plaintiff have merit. The Court further finds that this litigation is public interest litigation in that it will have major impacts on the environment of Utah, particularly protection of endangered species, water and stream resources, and publicly-owned lands, and in that compliance with the above laws by federal agencies, especially those entrusted with stewardship of public resources like endangered wildlife and public lands, are issues of strong public interest.

WHEREFORE, this Court orders that a Temporary Restraining Order be issued enjoining Defendant BLM from permitting, allowing, authorizing or otherwise making or allowing to be made any on-the-ground changes of any kind to the lands at issue in this case. No coal mining, subsiding of the East Fork of Box Canyon Creek, clearing or any other activity of any kind in preparation for the development of a coal mine or anything else on these lands is permitted until further order from this Court. Further, as this case and the issues involved are ones involving the public interest, the Court orders that no security is required for this TRO. *Cronin v. United States Dept. of Agriculture*, 919 F. 2d 439 (7th Cir. 1999); *Friends of the Earth, Inc. v. Brinegar*, 518 F. 2d 322 (9th Cir. 1975); *Anderson Foreign Motors, Inc. v. New England Toyota Distributors, Inc.*, 492 F. Supp. 1383 (D. Mass. 1980); *Hunter v. Ann Arbor*, 325 F. Supp. 847 (E.D. Mich. 1971).

ORDERED AND DONE this \_\_\_\_\_ day of \_\_\_\_\_, 2003, at \_\_\_\_\_.

\_\_\_\_\_  
DISTRICT JUDGE

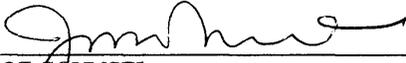
A hearing on the Plaintiff's request for a preliminary injunction is hereby set for  
\_\_\_\_\_ on \_\_\_\_\_, \_\_\_\_\_, 2003.

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DISTRICT JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that I have delivered, either by hand delivery or by mail, a copy of the foregoing document and exhibits, properly addressed and postage paid, to the Defendants or their counsel, as listed below, on this the 15 day of October 2003.

  
OF COUNSEL

Via Hand delivery:  
U.S. Attorney's Office  
185 South State St., #400  
Salt Lake City, UT 84111

Via Hand delivery:  
Kent Hoffman  
Deputy State Director  
Division of Lands & Minerals  
324 South State Street  
PO Box 45155  
Salt Lake City, Utah 84145-0155

Via U.S. Certified Mail:  
Kathleen Clarke  
Bureau of Land Management  
1620 L St NW,  
Washington, DC 20036

Via U.S. Certified Mail:  
U.S. Attorney General John Ashcroft  
U.S. Department of Justice  
Room 5111, 10th and Constitution NW  
Washington DC, 20530

AO 440 (Rev. 10/93) Summons in a Civil Action

**Salt Lake County Sheriff's Office**

Aaron D. Kennard, Sheriff  
Court Services Division

**UNITED STATES DISTRICT COURT**

Served by Deputy \_\_\_\_\_

District of UTAH

On \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_ hours.

UTAH ENVIRONMENTAL CONGRESS

Served at \_\_\_\_\_

**SUMMONS IN A CIVIL CASE**

V.

CASE NUMBER:

KENT HOFFMAN, Division of Land  
and Minerals, Deputy State Director,  
Bureau of Land Management

Judge Dee Benson  
DECK TYPE: Civil  
DATE STAMP: 10/15/2003 @ 14:52:13  
CASE NUMBER: 2:03CV00911 DB

TO: (Name and address of Defendant)

KENT HOFFMAN,  
Division of Land and Minerals  
324 S. State  
PO Box 45155  
Salt Lake City, UT. 84145

*U.S. Attorney's office  
185 S. State St. # 400  
Salt Lake City, UT 84111*

**YOU ARE HEREBY SUMMONED** and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

James Mouritsen-#6117  
Utah Environmental Congress  
*1817 S. Main #10  
Salt Lake City, UT 84115*

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

MARKUS B. ZIMMER

CLERK

10-15-03  
DATE

*Krista J. Ames*  
(By) DEPUTY CLERK

AO 440 (Rev. 10/93) Summons in a Civil Action

RETURN OF SERVICE		
Service of the Summons and complaint was made by me <sup>(1)</sup>	DATE _____	
NAME OF SERVER ( <i>PRINT</i> )	TITLE _____	
<i>Check one box below to indicate appropriate method of service</i>		
<input type="checkbox"/> Served personally upon the defendant. Place where served: _____ _____		
<input type="checkbox"/> Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. Name of person with whom the summons and complaint were left: _____		
<input type="checkbox"/> Returned unexecuted: _____ _____		
<input type="checkbox"/> Other (specify): _____ _____ _____		
STATEMENT OF SERVICE FEES		
TRAVEL	SERVICES	TOTAL
DECLARATION OF SERVER		
<p>I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.</p>		
Executed on _____ Date _____ Signature of Server _____		
_____ <i>Address of Server</i>		

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.



preparing an Environmental Assessment (EA) under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and NEPA's implementing regulations. The project's only environmental analysis specific to this project was through a document entitled "Documentation of Land Use Conformance and NEPA adequacy" (DNA), prepared by the BLM. This document concluded it was unnecessary to prepare an Environmental Assessment since the impacts of the project were purported to have been analyzed in the Pines Tract Final Environmental Impact Statement dated January 28<sup>th</sup>, 1999. The U.S. Forest Service had directed the BLM to prepare an Environmental Assessment for this specific project.

2. The project is a separate project from the Pines Tract Project which was analyzed in the Pines Tract Project Final Environmental Impact Statement (FEIS) on January 28, 1999. The Pines Tract project encompasses 7,311 acres of National Forest System Lands in an area known as "the Pines" on the Manti-La-Sal National Forest. The Pines Tract project is located six miles Northwest of the town of Emery, Utah, and the proposed project is to fully extract coal reserves underneath the East Fork of Box Canyon Creek upstream from the town of Emery, Utah.
3. The BLM manages federal mineral rights, and initiates lease consideration, has leasing authority, and is responsible for pursuing its obligations under NEPA. The BLM is responsible for cooperating with the applicable surface management agency, in this case, the U.S. Forest Service. Because the Forest Service is the surface management agency, the U.S. Forest Service's consent to the BLM is required in order to lease the area for mining. The Forest Service must also direct the BLM to protect non-coal resources and is to assist the BLM in the NEPA process.
4. The Surface Mining Control and Reclamation Act of 1977 (SMCRA) gives the Office of Surface

Mining (OSM) primary authority to regulate the surface activities of coal mining activities. The Office of Surface Mining (OSM), the Utah Division of Oil, Gas and, Mining (UDOGM), BLM, and U.S. Forest Service all ensure that the coal permit will comply with applicable laws including NEPA. In Utah the OSM has delegated authority to the Utah Division of Oil, Gas, and Mining to approve mining operations. All lease development activities subsequent to leasing are subject to site-specific analysis and authorizations under NEPA and other authorities. (Pines Tract FEIS, 1-8).

5. The proposed project is an amendment to the permit which would allow the permitted parties, Canyon Fuel LLC and Southern Utah Fuel Company (SUFCO), to extract an extra 2.2 metric tons of coal. Such a decision requires joint consultation by the U.S. Forest Service and the Bureau of Land Management. The U.S. Forest Service has determined that this project would require a site-specific environmental analysis (EA) under NEPA because it would involve surface disturbance not previously analyzed. (Pines Tract FEIS, 1-9). The BLM, as administered by the Department of Interior must act according to the conditions imposed by the agency that has jurisdiction over the land containing the coal, in this case the U.S. Forest Service. 43 C.F.R. §3400.3-1.
6. Because the project has been predetermined to cause significant environmental impacts and would necessitate preparation of an environmental analysis (EA), the BLM has violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321, *et seq.*, and its implementing regulations, the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§1201, *et seq.*, and its implementing regulations, the Mineral Leasing Act of 1920 (MLA), 30

- U.S.C. §§181 *et. seq.*, and its implementing regulations as amended by the Federal Coal Leasing Amendments of 1975, the National Historic Preservation Act, 16 U.S.C. 470-470w-6 *et. seq.*, and its implementing regulations, and the Administrative Procedures Act (APA), 5 U.S.C. §702 .
7. Plaintiff seek a preliminary injunction of defendant Mr. Kent Hoffman's decision of July 31, 2003, which approved the implementation of the aforementioned project to remove additional coal from under the East Fork of Box Creek Canyon drainage without preparation of an environmental assessment. Plaintiffs seek relief pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §702, and seek appropriate declaratory and injunctive relief, and declaring the project unlawful and enjoining its implementation.

#### **JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction over the claims set forth in this complaint, by virtue of NEPA and pursuant to 28 U.S.C. § 1331 (federal question) and § 1361 (mandamus) and may issue a preliminary injunction and further relief pursuant to 28 U.S.C. § 2201 (declaratory relief) and § 2202 (injunctive relief).

#### **PARTIES**

9. Plaintiff Utah Environmental Congress ("UEC") is a Utah non-profit corporation based in Salt Lake City, Utah. Plaintiff's members use and enjoy the National Forests in Utah, particularly the Manti-La Sal National Forest, and they have taken particular and individual interest in the study and recovery of the natural forest ecosystems of the Manti-La Sal. Plaintiff's members regularly recreate in the Manti-La Sal National Forest, including the areas that are the subject of this lawsuit, and they enjoy the biological diversity, continuity, and harmony of the natural

ecosystems of the forests. Plaintiff's members write newsletter articles about the national forests and the Manti-La Sal in particular and about the land and biological resources of the Manti-La Sal, and they make part of their living from the health, biodiversity and beauty of the Manti-La Sal and the land and biological resources of the Manti-La Sal. Devoting much of their personal and professional time to the protection of the environment and to documenting and protecting the land and biodiversity of the area, Plaintiff's members are personally concerned about the plight of the Manti-La Sal National Forest and the destruction of any part of it through improper and illegal mining operations that destroy native forests. Plaintiff's members have hiked, bird-watched, studied plants and animals and otherwise enjoyed the recreational and aesthetic resources of the lands that are the subject of this mining proposal. Plaintiff's members have hiked, camped, bird-watched, and otherwise enjoyed the scenic and esthetic resources of the project area. Plaintiff's members are concerned with the proper administration of statutes and regulations designed to protect public lands and the public interest. Plaintiff's members are Utah citizens and taxpayers who are concerned about illegal abuse of statutes and regulations designed to protect their public health, their public lands, and their rights to good government. The approval of this mining decision without compliance with the law causes and will cause substantial injury to Plaintiff's members' use and enjoyment of the Manti-La Sal, and will significantly harm their aesthetic enjoyment and recreational use of the Manti-La Sal, as well as the use by wildlife dependent on the resources in the area. Plaintiff's members have used and enjoyed the areas that are the subject of this lawsuit and plan to use them in the future. UEC members, staff, and board members participate in a wide range of recreational activities on the

Manti-La Sal National Forest.

10. In addition, the UEC has paid individuals to visit the Manti-La Sal National Forest in an effort to determine the roadless areas that still remain intact on the forest. This survey was completed in 2000/2001. The UEC represents 280 individuals, 11 organizations, and 40 businesses, representing approximately 30,000 individuals, many of whom have visited the Manti-La Sal National Forest and have a direct interest in its management. The UEC has been involved in forest management issues since its founding. UEC members have hiked, fished, hunted and photographed the Manti-La Sal National Forest, including the Project Area. The UEC's collective membership includes professional photography businesses and freelance photographers that make their living in part by photographing Utah's National Forests, including the Manti-La Sal National Forest. The impacts associated with this decision detract from the beauty and biodiversity that makes these lands appealing to both professional photographers and UEC members that recreate within the vicinity of the project area. In addition, the UEC commented and participated in numerous meetings and discussions with the Manti-La Sal National Forest and other National Forests across the state of Utah. The UEC has also committed a great deal of financial resources and time to the roadless area survey conducted by the UEC on the Manti-La Sal National Forest.
11. Defendant Kent Hoffman is the Deputy State Director for Lands and Minerals of the Defendant Bureau of Land Management. Defendant Supervisor Kent Hoffman is the person in charge of activities in the project area. He made the decision to proceed with the full extraction of coal under the East Fork of Box Canyon Creek drainage and is sued in his official capacity.

12. Defendant Bureau of Land Management is the government agency in the Department of Interior that is responsible for managing sub-surface minerals on public lands. Their national headquarters is located at 1620 L St NW, Washington, DC 20036.

**FACTUAL ALLEGATIONS**

13. The Manti-La Sal National Forest holds publicly owned lands that contains the Box Canyon Creek Drainage that provide sources of water for Emery, Utah residents. Availability of water is a limiting factor in the project area. (Pine Tract FEIS, p. 3-182). Distribution of water resources is essentially confined to the two small perennial drainages (Box Canyon and the East Fork Box Canyon) that also originate in the project area. (FEIS, p. 3-57).

14. The proposed project is to occur in the East Fork of Box Canyon, in Sevier County Utah. The project's purpose is to fully extract coal underneath a 143.25 acre portion of the East Fork of Box Canyon Creek Drainage. The document is purported to be a "minor modification" to the already approved Pines Tract Project. The Pines Tract project encompasses 7,311 acres in the Manti-La Sal National Forest. (Pines Tract EIS, XIII.)

15. The Bureau of Land Management's proposed project is based on a "Documentation of Land Use Plan Conformance and National Environmental Policy Act (NEPA) adequacy" (DNA). The coal would be removed across three mine panels beneath the East Fork of Box Canyon Creek Drainage. This drainage contains a perennial stream across the first portion of the panel, and partially into the second part of the panel. This modification changes the point of extraction to below the drainage area. This type of extraction was not analyzed previously in the Pines Tract Final Environmental Impact Statement (FEIS).

16. In making the decision on the East Fork of the Box Canyon coal removal, the BLM has violated numerous federal land management statutes including the National Environmental Policy Act (NEPA), the Surface Mining Control and Reclamation Act (SMCRA), the Mineral Leasing Act (MLA), the Administrative Procedures Act (APA), the National Historic Preservation Act, and their own regulations.

**FIRST CLAIM FOR RELIEF**

**(Violations of The National Environmental Policy Act (NEPA) (42 U.S.C. § 4332), and the Administrative Procedures Act (5 U.S.C §§ 551-596, 601-612 and 701-706) in Defendants' Decision to mine coal under the drainage area)**

17. In making this decision, the BLM failed to meet the mandates of the National Environmental Policy Act.

**The BLM violated NEPA because they failed to prepare an Environmental**

**Assessment (EA) for this site-specific project:**

18. The National Environmental Policy Act (NEPA) requires that an environmental impact statement (EIS) be prepared for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). However, if an agency's regulations do not categorically require the preparation of an EIS, then the agency must first prepare an environmental assessment (EA) to determine whether the action will have a significant effect on the environment. 40 C.F.R. § 1501.4 (1999).

19. The proposed project constitutes a major federal action because potentially major impacts from the project as proposed by the BLM exist. "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major

reinforces but does not have a meaning independent of significantly". (§ 1508.27). 40 C.F.R. §1508.18.

