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(1904-1983)

August 23, 1990

RECEIVED  
AUG 23 1990

TO CALL WRITER DIRECT

DIVISION OF  
OIL, GAS & MINING

HAND DELIVERY

Lowell Braxton  
Assistant Director  
Division of Oil, Gas & Mining  
State of Utah  
3 Triad Center Suite 350  
Salt Lake City, Utah 84180-1203

2007/007  
#3

Re: Environmental Power Corporation/Sunnyside

Dear Lowell:

Pursuant to our telephone conversation of August 23, 1990, I am sending to you the current draft of the proposed Operating Agreement between Sunnyside Cogeneration Associates and Sunnyside Reclamation & Salvage, Inc. Pursuant to this Operating Agreement, Sunnyside Cogeneration Associates, the owner of the coal tailings pile located in Sunnyside, Utah, is agreeing with the coal mining operation that they will be the operator of the waste coal pile. As part of this Agreement the operator will retain for the waste coal pile its current reclamation permit. When that permit expires, it may be appropriate to then transfer a portion of their permit to the owner. However, pursuant to our discussion, it may make more sense that as long as the coal mine operator is required to have the permit for the coal mining operation to continue with the same arrangement. However, that decision must be discussed between the owner, the operator and the State and will be a subject of a future negotiation at the time when the next permit is issued.

If you have any concerns raised about whether or not the waste coal pile is properly covered by a reclamation permit, please contact me.

Sincerely,

CALLISTER, DUNCAN & NEBEKER

A handwritten signature in cursive script that reads "Fred W. Finlinson".

Fred W. Finlinson

FWF/mcm

CDN3835F

OPERATING AGREEMENT

This Operating Agreement (this "Agreement") is made and entered into as of August \_\_, 1990 between SUNNYSIDE COGENERATION ASSOCIATES, a Utah joint venture ("Owner") and SUNNYSIDE RECLAMATION & SALVAGE, INC., a Colorado corporation ("Operator").

R E C I T A L S:

WHEREAS, Owner is engaged in planning, developing, constructing and operating a cogeneration plant (the "Plant") near the Sunnyside Mine in Carbon County, Utah, and Owner proposes to acquire waste coal from the Sunnyside Mine for use as fuel for the Plant; and

WHEREAS, Operator is the owner and operator of Sunnyside Mine Numbers 1, 2 and 3 in Carbon County, Utah (the "Sunnyside Mine"); and

WHEREAS, KAISER COAL CORPORATION ("Kaiser") by a Deed, Assignment and Bill of Sale dated as of December 28, 1987, (the "Deed") conveyed to Sunnyside Fuel Corporation ("SFC"), an affiliate of Owner [, and SFC has further conveyed and assigned to Owner] the following:

1. The gob, coal tailings, slurry discharge and waste coal piles ("Tailings") associated with the Sunnyside Mine and located on certain real property (the "Real Property") more particularly described in Exhibit "A";
2. The Real Property;

3. Ingress and egress across other real property associated with the Sunnyside Mine to the Real Property for the purpose of transporting, mining and remove Tailings ("Access"); and

4. Environmental permits associated with the Real Property including (i) that portion of the State of Utah Coal Mining and Reclamation Permit No. ACT/007/007 which relates to the Real Property and (ii) any new reclamation permit which may be issued with respect to the Real Property either of the above referred to herein as the "Reclamation Permit"); and

WHEREAS Kaiser, as lessor, and Owner, as lessee, have entered into a Land Lease Agreement dated as of March 30, 1987 and amended as of December 28, 1987 (the "Lease") to provide an area for use as a site for the Plant on properties described at Exhibit "B" (the "Plant Site") and to provide the right to use the Sunnyside Mine for rights-of-way for power lines and other needs associated with the Plant, provided that such use is calculated to minimize interference with Operator's activities at the Sunnyside Mine; and

