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January 7, 2011

VIA OVERNIGHT COURIER

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Joseph Pizarchik, Director  
Office of Surface Mining Reclamation  
And Enforcement  
1951 Constitution Avenue, N.W.  
Washington, D.C. 20240

Mr. Earl Bandy, Jr.  
Field Office Director  
Office of Surface Mining Reclamation and  
Enforcement  
710 Locust St., 2nd Floor  
Knoxville, Tennessee 37902

**RE: Designation of Certain Lands Within the North Cumberland Wildlife  
Management Area and the Emory River Tracts Conservation Easement,  
Anderson, Campbell, Morgan, and Scott Counties, Tennessee as Unsuitable  
for Surface Coal Mining Operations**

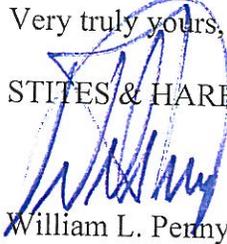
Dear Messers. Pizarchik and Bandy:

Pursuant to 30 C.F.R. §764.15(c), and by counsel Stites & Harbison, PLLC, Tennessee Mining Association (TMA), National Mining Association (NMA), on behalf of themselves and their members, and Campbell County, Tennessee (collectively "Intervenors") seek to intervene in opposition of the petition filed by the State of Tennessee on October 1, 2010.

Pursuant to 30 C.F.R. §764.15 (c), "any person may intervene in the proceeding by filing allegations of facts describing how the designation determination directly affects the Intervenor, supporting evidence, a short statement identifying the petition to which the allegations pertain, and the intervenor's name, address and telephone number." Part I of the Notice of Intervention In Opposition To The State Of Tennessee's Petition identifies the Intervenor and contact information, along with their interests and how designation would directly affect those interests and the interests of the Intervenor's members.

Joseph Pizarchik  
Earl Bandy, Jr.  
January 7, 2011  
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Should you have any questions, please do not hesitate to contact me. I look forward to hearing from you.

Very truly yours,  
STITES & HARBISON, PLLC  
  
William L. Penny

WLP:ncj

Enclosures as stated

cc: Chuck Laine w/enclosures  
Bradford Frisby, Esq.  
The Honorable William A. Baird  
Paul Schmierbach, TDEC  
David McKinney, TWRA  
Elizabeth McCarter, Esq., AG.

**OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT  
KNOXVILLE FIELD OFFICE**

**IN RE DESIGNATION OF CERTAIN  
LANDS WITHIN THE NORTH  
CUMBERLAND WILDLIFE  
MANAGEMENT AREA AND THE  
EMORY RIVER TRACTS  
CONSERVATION EASEMENT,  
CAMPBELL, CAMPBELL, MORGAN  
AND SCOTT COUNTIES, TENNESSEE  
AS UNSUITABLE FOR SURFACE COAL  
MINING OPERATIONS**

**RECEIVED**

**JAN 11 2011**

**OSM KNOXVILLE  
FIELD OFFICE**

**NOTICE OF INTERVENTION  
IN OPPOSITION TO THE STATE OF TENNESSEE'S PETITION**

Pursuant to 30 C.F.R. § 764.15(c), Tennessee Mining Association (TMA) and National Mining Association (NMA), on behalf of themselves and their members, and Campbell County, Tennessee (collectively, the Intervenors), request that the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement (OSMRE) grant the Intervenors the right to intervene in opposition of the Petition to Designate Certain Lands in Tennessee as Unsuitable for Surface Coal Mining Operations filed by the state of Tennessee on October 1, 2010. Under 30 C.F.R. § 764.15(c), “any person may intervene in the proceeding by filing allegations of facts describing how the designation determination directly affects the intervenor, supporting evidence, a short statement identifying the petition to which the allegations pertain, and the intervenor’s name, address, and telephone number.” Part I below identifies the Intervenors and their contact information, and describes their interests and how designation would directly affect those interests and the interests of the Intervenors’ members. The remaining parts of this Notice provide supporting evidence and identify those sections of the Petition to which the Intervenors’ allegations pertain.

The Petition seeks designation as unsuitable for surface coal mining operations an overly broad area including all lands lying within 600 feet of all ridge lines lying within the North Cumberland Wildlife Management Area (WMA), comprised of the Royal Blue WMA, the Sundquist WMA, and the New River WMA (also known as the Brimstone Tract Conservation Easement), and the Emory River Tracts Conservation Easement, and encompassing approximately 67,326 acres. (Petition at 1.) The Petition relies on two of the designation criteria set forth in section 522 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272 (SMCRA), asserting that (1) surface mining operations in the Petition area would be incompatible with numerous State land use plans and programs under 30 U.S.C. § 1272(a)(3)(A) (Petition at 3-4, 8-20) and that (2) the Petition area meets the definition of “fragile lands” under 30 U.S.C. § 1272(a)(3)(B) and surface mining may significantly damage the natural systems and esthetic, recreational, cultural, and historic values of the ridge lines and their viewsheds that exist within the Petition area. (Petition at 4, 20-28.)

Unfortunately, public statements and representations to the Department of the Interior by the representatives of the State may have led OSMRE to agree to deem the otherwise frivolous Petition complete. In an editorial published in *The Tennessean*, TDEC Deputy Commissioner Paul Sloan stated:

This petition is a balanced effort to protect the state’s investments while still allowing coal mining to take place under conditions that will not result in the destruction of mountaintops. Accordingly, the petition asks only that the method of mining be limited as it relates to these ridgelines. If the petition is granted, existing permits will not be affected, new surfacing mining that remediates historical water quality damage may continue, and mining by less disruptive methods will likewise be unaffected.

