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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

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DISTRICT OF UTAH
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UTAH ENVIRONMENTAL CONGRESS,

Plaintiff,

vs.

UNITED STATES BUREAU OF LAND
MANAGEMENT, an agency within the U.S.
Department of Interior, KENT HOFFMAN,
in his official capacity as BLM Deputy State
Director for Lands and Minerals,

Defendant,

CANYON FUEL COMPANY, L.L.C.,

Intervenor Defendant.

ORDER

Case No. 2:03-CV-0911 DB

Before the Court is Utah Environmental Congress's ("UEC") Motion for Permanent Injunction, (Docket No. 61), United States Bureau of Land Management's ("BLM") and Kent Hoffman's (collectively "Federal Defendants") Motion to Lift Preliminary Injunction, (Docket No. 79), and UEC's Motion to Strike Affidavits of Wesley Sorensen and L. Craig Hilton, (Docket No. 94). UEC's request for permanent injunction is based upon alleged violations of federal law when BLM modified Canyon Fuel's resource recovery and protection plan ("R2P2"), allowing Canyon Fuel to mine coal in the Pines Tract area not previously authorized. UEC contends that BLM violated the National Environmental Policy Act ("NEPA"), the Mineral Leasing Act ("MLA"), the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"),

101

and the National Historic Preservation Act ("NHPA"). This action was brought as a review of the administrative record ("AR").

BACKGROUND

I. Factual History

In 1998, Canyon Fuel Company proposed to BLM a lease to mine coal located in the Manti-LaSal National Forest. This proposal included 7500 acres of land and was known as the Pines Tract Lease. Included in the Pines Tract Lease is an area known as the East Fork of Box Canyon. Upon receipt of Canyon Fuel's proposal for the Pines Tract Lease, BLM determined that the requested action would constitute action upon federal land and therefore began a combined effort with the United States Forest Service ("USFS") to assess the environmental impact of the proposed action. This process culminated in a final environmental impact statement ("FEIS"), which was issued on January 28, 1999.

The Pines Tract FEIS analyzed potential environmental impacts with regard to geology; hydrology; ground water; surface water; wildlife; livestock; sensitive species of mammals; insects; fish; plants; cultural and historic sites; grazing; stock water; cliff escarpments; soils; vegetation; air, visual and noise quality; maximum coal recovery; and socioeconomic considerations. The environmental effects of four different alternatives were considered, labeled A, B, C and D. Alternative A offered a no-lease alternative, under which Canyon Fuel's mining proposal would be rejected. Alternative B permitted mining subject to standard BLM lease terms and conditions. Alternative C allowed for mining the area but, in addition to the standard lease terms and conditions, required inclusion of USFS special stipulations that prohibited longwall subsidence mining under cliff escarpments and streams. Alternative D also allowed mining in

the area and included the standard terms and conditions, and, pursuant to special USFS stipulations, allowed in some instances longwall mining underneath cliff escarpment and stream areas.

BLM and USFS jointly approved the proposed Pines Tract Lease, adopting a combination of Alternatives C and D, which permitted mining but required the inclusion of certain stipulations. Each agency decision was memorialized in a separate Record of Decision ("ROD"). Among the various stipulations that were drafted by the USFS was Stipulation 9, which pertained to mining underneath cliff escarpments and perennial streams, as follows:

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 escarpments failure and landslides, (2) cause damage to existing surface structures, and (3) damage or alter the flow of perennial streams. The Lessee shall provide specific measures for the protection of escarpments, and determine corrective measures to assure that hazardous conditions are not created.

(AR at 56).

Based on the joint approval of BLM and USFS, and the subsequent approval of Canyon Fuel's R2P2, Canyon Fuel was issued a permit and began mining operations in the Pines Tract.

On February 20, 2003, Canyon Fuel submitted a request to BLM to modify the R2P2 to permit recovery of approximately three (3) to four (4) million tons of coal not previously authorized under the lease.¹ This modification would permit Canyon Fuel to perform subsidence mining under the East Fork of Box Canyon.

¹Canyon Fuel sought the modification of the lease because it had encountered a 320-foot wide sand channel that prevented coal recovery in the area where longwall mining was approved under the original R2P2.

After reviewing the relevant portions of both BLM's and USFS's RODs, BLM reviewed the previous NEPA studies of the area, including in particular the FEIS, to determine whether the environmental impacts associated with the proposed R2P2 modification had been adequately analyzed by the previous NEPA-related materials. BLM determined that if it found that existing NEPA-documents adequately analyzed the proposed action, no further formal environmental analysis was required.

Accordingly, BLM issued a "Documentation of Land Use Plan Conformance and NEPA Adequacy" ("DNA"). As part of the DNA process, a four-member BLM team consisting of a mining engineer, a biologist, a geologist and a NEPA coordinator reviewed a total of eight (8) NEPA related documents that covered the proposed action, including the Pines Tract FEIS, USFS's ROD and BLM's ROD.² In deciding whether the Pines Tract FEIS and the other NEPA documents adequately addressed Canyon Fuel's proposed modification to the R2P2, BLM engaged in the following seven-stage analytical approach:

1. Is the current proposed action substantially the same action (or is it a part of that action as previously analyzed)?
2. Is the range of alternatives analyzed in the existing NEPA document(s) appropriate with respect to the current proposed action, given current environmental concerns, interests, resource values, and circumstances?
3. Is the existing analysis adequate and are the conclusions adequate in light of

