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FAX

- TO: 1. Lowell P. Braxton, Acting Director, DOGM, SLC
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5. Deann Owen, Esq. U.S. Department of the Interior, Office of the Solicitor,
Denver (Fax 303-231-5363)

FROM: Patrick J. O'Hara, Assistant Attorney General, Office of the Attorney
General, 160 East 300 South, 5th Floor, P.O. Box 140857, Salt Lake City,
UT 84114-0857 (Tel. 801-366-0508; Fax 801-366-0352)

DATE: May 18, 1998

RE: Sunnyside Bankruptcy--Stipulated Order re the Sale of the Footprint
Property--Copy of Letter from PJO'Hara to PWKcith 5/18/1998 (w/ cncl)

Fax consists of 11 pages including this cover sheet.

Final

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

| | | |
|-------------------------|---|-----------------------|
| In re: |) | |
| |) | |
| SUNNYSIDE COAL COMPANY, |) | CASE NO. 94-12794 CEM |
| |) | |
| Debtor. |) | Chapter 7 |

**ORDER RESPECTING TRUSTEE'S MOTION FOR APPROVAL TO
SELL FOOTPRINT PROPERTY AND WATER RIGHTS FREE AND
CLEAR OF CLAIMS ENCUMBRANCES AND INTERESTS PURSUANT
TO SECTION 363 OF THE BANKRUPTCY CODE**

This matter is before the Court on the motion (the "Motion")¹ of Kenneth A. Rushton, the Chapter 7 trustee appointed in this case (the "Trustee"), pursuant to 11 U.S.C. § 363 to sell certain real property of the estate known as the "Footprint Property" and water rights attendant thereto free and clear of interests to Penta Creek L.L.C. The Court, having reviewed the Motion and the objection filed thereto by the Utah Division of Oil, Gas and Mining ("DOGM"), and finding that the Trustee has settled the objection with DOGM and DOGM has approved the form of this order, and finding that no other written objections have been filed to the Motion, and taking notice of the file in the case, finds that it is appropriate to grant the Motion as set forth below.

IT IS THEREFORE ORDERED that, pursuant to the terms of the Footprint Property sale agreement (the "Agreement"), a true and correct copy of which is attached hereto as Exhibit B), the Trustee may sell the Footprint Property and attendant water rights identified therein to Penta Creek L.L.C. or its designee ("Buyer") under the terms and conditions of the Agreement, but subject to the following modification to such Agreement:

Section 5 of the Agreement is amended to add the following language:

¹The Motion has been corrected and supplemented by the Trustee in that certain document entitled "Trustee's Corrections and Supplement to Motion for Approval to Sell Footprint Property and Water Rights Free and Clear of Claims and Encumbrances and Interests Pursuant to Section 363 of the Bankruptcy Code (filed with the Court May 15, 1998) (the "Technical Correction"), so this Order is based on the Motion subject to the Technical Correction. A copy of the Technical Correction is attached hereto as Exhibit A.

It is expressly recognized by the Buyer and the Seller that the Buyer, after it purchases from Seller, intends to sell and lease and shall sell and lease certain parts of the "Footprint Property", consisting of about 210 acres, which Footprint Property is described more particularly in the Agreement attached hereto as Exhibit A, but subject to the corrected legal description in the Technical Correction attached hereto as Exhibit B, to COVOL Technologies, Inc., a Utah Corporation ("COVOL"). The parties recognize that COVOL is attempting to obtain approval from the Utah Division of Oil, Gas and Mining ("DOGM") of a post-mining land use with respect to certain parts of the Footprint Property. DOGM has expressed concern over the performance of COVOL under its intended post-mining land use. To facilitate the sale of the Footprint Property to Buyer, COVOL, the Buyer, and the Seller agree to the following provisions.

