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United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement

BROOKS TOWERS

1020 15TH STREET

DENVER, COLORADO 80202

OFFICE OF THE REGIONAL DIRECTOR

File ACT/007/009
Copy to MRP
Review Staff
Dane
Jim

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

05 MAY 1981

RECEIVED

MAY 7 1981

DIVISION OF
OIL, GAS & MINING

Dear Jim:

As you requested, my staff has completed an Apparent Completeness Review (ACR) of Eureka Energy Company's Sage Point-Dugout Canyon Mine. A preliminary draft of this ACR was sent to you by John Nadolski on March 3. This was followed up by a later draft which was sent to Ms. Sally Kefer of your staff on April 16.

Review of the plan indicates that the plan is incomplete and technically deficient (see Attachment No. 1). Comments from the U.S. Geological Survey (USGS) and the Bureau of Land Management (BLM) are incorporated into the ACR. Copies of this correspondence are also attached to this letter (see Attachments Nos. 2 and 3).

Eureka Energy should be complimented for their well-organized presentation which reflects the effort Eureka Energy put in the preparation of the mining and reclamation plan. The major deficiencies noted in the ACR are of a technical nature and should not involve more data collection. Exceptions to this may be cultural resources and vegetation baseline data for the disturbed areas.

Eureka Energy has requested a 40-year permit. As my staff has discussed with you, this request is being reviewed by OSM's Washington office. It is our understanding that the information submitted would not support a permit term longer than five years since the request does not provide evidence of a site-specific need for financing, equipping, or opening a mine.

Volume XI of the mining and reclamation plan is labeled confidential. I have previously requested Eureka Energy (by letter dated January 14, 1980) to reevaluate their request for confidentiality. Their response was a reaffirmation of the request for confidentiality. Based upon a review from our Regional Solicitor (see Attachment No. 4), I am declassifying with this letter the information pertaining to: (1) proposed production figures, (2) proposed mining sequence, (3) thickness of coal seam, (4) interburden thickness, and (5) outcrop maps. Mr. Nickolas Temnikov of Pacific Gas and Electric was notified of this in a conversation with John Nadolski on April 19, 1981, and we requested that this not be done before May 1, 1981.

Early last year, Eureka Energy requested your evaluation of a possible alluvial valley floor (AVF) in the permit area. Last fall, your staff requested OSM assistance in this matter. A field inspection of the permit area was made on November 6, 1980. Based upon the information obtained on the site visit. The information submitted in the mining and reclamation plan, and the additional information and methodology presented in this attachment, my staff has made a determination that there are several locations in Soldier Creek that are alluvial valley floors. Eureka Energy has purchased all of the land and water rights associated with this farmland. My staff has prepared a draft technical analysis of the AVF which is also attached to this letter (see Attachment No. 5). Based upon this analysis, I have made a preliminary determination that the alluvial valley floor which will be affected by the mine's operation is significant to farming. Our staffs are still working with the SCS and the BLM in order to gather more information regarding the questions of significance to farming.

Eureka Energy's proposed operation would impact the alluvial valley floor in two ways. First, I understand that the road, rail spur, parking lot, offices, and sedimentation pond are proposed to be built in the area previously farmed (two hay crops per year for a number of years). With the exception of the sedimentation pond, for which we have not yet evaluated, these proposed structures will not effect the hydrologic balance or the reclaimability of the area. However, all facilities would remove the hazards from production.

Second, and more importantly, the present Anderson Reservoir is proposed to be expanded in order to provide water for the mining operations. The reservoir would be expanded to have an active storage volume of 1675 acre feet. The water would be consumptively used in the mining operation, thus interrupting the hydrologic balance which provides flood irrigation water to the alluvial valley floor. As my staff has discussed with you, the Surface Mining Control and Reclamation Act prohibits the approval of a permit unless it is demonstrated that "the proposed surface mining operation...would not interrupt, discontinue, or preclude farming on alluvial valley floors...or not materially damage the quantity or quality of water in surface or underground water systems that supply the valley floors...." (P.L. 95-87, Section 510(b)(5)) This decision is supported by an opinion obtained from the Office of the Solicitor. This opinion is attached to this letter for your reference (see Attachment No. 6).

In summary, Eureka Energy must demonstrate that the affected alluvial valley floor in Soldier Creek is not significant to the farm's agricultural production, and if this demonstration is made, that the essential hydrologic functions will be preserved. If these demonstrations cannot be made, then the issuance of a permit incorporating the proposed diversion of surface water is prohibited. If my staff can be of any assistance in resolving this conflict, please call upon me or John Nadolski.

The Sage Point-Dugout Canyon Mines were addressed (as the Fish Creek and Dugout Canyon Mines) in Part 2 of the Final Environmental Statement for the Development of Coal Resources in Central Utah (DOI, 1979). The environmental impacts of the proposed operation were adequately addressed in Chapter FD-III of this environmental statement. Therefore, at this time, we are not proposing to prepare another site-specific environmental statement.

Sincerely,



DONALD A. CRANE

Attachments 1. ACR
2. USGS comments
3. BLM comments
4. Solicitor's memo on confidentiality
5. AVF technical analysis
6. Solicitor's memo on AVF

cc: Moffitt, USGS, SLC (w/attachments)
Berggren, BLM, Price (w/attachments)

Sage Point-Dugout Canyon Mines
Eureka Energy Company
Apparent Completeness Review

771.27 Verification of Application

The verification of the application has not been notarized or certified.

782.13 Identification of Interests

(e) Kaiser Steel Corporation is shown on the coal ownership map (Figure D03-0005), but is not listed in the narrative (pp. I-22 and 23). This oversight should be corrected.

Coal ownership has been provided but other subsurface owners of minerals other than coal have not been included. The regulation also requires the names and addresses of all subsurface owners contiguous to any part of the proposed permit area.

782.15 Right of Entry and Operation Information

(a) A description must be provided to describe on what the applicant bases its legal right to enter land owned by LaRue Layne, et al, which appears to be designated for surface facilities (Drawing 03-0004).

A long-term lease is being sought from the State of Utah; however, right-to-enter information for state-owned surface areas is also required before a permit can be issued. Information as to the progress of this lease application is needed.

Descriptions of some of the lands do not seem to match their placement on the ownership map: Area 6 as shown on the map should be NW 1/4 SW 1/4 not NW 1/4 SE 1/4. The applicant must correlate the written descriptions with the map.

783.14 Geology Description

Information included under geology (p.II-36) and mining sections indicates that there may be geologic hazards (e.g. faults). The company should give their assessment of potential geologic hazards including practices to eliminate or mitigate these hazards where necessary.

783.15 Ground Water Information

The estimate of the hydraulic gradient provided on page II-67 cannot be accurately utilized unless well completion information (including locations of the perforations) on the Walton well is provided. Also, Table IV-B.1: Column heading "Altitude of Perforated Zone," should read "Depth from Surface to Perforated Zone."

783.19 Vegetation Information

The sampling intensity of vegetation data collection (p. II-280) of cover and productivity on potentially disturbed communities and reference areas should be sufficient to detect a 10% change in the mean with 90% statistical confidence or with 80% statistical confidence on shrublands. A vegetation community or reference area may be considered a shrubland where shrub cover is 30% or more of the total vegetative cover. The density of woody plant species should be sampled at an intensity sufficient to detect a 10% change in the mean with 80% confidence. These sampling intensities are necessary for baseline data collection and selection of reference areas to be consistent with the level of accuracy required for assessment of revegetation success, as required by UMC 817.117.

The applicant has not demonstrated that the selected references are similar to potentially disturbed communities with respect to cover and production (p. II-299). This demonstration must be made for each potentially disturbed community (including the "farm and weed" community) or the applicant should propose an alternative for assessing revegetation success. The applicant should specifically state the size and range condition of each reference area selected.

*Fish and Wildlife Resource Information

The applicant should document the permission by Utah DOGM to forego further aquatic macroinvertebrate study (p. I-322).

The applicant should have used the same habitat types in the species list as those described in 2.1, Wildlife Habitats. This would permit easier assessment of the species affected by mine disturbance as outlined in the table on p. II-405.

Maps of mule deer migration routes would strengthen the applicant's claim that such routes will be relatively unaffected.

*Information required pursuant to Federal Land Management Policy Act. This information is also required to comply with the Federal and Utah's Surface Coal Mining Act.

*Soil Resource Information

No raw data for soil analyses have been provided--only summaries. The information is much more useful if the field data is provided; therefore, the applicant should provide this data.

The applicant states (p. II-208) that should circumstances necessitate the use of material other than topsoil, they will comply with UMC 817.22(e). The applicant should be aware by now whether or not a topsoil substitute will be needed. If overburden or other material is to be used as a topsoil substitute, analysis of this material must be provided.

