

June 3, 1997

**VIA FACSIMILE - 303-231-3194**

David S. Guzy  
Chief, Rules and Publications Staff  
Royalty Management Program  
Minerals Management Service  
P.O. Box 25165, MS 3101  
Denver, Colorado 80225-0165

Re: Proposed Rulemaking, Release of Third-Party Proprietary Information  
Published in 62 F.R. 16116 (April 4, 1997)

Dear Mr. Guzy:

The Pittsburg & Midway Coal Mining Co. (P&M) appreciates the opportunity to comment on the subject proposed rulemaking (Rulemaking). P&M operates five coal mines in four different states. Three mine areas contain federal coal leases. Of those three mines, the McKinley Mine in New Mexico is comprised of a tribal lease, along with federal and private coal leases. Royalties and other lease payments are made to MMS for the producing federal leases. P&M reports royalties from the Indian coal lease to MMS. P&M opposes this Rulemaking and encourages MMS to withdraw it.

The Rulemaking proposes to authorize MMS to release third-party proprietary information to appellants and entities involved in administrative appeals and other Alternate Dispute Resolution when that information is the basis for an MMS assessment. P&M's position is that such information cannot be released to third parties under the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (1996). Under Exemption 4 of FOIA, information that is not available to the public includes "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C.A. § 552(b)(4) (1996). Given the competitive nature of the coal industry, which is similar to other extraction industries, information on the volume of sales and value of production is extremely confidential and proprietary. Competitors could use this information to determine mine prices, and then obtain a favorable bid advantage over P&M on future coal sales.

David S. Guzy  
June 3, 1997  
Page 2

P&M respectfully disagrees that MMS may promulgate regulations that provide an exception to FOIA by virtue of the Trade Secrets Act (18 U.S.C. § 1905). MMS states in the Summary of the Rulemaking that the agency cannot release proprietary information under the Trade Secrets Act "except as provided by law." Neither the Trade Secrets Act nor FOIA authorizes the release of proprietary or confidential information. Therefore, MMS cannot provide this information by proposing a regulation. There is no statutory basis for this Rulemaking and MMS must adopt regulations that are in accordance with federal law. The release of proprietary information contemplated by this Rulemaking is not "authorized by law" within the meaning of the Trade Secrets Act on the theory that such disclosure was authorized by law because the release of information would be pursuant to an MMS regulation. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). "Authorized by law" in the Trade Secrets Act does not mean authorized by an agency's regulation. This Rulemaking is also contrary to the Department of Interior regulations pertaining to requests for records. 43 C.F.R. § 2.13(c)(4) (1996).

Regulatory changes by MMS that are not mandated or permitted under federal law are not proper or lawful. The mere fact of requiring a third-party to sign confidentiality and liability agreements prior to releasing this information does not justify the act of releasing the information in the first place. Prior to releasing this information, even with these types of agreements, MMS must have statutory authority. This Rulemaking is outside the authority of MMS.

For these reasons, P&M opposes the Rulemaking, and encourages MMS to withdraw it.

Sincerely,

John H. Miller

cc: Ms. Jolanta Barton