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### BLACK MOUNTAIN – AN OVERVIEW THE RESOLUTION OF THE LANDS UNSUITABLE PETITION FROM THE LEGAL AND TECHNICAL PERSPECTIVES

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#### ABSTRACT

In 1998, Kentuckians for the Commonwealth filed an Administrative Petition with the Kentucky Natural Resources and Environmental Protection Cabinet to designate 8,903 +/- hectares (22,000 +/- acres) on Black Mountain, which contains the state's highest point, as unsuitable for mining. A fast track legislative process was triggered which could have "taken" 100 million tons of coal reserves or, in the alternative, imposed severe restrictions on mining. Even with all parties represented by reasonable individuals, this process can be extremely cumbersome and expensive. The legal and technical preparation for this unusual hearing process as well as issues and strategies of the negotiated resolution are reviewed.

#### INTRODUCTION

The process for a "lands unsuitable" designation is extremely simple to initiate, can result in substantial damages to property rights and is extraordinarily expensive to defend. The process, essentially, involves a "town hall" legislative-type hearing for which there is no way to determine what will be presented as evidence beforehand. Obviously, the defense in opposition to a "lands unsuitable" designation involves a tremendous amount of anticipatory determination of what the evidence will be which, in turn, necessitates a very highly technical and costly presentation of evidence in rebuttal.

The most recent lands unsuitable petition filed in Kentucky began with an effort to preserve lands on Black Mountain which partially forms the southeastern-most boundary of the Commonwealth of Kentucky with the Commonwealth of Virginia and is the highest peak in Kentucky at 1262 meters (4,139

feet) in elevation. Fortunately, a resolution was reached which was hailed as the first time in Kentucky where environmentalists, industry and state government all cooperated to reach an amicable accord. This particular case, however, raised a host of legal and practical issues generated by the "lands unsuitable" designation process itself.

#### LANDS UNSUITABLE PETITION 98-2

##### The Petition Form

A lands unsuitable petition is a relatively simple document initially requiring very little information. The Lands Unsuitable Petition 98-2 (hereinafter "LUP 98-2")<sup>1</sup>, that was filed concerning the Black Mountain area, was actually a two (2) page document with pages of photocopies and bibliographies that was filed on December 10, 1998. (Referencing Petition, 1999) The narrative portion of LUP 98-2 called for the designation of 4,856 +/- hectares (12,000 +/- acres) in the Black Mountain area. The petition also attached a map showing the location of the area sought to be designated; however, the area outlined on the map was later determined to comprise nearly 8,903 +/- hectares (22,000 +/- acres).

##### The Petitioners, Challengers and Intervenors

The actual Petitioner for LUP 98-2 was Kentuckians for the Commonwealth. In order to bring a petition, one must show an interest in a particular area that is proposed for a designation as unsuitable

<sup>1</sup> The full text of this document and all others referenced herein, can be accessed at the following website: [www.mountainopmining.com](http://www.mountainopmining.com).

for mining. Although the entirety of Black Mountain has been, for the last century, privately owned by companies in the mineral and energy industry, KFTC stated in its petition that it had members who lived, worked, resided and enjoyed recreational activities in Harlan and Letcher Counties as well as those who enjoyed the beauty and biological diversity of Black Mountain. In addition to the current chair of KFTC being signatory to the Petition, two other members were mentioned in the Petition. Hazel King was a member of the Harlan County Chapter of KFTC who claimed that her use and enjoyment of a nearby stream had been adversely effected by mining activity on Black Mountain. The other Harlan County KFTC member was Gary Short, a professor at Southeast Community College, who was a resident and landowner at the foot of Black Mountain and claimed that he had a direct interest in the impact of any mining on Black Mountain on his water supply.

