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THE ATTORNEY GENERAL  
STATE OF UTAH

DAVID L. WILKINSON  
ATTORNEY GENERAL

RECEIVED

DEC 26 1985

DIVISION OF OIL  
GAS & MINING

STEPHEN G. SCHWENDIMAN, CHIEF  
Tax & Business Regulation Division

EARL F. DORRIS, CHIEF  
Governmental Affairs Division

PAUL M. WARNER, CHIEF  
Litigation Division

PAUL M. TINKER  
DEPUTY ATTORNEY GENERAL

DALLIN W. JENSEN  
Solicitor General

WILLIAM T. EVANS, CHIEF  
Human Resources Division

DONALD S. COLEMAN, CHIEF  
Physical Resources Division

MEMORANDUM

TO:           LOWELL P. BRAXTON  
                  Division of Oil, Gas and Mining

FROM:         BARBARA W. ROBERTS  
                  Assistant Attorney General

DATE:         December 24, 1985

RE:           **Mine Access Road at Gordon Creek #2**

#2

Attached is an August 15, 1985 memo from Wayne Hedberg to Dianne through you along with a note directing the question to me. Frankly, although I recall speaking with Wayne about the matter in August, I do not recall having received any verbal or written questions on this matter from the division prior to receiving your above-indicated note.

For your information, I have attached copies of my April 13, 1984 memo to Dianne (written in response to the issuance of a federal NOV) as well as the foundation information for that memo. Please be aware that Judge Flannery has remanded the "affected area" definition upon which the above-mentioned memo was based. Flannery seems to lean toward excluding only high use highways (such as interstates) from permitting requirements. In addition, Utah's definition of "affected area" was approved by OSM only to the extent that it conforms with Flannery's decision (see December 3, 1985 Fed. Reg). Although I do not believe that we will be challenged by anyone for awhile on our procedure for determining which roads should be permitted, a new Utah rule should be promulgated to cover this omission in our program. I have set a meeting with Ron Daniels to draft such a rule which will then be available for Division staff comments prior to its proposal to the Board.

If I can be of further help to you on this matter, please contact me.

Attachments

Mine File  
w. Hedberg  
L.C.B. (letter only)

UNITED STATES DEPARTMENT OF AGRICULTURE  
FOREST SERVICE

Manti-LaSal National Forest  
599 West Price River Drive  
Price, Utah 84501

2820  
7730

August 31, 1982



Mr. Tom Parker  
ARCO Coal Company  
1109 South Carbon Avenue  
Price, Utah 84501

Dear Mr. Parker:

Enclosed is the approved Road-Use Permit for Forest Development  
Road No. 50245 to your No. 4 mine.

Sincerely,

*W H Bailey*  
for  
REED C. CHRISTENSEN  
Forest Supervisor

Enclosure

ROAD USE PERMIT  
(re: FSM 7344)

Acts of 6/3/44, 4/24/50, 6/12/60,  
10/14/64, and 10/21/76 (16 USC 498,  
572, 530, and 532-38; and 43 USC 1702,  
1761, 1764, and 1765).

~~BEAVER CANYON~~ <sup>THIR</sup> Coal Company  
(Name)

of 1109 South Carbon Avenue  
Price, Utah 84501  
(Address and ZIP Code)

(hereafter called the permittee) is hereby granted use of the following road(s) or road segments: (See map attached) That segment of Mill Fork Canyon Road, No. 50245, from its intersection with State 31 to the Forest boundary located between Sections 16 and 21, T16S, R7E, SLBM, a distance of approximately 1.3 miles.

on the Manti-LaSal National Forest, subject to the provisions of this permit, including clauses 1 through 13, on page(s) 1 through 3 for the purpose of hauling coal from their No. 4 Mine and transporting supplies, equipment, and personnel to and from said mine.

The exercise of any of the privileges granted in this permit constitutes acceptance of all the conditions of the permit.

1. Compliance with Laws, Regulations, and Rules Governing Use. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, County, and Municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit. The permittee, its agents, employees, contractors, employees of contractors, and guests of the permittee shall comply with the rules and regulations prescribed by the Forest Service for the control and safety in the use of the road and to avoid damage to the road. Such rules and regulations shall include:
  - a. Closing the road or restricting the use when required by any government agency which, by law, has jurisdiction to authorize such closing or restrictions.
  - b. Upon reasonable notice closing the road during periods when, in Forest Service judgment, there is extraordinary fire or avalanche danger.
  - c. Traffic controls which, in the judgment of the Forest Service, are required for the safe and effective use of the road by authorized users thereof.