20. Such impacts have been raised in a recent letter (dated 8/22/03) from Manti La Sal Forest Supervisor, Alice Carlton to Mary Ann Wright Assistant director of the Utah Division of Oil, Gas, and Mining. Among the impacts of primary concern is the geomorphologic damage that was caused in the adjacent Main Fork of Box Canyon Creek, which was recently subsided. In this area subsidence cracks are apparent from observation, and it is unlikely that such cracks repair themselves on their own through sediment filling because many of the cracks in the Main Fork of Box Canyon remain open.
21. Alice Carlton stated in this letter that the proposal would likely result in a change to the post-mining land use, functional impairment of the associated ecosystem, and would be contrary to the Land and Resource Management Plan for the Manti-La Sal National Forest.
22. The proposed project to fully extract coal under the East Fork of Box Canyon Creek will cause subsidence. *Documentation of Land Use Conformance and NEPA Adequacy*, p. 1. Subsidence is a process that can alter the hydrologic balance and affect both ground and surface water flow. Subsidence potholes and the general lowering of the ground surface may also change the normal drainage pattern causing local surface flooding. In a report published by the Office of Surface Mining (OSM) they conclude in the section on underground coal mining operations that "it is important to note that the area of hydrologic impacts can extend beyond the subsided area". Underground mining may cause ground and surface water contamination. Underground mining may dewater overlying water-bearing zones and impacts may extend beyond the local surface-

water drainage divide. This can result in interbasin transfer of water and gaining or losing streams. *Permitting Hydrology—A Technical Reference Document for Determination of Probable Hydrologic Consequences (PHC) and Cumulative Hydrologic Impact Assessments (CHIA)*. Office of Surface Mining (May 2002).

23. There is additional concern for how area wildlife could be affected by the proposed project. Regional Supervisor of the Utah Department of Natural Resources raised concerns over how the proposed project may affect aquatic and terrestrial wildlife in the area. The letter dated 7/29/03 warns that subsidence could cause the loss of surface and subsurface flows. This could dry up ephemeral pools which would eliminate amphibian habitat (including the boreal toad known to be in the area and a state of Utah sensitive species), and drinking water for terrestrial vertebrates.
24. The project “significantly” affects the quality of environment under NEPA because its effects are not clearly understood by the BLM. Additionally there is much controversy surrounding the project by the public and a cooperating agency, namely the U.S. Forest Service. The project is significant in terms of its potential effect on downstream users of the watershed for residents of Emery, Utah. There are also potential significant effects on how the mining underneath the perennial stream would affect stream hydrology, the stream bed’s geologic structure, and the area’s terrestrial and aquatic wildlife. Allowing this type of project to move forward would create a dangerous precedent that would obviate the necessity to prepare an environmental analysis for projects that significantly affect the quality of the human environment under NEPA. This project is “significant” under NEPA, and the defining regulation for “significant” 40 C.F.R. § 1508.27.

25. BLM cannot rely upon the Pines Tract FEIS for this action because the proposed action was not contemplated in the original FEIS for the Pines Tract project. This proposed action was never analyzed because the mining company did not foresee this action as necessary initially. (Determination of NEPA Adequacy, 1-6). The proposed project was specifically referred to as an action that would require preparation of a project-specific environmental analysis. (Pines Tract FEIS, 1-9). The Pines Tract FEIS contemplated this action as reasonably foreseeable since the permitted party (Canyon Fuel LLC and SUFCO) applied for a permit amendment, but was deliberately unanalyzed because there would be surface disturbance that would be subject to a site specific environmental assessment.

**The defendant BLM failed to analyze the environmental impacts to the Project area's**

#### **Geology**

26. The failure to disclose potential environmental impacts to the geology and hydrologic regiment of the East Fork of Box Canyon, when subsidizing by longwall mining, is a NEPA violation. The BLM failed to do any site-specific analysis of geologic changes that would occur as a result of the project. These failures constitute a violation of NEPA regulations §1502.1(b) and 1502.24, requiring that the agency gather high quality information, provide accurate scientific analyses, and insure professional and scientific integrity.

27. It is well documented that streams respond unfavorably when they are subsided, which makes the absence of an environmental assessment especially egregious. "Should subsidence of perennial streams be authorized, there is a high potential for subsidence-induced cracking, both of a temporary and of a more permanent nature, to occur in the stream channels. (ROD, section VI,

- p. 9) The stream channels flow across exposed bedrock that is highly susceptible to this cracking. (Pines Tract FEIS, p. 3-63) This cracking could cause unnatural diversion of some or all flow in the streams and dewatering of alluvial and colluvial deposits. (FEIS, p. 3-47, 3-70 to 79).
28. The failure to discuss what specific types of cracks would form as a result of the project, as well as possible impacts to the streambed is a serious flaw which could have serious impacts on the project area's ecosystem. There was no discussion as to what impacts to the stream flow regime may occur as a result of the project. NEPA requires agencies to take a "hard look" at the environmental impacts of a project before the project is to commence. "We have warned that "general statements about "possible" effects and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided." *See Neighbors of Cuddy Mountain v. USFS*, 137 F.3d 1372, 1380 (9th Cir.1998).
29. Specific geologic features of particular concern is the escarpment area known as the "Elusive Peacock Rock Shelter", which is formed along the project area on the East Fork of Box Canyon. This particular feature is to be protected from mining that would cause subsidence; the site is located in a potential subsidence zone and is susceptible to adverse effects associated with underground mining. *See Pines Tract ROD*, p. 7. The site is also notable because of buried items and occupational surfaces that have retained their integrity, and because of this it is eligible for inclusion on the National Register. *Also see Environmental Resource Information*, September 30, 2003, p. 11.

**The defendant BLM has violated NEPA by committing to the proposed action before**

**engaging in full environmental review of the proposed action**

30. Despite the strong likelihood of there being adverse environmental impacts to the stream bottom through cracking, impacts to wildlife, and to the stream's flow regimen and possible water quality impacts the BLM has committed resources to the project without sufficiently analyzing the impacts of the project. The project was initiated by the permitted mining companies, and the BLM acquiesced with the proposed project before environmental analysis was conducted. The cursory environmental review conducted in the Documentation of NEPA adequacy was far below what NEPA requires in terms of thoroughness of review. The BLM made NEPA an afterthought when they made their decision to approve this project. The BLM's extensive reliance on the Pines Tract Final Environmental Impact Statement in their Determination of NEPA adequacy is evidence of this. The BLM without justification, and without any project-specific quantitative data, concluded that there would be no impacts, and since this was the conclusion the Pines Tract FEIS allegedly permitted this project as proposed. *See Documentation of NEPA Adequacy, p. 2.* This is in spite of the fact that the U.S. Forest Service had specifically prohibited the proposed actions in this particular area. The CEQ regulations warn that a NEPA document may not be used to justify a decision already made. 40 C.F.R. §1502.2(f). Before the public had any information on this project the decision approving the action had already been made. This makes a mockery of the NEPA process which mandates that information of a project be available before a project is approved. *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).

**The defendant BLM violated NEPA by improperly tiering to the Pine Tract Final**

**Environmental Impact Statement.**

31. Because the BLM was specifically precluded from relying on the Pines Tract FEIS, and was directed to prepare a site specific environmental analysis for the current proposal, it violated NEPA by relying entirely on the Pines Tract FEIS for the proposed project. BLM tiered their analysis of the current proposal to the Pines Tract FEIS which explicitly omitted analysis of this particular proposed project. (Pines Tract FEIS, 1-9). By tiering to a document that specifically said it was not analyzing this proposed project the BLM has failed to adequately study the environmental impacts of the project. "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements". 40 C.F.R. § 1502.24.

32. Tiering is the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. 40 C.F.R. § 1508.28. Agencies may tier information from a programmatic EIS to a project EIS or EA, or from an earlier EIS to a subsequent supplemental EIS or EA. 40 C.F.R. § 1508.28. The Pines Tract FEIS was not a programmatic EIS for the current proposed project, and so separate analysis is essential since each of these projects each has its own unique impacts on the environment.

**The BLM violated NEPA by inadequately analyzing impacts to Wildlife (Aquatic and Terrestrial) and Plant Species for the currently proposed project**

33. The BLM improperly tiered to the Pines Tract FEIS analysis on impacts to wildlife including Mexican Spotted Owl, Bald Eagles, both “threatened” species , and Northern Goshawks, Peregrine Falcons, and the Flammulated Owl, all “sensitive” species. There was no analysis as to how this specific proposed project may impact these species. Peregrine Falcon nests have been identified in the project area, and there may be a nesting pair in the project area that could be impacted by the proposed project. (FEIS, p. 3-130). Suitable habitat for the endangered southwest willow flycatcher exists, and this species of flycatcher could currently exist in the project area. (FEIS, p. 3-130).
34. The analysis cited from the Pines Tract FEIS was flawed because it did not adequately state what the impacts to these species would be. The FEIS states that impacts to surface hydrology “might” reduce riparian areas, and “could” reduce foraging habitats for these species. This does not satisfy NEPA’s ‘hard look’ requirement, “we have warned that "general statements about "possible" effects and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided." See *Neighbors of Cuddy Mountain v. USFS*, 137 F.3d 1372, 1380 (9th Cir.1998). It is entirely possible that aquatic life would be impacted if water resources were compromised based on the fact that area water sources are vital for wildlife, livestock, and riparian vegetation and habitat. *Pines Tract ROD*, p. 3.
35. The BLM has very little information if the threatened Mexican Spotted Owl is actually in the area; and if Mexican Spotted Owl does exist there is additional uncertainty as to whether they will be affected by the proposed project. In the *Determination of NEPA Adequacy* document there is the admission that Mexican Spotted Owl surveying had not been completed, but would

be completed by the time the mining started. This undermines the essential objective of NEPA which is to contemplate the environmental impacts of a project before it commences. Furthermore there was no on-the ground inspection and population surveying of these species which the BLM could accurately rely on. Instead historical records and aerial surveys from 1997 were used to survey area wildlife.

36. There was a complete absence of cumulative effects analysis in terms of impacts to wildlife and geologic features of the area as a result of past coal mining activity. Notably missing was any analysis of how the Pines Tract project has affected area geology, including the stream to be mined under, and whether wildlife have been affected by the project. A NEPA document must "catalogue adequately the relevant past projects in the area." It must also include a "useful analysis of the cumulative impacts of past, present, and future projects [which] requires a discussion of how [future] projects together with the proposed...project will affect the environment." *City of Carmel-by-the-Sea v. U.S. Dep't of Trans.*, 123 F.3d 1142, 1160 (9th Cir. 1997).
37. Substantially adverse impacts to riparian habitat and area wetlands are likely to occur as a result of the currently proposed project with potentially long-lasting effects. Former Manti-La Sal Forest Supervisor Janette Kaiser stressed the existence of key water resources in the area including seeps, and springs, which occur within the canyons shared by perennial streams, her decision was to protect these water resources from potential impacts of subsidence. (Pines Tract ROD-10). Flow diversion caused by cracking described above (Pines Tract FEIS, p. 3-47) and dewatering may stress the health of riparian vegetation, which would cause a reduction in the

function and value of riparian habitat. (Pines Tract FEIS, p. 3-99 to 104, and 3-113 to 3-119)  
These impacts could adversely affect this riparian habitat for up to two years (Pines Tract FEIS, p. 3-70, 3-75, 3-101, and 3-113), but the impacts could last longer based on season, climate cycle and crack morphology. (FEIS, p. 3-48, pages 3-70 to 71, appendix E, response to comment J-11).

38. Aquatic wildlife that are of particular concern are amphibians such as the boreal toad that are reliant upon healthy hydrological systems such as streams, ponds, lakes, but are also reliant on terrestrial habitat in woodlands and mountain meadows. Boreal toads breeding habitat is in shallow water along the edges of ponds, lakes, and streams. Boreal toads have been confirmed to be present in the project area based on U.S. Forest Service population surveys. Generally boreal toads are of special concern because of rapid declines of amphibian populations in the west, and are in need of long term monitoring programs. (Corn and Fogelman 1984; Bradford 1991; Fellers and Drost 1993). The species has been proposed to be listed under the Endangered Species Act, but currently in Utah the boreal toad is "state species of special concern" because of population declines. *Boreal Toad Distribution Surveys in Southwestern Utah 1994-1998, State of Utah Department of Natural Resources*. There was no mention of boreal toads in the Determination of NEPA adequacy document and so there was no analysis as to how this species could be impacted by the proposed project.

39. Sage Grouse are dependent on the springs and riparian areas in the project area for habitat (FEIS, p. 3-111), however there was no cumulative effects analysis as to how Grouse would be affected. Additionally there was no analysis of macroinvertebrates which are found in the area, and are a forest management indicator species. (FEIS, p. 3-112). Although there are no known fisheries in

the project area there are fisheries below the project area in lower Box Canyon and Muddy Creek. (FEIS, p. 3-112). The drainages in this basin are part of the Colorado River basin which is habitat for four endangered fish species: the humpback chub, the bonytail chub, the razorback sucker, and the Colorado squawfish. The activities proposed in the activity area could have an effect on downstream fisheries (directly and indirectly), and therefore failure to discuss these impacts violates NEPA. *See 40 CFR § 1508.8.*

40. A sensitive plant species which is known to be in the project area, the Link Canyon Columbine was unanalyzed. There are three confirmed populations of the Link Canyon Columbine in the project area, and are found in riparian areas at the heads of Link and Box Canyons. (Pines Tract FEIS, p. 3-66 and 3-133). *See Pines Tract ROD, p. 10.*

41. In the BLM's Determination of NEPA Adequacy, the section concerning cumulative impacts was improperly tiered to the Pines Tract FEIS. There was no project specific analysis which described specific past, future, and indirect impacts would affect the project area. Simply citing to a previous cumulative effects analysis from the Pines Tract FEIS does not fulfill the requirements under NEPA for analyzing the cumulative effects of the proposed project.

**The Defendant BLM violated NEPA by failing to adequately involve the public and other agencies through the NEPA process for this specific project**

42. The BLM made no effort to involve the public either in a scoping process, by soliciting comments, or in providing general information about the proposed project as NEPA requires. "Agencies shall: Make diligent efforts to involve the public in preparing and implementing their NEPA procedures. Provide public notice of NEPA-related hearings, public meetings, and the

availability of environmental documents so as to inform those persons and agencies who may be interested or affected". 40 C.F.R §1506.6.

#### **SECOND CLAIM FOR RELIEF**

**(Violation of the Mineral Leasing Act Mineral Leasing Act of 1920 (MLA), and 30 U.S.C. §§181 Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§1201)**

43. Because the U.S. Forest Service is the surface managing agency, the BLM is obligated to only lease land for mining if the Forest Service's conditions to protect land resources are complied with. 43 C.F.R. §3400.3-1. *Also see* 30 C.F.R. §740.4. Because the Forest Service had only authorized mining pursuant to the Pines Tract FEIS and specifically excluded mining as proposed in the current project unless an Environmental Assessment was prepared, the BLM has violated the Mineral Leasing Act, NEPA, and SMCRA. *See Pines Tract FEIS*, p. 1-9.
44. The BLM has violated the above provisions by not obtaining the consent of the U.S. Forest Service which explicitly prohibited mining in the areas that the BLM proposes to mine because perennial streams are to be protected from mining that would cause subsidence. (Pines Tract Record of Decision, part VI.A., p. 7). Under the proposed project the permitted mining companies (Canyon fuel LLC and SUFCO) plan on extracting coal which would cause stream subsidence. *See Determination of NEPA Adequacy*, p. 1. The ROD goes on to explain that specific stream reaches to be protected from subsidence include i) Box Canyon..., and ii) the East Fork of Box Canyon, including the southwest fork up to and including Joes Mill Ponds. Joes Mill Ponds is considered to be the most reliable water source for wildlife in the project area. (FEIS, p. 3-182). Since these are the exact areas where the BLM has authorized there to be

mining they have violated SMCRA and the MLA.

