

APR 17 1996

Office of the Attorney General  
DEQ-IDHW

BEFORE THE DEPARTMENT OF HEALTH AND WELFARE  
STATE OF IDAHO

IN THE MATTER OF ORE PROCESSING )	
BY CYANIDATION PERMIT NO. )	DOCKET NO. 0113-95-32
CN-000023 (STIBNITE MINE INC.), )	
)	
IDAHO RIVERS UNITED et al., )	ORDER DENYING PETITIONERS'
)	MOTION FOR SUMMARY JUDGMENT
Petitioners, )	AND GRANTING PARTIAL SUMMARY
)	JUDGMENT TO RESPONDENT/
-vs- )	INTERVENOR
)	
IDAHO DEPARTMENT OF HEALTH )	
AND WELFARE )	
)	
Respondent. )	
_____ )	
STIBNITE MINE, INC., )	
)	
Intervenor. )	
_____ )	

This matter came on for Hearing, pursuant to notice, on February 26, 1996. At issue are the Petitioners' Motion for Partial Summary Judgment and the Respondent/Intervenor's Motion for Summary Judgment. Intervenor, Stibnite Mine, Inc., has filed a Joinder to the Respondent DEQ's Motion for Summary Judgment. The motions all address certain pre-hearing procedural issues related to the issuance of the permit which is the subject of the instant controversy. All parties submitted legal memoranda in support of their respective motions and in reply to opposing motions. All parties also submitted affidavits and pertinent documentary evidence concerning their respective positions.

Oral argument was presented by the parties on the above referenced date, by and through their respective counsel: Laird J. Lucas, representing Petitioners; Douglas M. Conde, Deputy Attorney General, representing the Respondent Idaho Department of Health and Welfare, Division of Environmental Quality; and Dale R. Cockrell, representing Intervenor, Stibnite Mine, Inc.

On December 21, 1995, the parties conducted a pre-hearing and scheduling conference for purposes of simplifying the issues and for purposes of scheduling this matter for Hearing. Pursuant to

*22 Balchman*

that conference, the parties have filed a letter stipulating to the issues to be determined by Summary Judgment (referred to herein as Pre-Hearing Issues). Those issues are set forth in a letter dated January 8, 1996, from Douglas M. Conde, Deputy Attorney General, addressed to the hearing officer and setting forth therein stipulations as to the pre-hearing issues to be determined by the Hearing Officer. Mr. Conde indicated in the letter that Intervenor, Stibnite Mine, Inc., has concurred with the Department's rendition of the issues to be determined. Most of the issues as set forth in the letter are procedural in nature, but also necessarily involve some substantive issues to be ultimately determined.

For purposes of this decision on the parties' respective motions, the list of issues set forth in the letter will be addressed individually for purposes of simplification of the ultimate issues.

At the Pre-Hearing and Scheduling Conference in this matter the parties agreed that where the administrative procedural rules are silent in respect to procedural issues governing this case, the Idaho Rules of Civil Procedure will be followed. The pre-hearing motions having been submitted along with evidence and pre-hearing memoranda in support thereof, the motions will be considered as ones for summary judgment under the Idaho Rules of Civil Procedure under the standards applied to motions for summary judgment found in said rules.

Rule 56(c), I.R.C.P. provides that on a motion for summary judgment the Court shall review "the pleadings, depositions, and admissions on file, together with the affidavits, if any, to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c); Rawson v. United Steelworkers of Am., 111 Idaho 630, 726 P.2d 742 (1986); Schaefer v. Elswood Trailer Sales, 95 Idaho 654, 516 P.2d 1168 (1973).

The Idaho Supreme Court has consistently held that summary judgment should be granted only if there is no genuine issue of fact after the Court has construed the record in favor of the party opposing summary judgment and that party has been accorded the

benefit of all reasonable inferences. Tusch Enters v. Coffin, 113 Idaho 37, 740 P.2d 1022 (1987); Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986); Anderson v. Ethington, 103 Idaho 658, 651 P.2d 923 (1982); Kline v. Clinton, 103 Idaho 116, 645 P.2d 350 (1982); Palmer v. Idaho Bank & Trust of Kooskia, 100 Idaho 642, 603 P.2d 597 (1979). Where the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. Kline v. Clinton, 103 Idaho 116, 645 P.2d 350 (1982); Farmers Ins. Co. of Idaho v. Brown, 97 Idaho 380, 544 P.2d 1150 (1976); Stewart v. Hood Corp., 95 Idaho 198, 506 P.2d 95 (1973); Lundy v. Hazen, 90 Idaho 323, 411 P.2d 768 (1966).