²The other materials reviewed as part of this analysis were two reports/papers, (*Fluid Flow Characterization of the Castle Gate Sandstone, Southern Wasatch Plateau, Utah; Interpretation of Reservoir Partitioning Through Permeability and Porosity Analysis and Probable Hydrologic Consequences of Longwall Mining of the 3 Left Panel Modification Area at the SUFCO Mine*), a Canyon Fuel proposal regarding the 3 left pines east stream buffer subsidence proposal, a letter from Erik C. Petersen regarding a site visit to the East Fork of Box Canyon, and the National Register of Historic Places MOU Agreement No. 00-MU-11041000-017, dated May 2000.

any new information or circumstances (including, for example, riparian proper functioning condition [PFC] reports; rangeland health standards assessments; Unified Watershed Assessment categorizations; inventory and monitoring data; most recent Fish and Wildlife Service lists of threatened, endangered, proposed, and candidate species; most recent BLM lists of sensitive species)? Can you reasonably conclude that all new information and all new circumstances are insignificant with regard to analysis of the proposed action?

4. Do the methodology and analytical approach used in the existing NEPA document(s) continue to be appropriate for the current proposed action?

5. Are the direct and indirect impacts of the current proposed action substantially unchanged from those identified in the existing NEPA document(s)? Does the existing NEPA document sufficiently analyze site-specific impacts related to the current proposed action?

6. Can you conclude without additional analysis or information that the cumulative impacts that would result from implementation of the current proposed action are substantially unchanged from those analyzed in the existing NEPA document(s)?

7. Are the public involvement and interagency review associated with existing NEPA document(s) adequately [sic] for the current proposed action?

(AR, 9-17.) After an analysis of the documents, each of these questions was answered in the affirmative. As part of its DNA review, BLM made numerous findings regarding subsidence, an issue pertinent in the present action:

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 DNA then quotes sections of the FEIS, stating that

The loss of hydrologic function of hydric soils (18.6 acres) due to alteration of the surface and shallow groundwater flows by subsidence-induced fractures would be short termed. Most of the fractures would be filled by natural sedimentation and/or swelling for the clays in the rock stratas, thus restoring the natural hydrologic function. The short-term loss would be quickly restored naturally and should not irreversibly affect riparian or wetland vegetation communities (FEIS page 3-89).

The floor of East Fork Box Canyon is built up from colluvium that has accumulated against the face of the escarpment. The groundwater that seeps throughout the sedimentary rocks maintains a moist soil condition in these colluvial deposits well above the level attributed to the creek flow. This zone, often as much as 20 feet above the creek level, supports riparian species. Therefore, the diversion of the surface flow of the perennial waters in East Fork Box Canyon would not impact these "perched" riparian zone[s] that are recharged from ground water seeping into the canyon above the creek level (FEIS page 3-101).

...

All of these findings support the idea that the stream channels could be undermined with a low probability of affecting the stream. If impacted, the impacts would be short term in nature and would mitigate naturally. If natural mitigation will not produce the desired condition in a timely manner, other mitigation measures are available as stated in many place [sic] in the FEIS.

In addition, the DNA recognized the differing opinions held by BLM and USFS regarding impact and duration of possible stream impacts and stated, "[a]lthough the Forest Service has expressed their concerns with approval of the proposed modification, they have provided no documented information that would contradict statements in the FEIS nor other information that has not been considered as part of the process in the FEIS." (AR, 19.)

After answering each of the above questions in the affirmative, and offering considerable explanation as to how each conclusion was reached, as evidenced by the above example, BLM

concluded that existing NEPA documentation “fully covers the proposed action and constitutes BLM’s compliance with the requirements of NEPA.” (AR, 20.)

Around the same time the DNA was completed, and in connection with BLM’s consideration of the proposed R2P2 modification, BLM requested and received advice and responses from the United States Department of the Interior, Office of the Solicitor, and the USFS. In a letter dated June 26, 2003, the office of the Solicitor stated that because BLM is the agency that administers federal coal leases and has the responsibility and authority to apply the Pines Tract Lease, including its stipulations, BLM had the final authority to approve the R2P2 modification. (AR, 287-88.) In a letter from the United States Department of Agriculture, Forest Service, Mr. Jack Troyer, Regional Forester, stated that (1) BLM is the agency responsible for enforcing the terms and conditions of federal coal leases, (2) BLM has the authority to approve the proposed R2P2 modification if done consistent with the lease, (3) although USFS was required to (and did) consent to the initial Pines Tract Lease in order for the lease to go forward, USFS consent for the proposed R2P2 modification would not be required unless “the State [of Utah] or OSM [Office of Surface Mining] determine[d] the modification to be significant.” (AR, 429-30.)

On July 31, 2003, BLM gave its initial approval for the R2P2 modification. As required by law, Canyon Fuel then submitted a permit application package to the OSM and the Utah Division of Oil, Gas and Mining (“DOGM”). On August 4, 2003, the OSM reviewed the proposed R2P2 modification and concluded that the proposed modification did not “constitute a mining plan action requiring Secretarial [that is, the Secretary of Agriculture] approval.” (AR, 484.) On September 30, 2003, after completing a technical analysis, DOGM approved the R2P2

modification.

