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United States Department of the Interior
OFFICE OF SURFACE MINING
Reclamation and Enforcement
BROOKS TOWERS
1020 15TH STREET
DENVER, COLORADO 80202

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**DIVISION OF
OIL, GAS & MINING**

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MEMORANDUM

TO: Bob Hagen, Albuquerque Field Office

FROM: Allen D. Klein, Western Technical Center

SUBJECT: Valid Existing Rights - Price River Coal Company
and the Willow Creek Cemetery

The Price River Coal Company (PRCC) Mining and Reclamation Plan (MRP) states that surface operations will occur within 100 feet of an area known as the Willow Creek Cemetery. Specifically, the current surface operations within 100 feet of the cemetery are a building and an access road. PRCC is planning a rail system carrying mine supplies that would closely follow the existing access road and pass no closer than 25 feet of the nearest boundary to the cemetery. The cemetery is completely fenced and maintained by PRCC (see attached map). In accordance with UMC 761.4(a)(2) and 30 CFR 761.4(a)(2) PRCC has provided information (attached, Footnote 1, No. 5) in support of showing that the company held applicable valid existing rights on August 3, 1977. As you know, the Price River Coal Complex is being reviewed by OSM as part of the Utah repermitting effort.

The approved Utah Regulatory Program at UMC 761.11 and 30 CFR 761.11 provide that subject to valid existing rights no surface coal mining operations shall be conducted on any lands within 100 feet of a cemetery after August 3, 1977, unless those operations existed on that date. In accordance with the VER/Compatibility Determination Memorandum of March 1, 1983, I am requesting that a determination be made as to whether PRCC should be permitted to conduct operations within 100 feet of the Willow Creek Cemetery. It is the opinion of the Western Technical Center staff that PRCC should be permitted to conduct operations within 100 feet of the cemetery for the following reasons:

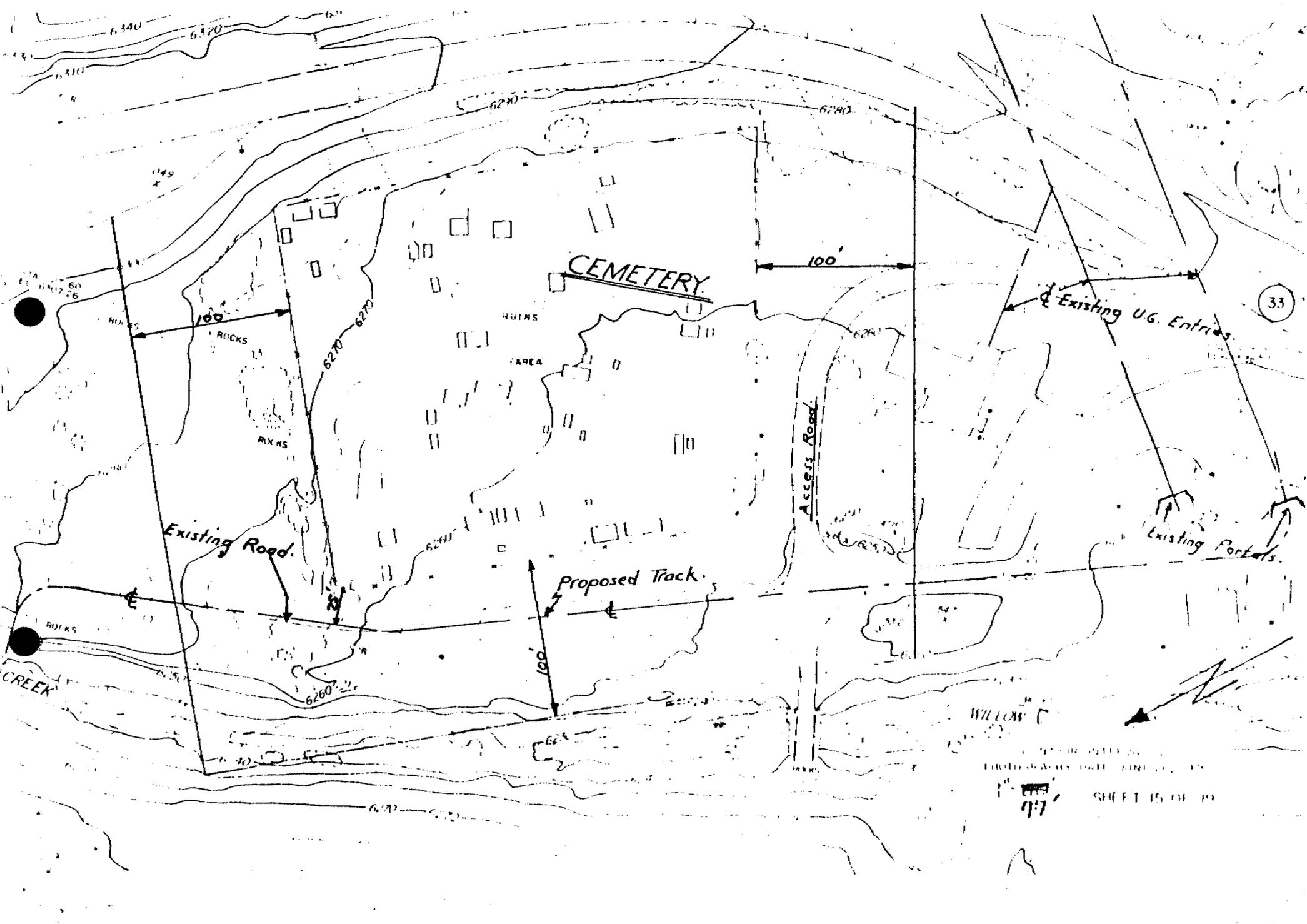
- 1) The surface facilities in question and the Willow Creek Cemetery are included in a state coal mining permit issued on April 27, 1977 by the Utah Division of Oil, Gas and Mining (see attached letter). The mine plan was also approved by the Geological Survey under the 30 CFR 211 regulations on the same date. These two documents appear to constitute valid existing rights under UMC 761.5(a)(1). Additional development within the 100 foot buffer zone would be limited to the proposed rail line and not involve mining under or adjacent to the cemetery or surface disturbance within the cemetery.

