United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
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July 24, 2019

Ms. Katherine Strong
Trustees for Alaska
1026 West 4th Avenue, Suite 201
Anchorage, AK 99501

Mr. Thomas Waldo
Earthjustice
325 Fourth Street
Juneau, AK 99801

Re: Citizen Complaints Regarding Usibelli Coal Mine, Inc.'s Wishbone Hill Coal Mine

Dear Ms. Strong and Mr. Waldo:

The Office of Surface Mining Reclamation and Enforcement (OSMRE) hereby responds to two citizen complaints from: 1) Trustees for Alaska, on behalf of Castle Mountain Coalition, the Alaska Center, Cook Inletkeeper, Alaska Community Action on Toxics, and the Sierra Club (collectively CMC), dated January 11, 2019; and 2) Earthjustice, on behalf of its client, the Chickaloon Village Traditional Council (Chickaloon), dated March 5, 2019.[1] The Chickaloon complaint explains that Chickaloon joins fully in CMC's complaint letter and sets forth additional considerations. In this response, references to the complainants or complaints include both CMC and Chickaloon and their respective complaints, unless otherwise specified.

The CMC and Chickaloon complaints object to the decision that the Alaska Department of Natural Resources (DNR) issued to Usibelli Coal Mine, Inc. (Usibelli) on November 29, 2018 (hereinafter DNR 2018 Decision). The DNR 2018 Decision addresses the status of Usibelli's Wishbone Hill Coal Mine permits numbered X11-141-182-005 and 11-141-182-006. The DNR 2018 Decision concludes that the subject permits[2] are valid and in good standing.

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[1] If CMC or Chickaloon does not have, and would like, copies of any documents referenced in this letter, please let me know, and OSMRE will be happy to provide copies.

[2] DNR first issued the Wishbone Hill permits to Idemitsu Alaska Inc. on September 5, 1991. In 1996, the permits were transferred to North Pacific Mining Corporation, and then to Usibelli in 1997. In this letter, the term "permittee" refers to the relevant permittee at the particular time referenced.

In their citizen complaints, the complainants assert that the Usibelli permits are not valid because they terminated before Usibelli began mining operations under the permits in 2010,[3] and DNR did not issue Usibelli valid extensions as required by the Alaska equivalent of 30 U.S.C. § 1256(c). Therefore, the complainants request that OSMRE conduct a Federal inspection and take enforcement action against Usibelli, including ordering a cessation of surface coal mining activities until Usibelli obtains a "new, valid permit."

The status of the Usibelli permits has been the subject of controversy since 2011, including extensive administrative and judicial proceedings. The DNR 2018 Decision to Usibelli provides Alaska's most recent position in response to issues raised in a 2016 decision from the U.S. District Court for the District of Alaska, OSMRE oversight actions, and citizen complaints. The complainants' most recent positions are summarized in the January 11, 2019, CMC citizen complaint and the March 5, 2019, Chickaloon citizen complaint. These types of citizen complaints can lead to OSMRE issuing a ten-day notice to the relevant State regulatory authority pursuant to 30 CFR 842.11(b)(1)(ii)(B)(*1*) if OSMRE concludes that there is a reason to believe that a violation exists. However, in this matter, this additional procedural step is not warranted. Based upon available information, including the extensive record before it, and the absence of disputed material facts, OSMRE does not have a reason to believe that a violation exists with respect to either of the subject permits.

DNR 2018 Decision

On November 29, 2018, DNR sent Usibelli a lengthy, detailed decision after its review of the validity of the Wishbone Hill permits.[4] This DNR 2018 Decision followed a letter that OSMRE sent to DNR on November 2, 2016, relating to two ten-day notices that OSMRE had sent to DNR. On November 17, 2016, DNR responded to OSMRE stating, among other things, that it was initiating a review of the subject permits and had ordered cessation of activities at the Wishbone Hill mine site pending its review. In the DNR 2018 Decision, it explains in detail its conclusion that the Wishbone Hill permits remain valid and in good standing[5] and have been since DNR issued them in 1991. Given its conclusion that the permits remain valid, DNR terminated the prior order it issued to Usibelli to cease activities.[6]

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[3] The complainants acknowledge that the operations under the Usibelli permits commenced in 2010.

