



URANIUM WATCH & LIVING RIVERS

182 IBLA 311

Decided June 25, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

URANIUM WATCH & LIVING RIVERS

IBLA 2012-101

Decided June 25, 2012

Appeal from and petition for a stay of a letter issued by the Field Manager, Moab (Utah) Field Office, Canyon County District, Bureau of Land Management, concerning ongoing operations at the La Sal Mine.

Appeal dismissed; petition for stay denied as moot.

1. Administrative Review: Generally--Appeals: Generally--Rules of Practice: Appeals: Generally

BLM's informational response to an inquiry from a member of the public with respect to ongoing permitted activities conducted by the permittee is not an appealable decision because such a response does not purport to take or authorize any action or confer any additional rights on the permittee that it did not already possess.

APPEARANCES: Sarah M. Fields and John Weisheit, Moab, Utah, for appellants; Michael A. Zody, Esq., Elizabeth A. Schulte, Esq., and Michael W. Young, Esq., Salt Lake City, Utah, for intervenors; Lawrence J. Jensen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Uranium Watch and Living Rivers (collectively, Uranium Watch) have appealed from and petitioned for a stay of the effect of a January 18, 2012, letter (BLM Letter) issued by the Field Manager, Moab (Utah) Field Office, Canyon Country District, Bureau of Land Management (BLM), concerning ongoing operations at the La Sal Mine (Mine), situated in southeastern Utah, near the town of La Sal, Utah. The Mine is operated by Denison Mines (USA) Corp., and owned by affiliated company Denison Colorado Plateau LLC (collectively, Denison), which have jointly intervened in the pending appeal. *See* Combined Motion to Intervene at 1.

BLM and Denison both move for dismissal of the appeal because the BLM Letter was not a final BLM decision, as required by 43 C.F.R. § 4.410(a), and, in the alternative, oppose the petition for a stay. Because we conclude that Uranium Watch's appeal is not taken from a final BLM decision, we grant BLM's and Denison's motions to dismiss.

Background

The Mine is, together with several other mines, part of the La Sal Mines complex (Complex), a large interconnected underground mining operation, situated on Federal, State, and private lands in Ts. 28 and 29 S., Rs. 24 and 25 E., Salt Lake Meridian, San Juan County, Utah, in the La Sal Mountains.¹ See Figure 1, Claims and Leases, Pandora Mines, dated Nov. 21, 2007 (attached to Note to File from BLM Geologist dated June 17, 2009). The involved Federal lands encompass approximately 36 acres of public land administered by BLM, covered by outstanding mining claims, situated in sec. 35, T. 28 S., R. 24 E., secs. 1 and 2, T. 29 S., R. 24 E., and sec. 6, T. 29 S., R. 25 E., Salt Lake Meridian, San Juan County, Utah.

Denison's initial predecessor-in-interest, Union Carbide Corporation, submitted an original Plan of Operations (POO) for the Complex on May 8, 1981, proposing to continue exploration and production operations for the recovery of uranium ore, pursuant to the U.S. Mining Laws, 30 U.S.C. §§ 21-54 (2006), and 43 C.F.R. Subpart 3809.²

BLM prepared an Environmental Assessment (UT-060-GR-1-29) on June 12, 1981, pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), and its implementing regulations, 40 C.F.R. §§ 1500.1-1518.4, in order to assess the likely environmental impacts of mining and related operations in the Complex. BLM approved the 1981 POO, subject to certain stipulations, in a June 12, 1981, decision. No appeal was taken from BLM's decision. BLM Response at 2. Since its approval of the 1981 POO, BLM has consistently monitored operations at the Complex for compliance with, among other

¹ The Complex previously was known as the Deer Creek mining complex. See Environmental Assessment (UT-060-GR-1-29), Union Carbide [Corporation]'s proposed Mining Activities at 1 (June 12, 1981).

