PRESS STATEMENT

FOR IMMEDIATE RELEASE: October 26, 2016

Contact:
Katie Strong, Trustees for Alaska (907) 433-2008
Ryan Schryver, The Alaska Center (907) 230-0597
Carly Wier, Cook Inletkeeper (907) 235-4068, ex. 25

U.S. District Court Upholds Decision to Protect Residents from Impacts of Wishbone Hill Coal Mine

Ryan Schryver, Deputy Director, The Alaska Center:
"Coal mining creates significant impacts to our communities and can put the health of local residents at risk. The Matanuska-Susitna Valley is a growing, vibrant community, and this ruling ensures that the impacts of coal mining to the community will be considered in a new permitting process if a coal mine is proposed."

Carly Wier, Campaign Director, Cook Inletkeeper:
"This ruling is a step in the right direction to make sure that we have a permitting process at the Department of Natural Resources that follows the important guidelines set forth by Congress in the creation of the Surface Mining Control and Reclamation Act."

Katie Strong, Staff Attorney, Trustees for Alaska:
"The court reaffirmed its prior decision, which protects the surrounding community and environment from unpermitted coal mining. The permits were drafted decades ago. Since then, the community has spent millions on environmental restoration and many people now live nearby. As a result of this case, if there's going to be coal mining at Wishbone Hill, there will be a new process that fully protects the surrounding community."

###

Trustees for Alaska, a non-profit public interest environmental law firm, represents the Castle Mountain Coalition, the Alaska Center, Alaska Community Action on Toxics, Cook Inletkeeper, and the Sierra Club in the case. The Chickaloon Village Traditional Council is represented by Earthjustice.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CASTLE MOUNTAIN COALITION, *et al.*, Plaintiffs, v. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *et al.*, Defendants, and USIBELLI COAL MINE, INC. and STATE OF ALASKA, Intervenor-Defendants.	Case No. 3:15-cv-00043-SLG

ORDER RE MOTION TO ALTER OR AMEND JUDGMENT

Before the Court at Docket 79 is Intervenor-Defendant Usibelli Coal Mine, Inc.'s Motion to Alter or Amend the Judgment. Usibelli asks this Court to alter the judgment at Docket 78 on the grounds that the judgment is "based on a manifest error of law."[1] The Court invited the other parties' responses,[2] and each party responded.[3] Oral argument was not requested and was not necessary to the Court's decision. The parties are familiar with the factual and procedural background in this case, which is set out in the Court's

[1] Docket 80 at 2 (citing FED. R. CIV. P. 59(e) and *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011)).

[2] Docket 81.

[3] *See* Docket 90 (OSM's Opp.); Docket 91 (Plaintiffs' Opp.); Docket 92 (State of Alaska's Response in Support).

July 7, 2016 order at Docket 77 that granted summary judgment to Plaintiffs. Although the Court will deny Usibelli's motion to alter the judgment, this order is intended to clarify certain aspects of the Court's July 2016 order.

Usibelli makes three primary contentions in its motion. First, it asserts that federal law does not play any role in permitting decisions in "primacy" states like Alaska because the State has exclusive jurisdiction over Usibelli's permits. Second, and relatedly, it argues that federal oversight of a state program enacted pursuant to SMCRA is limited to programmatic review of the state's program, such that OSM has no authority to review DNR's individual permitting decisions. Third, Usibelli asserts that the applicable federal regulations require OSM to defer to DNR's interpretation of state law.[4]

Usibelli's motion suggests that it may fundamentally misapprehend the scope of this Court's prior order. Usibelli asserts that the Court erred by "evaluat[ing] the validity of Usibelli's permits" under federal law instead of under Alaska law and urges the Court to uphold OSM's determination because DNR has already determined the permits are valid under Alaska law.[5] But the Court's July 2016 order did not evaluate the validity of Usibelli's permits. Rather, because this case was an appeal from a determination of a federal agency, the Court reviewed only the validity of OSM's determination that DNR had shown good cause for not taking corrective action against Usibelli.[6]

---

[4] *See* Docket 80 at 3-4.