#### ISSUE 1.

Whether DEQ was required by the Idaho Rules for Ore Processing by Cyanidation, IDAPA 16.01.13.000, et. seq., to deny the Stibnite permit because the permit application was allegedly incomplete.

In reference to this issue, Petitioners move for summary judgment on the basis that the permit application of Stibnite Mine, Inc. was incomplete and on this basis the application should be denied.

The pertinent regulatory provisions concerning application for permits is found at IDAPA 16.01.13.300.01, et. seq., which provides in pertinent part:

Substantially Incomplete Applications. An application which does not, on its face, include all the requirements of Subsection 100.03. will be returned to the applicant with a written list of the missing items.

. . .

Section 300.03. Basis for Permit Denial. The Director shall deny a draft or final permit if:

a. The application is inaccurate or incomplete;

b. The facility as proposed cannot be conditioned for construction, operation, and closure to protect beneficial uses of the waters of the State.

Section IDAPA 16.01.13.100. addresses permit applications. In reference to the contents of an application, subsection 100.03 sets forth that the permit application will be used to determine if the proposed facility will conform with applicable regulations of the Idaho Department of Health and Welfare including rules and regulations concerning water quality standards and waste water treatment requirements and Idaho regulations for public drinking waters. This subsection further sets out specific requirements which should be included in the application to determine its completeness.

In their Memorandum in Support of the Partial Summary Judgment Motion on this issue, Petitioners point out several alleged omissions from the initial application from Stibnite Mine, Inc., the lack of which should have provided a basis for the Respondent to deny the permit. The alleged omissions are set forth in some particularity in Petitioners' opening memorandum at Page 16. In response, Respondent asserts that the information required by the above referenced regulatory provision is to be ". . . in sufficient detail to allow the director to make necessary application review decisions concerning design concept, environmental protection and public health." As further noted in Respondent's Reply Memorandum, Section IDAPA 16.01.13.100.03, provides in pertinent part that ". . . these regulations recognize the need for practicable design flexibility in order to meet site specific operating and environmental protection criteria."

It seems apparent to this Hearing Officer that the permit application process is designed to be one of ongoing supplementation and augmentation to fulfill the regulatory requirements for the issuance of a permit. The intent of the regulations would seem to require initially enough detail for Respondent to determine what further detail is required to be submitted before issuance of a permit.

Petitioners appear to argue on this issue that the application should be submitted fully detailed in all respects or else it should be denied. This Hearing Officer does not read the regulation as mandating that level of detail on the initial application for the permit. In this particular instance,

Respondent responded with several additional requirements to Stibnite Mine, Inc. before a permit could be granted, which procedure appears to be contemplated by the regulations. In this particular instance, it took apparently a year for the permit applicant to provide information to the satisfaction of Respondent before a positive determination to issue a permit was made.

In summary, in respect to this first stipulated issue, the Hearing Officer has reviewed all materials submitted to Respondent during this application process, and while not substituting his opinion for that of any of the parties regarding the quality or substance of the submitted material, finds that the referenced permit application regulations have been complied with by the Respondent and Intervenor and considers the qualitative issues to be a material fact in dispute which cannot be disposed of on Summary Judgment under the above referenced Rules of Civil Procedure and decisions related thereto.

Therefore, on this first stipulated issue the Hearing Officer denies Petitioners Motion for Partial Summary Judgment and grants Respondent's and Intervenor's Motion for Summary Judgment in respect to the issue of the completeness of the application for issuance of the permit. The issue of qualitative merits of the application is retained for evidentiary hearing; Summary Judgment is granted only as to whether all required information was submitted by Intervenor.

#### ISSUE 2.

Whether DEQ failed to respond to Petitioners' comments regarding the Stibnite Permit in violation of IDAPA 16.01.13.400.04.c and 450.02.b.

IDAPA 16.01.13.400.01. provides "Public Notice of Permit Actions. No public notice is required when a request for permit modification or revocation is denied. The director shall give public notice of: a. Receipt of a application for permit; b. Any public meeting scheduled."