784.11 Operation Plan: General Requirements

Parameters used to calculate minable reserves included a mining limit boundary of 500 feet from the outcrop. It is recognized that oxidation, including burning, may penetrate more or less than 500 feet from the actual outcrop of the coal seam. Before any mining is arbitrarily stopped 500 feet short of the outcrop, site specific plans will be submitted to the U.S. Geological Survey-Conservation Division (USGS) for review and approval. The Geological Survey proposed that with the concurrences of the surface interest some coal within the 500-foot boundary can be recovered in a safe and environmentally acceptable manner. These locations may be site specific.

The mine plan for a logical mining unit under 30 CFR 211.10(c)(6)(ii) must show the mining of all the reserves in a period of not more than 40 years. The complete recovery period is shown as 46 years for the Dugout Canyon Mine No. 2. Rather than redraft the underground mine plans to reflect the 40-year depletion, USGS will accept a formal statement from Eureka of a proposal to reduce the mine life to 40 years. Future revisions of the mine plan maps can reflect this proposal.

Submit as a part of the mining and reclamation plan the complete Roof Control and Ventilation System and Methane and Dust Control Plans approved by Mine Safety and Health Administration (MSHA). Change any data or information in this submittal that may be in disagreement to the plans approved by MSHA.

(b) The water supply system for the overland belt conveyors must be protected against freezing during the winter months if it is to remain operational. The method for assuring this should be described.

Formaldehyde treated wastes from chemical toilets would be transported to the sewage lagoons for disposal (p. I-135) and biological and chemical sludges would be disposed (p. I-136). Table II-G.1 suggests that the Environmental Protection Agency has approved these actions. What are their conditions on the approval?

784.13 Reclamation Plans: General Requirements

Several citations are given in the narrative (Section IV) for references which are not listed in the "literature-cited" section. These omissions should be added to the literature-cited list.

784.14 Reclamation Plan: Protection of Hydrologic Balance

The applicant discusses the operational impacts on surface springs and perched aquifers (Section 7.2.2); however, the applicant must discuss the potential impacts of mining on the interbedded sandstone units of the Blackhawk Formation and Castlegate Sandstone--which act as aquifers.

(b)(3) Provision for monitoring collecting, recording and reporting of water quality and quantity data, per UMC 784.14(b)(3), is not included. Section IV B.1.2.2. of the application states that water quality sampling "will continue relatively unchanged"; however, more specific information (especially for streamflows) should be provided (e.g. frequency, parameters, etc.).

Table IV-B.2 lists over 40 springs with varying water quality and quantity parameters (Table IV-B.11a). The applicant needs to provide rationale for selecting springs (D-13-12) 9ddc-S1 and (D-12-12) 23ccb-S1 as representative ground water quality sources for monitoring (p. II-92).

The applicant should discuss the existing water use or diversion (including irrigation ditches) downstream of the project area. The impacts of decreased flow in Soldier and Dugout Creeks below the surface facilities as a result of consumptive water use in the mining operation must be analyzed.

784.14 Reclamation Plan: Protection of Hydrologic Balance

It is proposed that the culvert in Fish Creek Canyon will be backfilled with suitable material at the conclusion of mining, and drainage will be allowed to cascade over the outslope of the portal pad. The applicant must submit calculations on stability and

erosion control. A plan for maintenance must also be included. The regulatory authority will not approve this type of plan without substantial evidence on stability.

784.15 Reclamation Plan: Post-mining Land Uses

In order for the regulatory authority to assure a satisfactory post-mining land use, the description of the proposed post-mining land use also must be accompanied by a copy of the comments concerning the proposed use from the legal or equitable owners of record of the surface areas to be affected by surface operations or facilities as well as state or local government agencies which would have to initiate, implement, approve or authorize the proposed use.

784.16 Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments

(a) The applicant must clearly address MSHA requirements, including stability analysis, with regard to structures meeting or exceeding MSHA criteria (i.e., Anderson Reservoir, Dugout Reservoir).

Dugout Reservoir would have a design capacity for 20 acre feet for sediment storage (p. I-116). How often would the reservoir have to be cleaned of sediment during mine life and where would these sediments be disposed?

Dugout Reservoir would be left intact at the end of mine life (p. I-280). Assuming the reservoir would be cleaned of sediments at that time, how many years would lapse prior to complete filling of the reservoir due to siltation?

784.21
and
817.97

Fish and Wildlife Plan

Since successful reclamation is supposed to mitigate adverse impacts, as suggested on II-405, the applicant should provide an estimate of the time period between initial habitat disturbance and expected recolonization by wildlife.

Regarding UMC 817.97(a) and (d)(4), the practices designed to satisfy these requirements are described as preliminary pending submission of an addendum in July 1981. As a result, many of the mitigation and enhancement practices are discussed as possibilities instead of firm commitments. Numerous examples exist on pages II-408 through 411.

784.22 Diversions

Section III B.5.2.1 of the application states that there will be three diversions from Soldier Creek and Dugout Creek. Only two diversion channels are apparent on Maps D03-0021 and D03-0022. In addition, cross sections of these diversion channels are not provided.

Locations of the overland flow diversion ditches must be provided on Map D03-0027 for the Dugout Canyon Portal Area and on Map D03-0029 for the Preparation Plant Area.

784.24 Transportation Facilities

Although typical cross sections of Class I and II roads are presented, the applicant states that detailed design of roads will be submitted nine months prior to construction. No reference to gradients is made on specific roads and no specifications or sizing criteria were found for drainage culverts. It is, therefore, not possible to assess compliance for the roads. In addition, only very general information is included on the railroad.

Preliminary engineering or other evidence of compliance with specifications of road grade, pitch, vertical and horizontal alignment should be furnished.

Data should be furnished showing locations of existing drainage structures, including culverts, and demonstration that they are sized for 10-year, 24-hour precipitation event.

A tunnel is proposed through Fish Creek Ridge for the conveyor (p. I-84). The Bureau of Land Management has requested that the applicant provide information on sizing, stability, access safety, and reclamation for this 580-foot tunnel.

Cultural Resources

1. A complete description of each site is needed. The descriptions should include the specific results of the artifact analysis relating to temporal placement and site function. Maps and illustrations where needed should be referenced.
2. Site collection techniques need to be discussed. Table IV-1.2, for example, indicates that some sites and certain artifact types were collected while others were not. What is the underlying rationale for collecting and not collecting?
3. A statement that the National Register of Historic Places was checked as well as the results of the check is required.
4. Discussions of site eligibility and significance are confusing and inconsistent. Sites that have the potential to yield scientific information, both on a site-specific basis and on a regional scale, are considered eligible for nomination to the National Register of Historic Places pursuant to criterion (d) in 36 CFR 60.6. Under this criterion, the sites do not warrant in-place preservation; in fact, they realize their significance only when the data is collected, analyzed and the information disseminated. Eligibility and significance determinations need to be done on a justified site-specific basis. Specific reasons for inclusions or exclusion of a site in regards to National Register status needs to be presented. Field "testing" for eligibility should be kept to a minimum both in numbers of sites and the extent of testing on each site. "Testing" should determine presence of subsurface materials, what types of materials and what type of information could be gained from the site.
5. If eligible sites will be impacted by construction of mine facilities, a site(s) specific plan to mitigate the impact will be necessary. This plan should be prepared in accordance with the Advisory Council on Historic Preservation Guidelines for Making "Adverse Effect" and "No Adverse Effect" Determinations for Archaeological Resources in Accordance with 36 CFR Part 800.
6. Definition of what constitutes a site is needed.
7. A single or several maps outlining the mine plan area, the areas surveyed (intensive, sample), area of potential surface disturbance and site locations is needed. The Proposed Permit Area in the mine plan could be used as the base map.
8. What is the status of the "Historic Sites" documentation?



United States Department of the Interior

GEOLOGICAL SURVEY

U-092147

U-07064-

027821

Office of the District Mining Supervisor
 Conservation Division
 2040 Administration Building
 1745 West 1700 South
 Salt Lake City, Utah 84104

March 31, 1981

Memorandum

To: Regional Director, OSM, Denver

From: District Mining Supervisor, USGS-CD,
 Salt Lake City

Subject: Pacific Gas and Electric Company, Eureka
 Energy Company, Sage Point-Dugout Canyon
 Project, Carbon County, Utah, Mining and
 Reclamation Plan



By letter dated January 3, 1981, you forwarded an 11 volume subject mining and reclamation plan to the Conservation Division in Denver. We received three volumes on January 19, 1981, and the remaining eight volumes on January 21, 1981.