Obviously, once LUP 98-2 was filed, it generated the attention of companies (The Challengers) who had mined on Black Mountain in the past, who were currently mining on Black Mountain, and who intended to mine on Black Mountain in the future. LUP 98-2 received the attention of landowners on Black Mountain who owned both surface and the coal, namely, Apogee Coal Company, Penn-Virginia Corporation, Blackwood Land Company and Blackwood Operating Company. Processing Systems, LLC owned surface rights on the property. Harlan Reclamation Services, LLC had a lease to both surface and underground coal on the property, and Lone Mountain Processing, Inc., was currently underground mining on the property.

Probably the operation which was the focus of LUP 98-2 was Jericol Mining, Inc. Jericol was currently contour mining on Black Mountain and had submitted an amendment to its permit to extend its operations. The filing of LUP 98-2 automatically put that amendment application on hold. That permit application could not be processed as long as LUP 98-2 was pending.

The interesting twist in this whole scenario was that Jericol had another permit that had been issued for contour mining on an upper seam. The filing or approval of LUP 98-2 would not halt operations on this issued permit, but the permit was a focal point for the Petitioners.

Once battle lines are drawn, there are inevitably others who want to join in the fight or "intervene." Intervening in lands unsuitable process is actually a very simple matter. All one must do is to fill out a form and come up with a simple statement that you intend to intervene in the petition. (Referencing Intervening Petition). One of the Intervenors was

Trout Unlimited. That entity was obviously in favor of the Petition. Also in favor of the Petition were three individuals, namely Sheila Kay Wilson, Larry Wilson and Chris A. Fleming. Another attempted Intervenor supporting the Petition was a group known as AmericasRoof, better known as the High Pointers. As noted above, Black Mountain is the site of Kentucky's highest point of elevation. The High Pointers travel around to each state and visit the highest point in each state which was their interest in declaring Black Mountain unsuitable for mining.<sup>2</sup>

Three other Intervenors entered into the fray opposing the Petition. Nally & Hamilton Enterprises, Inc., Resource Development, LLC and Arch Coal, Inc. all had mining interests on Black Mountain that were impacted. There was one other company that never joined in any of the Petition proceedings but was an absolute key to the resolution---Pocahontas Development Corporation.

## **THE CHALLENGE PROCESS**

### The Request for a Hearing

Once a lands unsuitable petition is filed, anyone opposing it can request a hearing. This is not the typical type of court proceeding hearing. It is deemed to be a legislative process. There are no depositions, no discovery of the positions and claims of the petitioners, no advance list of witnesses or experts and no motions for definite statements. In short, any party opposing a lands unsuitable petition must literally guess as to what the petitioners are going to present as evidence. Typically, a representative of the Secretary for Natural Resources (Kentucky's SMCRA Regulative Authority) will chair the hearing and take testimony. Any person can testify about any subject and there is no cross examination or process to challenge their expertise to make such statements or even whether they are being truthful.

In trying to anticipate what the petitioners are going to bring forth by way of testimony in these hearings, the opposition has to anticipate every issue that can possibly be raised and be ready to address those issues. Obviously, preparation for such a hearing is extremely involved, very technical and very costly. If a person in support of a lands unsuitable petition stands up, claims to be an expert and then begins to rattle off a lot of allegations, opposing parties must

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<sup>2</sup> Early on in this controversy, the Petitioners claimed that proposed mining on Black Mountain would eliminate the highest point. There was never any plan to mine the highest point in Kentucky by any entity. In fact, very near the peak has been a Federal Aviation Administration (FAA) station for decades.

be ready to have an expert available to listen to the claims and offer testimony in rebuttal to those claims.

### The Legal and Technical Issues

This process necessitates an extremely technical and broadly encompassing defense which attempts to try to anticipate every legal issue that could possibly be presented along with every technical issue, as well. The legal analysis for LUP 98-2 was performed by the authors of the law firm of Wyatt, Tarrant & Combs and the technical analysis was accomplished by the engineering firms of Mining Consulting Services, Inc., and Brighton Engineering, Inc., with assistance from the individual companies engineers. Preparation for the defense involved a broad identification of legal issues and technical issues along with a plan for presenting expert testimony in rebuttal.