² At that time, operations had been ongoing for 10 years. BLM Response to Petition for Stay; Motion to Dismiss (BLM Response) at 2.

things, the 1981 POO. *See generally* Administrative Record, various BLM Compliance Documentation, 1981-2011.³

Since Denison acquired its interest in the Complex, it has been conducting mining and related operations under the 1981 POO. Denison's Motion to Dismiss and Opposition to Appellant's Petition for Stay (Denison's Motion) at 2. Beginning in 2007, Denison began discussing with BLM its plans to rehabilitate and possibly expand various structures, facilities, and operations at the Complex. *See, e.g.*, Denison Letter to BLM, dated Oct. 10, 2007, at 1. However, "[p]rior to any disturbance, an amended Plan of Operation and NEPA documentation will be provided." *Id.* It also later confirmed that with respect to the Mine, "Denison does not intend to go outside of the existing, approved disturbed area, or conduct activities outside of those originally proposed. The current [1981] Environmental Assessment (EA) and Plan of Operations (PO) for the La Sal Mines encompass the La Sal mine area, the Snowball, and the small waste rock area at the Beaver Shaft." Denison Letter to BLM, dated Aug. 24, 2009, at 1. Denison has since submitted its proposed POO Amendment (POA) for the Complex, dated November 2010. BLM currently is reviewing the POA. BLM Response at 3; Denison's Motion at 2.

Uranium Watch sent a letter to BLM, dated September 6, 2011, asking, among other things, that BLM "confirm that the BLM considers the 1981 POO as sufficient under its regulations and that Denison's operations at and near the La Sal Mine portal are covered by this POO. Also, please confirm that the 1981 EA is a sufficient National Environmental Policy Act document for the current mining operations at the La Sal Mine." This letter also included allegations that the 1981 POO "is deficient in several respects" and that omissions in the 1981 POO "also call into question the BLM's 1981 Environmental Assessment."

BLM responded with the BLM Letter, which stated:

With respect to the sufficiency of the EA for the operation of the La Sal Mine. The mine plan [1981 POO] is sufficient. No new decisions have been made under the 1981 Deer Creek Group which encompasses the La Sal Mine, the Beaver Shaft waste rock pile and the Snowball Mine collectively. An EA is sufficient until a new decision needs to be made. The Deer Creek Group Mining Plan of Operations is included in La Sal Mines Complex Mine Plan [POA] which is undergoing environmental analysis.

³ Operations at the Complex also have been subject to compliance monitoring by the Utah Division of Oil, Gas and Mining (DOG M). *See generally* Administrative Record, various DOGM Compliance Documentation and related correspondence, 1988-2010.

After receiving the BLM Letter, Uranium Watch filed its appeal and petition for stay. BLM and Denison both oppose the stay petition, and also move the Board to dismiss Uranium Watch's appeal because the BLM Letter is not a final BLM decision, as required by 43 C.F.R. § 4.410(a). Uranium Watch objects to BLM's and Denison's motions to dismiss.

Discussion

In order to properly pursue an appeal from a BLM decision, the issues raised by the appeal must be ripe for review by the Board. To be ripe for review, the appeal must be taken from a final BLM "decision," under 43 C.F.R. § 4.410(a). A "decision" is generally held to take or prohibit some action that affects a person having or seeking some right, title, or interest in public lands or resources. *See, e.g., GEO-Energy Partners-1983 LTD.*, 170 IBLA 99, 119 (2006), *aff'd*, *GEO-Energy Partners-1983 LTD. v. United States*, 551 F. Supp. 2d 1210 (D. Nev. 2008), *aff'd*, 613 F.3d 946 (9th Cir. 2010). Where a BLM decision is not yet final, an appeal is premature, since it does not present any issues ripe for review, and thus is properly dismissed. *See, e.g., Powder River Basin Resource Council*, 180 IBLA 32, 44 (2010).

If Uranium Watch intends to appeal BLM's decision approving the 1981 POO and 1981 EA, as is suggested by its September 6, 2011, letter to BLM and its SOR, *see* SOR at 13-17, such an appeal clearly is untimely and must be dismissed. *See* 43 C.F.R. § 4.411(a) (notice of appeal must be filed no later than 30 days after the date of service of the decision). To the extent that Uranium Watch intends to appeal any aspect of Denison's proposed POA and the related EA, such an appeal is premature, as those documents have not been finalized and BLM has yet to issue its decision. *See, e.g., Powder River Basin Resource Council*, 180 IBLA at 44 ("Where a BLM decision is not yet final, an appeal is premature and properly dismissed if it does not present any issues ripe for review.").