- 5a. Addition of COVOL as Party to Agreement; Recognition of Third Party Beneficiary. COVOL shall execute this Agreement as a party and agrees, by so signing, to be bound by the covenants contained in this section 5 (including all its subparts). COVOL, Buyer and Seller expressly recognize that the terms and covenants in this section are made for the benefit of DOGM and DOGM is accepted as a third-party beneficiary to this Agreement with rights to enforce any provision or covenant in this Agreement and is specifically entitled to enforce the provisions of this section 5 (including all its subparts) against any of the parties hereto by means of equitable remedies including negative or affirmative injunctions including seeking the same from the Bankruptcy Court to the extent such court has or retains jurisdiction over such enforcement action, or the Third District Court in and for Salt Lake County, Utah. It is agreed by the parties that this section 5 shall be binding upon the successors or assigns of the parties. Provided: To encourage and induce DOGM to approve an alternative post-mining land use of light industrial, including but not necessarily limited to that specific light industrial use as proposed by COVOL for the Footprint Property, the Seller, the Buyer, and COVOL, on behalf of themselves and their respective successors and assigns, hereby certify to that this agreement and the order approving same impose no contractual obligations in their favor vis-a-vis the United States of America, the U.S. Office of Surface Mining Reclamation & Enforcement, the State of Utah, DOGM, the Utah Board of Oil, Gas & Mining, or any of their respective agents, employees and contractors.
- 5b. Asbestos Obligation (Deadline: 11/15/1998).--The obligation assumed by COVOL, for itself and its successors and assigns, under this paragraph is referred to herein as the "Asbestos Obligation." To encourage and induce DOGM to approve the alternative post-mining land use of light industrial, as proposed by COVOL for the Footprint

Property, by November 15, 1998, COVOL, for itself and its successors and assigns, agrees that, if the approval is made by DOGM, and if COVOL timely closes on its contemplated purchase and lease from Buyer, COVOL shall, at its sole expense, remediate all known potentially hazardous material within the structures and areas to be retained by COVOL. Specifically, COVOL, for itself and its successors and assigns, agrees it shall mitigate the asbestos materials as identified in the pre-demolition asbestos survey conducted by IHI Environmental of Salt Lake City, dated October 20, 1997 (a true and correct copy of which is reproduced as Appendix H in COVOL's filing with DOGM entitled, "Post Mining Land Use Change Application, Sunnyside Property, April 1998", and which is hereby incorporated by this reference). COVOL agrees it shall get all required permits and shall use qualified personnel timely to complete said asbestos remediation work in a workmanlike manner in accordance with all applicable state and federal laws.

- 5c. Site Safety Obligation (Deadline: 11/15/1998) .---The obligation assumed by COVOL, for itself and its successors and assigns, under this paragraph is referred to herein as the "Site Safety Obligation". To encourage and induce DOGM to approve the alternative post-mining land use as proposed by COVOL for the Footprint Property, by November 15, 1998, COVOL, for itself and its successors and assigns, agrees that, if the approval is made by DOGM, and if COVOL timely closes on its contemplated purchase and lease from Buyer, COVOL, for itself and its successors and assigns, shall, by November 15, 1998, at its sole expense, abate any safety hazards which exist within the areas retained by COVOL. Specifically, COVOL, with regard to the hole in the upper bridge over Grassy Trail Creek, COVOL, for itself and its successors and assigns, agrees that it shall by said deadline repair, gate or otherwise secure said hole so it will not pose a hazard to the public and site workers. Also, with regard to the structures and areas at the Sunnyside site retained by COVOL, COVOL, for itself and its successors and assigns, also agrees it shall by said deadline install reasonable site security measures, including signs and gates to restrict access and to prevent unauthorized entry to the site.
- 5d. Waiver of Rights to Contest Decision of DOGM. COVOL recognizes that there remains certain actions which must be undertaken by COVOL (the "Remaining Actions") prior to the acceptance and approval by DOGM of an alternative post-mining land use of light industrial on the Footprint Property, such as the specific light industrial land use described in COVOL's proposed post-mining land use, including but not limited to delivery of an acceptable letter of credit to DOGM and OSM to guarantee COVOL's performance of

the Asbestos Obligation and the Site Safety Obligation. In particular, the Remaining Actions are set forth more particularly in Paragraph 5e and 5f. COVOL represents that it will be able to complete the Remaining Actions by June 5, 1998 (the "Submission Deadline"). If the Remaining Actions are not completed by the Submission Deadline, the Trustee, COVOL, the Buyer and the Seller irrevocably agree that none of them will:

(1) interfere, hinder or obstruct in any way the Debtor, DOGM or OSM in post-sale reclamation or inspection activities on the Footprint Property including any action such parties may take with respect to the destruction of any buildings or structures on the Footprint Property or the realignment of certain stream channels.