The plan has been reviewed for completeness and technical adequacy pursuant to the cooperative agreement between our offices and for conformance with the Federal regulations 30 CFR 211.10 (c) dated May 17, 1976, as amended August 22, 1978. The following are our comments:

1. The geologic description required under 30 CFR 211.10 (c) 2 shall include as a minimum, potential geologic hazards;.... Information included under geology and mining sections would indicate there may be geologic hazards. The company should address this topic giving their assessment of potential geologic hazards including practices to eliminate or mitigate these hazards.
2. Parameters used to figure minable reserves included a mining limit boundary of 500 feet from the outcrop. It is recognized that oxidation, including burning, may penetrate more or less than 500 feet from the actual outcrop of the coal seam. Before any mining is arbitrarily stopped 500 feet short of the outcrop, site specific plans will be submitted to the USGS-CD for review and approval. The Geological Survey proposes that with the concurrence of the surface interest some coal within the 500-foot boundary can be recovered in a safe and environmentally acceptable manner. These locations may be site specific.
3. The mine plan for a logical mining unit under 30 CFR 211.10 (c) (6)(ii) must show the mining of all the reserves in a period of not more than 40 years. The complete recovery period is shown as 46 years for the Dugout Canyon Mine No. 2. Rather than redraft the underground mine plans to reflect the 40 year depletion, USGS will accept a formal statement from Eureka of a proposal to reduce the mine life to 40 years. Future revisions of the mine plan maps can reflect this proposal.

4. A principle responsibility of the USGS-CD is to ensure the maximum practicable recovery of the mineral resource. The designed bleeder system, the three-entry longwall development entries and the extra wide property and outcrop barriers will have a substantial affect on the overall recovery. As mining progresses and mining conditions are assessed the USGS-CD will review each situation with the mining operator to determine if modification of the mine plan is possible to increase recovery and still maintain safety and environmental integrity.

5. Final abandonment of mine openings and for underground works will require an onsite inspection with the GS and a formal submission of a sealing procedure to the GS for approval.

6. Submit as a part of the mining and reclamation plan the complete Roof Control and Ventilation System and Methane and Dust Control Plans approved by Mine Safety and Health Administration (MSHA). Change any data or information in this submittal that may be in disagreement to the plans approved by MSHA.

Jackson W. Moffitt

Jackson W. Moffitt

cc: Denver
Eureka Energy Co.
Mine Plan File



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Moab District
P. O. Box 970
Moab, Utah 84532

UT0041
Attachment No. 3
IN REPLY REFER TO
3400
(U-060)

APR 1 1981

Memorandum

To: Director, Office of Surface Mining, Denver, Colorado

From: District Manager, Moab

Subject: Mine Plan Review

The mining and reclamation plan submitted by Eureka Energy for the Sage Point-Dugout Canyon Project has been reviewed. Clarification or additional information is required on the following items:

1. A tunnel is proposed through Fish Creek Ridge for the conveyor (Page I-84). Information on construction techniques, tunnel dimensions, tunnel support and access by humans and wildlife is needed. Additional details on tunnel plugging and permanence is required (Page I-303).
2. Dugout Reservoir would have a design capacity for 20 acre feet for sediment storage (Page I-116). How often would the reservoir have to be cleaned of sediment during mine life and where would these sediments be disposed?
3. Formaldehyde treated wastes from chemical toilets would be transported to the sewage lagoons for disposal (Page I-135) and biological and chemical sludges would be disposed (Page I-136). Has the Environmental Protection Agency approved these actions and, if so, what are their conditions?
4. Dugout Reservoir would be based on bedrock of the Mancos shale (Page I-125). Have studies been conducted to determine the structural integrity of the dam considering the Mancos as the foundation?
5. Dugout Reservoir would be left intact at the end of mine life (Page I-280). Assuming the reservoir would be cleaned of sediments at that time, how many years would lapse prior to complete filling of the reservoir due to siltation?
6. The plan (Page I-322) indicates that Eureka was released from requirements of sampling for benthic organisms, etc. Who granted this release?
7. A definition for the term "cover" is needed to define its use in the vegetation section.



8. A section should be provided wherein the impacts of decreased water flow in Soldier and Dugout Creeks below the surface facilities as a result of consumption by the mining operation is analyzed.

The following stipulations to the approval of the mining and reclamation plan are recommended at this time. Additional stipulations may be provided after receipt of the additional information requested above and in rights-of-way issuances.

1. Surface disturbing activities will not occur in T. 13 S., R. 12 E., Section 27: $E\frac{1}{2}NW\frac{1}{2}SW\frac{1}{4}$, $E\frac{1}{2}SW\frac{1}{4}$, $W\frac{1}{2}W\frac{1}{2}SE\frac{1}{4}$; Section 34: $NE\frac{1}{2}NW\frac{1}{4}NW\frac{1}{4}$, $N\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}$, $NW\frac{1}{4}NW\frac{1}{4}NE\frac{1}{4}$ (200 acres) during the period of April 1 through July 15 (Cooper's hawk nest).
2. Widening of the existing roads along the riparian zone of Dugout Creek and Fish Creek shall be done opposite the side adjacent to the riparian zones to the maximum extent practicable as determined by the operator in consultation with the Authorized Officer.
3. Loss of riparian habitat on public lands through construction of facilities will be mitigated by upgrading adjacent riparian zones or establishing new riparian zones in conjunction with the Dugout Reservoir. Habitat upgrading will be accomplished by the operator prior to or during construction in accordance with guidelines to be furnished by the Authorized Officer.
4. Loss of critical winter habitat for deer by destruction or disturbance will be mitigated by upgrading adjacent winter range. Habitat upgrading will be accomplished prior to initiation of surface construction by the operator in accordance with guidelines to be furnished by the Authorized Officer.
5. Surface disturbances and facilities planned for the lease area shall be subject to Visual Resource Management considerations. Efforts shall be made to mitigate visual impacts by imitating the form, line, color and texture of the natural landscape to the greatest extent practical as determined by the Authorized Officer.
6. Prior to surface disturbing activities, the lessee shall have an archaeologist, acceptable to the Authorized Officer, conduct an archaeological survey of the area to be disturbed. The Authorized Officer retains the prerogative to require the relocation of proposed facilities to protect archaeological values located on leased lands, or the lessee may be required to have sites salvaged by a qualified archaeologist prior to proceeding with operations. If sites are uncovered by his operations, the operator shall not proceed further until additional clearance is granted by the Authorized Officer.

7. Dugout Reservoir will be left intact at the end of mine life if such action is determined to be in public interest. This determination will be made by the Authorized Officer at the end of mine life.

In reviewing the mine plan, the unsuitability criteria were applied to the Federal leases included in the permit area. The lands encompassed by this permit application were found suitable for mining.

Overall, Eureka's mine plan is an excellent example of a well prepared plan.



cc:
Utah State Director (U-930)



United States Department of the Interior
OFFICE OF THE SOLICITOR

DENVER REGION
P.O. BOX 25007
DENVER FEDERAL CENTER
DENVER, COLORADO 80225
March 26, 1981

Memorandum

To: Regional Director, OSM, Denver

From: Regional Solicitor, Rocky Mountain Region

Subject: Confidentiality Requests for Information Submitted with Mine Plans

By three separate memoranda, you have asked what specific information in a mine plan may be kept confidential pursuant to the provisions of the Surface Mining Control and Reclamation Act of 1977 [SMCRA], 30 U.S.C. § 1201 et seq. and the implementing regulations in 30 C.F.R. Parts 741 and 786.

There are four pertinent statutory provisions in SMCRA relating to confidentiality of information in mining and reclamation plans. Section 507 of SMCRA, 30 U.S.C. § 1257, contains the first two and the most important provisions. The first provision is a minor proviso contained in subsection 17 of subsection b, that is, section 507(b)(17), 30 U.S.C. § 1257(b)(17). Before looking at the proviso itself, it is important to put it into the proper context. Subsection b covers three pages and contains 17 subsections. Each one of the subsections requires very detailed information on some aspect of the mine plan. Subsection 17 requires that:

information pertaining to coal seams, test borings, core samplings, or soil samples as required by this section shall be made available to any person with an interest which is or may be adversely affected: Provided, That information which pertains only to the analysis of the chemical and physical properties of the coal (excepting information regarding such mineral or elemental content which is potentially toxic in the environment) shall be kept confidential and not made a matter of public record.

30 U.S.C. § 1257(b)(17).

As one can see, information about the coal seams can only be kept confidential to the extent it concerns the chemical or physical properties of the coal deposit itself, such as ash, sulphur, or water content. Nothing else pertaining to environmental information may be kept confidential. Especially may information about hydrology not be kept confidential.

The physical parameters of the mining site and its environs must be clearly set forth in the application, so as to yield an accurate picture of the geological, hydrologic, surficial, developmental, ecological, and general land use features of the landscape which will be affected directly or indirectly by the operator. Due to the movement of water through the environment, the hydrologic aspects of the application requirements will have the most profound implications for offsite residents and the community as a whole. Both the quantity and the quality of water supplies available to downstream users have been destroyed by the abysmal operational and reclamation practices of coal operators in areas where the State laws were insufficient and not enforced. Except for selected information derived from test borings relating to quantitative and qualitative analysis of the coal seam, all other such information shall be open to public scrutiny, especially that pertaining to toxicity. (Emphasis added.)