WHEREAS, Operator purchased the Plant Site from Kaiser subject to the Lease; and

WHEREAS, Owner desires Operator, as an independent contractor, to monitor environmental compliance of the Real Property, including the Reclamation Permit and other environmental permits associated with the Real Property; and

WHEREAS, Operator, as owner of the Sunnyside Mine has benefit of the right, reserved under the Deed, to continue to deposit Tailings from the Sunnyside Mine on the Real Property and the right to use the Real Property for any and all purposes necessary to operate the Sunnyside Mine in accordance with the terms of the Reclamation Permit and other environmental permits associated with the Real Property, subject to an Operating Agreement and an Operating Plan mutually acceptable to Operator and Owner and (if required) approved by permitting authorities; and

WHEREAS, the Plant is being financed by industrial revenue bonds supported by a credit facility provided by Swiss Bank Corporation, New York Branch ("Swiss Bank") and Swiss Bank has retained and is being advised concerning the Plant by R.W. Beck & Associates ("Independent Engineer"); and

WHEREAS, Owner will enter into (1) an Operations and Maintenance Agreement with Chas. T. Main, Inc. ("Main") under which Main will operate and maintain the Plant and (2) a Materials Transportation Contract with Savage Industries, Inc. ("Savage") under which Savage will excavate and haul Tailings from the Real Property to the Plant, among other duties; and

WHEREAS, Owner and Operator desire to enter into this Operating Agreement pursuant to the terms of the Deed.

NOW, THEREFORE, in consideration of the mutual agreements and covenants contained herein, the parties agree as follows:

COAL waste

ARTICLE I: ENVIRONMENTAL RESPONSIBILITY

1.1 Environmental Responsibility. Owner shall be responsible for obtaining all permits, licenses, reclamation bonds and any other governmental authority needed on the Real Property and the Plant Site to transport, deposit, stockpile, store, use, remine and reclaim Tailings on the Real Property. Notwithstanding the foregoing, Operator shall keep the Reclamation Permit and all other permits required to transport, deposit, stockpile or store Tailings on the Real Property in full force and effect until [expiration of the Reclamation Permit]. In consideration of the foregoing, Owner will pay Operator \$ \_\_\_\_\_ [on \_\_\_\_\_, 19\_\_] [upon closing of financing for the Plant].

1.2 Failure to Transfer Reclamation Permit. Owner shall seek governmental approval of transfer or reissuance of that portion of the Reclamation Permit which relates to the Real Property from Operator to Owner by [\_\_\_\_\_, 19\_\_]. Operator shall provide all necessary assistance requested by Owner in connection with such transfer or reissuance. In the event that such transfer or reissuance is not approved or is denied by the responsible governmental authority not later than [\_\_\_\_\_, 19\_\_], Owner and Operator agree to negotiate in good faith concerning appropriate amendments to this Agreement.

1.3 Hazardous Materials. Operator shall indemnify and hold harmless Owner, its employees, contractors, agents, successors, assigns, partners and representatives from and against any Losses

(as that term is defined below) resulting from hazardous, toxic or other environmental waste, pollutant, substance or contaminant "Hazardous Materials" (i) existing in, on or at the Real Property as of the date of this Agreement, including any subsequent release or emission by Operator of such Hazardous Materials, or (ii) arising or occurring in, on or at the Real Property subsequent to the date of this Agreement, in either event due to the acts or omissions of Operator, its agents, employees or contractors. However, Operator shall not be liable for, nor shall it indemnify and hold harmless Owner, its employees, contractors, agents, successors, assigns, partners or representatives against any Losses relating to Hazardous Materials deposited in, on or at the Site by Owner, its agents, employees, or contractors.

For the purposes of this Agreement, "Losses" shall mean any losses, claims, damages, liabilities or necessary costs or expenses, including without limitation reasonable legal, consulting, engineering and other expenses or any fines or penalties with respect to the Real Property.

This Section 1.3 shall survive the termination of this Agreement and shall remain in full force and effect until amended or terminated in writing by Owner and Operator.

