

FOGNANI & FAUGHT, PLLC
Attorneys at Law

April 15, 2009

Mr. Allen C. Sorenson
Reclamation Specialist
State of Colorado
Division of Reclamation, Mining and Safety
Department of Natural Resources
1313 Sherman Street, Room 215
Denver, Colorado 80203

Re: Centennial Project, Notice of Intent Modification MD-02, File No. P-2008-043

Dear Mr. Sorenson:

On behalf of our client, Powertech (USA) Inc. (Powertech), this letter responds to your letter dated March 31, 2009 (DRMS letter). In your letter you request additional information on the Notice of Intent Modification MD-02 (Notice of Intent Modification) for prospecting activities relating to Powertech's proposed Centennial Project in Weld County. This letter provides additional information on certain legal issues raised by the DRMS letter and related documents and correspondence. Powertech is contemporaneously sending a separate letter to which this letter is attached that is responsive to the technical issues raised in your letter. Both letters address, as a courtesy, certain issues raised in letters dated March 20, 2009 from Weld County and Western Mining Action Project.

Outside Parties Are Not Entitled to Intervene in the DRMS Review of a Notice of Intent

The DRMS letter directs Powertech to respond not only to issues raised by the Division of Reclamation, Mining and Safety (DRMS) itself, but also to issues raised in letters from two outside parties: Weld County (which submitted a letter dated March 20, 2009), and the Western Mining Action Project (an activist group that has opposed the Centennial project since its inception, which submitted a letter dated March 20, 2009 from Jeffrey Parsons). Powertech is aware that under Senate Bill 08-228 certain information in Notices of Intent (as well as modifications thereto) is now available for public review. However, this does not mean that the public is authorized to intervene formally or informally in the review by DRMS of a Notice of Intent. The Colorado Legislature has neither directed nor empowered DRMS to allow such intervention. Thus, DRMS's requirement that Powertech respond to arguments raised by outside

1700 Lincoln Street, Suite 2222, Denver, Colorado 80203 (t) 303.382.6200 (f) 303.382.6210

Mr. Allen C. Sorenson
April 15, 2009
Page 2

parties, and in this case, in particular, arguments raised by a project opponent (Western Mining Action Project), is outside DRMS's authority and inconsistent with existing law and regulation.

The Colorado Mined Land Reclamation Board (MLRB) has recently acknowledged that there is no right for an outside party to appeal a DRMS decision on a Notice of Intent. *See Board Order, In the Matter of High Country Citizens' Alliance Appeal of Final Office Determination of Prospecting Notice for the Lucky Jack Mine, Number T-2007-026, June 11, 2008.* Mr. Parsons should be well acquainted with that case since he represented High Country Citizens Alliance in the matter.

While outside parties are not entitled to challenge a Notice of Intent directly, the approach DRMS used in this case, allowing parties hostile to any given project to channel their arguments through DRMS, offers outside parties a "backdoor" avenue to challenge the Notice of Intent. That backdoor avenue confers an entitlement that virtually no one else enjoys and provides a measure of inappropriate credibility to the arguments presented. The Legislature has not provided for an adversarial, multi-party Notice of Intent process, and we do not believe that was the intention of the Legislature in enacting Senate Bill 228 last year. Nor is such a process a practically feasible or economically sound way for DRMS to oversee prospecting activities, especially in the current economic crisis, when agency budgets are constrained and mining operations, a life blood of the Colorado economy, are facing especially serious economic challenges.

From this point forward, we hope and trust that DRMS will maintain the distinction between the process for DRMS's review of a Notice of Intent and the process for review of a Reclamation Permit application. Without waiving our objection to DRMS's requirement that Powertech respond to arguments raised by outside parties, in a spirit of cooperation and full disclosure we provide the following information regarding the Notice of Intent Modification for prospecting activities in connection with the Centennial Project. Additionally, as noted above, a separate technical letter to which this letter is attached is being provided.

Framework for Analysis: Distinction Between Prospecting Stage and Mining Operations Stage

The two significant questions that we will address from a legal standpoint are: (1) whether the activities included in the Notice of Intent Modification are "baseline site characterization" under Section 112.5(5)(a) of the Colorado Mined Land Reclamation Act (MLRA), C.R.S. § 34-32-101 *et seq.*, and (2) whether the activities included in the Notice of Intent Modification are "mining" activities under Section 103(12) of the MLRA.

The answer to both of these questions is an emphatic "no." The fact that these questions are being raised at all reveals some confusion between the streamlined documentation and review process applicable to the prospecting stage of a potential mining operation, and the substantially more detailed and demanding documentation and review process applicable to the

Mr. Allen C. Sorenson
April 15, 2009
Page 3

actual mining phase. The Western Mining Action Project and, to perhaps a more limited extent DRMS, appear to conflate these two very different stages in attempting to require the kind of documentation and review at this very early prospecting stage that normally, and properly under the MLRA, are not required until the actual mining phase.