- 2) Willow Creek is located on privately-owned ground that has been associated with coal mining operations for nearly 100 years. The cemetery itself contains the remains of miners killed as a result of a mine explosion in 1924. PRCC and members of its corporate family hold pre-existing property rights to the fee simple estate in the surface and mineral estate in the area.

The Western Technical Center requests that a judgement as to whether PRCC be permitted to construct the proposed rail line on the surface within 100 feet of the Willow Creek Cemetery be determined by October 20, 1983 in order to meet the decision deadline for the entire facility. Enclosed for your review are documents concerning this matter. If you should have questions, please contact David Maxwell or Walter Swain at FTS 327-3807.

Enclosures

cc: Richard Robinson, P.O.I.
Jim Smith, UDOGM ✓



U.S. GEOLOGICAL SURVEY
GEOLOGICAL ENGINEERING CENTER
SHEET 15 OF 19

FOOTNOTE ¹

On Page 3 of the ACR, OSM requests Price River Coal to correct certain deficiencies relating to cultural resources and to address the potential impacts, both direct and indirect, on the Willow Creek Cemetery. The ACR also states that no destructive activities may take place within 100 feet of the cemetery boundaries.

The ACR appears to raise two basic questions arising under the mandatory unsuitability criteria set forth in the federal coal mining regulations. Under 30 CFR 761.11, it is provided that subject to valid existing rights, no surface coal mining operations shall be conducted after August 3, 1977, unless those operations existed on that date, on any lands which will adversely affect any places listed or eligible for listing on the National Register of Historic Sites, or on any lands within 100 feet measured horizontally of a cemetery. OSM's ACR appears to suggest that these two regulatory provisions regarding historic resources and cemeteries are applicable to the Willow Creek area.

These unsuitability provisions are inapplicable to Price River Coal's operations for the following reasons:

1. The Willow Creek Cemetery is neither eligible for nor listed on the National Register. A similar site in Scofield, Utah, where the bodies of miners killed in a mine disaster in 1900 were buried, has been affirmatively rejected for inclusion on the National Register, because it did not meet the eligibility criteria. The applicable federal regulation in 36 CFR 1202.6 provides that "ordinarily, cemeteries that have achieved significance within the past 50 years shall not be considered eligible for the National Register." Inasmuch as the older and more scenic cemetery near Scofield, Utah, has been rejected for inclusion on the National Register, it is clear that the Willow Creek Cemetery similarly fails to meet the applicable criteria.

2. There will be no adverse impact on the area within the cemetery. As proposed in Price River Coal's permit application and as depicted on Exhibit 3.6-1, Price River Coal intends to conduct certain surface operations within 100 feet of the area known as the Willow Creek Cemetery. These operations will not involve any destructive activities and will not have any adverse impacts on the area known as the Willow Creek Cemetery.

3. The Willow Creek Cemetery is not the type of area Congress had in mind when it enacted the unsuitability criterion for cemeteries. The cemetery is located on privately-owned ground that has been used for coal mining operations for close to a century. Price River Coal and members of its corporate family hold pre-existing property rights to the fee simple estate in the surface and mineral estate in the area. OSM recently proposed to modify its regulatory definition of the word, "cemetery", to exclude certain privately-owned burial grounds. It should be

FOOTNOTE (CONT.)

emphasized that the operations that Price River Coal proposes to conduct within 100 feet of the cemetery will not in any way result in any adverse impact upon the cemetery area. Undoubtedly, when Congress enacted the provision relating to cemeteries, it had in mind the possibility of strip mining operations being conducted within 100 feet of cemeteries, and desired to avoid the possibility that a back slope of a strip mining operation would destroy the cemetery. Such is not the case in Price River Coal's proposal. Price River Coal is merely proposing to conduct surface operations that are similar to those that have been conducted in the past and involve no surface excavations that could impair or damage the cemetery area or burial sites.

4. The operations were in existence on the date of enactment of SMCRA. Operations have existed in the Willow Creek area since before the enactment of SMCRA. The previously disturbed areas of Price River Coal's proposed operations in that area were in existence on the date of enactment and ventilation facilities have been operated continuously since before that date. Thus, the provisions of 761.11 are inapplicable.