(Paul Sloan, *State: Proposal is Fair to Miners, Promotes Job-Rich Ecotourism*, THE TENNESSEAN, Oct. 12, 2010, <http://blogs.tennessean.com/opinion/2010/10/11/state-proposal-is->

fair-to-miners-promotes-job-rich-ecotourism/.) The statement relates to the method of mining on ridgetops. The Petition, however, if granted, would also eliminate underground mining because it applies to surface impacts to underground mining. Mr. Sloan further states that existing permits would not be affected, which while true, completely overlooks the fact that many of the existing permits will require revisions and renewals that could be stopped. He also makes a statement concerning surface mining that could remediate historical water quality damage. To the extent that this refers to re-mining, the Petition is silent in that regard. In fact, most of the mining conducted in the Petition area and that will be conducted in the future will re-mine pre-law sites. Thus, TDEC has represented to the public that the Petition will have minimal effect on the mining industry when the Petition itself makes no exception whatsoever for any type of surface coal mining operations. (*See id.*) These public statements—which do not match the actual proposal—is yet another reason why the Petition should have been deemed incomplete.

Intervenors also submit this Notice to preserve claims against Petitioner and its attempt to misuse the federal Lands Unsuitable for Mining process to breach state contracts with the mineral owners, impair longstanding contractual obligations and commitments between itself and the owners of mineral rights, and blatantly ignore the role played by the mineral owners in establishing the WMA. For example, it is clear that Petitioner has confused the impact of pre-SMCRA mine sites that were not permitted or reclaimed with modern permitted surface coal mining operations.

The introduction to the Petition relies on incomplete and misleading paraphrases about the intent of SMCRA. (Petition at 1-4.) The Petition cites only two of the thirteen identified purposes and seems to paraphrase the intent of SMCRA. SMCRA became effective on August 3, 1977 and was enacted to remedy virtually unregulated surface coal mining. It was in that context

that Congress believed that the development of a regulatory program would help minimize the adverse affects of mining operations. The congressional findings in 42 U.S.C. § 1201 primarily address the adverse impacts created by previously unregulated and unreclaimed mining operations.

Unlike timber clear-cutting activities, which Petitioner will continue to allow, surface coal mining operations are now heavily regulated by both the state and federal governments so as to assure no adverse impact to the areas. Notwithstanding the detail provided below, Intervenors reserve the right to amend and supplement their arguments in opposition to the Petition in subsequent filings.

The intent of the Petition is nothing short of a land grab to persuade the federal government to take property interests that it wanted to obtain but failed or refused to purchase. If the State were a private litigant it could be sued for tortious interference with contract, if not breach of contract. The state of Tennessee's request to the federal government to effectively give TWRA the mineral estates free of charge is frivolous and a misuse of the Lands Unsuitable for Mining process. Intervenors intervene to contest these obviously improper actions.

In short, and as further set forth below for OSMRE's convenience, Intervenors submit this Notice and intervene in opposition to the State's Petition, which contains assertions of overbroad and unsupported allegations that surface coal mining is now incompatible with the State's land use plans for the Petition area. Petitioner did not complain that surface coal mining was incompatible when the State acquired the interests, despite knowing that mining was being conducted then and would be into the foreseeable future, nor do any plans for any of the areas ever mention incompatibility with surface coal mining operations.

I. **IDENTIFICATION OF THE INTERVENORS AND THEIR INTERESTS, AND DESCRIPTION OF HOW DESIGNATING THE PETITION AREA AS UNSUITABLE FOR SURFACE MINING ADVERSELY AFFECTS THOSE INTERESTS.**

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Intervenor Tennessee Mining Association (TMA) is a Tennessee not-for-profit corporation whose members own mineral rights and/or derive significant revenue from surface coal mining operations in the area covered by the Petition. The mineral rights are secured by agreements between Petitioner and TMA members, including National Coal, LLC, through written legally binding recorded conveyances that clearly provide the right to continue to conduct surface coal mining operations. If the Petition is granted, its members will be precluded from mining a substantial amount of coal by surface mining methods. In addition, its members, including mining engineers, equipment vendors, and others with ancillary interests, will lose substantial income if surface coal mining is precluded.

Intervenor National Mining Association (NMA) is a national trade association that includes the producers of most of the nation's coal, metals, industrial, and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry. NMA represents the interests of the coal mining industry on a national scale, and has had a strong interest in ensuring that the Lands Unsuitable for Mining provision under the Surface Mining Control and Reclamation Act is used in an appropriate manner. In addition, NMA has member companies, including National Coal, LLC, that are directly impacted by this Petition. NMA's longstanding interest in this issue in Tennessee goes back at least six years, when it filed comments with OSMRE in January 2006 on a similar Lands Unsuitable for Mining petition.

Intervenor Campbell County, Tennessee, is a political subdivision within the State of Tennessee. The designation of certain lands as unsuitable for surface coal mining operations will have great negative economic impacts on Campbell County. Coal in Campbell County provides employment for hundreds of people which complement other jobs related to the mining industry, such as equipment sale and service, fuel usage, logging, and agriculture. Coal has always been a way of life for the mining families in Campbell County and has been an occupation that has been passed from generation to generation with pride forthcoming to the next generation of coal miners. Campbell County received \$405,228.18 in coal severance tax in the fiscal year 2009-10. Campbell County Highway Department received \$202,614.10 with the entire amount going into the road paving budget. Campbell County Board of Education received \$202,614.08 with this amount going into the General Purpose School Fund. In order to produce this revenue on the backs of the local property owners, the county commission would need to raise the local property

tax rate by 7 cents, placing undue burden on property owners. In short, while not all of the coal is part of the Petition area or in Campbell County, the elimination of the ability to extract coal will have a substantial negative impact to Campbell County, which is in already poor economic times. Campbell County will lose substantial revenue with the loss of surface coal mining in the Petition area.

**II. TENNESSEE DOES NOT PERMIT MINING USING THE MOUNTAINTOP REMOVAL/VALLEY FILL METHOD**

Intervenors wish to dispel at the outset the myth that somehow the Petition is warranted to prevent mining using the mountaintop removal method. Much of the State's public statements and filings of intervenors in support of the Petition focus on the need to grant the petition to prevent mountaintop removal mining associated with valley fill. The State does not permit overburden from mining to be placed within 100 feet of a stream. T.C.A. § 69-3-108(f)(1). The overburden is returned to reclaim highwalls to approximate original contour from new or pre-SMCRA sites. Thus, Tennessee does not allow the mountaintop removal method. This position does not mean that Intervenors support such restrictions, but understand that surface coal mining must be conducted using contemporary mining methods allowed in Tennessee. Using contemporary mining methods, the Petition area will be reclaimed with no adverse impact to the area including ridgelines and associated streams. Thus the ridgelines will remain intact following reclamation contrary to the State's assertions and/or concerns that they wish to preserve unbroken ridgelines.