As noted above, the procedure itself is deemed to be a "legislative" process; however, the procedure for a Lands Unsuitable Petition hearing differs markedly from the procedure for true legislative hearings, such as those conducted by a state legislature. In short, there is virtually no guidance or "procedure" for a Lands Unsuitable Petition hearing in Kentucky. The mandates are sparse. If requested by anyone opposing such a petition, the Kentucky Natural Resources and Environmental Protection Cabinet ("KNREPC") must hold a public hearing within ninety (90) days of receipt of a petition to receive information concerning whether the area should be declared unsuitable. See, 405 Kentucky Administrative Regulation (KAR) 24:030 § 7. If there is no pending permit, the hearing is to be held within ten (10) months. There are no provisions as to whether a hearing can be continued or rescheduled, nor are there any provisions which provide any guidance as to who can request a continuance, who has the authority to grant a continuance, or any particular criteria for granting a continuance.

In this particular case, the KNREPC took the position that the "parties" could unanimously agree to reschedule or continue a hearing. There were no procedures nor any rules which specifically authorize that action. Likewise, there is neither a judge nor a hearing officer that can make any definitive rulings on who, when or where a hearing is to be conducted.

In most legislative hearings, the scheduling for individual committees is largely within the discretion of the chair of each such legislative committee. The hearings are usually conducted during regularly scheduled committee meetings. If hearings are to be held at any other time or place, the changes are usually pre-approved by a legislative body and

notice is given in adequate time for appearance by all concerned. In a true "legislative" process, then, there are established rules and procedures for the conduct of hearings. This is not the case for a lands unsuitable petition hearing.

### The "Completeness" Determination

Once a petition is received, KNREPC must determine whether that particular petition is "complete" and "not frivolous." See, 405 KAR 24:030 § 3. In this particular case, the narrative portion of LUP 98-2 called for the designation of 4,856 +/- hectares (12,000 +/- acres). However, as noted above, the required map attachment analyzed by Mining Consulting Services, Inc. was found to actually describe an area of nearly 8,903 +/- hectares (22,000 +/- acres). KNREPC, nevertheless, determined that LUP 98-2 was "complete."

The first real legal battleground was over that determination wherein the Challengers contested (pursuant to 405 KAR 24:030 § 9) contending that (1) substantially all the lands located within the petitioned area were not subject to designation and were exempt as a matter of law and (2) that the existence of the acreage discrepancies substantially rendered the Petition incomplete and frivolous.

Under the Kentucky Regulations (405 KAR 24:030), certain exemptions and exclusions from a lands unsuitable designation apply.<sup>3</sup> In this particular case, 77.7% of the LUP 98-2 area was currently under permit for either surface or underground operations. In Kentucky, and unlike the federal law, areas of underground mining are required to be shown as "shadow areas" within the permitted surface area and are further required to be permitted. See Kentucky Revised Statutes (KRS) 350.060(13). Without question, a mine operator is certainly responsible for any surface disturbances of underground mining within the "shadow area."

KNREPC, however, maintained that the "shadow area" was not exempted from a lands unsuitable designation, taking the position that a permittee's right to mine may be limited to a single seam, any areas of multiple coal seams, and that a permittee may not have the right to mine the seams above it. Additionally, KNREPC maintained that interpretation in this manner would render that particular provision of the Kentucky Surface Mining Regulatory Program

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<sup>3</sup> 405 KAR 24:030 § 2(1) states that: "Petition for designating lands as unsuitable for all or certain surface coal mining operations would not be considered for; . . . (b) lands covered by a permit issued under KRS Chapter 350 or a permit application for which the public comment period has closed . . . ."

less effective than federal law, and subject it to being superseded by federal law.

The Challengers maintained that a 4,046 hectare (10,000 acre) discrepancy between the LUP 98-2 form, narrative, public notice comments, a KNREPC letter and the topographical map, constituted an "incomplete" petition.<sup>4</sup> The Challengers questioned how any property owner could definitively know if property and current permitted operations were at risk or if any other interested individuals, including the general public, would actually know the real area of lands effected by the LUP 98-2 proceeding.