[4] The DNR 2018 Decision also served as a response to the OSMRE informal review decision dated December 14, 2017, directing DNR to assess the State's position on the Wishbone Hill permits in light of the 2016 court rulings in *Castle Mountain Coalition v. OSMRE*, 2016 U.S. Dist. LEXIS 87953 (D. Alaska July 7, 2016).

[5] DNR explains that between 1993 and 2011, it conducted over 70 inspections of the permitted areas, and, since 2011, it has conducted 53 inspections of the Wishbone Hill site.

[6] However, as DNR explained in the DNR 2018 Decision, Usibelli is currently under voluntary temporary cessation, and, pursuant to a 2014 renewal decision, Usibelli must complete at least six months of groundwater sampling before it can resume activities at the Wishbone Hill site.

The DNR 2018 Decision explains that it issued various renewals to Usibelli over the years with full knowledge that operations had not commenced, and that Usibelli had articulated to DNR the factors preventing commencement. DNR concedes that there were "documentation issues" with its prior administration of the Wishbone Hill permits, but describes the basis for its conclusion that DNR had "a clear understanding and intent … that extensions of time to commence mining would be granted with the renewals in 1996, 2001, and 2006…." Thus, DNR states that, despite documentation issues, it actually granted extensions, with knowledge of circumstances that would meet the extension criteria, and that the extensions were not merely implicit in connection with permit renewals. DNR also asserts that because the relevant permit history spans 27 years, there could have been a loss of relevant communications or documentation regarding extensions of time to commence mining. DNR further asserts that its various renewals, for which it gave public notice, were effectively findings that the permits were valid at the time of renewal. DNR explains that none of its renewal decisions was appealed prior to Usibelli's commencement of mining in 2010 (though one of its renewal decisions was challenged in 2014[7]).

Finally, and most pertinent to my analysis here, in the DNR 2018 Decision, it granted a retroactive extension to Usibelli. *See* DNR 2018 Decision at 24. For the reasons explained below, I find that DNR's grant of a retroactive extension to Usibelli was reasonable.

CMC Citizen Complaint of January 11, 2019

As authorized by 30 CFR 842.12(a), CMC filed its citizen complaint on January 11, 2019. CMC objects to the DNR 2018 Decision about the validity of the Wishbone Hill permits. The complaint requests "that OSM issue a notice of violation to [Usibelli] and that the notice require [Usibelli] to cease any operations at Wishbone Hill and to refrain from any surface coal mining activities until it obtains a new, valid permit."

The complainant further objects to any suggestion that CMC should appeal the DNR 2018 Decision administratively and to the State courts. CMC declined that approach and filed the instant citizen complaint with OSMRE. In support of its preferred approach, CMC states that because the DNR 2018 Decision allegedly conflicts with a 2018 OSMRE decision regarding a West Virginia mine,[8] OSMRE must take action to ensure that the Surface Mining Control and Reclamation Act of 1977 (SMCRA) is correctly and consistently applied across all States. CMC also states that OSMRE's 2018 decision in the West Virginia matter represents OSMRE's most recent interpretation of the automatic termination provisions, including an interpretation of the

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[7] In this regard, DNR explains that the complainants in this matter appealed DNR's 2014 renewal decision administratively, and an Alaska Commissioner affirmed the validity of the Wishbone Hill permits. DNR further explains that the appellants did not appeal the Commissioner's decision to State court.

[8] *See* OSMRE Deputy Director Glenda Owens's informal review decision to the West Virginia Department of Environmental Protection regarding the West Virginia Eagle No. 2 Mine matter (July 26, 2018).

"U.S. District Court for the District of Alaska's *Castle Mountain Coalition* decision on issues related to the Wishbone Hill permit."

The CMC complaint asserts that the Wishbone Hill permits terminated by operation of law due to an absence of a permit extension in accordance with Alaska Statutes (AS) 27.21.070(b).[9] CMC also asserts that DNR inappropriately concluded that it granted implicit extensions through the issuance of permit renewals. Additionally, CMC disagrees with DNR's position that it is not required to issue written extension findings and asserts that DNR ignored its regulatory requirement at 11 AAC 90.117(c) to provide public notice of extensions. CMC also believes that DNR's fairness or equity argument is without merit.