45. In a letter dated August 22, 2003, Manti-La Sal Forest Supervisor Alice B. Carlton informed Utah State Director of the BLM Sally Wisely that: “the Forest Service has not concurred; we have also advised DOGM the change is not consistent with the terms and conditions established in the Pines Lease (UTU-76195).” “No mining that would cause subsidence would be allowed under the perennial streams and escarpments in Box Canyon or the East Fork of Box Canyon...” (Pines Tract ROD, p. 6 and p. 1). Ms. Carlton adds that “I do not consent to any mining, other than for development entries, where the overburden is less than **600 feet**”. (emphasis added) This is based on guidance given by the Society of Mining Engineers (1992) which recommends maintaining a “60 times the mining height” separation between mine workings and surface water bodies. (Pines Tract ROD, p. 7). The proposed project will change this depth from 600 feet to 300 feet in direct violation of the Forest Service’s direction and guidance from the Society of Mining Engineers. See *UDOGM Operation Plan*, September 30, 2003, p. 35.

### **THIRD CLAIM FOR RELIEF**

#### **(Violation of BLM Categorical Exclusion, 516 DM, Chapter 6, Appendix 5.4 F. (8))**

46. The BLM’s interpretation of their own categorical exclusion regulation is untenable because the proposed modification is not a “minor” one. The BLM claims that the proposed project is a “minor modification” under the BLM’s categorical exclusion NEPA regulations. The regulation gives examples of a minor modification as a “change in mining sequence or timing”. The current proposal is neither of these modifications, and since it proposes to mine using a full extraction method, different area, and involves mining significantly more coal it cannot be considered a

*minor* modification under any reasonable interpretation.

**FOURTH CLAIM FOR RELIEF**

**(Violation of the National Historic Preservation Act 16 U.S.C. 470 et. seq.)**

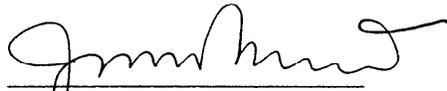
47. The project area is characterized as an area which contains cultural resource inventories, and there are ten sites which are eligible for listing in the National Register of Historic Places. *See Pines Tract ROD*, p. 10. Several unevaluated sites and National Register-eligible sites could be affected by subsidence. *Id.* One of these sites is the Elusive Peacock Shelter, which is eligible for listing under the National Register for Historic Places. *See Utah Oil Gas and Mining Coal Monitoring Program, Environmental Resource Information*, September 30, 2003, p. 11. The shelter contains lithics, fire-cracked rock, bone, and possibly hearth remains. The site is located in the potential subsidence zone and is susceptible to adverse affects due to subsidence and other disruptive effects associated with underground mining activities in the area.
48. The BLM's only mention of historically significant landmarks was in the Documentation of NEPA significance, stating only that the National Register of Historic Places requirements have been complied with based on a May of 2000 Memorandum of Agreement. *See Determination of NEPA Adequacy*, p. 10. Federal agencies are required to "seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties". 36 C.F.R. §800.4(a)3. There has been no analysis as to potential impacts to historically significant areas in relation to this *specific* project.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully request that this Court enter judgment in favor of Plaintiff, and:

1. Determine and declare that the Defendants have violated the National Environmental Policy Act, the Surface Mining Control and Reclamation Act, the Mineral Leasing Act, the BLM Categorical Exclusion regulations, the National Historic Preservation Act, and the Administrative Procedure Act and those statutes implementing regulations in making the decision on coal mining below the Box Canyon Creek drainage area.
2. Enjoin the Defendants and order that they not implement this decision to conduct this project until such time as the Defendants comply fully with NEPA, SMCRA, MLA, NHPA, and the APA, and their implementing regulations;
3. Award Plaintiff's costs (including reasonable attorney, witness and consultant fees) under the Equal Access to Justice Act; under Rule 54, Fed.R.Civ.P., and/or under any other statutory authority of the Court, and such other relief as the Court may deem just and proper; and
4. Award such other relief as this Court deems appropriate, just, and proper.

DATED this 15 day of October, 2003.



James Mouritsen #6117  
Utah Environmental Congress  
1817 S. Main #10  
Salt Lake City, UT 84115  
(801)-466-4055  
Attorney for the Utah Environmental Congress

## CERTIFICATE OF SERVICE

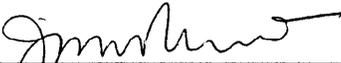
I hereby certify that I have delivered, either by hand delivery or by mail, a copy of the foregoing document and exhibits, properly addressed and postage paid, to the Defendants or their counsel, as listed below, on this the 15 day of October 2003.

Via Hand delivery:  
U.S. Attorney's Office  
185 South State St., #400  
Salt Lake City, UT 84111

Via Hand delivery:  
Kent Hoffman  
Deputy State Director  
Division of Lands & Minerals  
324 South State Street  
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Salt Lake City, Utah 84145-0155

Via U.S. Certified Mail:  
Kathleen Clarke  
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1620 L St NW,  
Washington, DC 20036

Via U.S. Certified Mail:  
U.S. Attorney General John Ashcroft  
U.S. Department of Justice  
Room 5111, 10th and Constitution NW  
Washington DC, 20530

  
\_\_\_\_\_  
OF COUNSEL

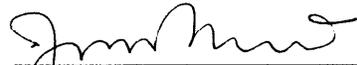


2. Enter an injunction enjoining the BLM from implementing the proposed project until the BLM first prepares an Environmental Assessment (EA) subject to public comment, and the public's right to appeal, pursuant to the National Environmental Policy Act. 42 U.S.C. §4332.

The basis for this Motion is more fully set forth in the accompanying Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction.

DATED this 15 day of October, 2003.

Respectfully submitted,

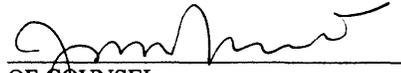


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Attorney for the Utah Environmental Congress

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Via U.S. Certified Mail:  
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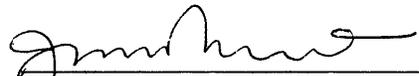
Via U.S. Certified Mail:  
U.S. Attorney General John Ashcroft  
U.S. Department of Justice  
Room 5111, 10th and Constitution NW  
Washington DC, 20530



Plaintiff believes that an additional five pages would allow the plaintiff to address thoroughly the necessary issues and arguments. Therefore, good cause existing for the submission of an overlength brief, Plaintiff requests that the court grant this motion.

Dated this 15 day of October 2003.

Respectfully submitted,



---

James Mouritsen,  
Attorney for Plaintiff

James Mouritsen-#6117  
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(801)-466-4055  
Attorney for the Utah Environmental Congress

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ATTACHMENTS—(Attached to Memorandum In Support of Temporary Restraining Order and Preliminary Injunction)

- *Pines Tract ROD (Record of Decision)*, p. 3, 7, 8, and 10. See Attachment A.
- *Pines Tract FEIS (Final Environmental Impact Statement)*, p.1-9. See Attachment B.
- *Documentation of Land Use Conformance and NEPA Adequacy*, p. 1-2, p.5. See Attachment C.
- See *Letter from Alice B. Carlton to Mary Ann Wright*, 8/22/03. See Attachment D.
- See *Permitting Hydrology—A Technical Reference Document for Determination of Probable Hydrologic Consequences (PHC) and Cumulative Hydrologic Impact Assessments (CHLA)*. Office of Surface Mining (May 2002). See Attachment E.
- See UDOGM Operation Plan, September 30, 2003, p. 10, 11, 35. See Attachment F.
- *Letter from Utah DWR, Derris Jones*. See Attachment G.
- Also see *East Fork Box Canyon Subsidence Photo Slides*, slide 1-4, slide 8-11. See Attachment H.



Management (BLM), its agents, employees, and all others in active concert or participation with it from continuing with their illegal National Environmental Policy Act (NEPA) process, and attempting to execute the full extraction of coal under the East Fork of Box Canyon Creek without authorization from the surface managing agency, U.S. Forest Service.

Defendants' BLM have approved the full extraction of coal from under the East Fork of Box Canyon Creek through the BLM's "minor modification" regulation as signed by BLM deputy State Director of Land and Minerals Kent Hoffman on July 31<sup>st</sup>, 2003. *See* BLM Categorical Exclusion, 516 DM, Chapter 6, Appendix 5.4 F. (8)). This so called "minor modification" is alleged to modify the already approved Pines Tract Project, which permitted the BLM to lease the Pines Coal Lease Tract with a number of conditions. The primary conditions the U.S. Forest Service stipulated to were that there would be no mining under streams which would cause subsidence, there would be no mining where the overburden is less than 600 feet, and specific stream reaches to be protected from subsidence include the East Fork of Box Canyon, including the SW fork up to and including the confluence area with the Main Fork of Box Canyon. *Pines Tract ROD*, p. 7. *See* Attachment A. All three of these conditions would be violated by the proposed project. If the project were to continue as proposed BLM would violate a number of federal statutes by disregarding the U.S. Forest Service's conditions described above as well as NEPA.

The National Environmental Policy Act (NEPA) is a procedural mandate which requires federal agencies to prepare an environmental assessment/environmental impact statement for any major federal action which would have a significant effect on the environment. *See* 42 U.S.C. §4332. The plaintiff's contend (based on numerous sources of evidence provided by the U.S. Forest Service) that the proposed action will have a significant effect on the environment, and therefore the

BLM has violated NEPA by failing to prepare an environmental assessment. Furthermore preparation of an environmental assessment is nondiscretionary since the U.S. Forest Service had mandated preparation of an EA for this proposed project. *Pines Tract FEIS*, p.1-9. See Attachment B. Because this project has been categorically excluded the plaintiffs can only enforce NEPA's action forcing provisions through filing this lawsuit. The defendant's issuance and approval of their "Documentation of Land Use Plan Conformance and NEPA adequacy" signed on July 31<sup>st</sup>, 2003 by Kent Hoffman is arbitrary and capricious and violates the APA. It is the plaintiff's primary objective to enforce NEPA's procedural mandate to prepare an environmental assessment for the proposed project if a preliminary injunction and temporary restraining order is issued.

#### **STATEMENT OF MATERIAL FACTS**

1. Plaintiff UTAH ENVIRONMENTAL CONGRESS (UEC), a Utah nonprofit corporation, is an environmental organization, with its principal office in Salt Lake City, Utah. The UEC represents more than 280 individual members, 11 organizations, and 40 businesses, representing approximately 30,000 individuals, many of whom have visited the Manti-La Sal National Forest and have a direct interest in its management. UEC members and staff share a working commitment to the protection, enhancement, preservation, conservation, and restoration of Utah's national forests and the native plant and wildlife populations that inhabit them. The UEC and its members derive economic, recreational, scientific, educational, and aesthetic benefit from hiking, camping, photography, study, contemplation, hunting, and other recreational activities within the area where the proposed project is to occur that will fully extract coal from under the East Fork of Box Canyon Creek.

2. The Manti-La Sal National Forest holds publicly owned lands that contain the Box Canyon Creek Drainage that provide sources of water for Emery, Utah residents. Availability of water is a

limiting factor in the project area. *Pines Tract FEIS*, p. 3-182. *See Pines Tract ROD*, p. 3. *See Attachment A*. Distribution of water resources is essentially confined to the two small perennial drainages (Box Canyon and the East Fork Box Canyon) that also originate in the project area. *Pines Tract FEIS*, p. 3-57. *See Pines Tract ROD*, p. 3. *See Attachment A*. [Complaint ¶14].

3. Kent Hoffman, BLM State Deputy Director, approved a mining proposal to fully extract coal underneath a 143.25 acre portion of the East Fork of Box Canyon Creek Drainage on the Manti-La-Sal National Forest on July 31<sup>st</sup>, 2003. [Complaint ¶1].

4. The project's only environmental analysis specific to this project was through a document entitled "Documentation of Land Use Conformance and NEPA adequacy" (DNA), prepared by the BLM, which approved the project on 7/31/03. [Complaint ¶1].

5. The project is distinct from the Pines Tract Project which was analyzed in the Pines Tract Project Final Environmental Impact Statement (FEIS) on January 28, 1999. The Pines Tract project encompasses 7,311 acres of National Forest System Lands in an area known as "the Pines" on the Manti-La-Sal National Forest. [Complaint ¶2].

6. The proposed action would fully extract coal in three mine panels underneath a 143.25 acre portion of the East Fork of Box Canyon Creek. This proposal would mine under a perennial stream, and would subside an area under a pond known as Joes Mills Pond. *Documentation of Land Use Conformance and NEPA Adequacy*, p. 1. *See Attachment C*. [Complaint ¶15, 16].

7. The Pines Tract project is located six miles Northwest of the town of Emery, Utah downstream from the project area. [Complaint ¶2].

8. The U.S. Forest Service has determined that this project would require a site-specific environmental analysis (EA) under NEPA because it would involve surface disturbance not

previously analyzed. *Pines Tract FEIS*, 1-9. See Attachment B. [Complaint ¶5].

9. A letter (dated 8/22/03) was sent from Manti-La Sal Forest Supervisor, Alice Carlton to Mary Ann Wright Assistant director of the Utah Division of Oil, Gas, and Mining. A number of potential impacts raised by Ms. Carlton, among them geomorphologic damage that was caused in the adjacent Main Fork of Box Canyon Creek, which was recently subsided. In this area subsidence cracks are apparent from observation, and it is unlikely that such cracks repair themselves on their own through sediment filling because many of the cracks in Main Fork of Box Canyon remain open. See *Letter from Alice B. Carlton to Mary Ann Wright*, 8/22/03. See Attachment D. [Complaint ¶20].

10. Alice Carlton stated in this letter that the proposal would likely result in a change to the post-mining land use, functional impairment of the associated ecosystem, and would be contrary to the Land and Resource Management Plan for the Manti-La Sal National Forest. See *Letter from Alice B. Carlton to Mary Ann Wright*, 8/22/03. See Attachment D. [Complaint ¶21].

11. The proposed project to fully extract coal under the East Fork of Box Canyon Creek will cause subsidence. Subsidence is a process that can alter the hydrologic balance and affect both ground and surface water flow. Subsidence potholes and the general lowering of the ground surface may also change the normal drainage pattern causing local surface flooding. Underground mining (such as the type proposed) may cause ground and surface water contamination. Underground mining may dewater overlying water-bearing zones and impacts may extend beyond the local surface-water drainage divide. See *Permitting Hydrology—A Technical Reference Document for Determination of Probable Hydrologic Consequences (PHC) and Cumulative Hydrologic Impact Assessments (CHLA)*. Office of Surface Mining (May 2002). See Attachment E. [Complaint ¶22].

12. “Should subsidence of perennial streams be authorized, there is a high potential for

subsidence-induced cracking, both of a temporary and of a more permanent nature, to occur in the stream channels. (ROD, section VI, p. 9) The stream channels flow across exposed bedrock that is highly susceptible to this cracking. (Pines Tract FEIS, p. 3-63) This cracking could cause unnatural diversion of some or all flow in the streams and dewatering of alluvial and colluvial deposits. (FEIS, p. 3-47, 3-70 to 79). See *Letter from Alice B. Carlton to Mary Ann Wright*, 8/22/03. See Attachment D. Also see *East Fork Box Canyon Subsidence*, slide 1-4, slide 8-11. See Attachment H. [Complaint ¶27].

13. Specific geologic features of particular concern is the escarpment area known as the “Elusive Peacock Rock Shelter”, which is formed along the project area on the East Fork of Box Canyon. This particular feature is to be protected from mining that would cause subsidence; the site is located in a potential subsidence zone and is susceptible to adverse effects associated with underground mining. See *Pines Tract ROD*, p. 7. See Attachment A and F. The site is also notable because of buried items and occupational surfaces that have retained their integrity, and because of this it is eligible for inclusion on the National Register. *Id.* [Complaint ¶29].