The Administrative Law Judge, initially hearing this "completeness" challenge, disagreed. The ALJ focused on the term "frivolous" which is defined in the regulations as any petition "in which the allegations of harm lack serious merit." See 405 KAR 24:030 § 3(4). The ALJ noted that "frivolity speaks to the merit of the Petition allegations of harm, rather than the acreage or percentage of the petitioned area that is under permit." (Referencing Hearing Officer's Report and Recommendation). The Decision basically went on to find that "harm" had been alleged and that it was up to KNREPC to further determine in the hearing whether exempt areas existed to be excluded from evaluation. Id.

Finally, the Judge ruled that "the Petition applicant is not obligated to delineate permit areas, therefore the existence of such areas does not render the Petition 'frivolous' or 'incomplete' as defined by regulation." Id. at pg. 15.

Regarding the acreage error, the ALJ specifically found that "statements of approximate acreage do not control the identification of the petitioned area" and, went on to note that "the completeness determination does not require DSMRE to determine that all allegations are accurate." Id. Finding that KNREPC had determined that all of the pieces of an application for designation had been filed, the ALJ ruled that no error was committed, "notwithstanding an alleged error in the acreage effected." Id.

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<sup>4</sup> In LUP 98-2, the size and location of the area in dispute was noted as 4,856 +/- hectares (12,000 +/- acres). In the narrative regarding "allegations and supporting evidence" the approximate size of the area was listed as 4,856 +/- hectares (12,000 +/- acres). The Public Notice submitted for publication pursuant to the regulations by the Cabinet, identified the area as "12,000 acres in Harlan and Letcher Counties." In a letter from the Commissioner of Surface Mining to the Commissioner of the Department for Property Valuation, the total acreage was described as "approximately 11,000 acres." The actual acreage determined by Mining Consulting Services, Inc., for the area encompassed in the Petitioner's attached map was found to be approximately 8,903 hectares (22,000 acres).

Federal law, however, appears to have mandated more than just a determination that "all of the required pieces of the application have been filed." In the legislative history regarding the federal counterpart on a lands unsuitable designation, namely 30 CFR § 764.15(a)(1), "Completeness Finding," the original regulation provided a 30-day time limit for the regulatory authority to determine whether a petition was "complete." Nevertheless, the Federal Office of Surface Mining (OSM) proposed 60 days for that determination. See 48 Fed.Reg. 41330 (1983)(codified at 30 CFR § 764.15(a)(1). OSM proposed to extend the time limit to "allow use of new initial hearing procedures and more extensive analysis of the requirements provided in § 764.13(b)" regarding completeness. Id. OSM wanted to "ensure that a complete initial scrutiny of the Petition can be accomplished before beginning the next step in the process." Id. OSM reasoned that the 60-day period would "allow the regulatory authority to make a detailed review of the Petition for completeness and decrease the vulnerability of operators by screening out incomplete petitions early in the process." Id.

One can only surmise that if the process were used only to determine "whether all of the required pieces of the application have been filed," then OSM would surely not have anticipated the process to last 30 days, and certainly not the 60 days that it later proposed. The effect of this ruling leaves a huge question mark as to whether a petition is ever "incomplete."

#### The Serious Implications of LUP 98-2

Thomas FitzGerald, representing the Petitioners, sent a letter "explaining" the breadth of LUP-98-2. (Referencing FitzGerald Letter of 2/28/99). On its face, it certainly affected any proposed surface mining operations within the designated area, with the exception of any existing permits that dealt with mining by surface mining methods. While the FitzGerald letter appears to suggest otherwise, LUP 98-2 could certainly be read to have a tremendous impact on existing deep mining permits and any proposed future deep mining with regard to issues of subsidence. Obviously, deep mining has an effect on surface lands, at least in regard to subsidence, and any petition seeking to protect the "surface" would most certainly impact underground mining within that same area.