Finally, CMC objects to DNR's grant of a retroactive extension to Usibelli. CMC asserts that: (1) Usibelli did not request a retroactive extension; (2) the statutory bases for an extension did not exist; and (3) the retroactive extension that DNR granted is not reasonable given the length of time involved in this matter.

Chickaloon Citizen Complaint of March 5, 2019

Earthjustice submitted its letter on behalf of Chickaloon, and requests, pursuant to 30 CFR 842.12(a), that OSMRE "conduct an inspection of the Wishbone Hill Coal Mine under 30 C.F.R. § 842.11(b), hold the operating permit invalid, and take appropriate enforcement action." Chickaloon alleges that Usibelli began operating without a valid permit in 2010 because its original permit terminated by operation of law in 1996. Chickaloon asserts that since November 28, 2011, "Chickaloon has been engaged continuously in administrative proceedings and court actions against DNR" regarding the alleged violation. Chickaloon objects to the DNR 2018 Decision and "joins fully in [the CMC citizen complaint], incorporating it by reference," and adds additional considerations.

Among the additional considerations, Chickaloon objects to the DNR position that DNR extended the Wishbone Hill permits through the renewal processes in 1996, 2001, 2006, and 2014, disagreeing with DNR's assertions regarding the relevance of past renewals. On this issue, Chickaloon states that OSMRE's 2018 decision in the West Virginia matter and the District Court of Alaska's *Castle Mountain* decision have rejected DNR's implicit extension theory. The complainant also takes issue with the retroactive extension that DNR granted on November 29, 2018 (*see* DNR 2018 Decision at 23-24), asserting that DNR arbitrarily concluded that the

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[9] AS 27.21.070(b) provides, in pertinent part:

> A permit terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued. The commissioner may grant reasonable extensions of time if the permittee shows that the extensions are necessary (1) because of litigation that precludes the commencement of the operation or threatens substantial economic loss to the permittee; or (2) for reasons beyond the control and without the fault or negligence of the permittee.

retroactive extension was reasonable and the extension criteria were satisfied. More specifically, Chickaloon asserts that the cumulative time of the retroactive extension was not reasonable, and that Usibelli's "inability to find a purchaser for the coal" did not satisfy the extension criteria. Finally, the Chickaloon complaint requests government-to-government consultation between Chickaloon and OSMRE regarding the Wishbone Hill Mine, including a request to accompany OSMRE on any Federal inspection of the Wishbone Hill Mine.

Analysis

In reviewing these citizen complaints, I am required to determine whether there is a reason to believe that there is a violation with regard to one or both of Usibelli's Wishbone Hill permits. 30 USC 1271(a)(1); 30 CFR 842.11(b)(1)(i). The matter largely hinges upon Alaska's interpretation and implementation of the permit term provision in AS 27.21.070(b). However, my analysis must consider this statutory provision in light of the well-documented facts available. Based on the information available to me, including DNR's grant of a retroactive extension, I do not have reason to believe a violation occurred.

Pursuant to SMCRA, DNR is the duly authorized regulatory authority with primary jurisdiction over coal mining activities in Alaska. DNR exercises its authority through its administration of the Alaska Surface Coal Mining Control and Reclamation Act and the regulations governing coal mining in Alaska. A State program must be consistent with and in accordance with SMCRA and the implementing Federal regulations. 30 CFR 730.5. OSMRE approved Alaska's program as such in 1983. 30 CFR 902.10. Although OSMRE maintains an oversight role, Alaska has achieved primacy and, as the primary regulatory authority, must be afforded reasonable deference regarding interpretation of its State program.

On July 7, 2016, the United States District Court for the District of Alaska issued its decision in *Castle Mountain*. Plaintiffs in that lawsuit were all of the complainants here. The decision addressed an appeal of a November 4, 2014, OSMRE determination, which the court ultimately vacated. The court's decision primarily addresses the question of permit termination, concluding that the phrase "shall terminate" as set forth in section 506(c) of SMCRA, 30 USC 1256(c), "is not ambiguous. Rather, Congress has directly spoken to the precise question and has provided that a surface coal mining permit terminates by operation of law when mining operations have not commenced within three years unless the agency has affirmatively granted an extension for one of the two specified reasons allowed in the statute." *Castle Mountain*, 2016 U.S. Dist. LEXIS 87953, at *42-43; *see also id.* at *47.