**III. STANDARD OF REVIEW: THE SECRETARY MUST ASSUME THAT CONTEMPORARY MINING PRACTICES WOULD BE FOLLOWED IF MINED.**

One of the most significant problems with the Petition is that it assumes contemporary mining practices leave highwalls, unreclaimed surfaces, and polluted water. In 1985, the United

States District Court for the District of Columbia upheld the government's interpretation of contemporary mining at 30 C.F.R. § 764.13(b)(1)(v), which requires a petitioner to assume that "contemporary mining practices required under applicable regulatory programs would be followed if the area were to be mined." *In re Permanent Surface Mining Regulation Litigation*, 620 F. Supp. 1519 (D.D.C. 1985). The lands unsuitable regulations require the petition to provide allegations of fact and supporting evidence, covering all lands in the petitioned area:

which tend to establish that the area is unsuitable for all or certain types of surface coal mining operations, pursuant to specific criteria of assuming that contemporary mining practices required under applicable regulatory programs would be followed if the area were to be mined. Each of the allegations of fact should be specific as to the mining operation, if known, and the portion(s) of the petitioned area and petitioner's interests to which the allegation applies and be supported by evidence that tends to establish the validity of the allegations for the mining operation or portion of the petitioned areas.

30 C.F.R. § 764.13(b)(1)(v) (emphasis added).

The Petition should not have been deemed complete, because the State did not provide evidence that would tend to show that the alleged impacts would occur even if contemporary mining practices were followed. The State only speculates that the mining has inherent problems. That is simply not evidence within the meaning of the rules and the Petition should have been rejected.

In evaluating the Petition, the Secretary must assume that the mining will be in compliance with such practices. For example, the Secretary must assume that the mining will comply with the State's water quality laws. Because the State imposes strict effluent limitations and standards in its water quality related permits, and no permit can be issued that would cause a condition of pollution, the State's allegations related to concerns over water-based recreation and

other such uses are groundless. Tenn. Code Ann. § 69-3-108(g). Under Tennessee law, pollution is defined as follows:

“Pollution” means such alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of this state, including, but not limited to, changes in temperature, taste, color, turbidity, or odor of the waters that will:

(A) Result or will likely result in harm, potential harm or detriment to the public health, safety, or welfare;

(B) Result or will likely result in harm, potential harm or detriment to the health of animals, birds, fish, or aquatic life;

(C) Render or will likely render the waters substantially less useful for domestic, municipal, industrial, agricultural, recreational, or other reasonable uses; or

(D) Leave or likely leave the waters in such condition as to violate any standards of water quality established by the board.

Tenn. Code Ann. § 69-3-108(22).

Because the Secretary must assume that the mining will be conducted in compliance with contemporary mining practices, the Secretary must also assume that no discharges from the surface coal mining operations in the Petition area will cause the harms that Petitioner claims will occur. Likewise, SMCRA permits have strict controls on blasting and dust control, and require restoration of all highwalls, including highwalls disturbed by pre-SMCRA mining. SMCRA reclamation plans are developed in coordination with the State to provide vegetation and other features requested for proper management. The Secretary must assume that all of these permitted activities will be correctly carried out. While the Petition addresses destruction of habitat and other resources, there are no facts that would show that the habitat would not be restored even if temporarily impacted. The Secretary must assume that the SMCRA permit, the State permits, and the reclamation plans will be designed to offset any temporary impacts during the active mining phase.

**IV. COAL SURFACE MINING IN THE PETITIONED AREA IS ENTIRELY COMPATIBLE FOR SURROUNDING LAND USES AND LAND USE PLANS.**

**A. The State Of Tennessee Has Recognized That Surface Coal Mining In The Petitioned Area Is Wholly Compatible With The Land Uses And Is Thus Suitable For Mining.**

It is somewhat puzzling that an agency charged with managing a wildlife area would take action that would actually interfere with that objective. Yet, that is precisely what the State is trying to do through its Petition. TWRA developed the Royal Blue, Sundquist, and New River WMAs through complicated real estate transactions that would allow it to manage the areas to benefit management of wildlife for hunting, fishing, and other related activities. In doing so, the State, through the State Building Commission, acquired only the surface rights. In fact, the State not only expressly acknowledged that surface coal mining would be conducted in the area but also that such mining was compatible with the management of the wildlife management area. In return, the State agreed to convey the surface rights to the mineral owners, upon request, for the coal resources up to a certain amount without restriction as to the location of the coal. Once the mining was completed, the owner of the mineral estate would deed the property back to the State. **Attachment A** contains some of the original Asset Purchase Agreements and related documents relating to mineral interests of some of the members of Intervenors TMA and NMA organizations. **Attachment B** is the deed evidencing the conveyance to the State of Tennessee and showing in Exhibit B to the deed that all mineral rights were reserved by the seller. In order to simplify the process, rather than deeding the property to the owner of the mineral estate, the State has entered into easements that allow access to the surface estate for surface coal mining.

On November 1, 2010, well after the instant Petition was filed, the State of Tennessee acknowledged the clear and unequivocal compatibility and right to conduct surface coal mining operations in the Petition area. **Attachment C** is the easement to National Coal, LLC, signed on

November 1, 2010. It expressly recognizes National Coal's right to mine coal. The State acknowledged that it acquired the surface rights subject to numerous outstanding prior conveyances, including mineral ownership of all coal reserves on the property and the right to develop the coal reserves. It expressly granted and conveyed National Coal the right to use all property for mining—including surface mining—of coal from all seams in, on, or underlying property in the New River Tract together with all necessary ingress and egress "it deems appropriate for the realization of the value of its coal mineral interests . . . ." (See Attachment C.) The property included the ridgelines that the State said were incompatible in its Petition filed prior to this easement.