H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 91 (1977).

Congress emphasized again in section 507 that all environmental information was to be made public.

Each applicant for a surface coal mining and reclamation permit shall file a copy of his application for public inspection with the recorder at the courthouse of the county or an appropriate public office approved by the regulatory authority where the mining is proposed to occur, except for that information pertaining to the coal seam itself.

Section 507(e), 30 U.S.C. § 1257(e).

Again, the legislative history confirms that all information in the application for a mining permit must be made public, except for the chemical and physical content of the actual deposit.

Each application will be available for public review at an appropriate place. The applicant must supply proof of newspaper notice that acquaints local residents with the location of the operation and where the application may be examined.

H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 92 (1977).

If SMCRA contained no more provisions on confidentiality, the analysis would end at this point with the conclusion that the proviso in subsection 507(b)(17), 30 U.S.C. § 1257(b)(17), excepts only the physical and chemical contents of the actual coal deposit from disclosure. However, two further provisions in the next section of SMCRA, section 508, 30 U.S.C. § 1258, appear to cloud the issue somewhat, but in reality, make no difference on environmental disclosure.

Subsection 12 of subsection a of section 508 is very similar to section 507(b)(17) of SMCRA with one important difference. Section 507 applies to mine plans while section 508 applies to the reclamation plan. Subsection 508(a)(12), 30 U.S.C. § 1258(a)(12), requires disclosure of:

the results of test boring which the applicant has made at the area to be covered by the permit, or other equivalent information and data in a form satisfactory to the regulatory authority, including the location of subsurface water, and an analysis of the chemical properties including acid forming properties of the mineral and overburden: Provided, that information which pertains only to the analysis of the chemical and physical properties of the coal (excepting information regarding such mineral or elemental contents which is potentially toxic in the environment) shall be kept confidential and not made a matter of public record

As one can see, the principal difference between subsection 507(b)(17) and 508(a)(12) is that the former is directed to the effects of the actual mining operation while the latter is directed to problems with reclamation.

What appears to confuse the issue is subsection b of section 508, 30 U.S.C. § 1258(b), which provides that:

Any information required by this section which is not on public file pursuant to State law shall be held in confidence by the regulatory authority.

Because that provision applies to all of section 508, it appears to allow withholding of the core hole data required in 508(a)(12), 30 U.S.C. § 1258(a)(12). That appearance is simply deceptive. First, the more specific proviso in subsection 508(a)(12) specifies what can be withheld from public disclosure under that subsection. Because it is more specific, it must control over the more general proviso in subsection 508(b), 30 U.S.C. § 1258(b).

Second, the legislative history of SMCRA makes clear that subsection b was meant to apply to the applicant's post-mining plans for use of the land.

A statement is required demonstrating that the permittee has considered all applicable State and local land use plans and programs including the desires of the owner of the surface with regard to post-mining land uses; and disclosure to the regulatory authority of all rights and interest in lands held by the applicant which are contiguous to the lands covered by the permit application is required. The purpose of this disclosure is to provide the regulatory authority with information on the prospective long-term plans of the applicant in the immediate vicinity. The bill would not require public disclosure of this information; however, it does not preclude State law from requiring disclosure of part or all of it.

S. Rep. No. 95-128, 95th Cong., 1st Sess. 77 (1977).

Clearly, subsection b was meant to apply only to those provisions in section 508 relating to post-mining plans, viz. subsections (a)(3), (a)(4), (a)(8), and (a)(11).

But the most important factor in construing sections 507 and 508 is that subsection 508(b) applies by its own terms only to section 508. It has no application to section 507. Accordingly, even if certain core hole data were held to be exempt from disclosure under section 508 (an unlikely conclusion), that data would still have to be disclosed under section 507, as subsection 508(b) has no application to section 507.

The Department's regulations reflect that interpretation of the four provisions of SMCRA just discussed. The permanent program regulation applicable to Federal lands is 30 C.F.R. 741.19. The regulation applicable to approval of a State program is 30 C.F.R. 786.15. Both regulations provide the same thing, as must any State program approved under 30 C.F.R. 786.15.

(a) Information in a permit application on file with the Office and any State regulatory authority shall be open for public inspection and copying at reasonable times upon written request, subject to the following--

(1) Information in a permit application which pertains only to the analysis of the chemical and physical properties of the coal, except information on a mineral or elemental content which is potentially toxic in the environment, shall be kept confidential and not made a matter of public record; and

(2) Only information in mining and reclamation plan portions of the application, which is required to be filed with the Regional Director under Section 508 of the Act and which is exempt from disclosure by the Freedom of Information Act (5 U.S.C. 552(b)), shall be held in confidence by the Regional Director according to 43 C.F.R. Part 2.

30 C.F.R. 741.19(a).

As one can see, all environmental data obtained under section 507 of SMCRA, 30 U.S.C. § 1257, must be made public, except for the physical and chemical content of the actual coal deposit. Some of the data pertaining to post-mining land use can be withheld under section 508 of SMCRA, 30 U.S.C. § 1258, in accordance with the standards set forth in 43 C.F.R. Part 2, or in accordance with State law. With the foregoing discussion of SMCRA, its implementing regulations, and any approved State programs under SMCRA, we turn to an examination of the specific requests for confidentiality referred to this office.

I. SAGE POINT-DUGOUT CANYON

Eureka Energy Company, a subsidiary of Pacific Gas and Electric Company, has responded to an earlier letter from the Regional Director suggesting that the company reevaluate its request for confidentiality as to a number of items contained in its proposed mine plan for the Sage Point-Dugout Canyon mine and reclamation plan in Utah. Attachment A-1 and A-2. The company cites only a portion of 30 C.F.R. 741.19(a)(2) referring to matters which may be exempt from disclosure under the Freedom of Information Act, as amended, 5 U.S.C. § 552(b), and the Department's implementing regulations at 43 C.F.R. Part 2. Unfortunately, that portion of the regulation, 30 C.F.R. 741.19(a)(2), as we have already seen, has application only to those matters in section 508 which refer to post-mining land use in reclamation plans. The information submitted under the mine plan pursuant to section 507 of SMCRA, 30 U.S.C. § 1257, may not be held confidential except as to the proviso in subsection 507(b)(17), 30 U.S.C. § 1257(b)(17), which exception is essentially repeated in 30 C.F.R. 741.19(a)(1).

The data which OSM questions include: 1) proposed production figures, 2) proposed mining sequence, 3) thickness of coal seams, 5) outcrop maps, 6) BTU content of the coal, 7) sulphur content of the coal, and 8) ash content of the coal. By the standards of the Act and the regulations discussed above, it is clear that the first five items in the mine plan must be disclosed and cannot be kept confidential. The latter three items all relate to the physical and chemical content of the coal and may be kept confidential, provided there are no problems created concerning toxicity of those items.

II. TRAPPER MINE

The second memorandum (Attachment B) concerns Utah International, Inc.'s Trapper Mine located near Craig, Colorado. Extensive maps, diagrams, operating data and cost figures are included in one volume which is marked "CONFIDENTIAL" on every page. However, only one page concerns itself with the physical and chemical content of the coal - page 2-398. Accordingly, only that page may be held confidential.

III. DORCHESTER MINE

The Dorechester Mine in western Colorado has asked Colorado's Mined Land Reclamation Division to withhold certain information pertaining to hydrology from the company's permit application. The MLRD has informally asked that the Department of the Interior comment, even though both the MLRD and the Colorado Attorney General recognize that the Department's views are not meant to be an attempt to interpret Colorado law. However, the Department can comment on what it thought it was approving in Colorado's State program submission. In that regard, the Department believed it was approving, and indeed was under a duty to approve, confidentiality and public disclosure provisions consistent with the provisions of SMCRA and 30 C.F.R. 786.15. To the extent that State law is consistent with the Federal provisions, the result would necessarily be that the hydrologic data could not be held confidential.

The attorney for Dorechester Coal argues that because the coal seam is itself an aquifer, the hydrologic study may be kept confidential as part of the data on the physical or chemical content of the coal. Attachment C. That is not what Congress intended; and, in fact, several subsections of section 507 require complete disclosure of hydrologic data. See e.g. 507(b)(11), 30 U.S.C. § 1257(b)(11).

Apparently, the primary concern of Dorchester is not the typical concern where one coal company has a competitive advantage over another due to knowledge of location and richness of coal deposits which may be acquired by either company. Rather, the competitive edge among the smaller local companies is so small that the extra cost of preparing a hydrologic study, which may also be used by neighboring coal companies if made public, will put the company paying for an expensive study at a serious cost disadvantage. The attorney for Dorchester Coal Company asserts that making the

study public would be unfair and inequitable; and, of course, he is correct. This situation presents one of those classic economic examples of "externalities." "Externalities" is economic shorthand for either "external" costs or "external" benefits which the owner of the resource does not pay or receive. For example, water pollution from surface mines, where there are no laws preventing it, is an "external" (as opposed to internal) cost which the operator does not have to pay. Instead that "cost" is born by the public. For that reason, the operator can sell his product at a lower price. It is precisely this kind of externality (that is, external cost) that most environmental laws aim to change - by making the operator pay all the costs of the operation. Or to put it another way, the Government forces the operator to internalize what were formerly external costs. Thus, all costs are reflected in the price of the coal.

