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Jim

# EUREKA ENERGY COMPANY

A SUBSIDIARY OF PACIFIC GAS AND ELECTRIC COMPANY

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June 9, 1981

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DIVISION OF  
OIL, GAS & MINING

Mr. James Smith, Jr.  
Coordinator of Mine  
Land Development  
Department of Natural Resources  
Division of Oil, Gas and Mining  
1588 West North Temple  
Salt Lake City, Utah 84116

Re: Coal Mining Permit Application  
of Eureka Energy Company

Dear Mr. Smith:

We appreciate the opportunity which you and your staff have provided us to review the letter of Mr. Donald A. Crane, Regional Director, Region V, United States Department of Interior, Office of Surface Mining Reclamation and Enforcement ("OSM"), dated May 5, 1981. This letter concerned an Apparent Completeness Review ("ACR") of Eureka Energy Company's Sage Point-Dugout Canyon Mine. The letter and its Attachments 5 and 6 addressed in some detail the issue of whether or not a permit could be issued to Eureka if the permit incorporated a proposed change of use of surface water from farming on an alluvial valley floor to mine operations. The letter seems to conclude, therefore, that a permit cannot be approved because of the provisions of Section 510(b)(5) of the Surface Mining Control and Reclamation Act ("SMCRA"). We strongly disagree.

We believe that OSM has made an overly broad interpretation of the protection standards for alluvial valley floors set forth in SMCRA. Under the analysis used by OSM, the total alluvial valley floor acreage upon which farming would be interrupted, including the land to be withdrawn from irrigation, would be "significant" to farming. OSM apparently believes that any plan which contemplates removing a significant portion of farms on alluvial valley floors from production, for whatever reason, cannot be approved. We believe that such an interpretation is unreasonable in light of the legislative history accompanying the enactment of SMCRA and in light of other compelling considerations which will be set forth in more detail below.

We believe that the SMCRA protection standards for alluvial valley floors were intended to prevent physical disturbances to alluvial valley floors which are generally associated with strip mining operations. We do not believe that the protection standards were intended to prohibit or curtail in any way the prudent water resource management on alluvial valley floors.

The legislative history relating to the enactment of SMCRA is summarized and consolidated in (1977) U. S. Code Cong. & Ad. News 593. A review of this history reveals that Congress reacted to a study of the National Academy of Science when it set forth protection standards for alluvial valley floors. The Academy study pointed out that removal of alluvium from a valley had the potential of lowering the water table and destroying protective vegetation. Further, the rehabilitation of such trenched valley floors would be a long and expensive process. Congress thus concluded that mining should be restricted on alluvial valley floors because of the delicate relationship which these alluvial valley floors played in the support of vegetation and because of the difficulty in reclaiming such areas.

The Academy study only mentioned the adverse consequences created by physical disturbance (i.e., trenching and excavation) as a danger from which the nation needed protection. Congress in enacting the protection standards reacted only to the danger created by the physical disturbance to alluvial valley floors. The legislative history contains no evidence that Congress intended to mandate a particular method of water management on alluvial valley floors or that farming once begun must always be continued. Indeed, the legislative history specifically states that Congress recognized "that farming on the mine site must be interrupted during the mining and reclamation process." Id. at 736. While the statutes and regulations are perhaps ambiguous enough to be interpreted in the way that OSM has done, such an interpretation is not mandated and is unreasonable in light of the legislative history.

OSM in making this interpretation may be reacting to a fear that a mine operator may seek to escape the alluvial valley floor protective standards by purchasing farms prior to the submission of a permit application and then removing the farms from production so that the operator could argue that the alluvial valley floors may be physically disturbed by trenching and excavation because they are "not significant to farming" and thus fall within the statutory exception to the alluvial valley floor protection standards. This situation, however, is very much different from the situation posed by Eureka. Eureka has purchased farmlands in advance solely for the purpose of acquiring the associated water rights. Eureka does not intend to physically disturb the alluvial

valley floors with trenching or excavation. It merely intends to temporarily divert water for its industrial uses. At the completion of the mining operation, the water could then be diverted back to the farms; and the alluvial valley floors would again be fully capable of supporting farm operations. An approval of Eureka's permit application would not create a precedent for approving another application where the mine operator intended to physically disturb the alluvial valley floor.

The position of the OSM creates other problems. A serious question exists as to whether the OSM position violates the Fifth Amendment to the United States Constitution because it prohibits the use of valuable water rights without providing just compensation. The OSM position also seems to usurp the authority of the Utah State Engineer. OSM apparently believes that it can require the continued diversion of water for agricultural purposes through exercise of its power to withhold a mining permit. Such an exercise of authority over water use, if recognized, would necessarily conflict with the right of the Utah State Engineer to grant a change in the point of diversion and nature and place of use of water. This position creates unnecessary tension between the authority of the federal government and the authority of the state to regulate water resources. Congress itself addressed this possibility by the inclusion of Section 717, which specifically stated that SMCRA was not intended to interfere with water right issues.

Finally, the position of OSM may severely inhibit the expansion of coal mining in Utah where virtually all water rights in coal producing areas have been appropriated. As water is needed for new mining operations, such water will likely need to be diverted from historic agricultural operations on alluvial valley floors. The OSM position would restrict the use of limited water supplies in expanding mine operations.

For the reasons stated above, we strongly believe that the OSM position is not mandated by SMCRA and is an unreasonable interpretation of the protective standards for alluvial valley floors. Lands affected by such an action, if not otherwise directly affected by surface disturbing activities, should not be taken into account in any determination of whether mining activities on an alluvial valley floor will significantly affect farming. We do not believe that Eureka's permit application should be denied on the basis that it contemplates a change in use of surface water from agricultural to mining activities.

Mr. Smith:

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June 9, 1981

If we can provide any additional information with regard to this issue, we will be glad to do so.

Sincerely,



PAUL B. ANDERSON  
Manager, Administrative  
and Regulatory Services

RGH/CJP/PBA:mg

cc: RFGoudge  
CJParr/RGHolt  
CASlaboszewicz