With regard to previous mining activity, the easement agreement provides at Paragraph 2.2:

The Surface Owner is aware of the current mining operations being conducted on the Property by the Coal Mineral Owner and/or its assigns. The Surface Owner, through the Tennessee Wildlife Resources Agency, previously granted permission to the Coal Mineral Owner to access any necessary portals or other surface areas in connection with the extraction of coal currently being conducted by the Coal Mineral owner to access any necessary portals or other surface areas with the extraction of coal currently being conducted by the Coal Mineral Owner . . . ."

Section 2.3 even addresses sites that affect environmental sensitive areas:

If Surface Owner believes any mine site . . . will materially adversely impact an endangered or threatened species or a unique rare geological phenomenon located within the boundaries of the proposed mine site, then the Surface Owner shall immediately inform the Coal Mineral Owner and the parties shall promptly meet to attempt to resolve the issues affective the proposed mine site.

Neither National Coal nor any other member of TMA or NMA has ever been notified by the State of any such potential adverse impact, and the State has never contacted National Coal about a meeting.

The easement carried over requirements from previous easements relating to mine development plans. Paragraph 2.4 requires the Coal Mineral Owner to notify the State of the location of a mining operation prior to commencement of operations. The plan would point out agreed upon buffers and acreage limitations. At no time since 1994 has the State informed either OSMRE or National Coal that mining on ridges in the now-Petition area would not be allowed, because the agreement does not give them that right.

In Paragraph 3.1, the State agreed that coal mining in any of the areas, including the ridgelines, did not detrimentally or materially affect the State's surface owner rights "if [National Coal's] activities and operations are consistent with local, state and federal laws and regulations." (See Attachment C.) This language appears in previous versions of the agreements. The State has not notified National Coal of any instance where the activities conducted by National Coal, including mining at the ridgelines, detrimentally or materially affected the State's surface rights.

Without agreement on the mineral rights as stated above, TWRA would not have been able to develop the WMAs. As evidenced by an October 4, 2006 letter from TWRA representative David McKinney, attached as **Attachment D**, TWRA was sensitive to blanket impacts to the various estates in WMAs. According to Mr. McKinney:

We have WMAs with fractured estates where TWRA has the surface estate but not the timber or mineral estate. In order to acquire these lands for long-term conservation purposes, the state has entered into multi party management agreements that do not anticipate Tier status for surface waters.

(See Attachment D.) The letter was written by TWRA in response to proposed changes in the State's antidegradation rule to "strongly recommend that waters found on WMAs not automatically receive Tier status designation." TDEC had proposed that all waters found in WMAs be automatically assigned "exceptional" (formerly Tier 2) status. If a water is

exceptional, no degradation can occur unless the applicant for a permit to either fill a stream or discharge wastewater from a mine site can demonstrate that there is a social and economic necessity to do so. Thus, TWRA realized that automatic designation of waters in WMAs—like automatic designation of all ridges in WMAs—violated the agreements with the owners of the mineral estates.

Because the Petition was so defective that it did not even contain documents evidencing the shared use agreements with the owners of the mineral estates, easements, or other such documents, it is difficult to understand, at least from a legal standpoint, how this process can even begin, let alone proceed. In addition, the Petition apparently intentionally fails to describe the actual benefits derived by the shared use arrangement with surface coal mining operations. Much of the mining done in the Petition area took place in sites before 1978. Accordingly, permitted operations will require reclamation of the old, pre-SMCRA sites to eliminate or modify the unreclaimed highwalls, which benefits and restores the contours of the area. In addition, as part of the shared use, TWRA and the coal permittee will develop a reclamation plan to benefit the wildlife management in the area. In the reclamation plan, TWRA requests the permittee to provide specific grass, vegetation, and trees. In some cases, the plan may specify that certain areas be grassed and not forested to better manage wildlife. If surface mining is eliminated in the Petition area, then TWRA would actually lose the ability to restore pre-law sites as well as develop and restore (at no expense to the State) areas to assist with the purposes and goals of the wildlife management areas. By seeking to remove the State's supervisory function and the permittee's contractual obligation to beneficially contribute to the wildlife management in this area, the Petition is contradictory to TWRA's intended goals.

For example, the management plan for the Royal Blue WMA (referenced in the Petition) discusses (at page 24) how it intends to work with post-1977 coal leases. TDEC and TWRA are among the team of agencies that would evaluate permits for surface coal mining under criteria set out in the agreement. At no time has TDEC or TWRA stated that any surface coal mining operation in the Royal Blue WMA did not meet the criteria it established along with the goal “that these mine sites be left with better overall habitat than existed before the coal harvest began.” In addition, TWRA provides that ongoing mining operations would be monitored by TWRA and TDEC, and specifically that TWRA’s role in the reclamation plan includes that “TWRA personnel will describe each detail of reclamation including the revegetation plan.”

The plan goes on to specify types of vegetation for food, for cover, and to enhance wildlife populations. (*See* management plan referenced in the Petition at 24.) Roads were expected to be left in usable states and completed in a manner to separate game population from public activities.

The Sundquist WMA has a similar requirement; however, the State failed to supply the shared use agreement as part of its Petition. It is difficult to understand how OSMRE could deem the Petition complete without this basic document.

TDEC officials have stated publicly that the Petition does not apply to re-mining operations. (*See, e.g.*, editorial by Paul Sloan, *supra*.) State officials also claim that it applies to only a small amount of coal available in the overall wildlife management areas. However, the Petition excludes nothing like that and makes no attempt to measure—let alone limit—the volume of coal that would be off-limits to mining.

The State’s Petition quotes liberally from Senate Joint Resolution 980, May 5, 2010, but omits one of the most important provisions as it relates to this Petition:

Whereas, the purpose of this resolution is to increase public awareness, visitation, and appreciation of the Cumberland Plateau, but refrains from imposing any regulatory requirement.

S.J. Res. 980, 106th Leg. (Tenn. 2010) (emphasis added).

The State's action flies square in the face of this clear statement of intent. It was not the general assembly's intention to impose a regulatory restriction such as that requested by the Governor. Thus, this Petition is contrary to the Petitioner's own intentions.