But the externality that Dorchester Coal complains about is the benefit it would be forced to give a neighboring coal company by disclosing its hydrology study. In fact, OSM wants to know if it can use that study for the SOAP program study on that mine (GEC). See section 507(b) of SMCRA, 30 U.S.C. § 1257(c), and the implementing regulations at 30 C.F.R. Part 795. There is no doubt that it would be inequitable, at least in the ordinary sense of that word, to let a neighboring mine have the benefit of the hydrology study at no cost and thus put Dorchester Coal at a competitive disadvantage. Unfortunately, the law on this point does not allow OSM to treat the hydrology study as confidential. SMCRA clearly mandates release of the information in the hydrology study. Moreover, the only other law on the subject also mandates that confidentiality be limited to pre-leasing (i.e., exploration) activities. See the Federal Coal Leasing Amendments Act of 1976, Pub. L. No. 94-377, 90 Stat. 1083, as amended, 30 U.S.C. §§ 201(b)(3), 208-1(c), and 208-1(d). See also, the implementing regulations at 43 C.F.R. Part 2, 43 C.F.R. 2.20(b)(3), and 2.20(c)(3).

There is a limited alternative available to some extent to all these companies. First, it sometimes happens that companies submit far more data to the regulatory authority than is legally necessary. When that happens, the regulatory authority, if it chooses to rely on such data, must make it public. But where it is really unnecessary for analytical purposes, the company should be given a reasonable opportunity to withdraw superfluous data. While the foregoing may be in the category of pointing out the obvious, withdrawal of excess

data is a reasonable alternative to disclosure of all the data. Moreover, withholding of certain portions of confidential data (to the extent the regulatory authority does not rely on the withheld parts) may, in effect, maintain the confidentiality of the rest of the data.

As to Dorchester Coal's problem with its hydrology study, the company may wish to consider asking the Department for financial relief under the Small Operator Assistance Program (SOAP). While the program, as currently constituted at 30 C.F.R. 795, does not appear to provide for OSM purchase of all or part of the study for use in the SOAP program, the Department may wish to consider that possibility by regulation or otherwise, due to the equities in this case.

CONCLUSION

The information contained in the three mine plans, with the exception of the physical or chemical content of the coal, must be made public. If the data are necessary to processing and public review of the mine plan, they must be made public. If the data are not necessary to processing and public review of the mine plan, they may be withdrawn. Data not withdrawn will be made public. When you notify the companies of your decision, you should add a final paragraph containing the following statement:

Pursuant to 43 C.F.R. 4.1280, you have the right to appeal this decision to the Interior Board of Surface Mining Appeals. You must file your notice of appeal within 20 days with this office and the Board. Failure to file with this office within 20 days will result in loss of all appeal rights.

Should you have further questions, please do not hesitate to contact me.

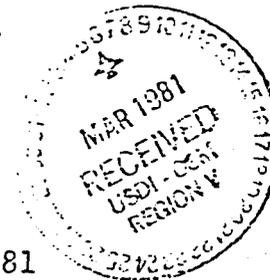
Lyle K. Rising
For the Regional Solicitor
Rocky Mountain Region

cc: ✓ J. Hardaway, OSM, Denver
J. Nadolski, OSM, Denver
Associate Solicitor, DSM, Washington
S. Keiner, DSM, Washington
L. Hodge, DSM, Washington

EUREKA ENERGY COMPANY

A SUBSIDIARY OF PACIFIC GAS AND ELECTRIC COMPANY

77 BEALE STREET • SAN FRANCISCO, CALIFORNIA 94106 • (415) 781-4211 • TWX 910-372-6587



February 26, 1981

Donald Crane, Regional Director
 Region V, Office of Surface Mining
 1823 Stout Street
 Denver, Colorado 80202

Re: Sage Point-Dugout Canyon
 Mine and Reclamation Plan

Dear Mr. Crane:

In your January 14, 1981 letter, you informed us that certain information marked "confidential" in our SMCRA permit application does not meet the requirements for confidentiality set forth in the Surface Mining Control and Reclamation Act. In response, we would like to point out that all of the information marked "confidential" is of a proprietary nature. Public disclosure of this information could be harmful to any financial negotiations we may take part in regarding the project.

30 CFR 741.19(a)(2) states that "information... which is exempt from disclosure by the Freedom on Information Act (5 U.S.C. 552(b)) shall be held in confidence... according to 43 CFR 2." 43 CFR 2.13(c) states, "The Act (Freedom on Information Act) provides that disclosure is not required of matters that are... trade secrets and commercial or financial information obtained from a person and privileged and confidential."

Accordingly, we feel that the status of most information marked "confidential" in our application comes under 43 CFR 2.13(c) and should not be changed. We agree that the overburden maps should not be considered "confidential" anymore.

By copy of this letter, we are advising Jim Smith of DOGM of this matter. We are trying to work through DOGM and the Interior pursuant to the June 11, 1979 Cooperative Agreement between the State of Utah and the U. S. Department of the Interior. So it would be helpful if further correspondence or discussion on this subject could be coordinated with that agency.

Sincerely,

Nicolas K. Temnikov
 NICOLAS K. TEMNIKOV
 Regulatory Coordinator

NKT:dmh

cc: Jim Smith (DOGM - Salt Lake City)
 RFGoudge (Eureka - Price, Utah)

81
JAN 14 1988

Mr. David F. Hess
 Vice President and General Manager
 Eureka Energy Company
 215 Market Street
 San Francisco, CA 94106

Dear Mr. Hess:

OSM has received and is in the process of determining completeness for the Sage Point - Dugout Canyon Mine and Reclamation Plan. Volume 11 of the plan is labeled "Confidential". Upon review of this volume, it was noted by my staff that the items marked "Confidential" included not only coal quality, but also the mining plan (detailed underground workings), thickness of seam, specific interval thickness and specific overburden thickness. The Surface Mining Control and Reclamation Act (Public Law 95-87, Sections 507(b)(17) and 508(a)(12)) requires that only information pertaining to the analysis of the chemical and physical properties of the coal shall be kept confidential and not made a matter of public record. Further, some information in the "Confidential" volume is reiterated in the non-confidential volume, in particular volume one. Thus it is unclear as to the specific information considered confidential. With this in mind, I suggest that you re-evaluate the items classified as "Confidential".

If you have any questions regarding the review of your plan, please call John Nadolski (303-537-3773) of my staff.

Sincerely,

DONALD A. CRANE

cc: Smith, DCGM, SLC
 Berggren, BLM, Price, Utah
 Goudge, Eureka Energy, Price, Utah
 Rising, OSM, Denver

bcc: OFC
 Reading/R.D.
 chron
 Nadolski

Nadolski:lc 12/22/80

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
BROOKS TOWERS
1020 15TH STREET
DENVER, COLORADO 80202



OFFICE OF THE REGIONAL DIRECTOR

MAR 20 1981

MEMORANDUM

TO: Jack Little

ATTN: Lyle Rising

FROM: Donald A. Crane *[Signature]*

SUBJECT: Request for Review of Validity of "Confidential" Designations
Submitted By Utah International For The Trapper Mine.

Attached is one volume of information designated "Confidential" by Utah International. I have requested your review to determine whether the material is justifiably designated. We find that most of the data presentations in this volume are not reproduced in the unclassified portions of the plan.

We find that some of the presentations are lacking adequate detail to satisfy the regulations anyway, but we would not want resubmissions to be inappropriately classified.

We suggest that only pages 2-398 can be classified as Confidential. Please advise at your earliest convenience. John Hardaway can answer questions.

Attachment: Confidential Data. C3



United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement

BROOKS TOWERS

1020 15TH STREET

DENVER, COLORADO 80202

OFFICE OF THE REGIONAL DIRECTOR

MAR 20 1981

MEMORANDUM

To: Lyle Rising, Assistant Regional Solicitor

From: Don Crane *Don*

Subject: Confidentiality of Mine Permit Applications

Lew Woods at the Colorado Attorney General's Office has requested that you review the attached letter requesting confidentiality for certain portions of a mine permit application.

We have attempted to acquire certain hydrologic and geologic information from the Dorchester Mine to reduce the information requirements and thereby the cost for a SOAP contract on the adjacent G.E.C. mine. Dorchester is unwilling to share their hydrologic and geologic information with G.E.C. and has therefore requested that it be kept confidential.

Please coordinate with Charles Harrison of my staff regarding the time frame for response. Clearly a decision in favor of confidentiality may have broad consequences for the administration of the permanent regulatory program in Colorado.

