

0017

R. Harden

ACT/00/002

#3

Patrick J. O'Hara
 Assistant Attorney General
 Office of the Honorable Jan Graham, Attorney General of Utah
 Attorney for the Utah Division of Oil, Gas & Mining
 160 East 300 South, 5th Floor
 P.O. Box 140857
 Salt Lake City, UT 84114-0857
 Telephone: 801-366-0508

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE DISTRICT OF COLORADO

<p>In Re</p> <p>SUNNYSIDE COAL COMPANY, a Utah corporation, #84-1102281,</p> <p>Debtor</p>	<p>) RESPONSE BY UTAH DIVISION OF) OIL, GAS & MINING TO THE) TRUSTEE'S MOTION FOR) APPROVAL TO SELL THE) FOOTPRINT PROPERTY AND) CERTAIN WATER RIGHTS)))) Case No. 94-12794 CEM) Chapter 7)) MC No. JLS-18)</p>
---	---

I. Introduction

The State of Utah, Department of Natural Resources, Division of Oil, Gas & Mining ("DOGM") hereby responds to the "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" (1/15/1998) (the "Motion").

II. Discussion

The parcel of land described more particularly in the Motion consists of about 110 acres of land, including various structures and buildings (the "Footprint Parcel"). The surface of this land was used by the Sunnyside Coal Co. (the "Debtor"), and its predecessors, to facilitate many decades of underground coal mining activities at the now-closed Sunnyside Coal Mine in Carbon County, Utah (the "Mine"). The Trustee also proposes to sell certain valuable water rights associated with the Footprint Parcel.

The Footprint Parcel is so-named because it forms a highly visible "footprint" of serious environmental degradation, or scar, on the surface of those 110 acres. DOGM's overall interest in this matter is that DOGM is the agency with primary coal regulatory jurisdiction over this Debtor and this Mine pursuant to the federal-state coal regulatory program mandated by Congress under the terms of the Surface Mining Control and Reclamation Act of 1977, Public Law 95-87, codified at 11 U.S.C. 1201 et seq. ("SMCRA").¹

While DOGM probably has the single largest proof of claim on file in this matter, DOGM is far more than a "typical" creditor with a mere monetary claim against the Debtor. DOGM also enjoys ongoing police power jurisdiction over the Debtor with respect to the coal mining reclamation fiasco at this failed coal mine. Also, whereas this is a bankruptcy case, there are also major "non-core" issues in this case implicating the full

¹The United States Department of the Interior, through its Office of Surface Mining Reclamation and Enforcement ("OSM"), has certified the Utah Coal Program administered by DOGM as having "primacy" (as that term is used in SMCRA) in Utah.

and vigorous enforcement of the national environmental laws applicable to all coal mines in the United States.

DOGGM seeks to force the Debtor to comply with its extensive environmental obligations under the federally sanctioned Utah Coal Program, as set forth in the Utah version of SMCRA, or U-SMCRA, codified at Utah Code Ann. §§ 40-10-1 et seq. (1953, as amended) (statutes) and Utah Admin. Code R645 et seq. (implementing administrative rules). The Debtor has an obligation under U-SMCRA to reclaim the lands disturbed by surface coal mining operations, which means, in general, that the Debtor has an obligation under law to restore the surface of the land to its pre-mining condition. The disturbed acreage sits near the mouth of a rather beautiful canyon in a mountainous region of Utah called the Book Cliffs, close to the towns of Sunnyside, Utah and East Carbon, Utah.

DOGGM is pleased to note that Exhibit A to the Motion, which is that certain November 30, 1997 "Purchase and Sale Agreement" (the "Sale Agreement") between the Trustee and Penta Creek, LLC, a Utah limited liability company ("Penta Creek"), expressly acknowledges that the Debtor does have a reclamation obligation on the Footprint Parcel and that DOGGM enjoys a police power right to come on to the property, even after the sale is consummated, to conduct reclamation on the property. The Sale Agreement states:

- b. Buyer covenants to grant reasonable and necessary access to Department of Oil Gas & Mining officials ("DOGGM"), employees, and

contractors to undertake reclamation activities on the Property as may, in the sole discretion of DOGM, be necessary."

Sale Agreement at ¶1(b) (page 2). The Sale Agreement further states:

5. Reclamation of Property. The State of Utah, Division of Oil, Gas & Mining, through the police power and other statutory rights, holds the right to enter on to the Footprint property to complete reclamation which is an obligation of Sunnyside Coal Company (the "Reclamation Obligation"). Buyer shall have no obligation with respect to the Reclamation Obligation. The Order approving the sale of the Property shall provide that the Buyer is not liable for any reclamation of the Property.