II. Procedural History

On October 15, 2003, UEC brought a motion for preliminary injunction to halt the mining of the 3L and 4L panels proposed to be mined by Canyon Fuel and as authorized by the modified R2P2. (Docket No. 2.) The Federal Defendants and Canyon Fuel opposed the motion. On October 29, 2003, after hearing oral argument, the Court denied UEC's motion as it related to the 3L³ panel but granted the motion as it related to the 4L panel. (Docket No. 21.) As a result, UEC's present motion for permanent injunction and the Federal Defendants' related motion to lift the preliminary injunction only relate to the 4L panel.

DISCUSSION

I. Legal Standard

UEC seeks to permanently enjoin coal mining of the 4L panel as outlined in the modified R2P2. In order to prevail on a motion for permanent injunction, UEC must meet an exacting standard, establishing: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Fisher v. Lkla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003).

³Mining of the 3L panel has already begun and is possibly finished by this point. According to Canyon Fuel, to mine around the 4L panel would impose substantial costs on Canyon Fuel: \$1,563,000 in moving costs, \$4,987,500 in lost sales revenue, and \$27,075,000 in lost market value of the coal. In addition are lost royalties to the United States, state and local governments in the estimated amount of \$2,166,000.

II. Analysis

A. Success on the Merits

In order to satisfy the first element of the test for permanent injunction, the moving party must establish actual success on the merits and it must do so consistent with the standard of review the Court is obligated to apply when reviewing an administrative record. Although the parties hotly dispute nearly everything in this lawsuit, they do agree that the standard of review the Court is to apply in its review of BLM's decision is the highly deferential arbitrary and capricious standard of the Administrative Procedures Act, 5 U.S.C. § 701 et seq. ("APA"). Success on the merits is demonstrated only if UEC can establish that BLM's decision to modify the R2P2 was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). UEC alleges BLM acted arbitrarily and capriciously when it approved the R2P2 modification because, in so doing, it violated four federal statutes, namely NEPA, MLA, SMCRA and NHPA.

1. National Environmental Policy Act

NEPA's two requirements are that (1) "all agencies of the Federal Government" prepare an environmental impact statement when major federal actions are taken that will significantly affect the quality of the human environment, 42 U.S.C. § 4322(2)(C); *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983), and (2) that it inform the public regarding its inclusion of environmental concerns in its decision-making process, *Baltimore Gas*, 462 U.S. at 97. In requiring that environmental concerns be a factor in the calculus of agency decisions, Congress did not elevate environmental concerns above other legitimate considerations, but required that certain procedures be followed when making decisions that affect the environment. *Id.* (internal

citations omitted). The Court's role in cases alleging a NEPA violation is to "ensure that the agency has adequately considered and disclosed the environmental impact of its actions" *Id.* at 97-98 (internal citations omitted).

UEC claims three separate NEPA violations regarding BLM's decision to approve the R2P2 modification: (1) BLM improperly classified the East Fork project as a categorical exclusion, thereby excluding it from NEPA analysis, (2) BLM failed to prepare a supplemental EIS ("SEIS"), and (3) BLM failed to involve the public in the decision-making process. The Court will address each argument in turn.

a. Categorical Exclusion

BLM's NEPA Handbook provides that proposed actions for federal lands fall within one of five categories: (1) actions which are exempt from NEPA requirements, (2) actions which are categorically excluded from NEPA requirements, (3) actions which are covered by existing NEPA documents, (4) actions which require preparation of an environmental assessment ("EA") to determine if an EIS is needed, and (5) actions which require preparation of an EIS. (AR, 492-95.) UEC's sole basis to support its claim that BLM considered the East Fork project as a categorical exclusion is that the first page of the DNA states that "[s]uch a change is normally considered as a minor modification to an existing mining plan and categorically excluded under BLM's NEPA policy." (AR, 6.) UEC therefore contends that BLM classified the East Fork project as a categorical exclusion in order to exclude it from NEPA analysis. Conversely, BLM maintains that despite the use of these words in the DNA, it was clearly decided the project was covered by existing NEPA documents.

The DNA, when considered in its entirety, fully supports BLM's position. UEC's

argument is a hasty generalization not supported by the record. The DNA begins with a statement of its purpose: "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.*" (AR, 7, emphasis added.) The conclusion of the DNA process belies any suggestion that it is intended as a means by which NEPA compliance was to be avoided: "Based on the review documented above, I conclude that this proposal conforms to the applicable land use plan and that the *existing NEPA documentation fully covers the proposed action* and constitutes BLM's compliance with the requirements of NEPA." (AR, 20, emphasis added.) The DNA provides clear evidence that BLM classified the East Fork project as covered by existing NEPA documents, not as an action that is categorically excluded from NEPA analysis.

b. Supplemental Environmental Impact Statement

UEC alleges that BLM violated NEPA by failing to supplement the original Pines Track FEIS. Agencies are required to prepare a supplemental EIS if there are (1) "substantial changes in the proposed action that are relevant to environmental concerns" or (2) "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(i)-(ii); see also *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372-73 (1989). This supplementation requirement is not so strict that it mandates that an agency "supplement an EIS every time new information comes to light" but it does require, at a minimum, that the agency take a "hard look" at every proposed action. *Marsh*, 490 U.S. at 373. In *Marsh*, the United States Supreme Court likened an agency's duty to take a "hard look" at proposed agency action to its duty to prepare an EIS in the first instance, "[i]f

there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent *not already considered*, a supplemental EIS must be prepared." *Marsh*, 490 U.S. at 373-74 (emphasis added) (quoting 42 U.S.C. § 4332(2)(C)).