Attachment

DELANEY & BALCOMB, P.C.

ATTORNEYS AT LAW

DRAWER 790

GLENWOOD SPRINGS, COLORADO 81001

ROBERT DELANEY
KENNETH BALCOMB
JOHN A. THULSON
EDWARD MULMALL, JR.
ROBERT C. CUTLER
SCOTT M. BALCOMB
DAVID R. STURGES
LAWRENCE R. GREEN
ANDREW O. NORELL

February 24, 1981

818 COLORADO AVENUE
DENVER, COLORADO 80202
TELEPHONE 945-6546
FAX 945-2371
AREA CODE 303

RECEIVED

FEB 23 1981

Mr. David Shelton, Director
Mined Land Reclamation
1313 Sherman Street, Room 423
Denver, CO 80203

MINED LAND RECLAMATION
Colo. Dept. of Natural Resources

RE: Dorchester Coal Company
Confidentiality of Certain Proprietary
Information in MRP Permit Applications

Dear Dave:

Pursuant to my various telephone conversations with you and your staff, including Lew Woods, please accept this letter in support of Dorchester Coal Company's (DCC) written requests dated January 27 and 28, 1981 for confidential treatment of certain portions of its previously filed MRP applications. We request you review this letter and respond to our claim of confidentiality. After Lew Woods has had an opportunity to review this matter, I would be available to meet with him and you to discuss your preliminary findings.

Part 2 of the Colorado Open Records Act provides in §24-72-201, C.R.S. 1973, as amended, that "it is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law." (Emphasis added) Public records are defined in §24-72-102(b) as including "...all writings made, maintained, or kept by the state or any agency...for use in the exercise of functions required or authorized by law or administrative rule or involving receipt or expenditure of public funds."

Thus, under the permit application requirements of the Colorado Mined Land Reclamation Act of 1976 and the Colorado Surface Coal Mining Reclamation Act of 1979, it would appear that a permit application filed and/or approved under these Acts would be viewed as a "public record" and would be subject to public inspection under §24-72-201 unless subject to an exemption provided (1) under Part 2 of the Colorado Open Records Act, or (2) as otherwise specifically provided by law.

In reviewing Part 2 of the Colorado Open Records Act it is important to note that §24-72-104(1) provides that "the custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section...." (Emphasis added) It is relevant to note that under the following grounds of subsection (1) the exception would apply to (a) where "such inspection would be contrary to any state statute" or (b) where "such inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law."

Subsection (2) of §24-72-104 does not appear relevant to this issue.

Subsection (3)(a)(IV) of §24-72-104 does appear relevant to this issue because it provides that "the custodian shall deny the right of inspection of the following records, unless otherwise provided by law... (IV) trade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person." (Emphasis added) Geophysical is defined in Webster's New Collegiate Dictionary as the "physics of the earth including the fields of meteorology, hydrology, oceanography, seismology, volcanology, magnetism, radioactivity and geodesy." Thus, it would appear that the hydrology study claimed as confidential in DCC's letters of January 27 and 28, 1981 should be afforded confidential treatment under authority of §24-72-204 (1) and (3)(a)(IV), unless otherwise provided by law.

In reviewing other Colorado statutes which might require the public inspection of such claimed confidential geologic and geophysical data, §34-32-112(9) of the Colorado Mined Land Reclamation Act of 1976 provides that "information provided the board in an application for a permit relating to the location, size or nature of the deposit or information required in subsection (5) of this section and marked as confidential information by the operator shall be protected by the board and not be a matter of public record in the absence of a written release from the operator or until such mining has been terminated." The dictionary's definition of "nature" is "the inherent character or basic constitution of a person or thing." It is our position that because coal bodies are generally considered aquifers (i.e., geologic

strata capable of bearing or transmitting water), hydrology investigations as required in permit applications are therefore specifically accorded confidential treatment under §34-32-112(9). In the alternative, it is our contention that §34-32-112(9) does not specifically preclude confidential treatment as claimed by DCC for this hydrology report and that §24-72-104(3)(a)(IV) of the Colorado Open Records Act does provide authority for confidential treatment of claimed confidential geologic or geophysical data.

Board Rule 1.33 under the 1976 Act implements the statutory authority found in §34-32-112(9) by providing that "an operator may mark "CONFIDENTIAL" information supplied in a permit application disclosing the location, size, or nature of the deposit...." This rule further provides in subsection (1) that "confidential information so marked shall not be available to the public until the mining operation is terminated, unless the operator gives a written consent to the release of all or any part of the information." It should be noted that both the above cited law and rule provide a mechanism whereby the operator is given the discretion to mark or indicate such information as confidential and that confidential treatment is thereby provided by operation of law and regulation. This cited statutory and regulatory authority, however, provides no authority or mechanism for the Board or the Division staff to contest or deny such claim of confidentiality as indicated at the discretion of the operator.

It should be noted that DCC has submitted a claim of confidentiality on this hydrology report, that its Dorchester No. 1 mining operations have not terminated, and that DCC has not given and will not give a written consent to the release of this report.

While the hydrology report in question was submitted with a permit application which was reviewed and approved by the Board under the 1976 Act, it is unclear whether the Colorado Surface Coal Mining Reclamation Act which was enacted on July 1, 1979 has any legal bearing on this issue. For the sake of argument, assuming the 1979 Act does have some legal bearing on this issue, the following points and authorities should be noted.

Section 34-33-111(1)(1) of the 1979 Act addresses confidentiality of permit data in the reclamation plan where it provides "...except that information which pertains to

the quantity of the coal or to the analysis of the chemical and physical properties of the coal... shall be kept confidential and shall not be made a matter of public record;...."

Subsection (2) of this same section provides that "any information required by this section which is not on public file pursuant to state law shall be held in confidence by the board and the division." (Emphasis added)

The Board rules implementing this statutory provision are found in Rule 2.07.5. Subsection (1)(c) of this rule provides that "information in the reclamation plan portions of the application, which is required to be filed with the Division under §34-33-111(2), C.R.S. 1973 and which is not on public file pursuant to state law, shall be held in confidence by the Board and the Division provided that such information is clearly indentified as being confidential or a specific written request is received from the applicant." (Emphasis added)

It is our position that §24-72-104(3)(a)(IV) is the appropriate legal authority for confidentiality treatment where the 1979 Act and Board rules cited above refer to "and which is not on public file pursuant to state law." It should be noted that it is my impression that Rule 2.07.5(1)(c) should cite §34-33-111(1) rather than §34-33-111(2). This may have been an oversight in the drafting and promulgation of this particular rule. Subsection (2) of §34-33-111 does not specify the legal requirements for a reclamation plan. It should not matter whether a hydrology report is physically located in a baseline information section or a reclamation plan section of the permit application as the mitigation or environmental protection measure described in the reclamation plan for the permit area normally must reference the baseline hydrologic investigation report should it be physically located in a section other than the reclamation plan section.

In reviewing applicable case law to this matter, only two Colorado Supreme Court case decisions have interpreted the Colorado Open Records Act. The case Cervi v. Russell, 184 Colo. 282, 519 P.2d 1189 (1974) does not appear relevant to this issue. A companion decision in Denver Publishing Company v. Dreyfus, 184 Colo. 288, 520 P.2d 104 (1974) does establish the basic premise, based on the clear legislative intent manifested in the declaration of policy, that all public records are to be open for inspection except as provided for in the Act itself or otherwise specifically

provided by law. The defendant in this case was unable to prove that his denial of the requested autopsy reports was excepted from public disclosure in the Act itself or in any other statute. This Colorado Supreme Court decision does not contradict our claim for confidentiality treatment under authority of §24-72-104(3)(a)(IV) of the Colorado Open Records Act, as provided for in §24-72-201 and 203(1) in the same Act.

There are no known Colorado court decisions interpreting §34-32-112(9) of the 1976 Act or §34-33-111(1)(1) or (2) of the 1979 Act. In addition, there are no known Colorado Attorney General's published opinions on the cited sections of these Colorado laws.

While not controlling, the Federal Freedom of Information Act found in 5 U.S.C. §552 provides some analogy of similar purposes of public disclosure and treatment of confidential information claims based on trade secrets and commercial or financial information supplied to the federal government. Subsection (b)(4) of 5 U.S.C. §552 specifically exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The term "confidential" in the context of Freedom of Information Act exemption (b)(4) requires a subjective analysis of whether matters are customarily held in confidence by the owners and persons like him, and objective analysis of whether disclosure would (a) significantly harm the owner's competitive position and (b) deter others from submitting this detailed data to the agency in the future. See Federal Information Disclosure, James T. Reilly, Sheperd's Inc. §14.08. Historically, the term "confidential" was added to this federal Act to encompass non-trade secret concepts about matters which were held secret by persons and corporations and which were customarily confidential in the hands of those persons.