Sale Agreement at ¶ 5 (page 4).

There is a strong public interest in seeing that the significant environmental mess created by the Debtor's coal mining operation is reclaimed. For that reason, DOGM urges the Court to not allow the Debtor to take any action with regard to the proposed Section 363 sale of the Footprint Parcel, and the associated water rights, which will either (a) diminish or hinder the Debtor's performance of its legal obligation to reclaim the Footprint Parcel or (b) make DOGM's regulatory burden vis-a-vis this Mine any more complicated than it already is. DOGM respectfully requests, therefore, that any court Order of the Bankruptcy Court approving the proposed sale of the Footprint Parcel (whether to Penta Creek or any other buyer), contain the express judicial conditions set forth below.

The Order of the Bankruptcy Court approving the sale--not just the Sale Agreement--must provide express post-sale protections to DOGM (and OSM). DOGM does not contend that the purchaser of the Footprint Parcel will be liable under SMCRA

for the Debtor's reclamation obligation, and yet any order approving a Section 363 sale must make clear that the Debtor's obligation to reclaim the Footprint Parcel will not in any way be diminished or extinguished by the Section 363 sale of the un-reclaimed land to a third party like Penta Creek.

DOGM requests that any Order approving the proposed Section 363 sale be conditioned substantially as follows:

(a) The Purchaser (and its successor in interest) is ordered by the Bankruptcy Court as a condition of this Section 363 sale to grant reasonable and necessary access to officials of the State of Utah's Division of Oil Gas & Mining ("DOGM"), and their employees, agents, legal counsel and contractors, to undertake reclamation activities on the Property as may, in the sole discretion of DOGM, be necessary.

(b) This Court holds that DOGM and the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement ("OSM"), through the police power and other statutory rights, enjoy the right to enter on to the Footprint Parcel to complete reclamation which is an obligation of the Debtor, Sunnyside Coal Company (the "Reclamation Obligation"). Also, notwithstanding this Section 363 sale of the Footprint Parcel, the Debtor is not relieved of its Reclamation Obligation on that land, so the Debtor shall also, post-sale, hold the right to enter on to the Footprint Parcel to complete its Reclamation Obligation.

(c) Other than the duty fully to cooperate with the Debtor and DOGM in allowing the reclamation to be done, the Purchaser (and its successor in interest) is not financially liable for the cost of any reclamation of the Property undertaken by the Debtor (or by DOGM or OSM). Similarly, DOGM and OSM, like the purchaser, are not liable under SMCRA for the Debtor's Reclamation Obligation, since that obligation remains with the Debtor. DOGM and OSM have no duty to perform any particular items of reclamation for the benefit or satisfaction of the Debtor, the Debtor's Purchaser, or any successive purchaser. To the extent that DOGM (or OSM) undertakes to do reclamation activities at the now-closed Sunnyside Coal Mine which are not completed by the Debtor as required by law, DOGM (or OSM) may undertake such reclamation activities as it deems

prudent within the exercise of its sound administrative discretion and subject to the resources available to DOGM (or OSM) for such purposes.

(d) This Court hereby finds that the Footprint Parcel was previously disturbed by the Debtor's surface coal mine operation, and has not been reclaimed by the Debtor in compliance with applicable coal regulatory law. Therefore, the Section 363 Purchaser (and its successors in interest) of this un-reclaimed parcel of disturbed "coal" land is hereby expressly ordered by the U.S. Bankruptcy Court as a condition of this Section 363 sale to not, post-sale, interfere, hinder or obstruct in any way with the Debtor, DOGM or OSM in post-sale reclamation or inspection activities on the land. In this instance, for example, reclamation may well involve the destruction of certain buildings and other structures on the Footprint Parcel, and the realignment of certain stream channels. The Section 363 Purchaser of the Footprint Parcel and the associated water rights (and any of its successors in interest) may not 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 Parcel to inspect the land, to survey the land, to re-contour the land, to re-vegetate the land, to demolish any buildings and 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 Control and Reclamation Act of 1977, Public Law 95-87, 11 U.S.C. 1201 et seq. ("SMCRA"), codified at Utah Code Ann. §§ 40-10-1 et seq. (1953, as amended) (statutes) and Utah Admin. Code R645 et seq. (implementing administrative rules) ("U-SMCRA").

