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February 22, 1996

ACT/007/007

#2

James W. Carter
Director
Division of Oil, Gas & Mining
#3 Triad, Suite 350
Salt Lake City, Utah 84180-1204

Dear Jim:

Enclosed please find a copy of Rio Lobo's Objection to the Trustee's sale on March 12, 1996. Rio Lobo's Objection makes numerous representations concerning DOGM's claim and position in the bankruptcy. I believe a response should be filed setting forth clarification of the Division's position. However, I recognize that there is considerable political pressure to compromise the state's position. Therefore, because my legal advice may conflict with other considerations you may have. I will not file anything further with regard to this until I hear further from you.

In addition, an entity known as Syn-Fuels has signed an agreement which will soon be noticed for the purchase of the disturbed property from the Trustee. I do not know the purchase price, but am informed that it is substantial. Syn-Fuels has represented to the Division and the Trustee that their coking operations will be operational within two years. Please let me know at your earliest convenience your wishes in this matter.

Very truly yours,

Thomas A. Mitchell
Assistant Attorney Generallsj
cc: Patrick J. O'Hara

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Tram Electric, Inc., and Pierce Oil Co.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO, CENTRAL DIVISION**

In re:

SUNNYSIDE COAL COMPANY,
Debtor.

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Case No. 94-12794 CEM
Chapter 7

**OBJECTION TO MOTION FOR APPROVAL TO SELL OF PROPERTY OF
THE ESTATE**

Rio Lobo L.L.C., ("Rio Lobo") a party in interest, Industrial Electrical Motor Service, Inc., Mine Supply, Inc., Tram Electric, Inc., and Pierce Oil Co., unsecured creditors, (collectively referred to as "Objectors") by and through their attorneys, Vinton Nissler Allen & Vellone, P.C. (Denver, Colorado), and Parsons Behle & Latimer (Salt Lake City, Utah) (only representing Rio Lobo) pursuant to Notice issued on January 26, 1996, submit this Objection to the Trustee's Motion for Approval to Sell Property of the Estate and in support thereof, state as follows:

I.

INTRODUCTION

The Trustee's Motion seeks approval from the court for the sale of approximately 26,000 acres of timber covered real property (the "Undisturbed Property") located in Carbon County, Utah owned by the Debtor. The Trustee's Motion does not seek to sell adjoining environmentally disturbed property of substantially less acreage (the "Disturbed Property"). The Trustee's intention to sell only the valuable Undisturbed Property, rather than sell both properties simultaneously, will result in a substantial overall detriment to the estate and its creditors. Furthermore, the bidding procedures established by the Trustee and breakup fee to be paid to the prospective purchaser, Penta Creek, LLC, are not proper and will serve to chill competitive offers for both the Undisturbed and Disturbed Properties.

Rio Lobo is an entity made up of parties with strong ties to the communities located near the Sunnyside Mine. Rio Lobo believes that with a fair bidding procedure, it can present to the Trustee a higher and better offer for purchase of both the Undisturbed and Disturbed Properties. Industrial Electrical Motor Service, Inc., Mine Supply, Inc., Tram Electric, Inc., and Pierce Oil Co., are all unsecured creditors of the Debtor and they include three members of the Official Unsecured Creditors' Committee from the Debtor's Chapter 11 proceeding. In addition to wanting the greatest return for their unsecured claims, these four unsecured creditors are all located near the Sunnyside Mine and, as a result, have an interest in the future use of both Undisturbed and Disturbed Properties.

The State of Utah through its Division of Oil, Gas and Mining ("DOGMA") has a secured claim against the Undisturbed Property. The secured claim relates, however, to the reclamation of both the Undisturbed and Disturbed Properties. DOGMA also has a substantial unsecured claim that relates to the reclamation costs and exceeds \$6 million -- which equals approximately one half of the total unsecured claims. Under the Trustee's present proposal to sell only the Undisturbed Property, adequate reclamation of the Disturbed Property is jeopardized. The proceeds of the sale will merely begin the reclamation of the Disturbed Property. However, by allowing a purchaser to acquire both the Undisturbed and Disturbed Properties together, all of the reclamation can be accomplished because it becomes economically feasible to engage in proper post-

mining use of the Disturbed Property which would result in a dramatic decrease in the reclamation costs.

Rio Lobo believes that its proposal to purchase both the Undisturbed and Disturbed Properties which includes post-mining use of the Disturbed Property, will have the support of DOGM, the neighboring cities of East Carbon and Sunnyside, and will result in a substantial benefit to the unsecured creditors of the estate. If Rio Lobo becomes the successful purchaser of both the Undisturbed and Disturbed Properties, and can carry out the post-mining use, the claim of DOGM can be substantially reduced. Rio Lobo's proposal will only be feasible if it can acquire all the Debtor's properties simultaneously, not in separate sales from the Trustee.