This permit is accepted subject to all of its terms and conditions.

	Permittee (Name and Signature)	Date
ACCEPTED	<i>Thomas H. Foster</i>	25 Aug 1982
	Issuing Officer (Name and Signature) Title	Date
APPROVED	<i>W. H. [unclear]</i>	9/1/82

- d. The permittee shall not use chemical poison, as defined in Section 2 of the Federal Insecticide, Fungicide, and Rodenticide Act of June 25, 1945, as amended (61 Stat. 163; 73 Stat. 286; 75 Stat. 18; 75 Stat. 190), or any chemical or other road surface treatment without the approval of the Regional Forester or his designated representative. The application for approval shall be in writing and shall specify the area to be treated, the material used in the treatment, and the time, rate, and method of application.
2. Use Nonexclusive. The privileges granted in this road use permit, including use when the road is closed to public use, is not exclusive. The Forest Service may use the road and authorize others to use the road at any and all times. The permittee shall use the road in such a manner as will not unreasonably or unnecessarily interfere with the use thereof, by other authorized persons including the Forest Service.
3. Use Plans. Prior to use each year this permit is in effect, the permittee shall notify the District Ranger Ira W. Hatch 10 S. Carbon Ave., Price, Utah 84501, telephone No. 801- 637-2817 in writing of the date and approximate time when such use will commence; the anticipated duration of such use, the names and addresses of permittee's contractors or agents who will use the road on behalf of the permittee, the estimated extent of use, purpose of use, and such other information relative to permittee's anticipated use as the Forest Service may from time to time reasonably request. When there is a significant change in use by the permittee, it is the permittee's responsibility to promptly notify the District Ranger in writing. Plans and changes will be approved by the Forest Supervisor before use may commence.

Operation of equipment is not desirable on these roads when wet surface or saturated subgrade conditions would cause excessive damage. ~~if sustained winter operation is prohibited, and snow removal is to be done only on an emergency basis unless specifically approved in the annual use plan, or as a provision of this permit.~~ JTH  
WS Where emergency access by the permittee is required during periods when excessive damage will occur, the permittee will promptly repair the damage.

4. Maintenance. The permittee shall bear the expense of maintenance proportionate to his use. This expense will be borne by the permittee, its agents, operators, and/or contractors. The Forest Service will, upon request of the permittee, make a determination of the proportionate road use and resulting road maintenance responsibilities and assign the maintenance accordingly.

Where road maintenance standards required by the permittee are above those required by the Forest Service, the permittee shall bear the total incremental cost of maintaining the road to the higher standard.

Maintenance shall be performed in accordance with Forest Service specifications or requirements for maintenance as hereinafter listed, or as may be mutually agreed upon from time to time and shall consist of (1) current

maintenance as necessary to preserve, repair, and protect the roadbed, surface and all structures and appurtenances, and (2) resurfacing equivalent in extent to the wear and loss of surfacing caused by operations authorized by this permit.

- a. Maintenance and Resurfacing Requirements and Specifications. Exhibit I, attached, specifies these requirements and shall be adhered to.
5. Fire Prevention and Suppression. The permittee shall take all reasonable precautions to prevent and suppress Forest fires. No material shall be disposed of by burning in open fires during the closed fire season established by law or regulation, without a written permit from the Forest Service.
6. Damages. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and promptly upon demand shall pay the United States for any damage resulting from negligence, or from violation of the terms of this permit or of any law or regulation applicable to the National Forests, by the permittee, or by his agents, contractors, or employees of the permittee acting within the scope of their agency, contract, or employment.
7. Officials Not to Benefit. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.
8. Outstanding Rights. This permit is subject to all outstanding rights.
9. Suspension. Upon the failure of the permittee, its agents, employees or contractors to comply with any of the requirements of this permit, the officer issuing the permit may suspend operations in pursuance of this permit.
10. Termination. This permit shall terminate on January 1, 1986 unless extended in writing by the Forest Service. It may be terminated upon breach of any conditions herein.
11. The Environmental Assessment Report developed for this project shall be made a part of this permit. This permit is subject to the guidelines, requirements and constraints developed in that report.
12. Traffic Operations. The permittee may install a guard shack on Forest land adjacent to road #50245 near the lower loadout facility. The purpose of the guard shack shall be to provide protection of the guard person from the elements. The activities of a guard may be to administer use of the road in an attempt to discourage theft and vandalism from the mine. The purpose of the guard shall not be to prevent the public from use of the road. The appearance and size of the guard shack shall be as mutually agreed to between District Ranger Ira Hatch and the permittee.