[5] Docket 80 at 2, 10.

[6] *See* Docket 26-3 at 6 (OSM's decision).

Under the APA, a court must "hold unlawful and set aside" an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[7] In OSM's decision,[8] OSM strived to interpret federal law to determine whether the State's interpretation of its own laws was itself arbitrary or capricious, and specifically whether it was "no less stringent" than federal law required.[9] Because the basis for OSM's decision was its interpretation of federal law, the Court reviewed OSM's interpretation of that law.[10] The Court found that OSM's decision was "not in accordance with law" because its interpretation of SMCRA was contrary to the "shall terminate" provision in 30 U.S.C. § 1256(c). Having concluded that OSM's interpretation was erroneous, the APA required the Court to "hold unlawful and set aside" the agency decision.[11] On remand, OSM will assess DNR's explanation for its failure to act, and will determine, applying this Court's

[7] 5 U.S.C. § 706(2)(A).

[8] The decision that was appealed is reprinted in Docket 26-2, at pages 7-18 and continues at Docket 26-3, at pages 1-7.

[9] *See* Docket 26-3 at 6 ("I conclude that [Alaska's] interpretation . . . is no less stringent than section 506(c) of SMCRA.").

[10] *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *see also MPS Merchant Servs., Inc. v. FERC*, 2016 WL 4698302 (9th Cir. Sept. 8, 2016). The reason for this rule is to ensure that the policy discretion that Congress assigned to the agency is in fact exercised by the agency, and not by a court. *Louis v. Dep't of Labor*, 419 F.3d 970, 977-78 (9th Cir. 2005)

[11] The statute governing the Court's review uses the word "shall." 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be [] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

interpretation of the statute, whether the State has demonstrated the requisite good cause for its inaction.

The Court also finds that Usibelli's premise regarding the exclusivity of state law is not accurate. Federal law sets forth explicit exceptions to a primacy state's "exclusive jurisdiction."[12] 30 U.S.C. § 1253(a) provides that primacy states attain "exclusive jurisdiction . . . *except as provided in section 1271* and 1273 of this title and subchapter IV of this chapter." Section 1271—the section relevant here—explicitly provides for OSM's review of violations of federal law.[13] An operator such as Usibelli cannot reasonably rely on a state law that is less stringent than federal law. Rather, a state program must necessarily comply with the minimum standards set by federal law,[14] and SMCRA plainly contemplates continuing federal oversight as laid out in 30 U.S.C. § 1271.

---

[12] *See Farrell-Cooper Min. Co. v. Dep't of Interior*, 728 F.3d 1229, 1232 (10th Cir. 2013) ("States have 'exclusive jurisdiction over the regulation of surface coal mining and reclamation operations' within their borders, subject to three statutory exceptions." (quoting 30 U.S.C. § 1253(a) (citation omitted)).

[13] 30 U.S.C. § 1271(a) ("Whenever . . . the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter . . . [and] the State regulatory authority fails within ten days after notification . . . to show good cause . . . the Secretary shall immediately order Federal inspection of the surface coal mining operation . . . .").

[14] *See* 30 U.S.C. § 1253(a)(1) (providing that state laws must "provide[] for the regulation of surface coal mining and reclamation operations in accordance with the requirements" of SMCRA); *id.* § 1255 (providing that state laws must be at least as stringent as SMCRA); *see also Penn. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 324 (3d Cir. 2002) (noting that state law controls in a primacy state "[u]nless an element of an approved state program is inconsistent—*i.e.*, less stringent than—the federal objective it implements").