In addition to their concerns related to sale of only the Undisturbed Property, the Objectors believe that the Trustee's bidding procedure is not reasonable and should not be approved by the court. The Trustee's bidding procedure contains several elements that are flawed and serve to deter competitive bidding. The most significant flaw is that the auction of the Undisturbed Property is scheduled for the day before the court can consider any objections to the sale. Because the bidding procedure contains several elements that serve to deter competitive bidding, an accurate record of those who are interested in

II.

LEGAL ANALYSIS

While a bankruptcy trustee is shown substantial deference concerning the trustee's business judgment to sell assets of an estate, this does not provide a trustee with an unfettered right to sell such assets. The sale of assets outside the ordinary course of business should be carefully scrutinized by the court. In this case, there are several problems with the sale as presently proposed:

1. By failing to simultaneously sell the adjoining Disturbed Property, a reduced return to creditors is likely. Moreover, this procedure jeopardizes the reclamation of the Disturbed Property;
2. Conducting the auction for the Undisturbed Property prior to obtaining court approval for the sale and the bidding procedure may chill competitive offers;
3. The requirement of posting a \$250,000 deposit in order to participate at the auction when the Trustee has not first obtained court approval for the sale and the bidding procedure may chill competitive offers;
4. The requirement of having the opening bid begin at \$2,540,000 in order to participate at the auction when the Trustee has not first obtained court approval for the sale and the bidding procedure may chill competitive offers; and
5. The breakup fee payable to Penta Creek without first obtaining court approval of such fee may chill competitive offers.

In order to assure that the sale of the Debtor's assets are maximized for the benefit of creditors, the Trustee should first consider offers that propose to resolve all issues, including the reclamation of the Disturbed Property. The Trustee's primary concern in this case should be to resolve the reclamation issues. The proposal of Rio Lobo resolves the reclamation of the Disturbed Property. Unfortunately, the reclamation of the Disturbed may be contingent on its sale. If the Trustee cannot sell the Disturbed Property, he may attempt to abandon it to the detriment of the residents in the neighboring communities as well as all the people of the State of Utah. Sale of the Undisturbed Property alone, makes this result much more likely.

Through post-mining use, which will employ residents of the neighboring communities, the reclamation can be accomplished. Because Rio Lobo's proposal puts in place a feasible post-mining use, it believes that it will receive the support of DOGM and its claim may be substantially reduced. However, if the Undisturbed Property is offered for sale under the terms proposed by the Trustee, Rio Lobo's proposal may not be effectuated because it must be assured that it will be able to acquire the Disturbed Property which is required in order to make its offer economically feasible.

Other elements of the bidding procedure serve to deter competitive offers. The bidding procedure requires that an offeror pay substantial sums up front in addition to requiring that bids begin at least \$100,000 over the present offer. An offeror, such as Rio Lobo, may have an offer that is better because it results in a substantial benefit to

unsecured creditors, however, it may be based on an offer that is less than \$100,000 over the present offer. Furthermore, it is unreasonable to expect an offeror to deliver \$250,000 to the Trustee when the bidding procedure has not first received court approval.

Finally, the breakup fee that would be paid to Penta Creek, which could reach \$150,000, should be reviewed by the court prior to conducting the auction. The Trustee should be required to present evidence and follow the guidelines established by the court in In re Twenver, Inc., 149 B.R. 954, 956 (Bankr. D. Colo. 1993) concerning the payment of a breakup fee. Prior to the auction, the court should find that the proposed breakup fee was negotiated at arms length, could not chill competitive bidding, and that it is reasonable.

III.

CONCLUSION

In summary, the Trustee's structure of the pending sale has numerous elements that will chill competitive bidding. The sale of the Undisturbed Property alone, may result in a substantial loss to unsecured creditors, as well as the people of the State of Utah, if the Disturbed Property cannot be subsequently sold. This, coupled with the

other elements of the bidding procedure that serve to deter competitive bidding, provide sufficient grounds for the court to deny the Trustee's Motion.

Dated this 20th day of February, 1996.

VINTON NISSLER ALLEN & VELLONE, P.C.

Patrick D. Vellone Esq.
Attorney for Rio Lobo L.L.C., Industrial
Electric Motor Service, Inc., Tram Electric,
Inc., and Pierce Oil Co.