

April 17, 2013

SENT VIA CERTIFIED MAIL (RETURN RECEIPT REQUESTED) AND ELECTRONIC MAIL

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Bureau of Land Management Arizona Strip District
United States Department of the Interior
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RE: Petition for Agency Action on the Proposed Re-Opening of the Pinenut Mine

Dear Mr. Florence:

We submit this petition on behalf of the Grand Canyon Trust, the Center for Biological Diversity, and the Sierra Club (“Conservation Groups”), in accordance with the Administrative Procedure Act (“APA”). *See* 5 U.S.C. § 555(e). The Conservation Groups object to the Bureau of Land Management’s (“BLM”) failure to conduct a mineral examination on the mining claims or requiring a new or revised mining plan of operations (“MPO”) before Energy Fuels, Inc. (“Energy Fuels”) resumes operations at the Pinenut mine site.¹

The Conservation Groups understand that Energy Fuels is undertaking preliminary activities at the Pinenut site in anticipation of fully reopening the mine later this year. There has been no active mining on the site since operations were suspended in 1989. The MPO in effect for the Pinenut site was approved by BLM in 1986 (“the 1986 Plan”), and has not been updated. The Arizona Strip, on which the Pinenut mine sits, was withdrawn from mineral exploration by the Department of the Interior on January 9, 2012. *See* 77 Fed. Reg. 2317.

These facts require BLM to take additional action with respect to the Pinenut site. Specifically, BLM must (1) conduct a mineral examination to determine whether the Pinenut claims are valid existing rights as contemplated by the mineral withdrawal, and (2) require that Energy Fuels either submit a new MPO for the Pinenut site, or revise the current MPO. The Conservation groups therefore petition BLM under the APA to take these two actions. *See* 5 U.S.C. § 555(e).

¹ The Pinenut mine is located at 36°30'9.80, -112°43'58.09. *See* Energy Fuels, *Pinenut*, <http://www.energyfuels.com/projects/pinenut/> (last visited Mar. 2, 2013). The Pinenut site encompasses five separate mining claims. *See* 1986 Plan at 3.

I. BLM must prepare a mineral examination report for the Pinenut site.

BLM must prepare a mineral examination for the Pinenut site because Secretary Salazar withdrew this land from mineral development in 2012. *See* Record of Decision, Northern Arizona Withdrawal (Jan. 9, 2012). The withdrawal decision allows mineral development only on claims with valid existing rights, and explains that “mining claims that do not constitute valid existing rights [will] not be developed.” *Id.* at 7. Here, when the Center for Biological Diversity sought records relating to valid existing rights in 2009,² BLM was unable to “provide written confirmation of which mines have existing rights until a BLM validity exam is conducted.” Letter from Toni Klimek, Bureau of Land Management, to Taylor McKinnon, Center for Biological Diversity (Sept. 16, 2009) (attached as Ex. A). That is, BLM itself has been unable to say whether or not the Pinenut claims have valid existing rights in the absence of a mineral examination report.

For mining claims in a withdrawn area, validity must be established as of the time of the withdrawal decision. Courts have recognized that federal agencies must conduct a mineral examination for the claims within withdrawn areas before mining operations on these claims proceeds. *See Yount v. Salazar*, CV11-8171-PCT DGC, 2013 WL 93372 at *2 (D. Ariz. Jan. 8, 2013) (“Because the right to prospect for minerals ceases on the date of [the Northern Arizona] withdrawal, a discovery must have existed—meaning that minerals must have been exposed—by the date of withdrawal.”) (*citing Lara v. Sec’y of Interior*, 820 F.2d 1535, 1542 (9th Cir. 1987)). As the *Yount* court recognized, for all claims in the Northern Arizona Withdrawal, including the Pinenut claims, “the BLM or another federal land management agency must conduct a mineral examination before allowing the development of noticed claims.” *Id.* This language confirms that BLM must conduct a mineral examination for the Pinenut claims before mining operations can legally resume.