## MAINTENANCE REQUIREMENTS

### EXHIBIT I

Road Maintenance. Road maintenance is defined as the performance of work on the entire road facility commensurate with Permittee's use. This work consists of restoration and preservation of surface, shoulders, roadsides, structures, drainage, sight distance, and such traffic control devices as are necessary for prevention of excessive erosion damage to the facility and adjacent lands.

- I. Description. Maintenance work to be done currently during the periods of use by the Permittee shall include:
  - A. Removal of slides and boulders, which obstruct safe sight distance.
  - B. Adequate blading and shaping of roadway surfaces and ditches to maintain the original cross sections.
  - C. Removal of earth and debris from ditches and culverts so that the drainage systems will function efficiently at all times.
  - D. Prevention of excessive dusting of road surface materials.
  - E. Repair of damages to fences, cattleguards, culverts, and other roadway structures including traffic regulatory and directional signs.
  - F. Restoration of eroded fills and repair and protection of shoulder berms, berm outlets, stabilized waterways, vegetated slopes, and other erosion control features.
  - G. Removal of snow from roadway surface.
  - H. Replacement of roadway and/or surfacing material worn out and lost through use of the roadway.
  - I. Maintenance and erection of signs to warn the public of hauling operations.
  
- II. Performance. All items of maintenance work shall be done currently as necessary to insure safe, efficient transportation and to protect roads, streams, and adjacent lands from excessive damage. Work shall be done in accordance with the following minimum standards of performance:
  - A. Removal of Material. Earth, rocks, trees, brush, and debris removed from roadways and ditches shall not be deposited in stream channels or upon slope stabilization and erosion control features.

- B. During roadway blading and shaping operations, banks shall not be undercut nor shall gravel or other selected surfacing material be bladed off the roadway surface. The original crown or slope of the road shall be preserved. Mud, debris, and oversize material shall be deposited outside the roadway by hand or by careful blading, and these materials shall not be mixed with the road surfacing material.
- C. Ditches, culverts, drop inlets, trash racks, downspouts, and splatter structures shall be kept clear of earth, slash, and other debris so that drainage systems will function efficiently during, and immediately following, periods of road use by Permittees. This includes correcting and eliminating causes of erosion or plugging of the structure, and actual repair of the structure and riprap if damaged.
- D. Fugitive dust shall be controlled to prevent hazardous driving conditions or loss of road surface or binder material. The Permittee shall control such dusting by sprinkling, or other approved surface treatments.
- E. Permittee shall promptly repair all damages, caused by the Permittee's operations, to the road surface or to any structures in or adjacent to the roadways.
- F. Any washing or settling of roadway fills shall be corrected promptly to prevent additional soil erosion or roadway damage. Shoulder berms, berm outlets, and stabilized waterways shall be protected during road maintenance operations and, if damaged, such structures shall be promptly restored to their original condition including repair and reseedling of vegetation established to control slope erosion. No earth, rocks, or other debris shall be deposited upon any roadside slope stabilization structure or feature.
- G. Snow Removal
  - 1. Requirements
    - a. Sanding of hazardous areas shall be with sand. Coal dust or salt are not to be used.
    - b. Equipment - The equipment should be in sound operating condition, be equipped with angle blade or adequate grousers or traction tires, and be operated by a fully qualified operator.

c. Removal

Width - Snow will be removed to the full width of the road plus any turnouts and ditch lines. Through-cuts will be allowed only after snow depths exceed the height of the cab or across flat ground. Disposal shall always be to the outside or downhill side of the road.

Outlets - Outlets for surface runoff shall be placed in all snow through-cuts at points where water can flow off the road surface at the following intervals:

8% or less grades - 500 feet center to center minimum.

8% and up grades - 300 feet center to center minimum.

Cattleguards - Crawler tractors will not be operated across cattleguards.