Finally, Intervenors are aware of numerous surface coal mining permits issued in recent years in the Petition area. Petitioner did not object to any of these permits as incompatible with the land use plans. It is grossly inconsistent with past practice and wholly consistent with a new strategy of conforming a managed area to a preservation area, which is incompatible with the land use plans for those areas.

**B. Surface Coal Mining and Its Associated Reclamation Is Environmentally Beneficial to the Petition Area.**

The Petition makes a number of false and illogical leaps, among the worst of which is the apparent belief that surface coal mining is per se incompatible with the planned uses and adversely impacts fragile lands when, in fact, surface coal mining being conducted and proposed to be conducted in the Petition area will greatly improve the habitat and environment there. Most of the ridges in the Petition area suffered from destruction by surface coal mining operations conducted prior to the effective date of the Surface Mining Control and Reclamation Act of 1977. Thus, thousands of linear feet on or along the ridgelines remain scarred with unreclaimed highwalls. Streams in the area were also impacted by the previous pre-law mining activities.

Surface coal mining in the Petition area gives the State of Tennessee an opportunity to improve the area, not make it worse. First, surface coal mining is stringently regulated in Tennessee by the federal OSMRE and through water quality permits issued by the State. The

Petition fails to state how surface coal mining operations, properly conducted pursuant to established regulations, will negatively impact the land uses. During active mining, the area is no different than a commercial construction project with temporary land disturbances. Most of the area will be subject to re-mining requirements that will require reclamation of the previous unreclaimed highwalls. Thus, the mining actually restores the ridges rather than harms them.

There are approximately 1,000 miles of abandoned mines in Tennessee. Since 2003, the industry has reclaimed 125 miles of those abandoned mines. In 2009 and 2010, Tennessee's coal industry planted 250,000 trees, reestablished wildlife habitat (which allowed introduction of elk), improved water quality, and restored viewsheds scarred by past mining. According to OSMRE, 321,000 trees were planted as part of reclamation of sites. Approximately 73% of those sites were planted using the forestry reclamation approach (FRA) recommended by OSMRE. (*See, e.g.,* Brown, Fred, *Restoring forests at mines takes root*, The Knoxville News Sentinel (Mar. 10, 2008), *available at* <http://www.knoxnews.com/news/2008/mar/10/restoring-forests-at-mines-takes-root/>.)

Through the easements and other shared use agreements with TWRA, reclamation in the Petition area is accomplished in a manner that TWRA believes is best for the area. For example, TWRA may specify the type of vegetation or even the contours that should remain in the reclamation plan. Thus, the State gets substantial benefit—at no cost to taxpayers—for improving the area for wildlife habitat. The State relies heavily on the TWRA's "Comprehensive Wildlife Management Strategy." That documents makes it a priority to reclaim pre-law mining sites. While TWRA hopes that federal abandoned mine land funds will assist in reclamation, Tennessee will never be able to maximize the grants for such work because the State chose not to regulate surface coal mining. Thus, the re-mining will be the best, and quite possible the only

opportunity to reclaim the pre-law sites. Re-mining in the area will not only be compatible with the State's desired land use, it will help TWRA achieve the important goal of restoring abandoned mine sites.

Surface mining in the Petition area will also allow native reforestation with introduction of trees such as the American Chestnut. This reforestation will reintroduce a number of species and improve habitat. Specification of vegetation and its location will also provide habitat for numerous other species which have not been prevalent in the past. In short, surface coal mining in the Petition area is not only compatible with area, it will enhance the habitat through re-mining and restoration of pre-SMCRA sites.

C. **Surface Coal Mining Provides Has a Substantial Economic Footprint and Can Co-Exist With Other Development Plans.**

PricewaterhouseCoopers, LLP prepared a report entitled *The Economic Contributions of U.S. Mining in 2008* for NMA, a copy of which is attached as **Attachment E**. The report, issued in October 2010, provides reliable statistics on direct and indirect benefits of coal mining in Tennessee. According to the report, contribution to GDP in Tennessee from coal mining was \$604,000,000. In terms of employment, coal mining represented \$6,480,000,000 and an overall tax contribution of \$128,000,000, of which \$47,000,000 represents state and local taxes. Thus, surface coal mining provides substantial economic benefit to the State. Not allowing surface coal mining in the Petition area will render the surface mining of coal in the entire North Cumberland Wildlife Area uneconomical and result in the loss to the State of the contributions from these operations.

Rather than rely upon its own Department of Economic and Community Development, the State relies upon an un-peer reviewed report by an environmental advocacy group that makes questionable and unsupported claims. That report, however, does not state the types of jobs or

other types of opportunities that would exist, in addition to those that are already available in the Petition area, in the absence of coal mining. Assuming mining can be conducted economically in the wildlife management areas away from the Petition area, then the State apparently believes the noise, dust, vibration, and scenic views it complains about will not otherwise hamper recreational opportunities.

The State would have OSMRE believe that somehow after all these years, it has come to the sudden conclusion that if mining could be eliminated in the Petition area, then these state holdings would be re-populated with better paying and longer term jobs. In fact, Deputy Commissioner Sloan stated in his editorial that “the Tennessee 2020 plan found that for every dollar spent on state parks, visitors to our parks spent \$37.” (*See, e.g.*, editorial by Paul Sloan, *supra.*) Even assuming, for the sake of argument, that statement is true, the State has failed these areas and counties miserably by not coming up with a marketing and tourism plan by now, and the elimination of surface coal mining will hurt, rather than help the economics of the already negatively impacted area. Through the General Assembly, the Governor has provided millions of dollars in tax breaks and other incentives to attract businesses to Tennessee, but has apparently short changed the tourism enhancement in the area, now apparently blaming surface coal mining as the culprit. In fact, the Intervenors are unaware if the State has even requested an appropriation to fund a marketing study in the wildlife management areas, despite the reintroduction of elk and other game because of surface mines reclaimed through re-mining of the Petition area. The State would have been better advised to use the millions of dollars that evaluating this Petition will cost the taxpayers to develop a marketing plan. In fact, the Department of Tourist Development markets the Museum of Appalachia for the city of Clinton, which highlights, among other things, coal mining. In Jellico, another coal region, the

Department of Tourist Development markets reclaimed surface mining operations so that tourists may see how surface mining sites can be successfully reclaimed. For Caryville, the Department of Tourist Development markets the Cove Lake State Park and the Justin P. Wilson trail. The argument that the State makes about coal mining as incompatible with tourism is specious at best. (Petition at 12, 22-28.)