## ARTICLE II: OPERATING PLAN

2.1 Deposit of Tailings. Owner hereby grants to Operator, subject to the Reclamation Permit, NPDES Permit and all other

applicable permits, all rights necessary to transport and deposit Tailings on the Real Property pursuant to this Operating Agreement as set forth below. Operator agrees that it will transport and deposit such Tailings to the extent that the Sunnyside Mine produces the same and to the extent that Owner is authorized by the terms of the Reclamation Permit to receive such Tailings. Within \_\_\_\_\_ months after the execution of this Agreement, Operator and Owner agree to develop a mutually acceptable operating plan (the "Operating Plan") (which shall be subject to review and comment by Swiss Bank, Independent Engineer, Main and Savage) setting forth the details of use of the Real Property including, but not limited to, the issues set forth in this Article II. Relevant portions of the Operating Plan will be subject to approval by the State of Utah in conjunction with the Reclamation Permit and subject to approval of other governmental entities as required by applicable law.

(a) Coarse Refuse. At Owner's option, Operator will deliver coarse refuse to the Plant Site or the coal refuse disposal area at the Real Property (the "Coal Refuse Disposal Area") as described in Exhibit "A". Without limiting Section 1.1, Owner shall be responsible for obtaining all permits, licenses and authority required on the Real Property and/or Plant Site for Operator to transport, deposit, stockpile, store, coarse refuse on the Real Property and/or Plant Site; or for transportation of Tailings from the Real Property.

(b) [Industrial Waste Dump. Owner will designate the existing industrial waste dump as an area for disposal of "industrial waste" (which shall be limited to rock from surface or underground construction and development at the Sunnyside Mine) on the Real Property and provide Operator with access to the designated area for purposes of transporting and depositing mine development waste within such area. Operator will remain responsible for dumping and operation and management of the industrial waste dump, including but not limited to maintaining and complying with the requirements and limitations of all necessary permits.]

[(c)] Coal Slurry. Operator shall be responsible for delivery of coal refuse slurry from the Sunnyside Mine to the slurry ponds (cells) located on the Real Property via the Operator's slurry ditch. Owner shall be responsible for transporting the slurry from the slurry ponds to the Plant Site or to the Coal Refuse Disposal Area. Operator will be responsible for obtaining and maintaining all permits, licenses and authority associated with the coal slurry until delivery of such coal slurry to the slurry ponds. [Owner is responsible to maintain capacity in the slurry ponds for receipt of slurry from Operator's ditch.]

2.2 Site Security. The parties hereto agree that Owner shall not be responsible for the loss of or damage to the property of Operator and/or its subcontractors, if any, from any

cause. Operator shall furnish whatever security it finds necessary to adequately protect its property.

2.3 Roads and Access. It shall be the sole responsibility of Operator to construct and maintain such roads, ways and transportation facilities as Operator may require to transport the Tailings from the Sunnyside Mine to the Real Property and the Plant Site and to dispose of Tailings on the Real Property in accordance with this Agreement and the Operating Plan or as otherwise requested by Owner.

2.4 Structures and Improvements. Notwithstanding the reservation of rights of Operator contained in the Deed, the construction of new structures and improvements on the Real Property by the Operator shall be subject to approval of the Owner; further, in no event shall Operator in its exercise of such rights, impair Owner's use of or access to the so-called Tonka Road.

#### ARTICLE III: TERM

3.1 Term. The Term of this agreement shall be effective from the date hereof and shall continue for a period of thirty (30) years from the date hereof or until the Sunnyside Mine is permanently closed, whichever occurs first; provided, however, that the parties may mutually agree in writing as provided in Section 7.3 to extend this Agreement for subsequent five (5) year terms at any time after any date which is ninety (90) days prior to the expiration or termination of this Agreement.

3.2 Commencement of Plant Operation. Owner and Operator hereby agree to negotiate in good faith no later than sixty (60) days prior to commencement of Plant operation with respect to any changes in expected use of the Plant Site and Real Property necessitated by operation of the Plant.