DNR's explanation in the DNR 2018 Decision that it granted extensions over the years has merit. At a minimum, DNR's position helps to frame the equities. However, I do not need to decide whether DNR granted contemporaneous extensions because, as I explain in more detail below, DNR appropriately granted a retroactive extension.

Here, the *Castle Mountain* court itself considered the possibility of retroactive extensions, even if a permit would have otherwise terminated:

> And Plaintiffs concede that "the statute places no express time limits on when an extension may be granted." Accordingly, it may be that under SMCRA the regulatory authority can extend the time to commence mining even after a permit has terminated, provided the statutory grounds for extension have been met. This Court need not determine that issue in this proceeding.

Id. at *46-47.

On July 26, 2018, after considering the *Castle Mountain* decision, OSMRE's Deputy Director issued a Decision on Request for Informal Review in a similar, but not identical, matter in West Virginia (referenced above).[10] With regard to a particular issue in that decision, OSMRE explained that "neither SMCRA nor West Virginia's approved program disallows permit extensions after the three-year mark." That is, OSMRE recognized that a retroactive extension may be appropriate, as long as a permittee can meet the statutory criteria for an extension.[11]

In the DNR 2018 Decision, DNR presented reasonable bases and explanations that support its grant of a retroactive extension. As previously noted, AS 27.21.070(b) provides, in pertinent part, that DNR "may grant reasonable extensions of time if the permittee shows that the extensions are necessary (1) because of litigation that precludes the commencement of the operation or threatens substantial economic loss to the permittee; or (2) for reasons beyond the control and without the fault or negligence of the permittee." DNR initially issued the subject permits in 1991. In 1994, the permittee sought an extension to 1996, which DNR granted. Thereafter, in terms of the two criteria for extensions, DNR and Usibelli have provided reasonable explanations for why extensions were necessary up until the time that mining commenced, no later than 2010.

DNR also explains events and circumstances that could have supported extensions throughout the years. The DNR 2018 Decision, with corresponding attachments, sets forth these circumstances in detail. I do not repeat all of the pertinent facts from the DNR 2018 Decision here, but I will summarize the more salient points. As DNR explains, from the beginning, it was

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[10] One difference between the West Virginia matter and this one is that West Virginia has a policy that, in certain circumstances, allows it to grant extensions, even if more than three years have passed since permit issuance, and we are not aware of any such Alaska policy. However, this difference is not important because, as the *Castle Mountain* court noted in its decision, "Plaintiffs concede that 'the statute places no express time limits on when an extension may be granted.'" *Castle Mountain*, 2016 U.S. Dist. LEXIS 87953, at *46-47. The fact that the Alaska statute does not place a time limit on when an extension may be granted is the only predicate that the court identified when it referenced the possibility of retroactive extensions.

[11] In subsequent developments on a particular issue in the West Virginia matter, including further factual development, OSMRE's Charleston Field Office found, among other things, that a retroactive extension was justified based upon conditions beyond the control of the permittee and a threat of litigation.

understood that the permittees needed long-term supply contracts, and the parties did not expect those contracts to be local. DNR 2018 Decision at 13.[12] The DNR 2018 Decision further explains that Alaska is geographically remote, has a smaller population than most States, and that, from the beginning, the permittees were looking to Asia for a market for their coal. *Id.* at 13-14. DNR notes that, at the time of permit application in 1989, Idemitsu was looking to Japanese utilities and hoped to begin shipments in the fourth quarter of 1991. *Id.* at 6, 13-14. However, citing a news article, DNR asserts that "[a]n injunction [in the Mental Health Land Trust (MHLT) litigation[13]] prohibiting development of the lease made this impossible." DNR 2018 Decision at 14.[14] In July 1996, the North Pacific Mining Corporation submitted a draft letter to DNR, which was later finalized as a cover letter for a permit renewal application and which referenced the depressed international steam coal market and the effect of the MHLT litigation on the commencement of operations.[15] *Id.* at 8.