14. Dewatering and loss of surface flows could eliminate amphibian habitat (including the boreal toad known to be in the area and a state of Utah sensitive species), and drinking water for terrestrial vertebrates as was stated by the Regional Supervisor of the Utah Department of Natural Resources. [Complaint ¶23]. See Attachment G.

15. The project area is habitat for a number of management indicator species and species listed under the Endangered Species Act. Sage Grouse are dependent on springs and riparian areas in the project area for brood habitat (FEIS, p. 3-111). Macroinvertebrates are a forest management indicator species and can be found in surface waters in the project area. (FEIS, p. 3-112). An eyrie

for a peregrine falcon, a sensitive species has been found near the project area, and a nesting pair may forage in parts of the project area. The project area forms part of the drainage of the Colorado River basin habitat for four endangered species: the humpback chub, the bonytail chub, the razorback sucker, and the Colorado squawfish. *See Pines Tract ROD*, p. 3. *See Attachment A*. [Complaint ¶39].

16. Flow diversion caused by cracking described above (Pine Tract FEIS, p. 3-47) and dewatering may stress the health of riparian vegetation, which would cause a reduction in the function and value of riparian habitat. (Pine's Tract FEIS, p. 3-99 to 104, and 3-113 to 3-119) These impacts could adversely affect this riparian habitat for up to two years (Pines Tract FEIS, p. 3-70, 3-75, 3-101, and 3-113), but the impacts could last longer based on season, climate cycle and crack morphology. (FEIS, p. 3-48, pages 3-70 to 71, appendix E, response to comment J-11). *See Letter from Alice B. Carlton to Mary Ann Wright*, 8/22/03. *See Attachment D*. [Complaint ¶37].

17. A sensitive plant species, which is known to be in the project area, the Link Canyon Columbine was unanalyzed. There are three confirmed populations of the Link Canyon Columbine in the project area, and are found in riparian areas at the heads of Link and Box Canyons. (Pines Tract FEIS, p. 3-66 and 3-133). *See Pines Tract ROD*, p. 10. *See Attachment A*. [Complaint ¶40].

18. The Pines Tract ROD states that specific stream reaches to be protected from subsidence include i) Box Canyon..., and ii) the East Fork of Box Canyon, including the southwest fork up to and including Joes Mill Ponds. Joes Mill Ponds is considered to be the most reliable water source for wildlife in the project area. (FEIS, p. 3-182). The proposed project will fully extract coal, and to subside the East Fork of Box Canyon and Joes Mills Pond. *Determination of NEPA Adequacy*, p. 1. *See Attachment C*. [Complaint ¶44].

19. In regard to the currently proposed project, a letter dated August 22, 2003, written by Manti-La Sal Forest Supervisor Alice B. Carlton, informed Utah State Director of the BLM Sally Wisely that: “the Forest Service has not concurred; we have also advised DOGM the change is not consistent with the terms and conditions established in the Pines Lease (UTU-76195).” See Attachment D. [Complaint ¶45].

- a. Ms. Carlton adds that “I do not consent to any mining, other than for development entries, where the overburden is less than 600 feet”. (emphasis added) This is based on guidance given by the Society of Mining Engineers (1992) which recommends maintaining a “60 times the mining height” separation between mine workings and surface water bodies. See Attachment A. *Pines Tract ROD*, p. 7. The proposed project will change this depth from 600 feet to 300 feet in direct violation of the Forest Service’s direction and guidance from the Society of Mining Engineers. See UDOGM Operation Plan, September 30, 2003, p. 35. See Attachment F.

20. The proposed project was specifically referred to as an action that would require preparation of a project-specific environmental analysis. *Pines Tract FEIS*, 1-9. See Attachment B. [Complaint ¶25].

## II. Governing Law

### A. National Environmental Policy Act.

NEPA's Council on Environmental Quality (CEQ) has promulgated regulations to provide federal agencies with guidance for complying with NEPA's requirements. *See* 40 C.F.R. §§ 1500-1517. The regulations encourage agencies to document environmental impacts using an environmental assessment, briefly providing the agency with sufficient evidence to determine whether the proposed agency action has no significant impact on the environment or whether the action has a significant impact that requires the preparation of a detailed environmental impact statement under NEPA. *See* 40 C.F.R. § 1508.9. The EIS is "a procedural obligation designed to assure that agencies give proper consideration to the environmental consequences of their actions." *Merrell v. Thomas*, 807 F.2d 776, 777-78 (9th Cir. 1986). The EIS also ensures that the public is informed about the environmental impact of such actions. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

The CEQ regulations state:

"NEPA procedures must insure that environmental information is available to public officials and citizens **before decisions are made and before actions are taken**. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."  
40 C.F.R. § 1500.1(b)(emphasis added). *Also see Andrus v. Sierra Club*, 442 U.S. 34 (1979).

By endorsing this proposal now (before an EA was prepared), BLM biases the outcome of the NEPA process, commits irretrievable resources, and violates NEPA and the APA. NEPA is primarily a procedural statute: It mandates a particular process but not necessarily a particular result. *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996).

This process must proceed without undue bias from the action agency and ultimate decision maker. The CEQ regulations warn that a NEPA document may not be used to justify a decision already made. 40 C.F.R. § 1502.2(f) and (g) state:

“(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (Sec. 1506.1).

“(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”

NEPA procedures are designed to ensure that environmental information is available to public officials and citizens before decisions are made, so that environmental considerations are part of the agency's decision-making process. See *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981); *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C.Cir.1977); 40 C.F.R. §§ 1500.1(b), 1502.2(g). In this case the public was not given any information about this site-specific project until it had already been approved. BLM has predestined its NEPA process so that it cannot take a “hard look” at the environmental impact of its decision as required by NEPA. See 42 U.S.C. § 4332(2).

NEPA imposes a procedural requirement that an agency must contemplate the environmental impacts of its actions. *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 758 (9th Cir.1996) (finding that NEPA is concerned with the process of disclosure, not any particular result). NEPA “ensures that the agency ... will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989); *Inland Empire*, 88

F.3d at 758. Courts have held that an EIS must be prepared if “substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor.” *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir.1992) (citation omitted); *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir.1988). To trigger this requirement a “plaintiff need not show that significant effects will in fact occur,” raising “substantial questions whether a project may have a significant effect” is sufficient. *Greenpeace*, 14 F.3d at 1332 (emphasis added).

In this case the failure to prepare an environmental assessment despite the fact that the surface management agency, U.S. Forest Service had mandated the preparation of a project-specific EA is a subversion of the NEPA process. The need for environmental analysis is raised when a project *may* have a significant effect on the environment. “Significant is defined as “the degree to which the effects on the quality of the human environment are likely to be highly controversial”. 40 C.F.R. § 1508.27. The mining to take place under the East Fork of the Box Canyon Drainage will have unknown and controversial effects on the environment; therefore an environmental assessment must be prepared.

Furthermore the BLM’s failure to prepare an EA eliminates their ability to claim there are no significant impacts: “any assertions that there are no significant impacts must be made in an environmental assessment and a FONSI after a preliminary environmental inquiry, not to a court after suit is filed. The Court may not substitute its own findings of no significant environmental impact on the basis of arguments of the parties, when the agency has failed to prepare an environmental assessment or FONSI in the first instance”. *LaFlamme v. Federal Energy Regulatory Commission*, 852 F.2d 389, 399 (9th Cir. 1988); *Sierra Club v. Hodel*, 848 F.2d at 1092-94.

Preparation of an EA is a prerequisite to making the claim that there are no significant impacts to the environment, since the BLM has not done this they have violated NEPA.

**B. Administrative Procedures Act**

“Because [NEPA] does not contain a private right of action for those seeking to enforce its procedural requirements, a plaintiff must rely on the Administrative Procedures Act (APA) as the basis for its actions....” *Committee to Save the Rio Hondo v. Lucero*, 102 F. 3d 445, 448 (10<sup>th</sup> Cir. 1996). Under the APA, 5 U.S.C §706(2)(A), a court will “set aside an agency’s decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Id.* While the arbitrary and capricious standard gives due deference to agency expertise, it still requires the court to make sure that an agency has taken a “hard look” at the environmental consequences of its proposed action. *Washington Trails Ass’n v. United States Forest Serv.*, 935 F. Supp. 1117, 1121 (W.D. Wash. 1996). The BLM’s actions have violated the APA based on the non-existence of an environmental assessment, that without NEPA’s ‘hard look’ requirement has been violated.

**UEC IS ENTITLED TO THIS COURT’S PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER.**

In order to obtain injunctive relief, a party must demonstrate that:

1. there is substantial likelihood that the moving party will eventually prevail on the merits of the underlying claim.
2. the moving party will suffer irreparable harm unless the injunction issues;
3. the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; and
4. the injunction, if issued, would not be adverse to the public interest.

*Tri-State Generation and Transmission Ass’n, Inc. v. Shoshone River Power, Inc.*, 805 F. 2d 351, 355 (10<sup>th</sup> cir. 1986) (“*Tri-State Generation I*”); *Otero Savings and Loan Assn. v. Federal Reserve Bank of Kansas City, Missouri*, 665 F. 2d 275, 278 (10<sup>th</sup> Cir. 1981); *See also* Fed. R. Civ. P. 65.

In deciding whether to grant a TRO or a preliminary injunction, the court may take into account interests of the public as well as those of the parties before it, and such consideration is particularly appropriate in cases where there is a strong public interest involved. *Hartford v. Hills*, 408 F. Supp. 879 (D. Conn. 1975). In this case, there is such a strong public interest, namely the public interest in protecting public lands that are open to multi-use public recreation, enjoyment, as well as providing benefits to wildlife which are a public resource.

It is not required that a plaintiff prove its case with absolute certainty in order to receive a TRO or a preliminary injunction. It is enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation and thus for more deliberate investigation. *Washington Capitols Basketball Club, Inc. v. Barry*, 304 F. Supp. 1193 (N.D. Cal.), *aff'd*, 419 F. 2d 472 (9th Cir. 1969). The movant need not prove its case with that degree of finality required to support the granting of relief at a trial on the merits; movant need only establish reasonable probability or possibility of eventual success on the merits. *Williams v. San Francisco United School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972).

**A. UEC Will Suffer Irreparable Harm if the Preliminary Injunction and Temporary Restraining Order is Not Entered.**

The Tenth Circuit has held that if damages cannot be reasonably measured then the remedy at law is inadequate and injunctive relief is appropriate. *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F. 2d 1346, 1361-62 (10<sup>th</sup> Cir. 1989) (“*Tri State Generation IP*”). A preliminary injunction is the appropriate form of relief when an agency fails to abide by the procedures of NEPA because “[an] environmental injury usually is of an enduring or permanent nature, seldom remedied by money damages and generally considered irreparable.” *Catron County*

*Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F. 3d 1429, 1440 (10<sup>th</sup> Cir. 1996).

Obviously there will be irreparable harm to the Plaintiff's interests if the public lands and streams at issue are mined through subsidence and irrevocably changed due to the actions of the defendants. BLM's Determination of NEPA Adequacy is a sham and causes present and ongoing damage to the interests of the Plaintiff. Once this area is mined, the damage done cannot be reversed. Once the wildlife there, including several threatened and sensitive species listed under the Endangered Species Act are harmed, they cannot be restored. Once historic and archeological resources are destroyed, they cannot be recreated. Once the watershed experiences subsidence cracking and habitat deterioration, it will be very difficult and expensive to reverse and repair the damage, if that can be done at all.

The proposed project may cause irreparable harm to areas outside of traditional environmental concerns, and may include important cultural and paleontological resources. The project area is known to contain many archaeological sites, several of which have been declared eligible for listing in the National Register of Historical Places. (FEIS, Table 3.7). *See Pines Tract ROD*, p. 3. *See Attachment A*. The sites in this area include rockshelters and surface artifact scatters containing chipped stone artifacts, groundstone artifacts, firehearths and other features of the prehistoric occupation of the area. *See Pines Tract ROD*, p. 3. *See Attachment A*. Cultural resource inventories have indicated that within the project area there are 10 sites eligible for listing in the National Register of Historic Places. *See Pines Tract ROD*, p. 10. *See Attachment A*.

The Peacock Shelter is one of the most notable archeological features in the project area, and is located in a potential subsidence zone, which could be disturbed by underground mining. *See Utah Oil Gas and Mining Coal Monitoring Program, Environmental Resource Information*,

September 30, 2003, p. 11. *See* Attachment F. Because there has been no analysis of these features there is a high probability that these features could be irreparably harmed by the proposed activities. Additionally the failure to identify culturally and historically significant landmarks in the project area is a violation of the National Historical Preservation Act. *See* 36 C.F.R. §800.4(a)3.

In support of this motion, Plaintiff shows the Court that a preliminary injunction and temporary restraining order is needed in this case in order to prevent the Defendant from continuing on with an illegal NEPA process and to prevent the mining under the East Fork of Box Canyon Creek Drainage. Without a preliminary injunction and temporary restraining order, the BLM and permitted mining companies (Canyon Fuel LLC and Southern Utah Fuel Company) will continue with a fraudulent NEPA process, and the stream, downstream residents, and area wildlife will be irreparably harmed before the Court can address the issues in the case. Furthermore plaintiff's appeal rights will be irretrievably lost and any environmental harm will already be done if the injunction is not issued.

**B. The Threatened Injury to UEC Outweighs Any Damage that the Preliminary Injunction and Temporary Restraining Order May Cause the BLM.**

As to the issue of possible harm to the Defendants, obviously there can be no harm to the Defendant BLM from issuing a preliminary injunction and temporary restraining order. The BLM has no pecuniary or other interest in this divesting of public lands. Further, mere financial loss, if any, is not sufficient reason for denying a preliminary injunction. "[T]he Government's economic loss cannot be considered compelling if it is to be gained in contravention of federal law." *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1491 (E.D. Cal. 1988), *rev'd on other grounds*, 918 F.2d 813 (9th Cir. 1990) (citing *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988)). Monetary injury is not "irreparable" in the equitable sense. *Sampson v. Murray*, 415 U.S. 61,

90 (1974). See also *Tenakee Springs v. Clough*, 915 F.2d 1302 (9th Cir. 1990).

The irreparable injury that the UEC and its members will suffer due to the procedural and substantive inadequacies of the BLM's actions, demonstrates that the balance of harms favors the UEC. An injunction would not stop the Defendant and the permitted companies from mining the coal under the stream should this Court ultimately rule in their favor. On the other hand, failure to grant an injunction will mean that the public's legal rights under NEPA and that publicly-owned forests, wildlife habitat, historic and archaeological sites, harm to the stream hydrology, and other public values of this land will be lost forever. If an environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment. See *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

**C. The UEC is likely to Succeed on the Merits of its Claims Against the BLM.**

Clearly, there is a reasonable probability that the Plaintiff will prevail on the merits once this case is heard fully by the Court. Indeed, the evidence shows a high probability of success.

The Tenth Circuit has adopted a liberal definition of the "probability of success" requirement and held that when the other three requirements for a preliminary injunction are satisfied "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Tri-State Generation I*, 805 F. 2d at 358; *Otero*, 665 F. 2d at 278.

Here, the BLM has failed in its duty to prepare an Environmental Assessment, in violation of NEPA and the APA. The plaintiffs have presented evidence that mining in the area proposed is specifically prohibited until a site specific environmental analysis is prepared. The U.S. Forest Service has documented various areas where there is high potential for significant environmental

impacts which would be caused by subsidizing the proposed mining area, and have presented evidence that many of these impacts may be unavoidable by such a project.