#### The Required Experts in Opposition to LUP 98-2

Based upon LUP 98-2, and what was anticipated to be raised at the hearing, the Challengers needed testimony from biologists, mining engineers, hydrologists, foresters, geologists, socioeconomists,

and agronomists or soil scientists. Biologists were needed to address terrestrial issues, aquatic issues, botany, entomology, critical habitats and biostatistics regarding the Black Mountain area. Mining engineers were needed to explain the mining that had occurred, the mining that was currently being conducted and what would be conducted in the future in terms of planning, permitting, reclamation and geotechnical considerations. Hydrologists were needed to address issues of surface water, ground water, water quality, and treatment along with erosion and sedimentology that would be associated with mining the area. Regarding forestry, an expert versed in natural resource management as well as land use planning was needed to address those issues. Again, subsurface issues of geology were very important as they related to surface subsidence as well as water quantity and quality. An agronomist or soil scientist was needed to address the effects on the soil and the post-mining land use for Black Mountain.

One very important aspect was the role of the socioeconomist. Testimony of this historical nature was geared toward any archeological or anthropological values that may or may not exist on Black Mountain. More importantly, however, was testimony about the economic effects throughout the community surrounding Black Mountain if mining were to be continued or if mining were to be declared unsuitable and stopped. These effects not only revolved around the amount of revenue derived from operations conducted on the mountain, but the effects on tourism and recreation.

Putting together the testimonies of all of these experts and coordinating all of the presentations into a comprehensive opposition defense is a monumental task, especially in the compressed schedule of 90 days. It was extremely fortunate that all parties concerned were able to work out a resolution of the mining issues on Black Mountain.

## **THE RESOLUTION**

### The Goals of the Petitioners and Challengers

The Petitioners in LUP 98-2 were primarily concerned in preserving the top of Black Mountain. They were also concerned about placing limitations on surface mining around Black Mountain's summit, concentrating on particular locations of the mining, the timing of the operations and the methods that would be used. Obviously, the Challengers were interested in continuing mining operations with as few constraints as possible. If the Petitioners were to ultimately prevail in the Lands Unsuitable Hearing, there would be absolutely no future mining conducted on Black Mountain whatsoever which would

jeopardize not only the economic interests of industry in the surface mining operations but could possibly jeopardize interests related to underground mining, as well. If the Challengers were to prevail in a Lands Unsuitable Hearing, then no portion of Black Mountain would be prohibited from the effects of mining and any values sought to be preserved by the Petitioners would certainly be in jeopardy. Both sides wanted a permanent resolution to the matter. The Petitioners wanted assurances that values of Black Mountain would be preserved in perpetuity and the Challengers wanted a resolution with assurance that further litigation, on any front, would cease concerning the mountain.

### The Critical Components to the Negotiations and Resolution

Two key elements were instrumental in the resolution of LUP 98-2. First, it should be noted that nothing in the Surface Mine Control and Reclamation Act of 1977, or the statutes enacted by the Kentucky legislature implementing SMCRA, or the regulations promulgated thereto regulate or prohibit timbering and logging operations in any manner. Consequently, if the Petitioners had ultimately prevailed and declared the entirety of Black Mountain off limits to mining, it is conceivable that logging and timbering interests could nevertheless completely clear cut the entire 8,903 hectares (22,000 acres). The trees and forests were of extreme importance as values to the Petitioners.

Secondly, Jericol Mining Co. already had an existing permit that had been submitted and issued near the top of Black Mountain prior to the filing of LUP 98-2. In short, even if the Petitioners ultimately prevailed on declaring Black Mountain off limits for mining in its entirety, nothing could stop Jericol from activating this permit and mining in this area.<sup>5</sup> A victory for the Petitioners, without stopping the existing Jericol permit or without stopping timbering on Black Mountain, would obviously ring hollow.