Usibelli also asserts that any federal oversight is limited to programmatic review of state programs. But federal law provides a "floor" that requires a primacy state's compliance with SMCRA and requires OSM to ensure each state's compliance with federal law.[15] This means that, pursuant to 30 U.S.C. § 1271(a) and 30 C.F.R. § 842.11, OSM can review a state's individual permitting decisions.[16] Indeed, the statute directs the Secretary to act when she "has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter."[17] And the regulation provides that the Secretary "shall conduct inspections of surface coal mining and reclamation operations" in order to ensure compliance with governing law, and to "determine whether any notice of violation or cessation order issued during an inspection . . . has been complied with."[18] The federal statutory and regulatory provisions expressly provide for more than programmatic review of a state's laws and regulations.[19]

---

[15] *Cf. Penn. Fed'n of Sportsmen's Clubs*, 297 F.3d at 317 ("[T]he Secretary retains a limited and ordered federal oversight role to ensure that the minimum requirements of SMCRA are being satisfied.").

[16] *Coteau Prop. Co. v. Dep't of Interior*, 53 F.3d 1466, 1474 (8th Cir. 1995) (noting that OSM has authority to review state permitting decisions "whether based on state or federal regulations").

[17] 30 U.S.C. § 1271(a). SMCRA defines "person" to include "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." *Id.* § 1291(19).

[18] 30 C.F.R. § 842.11(a)(4).

[19] *See also* 30 C.F.R. § 843.11(a)(1) (authorizing the Secretary to "order a cessation of surface coal mining and reclamation operations" when "she finds, on the basis of any Federal inspection, any condition or practice, or any violation of the Act" which creates a danger to the public or the environment).

Finally, Usibelli errs in its description of the deference that OSM must accord to the State's interpretation of Alaska law. Under the federal regulations, OSM will not conduct an inspection if the State regulatory authority "show[s] good cause for" its failure to take corrective action.[20] And "good cause" includes a state's finding that "[u]nder the State program, the possible violation does not exist."[21] But contrary to Usibelli's assertion, OSM is not required to unconditionally accept a primacy state's assertion that there is no violation of state law and accordingly to decline any inspection. Rather, the regulation also provides that only "an action or response by a State regulatory authority that is not *arbitrary, capricious, or an abuse of discretion* under the state program shall be considered . . . 'good cause.'"[22] Conversely, then, a state response that is arbitrary, capricious, or an abuse of discretion is *not* good cause. Thus, pursuant to the federal regulation, OSM may not simply defer to Alaska's interpretation of state law. Rather, OSM must review the state's response—including its contention that there is no violation under state law—for arbitrariness, capriciousness, or an abuse of discretion.[23]

As the Court held in its previous decision, "SMCRA sets the floor to which state programs must comply, [and] Alaska's statute must be in accordance with" the SMCRA.[24]

---

[20] 30 C.F.R. § 842.11(b)(1)(ii)(B)(1).

[21] 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i).

[22] 30 C.F.R. § 842.11(b)(1)(ii)(B)(2) (emphasis added).

[23] And, if OSM's subsequent decision is appealed, a reviewing court will review OSM's determination and set it aside if it is "arbitrary, capricious, [or] an abuse of discretion," and will also set it aside if it is "otherwise not in accordance with law," including if it is not in accordance with SMCRA. 5 U.S.C. § 706(2).

[24] Docket 77 at 30-31.

The proper interpretation of state law, and OSM's review of DNR's interpretation of Alaska law, is necessarily derived from the proper interpretation of federal law. The Court agrees with the State and with OSM that it is now the task of OSM, in the first instance, to determine whether Alaska's program is in accordance with SMCRA, applying the interpretation of that law as set forth in the Court's July 7, 2016 order.[25]

Accordingly, Usibelli's Motion to Alter or Amend the Judgment at Docket 79 is DENIED.

DATED this 26th day of October, 2016, at Anchorage, Alaska.

/s/ Sharon L. Gleason
UNITED STATES DISTRICT JUDGE

[25] *See* Docket 92 at 6 ("The State also believes that any determination as to whether Alaska's program is consistent or inconsistent with SMCRA as interpreted by this Court should be left—in the first instance—to the agency Congress charged with making that determination."); Docket 90 at 11 ("OSMRE will then take [any new explanation given by the state] into account before issuing a new determination on the TDNs that is consistent with the Court's interpretation of [SMCRA].")