Culvert Cleaning - Culvert heads and outlets shall be cleaned of snowpack by hand.

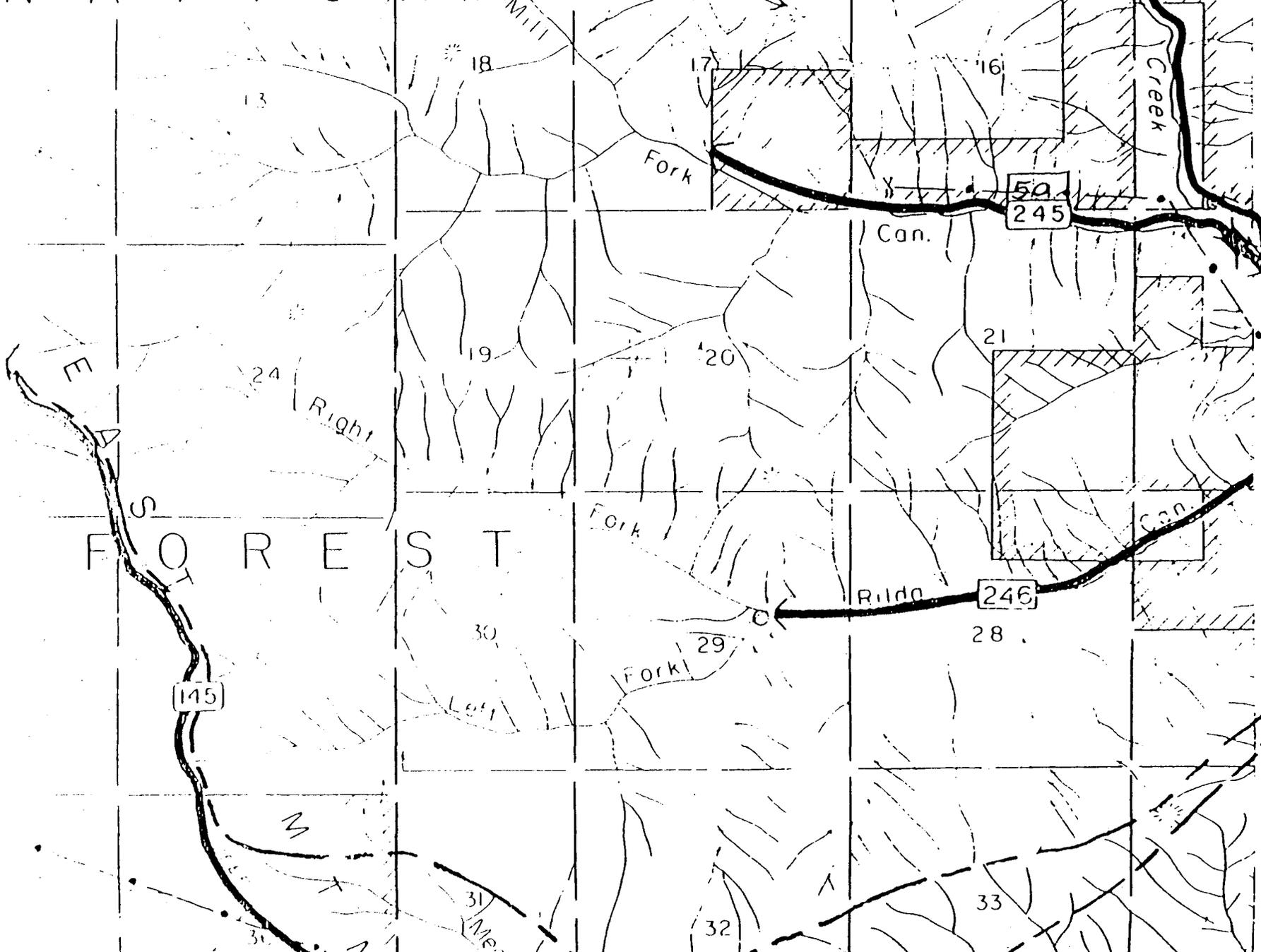
Tree Damage - Snow should not be pushed, blown, or stacked on trees along the roadside. Care will be taken to avoid scarring trees with equipment.

2. Inspections

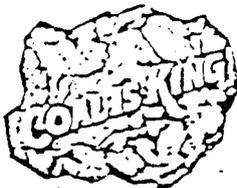
- a. Intermittent inspections may be made during snow removal operations.
- b. Final inspection will be made to check for full compliance and damages.