Pocahontas Development Corporation was the primary holder of timbering interests on Black Mountain.<sup>6</sup> As noted above, Pocahontas was never a party to the Petition nor was it an Intervenor. Its role, however, was vital in the resolution of this matter since it controlled the one element in this controversy which could not be resolved by a lands

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<sup>5</sup> It goes without saying, however, that the Petitioners could elect to challenge this Jericol Permit on enforcement issues in the future or on grounds of violations of other environmental regulations.

<sup>6</sup> Timbering interests were also held by Blackwood Land Co. Inc., Penn-Virginia Corporation and Arch Coal, Inc.

unsuitable petition, namely, the trees. Pocahontas voluntarily entered settlement negotiations in an effort to bring forth some resolution.

The April 19, 1999 Letter Agreement Between the Parties

All sides prevailed upon Kentucky Governor Paul E. Patton, a former coal operator and engineer himself, to facilitate the settlement negotiations. It was recognized early on that any resolution relinquishing property rights would have to be justly compensated. The Commonwealth of Kentucky would most likely play a part in that compensation, as well. The negotiations culminated in a letter agreement between the parties dated April 19, 1999. That Letter Agreement effectively outlined the understanding of all parties to LUP 98-2 as to how a resolution would be attained. (Referencing April 19, 1999 Letter Agreement Between the Parties).

The Letter Agreement stated that terms of resolution were contingent upon completion of the actions by all parties concerned. Obviously, the Letter Agreement referenced some consensus that would be drawn as to the existing Jericol Mining permit on the property. The Letter Agreement segregated Black Mountain into three distinct zones, namely, the Timber Purchase Area, the Timber Conservation Easement Area, and the Mineable Areas. At the top of the mountain was the zone designated as the Timber Purchase Area. Regarding that zone, the parties agreed to use their best efforts to "persuade" owners of timber rights to transfer those rights to an arm of the government of the Commonwealth of Kentucky. The transfer of those timber rights, however, was to reserve all subsidence rights in that particular zone and all parties had to agree that in no event would the argument be advanced that this particular zone (the Timber Purchase Area) would be classified as a "renewable resource land" as that term is defined in the Kentucky Regulations 405 KAR 8:001. No surface mining would be conducted in the Timber Purchase Area.

The next zone down in elevation was designated the Timber Conservation Easement Area. This was effectively a buffer zone in which the parties were to use their best efforts to "encourage" the owners of timber rights to commit to sustainable forest practices and best management practices for developing the timber resources within that area. Nothing, however, was to prevent the removal of timber within any permitted area in furtherance of a permitted surface coal mining and reclamation activity. Again, all subsidence rights were reserved and in no event would the Timber Conservation Easement area be classified as a renewable resource land.

The Mineable Area was depicted as the land between the 914 meter (3,000 foot) elevation contour to either the 975 meter (3,200 foot) contour or 61 vertical meters (200 feet) above the High Splint coal seam, whichever was higher. In essence, no surface mining would be conducted in the Timber Purchase Area, limited surface mining could be conducted in the Timber Conservation Easement Area and there were no restrictions to any mining below the 914 meter (3,000 foot) elevation contour. Additionally, in the Mineable Area, there was no restriction on construction facilities to support underground mining activities, no restriction on full extraction mining, no restriction on existing operations and no subsidence control plan would be required for any underground mining within or beneath the petitioned area.

Access to the area was also an important part of these negotiations. In the Letter Agreement, the Intervenor were to use their best efforts to negotiate a limited access to the area to the Kentucky Nature Preserves Commission, the Kentucky Natural Resources and Environmental Protection Cabinet, the Kentucky Department for Fish and Wildlife Resources and the Kentucky State Universities for the unlimited purposes of inventory in the performance of scientific investigation. The Intervenor conditioned access upon seventy-two (72) hour advance notice of any desired entry, the execution of a waiver of liability and the submission, on a quarterly basis, of a written summary of the results of the investigations, inventories or scientific activities conducted. An additional requirement was that under no circumstances would any of these areas be deemed a "public park" as that term was defined in the Kentucky Statutes and Regulations.