3.3 Without limiting any other termination provision in this Agreement, Owner may terminate this Agreement upon giving Operator a written notice of termination if the January 30, 1987 Power Purchase Agreement between Buyer and Pacificorp, an Oregon corporation doing business as Utah Power and Light, as the same is amended from time to time, shall be terminated for any reason.

#### ARTICLE IV: FORCE MAJEURE

4.1 Force Majeure. Neither party shall be liable to the other for for any failure to perform such party's obligations hereunder to the extent and for the period that such failure is due to any cause beyond its reasonable control which cannot be remedied through exercise of due diligence or expenditure of reasonable sums of money (all of which causes are called "Force Majeure" herein), including but not limited to civil disturbances, war, fires, climatic conditions not reasonably foreseeable, acts of God, acts of a public enemy, or acts or failures to act by any governmental entity.

4.2 Obligations of Affected Party. The affected party shall (1) notify the other party promptly in writing of the occurrence of any Force Majeure which may hamper or impair the

performance of such affected party, (2) give full information concerning such Force Majeure, (3) promptly exercise all due diligence and expend all reasonable sums of money to remove or lessen the effect of such Force Majeure, and (4) promptly notify the other party of the ending date of such Force Majeure. No suspension or reduction due to Force Majeure shall invalidate the remainder of this Agreement; provided, however, on removal or remedy of the Force Majeure event in whole or in part, the parties shall resume their performance as provided for herein.

#### ARTICLE V: FEES AND TAXES

5.1 Fees and Taxes. Owner will pay all fees, taxes and royalties, if any, assessed and levied on the Real Property, including but not limited to real estate taxes, reclamation fees imposed pursuant to Section 402(a) of the Federal Surface Mining Control and Reclamation Act of 1977 and the excise tax imposed pursuant to Section 4121 of the Federal Black Lung Benefits Revenue Act of 1977.

#### ARTICLE VI: OWNER'S RIGHTS AND OBLIGATIONS

6.1 Other Agreements. Operator acknowledges that in connection with the Plant Owner will enter into an Operations and Maintenance Agreement with Main substantially in the form of Exhibit "C" and a Materials Transportation Contract with Savage substantially in the form of Exhibit "D" (collectively, the "Plant Operation Agreements"). Operator further acknowledges that Owner may assign or delegate certain of its rights and

responsibilities to Main and Savage through the Plant Operation Agreements.

6.2 Cooperation and Notices. Operator agrees to cooperate with Main and Savage in their exercise of any of Owner's rights and responsibilities under this Agreement assigned or delegated to Main or Savage under the Plant Operation Agreements. Operator shall accept any authorized communication from Main or Savage pursuant to such Plant Operation Agreements as though the same were given by Owner.

#### ARTICLE VII: INDEPENDENT CONTRACTOR

7.1 It is agreed and understood that Operator is in all respects an independent contractor, and nothing contained in this Agreement shall make Operator an agent or employee of Owner, its partners, parent corporations or affiliates. Operator shall be solely responsible for selecting the manner and method of its performance hereunder. Nevertheless, in the performance of its obligations under this Agreement, Operator shall cooperate with Owner, Main and Savage and shall comply with the reasonable requests of Owner, Main or Savage concerning Operator's activities on the Real Property as provided for herein.

#### ARTICLE VIII: REPRESENTATIONS AND WARRANTIES

8.1 Representations and Warranties. Each party to this Agreement represents and warrants to the other party as follows:

(a) such party has all necessary power and authority to enter into this Agreement and to perform its obligations hereunder;

(b) the execution and delivery by such party of the Agreement and the performance of its obligations hereunder has been authorized by all necessary action (corporate, partnership or otherwise) and, upon execution thereof by the other party, this Agreement will be its legal, valid and binding obligation of such party;

(c) no consent, approval or other authorization is needed for the execution or delivery by such party of this Agreement or the performance of its obligations hereunder; and

(d) neither the execution or delivery by such party of this Agreement nor the performance by such party of its obligations hereunder conflicts with or causes or will cause a default under any Laws, corporate or partnership documents (as the case may be) or any other contracts, agreements or instruments by which it or any of its properties are or may be bound.