Further, with regard to Usibelli's prospects, DNR notes that Usibelli explained in a 2000 letter that development of the type of project it envisioned could take ten years or more. *Id.* at 14. DNR also notes that Alaska's limited population density has real consequences for the marketability of Alaskan coal. Likewise, DNR points to high transportation costs that make it expensive to ship coal to existing markets. *Id.* DNR attached to the DNR 2018 Decision an April 20, 2001, letter that Usibelli sent to DNR when it was applying for a permit renewal. In that letter, Usibelli explained that, "[i]n conjunction with marketing efforts, [Usibelli] continues to evaluate methods for extracting and transporting the coal; however, because of the present uncertainty in pricing for energy commodities, operational plans for the project have not been revised at this point." *Id.* at 9. In addition, during a 2006 public meeting on a Usibelli renewal request, a representative

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[12] The DNR 2018 Decision includes multiple attachments, some of which support the statements that I paraphrase in this paragraph. In general, I do not make specific reference to DNR's attachments in this letter, but see the applicable attachments to the DNR 2018 Decision.

[13] The MHLT litigation – *State v. Weiss*, 706 P.2d 681 (Alaska 1985) – was a class action suit brought by a group of mental health patients against the State of Alaska for dissolving a land trust that funded Alaska's mental health program. John Stuart Kaplan, Note, *The Mental Health Land Trust Litigation: State v. Weiss and its Aftermath*, 9 Alaska L. Rev. 343 (1992). The referenced law review article explains that the dispute involved a considerable portion of Alaska's land and resources. *Id.* The article also notes that, as a result of uncertainty over title to former trust lands and a July 1990 injunction, "projects such as the Wishbone Hill coal mine have been delayed." *Id.* at 366. In this regard, the article also explains that the 1990 preliminary injunction in the MHLT litigation prohibited Alaska from issuing a surface coal mining permit to Idemitsu (the original permittee). *Id.* at 374 n.153. As noted above, DNR ultimately issued the Wishbone Hill permits to Idemitsu on September 5, 1991.

[14] DNR further explains that, due to the MHLT litigation, Australian producers filled much of the market share for the Japanese utilities. *Id.* at 14.

[15] DNR also explains, "in the Wishbone Hill context, the Mental Health Trust litigation had an impact that went far beyond the years of litigation and conclusion of litigation in 1991. Any long-term contract opportunities established before or at the time of issuance of the permits in 1991 were lost as a result of the litigation and resulting uncertainty leaving the company at square one again in terms of obtaining such a contract once litigation resolved." DNR 2018 Decision at 14. While OSMRE has previously rejected DNR's rationale that Usibelli could also have satisfied the "litigation" criteria to support extensions, DNR's most recent explanation involving the MHLT litigation appears to satisfy the litigation criteria, as well as the "beyond the control" criteria, for at least part of the time at issue in this matter.

from Usibelli explained that mining would not begin immediately because Usibelli still had to develop a market. *Id.* at 10-11. Also, in a December 2, 2016, letter from Usibelli to DNR that DNR attached to the DNR 2018 Decision, Usibelli references the unfavorable market conditions that it claims did not warrant commencement of mining operations and explains that the Wishbone Hill project did not become economically feasible until 2008. At that time, Usibelli explains that it acted quickly toward project development and began negotiations with prospective partners to commence operations. Finally, DNR attached to the DNR 2018 Decision a November 28, 2017, letter from Usibelli to DNR that explains that Usibelli had previously made submittals to DNR that showed that demand for thermal coals was weak until the late 2000s. DNR asserts that it has never had a reason to question Usibelli's diligence in attempting to find a market for the coal. *Id.* at 22. In fact, based upon its review of the economic conditions since the permits were issued, DNR states that it "affirmatively find[s] that it would not have been reasonable to begin mining at Wishbone Hill at any point before 2010." *Id.* at 22. DNR also sets forth further support for its position in other parts of the DNR 2018 Decision.