UEC's claim that BLM violated NEPA by failing to prepare an SEIS as part of its decision-making process in permitting mining beneath the perennial streams of the East Fork area has at its heart a fundamental misreading of *Marsh*. It is only those actions that will affect the environment in ways not previously considered that will create an obligation for an agency to prepare an SEIS. *Id.* Where, as here, the environmental impacts of the approved change were previously assessed, *Marsh* imposes no duty to prepare an SEIS. The conclusion BLM reaches at the end of its DNA, that no SEIS is required by law, is extensively supplemented by the administrative record.

As discussed in the DNA, BLM employed a team of experts, including a mining engineer, a biologist, a geologist and a NEPA coordinator to consider whether the host of existing NEPA-related materials adequately addressed the environmental concerns raised by the R2P2 modification. In addressing whether the existing NEPA documents adequately analyzed the proposed R2P2 modification, BLM first determined that the R2P2 modification was substantially similar to the original Pines Tract Lease that was previously analyzed. In reaching this conclusion, BLM cited portions of the Pines Tract FEIS that were specific to the East Fork of Box Canyon finding that: (1) the loss of hydrologic function of hydric soils would be short-termed and any fractures would be naturally repaired, thus restoring the natural hydrologic function and not irreversibly affecting riparian or wetland vegetation communities; and (2) the

accumulated colluvium that makes up the floor of the East Fork of Box Canyon allows for groundwater to seep through and maintain a moist soil condition to support riparian species, which will not be impacted if the surface flow of the perennial waters is diverted.⁴

BLM then found that any new information and new circumstances present in the R2P2 modification were insignificant. In reaching this determination, BLM, in consultation with the United States Fish and Wildlife Service, considered the effect the R2P2 modification would have on wildlife (including the Mexican spotted owl, the Bald Eagle, the Northern Goshawk, and the Peregrine Falcon) and on possible escarpment failure. BLM also concluded that existing NEPA materials sufficiently analyzed site-specific and cumulative impacts related to the R2P2 modification; this conclusion relied upon information contained in the FEIS that related to ground water, surface water, soils, vegetation and wildlife.

Considering the above, BLM, in its DNA, took a "hard look" at all the information before it, both new and old, and decided, in its reasonable discretion, both that the environmental impacts had already been adequately analyzed in the existing NEPA documents, and that the R2P2 modification should be approved. The wisdom of that determination is not a question for this Court to determine. The correct standard of review is whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). In this case, the range of factors taken into account in the DNA, including the thoroughness with which each factor was considered, belie any suggestion that the BLM's

⁴The variety and complexity of the environmental factors considered by BLM in arriving at its conclusion provide a particularly apt illustration of the rationale underlying judicial deference to agency expertise in areas properly committed to agency, rather than judicial, discretion. *Baltimore Gas*, 462 U.S. at 103.

decision constituted an abuse of discretion or otherwise violated this legal standard.

The essence of UEC's alleged NEPA violation is that because the initial Pines Tract Lease did not provide for mining underneath perennial streams in the East Fork of Box Canyon, a supplemental EIS should have been prepared. UEC misunderstands the impact of the law as articulated in *Marsh*. *Marsh* stands for the proposition that if the environmental impacts of a proposed change in action were previously considered, there is no duty to prepare an SEIS. That is the very conclusion BLM reached, within its discretion, in its DNA.

c. Public Notice

UEC's final allegation of a NEPA violation is that BLM failed to notify the public of the East Fork project. UEC's claim that BLM was required to notify the public regarding the East Fork project is without legal support. An agency is required to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a). However, this duty to involve the public does not apply to actions BLM reasonably determined to have been previously covered by existing NEPA documents. UEC has not directed the Court to a statute, regulation or case law that would require BLM to inform the public about action that was previously considered in the FEIS. Case law and common sense mandate the opposite conclusion.

In considering whether it was required to prepare an SEIS, BLM reasonably determined that the environmental impacts of the proposed action in the East Fork of Box Canyon were previously considered by existing NEPA documents. That classification extinguished further responsibilities BLM was required to perform pursuant to NEPA regarding the contemplated action; it was not required to create an SEIS. In this regard, the Court finds persuasive the Ninth

Circuit Court of Appeals's reasoning in *Friends of the Clearwater v. Dombek*: "[a]lthough NEPA requires agencies to allow the public to participate in the preparation of an SEIS, there is no such requirement for the decision *whether* to prepare an SEIS." 222 F.3d 552, 560 (9th Cir. 2000) (emphasis in original) (internal citations omitted). BLM's reasonable classification of the proposed R2P2 modification as already covered by existing NEPA documents was not a decision that required public comment. In the instant case, the decision-making process for the Pines Tract EIS covered an eighteen-month period which afforded the public ample opportunity to comment on the proposed action. The public responded to its opportunity to comment by submitting numerous written comments and verbal comments.⁵

2. Mineral Leasing Act and Surface Mining Control & Reclamation Act

UEC claims that BLM violated MLA and SMCRA by failing to comply with Stipulations 3 and 9 of the Pines Tract Lease and by mining in an area "unsuitable" for mining.⁶

⁵In addition to the above rule articulated by the Ninth Circuit Court of Appeals, the Court is also persuaded by an unpublished case by the Ninth Circuit that recognized that, even when an agency has a duty to supplement an EIS and the supplemental EIS is prepared, an agency is "not required to circulate its supplemental information report for public comment." *Forest Conservation Council v. Espy*, 42 F.3d 1399, (9th Cir. 1994) (unpublished) (internal citations omitted). The Ninth Circuit's rationale in *Espy* was based on 40 C.F.R. § 1502.9(c)(1), which requires only substantive, not procedural, standards in deciding whether to prepare a supplemental EIS. Although *Espy* is an unpublished decision from another circuit, the Court nonetheless finds the reasoning stated therein persuasive as to the facts of this case; BLM did not have a procedural duty to notify the public of its decision to go forward with mining in the East Fork area especially when it was not required to prepare a supplemental EIS.