**1. The Failure to Prepare an Environmental Assessment is a violation of NEPA, and therefore an injunction is justified.**

Under appropriate circumstances, federal courts will grant injunctive relief to preserve the status quo until the requirements of NEPA have been satisfied. See *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456-457 (D.C. Cir. 1977).

Ordinarily when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance. See *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 513 (1974), "In most cases, perhaps, it is possible and reasonable for the courts to insist on strict compliance with NEPA, and actions can, consistently with the public interest, be enjoined until such compliance is forthcoming."

The fact that a project will soon be under way by no means insulates it from the equity power of a court: "The substantial additional costs which would be caused by court-ordered delay" may well be justified by the compelling public interest in the enforcement of NEPA. *Steubing v. Brinegar*, 11 F.2d 489, 497 (2d Cir. 1975).

The first rationale for injunctions is that a project should not proceed, with its often irreversible effect on the environment, until the possible adverse consequences are known. In affording injunctive relief in one case Judge Friendly observed that if a NEPA analysis were done, it might "reveal substantial environmental consequences" which might be critical to further consideration of the propriety of the action. *City of New York v. United States*, 337 F. Supp. 150, 160 (E.D.N.Y. 1972) (three-judge court).

Similarly, another court noted, where an EIS had not been prepared, an injunction is justified against an ongoing project because “the decision makers are entitled to all the information relevant to a determination whether to abandon the project or to alter it.” *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1182 (6th Cir. 1972). In short, courts will not hesitate to stop projects that are in the process of affecting the environment when the agency is in ignorance of the consequences, as when it should have prepared an EIS but failed to do so.

Another reason for enjoining ongoing projects is to preserve for the agency the widest freedom of choice when it reconsiders its action after coming into compliance with NEPA, e. g., after finding out about the possible adverse environmental effects of its action. This rationale often requires an injunction against all the activities of a project, even activities that themselves have no effect on the environment. For, as one court realistically recognized.

“The more time and resources [the agency is] allowed to invest in this project, the greater becomes the likelihood that compliance with section 102 of the NEPA, and the reconsideration of the project in light of section 101, will prove to be merely an empty gesture.” *EDF v. TVA*, at 1183-84.

In this case the mining of coal under the drainage basin of the East Fork of Box Canyon Creek is illegal. The BLM signed off on the project lacking authority from the U.S. Forest Service and the NEPA process (BLM’s “Determination of NEPA Adequacy”) was not legally valid.

2. **The BLM has violated NEPA, SMCRA, and the MLA by not preparing an Environmental Assessment, since there are likely to be significant environmental impacts, and because BLM was specifically directed to prepare an EA for this project.**

Regional Supervisor of the Utah Department of Natural Resources Division of Wildlife Resources, Derris Jones, stated in a letter dated July 29, 2003 that his department was concerned the proposed project would harm aquatic and terrestrial wildlife. *See* Attachment G. Specifically Mr.

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Jones cited the likelihood of subsidence which could fracture bed materials and cause loss in surface and subsurface flows drying out the area. If this were to occur it would decrease or eliminate ephemeral pools, impact amphibian habitat and drinking water for terrestrial vertebrates, and it would lower the total biomass of invertebrates. Mr. Jones has recommended comprehensive surveying of avian, amphibian, and mammalian species both before and after the project to determine impacts to these species. The public and the plaintiffs are not aware of any such surveying which has determined that there will not be impacts to these species.

In Alice Carlton's (Manti La Sal Forest Supervisor) letter (dated 8/22/03) to Mary Ann Wright of Division of Oil, Gas, and Mining (DOG M) there were a number of impacts to the hydrology of Box Canyon which were not discussed in the Pines Tract FEIS in relation to this current project. *See* Attachment D. Ms. Carlton cited a number of impacts such as the adjacent Main Fork of Box Canyon which has numerous cracks that have not fully repaired themselves through sediment filling as was originally suggested in the Pines Tract FEIS. The letter stated some of the obvious cracks could be filled in the current proposal with bentonite, but many cracks would not be found and would be untreated. In fact efforts to locate and fill all of the cracks would likely require efforts that would be equally damaging to the area ecosystem. This letter should have raised concern that cracking is likely to result if this project proceeds, and this cracking could in fact be impossible to mitigate. *See* Attachment H photos.

The cursory NEPA analysis the BLM conducted was through citation of sections of the Pines Tract FEIS, which is presumed to have contemplated the current project. In reality this interpretation is erroneous and irresponsible since the U.S. Forest Service specifically left the current project unanalyzed, and clearly stated that the current project would be subject to site-

specific environmental analysis under NEPA, because it could involve surface disturbance not previously analyzed. *See* Pines Tract FEIS, 1-9. *See* Attachment B.

In the BLM's Determination of NEPA Adequacy (DNA) the BLM construed the Forest Service "stipulation nine" in the lease consent form as permission to undermine the stream. Stipulation 9 originates from the Manti-La Sal Forest Plan, which essentially protects streams from mining that would cause subsidence. The BLM construed this stipulation as permission to mine through arrival of the conclusion that there would be no impacts. The BLM's reliance on this stipulation is wholly erroneous since mining in the East Fork of Box Canyon was unequivocally prohibited without preparation of an environmental assessment. Moreover, since there was no environmental assessment (EA), and since the BLM relied entirely on the Pines Tract FEIS for analysis of the current project, it is impossible for them to assure the public that adverse impacts to surface areas will not occur.

As stipulation 9 states: "there must be prevention of surface subsidence so that there is no potential for escarpment failure and landslides, damage to surface structures, and damage or alteration of the flow of perennial streams". *See* Determination of NEPA Adequacy, p. 2. *See* Attachment C. The lessee shall provide specific measures to assure that hazardous conditions are not created. *See* Determination of NEPA Adequacy, p. 2. *See* Attachment C. The BLM or the lessee have not analyzed potential environmental impacts to ensure impacts would be minimized. In fact the BLM has all but conceded that there is a strong possibility that there would be interruption of streamflow, a violation of the above stipulation. *See* Determination of NEPA adequacy, p. 5. *See* Attachment C. Additional evidence that this cracking is common in the area, and rarely fully fill with sediment is reason enough to prevent this project from commencing.

The BLM has failed in its duty to comply with the surface management agency's conditions for coal mining. The U.S. Forest Service as the surface management agency is responsible for ensuring that the land where the coal is being mined is being protected. To ensure the protection of the land in the Box Canyon Creek area the Forest Service conditioned permission to mine the area under the East Fork of Box Canyon Creek to be subject to a separate environmental assessment. The BLM ignored this condition and therefore violated the Mineral Leasing Act and the Surface Mining Control and Reclamation Act, and their implementing regulations. 43 C.F.R. §3400.3-1 and 30 C.F.R. §740.4.

The U.S. Forest Service has not acquiesced in the BLM's modification to the existing lease to commence coal mining operations under the East Fork of Box Canyon Creek. "The current Permit Application Package (PAP)/Mine Plan and permit do not authorize mining that would cause subsidence of Box Canyon". *See* Pines Tract ROD, p. 8. *See* Attachment A. The source of the U.S. Forest Service's authority to approve permit amendments is unquestionable, and is set-out in the Mineral Leasing Act, Surface Mining Control and Reclamation Act, and the Utah Coal Rules. The BLM's approval of the current mining proposal without consent from the Forest Service demonstrates the BLM's disregard for permit amendment protocol, which mandates multi-agency approval processes between federal land management agencies for coal mining projects.

3. **The BLM has violated their own regulations by arbitrarily and capriciously classifying the proposed project as a "minor modification" when all evidence indicates that there is likely to be significant environmental impacts**

The "minor modification" categorical exclusion aptly applies only when the modification is in fact "minor". The current project is not minor by any interpretation, even the BLM's own interpretation. Under their own regulations examples of such a modification are explained: "approval

of minor modifications or minor variances from activities described in an approved underground or surface mine plan for leasable minerals (*e.g. change in mining sequence or timing*) *emphasis added*. (BLM Categorical Exclusions, 516 DM Chapter 6, Appendix 5.4 F (8)). In this case a radical change in the location and method of coal extraction, the amount of coal mined, and the potential environmental impacts of the proposed project make it imperative to prepare an environmental assessment because such a change is not "minor" by any objective measure.

The "minor modification" regulation which the BLM relies on is a categorical exclusion where the BLM can avoid environmental analysis by changing/amending an already approved action. The minor modification exception only applies if there is no potential for causing substantial environmental impact. 43 CFR §10010.61. As has been demonstrated the U.S. Forest Service, the Utah Department of Natural Resources, and the public have credible evidence that the proposed project will cause undesirable environmental impacts, and that these impacts need further study and analysis.

**D. The Preliminary Injunction and Temporary Restraining Order Sought by UEC is Not Adverse to the Public Interest**

As to the issue of public interest, there is clearly a strong public interest in having decisions made about divesting the public of public lands be done in full compliance with all applicable federal laws and regulations. There is no public interest in eliminating the NEPA process that has become the primary method of predicting the environmental consequences of governmental actions on public land. There is no public interest in ignoring the potential impacts that will result from mining under a stream when the project may be accomplished just as easily after full environmental review.

The public interest in this case clearly weighs strongly toward the Court's issuing the preliminary injunction and temporary restraining order. Granting this injunction will only preserve the

public's interest under NEPA. The public interest will be served by the BLM addressing the public's concerns by complying with NEPA requirements. *See Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998). Similarly, the public has a general interest in "the meticulous compliance with the law by public officials." *Id.* (internal quotations and citations omitted).

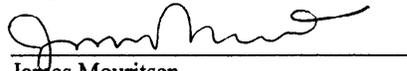
Plaintiff does not need to exhaust administrative remedies in this case. The BLM has already approved their decision, and is likely to start the project soon. Further participation in the administrative process by the Plaintiff would be futile since there is no administrative process for the categorical exclusion issued by the BLM.

#### **CONCLUSION**

WHEREFORE, the Plaintiff respectfully requests that this Court issue a preliminary injunction and temporary restraining order preventing the Defendant from continuing with this fraudulent NEPA process and from taking any action that changes the current conditions of the Forest Service lands at issue, order a hearing within ten days on Plaintiff's request for a preliminary injunction, and then enjoin Defendants until the Court makes a final ruling in this case. Plaintiff also respectfully requests that such preliminary injunction have no requirement for a bond or else have a nominal bond.

DATED this 15 day of October, 2003.

Respectfully submitted,



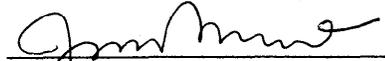
James Mouritsen,  
Attorney for Plaintiff

James Mouritsen-#6117  
Utah Environmental Congress  
1817 S. Main #10  
Salt Lake City, UT 84115  
(801)-466-4055  
Attorney for the Utah Environmental Congress.

**ATTORNEY'S CERTIFICATE**

Comes now the Plaintiff's attorney, James Mouritsen, who certifies to the Court that the Plaintiff's attorney made attempts to contact the Defendants before making this request for a TRO. I contacted the counsel for the Defendant Bureau of Land Management, John Steiger in the U.S. Solicitor's General Salt Lake City office and Carlye Christensen at the U.S. Attorney's, on October 15, 2003, and notified them of the Plaintiffs' intention of seeking a TRO and the approximate time we would be here seeking the TRO.

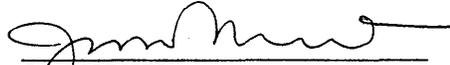
Formal notice should not be required because actual notice was given.

  
\_\_\_\_\_  
JAMES MOURITSEN  
Attorney for Plaintiff

Sworn to and subscribed before me this 15 day of October, 2003.

**CERTIFICATE OF SERVICE**

I hereby certify that I have delivered, either by hand delivery or by mail, a copy of the foregoing document and exhibits, properly addressed and postage paid, to the Defendants or their counsel, as listed below, on this the 15 day of October 2003.

  
\_\_\_\_\_  
OF COUNSEL

Via Hand delivery:  
U.S. Attorney's Office  
185 South State St., #400  
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Via Hand delivery:  
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1620 L St NW,  
Washington, DC 20036

Via U.S. Certified Mail:  
U.S. Attorney General John Ashcroft  
U.S. Department of Justice  
Room 5111, 10<sup>th</sup> and Constitution NW  
Washington DC, 20530



# **PINES TRACT PROJECT**

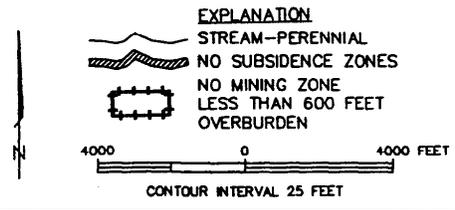
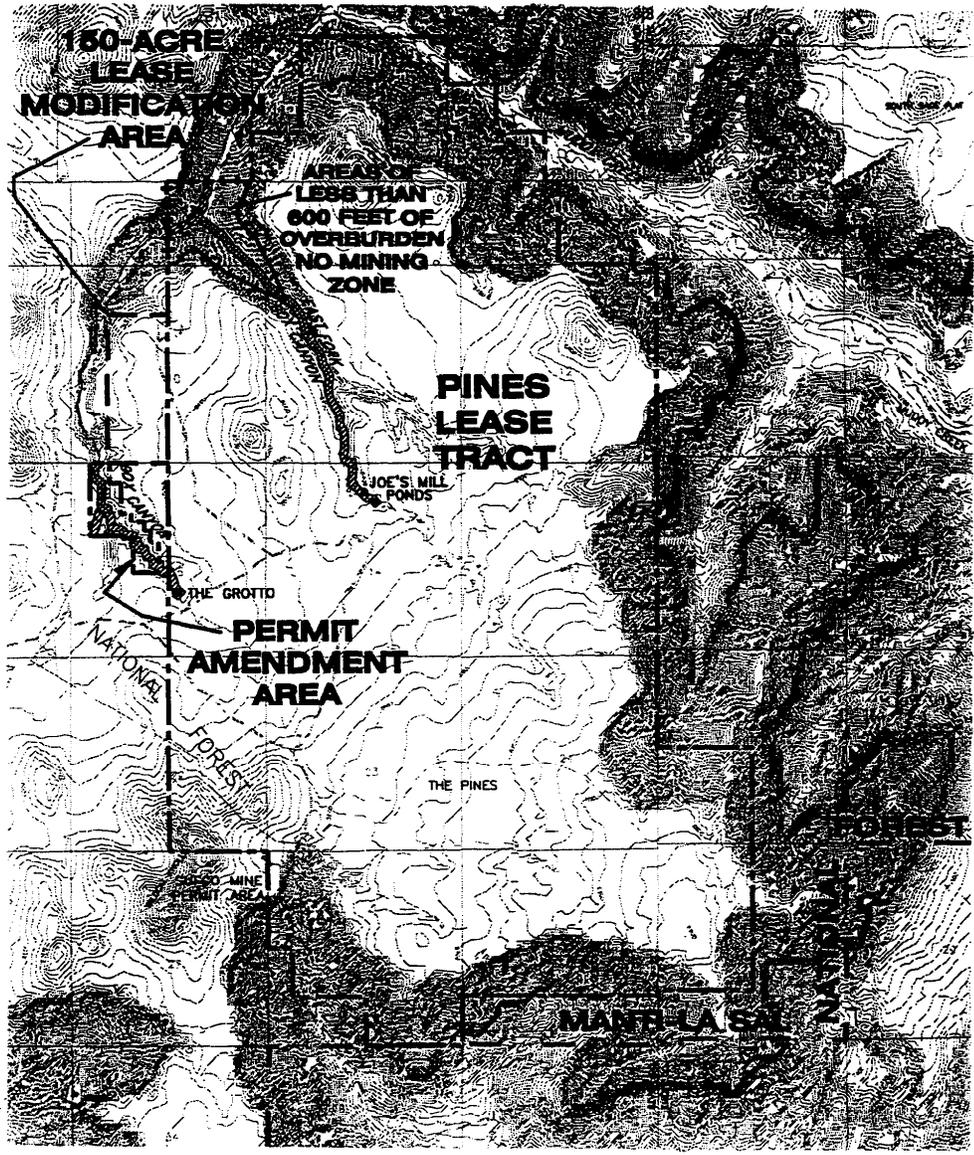
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## **Record of Decision**



January 28, 1999





**MANTI-LA SAL NATIONAL FOREST  
PINES TRACT PROJECT**

FIGURE 1  
RECORD OF DECISION

SCALE 1"=4000'	DATE DRAWN 8/14/98	LAST REVISION 1/21/99
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## Pines Tract Project Record of Decision

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in Muddy Canyon. Portions of the Project Area has exposed sandstone on the land surface. The streams in Box Canyon and the East Fork Box Canyon flow on the exposed sandstone bedrock (FEIS, page 3-63). The coal reserves present are part of the Wasatch Plateau coalfield (FEIS, page 3-11).