NATIONAL

22



BR NO  
50245-1



# CARBON COUNTY

PRICE, UTAH

November 20, 1975

Swisher Coal Company  
Professional Building  
Price, Utah 84501

Gentlemen:

On July 3, 1975, Carbon County entered into that certain "Agreement" with Swisher Coal Company covering a road in Gordon Creek area, formerly known as State Highway No. 139. Said Agreement was amended by that certain "Amendment to Agreement" dated August 18, 1975.

In Commission Meetings prior to November 20, 1975, we have orally agreed with you that the unlimited use of said roadway by any other coal operator will be subject to their satisfactorily working out with you, in advance, an equitable pro-rata share of your cost of maintenance of said road. In addition such unlimited use by another coal operator shall not materially interfere with your use.

The purpose of this letter is to confirm in writing the above oral agreement with you.

Sincerely,

Carbon County,  
a body politic

By

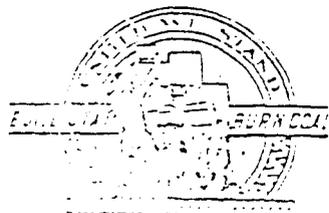
*David Kachinski*

Commissioner

*James H. Brown*

Commissioner

Commissioner



MAX ROSS  
PRESIDENT

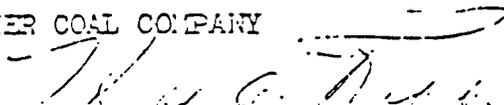
NOVEMBER 21,  
1975

CARBON COUNTY COMMISSION  
COURT HOUSE BUILDING  
PRICE, UTAH 84501

IN RESPONSE TO YOUR REQUEST PLEASE BE ADVISED THAT AS A CONDITION TO YOUR SIGNING THAT CERTAIN LETTER TO SWISHER COAL COMPANY DATED NOVEMBER 20, 1975, OUR COMPANY NOW AGREES THAT IT WILL NOT WRONGFULLY WITHHOLD PERMISSION FROM ANY COAL OPERATOR TO HAVE UNLIMITED USE OF THE GORDON CREEK ROAD SO LONG AS SUCH OPERATOR REASONABLY COMPLIES WITH THE INTENT AND REQUIREMENTS OF THE SECOND PARAGRAPH OF YOUR LETTER.

SINCERELY,

SWISHER COAL COMPANY

BY   
\_\_\_\_\_

ITS PRESIDENT

JENSEN LAW OFFICES

190 NORTH CARBON AVENUE

PRICE, UTAH 84501

(801) 637-1542

HERALD N. JENSEN  
JAMES T. JENSEN  
MICHAEL J. VAN WAGENEN

11:15  
9-9-81

April 30, 1981

Carbon County Commissioners  
County Court House  
Price, Utah 84501

Re: County Road Agreement with Swisher Coal Company

On July 3, 1975 Carbon County entered into an agreement with Swisher Coal Company concerning the county road in Gordon Creek. This agreement was amended on August 18, 1975. The agreement requires Swisher, now known as Beaver Creek Coal Company, to maintain the road, including removal of snow.

Beaver Creek's operations have changed substantially and it no longer operates 100 ton coal haulers on the road. In addition, portions of the road are now used by other companies, the State of Utah, and the public in general.

Request is made that the County consider terminating, or in the alternative, modifying the agreement so that in the future Beaver Creek would be responsible for the following with respect to the Gordon Creek Road:

1. Furnish equipment and manpower for removal of snow on the entire road;
2. Furnish a motor grader and operator, as necessary, to grade and maintain the graveled portion of the road; and
3. Furnish and deliver, as necessary, crushed gravel in excess of 750 tons per year.

If any other business entity uses any portion of the road on a regular basis, it would be expected to reach an agreement with Beaver Creek to share, on a pro-rata basis, in the above expenses.

Beaver Creek's obligation would terminate when it no longer mines coal or regularly uses the road in the Gordon Creek area.

Carbon County would be responsible for the following with respect to the Gordon Creek Road:

Page 2

April 24, 1981

1. Maintain the blacktop portion of the road, except for snow removal;
2. Furnish and deliver, as necessary, pit run gravel; and
3. Furnish and deliver, as necessary, crushed gravel in an amount not to exceed 750 tons per year.