⁶UEC states additional grounds for alleged violations of the MLA and SMCRA, namely that BLM improperly modified the Pines Tract Lease without USFS consent. The Court, however, will not separately address this argument because it is adequately considered in the Court's analysis regarding Stipulation 9. UEC sums up its Lease modification argument by stating: "To mine under the East Fork of Box Canyon Creek would violate stipulation nine, and therefore the Pines Tract Coal lease." (Motion, p. 17.) The Court's analysis regarding the alleged violation of Stipulation 9 will therefore address UEC's claim regarding a Lease

a. Stipulation 3

Included as part of the Pines Tract Lease were specific USFS stipulations. UEC avers that BLM's decision to modify the R2P2 violates Stipulations 3 and 9 of the Lease. Stipulation 3 reads:

The lessee shall be required to perform a study to secure adequate baseline data to quantify the existing surface resources on and adjacent to the lease area. Existing data may be used if such data are adequate for the intended purposes. The study shall be adequate to locate, quantify, and demonstrate the interrelationship of the geology, topography, surface and groundwater hydrology, and wildlife. Baseline data will be established so that future programs of observation can be incorporated at regular intervals for comparison.

Although UEC makes detailed allegations regarding BLM's and Canyon Fuel's failure to meet its Stipulation 3 obligations, before the Court can address the merits of those claims it must determine whether they were properly raised.

Generally, a plaintiff's claims are limited to those properly framed by the complaint. *See Pierce v. Montgomery County Opportunity Board, Inc.*, 884 F. Supp. 965, 970-71 (E.D. Penn. 1995). UEC's allegation of a Stipulation 3 violation is not pled in the complaint. Even under the broad pleading requirements found in the Federal Rules of Civil Procedure, i.e. notice pleading, the Court is unable to find where in the complaint UEC pled facts that would put BLM and Canyon Fuel on notice that it was alleging that BLM's approval of the R2P2 modification was a violation of Stipulation 3. UEC's claim regarding a violation of Stipulation 3 is therefore not properly before the Court.

In addition, UEC has the burden of proof and persuasion as to its standing to bring this claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To establish standing UEC

modification.

must establish:

(1) an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that is fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

UEC has alleged that it regularly recreates in the general area affected by the R2P2 modification and that the R2P2 modification, if allowed to go forward, will harm UEC's aesthetic and recreational interests in the area. However, this is not enough to establish an injury in fact for a violation of Stipulation 3. Stipulation 3 applies specifically to the lessee, Canyon Fuel, and requires Canyon Fuel to obtain base-line data regarding various environmental data. UEC has not made any allegation in its complaint regarding how Canyon Fuel's alleged failure to obtain this base-line data has injured UEC. Therefore, UEC lacks standing to bring a claim alleging a violation of Stipulation 3.

Even if UEC had standing to bring a complaint that Stipulation 3 was violated, the claim would fail because Canyon Fuel, the lessee, complied with Stipulation 3 in obtaining the required base-line data. Utah law requires that entities wishing to mine in a particular area must include in their permit applications certain information. *See* Utah Admin. Code R645-310-121.100; *see also*, Utah Admin. Code R645-200, R645-300, R645-301, R645-302 (2003). The required information consists of: (1) "Baseline information . . . includ[ing] hydrologic, geologic, and climatologic information", *id.*, at R645-301-724; (2) soil analysis, *see id.*, at R645-301-200; (3) vegetation analysis, *see id.* at R645-301-356; (4) land use and air quality analyses, *see id.*, at

R645-301-400; and (5) wildlife analysis, *see id.*, at R645-301-358. UDOGM approved Canyon Fuel's mining permit and in so doing determined that it performed the analyses required not only by statute but also, implicitly, as required by Stipulation 3. Because this determination is entitled to a presumption of procedural regularity and substantive validity, *see Citizens to Preserve Overton Park, Inc.*, 401 U.S. 402, 415 (1971), which UEC has failed to rebut, the Court finds that Stipulation 3 was not violated.

b. Stipulation 9

Stipulation 9 provides:

Except at specifically approved locations, underground mining operations shall be conducted in such a manner so as to prevent surface subsidence that would (1) cause the creation of hazardous conditions such as potential escarpment failure and landslides, (2) cause damage to existing surface structures, and (3) damage or alter the flow of perennial streams. The Lessee shall provide specific measure for the protection of escarpments, and determine corrective measures to assure that hazardous conditions are not created.

UEC alleges that BLM violated Stipulation 9 when it approved the R2P2 modification because "Stipulation 9 . . . made it known that surface structures were to be protected, and damage to or alteration of perennial stream flow was to be avoided." (Memo ISO Motion, p. 16.) BLM counters UEC's argument, asserting that BLM's decision to modify the R2P2 fully complied with Stipulation 9 because (1) Stipulation 9 is not a complete prohibition on mining, (2) BLM, as the agency authorized to administer the Pines Tract Lease, reasonably interpreted the lease to allow it to specifically approve mining in the East Fork of Box Canyon, and (3) USFS's position regarding mining in the East Fork of Box Canyon was that BLM did not need USFS's consent unless OSM determined that the modifications were significant. The Court, having reviewed the parties' arguments and relevant law, agrees with BLM and adopts its position regarding an

alleged violation of Stipulation 9.