The recognized objective test for "confidential" status is that established by National Parks & Conservation Assn. v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The Appeals Court summarized the legal objective test for (b)(4) confidential status as follows:

Commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects:

(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Emphasis added)

Using the narrative description above regarding the analogous treatment of the FOIA §(b)(4) exemption, the following assertions are submitted in support of DCC's claim of confidential treatment of its hydrology report:

(1) "Customarily Confidential" Test. Most, if not all, Colorado coal operators wish to and/or have taken steps to protect as confidential their hydrologic and geologic investigations, reports, etc. which have only recently been required as part of MRP applications. These hydrologic/geologic studies and reports usually describe or supplement other descriptions of the coal deposit which upon close analysis by a competitor can lead to an identification of certain mining and/or reclamation costs of the mining operation. As such hydrologic studies have been required in all MRP applications for only a short time, the "customary" aspect of this subject should be examined only over the past few years. In this writer's experience, he has known of no instance where coal operators have exchanged such hydrologic information, except where some financial investment by the reviewing company was an inducement to the exchange of such information. Hydrologic studies done for or by coal companies have customarily been viewed as a valuable asset of the owning company and customarily not released to the public at large, directly, or indirectly through public agencies.

(2) "Impair Government's Ability to Obtain Such Information in the Future" Test. It is our understanding that a number of coal operators have and are filing claims of confidentiality on hydrology and other specific data reports. An increase of such claims could be viewed as a potential impairment of the CMLR's ability to secure such information in the future, particularly if all such claims for confidentiality are unilaterally denied by the CMLR. A claim of confidentiality, however, does not now impair the CMLR from using this information to meet its statutory obligations. If CMLR were to deny, on some theory of legal authority, all pending and future claims of confidential information, then it is conceivable that the CMLR might become the subject of either amendatory legislation or law suits challenging the CMLR's authority and action in denying such claims. Such a possible response could further impair or impede the agency's ability to secure this information.

(3) "Substantial Harm to the Competitive Position"
Test. In Fremont County, Colorado, DCC's mining operations are in a highly competitive coal development area. DCC's Dorchester No. 1 mine is contiguous to both GEC, Minerals, Inc.'s surface mining operation, and to Harrison Western's Newlin Creek underground mining operation. There is active pursuit by all three companies to hold down the costs of operations, including the costs of permitting and environmental compliance, as well as increasing production efficiencies. In addition, DCC is in and presumably will remain in active marketing competition with these neighboring mining operators. Specifically, these companies, in whole or in part, compete for sales to Lone Star Industries (cement plant) in Texas; Southern Colorado Power Division of Central Telephone & Utilities Corp. (power plant) in Canon City; Colorado State Hospital in Pueblo; and Martin Marietta (cement plant) in Lyons. Future competition may be directed at Great Western Sugar Co. and the Federal Center in Denver.

The cost to DCC for obtaining the hydrology study in question is estimated to be \$50,000 for drilling costs and \$12,300 for the analysis and write-up of the hydrology report. Such costs, estimated at a total of \$62,300, can be critical in securing or maintaining a position in coal sales given the tight competitive market described above. The cost of these drilling operations and hydrology studies are recognized by Colorado coal operations as representing the highest single component cost in permit applications. To make such hydrology reports readily available to one's competitors would be contrary to all equitable considerations and contrary to the legal standards found in §24-72-104(3)(a)(IV) of the Colorado Open Records Acts.

Dorchester feels that the foregoing analysis of legal authorities and factual assertions of significant harm to DCC's competitive position provides ample support for its claim of confidentiality.

It may be appropriate to re-emphasize that there appears to be no legal authority for CMLR to dispute an operator's claim of confidentiality once exercised by the operator. In addition, under current Board Rule 2.07.5, it is noted that "information contained in permit applications shall be open, upon written request, for public inspection...." (Emphasis added) It should be clear that this process, if at all authorized by law, of making a determination as to the appropriate classification and treatment of data as confidential, begins with a written request for public

Mr. David Shelton, Director
February 24, 1981
Page Eight

inspection. As the CMLR staff has access to even confidential information in its permit review function, such written requests should, and presumably would be initiated from some outside source. It would appear that at this stage and time some review of confidential data claims might commence once such written request was filed.

It is this writer's opinion that a "completeness" letter determination stage has absolutely no bearing on this matter of confidential data claims. It should be noted that Rule 2.07.4(4)(a) appears contradictory and without legal authority when it refers to "data and/or other information if it is determined by the Division to be confidential according to 2.07.5." Rule 2.07.5, as written and based on its cited statutory authority, does not clearly provide authority for a discretionary determination by the CMLR staff of the appropriateness of confidential data claims. The authority in §34-33-110(4), which refers explicitly to an exception to disclosure of coal seam data, cannot be read and applied without regard to the applicability of §24-72-104(3)(a)(IV) of the Colorado Open Records Act. Thus, once the operator files a MRP application or written request for confidential treatment under authority of §24-72-104(3)(a)(IV) of the Colorado Open Records Act, this designation of confidential data cannot be contradicted during the initial "completeness" review process. Once a written request is received by the CMLR for disclosure of a claimed confidential matter, only then might an inquiry be conducted into the appropriateness of the confidentiality claim. I would presume that an analysis of applicable state law and common law determinations of privileged or confidential data would then be reviewed against the assertions of legal authority and facts presented by the applicant. Subsections (4), (5) and (6) of §24-72-204 of the Colorado Open Records Acts sets forth the procedures for the CMLR to respond to such written requests for public disclosure, including the rights and remedies available to the requestor and to the official custodian of any public record.

I apologize for the length of this letter, but the precedential nature of this matter and the lack of clarity in the Colorado statutes required the length and depth of this analysis. As noted above, I would be pleased to meet with you and Lew Woods to discuss this matter further. I would be happy to supply you with any further research or factual data if you deem it necessary to support our claim.

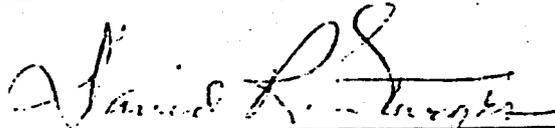
Mr. David Shelton, Director
February 24, 1981
Page Nine

I believe it would be advisable to continue to review this important matter on a rationale and reasonable time course and not move to a precipitous decision based on some imagined time constraint. Please contact me when you are ready to discuss further.

Sincerely,

DELANEY & BALCOMB, P.C.

By



David R. Sturges

cc: Darrel Hespe
Lee Acre

Sage Point-Dugout Canyon Mine
Eureka Energy Company
Carbon County, Utah

Draft Technical Analysis of Alluvial Valley Floor Determination

Information used in this draft analysis, unless otherwise noted, was obtained from information submitted by Eureka Energy to Utah Division of Oil, Gas and Mining (DOGGM) on July 30, 1980 (transmitted to OSM on September 15, 1980) and the Mining and Reclamation Plan submitted on December 8, 1980. A field examination was conducted on November 6, 1980. Those entities represented at the field examination were DOGM, Manti-LaSal National Forest, Eureka Energy and OSM.

Format for this analysis was taken from Wyoming Department of Environmental Quality Guideline No. 9.

I. IDENTIFICATION OF ALLUVIAL VALLEY FLOOR

A. Introduction

Eureka Energy Company has proposed the opening of the Sage Point-Dugout Canyon Mine near Price, Utah. Soldier Creek and Fish Creek (a tributary to Soldier Creek) drain the western half of the project area. Both of these streams are a perennial stream in the permit area; however, occasionally there is zero flow below the site. The confluence of Soldier Creek is about six miles south of the southern edge of the permit area.

The eastern half of the project area is drained by Dugout Creek, Corbula Creek (a tributary to Dugout Creek), and Pace Creek (another tributary to Dugout Creek). The three streams discharge into Grassy Train Creek approximately seven miles southeast of the permit area. Corbula and Pace Creeks are perennial above the Book Cliff escarpment and are intermittent below the cliffs. The lower reaches of the streams (southern part of the permit area and downstream) are ephemeral.

Water from Soldier Creek is partially diverted to and stored in Anderson Reservoir and used for irrigation. Eureka Energy proposes to enlarge Anderson Reservoir (to 1675 acre-feet of active storage) and use the water in the underground operation as well as the coal preparation plant. It is anticipated that these operations would consumptively use all stream water for two to ten years. Water encountered in mining will eventually supplement the use of surface waters. A reservoir is also planned on Dugout Creek (active storage 525 acre-feet).

Eureka Energy has purchased the land and associated water rights from Messrs. John Mahlares and John Sampinos. Part of these lands are in the valley bottom of Soldier Creek. Water rights have also been obtained for Dugout Creek.

B. Identification of Unconsolidated Stream Laid Deposits

Eureka Energy has identified on a map (1 inch = 200 feet) alluvial deposits in the adjacent area. Soldier Creek, Fish Creek, Corbula Creek, and Dugout Creek drainages all contain areas of alluvium. Pace Creek flows completely out of the permit area prior to entering alluvial deposits.

