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November 11, 1994

TO: Lowell Braxton
Pam Grubaugh-Littig

FROM: Tom Mitchell

RE: November 9, 1994, Request For Legal Assistance Concerning Cyprus Plateau/Castle Gate Reclamation Agreement Changes.

I have reviewed the November 1, 1994, letter from John Kirkham on behalf of Cyprus Plateau, and the proposed changes. In addition, I have the concerns expressed by Lowell.

Concerning whether or not the proposed changes would effect the contract, the answer is yes and no, as set forth in the discussion below. Concerning the second question regarding the willingness of the Division to agree to changes in the standard form contract, I would suggest that where a change is an improvement, that improvement be made to all standard form contracts, and where changes are not an improvement to the contract they not be made for any reason.

Addressing the specific points raised by John Kirkham, I provide the following analysis set forth in the order addressed in the November 1, 1994 letter.

1. I agree the fourth "whereas" paragraph on page one should substitute the word "permittee" for the word "subject".

2. Because the Agreement contemplates that the permit is issued subject only to the filing of a bond and the signing of an agreement, paragraph 3 as drafted is inaccurate in that it contemplates that the legal description necessary for

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issuance of a permit has yet to be provided. Therefore, I agree that the term "has provided" should be substituted.

3. The change to paragraph 8 of the Agreement proposed by John Kirkham is not acceptable. The change proposed by him would completely obviate the authority of the Division to require modifications to the Agreement to reflect the changes in the underlying law. Because SMCRA and the Utah Coal Program in its implementing rules and regulations may be modified from time to time, this Agreement must also be modifiable to comply with lawful changes. Therefore, the Division cannot agree to the changes proposed in paragraph 3.

4. I agree with John Kirkham that paragraph 12 cannot create any additional remedies not provided by law. However, I would modify the paragraph to provide as follows:

> Any breach of the provisions of this Agreement, the Act, the rules, or the PAP may, at the discretion of the Division, result in "enforcement actions by the Division which include but are not limited to," an order to cease coal mining and reclamation operations, revocation of the permittee's permit to conduct coal mining and reclamation operations, and~~/or~~ forfeiture of the bond.

5. I agree with the concern expressed by John Kirkham concerning paragraph 13. However, the change proposed by him is not satisfactory. The Division cannot be contractually bound to provide funds to any party specified by the permittee. It is entirely possible that at the time such an event may occur, there may be disagreement among parties who have colorable title. Therefore, the term "appropriate party" should be further modified to address John's concern. I would propose the following:

> . . . any excess monies resulting from the forfeiture of the bond amount upon compliance with this contract shall be refunded "as directed by the permittee or, if a dispute arises, as directed by a court of competent jurisdiction by interpleading the funds subject to the dispute."

I would be glad to meet with Division staff members and/or Kirkham concerning any of these issues.

lsj
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Pam: please modify the reclamation contract per Tom's advice. Use this modified version for future reclamation contracts.

Lowell 11/11/94