As a preliminary matter, the Court observes that some measure of deference is due BLM's interpretation of its own lease. In *United States v. Southwest Potash Corp.*, 352 F.3d 113 (10th Cir. 1965), the Tenth Circuit Court of Appeals recognized that the construction of a royalty provision of a mining lease by the Secretary of Interior is entitled to great respect. *Id.* at 116. The *Potash* decision accords with case law from numerous federal courts of appeal, including the District of Columbia, Fourth and Fifth circuits, which have held that "interpretation of a contract by the federal agency concerned is entitled to deference." *Consolidated Gas Supply Corp. v. Federal Energy Reg. Comm'n*, 745 F.2d 281, 291 (4th Cir. 1984); *see also, A/S Ivarans Rederi v. United States*, 895 F.2d 1441, 1447 (D.C. Cir. 1990) and *Coca-Cola Co. v. Atchison, Topeka, and Santa Fe Ry. Co.*, 608 F.2d 213, 222 (5th Cir. 1979). Because, as the parties agree, BLM is the agency empowered to administer the lease in question, the Court will afford it some deference in its interpretation of Stipulation 9.

The tendency toward deference is strengthened by the reasonableness of the actions undertaken by BLM in order to ensure compliance with obligations imposed by statute and by the lease. As the agency in charge of the surface rights of the federal land implicated in the proposed mining of the Pines Tract area, USFS was required by law to give approval for the Pines Tract Lease. USFS conditioned its consent on the inclusion of certain stipulations in the Pines Tract Lease, including Stipulation 9, which was drafted by USFS. The initial plans by Canyon Fuel, as agreed upon in the Lease, did not include mining the 4L panel in the East Fork of Box Canyon. However, after encountering a 320-foot wide sand channel that prevented mining of coal explicitly authorized in the Lease, Canyon Fuel proposed to BLM a request to mine the 4L panel.

This request posed some difficulties for BLM, because the land under which Canyon Fuel requested to mine contained a perennial stream, thereby rendering applicable Stipulation 9.

In determining the impact of Stipulation 9, BLM first interpreted Stipulation 9 pursuant to its plain meaning: Stipulation 9 is not a complete prohibition on mining under perennial streams. Rather, Stipulation 9 explicitly states that such mining may occur “at specifically approved locations” Stipulation 9, however, is ambiguous as to who is authorized to give such approval. In an effort to determine whether BLM was entitled to approve the R2P2 modification as per Stipulation 9, BLM sought direction both from the United States Department of the Interior, Office of the Solicitor, and the USFS. In a letter dated June 26, 2003, received in response to its request, BLM was advised by the office of the Solicitor that, as the agency in charge of administering the coal lease in question it could, consistent with Stipulation 9, approve the R2P2 modification. This advice was based in large part upon the reasoning that the language of Stipulation 9 was not a mining prohibition, but actually allowed mining in specifically approved locations even if the three conditions specifically mentioned in the lease would occur. The Office of the Solicitor believed that, because BLM was the agency authorized to implement the Lease, it was also authorized to grant the specific approval as per Stipulation 9. The Office of the Solicitor further reasoned that if USFS had intended to prohibit subsidence mining altogether, it would have said so.

Additionally, BLM consulted with USFS regarding the proposed R2P2 modification. On July 29, 2003, Jack Troyer, Regional Forester of USFS, wrote a letter to BLM regarding the proposed R2P2 modification. In that letter, Mr. Troyer as a representative of USFS, “recognize[d] that BLM has the responsibility for administration of federal leases and as such has

the authority to approve the proposed R2P2 modification as long as it is consistent with the terms of the lease.” Mr. Troyer also recognized that USFS’s approval would only be necessary “[i]f the State or OSM determines the modification to be significant based on their existing criteria.”

OSM later determined that the R2P2 modification was not a significant mine plan modification.

Based on these responses and pursuant to its independent analysis, on July 31, 2003, BLM approved the modification of the R2P2. In light of the fact that Stipulation 9 does not prohibit mining under perennial streams, the understanding between BLM and USFS that BLM was authorized to administer the Lease, and USFS’s deferral to OSM regarding consent for the R2P2 modification, it was reasonable for BLM to interpret Stipulation 9 to mean that it was the entity empowered to approve mining the 4L panel in the East Fork of Box Canyon. This decision appears particularly reasonable in light of the position taken by USFS during discussions regarding this very subject, as evidenced by the letter from Jack Troyer. When given the opportunity to articulate what it meant when it drafted Stipulation 9, USFS agreed with BLM that BLM had authority to authorize the R2P2 modification and that any consent on its part was contingent upon a subsequent finding by a wholly independent entity, OSM. USFS never stated that it was the entity that was entitled to specifically approve locations for mining that would affect perennial streams. The letter from Jack Troyer clearly demonstrates that the only other interested and arguable contractual beneficiary to the Pines Tract Lease, USFS, deferred any rights related to approval of the R2P2 modification to BLM and OSM. Because OSM did not find that the R2P2 modification constituted action that would require USFS consent, BLM’s determination that it has authority to interpret Stipulation 9 was not arbitrary or capricious.