(2) prevent, hinder or interfere with the Debtor, DOGM or OSM, or any of their respective agents, contractors, employees, or legal counsel, in entering upon the Footprint Property to perform any act related to reclamation of such land including to inspect the land, to survey the land, to re-contour the land, to re-vegetate the land, to demolish any buildings or structures used by the Debtor as part of the coal mine, or to otherwise complete any other reclamation activities consistent with the Utah version of the Federal Surface Mining and Control and Reclamation Act of 1977, Public Law 95-87, 11 U.S.C. 1201 et seq. ("SMCRA"), codified at Utah Code Ann. §§ 44-10-1 et seq. (1953, as amended) and Utah Admin. Code R645 et seq. (implementing administrative rules) ("U-SMCRA").

(3) seek any suit in law or equity against DOGM, OSM or the governments of the State of Utah or Federal Government or any branch or agency thereof that alleges recovery under any theory of contract, tort, eminent domain, taking, temporary taking, inverse condemnation, or regulatory taking with respect to any of the reclamation activities of the Debtor, DOGM, OSM or any agents or employees as set forth herein or pursuant to the laws cited above, as this Agreement is intended to provide said agencies and persons a blanket release for all such claims, if any, which may now exist or which may arise hereafter.

- 5e. Letter of Credit Obligation (Deadline: 6/5/1998).--The obligation assumed by COVOL, for itself and its successors and assigns, under this paragraph is referred to herein as the "Letter of Credit Obligation." By 4:00 p.m. Salt Lake City time on June 5, 1998, COVOL agrees, for itself and its successors and assigns, that it shall deliver to DOGM a \$100,000 letter of credit for the joint benefit of DOGM and OSM, issued by a federally-insured bank authorized to do business in the

proposed light industrial alternative post-mining land use in whole or in part.

- 5i. **Right of Entry.**--Despite any of the foregoing, COVOL, the Buyer and the Seller agree that they will at all times grant access at no cost to DOGM, the U.S. Office of Surface Mining Reclamation and Enforcement ("OSM") or the Debtor, and their respective employees, agents, and contractors, to enter onto the Footprint Property to undertake reclamation activities and inspections as authorized by applicable law and by the police power of such agencies.
- 5j. **Survival Clause.**--The Seller, the Buyer, COVOL and the Trustee agree that all of the provisions herein and in other paragraphs of the Agreement for the benefit of the United States of America, the U.S. Office of Surface Mining Reclamation & Enforcement, the State of Utah, DOGM, the Utah Board of Oil, Gas & Mining, and their respective agents, employees and contractors, shall survive the execution, delivery and recording of the various deeds and leases contemplated by and between the Seller, the Buyer, and COVOL, and any of their respective successors and assigns.
- 5k. **Time is of the Essence.**--The Seller, the Buyer and COVOL are aware that DOGM currently plans to conduct a public meeting at Sunnyside on April 29, 1998 at 6:30 p.m. to discuss the intended reclamation plans for the Sunnyside Reclamation Project, and that DOGM plans that bids for construction of the site will be noticed and available on or about May 4, 1998 with the bid opening and bid award to occur by the end of May. Reclamation construction is anticipated to commence early in June. Therefore, the Seller, the Buyer and COVOL agree that time is of the essence with regard to COVOL's deadlines herein.

IT IS FURTHER ORDERED that the foregoing amendment to section 5 of the Agreement is incorporated by this order and made a part hereof and relate to the sale of the Footprint Property which is described with particularity in Exhibit A attached hereto; and

IT IS FURTHER ORDERED that neither the Buyer nor COVOL shall have, except as expressly provided in the foregoing language, any financial liability with respect to the reclamation of the Footprint Property either by law or by contract; and

IT IS FURTHER ORDERED that neither this order nor the sale of the Footprint Property under section 363 relieves the Debtor of any liability, including financial liability, for the reclamation of the Footprint Property; and

IT IS FURTHER ORDERED that the Trustee shall separately account for and preserve the proceeds from the sale of the Footprint Property, and