8.2 Survival. The representations contained in this Article VIII shall survive the execution and delivery of this Agreement.

#### ARTICLE IX: DISPUTE RESOLUTION

9.1 Procedure. In the event a dispute arises between Owner and Operator regarding any provision of this Agreement, either

party may notify the other party of the dispute in writing. Each party shall thereupon require a senior member of its management to meet at the Plant, or at any other mutually acceptable location, to resolve the dispute. Such meeting shall occur at a mutually agreeable time but in no event later than ten (10) days following the earliest date of a notice given by either party. Should the parties be unable to resolve the dispute to their mutual satisfaction within 30 days of such meeting (or if no meeting is held, then within forty (40) days of the first notice of dispute), the dispute shall be determined by arbitration pursuant to the balance of this Article IX.

9.2 Arbitration. In any case in which a dispute is to be resolved by arbitration, the party desiring arbitration promptly shall give written notice to that effect to the other party and shall initiate the arbitration process, and the other party promptly shall comply therewith, all in accordance with the then applicable rules of the American Arbitration Association. Such arbitration shall be conducted in Salt Lake City, Utah.

9.3 Decisions. The determination of the majority of the arbitrators, or of the sole arbitrator, as the case may be, shall be conclusive upon the parties and judgment upon the same may be entered in any court having jurisdiction thereof. If there are three arbitrators and there is a failure of the majority to reach a determination, the decision of a third arbitrator designated by the two arbitrators chosen by the parties shall be conclusive on the parties and judgment upon the same may be entered in any

court having jurisdiction thereof. The arbitrators or the sole arbitrator, as the case may be, shall give written notice to the parties stating their or his/her determination and shall furnish to each party a signed copy of such determination.

9.4 Costs. Each party shall pay the fees and expenses of the arbitrator or arbitrators as determined by the arbitrators or the sole arbitrator, as the case may be.

9.5 Continuation of Work. Pending final resolution of any dispute, the parties shall continue to fulfill their respective obligations hereunder. Notwithstanding anything in this Agreement to the contrary, in the event of any dispute the parties shall nevertheless continue performing their respective obligations not affected by such dispute pursuant to this Agreement without delay pending resolution of such dispute as provided for in this Article IX unless Owner and Operator shall agree otherwise in writing.

#### ARTICLE X: DEFAULT

10.1 Bankruptcy or Insolvency. Either party may terminate this Agreement immediately upon written notice to the other party if the other party should file a petition in bankruptcy or for an arrangement, composition or compromise, or if such a petition is filed against the other party and not settled or dismissed within sixty (60) days of such filing, or if the other party should make a general assignment for the benefit of its creditors, or if a

receiver should be appointed on account of the other party's insolvency.

10.2 Other Defaults. If either party defaults in any of its other material obligations hereunder and fails to cure such default within thirty (30) days after receiving written notice from the other party of such default (or if a cure cannot be completed within such thirty-day period, then within such longer period as reasonably may be required so long as the defaulting party has commenced its cure within such thirty-day period and is diligently pursuing such cure), then the other party in addition to any other rights it may have at law or in equity may terminate this Agreement by giving written notice to the defaulting party of its intention to do so specifying the date on which this Agreement shall be terminated (which shall not be less than ten (10) days after the date such notice of termination is delivered). Such termination shall not relieve any obligation of either party arising or having become due prior to the termination.

#### ARTICLE XI: INDEMNIFICATION

11.1 Each party agrees to defend at its own cost and expense and to indemnify and hold harmless the other party and its officers, directors, employees, partners, successors and representatives from any loss, damage, liability, demand, claim, damage to property or personal injury or death, legal or administrative proceeding, and costs and expenses (including but

not limited to reasonable attorney's fees and expenses) related to or arising from any of the same (each a "Loss"), to the extent any Loss results from or arises directly or indirectly, or in whole or in part from any negligent or willful act or material breach of this Agreement by such party, its agents or its employees.