Even if the Court did not afford BLM deference in its interpretation of Stipulation 9, and

reviewed BLM's interpretation of Stipulation 9 for correctness, the result would not change. Reviewing BLM's decision for correctness would turn on general principles of contract law as the Pines Tract Lease is, at its core, a contract between BLM and Canyon Fuel. The facts of this case put the Court in a rather interesting position. As a preliminary matter, there are only two parties to the Pines Tract Lease, BLM and Canyon Fuel; USFS is not a party, nor is UEC. BLM and Canyon Fuel agree as to the interpretation of Stipulation 9: BLM is empowered to authorize subsidence mining in specifically approved locations. UEC, not USFS, attempts through this lawsuit to interject its opinion that BLM and Canyon Fuel are not properly interpreting and therefore not enforcing their Lease. UEC is not an intended beneficiary of the Lease; at best it is an incidental beneficiary. *See Restatement (Second) of Contracts* § 302, at 439-40 (1981). "For a third party to have enforceable rights under a contract, then, that party must be an 'intended beneficiary' of the contract" *Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1386 (Utah 1989) (internal citations omitted). Because UEC is not an intended beneficiary of the Pines Tract Lease it cannot maintain an action against the BLM, or Canyon Fuel for that matter, for allegedly failing to properly interpret or enforce the Lease. *See id.*

c. Unsuitability

UEC claims that BLM violated SMCRA by allowing longwall mining beneath the Elusive Peacock Shelter, which is eligible for inclusion on the National Register of Historic Places, because the area is allegedly "unsuitable" for mining purposes. SMCRA, as a general rule, prohibits mining in areas that are eligible for the National Register of Historic Places. *See* 43 C.F.R. § 3461.5(g)(1). However, to compel agency compliance with SMCRA a citizen-plaintiff must follow clear procedural requirements delineated in the act, including providing

sixty (60) days' notice to the Secretary of the Interior prior to filing suit. *See* 30 U.S.C. § 1270(b); *Powder River Basin Coal Council v. Babbitt*, 54 F.3d 1477, 1486 (10th Cir. 1995). UEC has neither averred in its Complaint nor presented any evidence to the Court to establish that it notified the Secretary of the Interior prior to filing this lawsuit. Therefore, the Court dismisses this claim. *See Powder Basin*, 54 F.3d at 1486.

In addition, the Court finds that even if this claim were properly before the Court it would nonetheless fail because the land at issue, namely that in the East Fork of Box Canyon, was subject to the Pines Tract Lease when the R2P2 modification was proposed and subsequently passed. The implementing regulations of SMCRA unambiguously state that "The unsuitability criteria shall only be applied [] prior to lease issuance," 43 C.F.R. § 3461.3-1(a), and "[t]he unsuitability criteria shall not be applied to leased lands," *id.* at § 3461.3-2. Accordingly, the unsuitability provisions of SMCRA do not apply to the proposed modification of the R2P2.

3. National Historic Preservation Act

UEC claims that BLM's actions in approving the R2P2 modification are not in compliance with NHPA's mandates. At its core, NHPA is a procedural statute that places obligations on federal agencies to assess the potential impacts proposed federal action would impose on "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f (Section 106). In fulfilling its Section 106 duties, agencies must: (1) identify potential areas affected by the proposed action, (2) identify potentially affected objects within the area that are eligible for the National Register of Historic Places, (3) evaluate whether the proposed action will adversely affect the potential historic places, (4) if the agency concludes there will be adverse impacts on historic properties, it must

determine steps, through project modification or imposition of conditions, to avoid, minimize, or mitigate those impacts, (5) if the agency concludes there will be no such impacts "it may then propose a finding of no adverse effect to all consulting parties, including the state historic preservation officer (SHPO), relevant Native American Tribes, and the Advisory Council on Historic Preservation (Council). Unless the SHPO or the Council disagree with the ruling and intervene in the process, the agency may continue." *S. Utah Wilderness Alliance*, 277 F. Supp. 2d 1169, 1193-94 (D. Utah 2003).

UEC does not contend that BLM failed to comply with its Section 106 duties in initially evaluating the Pines Tract Lease; the Court finds that BLM complied with its Section 106 duties, as evidenced by the FEIS, which identified objects within areas potentially effected by the R2P2 modification that were eligible for inclusion on the National Register of Historic Places, evaluated the adverse impacts that would occur if mining were to occur as outlined in the R2P2 and determined steps necessary to avoid or mitigate any adverse impacts. UEC's claim regarding NHPA is that because the MOA did not contemplate mining under the Elusive Peacock Shelter and because USFS did not consent to the project, BLM was required to initiate a new NHPA process. UEC's argument is misguided; BLM fulfilled its procedural NHPA requirements as they relate to mining in the East Fork of Box Canyon. Completion of the FEIS ended BLM's obligations pursuant to NHPA because the FEIS specifically analyzed potential adverse impacts that could occur to the Elusive Peacock Shelter if mined. In addition, the FEIS listed specific mitigation, treatment and monitoring requirements to be implemented in an effort to comply with NHPA. By performing the above analysis, including the mitigation measures, BLM conformed with the procedural requirements of NHPA. Absent a showing that actual impacts or mitigation

for the East Fork project changed in a manner that was not previously analyzed, BLM's NHPA obligations, as they relate to mining in the East Fork area, were completed with issuing the FEIS. UEC has not established if and how actual impacts or mitigation for the East Fork project have changed since the FEIS was completed. Accordingly, BLM did not violate NHPA when it approved the R2P2 modification that permitted mining under the Elusive Peacock Shelter.