C. Identification of Flood Irrigation and Subirrigation

Eureka Energy has identified on a map (1 inch = 200 feet) the present irrigation system, lands irrigated in the past five years, and land historically irrigated but not irrigated in the last five years. All currently irrigated lands are planted in alfalfa and irrigated by flood irrigation. All irrigation is in the Soldier Canyon Drainage. The vegetation and hydrology surveys identified no significant areas of subirrigation.

D. Identification of Water Quality and Water Quality Sufficient for Flood Irrigation or Subirrigation Agricultural Activities

There are approximately 30 acres (as measured by OSM from the Topographic and Hydrologic Exhibit) of land under irrigation. There is an existing reservoir (Anderson Reservoir) and diversion in place to provide irrigation water to the land.

E. Summary

Only Soldier Creek has been identified as having an alluvial valley floor. Fish Creek, Dugout Creek, Corbula Creek, and Pace Creek have not been identified as an alluvial valley floor because of lack of unconsolidated stream-laid deposits or irrigable lands.

II. EXTENT OF ALLUVIAL VALLEY FLOOR

The extent of the alluvial valley floor was not directly measured; however, it is assumed that the areas under irrigation are part of the alluvial valley floor.

III. IMPORTANCE OF ALLUVIAL VALLEY FLOOR TO FARMING

The area under irrigation is part of several parcels of land purchased by Eureka Energy from Messrs. John Mahlares and John Sampinos. This land transaction took place in 1980. Messrs. Mahlares and Sampinos used the alfalfa hay as winter feed to supplement their cattle operation (phone conversation with SCS, Price, Utah, 4/27/81). Messrs. Mahlares and Sampinos were also permitted for the Soldier Canyon Grazing Allotment from the Bureau of Land Management (phone conversation with BLM, 4/27 and 4/28/81). Eureka Energy presently leases the farmland and the grazing allotment back to Messrs. Mahlares and Sampinos.

The Soldier Canyon Grazing Allotment consists of 18,407 acres with a productivity on public lands of approximately 835 animal unit months (AUM) (BLM, 4/27/81). The productivity of the farmland in question has been three and one-half to four tons per acre (SCS, 4/27/81). In order to make a significance determination, OSM used a value of three and one-half tons per acre (2.38 AUM/ton) and 38.1 acres of farmland or 317 AUM's for the area to be removed from agricultural production.

Where developed lands are involved, the loss of such lands from a farm production capabilities must be assessed. The equation of:

$$P = 3 + 0.0014 X$$

Where: P = productive loss in percent

X = number of animal units in excess of 100

"P" is used to determine the threshold above which loss in production of an AVF would become significant. A production loss of 10 percent or greater is assumed to be significant to the farm production.

The equation was developed by Wyoming Department of Environmental Quality to determine at what point production loss is considered to be a negligible impact to a Wyoming farm. The method has directly been used on several mines in the Powder River Basin. OSM considers the extrapolation to a Utah farm as being acceptable because of the similar climates and farming activities. Also, there is no methodology established to date in Utah to determine significance in regard to alluvial valley floors.

The number of AUM for the entire ranch is:

X = productivity from grazing land + productivity for AVF

X = 835 AUM + 38.1 acres (8.33 AUM/acre)

X = 835 AUM + 317 AUM

X = 1152 AUM

Therefore, $P = 3 + 0.0014 (1052)$

$P = 3 + 1.47$

$P = 4.47\%$ for the entire ranch

The percentage of production from the AVF versus the entire ranch equals:

$$1 - \frac{1152-317}{1152} = 27.5\%$$

Therefore, assuming that all of the alluvial valley floor is taken out of production, there would be a loss of 27.5 percent of the productivity of the entire farm operation. This high of a productivity loss would be significant to the farm operation.



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MEMORANDUM

MAR 3 1981

To: John Hardaway, Assistant Regional Director,
Division of Technical Analysis and Research
Office of Surface Mining, Region V

From: Suellen T. Keiner, Assistant Solicitor,
Regulatory Programs
Division of Surface Mining *Suellen T. Keiner*

Subject: Mine permit applications: Diversion of water by a
proposed surface mining operation.

Issue

Mike Bishop of your staff requested that this office prepare a brief memorandum advising you whether a proposed surface mining operation, which has acquired an operating farm's water rights to a stream that irrigates alluvial valley floor lands of that farm may divert such water to its own use during the life of the mining operation.

Conclusion

Yes, the proposed operation could obtain a permit in compliance with the Surface Mining Act. The mere acquisition of a superior water right does not, however, relieve the surface mining operation from requirements of the Act or State law. The Act (Section 510(b)(5)(B)) still requires an operator to demonstrate that the hydrologic balance of the downstream alluvial valley floor (AVF) will be preserved.

Discussion

- a) General hydrology requirements under the Act and its regulations.

Based on the information provided to this office, it appears that an existing farm located on an AVF in a western State has transferred its stream water rights to a proposed surface mining operation located upstream from the farm.

The preamble to the Department's rule states that mining would be permitted if the operator can show that, "in the case of alluvial valley floors outside the permit area, the hydrologic balance of the valley floor will not be materially damaged during or after mining" (emphasis added). 44 F.R. 15094, March 13, 1979. This position was implemented in the permanent program rules at 44 Fed. Reg. 15376, and codified at 30 C.F.R. 785.19(e)(1)(ii)(B):

No permit ... shall be approved ... unless:

(e)(1)(ii) The proposed operations would not materially damage the quantity and quality of water in surface and underground water systems that supply those alluvial valley floors that are -

...

(B) Outside the permit area of an existing or proposed surface coal mining operation.

This regulation, although generally upheld in litigation, has been remanded to the Department by the U.S. District Court for the District of Columbia for revision to exempt from its requirements undeveloped range lands and small farm acreage. In Re: Permanent Surface Mining Regulation Litigation, C.A. 79-1144 (D.D.C., February 26, 1980). The court found that the Secretary exceeded his statutory authority by not allowing the alluvial valley floor hydrology of undeveloped rangelands and small farm acreage outside the permit area to be damaged, just as it could be damaged inside the permit area. Slip op. at 53. In your review of mine plans and permit applications, you should be mindful, therefore, that interruption of small farm acreage and undeveloped rangelands on AVFs can be allowed as an exemption from the requirements of 30 C.F.R. 785.19(e)(1)(ii)(B).

In practical terms, this rule provides that, if the operator can demonstrate that the diversion will not affect ongoing or prospective agricultural activities which are significant to farming on AVF lands (except undeveloped rangelands and small farm acreage), then the operation may obtain a permit. If any ongoing or prospective agricultural activities on the AVF are not dependent on the diverted water or will not be impacted because of the development of alternative water sources, then the operation can also obtain a permit.

On the other hand, the Act still does not allow a mining operation to impair permanently the hydrologic balance of downstream areas, even undeveloped rangelands and small farm acreage. Section 515(b)(10)(F) of the Act requires operations to:

[preserve] throughout the mining and reclamation process the essential hydrologic functions of alluvial valley floors in the arid and semi-arid areas of the country.

The water resource performance standards that implement Section 515(b)(10)(F) are generally found at 30 C.F.R. 816.41 - 816.57. These require, inter alia, the planning of mining activities "to prevent long-term adverse changes in [the prevailing hydrologic balance] that could result from those activities." 30 C.F.R. 816.41(a). Thus, any permit issued to the proposed operation "shall require that such surface coal mining operation will meet [these] applicable performance standards" SMCRA Section 515(a). A careful and critical scrutiny of the hydrologic protection provisions contained in the mine plan and permit application is, therefore, advisable.

b) Relationship of hydrology requirements to State water law.

Mr. Bishop apparently had been advised that, in accordance with the applicable state law, the farm's transfer of its water rights to the proposed operation has created a priority or superior water right in the proposed mining operation. Although a priority right was created, this does not grant the operation the unlimited use of the water. Limitations to that use will depend on the individual State's water law. In Colorado, for example, certain limits may be placed on the priority user's water rights consistent with decreed rights of the District Water Court. See 45 Fed. Reg. 82181, December 15, 1980. Thus, Section 717(b), which requires the replacement of water supplies affected by a surface coal mine operation, "does not protect water users from the determination of their rights" in accordance with State water law. Ibid. Irrespective of the protections provided in the performance standards of the Act and the Department's regulations, actual diminution of water supply becomes a matter to be decided between users under State law, as provided in Section 717(a) of the Act.

Consequently, transfer of priority water rights to the proposed surface mining operation does not relieve that operation from the requirements and limitations of the Act and State water law. The permit applicant must still meet all applicable statutory and regulatory requirements. If problems of water supply (diminution, etc.) develop between the senior and junior water users, however, these become a matter to be determined through the application of State water law.