Your consideration of the above proposal will be appreciated. Beaver Creek will be available to meet with you at any time to further discuss this matter and to work out any other details.



James T. Jensen

JTJ:bmo

cc: Beaver Creek Coal Company  
Attn: Max A. Robb

r/3

JENSEN LAW OFFICES

190 NORTH CARBON AVENUE  
PRICE, UTAH 84501

(801) 637-1542

THORALD N. JENSEN  
JAMES T. JENSEN  
MICHAEL J. VAN WAGENEN

October 29, 1981

Carbon County Commissioners  
County Court House  
Price, Utah 84501

Re: County Road Agreement With Swisher Coal Company

This letter will confirm the conversation which Max Robb of Beaver Creek Coal Company, formerly known as Swisher Coal Company, and I had with the County Commission on October 28, 1981.

In addition to the proposal of Beaver Creek to the County set forth in my letter of April 30, 1981, Beaver Creek is also willing to furnish and apply magnesium chloride upon the Gordon Creek Road as required on an annual basis.

Max and I look forward to meeting with you on November 12, 1981 at 1:00 p.m. to finalize this matter.

James T. Jensen

JTJ:bmo

cc: Beaver Creek Coal Co.  
Attn: Max A. Robb

D/5-R/17

*At meeting, Commission agreed to item #3 but restricted amount*

Carbon

JENSEN LAW OFFICES

THORALD N. JENSEN  
JAMES T. JENSEN  
MICHAEL J. VAN WAGENEN

190 NORTH CARBON AVENUE  
PRICE, UTAH 84501

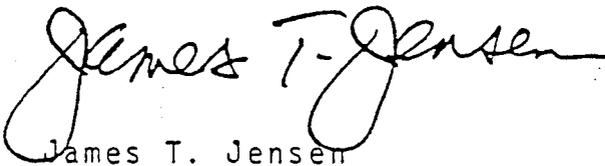
(801) 637-1542

January 7, 1982

Carbon County Commissioners  
County Courthouse Building  
Price, Utah 84501

Attention: Lee Semken

Enclosed is the County's fully executed copy of Second Amendment to Agreement dated November 25, 1981 by and between Carbon County and Beaver Creek Coal Company. I assume that you will deliver this document to the County Clerk for appropriate filing.



James T. Jensen

JTJ:jcr

Encl.

~~cc:~~ Beaver Creek Coal Company  
P. O. Box AU  
Price, Utah 84501  
Attn: Max Robb