**D. The Petition Does Not Significantly Impact Fragile Lands Within the Meaning of SMCRA.**

Citing its own report, the State alleges that the North Cumberland area is “one of the most ecologically significant places in the world,” and then concludes these are “fragile lands” within the meaning of SMCRA. (Petition at 20.) The State apparently makes an inconsistent illogical leap that the ridgelines and the associated proposed take area are ecologically different from other lands in the affected wildlife management areas. However, the State submitted no scientific evidence or basis that any of the so-called fragile features will be significantly damaged.

The State alleges, therefore, that assuming the mining operations comply in all respects that it will “significantly affect” the so-called fragile lands. The allegations to support their contention include:

Fragile lands are defined as:

areas containing natural, ecologic, scientific, or esthetic resources that could be significantly damaged by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, paleontological sites, National Natural Landmarks, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, and areas of recreational value due to high environmental quality

30 C.F.R. § 762.5 (emphasis added).

1. The “inherent impacts of surface coal mining operations.” (Petition at 4.)

This allegation was glommed off of the Fall Creek Falls petition and was related specifically to the factors in that particular application—not in general. Otherwise, surface coal mining would be inherently unsuitable anywhere. Such a leap of logic is unfortunate, particularly given the actual language used by the Secretary in the Fall Creek Falls decision:

I find that SMCRA does provide significant environmental protection from inherent impacts through its permitting requirements and performance standards.

65 Fed. Reg. 39178, 39183.

Thus, there are no allegations of fact that the “inherent impacts” will in any way significantly affect the area.

2. “Royal Blue and Sundquist WMA serve as a corridor of vital habitat for priority songbirds . . . offer unique opportunities for bird watching, and are popular destinations among birdwatchers.” (Petition at 22.)

The State does not even show that such habitat is restricted to the Petition area. Even if it were, Petitioner does not allege how the temporary nature of the mining activity will significantly impact those activities, assuming, as the Secretary is required to do, that the mining is properly conducted. In fact, reclamation and reforestation efforts should significantly enhance these features. The State has provided no evidence that it would destroy the bird habitat. At least since 1992 in the Royal Blue WMA, there is no mention of the decline of songbirds in the areas, and the State has alleged no proof that such would happen for future mining.

- a. The “recreational activities, including hiking, biking, fishing, camping, and wildlife viewing.” (Petition at 11-12.)

The State does not provide any evidence that such activities will be significantly affected. These same recreational activities have actually been enhanced in the area through surface coal mining. The State provides no source of information to support their allegations that wildlife

viewing opportunities would be destroyed, visual and noise impacts would deplete the scenic quality, or that the water quality would be impacted. The State has made mere bare allegations with no supporting documentation whatsoever. A bare allegation that it will somehow affect these activities show the complete non meritorious nature of this Petition.

- b. The Petition area is an important source of tourism-generated income for the State of Tennessee and the four counties that contain these lands. (Petition at 12-13.)

The State cited no studies or other information that the current ability to develop these lands for tourism has been impacted at all. In fact, as noted previously, the area is used successfully for tourism. The ability to have agreements with permittees enhances the area and does not detract. Thus, this Petition should never have been deemed complete in the first place if it were based on the designation as fragile lands.

- c. The Cumberland Trail is not negatively affected or impacted by mining in the Petition area. (Petition at 24.)

The Petition discusses a number of alleged impacts to the Cumberland Trail State Park all of which are blatant speculation. Intervenors would note that the park is actually named the Justin P. Wilson Cumberland Trail after the former Commissioner of TDEC and former Deputy Governor. He was instrumental in assisting the development of this trail and surrounding park, knowing that surface coal mining operations were being conducted and would continue to be conducted in the foreseeable future. The State, therefore, believed the trail would be compatible with surface coal mining. The State does not even know if coal exists under portions of the Cumberland Trail in the Petition area or if so, anything more than a generalized belief. However, the Secretary must assume that contemporary mining practices will be complied with, and if so, any disturbance to the viewshed would be temporary at best and any physical impact to the trail would be restored. Intervenors also claim specific harm to the so-called Smoky Mountain

segment. However, such reference is a misnomer. It is not in the Great Smoky Mountains National Park. In addition, the name of that segment is the New River segment not Smoky Mountain.

The current condition of much of the ridgeline in the Petition area shows scarred remnants of previously mined and unreclaimed areas. If the State is now advocating that such scarred mountains are part of the esthetic beauty of the Cumberland Trail, then such a belief is contrary to SMCRA's policy to reclaim these pre-law sites contrary to what the State is apparently advocating.

The State once again tries to rely on the Fall Creek Falls decision to support its argument. Land for that park and surrounding areas was acquired in the 1930s, well before coal mining operations had commenced in the area. According to the Tennessee Encyclopedia of History and Culture:

The State Forestry Service and Department of Agriculture administered the park throughout the 1930s and 1940s. The National Park Service oversaw development, which included the construction of parking areas, picnic and camping facilities, trails, shelters, scenic overlooks, a dam, a swimming pool, a lodge, and cabins. Although the park's remote location made access difficult, the National Park Service encouraged visitation by accentuating the area's multiple waterways, including the spectacular 250-foot Fall Creek Falls. In time, the multiple waterfalls secluded by cliffs and the backdrop of the Cumberland Mountains made Fall Creek Falls one of the state's most popular parks.