B. Irreparable Harm

UEC alleges that mining the 4L panel as outlined in the modified R2P2 threatens the environment of the East Fork of Box Canyon. UEC does not go so far to allege that irreparable environmental consequences will occur but states that the most likely environmental harms that will occur are damage to the streambed's geologic integrity and change in the stream flow. The standard UEC must satisfy is proof that the alleged harm is irreparable, i.e. permanent or at least of long duration, and is sufficiently likely to occur. *See Amoco Production Co. v. Vill. Of Gambell*, 480 U.S. 531, 545 (1987). The evidence before the Court does not support UEC's claim of irreparable harm. BLM stated in its DNA that:

All of these findings [in the FEIS] support the idea that the stream channels could be undermined with a *low probability* of affecting the stream. If impacted, the impacts would be *short term* in nature and would *mitigate naturally*. If natural mitigation will not produce the desired conditions in a timely manner, *other mitigation measures are available* as stated in many places in the FEIS.

In addition, the OSM, an independent entity, concluded that the modification to the R2P2 did not constitute "[a]ny change which would adversely affect the level of production afforded any land, facility or place designated unsuitable for mining." Based on the above evidence, UEC has failed to meet its burden of establishing a sufficient likelihood of irreparable injury; the opposite appears to be true. There is a low probability of impact on the stream; if impacted it would be of

short duration and would mitigate naturally, and if that natural mitigation is too slow in coming, other mitigation measures are available. Injury to the stream, if any, is not irreparable.

C. Balance of Harms⁷

UEC avers that the balance of the harms of issuing a permanent injunction favors UEC because any financial loss to the government was gained in contravention of the law and Canyon Fuel's only loss is the cost of moving the mining equipment. UEC misunderstands the impact a permanent injunction will have on BLM and Canyon Fuel.

First, BLM is mandated by Congress to obtain the "maximum economic recovery of coal within a tract." 30 U.S.C. § 201(a)(3)(c). If BLM is enjoined from authorizing the longwall mining of the 4L Panel in the East Fork of Box Canyon, the United States, state and local governments will be deprived of \$2,166,000 in royalties and other funds.

Second, if the Court were to grant the motion for permanent injunction Canyon Fuel will be forced to mine around the 4L Panel; failing to mine the 4L Panel will result in a loss of 1.9 million tons of coal. The total cost of mining around the 4L Panel is claimed by Canyon Fuel to be \$1,563,000 in moving costs, \$4,987,500 in lost sales revenue, and \$27,075,000 in lost market value of the coal.

When weighing the above alleged financial losses to the United States, state and local

⁷This is an appropriate place to address UEC's Motion to Strike Affidavits of Wesley Sorensen and L. Craig Hilton. UEC asks the Court to strike the affidavits because they are extra-record evidence not falling into one of the approved exceptions to the general prohibition regarding consideration of extra-record evidence when determining the correctness of agency action. Because the affidavits were neither submitted nor considered by the Court in determining the correctness of BLM's decision to modify the R2P2 (the first factor analyzed in whether to issue a permanent injunction), it DENIES the motion. The Court notes that it did rely on the affidavits in analyzing the other factors it must consider in reaching its determination regarding the issuance of a permanent injunction.

governments, not to mention Canyon Fuel, that would result if the Court permanently enjoined the mining of the 4L Panel, against the speculative claims of environmental harm alleged by UEC if the mining were permitted to go forward, the balance of the harms weighs in favor of denying the permanent injunction.

D. Adverse Effect on Public Interest

UEC claims that enjoining the mining of the 4L Panel would not be adverse to the public interest because the public has a significant interest in ensuring that decisions regarding public lands be made in full compliance with federal laws and regulations.⁸ The Court recognizes that interest as significant, however, as discussed more fully above, BLM did fully comply with each and every federal law and regulation applicable to the present situation.

In reality, if the injunction is issued the public will be adversely affected. Requiring Canyon Fuel to mine around large portions of the 4L Panel will result in the permanent loss of approximately 1.9 million tons of coal. The amount of coal lost would provide electricity to 476,796 households or 1,492,378 residents for one year. This is especially adverse to the public's interest in light of the President's energy policy that elevated the public interest in energy resources. Because BLM did not violate any federal rules or regulations in approving the modification to the R2P2, enjoining the mining of the 4L Panel of the East Fork of Box Canyon would be adverse to the public interest.

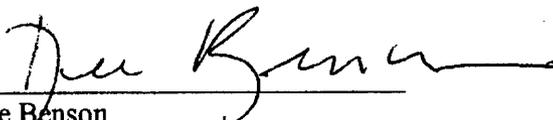
⁸In its reply, UEC raises additional reasons why the public interest would be adversely affected if the permanent injunction is not issued. The Court, however, will not address these grounds as they are improperly raised for the first time in UEC's response, thereby not providing the Federal Defendants or Canyon Fuel and opportunity to respond. *Thurston v. Page*, 931 F. Supp. 765, 768 (D. Kan. 1996); *Glad v. Thomas County Nat'l Bank*, 1990 WL 171068, at *2 (D. Kan. 1990).

CONCLUSION

For the aforementioned reasons, the Court DENIES UEC's Motion for a Permanent Injunction, GRANTS Federal Defendant's Motion to Lift Preliminary Injunction and DENIES UEC's Motion to Strike.

IT IS SO ORDERED.

DATED this 14th day of July, 2004.



Dee Benson
United States District Judge

United States District Court
for the
District of Utah
July 14, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00911

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