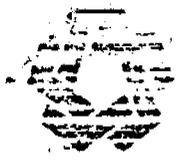
5. Price River Coal has valid existing rights. Based on its private ownership of the area within the Willow Creek Cemetery, as well as the permitting and operational history of the area, Price River Coal clearly enjoys valid existing rights to conduct its proposed surface operations within 100 feet of the area known as the Willow Creek Cemetery. The regulatory definition of valid existing rights is set forth in 30 CFR 761.5. Price River Coal clearly meets the property rights test, inasmuch as its sister corporation, Franklin Real Estate Company, acquired a fee simple estate in the area within and surrounding the Willow Creek Cemetery by a Warranty Deed from McCulloch Oil Corporation on March 20, 1974. As the owner of the surface and mineral estate in the lands prior to August 3, 1977, Price River Coal and its corporate family have adequate property rights to conduct underground coal mining operations in the Willow Creek area. Price River Coal also meets the second test established by OSM known as the "all permits" test. As set forth in OSM's regulations, the test requires that the applicant show that it was validly issued on or before August 3, 1977, all state and federal permits necessary to conduct operations on the lands in question or that the coal to be mined is both needed for and immediately adjacent to an ongoing operation for which all mine plan approvals and permits were obtained prior to that date. This test was significantly modified by Judge Flannery in his decision of February 28, 1980, in the Permanent Surface Mining Regulation Litigation, when he held that the all permits test may be satisfied by showing that a good faith attempt was made by the applicant to obtain all permits before August 3, 1977.

A mining plan, including the Willow Creek area and what is known as the No. 6A Mine (formerly known as the Utah Fuel Company

FOOTNOTE : (CONT.)

No. 2 Mine) was submitted to the United States Geological Survey in April, 1976, with Braztah as Operator, pursuant to the then applicable regulations in 30 CFR Part 211. Approval for that plan was received on April 27, 1977. A similar mine plan was submitted to the Utah Board and Division of Oil, Gas, and Mining pursuant to the Utah Mine Land Reclamation Act of 1973, and was approved by them in April, 1977. These permits and approvals covered the Willow Creek area as well as the Castle Gate mining operation. The operations now proposed by Price River Coal in the Willow Creek area will be used to mine coal as well as enhance recovery of other reserves that are both needed for and adjacent to the ongoing and previously authorized and existing operations at Castle Gate.

Based on the foregoing, Price River Coal is confident that it holds valid existing rights to the Willow Creek area and that any prohibition of its proposed surface operations in that area on the basis of the unsuitability criteria discussed above, would constitute an unreasonable and unconstitutional taking of the vested property rights of Price River Coal and its family of companies. Moreover, in light of the fact that the proposed operations to be conducted within 100 feet of the Willow Creek Cemetery will not be destructive and will not have any adverse impact on the cemetery area, there can be no rational basis for prohibiting such operations.



STATE OF UTAH
NATURAL RESOURCES
Oil, Gas & Mining

Scott M. Matheson, Governor
Temple A. Reynolds, Executive Director
Dr. G. A. (Jim) Shirazi, Division Director

4241 State Office Building • Salt Lake City, UT 84114 • 801-533-5771

September 16, 1983

Mr. Allen D. Klein, Administrator
Western Technical Center
Office of Surface Mining
Brooks Towers
1020 Fifteenth Street
Denver, Colorado 80202

RE: Interim Permit Boundary
Price River Coal Company
Price River Complex
ACT/007/004, Folder No. 2
Carbon County, Utah

Dear Mr. Klein:

On September 12, 1983, Mr. Dave Maxwell of your staff requested a legal description of Price River Coal Company's interim permit area for the Price River Complex. Specifically for the Willow Creek area in relation to the cemetery located in Sec. 31, T. 12 S., R. 10 E., and Sec. 6, T. 13 S., R. 10 E.

On September 21, 1976, the Division of Oil, Gas and Mining (DOGM) received a permit application from Braztah Corporation (currently known as Price River Coal Company) pursuant to the Utah Mined Land Reclamation Act. This plan was given approval in 1977.

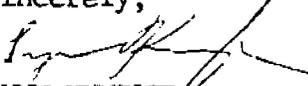
The legal description of the permit area is as follows:

Secs. 35 and 36, T. 12 S., R. 8 E.
Secs. 19-36, T. 12 S., R. 9 E.
Secs. 19-36, T. 12 S., R. 10 E.
Sec. 2, T. 13 S., R. 8 E.
Secs. 2-6, 9 and 10, T. 13 S., R. 9 E.
Secs. 1-6, 8-12, T. 13 S., R. 10 E.

As you will note, both Sec. 31 of T. 12 S., R. 10 E., and Sec. 6 of T. 13 S., R. 10 E., are included in the permit area.

Should you need further clarification on this matter, please don't hesitate to call.

Sincerely,


LYNN KUNZLER
RECLAMATION BIOLOGIST

LK/btb

cc: Dave Maxwell, OSM
T. Tetting, DOE