Park development moved slowly in order to maintain the area's "natural state." In 1940 the Park Service permitted the construction of vacation cabins, a lodge, horse barns, and horse trails to encourage visitation, but abandoned the project because of World War II labor and funding demands. In 1944 the Department of the Interior transferred the park to the State of Tennessee, but restricted land to recreation and conservation. The Tennessee State Planning Commission resubmitted the National Park Service's proposal of 1940 in 1950 and obtained state funding for the construction of recreational facilities. The park added swimming facilities in 1954, but eight years later the recreational area still included only two manmade camping areas and prohibited boating, emphasizing the area's natural falls and scenery rather than its modern amenities.

Nichols, Ruth, *Fall Creek Falls State Park*, THE TENNESSEE ENCYCLOPEDIA OF HISTORY & CULTURE, available at <http://tennesseencyclopedia.net/imagegallery.php?EntryID=F003>.

The contrast to the Petition area is startling. All of the surface rights to the Petition area were acquired by the State with written documents acknowledging that surface coal mining operations were being conducted in the area and would be conducted in the foreseeable future. However, the Secretary's reliance on the incompatibility decision for Fall Creek Falls was based on the fact that the park was designed for the purpose of keeping the park in its natural, un-mined condition. Such cannot be said for the Petition area.

**E. The State Has Not Demonstrated that the Petition Area Constitutes Historic Lands or if They are How they Would be Adversely Impacted.**

OSM defines "historic lands" as:

[A]reas containing historic, cultural, or scientific resources. Examples of historic lands include archeological sites, properties listed on or eligible for listing on a State or National Register of Historic Places, National Historic Landmarks, properties having religious or cultural significance to Native Americans or religious groups, and properties for which historic designation is pending.

The Petition itself is devoid of any reference to any of the examples provided in the definition. Certainly the land has value to both surface owners and mineral owners, but the State

has not provided any specific findings that would show that it meets the definition of historic lands. Most of the State's concerns lie with the Cumberland Trail; however, there are no allegations that coal deposits are even located in areas that might affect the Cumberland Trail. Therefore, the Petition is not even ripe. The Petition goes on to say—with no support whatsoever—“since the prior petition, the State of Tennessee has recognized lands within the petition area as containing important historic, cultural, and scientific values, as a result of the Cumberlands acquisition . . . .” (Petition at 27-28.) Such self-serving statements are far from the standard necessary to keep a petition, let alone this Petition, from being deemed complete.

V. **THE PETITION DOES NOT COMPLY WITH THE BASIC REQUIREMENTS OF THE SURFACE MINING CONTROL AND RECLAMATION ACT.**

This entire proceeding is unlawful as a matter of course and will cost the taxpayers of this country millions of unnecessary dollars, not to mention the loss of millions of dollars in lost revenue from coal mining. Notwithstanding OSMRE's determination to the contrary, attached as **Attachment F**, Intervenor maintain that the Petition is woefully inadequate to meet the elements required by law and should have been (and now should be) dismissed as incomplete and without serious merit. Intervenor request that OSMRE reconsider its completeness determination. Allowing the Petition to proceed as complete sets catastrophic precedent and proceeding with consideration on the “merits” of a frivolous and incomplete Petition has potentially enormous disruptive and unintended consequences for coal mining throughout the United States.

Federal regulations require that

(1) At a minimum, a complete petition for designation shall include . . . v) Allegations of fact and supporting evidence, covering all lands in the petition area, which tend to establish that the area is unsuitable for all or certain types of surface coal mining operations . . . assuming that contemporary mining practices required under applicable regulatory programs would be followed if the area were to be mined.

30 C.F.R. § 764.13. In the event the Petition is allowed to proceed it is not at all clear how OSMRE will be able to ferret out the actual allegations that affect every acre of this huge expanse. Each of the allegations of fact should be specific as to the type of mining operation that is deemed unsuitable by the petitioner and the portion(s) of the Petition area and Petitioner's interests to which the allegation applies. The Petition must be supported by evidence that establishes the validity of the allegations for the particular type of mining operation for each portion of the Petition area. Simply, there is no justification for this proceeding as OSMRE should have dismissed the Petition as incomplete and frivolous. Without waiving any argument, below are details as to how the Petition fails to meet the requirements for consideration, should have been dismissed, and should now be denied.

For example, the Petition fails to specify how surface mining operations in the Petition area would be "incompatible with the conservation goals of Tennessee's 'Connecting the Cumberlands' project." (Petition at 8-20.) Indeed, Petitioner cannot specify how surface mining operations would be incompatible with this project as "no comprehensive management plan has yet been developed for the new North Cumberland WMA," according to the Petition (at 13), meaning that it is quite possible—if not likely—that surface mining operations, and in particular certain reclamation plans developed for specific habitats or that would reclaim abandoned mine lands, could be entirely compatible and consistent with the same goals as the State. Despite being its main reason for asking this area to be designated as unsuitable for surface mining operations, Petitioner fails to present any basis, facts, or evidence supporting this allegation. In short, the

entire argument that surface mining operations would be incompatible with any of the State's goals is incomplete, wholly conclusory, and without merit.

Second, the Petition is overly broad in scope. For example, the sheer size of the Petition area is vague, ill defined, and a blatant misuse of the Lands Unsuitable for Mining process because it so overly broad in geographic scope. According to the Petition (at 5), the Petition area "includes:"

600 feet on either side of the ridge lines within the North Cumberland WMA and the Emory River Tracts Conservation Easement approximately 67,326 acres in parts of four counties in Tennessee—Campbell, Campbell, Morgan and Scott.

While a map of the area was included with the Petition, the relief is too large to properly define the location of the ridgelines.

Further, the Petition does not present the required factual allegations and supporting evidence for the Petition area, and the large size of the Petition area suggests that it is unlikely that the evidence presented can relate to criteria for designation throughout the entire Petition area. Petitioner has failed to identify the area to which each allegation applies within the larger area or provide adequate evidence to support the allegation for the entire area. For example, Petitioner does not provide evidence that or how surface mining operations would affect—let alone damage—"fragile lands" at all. Generic statements that "surface mining operations would interfere with recreational opportunities" are insufficient under both federal regulations and common sense. (Petition at 22-27.) Additionally, such overly broad statements fail to provide specific owners of mineral and other property rights with proper notice that their interests may be impaired, in violation of their rights to due process under the law. There is simply no reason to deprive Intervenors, their members, and other owners of mineral rights in the Petition area from

their vested and valid property interests; Petitioner has failed to carry its burden under the law to demonstrate any and its Petition should be dismissed accordingly.