As for the BLM Letter, and Uranium Watch's assertion that in issuing the BLM Letter "BLM incorrectly made a decision that the mine plan for the La Sal Mine 'is sufficient' for the reopening and operation of the mine," SOR at 12, we must evaluate the nature of the letter. We have long held that there is no particular form to a decision. *See, e.g., Mesa Sand and Rock, Inc.*, 128 IBLA 243, 245 (1994). A decision may have been made even if it does not include an appeals paragraph setting forth the right to appeal BLM's action to the Board. *See, e.g., Hacienda del Cerezo, Ltd.*, 135 IBLA 277, 279 (1996). But, "[t]his Board's appellate review authority cannot be invoked simply because someone may object to something BLM is doing. . . . there

must be an identifiable decision.” *Southern Utah Wilderness Alliance*, 122 IBLA 17, 20 (1992).⁴ In this case, as we have said before in other cases, the BLM Letter

is not captioned as a proposed or final decision; its language and tone do not purport to take any action, and is clearly explanatory in nature; it is obviously a response to a previous communication from [appellant] . . . ; and it does not include the standard paragraphs that unambiguously inform adversely affected persons of their appeal right and right to seek a stay of the decision.

Michael R. Ware v. U.S. Department of the Interior, No. Civ. 03-3081-CO, 2004 WL 2513916, at *3 (D. Or. Nov. 8, 2004) (Cooney, Mag. J.) (adopted 2004 WL 3103943 (D. Or. Dec. 2, 2004), *quoting and affirming*, *Michael R. Ware*, IBLA 2003-66, Order dated Dec. 30, 2002.

The BLM Letter was elicited by Uranium Watch, not as the result of an application to enter or use public lands and resources but by a request for information about Denison’s ongoing permitted operations. The BLM Letter did not purport to take or authorize any specific action that adversely affected Uranium Watch, *see Cambrillic Natural Stone (On Reconsideration)*, 165 IBLA 140, 146 n.9 (2005), and it did not confer on Denison any rights that Denison did not already possess through BLM’s prior approval of the 1981 POO and the 1981 EA, *see Hacienda del Cerezo*, 135 IBLA 277, 279-80 (1996). As a result, we find that the BLM Letter “was merely informational and explanatory of actions already taken. It was not an adjudication.” *Id.* at 280. To find otherwise could in the future subject BLM and this Department to a potentially unending barrage of “appeals” by entities dissatisfied with prior BLM decisions who could fabricate appealable decisions merely by submitting information requests to BLM and filing an appeal whenever BLM responds.⁵ Not only is such a circumstance administratively unsustainable, it would discourage BLM from responding to such inquiries, resulting in a chilling effect on the Department’s commitment to government transparency and public access to information.⁶

⁴ We also have held that we will not respond to requests that we order BLM to update its environmental analyses or records of decision in the absence of an actual decision by BLM. *See Defenders of Wildlife*, 169 IBLA 117, 127 (2006).

⁵ Such an “appellant” could then assert that it had standing to appeal the “decision” under 43 C.F.R. § 4.410(a) because it was a party to the case, a case it initiated merely by requesting information from BLM.

⁶ *See* Statement by Secretary Ken Salazar, “The Department of the Interior Leads in
(continued...) ”

Because we conclude that the BLM Letter was not a final decision and not appealable, we grant BLM's and Denison's motions to dismiss.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal is dismissed and the petition for stay is denied as moot.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge

⁶ (...continued)
Natural Resources Transparency," dated Mar. 16, 2012 (available at <http://www.doi.gov/news/blog/The-Department-of-the-Interior-Leads-in-Natural-Resources-Transparency.cfm>, last visited June 13, 2012).