EXHIBIT C

EXHIBIT C

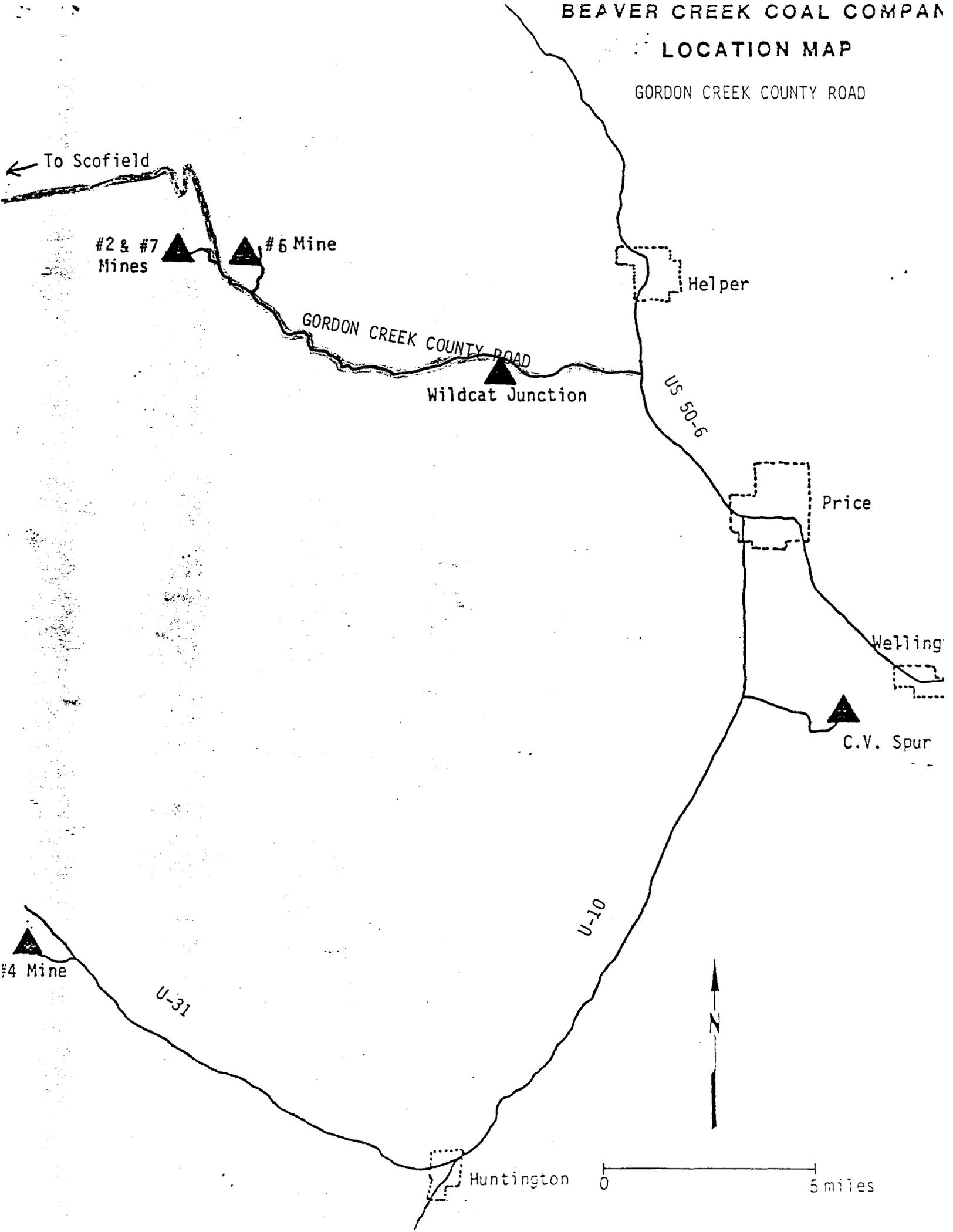
Regular Users of Gordon Creek Road

Calvin K. Jacob & Sons  
Ted Pierce  
Movell Jewkes  
Steve Stamatakis  
Helper Associates  
Wasatch Coal Co.  
Blazon Coal  
Utah Power & Light  
Utah Division of Wildlife Resources  
Carbon County  
Bureau of Land Management  
Beaver Creek Coal Company  
Tower Resources  
Savage Brothers  
H.E. Lowdermilk Co.  
Dick Lee  
Bob Finney  
Utah Railway  
Mountain Homes in Beaver Creek  
Sportsmen/Recreationists  
General Public

EXHIBIT D

LOCATION MAP

GORDON CREEK COUNTY ROAD



To Scofield

#2 & #7  
Mines

#6 Mine

Helper

GORDON CREEK COUNTY ROAD

Wildcat Junction

US 50-6

Price

Welling

C.V. Spur

#4 Mine

U-31

U-10

Huntington



0 5 miles

Beaver Creek Coal Company

411

*Jill Copy HCL 100 1/010*  
*Copy to Barbara Roberts*  
*Jim Smith*  
*Ron Daniel*



FEB 17 1984

January 26, 1984

Mr. Ronald W. Daniels  
Deputy Director  
Utah Division of Oil, Gas & Mining  
4241 State Office Bldg.  
Salt Lake City, Utah 84114



RE: Public Use of Roads; **DIVISION OF OIL, GAS & MINING**  
Gordon Creek Road

Dear Mr. Daniels:

Based on a review of your criteria for defining public roads, Beaver Creek Coal Co. does hereby request that the Gordon Creek road remain classified as a public road and therefore be exempted from meeting Class I Haul Road Standards. The basis for this request is that the Gordon Creek Road does in fact meet each of the criteria for a public road. The following is an explanation of how each of the criterion are met, supported by attached documentation:

"A public road is one which:"

- (1) "is classified as a public use road by the subject public body;"  
The attached letter from Carbon County will verify that the Gordon Creek Road is a public use road. (Exhibit A).
- (2) "is constructed similarly to similarly classified roads;"  
The attached Exhibit A will also verify an opinion by the County that the Gordon Creek Road is constructed similarly to other public use (county) roads.
- (3) "is publicly funded:"
  - (a) "is literally constructed and/or maintained by the public body; or
  - (b) there is, at the public body's insistence, a construction and maintenance agreement with the operator wherein the public body retains control, over the construction and/or maintenance and some public funds are expended through the exercise of that control."