DRMS's Mischaracterization of Prospecting Activities as Baseline Site Characterization

The DRMS letter asserts the following: "Many of the activities being conducted or proposed to be conducted under prospecting notice P-2008-043 are baseline characterization under the Colorado Mined Land Reclamation Act at 34-32-112.5(5)(a)." DRMS Letter, March 31, 2009, at 2, ¶7. Because DRMS characterizes the (unspecified) activities as such, the letter states that DRMS will retain an independent third party reviewer "to oversee baseline site characterization, monitor field operations, and review the information collected, developed, or submitted." However, hiring of a third party reviewer is *not* appropriate in connection with a Notice of Intent; instead, it is required only in connection with baseline site characterization activities conducted in connection with an application for a Reclamation Permit under Section 112.5 of the MLRA.

Powertech is at a loss to understand how DRMS can attempt to impose requirements applicable to an application for a Reclamation Permit on a company that has simply filed a Notice of Intent to prospect. Powertech disagrees with DRMS's conclusion that the listed prospecting activities constitute baseline site characterization, and we believe that DRMS's conclusion is inconsistent with the MLRA and the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for Hard Rock, Metal and Designated Mining Operations (MLRB Regulations). Because DRMS does not provide any information about what specific activities it refers to or how it reached the conclusion that those activities constitute baseline site characterization, presumably DRMS is taking the position that *any* sampling or testing activities at a potential mining site constitute baseline site characterization. This is simply not the case, either practically or legally.

Potential operators conduct a wide variety of tests and analyses at a site during the prospecting stage to determine whether or not to attempt to mine the site. It is overly burdensome and, moreover, completely unnecessary for the potential operator to be required to coordinate with and pay for the services of a third-party reviewer hired by the MLRB before every test it conducts during the prospecting phase, however limited or preliminary any given test might be. It would also be unnecessary, since the potential operator will be required to conduct a thorough baseline site characterization under the supervision of a third-party reviewer and submit the information to the MLRB if and when it determines to mine the site, at which stage it will be required to include all this information in its application for a Reclamation Permit. That certainly would be a more appropriate time to evaluate the use of a third-party review.

Treating, testing and analyses performed at the prospecting phase as “baseline site characterization,” as DRMS apparently proposes to do, ignores the two-tiered structure of the MLRA, which was unaltered by HB08-1161. Section 113 of the MLRA establishes requirements for the contents of a Notice of Intent to prospect. C.R.S. § 34-32-113. The requirements are limited and not heavily burdensome to potential operators, since at the prospecting stage the potential operator has not conclusively determined to proceed with mining operations – that is, development and production activities. Thus, at this stage, there is no requirement to develop or submit baseline site characterization information. In fact, baseline site characterization information is not required to be developed or submitted until the potential operator submits a full, detailed application for a Reclamation Permit. C.R.S. § 34-32-112.5(5)(a). Reclamation Permit applications are voluminous and highly specific, and can be extremely expensive to assemble. Such expense and specificity are justifiable, however, at this later stage, when the potential operator has determined that it is desirable from an operational, technical and economic standpoint to proceed with mine development and extraction, and is requesting approval from DRMS to engage in those activities. However, bumping up the “baseline site characterization” concept to the prospecting phase imposes an unacceptable expense and logistical burden on the potential operator, who may in the end never decide to mine the site.

Prospecting Activities Versus Mining Activities

The Western Mining Action Project claims that the aquifer pumping test included in Powertech’s Notice of Intent Modification is “development work” rather than “prospecting” under the MLRA. Under Mr. Parsons’ theory, which we reject in total, the aquifer pumping test (as well as a range of activities already approved by DRMS in the original Notice of Intent and Modification MD-01) presumably would trigger the requirement for a Reclamation Permit under the MLRA. We note that DRMS (correctly) does not itself argue that activities proposed under the Notice of Intent Modification constitute mining activities requiring a Mined Land Reclamation Permit under the MLRA. However, because DRMS requires Powertech to respond to issues raised by the Western Mining Action Project, we provide the following analysis of the issue.

All of the activities described in the Notice of Intent Modification clearly constitute “prospecting” under the MLRA and the MLRB Regulations. “Prospecting” is defined in the MLRA as:

The act of searching for or investigating a mineral deposit. “Prospecting” includes, but is not limited to, sinking shafts, tunneling, drilling core and bore holes and digging pits or cuts and other works for the purpose of extracting samples prior to commencement of development or extraction operations, and the building of roads, access ways, and other facilities related to such work....