ARTICLE XII: MISCELLANEOUS

12.1 Notices. All notices, payments reports, consents and other communications between the parties shall be in writing and shall be sufficient when delivered in person or when mailed by certified United States mail, postage prepaid, or when delivered by personal delivery or sent by telecopy to the parties at their respective addresses, which shall prevail unless notice of a change is given in writing:

TO OWNER: Sunnyside Cogeneration Associates  
Attn: Robert E. Barton  
Environmental Power Corporation  
2920 North Academy Boulevard, Suite 201  
Colorado Springs, Colorado 80917

WITH A COPY TO: Michael B. Barr, Esq.  
Hunton & Williams  
2000 Pennsylvania Avenue, N.W.  
P.O. Box 19230  
Washington, D.C. 20036

TO OPERATOR: Sunnyside Reclamation & Salvage, Inc.  
2033 11th Street  
Boulder, Colorado 80302

WITH A COPY TO: Kenneth R. Oldman, Esq.  
Knutson, Bristwell & Reeves, P.C.  
1200 Hudson's Bay Centre  
1600 Stout Street  
Denver, Colorado 80202-3133

AND: Sunnyside Reclamation & Salvage, Inc.  
Attn: William Balaz  
P.O. Box 99  
Highway 123 Whitmore Canyon  
Sunnyside, Utah 84539

Unless otherwise provided herein, any notice given by U.S. mail shall be deemed given seventy-two (72) hours after the same is deposited in the mail with sufficient postage attached. Unless otherwise provided, twenty (20) days shall be deemed sufficient notice.

12.2 Governing Law. The validity, interpretation and performance of this Agreement shall be governed by the laws of the State of Utah.

12.3 Entire Agreement. This Agreement sets forth the entire agreement between the Owner and the Operator with respect to the subject matter hereof and supersedes all prior negotiations and dealings. No change in, addition to or modification of any of the provisions of this Agreement shall be binding upon either party unless in writing, signed by an authorized representative of each party.

12.4 No Waiver. No waiver by either party of any breach of the other party of any of the provisions of this Agreement shall be construed as a waiver of any subsequent breach, whether of the same or of a different provision in this Agreement.

12.5 Successors Bound. It is understood and agreed by and between the parties hereto that all the terms and conditions herein contained shall extend to, inure to the benefit of, and

bind the parties hereto and their respective successors and assigns, subject to the provisions of Sections 3.1 and 1.3.

12.6 Assignment. Except as expressly provided for herein, neither party shall have the right to assign this Agreement to a third person or entity without first receiving the express written consent of the other party, which shall not be unreasonably withheld; provided, however, that this Section 12.6 shall not prevent either party from assigning this Agreement to secure borrowings by or preexisting indebtedness of such party, nor shall it prevent Owner from assigning this Agreement in connection with any sale and leaseback of the Plant. Any attempted assignment inconsistent with this Section 12.6 shall be null and void.

12.7 Severability. The invalidity or unenforceability of any portion or provision of this Agreement shall not affect the validity or enforceability of the remainder of this Agreement. Any invalid or unenforceable portion or provision shall be deemed severed from this Agreement and the balance thereof shall be construed and enforced as if the Agreement did not contain such invalid or unenforceable portion or provision.

12.8 Captions. The captions contained in the Agreement are for convenience and reference only and in no way define, describe, extend or limit the scope or intent of this Agreement or the intent of any provision contained herein.

12.9 Counterparts. This Agreement may be executed by the parties in separate counterparts, each of which shall be an original but all of which shall be one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first set forth above.

SUNNYSIDE COGENERATION ASSOCIATES

By: \_\_\_\_\_

Its: \_\_\_\_\_

SUNNYSIDE RECLAMATION AND  
SALVAGE, INC.

By: \_\_\_\_\_

Its: \_\_\_\_\_