IDAPA 16.01.13.450.02.b provides that the Department's response to all written comments and information received during the comment period shall be responded to and the response shall

"Briefly describe and respond to all written comments on the draft permit or denial."

As pointed out by the Respondent in its Memorandum, the above cited sections require DEQ to describe and respond to relevant written comments on the draft permit. There is no requirement of written response to comments concerning the initial application material. As set forth by Affidavits submitted by Respondent, comments submitted by the Petitioners were considered by staff of the Respondent during the review process (Affidavits of Martin Bauer, Joe Baldwin and Bruce Schuld).

Apparently, the written comments from Petitioners on the application were resubmitted in respect to the draft permit and this Hearing Officer is satisfied that the cited regulations concerning public comment response were satisfied by the Respondent.

Again, Petitioners' Motion for Summary Judgment appears to address the quality of the information responded to by the Respondent which should properly be a disputed material fact for resolution through evidentiary hearing processes. Therefore, Petitioners' Motion for Summary Judgment in respect to this issue is denied. Respondent's Motion for Summary Judgment in respect to the procedural issue of whether the comment response requirements of the regulation were adhered to by Respondent is granted and the substantive issues relating to the issuance to this permit are hereby retained for further proceedings.

### ISSUE 3.

The issue as presented by DEQ and Intervenor Stibnite Mine, Inc., is whether pursuant to the Idaho Rules for Ore Processing by Cyanidation IDAPA 16.01.13.300.02, DEQ could, upon written request of Stibnite, suspend indefinitely the running of the sixty day period in which DEQ must issue a notice of intent to deny or draft a permit.

As submitted by Petitioners: Whether pursuant to the Idaho Rules for Ore Processing by Cyanidation IDAPA 16.01.13.000, et. seq., DEQ could extend indefinitely the period in which DEQ was required to issue a notice of intent to draft or deny a permit on

the Stibnite application.

The regulatory provision concerning this issue is found at IDAPA 16.01.13.300.02, providing in pertinent part ". . . Within sixty (60) days of receipt of an application for a new permit or to modify an existing permit, the Director shall issue to the applicant a notice of intent to deny or draft a permit; provided, the Director may suspend the running of the sixty (60) day period for no more than thirty (30) days by requesting more detailed information necessary to ensure completeness and accuracy of an application, or the applicant may suspend the running of the sixty (60) day period by written request to the director."

It appears in respect to this issue that the above cited regulatory provision was complied with by DEQ. The permit application was submitted on April 7, 1994, with a sixty day period to end June 7, 1994. Prior to the expiration period on May 25, 1994, DEQ notified the applicants that the period was extended for an additional thirty days until July 7, 1994. Prior to that date, the applicant requested an indefinite suspension of the sixty day period for purposes of gathering more information for submitting to DEQ. On June 27, 1994, the time period was suspended with public notice thereof provided. It appears that the suspension period was complied with as set forth in the above noted regulation.

On this issue, therefore, the Hearing Officer denies the Petitioners' Motion for Summary Judgment and grants the Respondent/Intervenor's Motion for Summary Judgment in respect to the procedural aspects of delaying the completion of the application.

#### ISSUE 4.

As presented by DEQ and Intervenor Stibnite Mine, Inc., whether after the running of the time within which DEQ must issue a notice of intent to deny or draft a permit was suspended at the request of Stibnite, DEQ violated the Idaho Rules for Ore Processing by Cyanidation IDAPA 16.01.13.400.01 by failing to provide public notice of the receipt of additional information from Stibnite in support of its permit application.

As submitted by Petitioners: Whether DEQ violated the Idaho Rules for Ore Processing by cyanidation IDAPA 16.01.13.000, et. seq., by failing to provide public notice of receipt of any new or revised permit application from Stibnite after receipt of the initial application.

During the period of time set forth in reference to Issue 3 during which the decision to deny or draft a permit was suspended, the Intervenor, Stibnite Mine, Inc. submitted additional information in support of its permit application. There was no specific public notice of the receipt of additional information from Stibnite Mine, Inc.

Petitioners assert that public notice of the receipt of additional information should have been given by DEQ, and move for Summary Judgment on the issue of whether the rules for Ore Processing by Cyanidation were violated by the DEQ's failure to give specific public notice of the receipt of additional information during the subject period of time.