In contrast to BLM’s position on the Pinenut mine, the Forest Service has recognized that the withdrawal decision requires that a mineral examination be completed before operations may resume on claims within the withdrawn area. The Forest Service addressed a claim validity issue for the Canyon Mine—another mine in the withdrawn area—and concluded that a mineral examination report was required to allow mining operations to resume there post-withdrawal. *See* U.S. Forest Service, Mineral Report, Canyon 74 and 75 (2012). After the mine owner requested to resume mining after the withdrawal decision, the Forest Service “conduct[ed] a valid existing rights determination on the subject claims” pursuant to the withdrawal decision. *Id.* at 5. The Forest Service further explained that it will only “allow operations on mining claims within a withdrawal that have valid existing rights.” Because Secretary Salazar withdrew the Pinenut site from mineral development, BLM is similarly obligated to conduct a mineral examination report for the Pinenut claims.

² BLM’s reply to the Center for Biological Diversity’s request is dated September 16, 2009. This date is after the initial segregation date of July 21, 2009 for the Northern Arizona Withdrawal, which is the applicable date to establish valid existing rights for the Pinenut claims. *See* U.S. Forest Service, Mineral Report, Canyon 74 and 75 at 5 (2012) (explaining that the date of initial segregation is the appropriate date for establishing validity because “there was no gap between the initial segregation date, the emergency withdrawal, and the Secretary’s decision for a withdrawal.”)

II. BLM should require that Energy Fuels submit a new plan of operations.

The 1986 Plan does not describe the operations currently underway at the Pinenut site and is therefore insufficient to authorize them. A mining operator's failure to comply with "the terms and conditions of an approved plan of operations" constitutes "unnecessary or undue degradation" ("UUD"), 43 C.F.R. § 3809.5, which BLM has a mandatory duty to prevent under the Federal Land Policy Management Act ("FLPMA"). *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 33 (D.D.C. 2003). For the Pinenut site, the Plan's terms (1) do not account for the accumulation of millions of gallons of water currently in the mineshaft, (2) require a holding pond with different engineering specifications than the pond currently on site, and (3) anticipate a far shorter time period for Phase II mining.³ Because of this, BLM should require a new mining plan of operations for the site to ensure compliance with its UUD mandate under FLPMA.⁴

The 1986 Plan is inadequate because it does not account for the several million gallons of water in the mineshaft as of February 2012. A plan of operations "must contain" a "description of the equipment, devices, or practices you propose to use during operations including . . . [w]ater management plans." 43 C.F.R. § 3809.401(b). Here, the water management terms in the plan do not address the accumulation of approximately 2.85 million gallons of water in the mineshaft. *See* E-mail from Jerry H. Smit, Arizona Department of Environmental Quality, to Taylor McKinnon, Center for Biological Diversity, (Feb. 23, 2012) (attached as Ex. B). Moreover, the 1986 Plan does not address the current dewatering efforts necessary to reopen the mine. These omissions in the Plan render it inadequate.

The Plan also states that the holding pond on the site will be "sized with sufficient capacity to hold the surface run-off which would be expected to fall within the disturbed area . . . as a result of a 100-year, 24-hour event . . . as well as any mine water which may be encountered during operations." 1986 Plan at 18. Currently, the holding pond is at capacity, even though there is still water in the mine. In other words, the holding pond is not currently large enough to hold both site surface runoff and the water being pumped out of the mine. E-mail from Jerry H. Smit, Arizona Department of Environmental Quality, to Taylor McKinnon, Center for Biological Diversity, (Mar. 2, 2012) (attached as Ex. C).

By anticipating that ore recovery activities at Pinenut will last approximately seven years, the 1986 Plan makes assumptions that are fundamentally inadequate in describing current operations. For example, the Plan explains that "about two years after Phase II [ore recovery] activities begin, the mine will be operated at an average production rate of 300 tons per day for approximately five years." 1986 Plan at 11. Furthermore the 1986 Plan does not contemplate a 20-plus year period of inactivity—at most it describes a period of non-operation of "more than a year." *Id.* at 22. The authors of the 1986 Plan expected a much shorter timeframe for mining

³ The Plan describes two phases of operations at Pinenut. Phase I is described as "underground evaluation," and mainly consists of activities required to access the deposit. 1986 Plan at 9. Phase II is described as "ore recovery" and mainly consists of commercial recovery of uranium from the mine.