(e) The Trustee of the Debtor shall, in consultation with DOGM, use the proceeds of this Section 363 sale of the un-reclaimed Footprint Parcel, and associated water rights, exclusively and solely for DOGM-approved reclamation activities on the surface of the Footprint Parcel.

(f) The foregoing post-sale protective conditions in subparagraphs (a) through (e) in favor of the Debtor, DOGM and OSM concerning the Debtor's Reclamation Obligation shall be subject to enforcement by this Court without any limit as to time, notwithstanding anything to the contrary in ¶18 (at page 8) of that certain Sale Agreement between the Trustee and Penta Creek LLC dated November 30, 1997.

III. Conclusion

There is a substantial public interest in seeing that the enforcement of our Nation's environmental laws not be circumvented by those who file for bankruptcy. DOGM respectfully requests, therefore, that the reasonable conditions set forth above be included in any Order of this Court approving a Section 363 sale of the Footprint Parcel, and the associated water rights.

DATED this 11th day of February, 1998.

Office of the Honorable Jan Graham
Attorney General of Utah
Patrick J. O'Hara
Assistant Attorney General

By Patrick J. O'Hara
Attorney for the Utah Division of Oil, Gas & Mining
Office of the Utah Attorney General
160 Est 300 South, 5th Floor
P.O. Box #140857
Salt Lake City, Utah 84114-0857
Telephone: 801-366-0508

CERTIFICATE OF SERVICE

I hereby certify I caused to be mailed by United States Mail, postage prepaid, on this 12th day of February, 1998 a true and correct copy of the foregoing "RESPONSE BY UTAH DIVISION OF OIL, GAS & MINING TO THE TRUSTEE'S MOTION FOR APPROVAL TO SELL THE FOOTPRINT PROPERTY AND CERTAIN WATER RIGHTS" to the following:

Jack L. Smith, Esq.
HOLLAND & HART
Attorneys for Sunnyside Coal Co.
555 Seventeenth Street, #2900
P.O. Box 8749
Denver, CO 80201

Teryl R. Gorrell, Esq.
James T. Burghardt, Esq.
MOYLE, GILES, O'KEEFE,
VERMEIRE & GORRELL
Attorneys for Tuckers
1225 Seventeenth Street, 29th Fl.
Denver, CO 80202-5529

Caroline C. Fuller, Esq.
FAIRFIELD & WOODS
Attorneys for Unsecured
Creditors
1700 Lincoln, Suite 2400
Denver, CO 80203-4524

Duane H. Gillman, Esq.
McDOWELL & GILLMAN
Attorneys for Unsecured
Creditors
50 West Broadway, Twelfth Floor
Salt Lake City, Utah 84101

Steven J. McCardell, Esq.
Penrod W. Keith, Esq.
LeBoeuf, Lamb, Greene & MacRae
Attorneys for Chapter 7 Trustee
Kenneth Rushton
1000 South Main Street
Salt Lake City, Utah 84101

John C. Parks, Esq.
Bart B. Burnett, Esq.
James H. Millar, Esq.
LeBoeuf, Lamb, Greene & MacRae
Attorneys for Chapter 7 Trustee
Kenneth Rushton
33 Seventeenth Street, #2000
Denver, CO 80202

Kenneth A. Rushton
Chapter 7 Trustee
99 West Main, #202
P.O. Box 212
Lehi, UT 84043

Dennis J. Bartlett, Esq.
Kerr Friederich Brosseau Bartlett,
Attorneys for the Division of Oil, Gas
and Mining, Department of
Natural Resources, State of Utah
1600 Broadway, Suite 1660
Denver, CO 80202

Herschel J. Saperstein, Esq.
Ray, Quinney & Nebeker
Attorneys for the Division of Oil, Gas
and Mining, Department of Natural
Resources, State of Utah
79 South Main Street, Suite 500
Salt Lake City, UT 84111

Tom H. Connolly, Esq.
Connolly & Halloran, P.C.
Attorneys for the Tuckers
1121 Broadway, Suite 202
Boulder, CO 80302

Robert D. Clark, Esq.
Assistant U.S. Attorney
U.S. Attorney for the District of
Colorado
Attorneys for the U.S. Department of the
Interior, Office of Surface Mining
Reclamation and Enforcement
1961 Stout Street, Suite 1100
Denver, CO 80294

Patricia J. O'Brien