An additional requirement in the April 19, 1999 Letter Agreement between the parties revolved around what would be included within the final order of the KNREPC Secretary resolving this matter. The requirement was that this Order would provide that the agreement between the parties adequately protected the values of concern to all parties. In short, this would give maximum protection to all parties that the matter was resolved and any possible future petition concerning Black Mountain would have to allege values on the mountain that were not included in LUP 98-2.

The April 19, 1999 Letter by KNREPC

KNREPC issued its own Letter Agreement simultaneously with the April, 1999 Letter Agreement between the parties, which set forth the conditions under which KNREPC would treat this controversy. (Referencing April 19, 1999 Letter by the Cabinet). It adopted the April 19, 1999 Letter Agreement

between the parties in its entirety. The Cabinet agreed that no presumption of "renewable resource lands" would be made regarding these areas. The Cabinet also agreed that it would not consider the area to be a "park" solely on the basis of the transfer of property interests. Finally, the Cabinet agreed to release certain permits that had been pending during this controversy for further processing.

The May 3, 1999 Letter Between Jericol and the Petitioners

Regarding the Jericol Permit Amendment that was suspended by the filing of LUP 98-2, both the Petitioners and Jericol worked out a plan for Jericol to continue to mine. (Referencing May 3, 1999 Letter). That particular plan involved redesign of some hollow fills proposed for the permit amendment area along with a sediment control plan to maximize the use of on-bench ponds. Additional temporary sediment controls, in the form of silt fences and straw bale sediment barriers, were planned to be installed prior to construction of the mining related structures to prevent sediment transport from the disturbed area. The post-mining land use for the area was agreed to be forestland.

The Agreed Order of the Secretary

On June 30, 1999, James E. Bickford, Secretary of KNREPC executed the Order resolving this controversy. That Order incorporated all the Letter Agreements mentioned above and made certain findings. The Secretary's Order found that AmericasRoof had no standing to intervene. The Secretary also found that the values of concern to all had been protected and, finally, LUP 98-2 was denied.

**CURRENT STATUS**

To date, the Commonwealth of Kentucky is in the appraisal process for the value of the coal reserves and the value of the timber resources. Offers from the various owners have been presented to the Commonwealth for consideration. The State is also in the process of raising or designating funds for purchase of these interests.

**CONCLUSION**

The Lands Unsuitable Petition process is, by no means, a thorough procedure. While deceptively simple to initiate, a "lands unsuitable" designation can substantially impact property rights. LUP 98-2, involving Black Mountain, fortunately resulted in a resolution that was acceptable to all concerned.

There are lessons to be learned for the coal industry from this latest lands unsuitable petition, however. Any petition for a designation of "lands unsuitable" must be taken very seriously. Mining operations can be stopped entirely or severely curtailed. Since the clock begins running once a petition is filed, it is absolutely imperative that anyone with an affected interest must respond immediately in order to protect that interest.

Finally, it is obvious that there are serious procedural gaps in this process. These lands unsuitable petitions come about rarely, but when they do, they can be very devastating to the property interests of the coal industry. Likewise, the lack of guidelines in such a process also adversely affects petitioners who are seeking to establish such a "designation" as well as regulators who are trying to make an informed decision on the petition. Accordingly, it would behoove all concerned to lobby for a change in the procedure to permit time for preparation and negotiations.

**REFERENCES**

- Application for Intervenor Status, Chris A. Fleming, March, 1999
- FitzGerald Letter Dated February 25, 1999 (Kentucky Resources Council, Inc.)
- Hearing Officer's Report and Recommendation, March, 1999 (Environmental Administration Hearing Officer Vanessa Mullins, Office Administrative Hearings)
- Letter Agreement by the Parties, April 19, 1999
- Letter Agreement by the Cabinet, April 19, 1999
- Letter, May 5, 1999 (RE: LUP 98-2, Jericol Amendment #2 and Jericol Permit)
- Petition to Designate an Area as Unsuitable for Surface Coal Mining, 1999 (Petition No. 98-2, Department for Surface Mining Reclamation & Enforcement, Division of Permits)