I find that it was reasonable and within its discretion for DNR to conclude that, under AS 27.21.070(b)(2), unfavorable market conditions, such as those identified in the record, that are beyond the control and without the fault or negligence of the permit holder can properly support a permit extension. In support of its market conditions rationale, DNR cites to a 2007 decision from the Court of Appeals of Texas. *Railroad Comm'n of Texas v. Coppock*, 215 S.W.3d 559, 571 (Tex. App.–Austin 2007, pet. denied). While that decision is not controlling here, it is instructive. The Texas court agreed that unfavorable market conditions "beyond the control and without the fault of the permittee" may justify an extension. The Texas court concluded that the State SMCRA regulatory authority's interpretation of a Texas statutory provision as "allowing for a permit extension due to unfavorable market conditions 'beyond the control and without the fault or negligence of the permit holder' is consistent with the plain language of the statute."[16] In the context of the applicable Alaska law, it was reasonable for DNR to cite the Texas court's language as persuasive authority for its position here, and I find that

[16] I acknowledge that in our November 4, 2014, determination, OSMRE noted that DNR's "market conditions" rationale was problematic. OSMRE also noted that it was highly questionable that "depressed market conditions" could fall into the category of "reasons beyond the control and without the fault or negligence of the permittee." However, in that decision, OSMRE did not discuss the rationale set forth in *Railroad Comm'n of Texas*. I have fully considered the Texas case, and DNR's related arguments, and I find DNR's position to be reasonable. In addition, on page 14 of OSMRE's informal review decision in the West Virginia matter referenced above, it explained that the sole basis for a particular extension request was that, if the time for commencement of operations was not extended and the permit was terminated, the permittee would lose its investment in the permit. OSMRE disagreed with that position because the permittee's request did not advance evidence of litigation or specific conditions beyond its control or without its fault or negligence that precluded commencement of mining operations. OSMRE concluded that loss of investment in the permit alone could not be the basis for an extension. (After further factual development on this aspect of the West Virginia matter, an OSMRE field office found that a retroactive extension was justified based upon the extension criteria.) Here, however, the basis for the extension that DNR granted was not merely the potential loss of Usibelli's investment. Rather, the record indicates that there were indeed unfavorable market conditions that were beyond the control and without the fault or negligence of the permit holder.

DNR has provided adequate justification to support its market conditions rationale.[17] In sum, I find that it was reasonable for DNR to grant a retroactive extension in this matter because it had made a reasonable demonstration that Usibelli satisfied the extension criteria.

Any question about whether Usibelli requested a retroactive extension is immaterial here. Nothing in Alaska law requires that a permittee must make an extension request in writing. Instead, AS 27.21.070(b) provides that DNR may grant an extension "if the permittee shows" that it has met one of the criteria for an extension. The Federal regulations at 30 CFR 773.19(e)(2) require "receipt of a written statement showing that such an extension of time is necessary…." In this case, although it does not appear that Usibelli requested a retroactive extension in writing, as explained above, Usibelli did provide at least two letters – dated December 2, 2016 and November 28, 2017 – explaining or showing the basis for the delayed operations. The letters explain that challenging market conditions, dating back to the 1990s, were beyond the control and without the fault of the operator. Because Usibelli showed, in writing, why an extension was justified, I find that Usibelli did not need to use certain words "requesting" an extension. In addition, as noted above, at various times, DNR and Usibelli have made reasonable demonstrations in writing that circumstances existed that would have justified extensions; those circumstances also support DNR's grant of a retroactive extension to Usibelli.

AS 27.21.070(b) also specifies that DNR can grant "reasonable extensions," which means that any extension granted must also be "reasonable" regarding duration. Although the complainants argue that the permits terminated by operation of law in 1996, it was not until 2011, after mining commenced in 2010, that the complainants raised the possibility that the Wishbone Hill permits had terminated before mining started. Thus, the question is whether the 14 years between the alleged lapse of the permit and the commencement of mining in 2010 was unreasonable. One of the reasons for the cooperative federalism approach in SMCRA is a recognition that State regulatory authorities are in a better position to know the conditions affecting mining. Although this typically refers to physical conditions, *see, e.g.*, 30 U.S.C. 1201(f), it logically extends to market conditions as well. This is especially true outside of the contiguous United States, where factors such as those described in the DNR 2018 Decision can affect coal's marketability. In the absence of any evidence to the contrary, I defer to Alaska's reasoned judgment that the local conditions in Alaska supported Usibelli's showing that the duration of the extension was appropriate.