The rules provide on this issue of public notice as follows:

IDAPA 16.01.13.400 Public Involvement in Permit Procedures.

01. Public Notice of Permit Actions. No public notice is required when a request for permit modification or replication is denied. The Director shall give public notice of:

- a. Receipt of an application for a permit;
- b. Any public meeting scheduled;
- c. Issuance of a draft permit or a decision to deny the application for a permit;
- d. An appeal that has been granted.

The rules further provide at IDAPA 16.01.13.450 regarding the final permit decision in pertinent part as follows:

.02. Response to Public Comments. All written comments and information received during the comment period, together with the Department's final permit and the response to relevant written comments shall be made available to the public . . ."

Clearly Section 400 does not require public notice of each occasion of receipt of additional information, but read in

conjunction with Section 450, the DEQ did inform the public that the information submitted was available for public review. Apparently the availability of the information was utilized by the Petitioners for purposes of review during the comment period.

The Hearing Officer denies Petitioners' Motion for Summary Judgment on this issue and grants Respondent/Intervenor's Motion for Summary Judgment regarding the public involvement in permit procedure issue.

#### ISSUE 5.

As submitted by DEQ and Intervenor, Stibnite Mine, Inc., whether DEQ violated the Idaho Rules for Ore Processing by Cyanidation by allegedly considering, in making its permit decision, information received outside the written permit application.

As submitted by Petitioners: Whether DEQ violated the Idaho Rules for Ore Processing by Cyanidation IDAPA 16.01.13.000, et. seq., by basing its decision to grant the Stibnite permit on information that was received from Stibnite outside the written permit application and never the subject of public notice, review or comment.

Petitioners raise this issue based upon the May 23, 1995 Fact Sheet attached by DEQ to the permit indicating that DEQ's decision to issue permit was "based on the permit application and subsequent negotiations by the Division of Environmental Quality and the proponent of design construction operating maintenance and closure criteria." Petitioners argue that evidently there were oral negotiations between the applicant and DEQ which have not been reduced to writing for future review purposes or for purposes of public comment. On the other hand, Petitioners do not argue that negotiations, discussions or meetings with permit applicants is improper.

Respondent argues that there simply were no oral agreements between the applicant and DEQ which have not been reduced to writing. The Respondent also argues that indeed a representative of Idaho Rivers United (one of the Petitioners herein) was also involved, during the period before the issuance of the draft

permit, in oral discussions with the DEQ concerning this subject application. See the statement of Bruce Schuld in his Affidavit in Support of Motion for Summary Judgment dated February 5, 1996, wherein the Affiant states "I reviewed and considered all the public comments received by DEQ regarding the application submitted by SMI when I assisted in drafting the SMI permit. I specifically reviewed and considered the comments of Idaho Rivers United and Idaho Conservation League . . . In early May 1995, I spoke with Charlie Ray from the Idaho Rivers United by telephone regarding the SMI facility, the application submitted by SMI and the requirements to be included in the SMI permit."

While Petitioners argument is well taken that oral representations made between applicants and DEQ can be subject to misinterpretation, lack of opportunity for public review and problems resulting from turnover of staff, there is simply no evidence in support of this aspect of Petitioners' Motion that any oral discussions between the parties were not reduced to writing and are not to be found within the documentation pertaining to the permit application in this particular case. Further, it would appear that discussions and negotiations between the parties would be a logical part of the process for determining whether to issue a draft permit in a matter such as this.

Based upon this, the Hearing Officer denies Petitioners' Motion for Summary Judgment on this issue and grants Respondent/Intervenor's Motion for Summary Judgment concerning the issue of whether DEQ violated the Idaho Rules for Ore Processing by Cyanidation by permitting the applicant to engage in oral discussions and negotiations in support of its application.

#### ISSUE 6.

Whether it was a violation of Idaho Rules for Ore Processing by Cyanidation, IDAPA 16.01.13.450.02, for Stibnite to assist DEQ in preparing a response to public comments regarding the Stibnite permit.

IDAPA 16.01.13.450 regarding the final permit decision provides in pertinent part regarding this issue as follows .02 "Response to public comments, all written comments and information

received during the comment period together with the department's final permit and the response to relevant written comment shall be made available to the public...."