⁴ 43 C.F.R. § 3809.424(a)(3) provides that BLM may review operations that have been inactive for more than five years and determine whether to terminate the plan for those operations. Here, because Pinenut was inactive for more than five years starting in 1989, BLM has discretionary authority to review and terminate the 1986 Plan.

activities, and never contemplated the events that have occurred on and around the Pinenut site during the long period of inactivity (particularly the January 2012 mineral withdrawal). The current activities are much too far removed from the seven-year prediction to be adequately addressed by the 1986 Plan.

Requiring a valid MPO for mining operations is critical in preventing UUD under FLPMA. Indeed, in defending the 43 C.F.R. Part 3809 regulations against a legal challenge, BLM argued that these regulations prevent unnecessary or undue degradation “because of the environmental protection provided by the [mining plan of operation] process.” *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 645 (9th Cir. 2010) (citing *Mineral Policy Ctr.*, 292 F. Supp. 2d at 44). Similarly, the Part 3809 regulations themselves rely primarily⁵ on the terms of the MPO to prevent UUD. See 43 C.F.R. § 3809.5. Because the MPO is crucial to avoid UUD, and because the Plan inadequately describes the current activities on the Pinenut site, BLM should require a new MPO be submitted before allowing further mining activities.

III. BLM must, at minimum, require modification of the 1986 Plan of Operations.

If BLM chooses not to require a new MPO for Pinenut, it must, at a minimum, require modification of the plan. See 43 C.F.R. § 3809.431. This is necessary to remedy the inadequacies mentioned above, and to account for any other departures from the 1986 Plan. The Part 3809 regulations require operators to modify their plans of operations “before making any changes to the operations described in [the] approved plan of operations.” 43 C.F.R. § 3809.431. In this case, the approved 1986 Plan’s terms (1) do not account for the current accumulation of millions of gallons of water in the mineshaft, (2) require a holding pond with different engineering specifications than the pond currently on site, and (3) anticipate a far shorter time period for Phase II mining than has actually occurred. See *generally supra* Part II. Because of these inadequacies, BLM must require Energy Fuels to modify its plan before BLM allows mining operations to proceed on the site.

The modified plan must contain changes sufficient to address the new scope of operations at the Pinenut site. When the Ninth Circuit addressed BLM’s obligations with respect to the filing of MPOs, it held that “[i]nsofar as BLM has determined that it lacks adequate information on any relevant aspect of a plan of operations, BLM not only has the authority to require the filing of supplemental information, it has the obligation to do so.” *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 644 (9th Cir. 2010) (quoting *Great Basin Mine Watch*, 146 I.B.L.A. 248, 256 (1998)). The 1986 Plan creates a similar obligation for BLM because it lacks adequate information on the new activities planned for the Pinenut site. As described above, the 1986 Plan fails to address current mine operations. If the 1986 Plan is to “provide meaningful environmental protection beyond that provided by other laws,” the Plan must at least be amended to address the new operations at Pinenut. 623 F.3d at 649.

⁵ While compliance with other state and federal law is required by the UUD definition, the major substantive components are compliance with the MPO and compliance with the § 3809.420 performance standards.

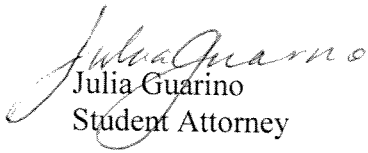
IV. Request for Relief

The Northern Arizona Withdrawal decision requires that BLM conduct a mineral examination for the Pinenut claims. Furthermore, the current MPO in effect for the Pinenut mine is inadequate under FLPMA and BLM's own regulations. The Conservation Groups therefore request that BLM (1) conduct a mineral examination of the Pinenut claims, and (2) require that Energy Fuels either develop a new MPO or revise the existing Plan.

Sincerely,



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Encl.