IT IS FURTHER ORDERED that the parcel of real property described more particularly in Exhibit A to the Technical Correction constitutes the true and correct final amended description of the Footprint Property for all purposes of this Order and the Agreement; and

IT IS FURTHER ORDERED that, pursuant to the relief requested in the Technical Correction, the entities who obtained any part the Footprint Property by inadvertence and mistake are hereby ordered expunged from the title to the extent such parties voluntarily reconvey the mistakenly transferred acreage to the Sunnyside Trustee and its estate; specifically, Frank Barnes, Sunnyside Land L.L.C. and Sunnyside Timber L.L.C., shall be expunged from the chain of title on the Footprint Property and such expungement may be accomplished by the filing the voluntary reconveyance instrument along with a copy of this Order in the real property records of the applicable county or counties; and

IT IS FURTHER ORDERED that the Trustee be allowed to pay the costs of Sunnyside Land L.L.C. and Sunnyside Timber L.L.C. associated with the reconveyance of the mistakenly transferred portions of the Footprint Property, which costs are not to exceed \$1500, unless adequate documentation is presented to the court for approval and served on creditors explaining the basis of such costs; and

IT IS FURTHER ORDERED that the transfer of Footprint Property as described more particularly in Exhibit A to the Technical Correction and of the water rights identified in the Agreement shall, except as set forth above, be free and clear of all liens, encumbrances, and interests, with valid liens to attach to the proceeds of the sale; and

IT IS FURTHER ORDERED that the Trustee shall, within no more than 30 days after entry of this Order, record a true and correct certified copy of this Order (including its Exhibits) with the County Recorder for Carbon County, UT to impart constructive notice of its contents to all persons interested in the Footprint Property. The Seller, the Buyer, and COVOL shall have a duty to execute any additional documents as may be required to facilitate the recording of the Agreement and this Order.

DATED this ____ day of May, 1998.

BY THE COURT

Charles E. Matheson
Chief Bankruptcy Judge

APPROVALS:

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|---|--|
| <p>Approved this ____ day of May, 1998.</p> <p>By _____ Counsel for the Trustee Kenneth Rushton Penrod W. Keith Steven J. McCardell Leboeuf, Lamb, Greene & MacRae 136 South Main Street, Suite 1000 Salt Lake City, UT 84101-1645 Telephone: 801-320-6700</p> | <p>Approved this ____ day of May, 1998.</p> <p>By _____ Kenneth A. Rushton Chapter 7 Trustee of the Estate of Sunnyside Coal Co. (Seller) 99 West Main St., Suite 202 Lehi, UT 84043 Telephone: 801-768-8416</p> |
| <p>Approved this ____ day of May, 1998.</p> <p>By _____ COVOL Technologies, Inc. 3280 North Frontage Road Lehi, UT 84043 By Russell Madsen Its Vice President Telephone: 801-768-4483</p> | <p>Approved this <u>18th</u> day of May, 1998.</p> <p>By <u>Patrick J. O'Hara</u> Counsel for the Utah Division of Oil, Gas and Mining Patrick J. O'Hara Assistant Attorney General Utah Attorney General's Office 160 East 300 South, 5th Floor Salt Lake City, Utah 84114-0857 Telephone: 801-366-0508</p> |
| <p>Approved this ____ day of May, 1998.</p> <p>By _____ Penta Creeks L.L.C. (Buyer) 140 South Newton Albert Lea, MN 56007 By: Greg Jensen Its: Manager Telephone: _____</p> | <p>Approved this ____ day of May, 1998.</p> <p>By _____ Counsel for the U.S. Office of Surface Mining Reclamation & Enforcement Robert D. Clark, Assistant U.S. Attorney for the District of Colorado 1961 Stout Street, Suite 1100 Denver, CO 80294 Telephone: 303-844-3885</p> |
| <p>Approved this ____ day of May, 1998.</p> <p>By _____ Counsel & Principal for Penta Creeks LLC Ralph C. Petty, Esq. Weiss, Barrett & Petty 170 South Main Street, Suite 1100 Salt Lake City, UT 84101</p> | <p>Note: This space intentionally left blank.</p> |