Petitioners assert that the Fact Sheet Addendum of July 24, 1995, acknowledges that it was not totally prepared by DEQ and cites the following language: "This is a summary of the relevant written comments received on a Stibnite Mine, Inc. Cyanidation draft permit along with responses developed by Idaho Division of Environmental Quality (DEQ), and Stibnite Mine, Inc. (SMI) . . ."

Respondent argues that there was no violation of the above referenced rule involved in the applicant's assistance in preparing public response to public comment. The Respondent further argues that it was helpful from a practical respect to have the applicant assist in responding to the comments of a technical nature regarding issuance of the permit.

On this issue, the Hearing Officer is unaware of any provision in the above referenced rule prohibiting assistance of the applicant in drafting a response to comment. In the absence of a prohibition in the explicit language of the noted rule of this activity the hearing officer denies Petitioners' Motion for Summary Judgment on this issue and grants Respondent/Intervenor's Motion for Summary Judgment concerning whether there was a violation of the Idaho Rules for Ore Processing by Cyanidation for the applicant to assist the DEQ in preparing a response to public comments regarding the Stibnite Permit.

#### ISSUE 7.

Whether DEQ violated the Idaho Rules for Ore Processing by Cyanidation, IDAPA 16.01.13.650, by requiring a bond in the amount of \$54,000.00.

IDAPA 16.01.13.650.02 in reference to financial assurance for permanent closure of the facility provides that: "The amount of financial assurance shall be determined by multiplying five cents (\$.05) by the number of tons of untreated processed ore and the projected number of tons to be leached with cyanide with the next calendar year, unless the permittee requests an amount based on a projection for more than one (1) year; however, the minimum amount of financial assurance shall be the sum of twenty-five thousand

dollars (\$25,000) and the maximum amount shall be the sum of one hundred thousand dollars (\$100,000)".

In this instance the amount of financial assurance was set by DEQ as the amount of fifty-four thousand dollars.

This issue appears to be one of a merely arithmetical calculation and was not strongly pursued by Petitioners in their memoranda or at oral argument on the Motions for Summary Judgment. No further information or evidence having been submitted in support of this Motion by Petitioners, the Hearing Officer denies their Motion for Summary Judgment in respect to this issue and grants the Motion for Summary Judgment of the Respondent/Intervenor regarding the issue of whether the above cited rule was complied with by DEQ.

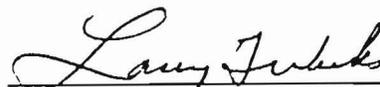
#### ISSUE 8.

As presented by DEQ and Intervenor, Stibnite Mine, Inc., whether Petitioners Connecting Point for Public Lands and Concerned Citizens for Responsible Mining have standing to appeal DEQ's permit decision.

The Respondent and Intervenor have apparently chosen not to pursue this particular issue on Summary Judgment and therefore insofar as the stipulated issue is construed as a Motion for Summary Judgment by the Respondent/Intervenor, it is denied.

In summary, procedural issues stipulated to and presented to the Hearing Officer in this matter are hereby disposed of. It appears that the most important of the issues regarding a completeness of the permit application by Stibnite retains all characteristics of substantive issues to be determined at a evidentiary hearing. The Hearing Officer commends all parties for the well briefed and substantiated Motions for Summary Judgment as well as oral argument presented at the hearing in this matter on February 26, 1996.

SUBMITTED this 12 day of April, 1996.



LARRY F. WEEKS, Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of April, 1996, I mailed a true and correct copy, postage prepaid, of the foregoing ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PARTIAL SUMMARY JUDGMENT TO RESPONDENT/INTERVENOR to the following:

Laird J. Lucas  
Land and Water Fund of the Rockies  
P.O. Box 1612  
Boise, Idaho 83701  
CERTIFIED MAIL/RETURN RECEIPT

Doug Conde  
Deputy Attorney General  
Division of Environmental Quality  
1410 N. Hilton  
Boise, Idaho 83706

Murray D. Feldman  
Holland & Hart  
P.O. Box 2527  
Boise, Idaho 83701

Dale R. Cockrell  
Murphy, Robinson, Heckathorn & Phillips  
P.O. Box 759  
Kalispell, MT 59903-0759



---

STACI WELSH  
Administrative Procedures Coordinator