**Groundwater and Surface Water Resources:** Availability of water is a limiting factor in the Project Area (FEIS 3-182). Distribution of water resources is generally confined to the two small perennial drainages (Box Canyon and the East Fork Box Canyon) that originate within the Project Area (FEIS, page 3-57 and Figure 3-8). The majority of springs occur within these two drainages (FEIS, Figure 3-4). Eight stock ponds have been developed to aid in providing water for wildlife and livestock on the grazing allotments that overlap the Project Area (FEIS, Figure 3-8 and page 3-182). The available live water sources (i.e. springs seeps, perennial drainages) are vital for wildlife, livestock and riparian vegetation and habitat (FEIS, page 3-96, Figure 3-11, page 3-111 to 112, and page 3-182).

**Vegetation and Special Status Species:** The Project Area supports nine vegetation communities: grassland-perennial forb, sagebrush, mountain brush, conifer timber, aspen/deciduous forest, pinyon/juniper woodland, riparian, a mixed type, and barren ground (FEIS page 3-92 and Figure 3-10). The primary vegetation community is a conifer timber forest of ponderosa pine, white fir and Douglas-fir which is unlike other areas on the MLS. In general, the vegetation communities are dispersed across the Project Area, except that riparian vegetation is mainly confined to the perennial stream corridors and locations of seeps and springs (FEIS, page 3-62, 3-96 and Figure 3-11).

A sensitive plant species known to occur in the Project Area is the Link Canyon columbine. Three confirmed populations of the Link Canyon columbine have been found in the Project Area associated with wet areas at the heads of Link Canyon and Box Canyon (FEIS, page 3-66 and 3-133). A fourth unconfirmed population may also be present at a rock shelter site in the East Fork of Box Canyon (project file).

**Wildlife and Special Status Species:** Elk are the most abundant big game species and are a Forest management indicator species (FEIS, page 3-107). The Project Area hosts winter range for a part of the Manti Elk Herd, the largest in the state of Utah. Sage grouse were once abundant in the area, but populations have declined. Sage grouse are dependent on springs and riparian areas in the Project Area for brood habitat (FEIS, page 3-111). Macroinvertebrates are also a Forest management indicator species and are present at the water sources in the Project Area (FEIS, page 3-112). There are no known fisheries within the Project Area. However, there are fish below the Project Area in lower Box Canyon and Muddy Creek (FEIS, 3-112).

The bald eagle, a threatened species, may occur in the Project Area as a transient species. No roost sites have been found in the Project Area (FEIS, page 3-130). An eyrie for a peregrine falcon, an endangered species, has been found near the Project Area and the nesting pair may forage in portions of the Project Area (FEIS, page 3-130). Suitable habitat for the southwest willow flycatcher, also an endangered species, is present but its confirmed presence and use are undetermined at this time. A species of willow flycatcher has been found on the MLS, but it is undetermined if it is the southwest willow flycatcher. DNA testing is on-going at this time (FEIS, page 3-131). The drainages in the Project Area are part of the Colorado River Basin which is habitat for four endangered fish species: the humpback chub, the bonytail chub, the razorback sucker, and the Colorado squawfish. Critical habitat for these species are large rivers, which do not occur in the Project Area (FEIS, page 3-131 and 132). Sensitive species known, or suspected to occur within the Project Area include the spotted bat, Northern goshawk, flammulated owl, and three-toed woodpecker (FEIS, pages 3-136 to 3-139).

**Cultural/Paleontological Resources:** The Project Area is noted for containing many significant archaeological sites, several of which have been determined to be eligible for listing in the National Register of Historic Places (FEIS, Table 3.7). These sites include rockshelters and surface artifact scatters containing chipped stone artifacts, groundstone artifacts, firehearths and other features associated with prehistoric occupation of the area. The sandstone outcrops in the stream canyons frequently form rock overhangs which were used by prehistoric peoples as shelters. Diagnostic artifacts and recent research at nearby sites provide evidence for long-term occupation of the Project Area possibly beginning in the Paleoindian Period (ca. 7,500 to 11,500 years ago) to the Protohistoric Period (after A.D. 1300). Only minor paleontological resources exist in the Project Area (FEIS, page 3-168).

## Pines Tract Project Record of Decision

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ecosystems present while recovering the mineral resources. My decisions would result in the recovery of at least 62.4 million tons of coal.

The basic premise of Alternative C is to protect perennial drainages and escarpments in the Project Area from subsidence. However, my decision includes allowing subsidence of most escarpments in the Project Area because analysis presented in the FEIS shows that risks to escarpments are low (FEIS, pages 3-22 to 23, 3-195 to 196). Figure 1 shows the areas identified for protection.

Specifics of my decisions are detailed below.

- A. 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. Specific terms and conditions of my consent are given in items 1 and 2 below.
1. 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. However, I do consent to full-support mining under perennial and perennially-functioning stream reaches where the separation (overburden thickness) between the stream elevation and the elevation of mining is more than 600 feet.

I do not consent to any mining, other than for development entries, where the overburden is less than 600 feet. This is based on guidance given by the Society of Mining Engineers (1992) which recommends maintaining a "60 times the mining height" separation between mine workings and surface water bodies (project file). Given the expected extraction heights in the Project Area this would be about 600 feet.

Specific stream reaches to be protected from subsidence include: i) Box Canyon and perennial portions of its branches in the Permit Amendment Area, and ii) the East Fork of Box Canyon, including the southwest fork up to and including Joes Mill Ponds. The stream reaches under which no mining will be allowed due to shallow overburden are the lower portions of the East Fork of Box Canyon including the confluence area with the Main Fork of Box Canyon. Refer to Figure 1 of this ROD for areas to be protected.

2. For most escarpments in the Project Area, Alternative D is the selected alternative which allows subsidence. However, the following escarpment areas will be protected from mining that would cause subsidence:
  - a. The escarpment area known as the "grotto" (natural pond/alcove) at the head of Box Canyon in the Main Fork (see FEIS, Figure 3-4) will be protected from mining that would cause subsidence.
  - b. The escarpment area forming the Elusive Peacock rock shelter, along the East Fork of Box Canyon, identified as being near the location of spring 214 (see FEIS, Figure 3-4) will be protected from mining that would cause subsidence.
  - c. Subsidence of other areas containing rockshelters and/or other significant National Register eligible or potentially eligible sites will be contingent upon completion of a three-party agreement between the Utah State Historic Preservation Office (USHPO), Advisory Council on Historic Preservation and MLS specifying data recovery and mitigation plans. The MLS, USHPO and the Advisory Council on Historic Preservation have concurred previously that subsidence effects to these sites can be mitigated through implementation of a three-party agreement for data recovery and mitigation prior to mine plan approval (USHPO and Advisory Council letters dated August 24, 1998 and September 22, 1998, respectively).

## Pines Tract Project Record of Decision

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- d. I do not have the authority to allow subsidence that may result in the "taking" of an active or inactive raptor nest. Therefore, subsidence of escarpments which contain active and inactive raptor nests will be allowed contingent upon the successful lessee consulting with the US Fish and Wildlife Service and obtaining a "take permit" from that agency.
- B. I consent to the BLM modifying the Quitchupah Lease by adding 150-acres. The existing stipulations on that lease will apply to the modification area.
- C. I do not consent to the Utah Division of Oil, Gas and Mining (UDOGM) approving the Permit Amendment Package to subside Box Canyon. I am choosing not to exercise the provision in Stipulation 13 on the existing Quitchupah Lease (stipulation 9 from the Forest Plan) that would authorize subsidence of the perennial stream in Box Canyon.

### VII. RATIONALE FOR THE DECISION

My decisions are based upon several criteria, some of which are summarized in this section.

#### A. Consistency With Forest Plan Goals, Objectives, And Standards

I evaluated each alternative analyzed and compared them to Forest Plan goals, objectives, standards, and guidelines for the Project Area. Several considerations pertaining to Forest Plan consistency are reflected in my decision and are detailed below. My decision is consistent with the Forest Plan.

Consistency with Multiple Use Management Unit Direction. Multiple use management units and direction designated in the Forest Plan for the Project Area (Forest Plan, pages III-64 to III-76) include timber, range, leasable mineral development, general big game winter range and riparian maintenance (FEIS, page 3-1 and 2).

The timber unit emphasizes wood-fiber production and harvest, allowing other uses so long as the use or rehabilitation returns the area to a condition that is in harmony with the timber emphasis. No timber activities are foreseen for the Project Area (FEIS, Appendix B).

The range unit emphasizes the production of forage and cover for wildlife and livestock, with specific direction for minerals activities to assure continued access and use, and replace losses through appropriate mitigations. The application of the SCLS in Alternatives C and D require replacement of water at the source (SCLS 17, FEIS, Appendix D) that would mitigate any loss of water from stock ponds that might occur (FEIS, page 3-185). Additional mitigations for access would also be required (FEIS, page 3-190 to 191).

The leasable mineral unit emphasizes development of the mineral resources while allowing other resource uses. The Project Area is part of the Quitchupah Pines Coal Multiple Use Evaluation Area, and the Forest Plan makes it available for further consideration for coal leasing (Forest Plan, page Appendix C, page C-9, no. 6, and FEIS, page 1-2). This NEPA analysis was performed to further consider it.

The general big game winter range unit emphasizes maintaining areas that wildlife traditionally use in winter. Other uses may occur so long as they do not cause unacceptable stress on wildlife. The analysis showed minimal impacts to big game winter range (FEIS, page 3-114).

The riparian unit emphasizes management of riparian area and their component ecosystems. The goals of management are, in part, to maintain water flows to provide free and unbound water within the soil needed to create the distinctive vegetation community, provide healthy self-perpetuating plant communities and provide habitats for viable populations of wildlife and fish. With specific regard to mineral management activities, the Forest Plan calls to, "avoid and mitigate detrimental disturbance to the riparian area . . . and, where possible, to

## Pines Tract Project Record of Decision

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they do not preclude the opportunity to mine using full-support mining methods or access to adjacent coal reserves for mining by some accepted mining method.

The following discussions explain how I considered the FEIS issues in making my decisions. The discussions are presented by resource categories rather than by individual issue, but each issue is addressed. A list of the issues by resource category is found on pages XVIII to XXIV of the FEIS Executive Summary and pages 2-2 to 2-8 of the FEIS.

**Geology, Topography and Subsidence:** An inventory of geologic features in the Project Area was completed. No natural bridges or arches were found, but the Project Area contains extensive escarpments and alcoves. Perennial drainages have carved deep canyons through the massive Castlegate Sandstone forming the canyon walls or escarpments. Several alcoves occur in these canyon/escarpment areas.

My decisions will allow subsidence of escarpments and geologic structures with exceptions as described in Section VI of this ROD. My decisions allow subsidence of escarpments and mining-induced failures of escarpments in most areas, but protects escarpments from subsidence where I have determined that there are resources that I am not willing to put at risk regarding mining-induced damage. By protecting these identified areas and structures from potential mining-induced damage, I believe that I am preserving the most important and unique sites that characterize the geology of the area.

**Groundwater and Surface Water Resources:** The key water resources in the Project Area, seeps, springs occur within the canyons shared by the perennial streams (see Section II). My decisions involve protecting the water resources from potential impacts of subsidence. I believe that I have taken the reasonable approach to maintaining the availability and function of these key water resources for maintaining the ecosystem and supporting downstream uses.

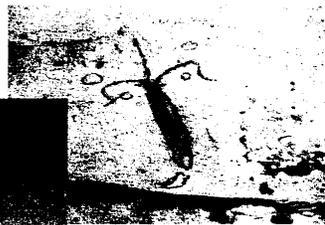
**Vegetation and Special Status Species:** The overall lowering of the land surface due to subsidence would not affect the overall health and distribution of the terrestrial plant communities present (FEIS, page 3-99). However, diversion of water could affect riparian vegetation. Since most of the riparian vegetation is associated with the stream corridors (see Section II), my decision to protect the perennial drainages also protects the viability of the riparian communities.

By protecting the grotto site from subsidence, one known population of Link Canyon columbine in the Project Area will be protected (see Section II and VI, item 2 (a)).

**Wildlife and Special Status Species:** The primary concerns for wildlife include potential reduction of habitat resulting from water diversion. I believe my decision minimizes the risk for reducing habitat by maintaining the key water resources. It also ensures that live water sources will be available to support wildlife. Although effects to special status species are expected to be minimal, my decision further limits the potential for impacts. Again, the key concern is reduction of water availability and translated effects to habitat. Since the risk for losing habitat to escarpment failures is low (see Section VII, A), I am confident that my decision to allow some escarpments to be subsided will not adversely affect wildlife habitat.

**Cultural/Paleontological Resources:** Cultural resource inventories have been completed in the Project Area. Thirty four sites have been identified, 16 of which were considered ineligible and 10 were considered eligible for listing in the National Register of Historic Places. The remaining eight sites are unevaluated (FEIS, Table 3.7). Of the unevaluated and National Register-eligible sites, the National Register character of 10 sites could be affected by subsidence. The FEIS outlines site-specific measures that would be enacted to monitor/mitigate these impacts (FEIS, Table 3.11). The MLS, USHPO and Advisory Council have concurred that these measures could be implemented through an agreement among the USHPO, Advisory Council and MLS thereby protecting and/or mitigating any adverse effects to the National Register values of these sites (USHPO and Advisory Council letters dated August 24, 1998 and September 22, 1998, respectively). My selected alternative identifies specific escarpment areas that contain significant cultural resource sites that will be protected. This protection ensures the preservation for future research and knowledge base. Other sites





ROD

# **PINES TRACT PROJECT**

## **Final Environmental Impact Statement**



This is a FEIS conducted through the NEPA process on the Manti-La Sal National Forest by JBR Environmental Consultants, Inc.



tract. The BLM then initiated assessment of the proposed lease. The first step in the lease evaluation process was to delineate the tract. Tract delineation was completed by the BLM in October 1997, which expanded the tract boundaries to encompass 7,311 acres. The tract delineation report is available in the FS MLS project file. After tract delineation, the LBA process calls for a Data Adequacy Review, application of Unsuitability Criteria, and conducting an environmental analysis of the proposed action. The Pines Coal Lease Tract contains an estimated 71 million tons (MT) of recoverable coal.