Ignoring, for sake of argument, Petitioner's woefully deficient presentation of facts and supporting evidence, the Petition should be denied (and should have been dismissed) as lacking serious merit as it does not include evidence of impacts that are not preventable under current SMCRA regulations. For example, the Petition relies upon anecdotal evidence, such as

The potential noise, water, and air pollution from surface mining in the petition area would significantly diminish the esthetic and recreational values of the Cumberland Trail, obscuring scenic vistas and impairing water quality within the nearby rivers and streams that are used by hikers and campers as a supply of potable water.

(Petition at 25) (emphasis added). Such statements are inflammatory and completely ignore the requirements of permitting and reclamation already provided for under SMCRA and by OSMRE to protect against these kinds of secondary impacts of surface mining. OSMRE rejected a similarly broad petition regarding the New River watershed on January 13, 2006. In its Statement of Reasons rejecting the New River petition, OSMRE observed that several provisions of SMCRA protect against the harms alleged by the petitioners. (*See, e.g.*, Statement of Reasons for Determination of Completeness for the New River Lands Unsuitable for Mining Petition at 8 (Jan. 13, 2006) ("The petitioners offer no evidence why the permitting requirements, the performance standards, and the reclamation requirements in SMCRA for establishing a post-mining land use of forestry are not adequate to achieve reforestation of a mine site."), a copy of which is attached as **Attachment G.**)

Allowing such imprecision in the Petition (or, worse, ignoring it and nonetheless deeming the Petition complete) opens the door to additional petitions seeking to designate the entire Appalachian Mountains as unsuitable for surface mining, clearly in contravention of our national

policy under SMCRA. If Congress had intended to prohibit surface mining throughout overly broad, ill-defined areas, then the requirements for definition in the petition of the geographic area to be designated as unsuitable under SMCRA are superfluous. Petitioner cannot circumvent these requirements and must identify the specific areas in its Petition. Deeming the Petition complete—let alone designating as unsuitable for mining such a vague and broad geographic span of the region—defies the regulations and has the potential to allow for enormously disruptive consequences never intended by Congress or OSMRE.

These consequences are not overstated. For example, Intervenors and their members were immediately impacted by OSMRE’s decision to deem the Petition complete. Under 30 C.F.R. § 773.15,

No permit application or application for a significant revision of a permit shall be approved unless . . . the proposed permit area is not within an area under study or administrative proceedings under a petition, filed pursuant to parts 764 and 769 of this chapter, to have an area designated as unsuitable for surface coal mining operations  
. . . .

30 C.F.R. § 773.15(c)(1). Accordingly, because OSMRE deemed the Petition complete (despite its flagrant deficiencies in contravention of the elements required under SMCRA), applications for permits or permit revisions will not be approved. This decision deprives permit applicants of their valid rights to mine coal in the Petition area (see below) without justification or sense. Clearly, OSMRE’s completeness decision was in error and should be reversed: Petitioner should not be allowed to proceed with the Petition as wholly incomplete as it is.

**VI. THE PETITION ATTEMPTS TO UNLAWFULLY INTERFERE WITH PETITIONER’S OWN BINDING CONTRACTUAL OBLIGATIONS AND MUST BE DENIED.**

In 1994, Tennessee Mining, Inc., sold its surface rights, but expressly reserved all mineral rights, including “without limitation” coal.

The Fifth and Fourteenth Amendment of the federal Constitution provides that “nor shall any State deprive any person of life, liberty, or property, without due process of law.” The State’s filing of the Petition to have certain lands designated by the federal government as unsuitable for surface mining is an action that would deprive the mineral rights owners of their property rights. While Intervenors acknowledge that courts have upheld takings through the Lands Unsuitable for Mining process, this situation is different in that Petitioner, having purchased lands subject to mineral rights and with acknowledgement that surface mining is compatible with land use by the surface owner, now seeks to use the Lands Unsuitable process to deprive owners of the mineral estates of their contractual rights.

“Valid contracts have the status of property for the purpose of the guarantee of due process of law and as such are protected from being taken without just compensation, whether the obligor is a private individual, a municipality, a state, or the United States.” *Lynch v. United States*, 292 U.S. 571, 579 (1934) (emphasis added); *see also United States v. Central Pacific R. Co.*, 118 U.S. 235, 238 (1886) (after finding that a valid contract existed between the government and a company, the Supreme Court held that “[t]his contract is binding on the United States, and they cannot, without the consent of the company, change its terms by any subsequent legislation”) (emphasis added). Here, there are valid contracts between the State of Tennessee and property owners in the Petition area. Those property owners have valid interests in certain mineral rights throughout the Petition area. The State is now attempting to deprive those owners of their mineral rights by its action of filing the current Petition to ask the federal government to do indirectly what it has contracted expressly not to do. Without greater specificity of how surface mining operations would be incompatible with the goals of the State, those property owners in the Petition area may not have proper notice that their rights and interests may be

deprived, or even if they have proper notice, because the Petition is overly broad and vague, they are unable to respond to the allegations and preserve their rights, in violation of their rights to due process of law.

**VII. CONCLUSION.**

Regardless of the seemingly altruistic rationale offered by the State, the Lands Unsuitable for Mining process cannot be misused to allow the State to avoid its obligations under contract. The entire Wildlife Management Area process was made possible because the owners of the mineral estates cooperated with TWRA, and TWRA has never determined in any document—including the instant Petition—that surface coal mining operations conducted under current law are in any way incompatible with those goals or uses within the Petition area. The State’s newfound opinion that mining on the ridgelines is somehow incompatible with the planned uses of the areas in the North Cumberland Wildlife Areas is nonsensical, unsupported, damaging to property interests, and must be denied.

For all of the foregoing reasons and to preserve the rights of its members to contest the wholly frivolous Petition, Intervenors hereby respectfully submit this Notice of Intervention in Opposition to the State’s Petition.

Respectfully submitted,



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