Mr. Allen C. Sorenson
April 15, 2009
Page 5

C.R.S. § 34-32-103(12); *see also* MLRB Regulations Section 1.1(43) (employing identical language). The activities described in the Notice of Intent Modification, including the aquifer pumping test, are precisely the type of activities defined as “Prospecting” activities in the statute and regulations. In the case of in situ leach recovery operations, an essential part of “searching for or investigating” the mineral deposit is determining the location, contours, and physical/geochemical characteristics of the aquifer and geologic substrata, because that information is essential to a determination of the quantity of the mineral deposit as well as a determination whether extraction of the minerals, as and where they are situated, is commercially viable. Moreover, installation and operation of the aquifer pump testing well is necessary to “extract . . . samples prior to commencement of development or extraction operations.” All of the activities described in the Notice of Intent Modification are related to and necessary for achieving the desired exploration objectives in an effective, safe and environmentally sound manner and in accordance with applicable laws, regulations and industry standards, and thus fit firmly within the definition of “Prospecting.”

The Western Mining Action Project’s claim that the aquifer pumping test is not “Prospecting” but is instead “Development” is based on two fundamental misconceptions. First, the proposed activities do not qualify as “Development” activities, which are defined in the MLRA and regulations as:

The work performed in relation to a deposit, following the prospecting required to prove minerals are in existence in commercial quantities but prior to production activities, and aimed at, but not limited to, preparing the site for mining, defining further the ore deposit by drilling or other means, conducting pilot plant operations, constructing roads or ancillary facilities, and other related activities.

C.R.S. § 34-32-103(4). As discussed earlier, the work described in the Notice of Intent Modification is work required to search for or investigate the mineral deposit; it is not work intended to prepare the site for mining or in any other way to develop the potential mine. The prospecting activities included in the Notice of Intent Modification simply do not qualify as “Development” activities under the statutory definition.

Second, Section 5.1.1(2) of the MLRB Regulations requires DRMS to determine whether an activity is “Prospecting” or “Mining,” *not* whether the activity is “Prospecting” or “Development.” The real question, then, is whether the activities conducted under the Notice of Intent are “Mining.” The MLRA and MLRB Regulations typically tie the term “Development” to “Extraction.” Indeed, the MLRA defines “Mining Operations” as “the *development* or extraction of a mineral.” C.R.S. § 34-32-103(8). By definition, therefore, “Development” is intended to describe the activities necessary for the imminent extraction of the mineral deposit.

None of the activities described in the Notice of Intent Modification is related to the imminent extraction of the mineral deposit. Under Section 5.1.1(2) of the MLRB Regulations,

Mr. Allen C. Sorenson
April 15, 2009
Page 6

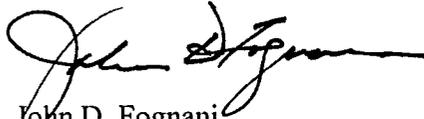
the DRMS must determine whether the proposed activities are "Prospecting" or "Mining." These activities are not mining – they are not being conducted as the immediate prelude to the extraction and production of minerals, but instead are exploratory in nature. Any activity prior to the development activities necessary to conduct mining operations is "Prospecting" and may be conducted under a Notice of Intent.

Additional Issues Requiring a Brief Response

The Western Mining Action Project claims that the MLRB was required by C.R.S. § 34-42-116(7)(j) to consult with the local Board of County Commissioners regarding the Powertech Notice of Intent. This is a baseless argument and cannot be characterized in any other way but misleading. The clear language of the statute shows that this requirement applies only to an application for a reclamation plan, which is not required at the prospecting stage. See C.R.S. § 43-32-113(1). The general language in Section 113 of the Act stating that the Notice of Intent should include measures to be taken to reclaim any affected land consistent with the requirements of Section 116 of the Act cannot be taken to convert the very limited requirements for the Notice of Intent into the far more detailed, comprehensive, and onerous requirements for an application for a Reclamation Permit.

Thank you for your time and attention to this important matter. We look forward to a continued dialogue with DRMS about the Centennial Project and to a process that is fair and balanced. Additional information about the technical aspects of the proposed aquifer well pumping test and other prospecting activities is being provided in a separate but contemporaneously filed letter. We believe the approach set forth herein will serve to put the technical issues raised in the proper context. We do not however, believe any further technical concession or undertaking is required by law nor should our willingness to address on a voluntary basis the issues raised in comments at this point establish any precedent for future purposes.

Very truly yours,



John D. Fognani
Of Fognani & Faught, PLLC

cc: Mr. Richard C. Clement
Mr. Richard Blubaugh