Data Adequacy Standards, as established by the Uinta-Southwestern Utah Coal Region, were met after the company submitted supplemental information requested by the reviewing specialists. Application of the Unsuitability Criteria for Coal Mining found in 43 CFR 3461 determined that the proposed tract is suitable for leasing. A detailed discussion regarding the application of unsuitability criteria and required consultations with the United States Fish and Wildlife Service (USFWS) and the Utah State Historic Preservation Office (USHPO) are contained in the project file. This NEPA document addresses the need for the environmental analysis for the coal lease according to 43 CFR 3425. Table 1.1 below shows the authorizing actions and decisions associated with leasing the Pines Coal Lease Tract.

**1.3.2. Modify Federal Coal Lease U-63214 (Quitcupah Lease)**

Canyon Fuel submitted an application with BLM to modify their existing Quitcupah Lease on January 12, 1998. A lease modification entails adding additional lands to an existing lease and is governed by the MLA. This analysis considers adding previously unleased land to Canyon Fuel's existing Quitcupah Lease, and adding 3.4 MT of coal reserves to the SUFCO Mine reserve base. The BLM must consider modifying the lease to encompass the additional reserves. The FS, as the SMA, must decide whether or not to consent to the BLM modifying the lease and ascertain the potential environmental impacts. The UDOGM has the permitting authority under the Utah Coal Rules, and would process mining proposals associated with the lease modification as an incidental boundary change (IBC) to the mine permit boundary. Table 1.1 shows the authorizing actions and decisions associated with modifying the Quitcupah Lease.

Canyon Fuel submitted a PAP amendment to UDOGM on January 19, 1998 (revised May 13, 1998) requesting approval to subside perennial reaches of Box Canyon using full extraction longwall methods. A permit amendment involves altering the approved PAP and mine operations plan to account for a change in the planned mining scenario. This EIS considers the application by Canyon Fuel to amend their approved permit and subside perennial portions of Box Canyon, currently not authorized. The Permit Amendment Area is encompassed in Canyon Fuel's current Quitcupah Lease holding, and contains an estimated 2.2 MT of recoverable coal. In this case, the FS and the BLM must assess whether or not to specifically approve mining that would cause subsidence of the escarpments and perennial drainage. Authority is given under the MLA, as amended. ~~This action is subject to a site-specific environmental analysis under NEPA because it could involve surface~~

*Main Box Canyon and  
E FK Box Canyon  
same Dale Harber, FS  
MLS/NF*

Table 1.2 shows the authorizing actions and decisions associated with approving the permit amendment.

**Table 1.1 Decisions and Authorizations Required for the Proposed Action (Lease Pines Tract and Modify Quitchupah Lease, U-63214)**

<b>Agency/ Responsible Official</b>	<b>Decisions</b>	<b>Authority</b>
BLM/ Utah State Director	Offer Pines Coal Lease Tract for Competitive Bidding and include Lease Stipulations  Modify U-63214 and include Stipulations	MLA, NEPA
FS/ Forest Supervisor, MLS	Consent to leasing by BLM and prescribe stipulations for protection of non-coal resources	MLA, as amended by Federal Coal Leasing Amendment of 1975, NEPA

**Table 1.2 Decisions and Authorizations for the Proposed Action (SUFCO Permit Amendment to Subside Box Canyon)**

<b>Agency/ Responsible Official</b>	<b>Decisions</b>	<b>Authority</b>
UDOGM/ Director	Approve the Permit Amendment	MLA, Utah Coal Rules, 30 CFR 700 et seq.
BLM/ Utah State Director	Approve Change to the SUFCO Mine Resource Recovery Plan (Mine Plan)	MLA, NEPA, 43 CFR 3400 et seq.
FS/ Forest Supervisor, MLS	Consent to approval of the Permit Amendment by UDOGM	MLA, NEPA, 43 CFR 3400 et seq.

#### 1.4 DECISIONS TO BE MADE BY RESPONSIBLE OFFICIALS

This EIS addresses the need for three Federal decisions, one associated with each of the three project components. The Forest Supervisor for the MLS, and the Utah State Director for the BLM are the responsible officials for the EIS. They will make their respective decisions regarding the proposed



**Worksheet**  
**Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA)**

U.S. Department of the Interior  
Bureau of Land Management (BLM)

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**Note:** This worksheet is to be completed consistent with the policies stated in the Instruction Memorandum entitled "Documentation of Land Use Plan Conformance and National Environmental Policy Act (NEPA) Adequacy" transmitting this worksheet and the "Guidelines for Using the DNA Worksheet" located at the end of the worksheet. (Note: The signed CONCLUSION at the end of this worksheet is part of an interim step in the BLM's internal analysis process and does not constitute an appealable decision.)

- A. **BLM Office:** USO, Solids Minerals Group
- B. **Lease/Serial/Case File No.** Federal Coal Lease UTU-76195

**Proposed Action Title/Type:** Minor Modification to an approved Resource Recovery and Protection Plan to fully extract coal underneath a 143.25 acre portion of the East Fork of Box Canyon Creek Drainage.

**Location of Proposed Action:** East Fork of Box Canyon, Sevier County Utah

**Description of the Proposed Action:** Canyon Fuel LLC, and Southern Utah Fuel Company (SUFECO) have submitted a minor modification to the Resource and Recovery and Protection Plan (R2P2) that includes a proposal to fully extract coal in three mine panels from one seam underneath a 143.25 acre portion of the East Fork of Box Canyon Creek Drainage in Sevier County Utah. The East Fork of Box Canyon contains a stream that is perennial across the first panel and partially into the second panel. The second panel would also subside a portion of the East Fork of Box Canyon that does not contain a perennial stream. The Forest Service has identified this area as a "perennially functioning" drainage and have indicated their desire to protect it from potential impacts of full extraction mining. The third panel would subside two stock ponds known as the Joes Mills ponds. Because of changes in the mining plan, the proposal would increase coal recovery by approximately 3-4 Million tons of federal coal.

Such a change is normally considered as a minor modification to an existing mining plan and categorically excluded under BLM's NEPA policy (BLM Categorical Exclusions, 516 DM Chapter 6, Appendix 5.4 F.(8)).

In the original R2P2, the company did not plan on full-extraction mining under the drainage in the East Fork of Box Canyon. However, due to unanticipated geologic conditions, they have requested approval to subside these areas. In the record of decision consenting to leasing the lands in question, the Forest Supervisor of the Manti-La Sal National Forest provided the following:

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ATTACHMENT 1-6

*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. Specific terms and conditions of my consent are given in items 1 and 2 below.*

- 1. 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.*

Lease Stipulation 9, that was forwarded by the Forest Service in their consent to the lease included language that allows the stream to be undermined under certain conditions.

**Stipulation 9.** 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, or (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.

This stipulation requires specific approval before any subsidence could occur that would damage or alter the flow of perennial streams. However, no further approval would be required if the mining would not damage or alter the flow of the stream. This DNA is being prepared to determine whether any impacts mining may cause due to the full extraction of the coal resource in this small area have been adequately analyzed in the existing NEPA documents.

The proposed action does not present environmental concerns that have not been addressed previously, in the leasing EIS.

**Applicant (if any):** Canyon Fuel Company, Skyline Mine

**B. Conformance with the Land Use Plan (LUP) and Consistency with Related Subordinate Implementation Plans**

LUP Name Land and Resource Management Plan, Manti-La Sal National Forest, (1986) (Forest Plan).

Date Approved November 1986

Other document

\*List applicable LUPs (e.g., Resource Management Plans or applicable amendments).

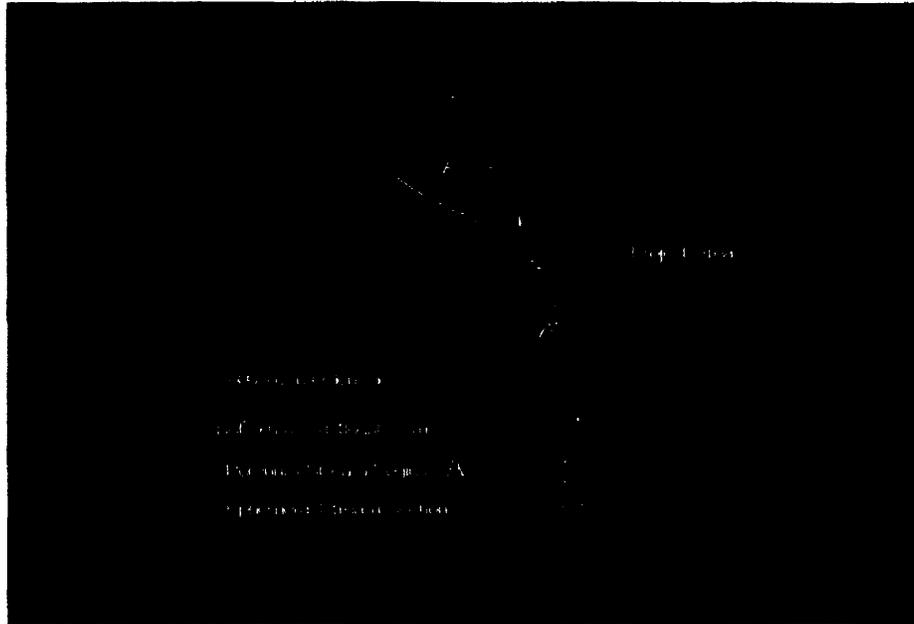
Forest Plan, Page III-72 "Avoid and mitigate detrimental disturbance to riparian area by mineral activities. Initiate timely and effective rehabilitation of disturbed sites."

Forest Plan Forest-wide Management Direction for Riparian, Flood Plain & Wetlands Management

Page III-31,02 "Give preferential consideration to riparian area dependent resources in cases of

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ATTACHMENT 1-6



**Map 1 Project Area Geology**

only perennial for a small portion of the drainage length. In the third longwall panel only has two small stock ponds in the area. When an area is subsided, two types of surface cracks can occur. Transient cracks that form parallel to the longwall face and cracks that form perpendicular to the longwall face over the gateroads. Both types of cracks are relatively shallow surface features and have been observed in the field to extend to depths of generally less than 30 feet. The limited cracks that occur in the bottom of drainages appear to close relatively quickly and fill up with sediment and other debris. Cracks that occur in the bottom of the streams could temporarily interrupt streamflow, but flow would resume once the cracks have filled with water or organic material. If this natural mitigation does not occur in a timely fashion, then the stream flow could be restored sooner by placing material in the stream channel. The FEIS discussed this issue at great length and addressed potential impacts and mitigation as follows:

“However, clays in the Blackhawk Formation shales and mudstones swell when wetted and anneal mining-induced fractures. Thus, the downward migration of ground waters is naturally mitigated. This occurrence is suggested by the fact that the discharge from mined-out longwall areas in the SUFCO Mine and other Wasatch Plateau mines consistently decrease with time. (FEIS page 3-45).

Mayo and Associates (1997b) conclude that if tension fractures occur in the Castlegate Sandstone in the bottom of the canyons, streamflow and water from colluvial groundwater systems may be temporarily diverted into the bedrock underlying the canyon. Once fractures fill with sediments and water, movement of water in the fracture will be essentially static and streamflow and colluvial ground water systems would no longer be directly affected. It is not expected that tension cracks will extend downward into the

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ATTACHMENT 1-6



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United States  
Department of  
Agriculture

Forest  
Service

Manti-La Sal  
National Forest

Supervisor's Office  
599 West Price River Drive  
Price, UT 84501  
Phone # (435) 637-2817  
Fax # (435) 637-4940

File Code: 2820-4  
Date: August 22, 2003

Sally Wisely  
Utah State Director  
Bureau of Land Management  
324 South State Street  
P.O. Box 45155  
Salt Lake City, UT 84145-0155

Dear Ms. Wisely:

Enclosed is a courtesy copy of a letter to the Utah Division of Oil, Gas and Mining (DOG M) regarding Canyon Fuel Company's proposal to subsidize the East Fork of Box Canyon, SUFCO Mine. Please note that the Forest Service has not concurred; we have also advised DOGM the change is not consistent with the terms and conditions established for the Pines Lease (UTU-76195).

Sincerely,

ALICE B. CARLTON  
Forest Supervisor

Enclosure

cc:  
Regional Forester, Intermountain Region  
Ken Paur, OGC



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MANTI-LA SAL NF

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United States  
Department of  
Agriculture

Forest  
Service

Manti-La Sal  
National Forest

Supervisor's Office  
599 West Price River Drive  
Price, UT 84501  
Phone # (435) 637-2817  
Fax # (435) 637-4940

File Code: 2820-4

Date: August 22, 2003

Mary Ann Wright  
Assistant Director  
Utah Division of Oil, Gas and Mining  
1594 West North Temple, Suite 1210  
P.O. Box 145801  
Salt Lake City, UT 84114-5801

RE: Undermining East Fork of Box Canyon Amendment, Canyon Fuel Company, SUFCO  
Mine, C/041/0002

Dear Mary Ann:

I have reviewed the July 30, 2003 application to revise the Mining and Reclamation Plan for the SUFCO Mine. I do not consent/concur with the proposed revision as it is not consistent with terms and conditions required by the Forest Service for the Pines Lease (UTU-76195) nor for concurrence to the original mine plan approval and permit. Forest Service terms and conditions are documented in the Forest Service Record of Decision (FS ROD), 1999 based on the Pines Tract Project FEIS; copy enclosed for your reference.

I believe that approval of the proposal would likely result in a change to the post-mining land use, functional impairment of the associated ecosystem, and would be contrary to the Land and Resource Management Plan for the Manti-La Sal National Forest. Additionally both Forest Service and BLM Records of Decision, authorizing leasing of the Pines Tract contained requirements that preclude mining that could cause subsidence of areas proposed for full extraction mining in the proposed amendment.

The Forest Supervisor, Manti-La Sal National Forest, consented to leasing the tract subject to specific terms and conditions. The FS ROD states (Part VI.A., Page 7): "Specific terms and conditions of my consent are given in 1 and 2 below. 1. 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. However, I do consent to full-support mining under perennial and perennial-functioning stream reaches where the separation (overburden thickness) between the stream elevation and the elevation of the mining is more than 600 feet. Specific stream reaches to be protected from subsidence include: i) Box Canyon..., and ii) the East Fork of Box Canyon, including the southwest fork up to and including Joes Mill Ponds."

Further, the ROD states (Section VI, Page 9): "Should subsidence of perennial streams be authorized, there is a high potential for subsidence-induced cracking, both of a temporary and of a more permanent nature, to occur in the stream channels. The stream channels flow across exposed bedrock that is highly susceptible to this cracking (FEIS, page 3-63 and sections 3.1, 3.2 and 3.3). Potential outcomes of cracking include diversion of some or all flow in the streams and dewatering of alluvial and colluvial deposits (FEIS, pages 3-47, 3-70 to 79). Flow diversion

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Mary Ann Wright

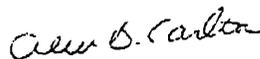
Page 2

or dewatering may stress the health of riparian vegetation, which in turn translates to a reduction in the function and value of riparian habitat (FEIS, pages 3-99 to 104, and 3-113 to 13-119). Duration of these effects and the time for self-healing has been estimated at up to 2 years (FEIS, pages 3-70, 3-75, 3-101, and 3-113) assuming that normal natural conditions persist, but may be longer based on season, climate cycle and crack morphology (FEIS, page 3-48, pages 3-70 to 71, Appendix E, Response to comment J-11)."