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[17] As CMC points out in its citizen complaint, the court in *Railroad Comm'n of Texas* allowed an extension to be granted after the three-year mark, but noted that the request for an extension had to be filed within the three-year deadline. *Id.* at 566. That fact is of little consequence here because we are interpreting the court's decision in *Castle Mountain*, which alludes to the possibility of retroactive extensions and does not qualify the possibility by suggesting that a permittee must request such an extension before the expiration date. Indeed, the court was aware of plaintiffs' argument that, after the first extension that Usibelli expressly requested and DNR granted, Usibelli had not sought express extensions before the applicable expiration dates; yet, the court still raised the possibility of retroactive extensions. Against this backdrop, it seems unlikely that the court would have mentioned the possibility of retroactive extensions if that avenue were *per* se foreclosed by plaintiffs' allegations.

DNR asserts that neither its statute nor regulations require a written decision on an extension request (DNR 2018 Decision at 18), and it does not appear that DNR gave public notice of its grant of a retroactive extension to Usibelli. However, DNR did copy the attorneys for the citizen complainants on the written DNR 2018 Decision that granted the retroactive extension to Usibelli. Thus, if there was any process flaw, I find that it constituted harmless error because the groups that have been most interested in this matter received actual notice of the retroactive permit extension.

Finally, I note that the issue of government-to-government consultation between OSMRE and the Chickaloon is important. In the instant matter, the request for consultation is made in the context of a request for OSMRE to determine whether it has reason to believe a violation exists. This is not an "OSM action with tribal implications" as defined in OSMRE's directive REG-18, "Tribal Consultation and Protection of Tribal Trust Resources," that would trigger tribal consultation. Instead, OSMRE is responding to citizen complaints. OSMRE stands ready to engage in tribal consultation when appropriate. If OSMRE determined that a Federal inspection was warranted, the Federal regulations at 30 CFR 842.12(c) specify that citizen complainants may accompany the inspector; however, as explained, OSMRE does not have reason to believe there is a violation and will not be conducting an inspection at this time.

Conclusion

The longstanding controversy in the matter of Usibelli's Wishbone Hill permits involves a body of facts and circumstances beyond the isolated issue of permit extension. DNR admits to lacking a complete record, but the DNR 2018 Decision does provide thorough explanations to support DNR's conclusion that the Wishbone Hill permits remain valid. DNR has also articulated its documented and clear intent to maintain the Wishbone Hill permits as valid, and, as mentioned above, operations under the Usibelli permits commenced in 2010. The history shows an intent to lawfully comply with Alaska's permitting process, and all the permit renewal related actions along the way were subject to public scrutiny and appeal. As noted above, notwithstanding the 2011 citizen complaint, no one filed any appeals before 2014. In addition, as explained above, I find that DNR's grant of a retroactive extension to Usibelli was reasonable.

Given the ample information available to me about this matter, I find that OSMRE does not have sufficient reason to believe that a violation exists. Therefore, I am neither issuing a ten-day notice to DNR nor ordering a Federal inspection at this time.

Finally, as DNR notes in the DNR 2018 Decision, it instituted procedures in 2014 to avoid repetition of the circumstances of this matter. Going forward, while AS 27.21.070 does not prohibit retroactive extensions, DNR considers prospective extensions to be the best agency practice.

Pursuant to 30 CFR 842.15(a), you may ask OSMRE's Deputy Director to undertake an informal review of this response to your citizen complaints. You should address any request for informal review to:

Glenda Owens, Deputy Director
Office of Surface Mining Reclamation and Enforcement
1849 C Street, NW
Washington, DC 20240

If you have any questions regarding the appeal process, you may contact me at 303-293-5001.

Sincerely,

David A. Berry
Regional Director

cc: Ms. Corri Feige, Commissioner
Alaska Department of Natural Resources

Mr. Russell Kirkham, Program Manager
Alaska Department of Natural Resources
Coal Regulatory Program