The ROD also points out that the estimate of effects is "...based on professional opinions, and there remains some disagreement between resource specialists of the MLS, BLM and third party contractor regarding the effects and their duration. Attempts to seal subsidence cracks at Rock Pond and associated ephemeral drainage have been marginally successful (FEIS, page 3-19). Given this information, it would be irresponsible of me to allow jeopardizing the integrity of the perennial streams, and knowingly allow damage to these resources to occur."

Based on observations made of subsidence cracks in the main fork of Box Canyon, numerous cracks would occur in the channel bottoms, and contrary to predictions contained in the FEIS, I do not see evidence that cracks in stream bottom will substantially seal naturally by filling with sediment within 2 years or as stated in the current proposal. Many of the cracks in the main fork of Box Canyon remain open. This may be due to decreased flows over the last 5 years under the drought conditions or the nature of the cracks and resource conditions. In addition, I remain unconvinced that all cracks can be located beneath the alluvial/colluvial materials in the drainages to allow effective sealing with bentonite. Sealing of obvious cracks in the exposed sandstone channel could mitigate the potential effects to some extent, but many cracks would likely remain unfound and untreated. Efforts to locate and fill all of the cracks would require methods that could also be equally damaging to the ecosystem. Considering the very low perennial base flow and my charge to maintain favorable conditions of water flow and properly functioning ecosystems on National Forest System lands, any loss of flow could jeopardize their integrity.

Sincerely,



ALICE B. CARLTON  
Forest Supervisor

Enclosure

cc:

Al Klein, OSM Regional Director  
Sally Wisely, BLM Utah State Director  
Regional Forester, Intermountain Region



# **PERMITTING HYDROLOGY**

**A Technical Reference Document for Determination  
of Probable Hydrologic Consequences (PHC) and  
Cumulative Hydrologic Impact Assessments (CHIA)**

## **BASELINE DATA**

Prepared by  
the Office of Surface Mining

**May 2002**

## **B. Underground Coal Mining Operations**

The process of underground coal mining results in the removal of coal under broad areas. The most common impact associated with underground mining is subsidence. The potential for subsidence depends on the thickness of the coal seams mined, the geometry of the mine, the thickness and strength characteristics of the overlying strata, the mining method and the percent of coal extracted.

Subsidence can alter the hydrologic balance and affect both ground- and surface-water flow. If subsidence cracks extend to the surface, surface flow can be diverted into underground mine workings, surface flow paths can be rerouted and ground-water recharge capacity may be increased. Depending on integrity of the coal barriers between mines, there can be a direct hydrologic interconnection between adjacent mines. However, recently and actively operating mines better maintain coal barrier integrity, which greatly impedes ground-water movement between adjacent mines. Subsidence potholes and the general lowering of the ground surface may also change the normal drainage pattern causing local surface flooding. It is important to note that the area of hydrologic impacts can extend beyond the subsided area.

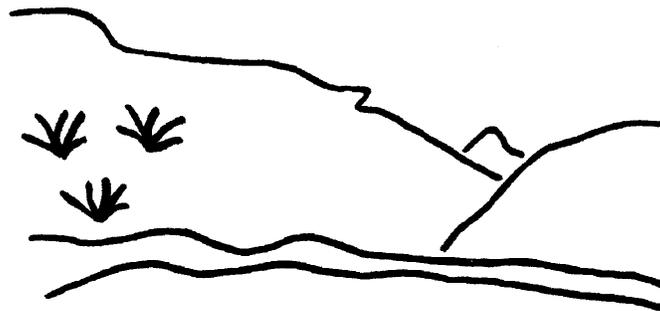
Fracturing of rock strata can also affect the ground-water hydrologic system. If the confining strata below an aquifer fractures, this could cause the aquifer to drain and its potentiometric surface to drop. As a result, wells could go dry and springs fed by ground-water discharge could be reduced or dry up entirely. Fractures created in the rock strata may also result in intermixing of poor quality ground water with potable ground water.

Underground mining may cause ground- and surface-water contamination. Surface water can be degraded by discharges from subsurface workings containing water with acid or toxic characteristics and elevated concentrations of metals and sulfate. Flow of degraded surface water to the ground-water system from fractures extending to the surface can result in increased mineralization of ground water. Underground mining may dewater overlying water-bearing zones and impacts may extend beyond the local surface-water drainage divide. This can result in interbasin transfer of water and gaining or losing streams. Also, pumpage of excess water from active workings can contribute to stream channel erosion and an increase in suspended solids.

After mining, the mine workings can flood and raise the water table. Effects vary with topographic location. Below-drainage mines flood completely; above-drainage mines may only flood partially. Above-drainage mines can also have outcrop barrier seepage and may be susceptible to blowouts. Methane and other gases such as hydrogen sulfide and carbon monoxide can migrate into wells from below-drainage underground mines leading to serious problems. Partially flooded workings may allow the circulation of air which induces the production of acid mine drainage.



# State of Utah



## Utah Oil Gas and Mining

### Coal Regulatory Program

Sufo Mine  
Mining Under the East Fork of Box Canyon  
Permit # C041/0002, Task ID #1713  
Technical Analysis  
September 30, 2003

Page 10  
C/041/0002  
Task ID #1713  
September 30, 2003

#### ENVIRONMENTAL RESOURCE INFORMATION

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Minor Modification to the R2P2. The letter describes the changes in coal reserves as a result of deleting the "sand channel area" in Panels 3LPE and 4LPE and adding the East Fork of Box Canyon coal blocks. CFC also included the Documentation of Land use Plan Conformance and NEPA Adequacy (DNA) prepared by the BLM, which includes a map showing the location of the sand channel and its relationship to the longwall panels, stream and lease boundary.

#### Findings:

Information provided in the application is considered adequate to meet the minimum Permit Area section of the Environmental Resource Information regulations.

#### HISTORIC AND ARCHEOLOGICAL RESOURCE INFORMATION

Regulatory Reference: 30 CFR 783.12; R645-301-411.

#### Analysis:

The current mining and reclamation plan contains confidential reports on cultural resources. Dr. FR Hauck et. al., of Archeological-Environmental Research Corporation (AERC) conducted the 1980, 1981, 1996, 1997 (a and b), 1999 Cultural Evaluations for the Southern Utah Fuel Company Coal Mine in Sevier County, Utah. The 1997 evaluation *Cultural Resource Evaluation Of A Potential Mining Subsidence Zone In The Pines Locality Sevier And Emery Counties, Utah* evaluates the Elusive Peacock. Scott Billat of Earth Touch (Layton, Utah) has conducted more recent monitoring of the Elusive Peacock (Mike Davis, personal contact, 9/9/03). Mr. Billat submits reports to the Permittee and USFS. DOGM does not have Mr. Billat's reported results at this time

Dr. Hauck (AERC) conducted the November 1997 Cultural Resource Evaluation of a Potential Mining Subsidence Zone in the Pines Locality Sevier and Emery Counties, Utah. This survey addressed the possible disruption to sites because of subsidence near Box canyon in the Pines, Wildcat Knolls, and Link Canyon. The surveyor identified twelve new cultural resource sites. Six are non-significant, two are undetermined, and four are significant resources having potential for nomination to the National Register of Historic Places. One of the four is the Elusive Peacock Shelter (site 42SV 2430; AERC 158200).

The Elusive Peacock Shelter consists of a rock shelter that measures 15 meters deep by 30 meters wide. This shelter rest partially on top of a large, wet rock cavern that is not eligible through NRHP. The large cavern contains springs seeping from the cave's walls. The majority of the shelter is intact and may contain a depth of 50 to 150cm. The floor of the shelter also partially serves as the roof of the large cavern. The shelter contains lithics, fire-cracked rock, bone, and possible hearth remains.

Page 11

C/041/0002

Task ID #1713

September 30, 2003

**ENVIRONMENTAL RESOURCE INFORMATION**

This site may contain buried features and occupational surfaces that have retained their integrity. It is a significant resource and is determined as eligible for inclusion on the National Register relative to criterion as defined in 36 CFR 60.6 (FEIS, Pines Tract Project, pg 3-153). This site is located in the potential subsidence zone and is susceptible to adverse affects due to subsidence and other disruptive effects associated with underground mining activities in the area. AERC (1997) considers that the shelter would collapse to the large cavern below, which would destroy any possible deposits or artifacts.

Agapito Associates, Inc. evaluated the possible degree of impact of subsidence on the Elusive Peacock (1998; FEIS, pg 3-160). Agapito assigned the Elusive Peacock as a Level III for possible effects. Level III addresses cultural resource sites that are located on cliff edges, overhangs, or canyon edges. At Level III, subsidence and compression are present with compressional strains possibly causing some buckling and/or movement of the rock. At Level III, it is possible that cracking could cause block failure at sites located near cliff faces or escarpments resulting in potential adverse effect to cultural resources.

The MRP (pg. 4-9) references the MOA (00-MU-11041000-017) for information concerning the specifics of cultural resources in relation to subsidence monitoring, possible subsidence impacts, and mitigation. The MOA is between the USDA-Manti-La Sal National Forest, USHPO, DOGM, and CFC. In brief, the MOA covers the monitoring and mitigation plans of the cultural resource sites. The Permittee has every intention to follow all requirements set by the MOA.

The Division developed a monitoring/mitigation plan that covers hydrology, biology, and cultural resources (September 2003). The plan for cultural resources follows the MOA. The Permittee incorporated the MOA as part of the MRP (Appendix 4-5). The text below provides the details of the DOGM cultural monitoring and mitigation plan.

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**Cultural Resource Monitoring Plan for Mining Under Panels 3Left, 4Left in the East Fork of Box Canyon (September 30, 2003)**

**Monitoring Plan:** (MOA 00-MU-11041000-017; MRP pgs 4-9 to 4-10)

Amend MRP to reflect the implementation of Monitoring Plan in respect to the NRHP eligible - Elusive Peacock. Provide two copies of an Executive Summary of monitoring results. Include one copy in DOGM Annual Reports (2003, 2004, 2005, 2006, and indefinitely until movement ceases). The Division will provide the second copy to the Manti-La Sal National Forest.

Monitoring Plan: (paraphrased from MOA 00-MU-11041000-017 pg 12; refer to MOA for the explicit schedule)

- One time event: The Permittee will provide baseline conditions six months prior to the period of mining.

Page 35

C/041/0002

Task ID #1713

September 30, 2003

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**OPERATION PLAN**

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The revision to page 5-26 proposes the changes to verbiage stating; "where perennial streams are not undermined they will be protected from subsidence by establishing stream buffer corridors within the mine from which only limited coal recovery will occur. "Entries that cross through the underground stream buffer corridors with less than (the proposal is to change this depth from 600 to 300 feet) 300 feet of cover will be sealed and/or backfilled upon abandonment using the best available technology to prevent disturbance of the overlying streams."

The proposed revision to page 5-27 merely adds the words "and streams" to the text describing the surface structures overlying the area to be subsided. The structures referenced include trails, unimproved dirt roads, fences, and runoff catchment ponds.

A revision to the *Anticipated Effects of Mining*, as required by the minimum regulatory requirements, is being proposed through the addition of a paragraph under that section on page 5-39. The additional text states "it is anticipated that subsiding under portions of East Fork Box Canyon will result in a slight flattening of the stream gradient, which will increase pooling of the stream through a stretch of several hundred feet of the stream. The MRP predicts that surface cracks will likely develop across the East Fork Box Canyon Creek directly above the long wall panels and along the gate roads. These crack zones will form shortly after undermining of the streambed. They are anticipated to be 1 to 2 inches or less in width with these cracks healing to some degree following formation. Details of the expected location of the cracks are given in Appendix 7-19. If cracks do develop in the channel floor and appear to be taking surface water from the creek, sealing of these cracks will be done with bentonite grout."

Appendix 7-19 is included as part of the submittal and identifies the probable hydrologic consequences (of the effects) of longwall mining of the 3 Left and 4 Left Panel Modification Area at the Sufco Mine. The document was prepared by Mr. Eric Petersen, P.G. of Petersen Hydrologic.

**Chapter 6.0, PROBABLE IMPACTS TO THE HYDROLOGIC BALANCE, Fracturing of the Stream Substrate**, pages 17 through 19 indicate that "fractures that form in the stream substrate would have small apertures (usually less than ½ inch) because of lateral confining pressure present in the interior of the canyon (i.e., although the rock fractures, there is little space created)."

Additional information is provided which states that the cracks only develop in the stream substrate to depths of not more than a few tenths of feet ("dead end" fractures).

The closing paragraph of the Fracturing of the Stream Substrate section concludes that the "tension fractures that form in the Creek bottom will not significantly alter the hydrologic balance of East Fork by diverting surface waters into the subsurface. There may be some short-term diminution in flow as fractures fill with water, sediment and clays; however, this is not expected to be a major impact because of the localized areas where tension fractures may occur".



09/30/2003 07:48 FAX 4356377381

DIV OF WILDLIFE RESOURCE

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State of Utah  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF WILDLIFE RESOURCES

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29 July 2003

Jim Kohler  
BLM - Utah State Office  
PO Box 45155  
324 S. State St.  
Salt Lake City, UT 84145-0155

RE: UDWR concerns with undermining of Box Canyon

Dear Jim,

On July 17<sup>th</sup>, 2003 we toured Box Canyon to look at the potential impacts to wildlife and habitat from the undermining of this reach. UDWR has the following concerns with the undermining of Box Canyon:

We are concerned that subsidence may fracture subsurface bed materials and cause the loss of surface and subsurface flows, causing a desiccation of the area. This drying of the area will alter the community structure by decreasing or eliminating ephemeral pools (impacting amphibian habitat and free drinking water for terrestrial vertebrates), and lower the total biomass of invertebrates (reducing forage for many species of passerine birds and bats).

We suggest that a survey of avian, amphibian, and mammalian species abundance and density be conducted pre and post mining to determine the extent of the impacts to the ecological community in Box Canyon. Thank you for considering our comments. If you would like to discuss this issue, please call Craig Walker (Aquatic Biologist) or Leroy Mead (Habitat Biologist) at 435-636-0260.

Sincerely,

A handwritten signature in cursive script that reads "Derris Jones".  
Derris Jones  
Regional Supervisor

CJC/ew

**Utah!**  
Where utans connect



# East Fork Box Canyon Subsidence - Photos

10/14/2003

1

# Introduction

BLM, Utah State Office is considering approval of subsidence of segments of the East Fork of Box Canyon inconsistent with both FS and BLM RODs for leasing.

This presentation contains photographs of these segments (East Fork Box Canyon) to show conditions there and subsidence cracks in the Main Fork Box Canyon to illustrate potential effects.

10/14/2003

2

# Box Canyon Subsidence Cracks – Stream Channel

The following photos show subsidence cracks in the channel bottom and sides of Box Canyon that occurred from longwall mining. These are intended to show potential subsidence effects on perennial/perennial functioning sections of the East Fork of Box Canyon.

10/14/2003

3



Subsidence cracks in sands, the drainage bottom

10/14/2003

## Box Canyon Subsidence Cracks – Canyon Rim

The following photos show larger cracks generally associated with permanent subsidence strain parallel to panel sides and ends. Since the panels would cross the East Fork, it is possible that cracks similar to these could occur in the stream channel bottom.

10/14/2003

8



Shadows of cracks of canyon rim

10/14/2003

9



Subsidence cracks on canyon rim. See background in foreground for scale.

10

10/14/2003



Photo show  
Tim Howard Canyon

10/14/2003

7.15.2003

11