Attached Exhibit B is a maintenance agreement between Beaver Creek Coal Co. and Carbon County, wherein it shows that Beaver Creek will maintain the Gordon Creek Road, the county will provide some public funds (material), and the county will retain control of the road.

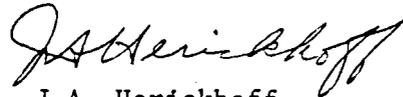
- (4) "has substantial (more than incidental) public use:  
(a) is, in fact, used by the public for access, and  
(b) the operator does not deny year round public access; and  
(c) has access to sites beyond permit area."

Exhibit C is a list of regular users of the Gordon Creek Road. Many of these people use the Gordon Creek Road to access rangeland and cabin sites in the Beaver Creek area, which is beyond our permit area. In addition, Beaver Creek Coal Co. does not restrict travel on any portion of the public use portion of the road at any time during the year. Locked gates are maintained only at our permit boundaries which are private property, and do not affect general public use of the Gordon Creek Road.

It is our hope that the above explanation and attached documentation is adequate to show that the Gordon Creek Road should remain designated as a public road.

If you have any questions, or need any further information, please let me know.

Respectfully,



J.A. Herickhoff  
President

cc: R.D. Robison  
J.S. Voorhees  
D.W. Guy  
File:

JAH/cn

EXHIBIT A



# CARBON COUNTY

## PRICE, UTAH 84501

February 8, 1984

J. A. Herickhoff, President  
Beaver Creek Coal Company  
P. O. Box 1378  
Price, Utah 84501

Dear Mr. Herickhoff:

In compliance with Mr. Guy's request, we have searched County records, and have determined that the Gordon Creek Road, located northwest of Price, has been in existence as a public use road for over fifty years.

Prior to 1930 the road was used primarily by livestockmen, recreationists, timber removal and by the residents of Pleasant Valley to commute to Price. In the 1930's various companies began coal mining operations, and coal transportation became another significant use of the Gordon Creek Road in addition to the uses outlined above.

The first 13.3 miles of the Gordon Creek Road was originally designated U-139 and was owned and maintained by the State of Utah. In a County Commission meeting on March 5, 1975, Carbon County agreed to accept ownership of the road from the State of Utah. Carbon County has, since that time, performed maintenance work on the Gordon Creek Road. As development of the coal mining properties progressed in the area, we have allowed the mining companies to assume road maintenance responsibilities on the lower 13.3 miles of road, with the County retaining oversight authority and supervision to assure that the Gordon Creek Road would have free access to and use by the public.

At the present time, the Gordon Creek Road provides the main access to the Gordon Creek and Beaver Creek areas, and is used extensively by business, government agencies, livestock owners and the citizenry at large.

Sincerely yours,  
BOARD OF CARBON COUNTY COMMISSIONERS

Lee Semken, Chairman

Floyd Marx, Commissioner

Guigo Rachiele, Commissioner

EXHIBIT B

A G R E E M E N T

THIS AGREEMENT MADE AND ENTERED INTO THIS 3rd DAY OF JULY, 1975, BY AND BETWEEN CARBON COUNTY, A BODY POLITIC, HEREINAFTER REFERRED TO AS THE "COUNTY", AND SWISHER COAL COMPANY, A CORPORATION HAVING ITS PRINCIPAL OFFICE AT 349 CRESTVIEW DRIVE, PRICE, UTAH, HEREINAFTER REFERRED TO AS "SWISHER",

WHEREAS, THE COUNTY OWNS AND MAINTAINS A PUBLIC ROAD IN THE GORDON CREEK AREA OF CARBON COUNTY, UTAH, SAID ROAD BEING FORMERLY KNOWN AS STATE HIGHWAY NO. 139; AND

WHEREAS, SWISHER OPERATES AN EXTENSIVE COAL MINE OPERATION IN SAID GORDON CREEK AREA INCLUDING THE OPERATION OF LARGE OFF-HIGHWAY COAL TRUCKS OVER THE WESTERN PORTION OF SAID PUBLIC ROAD; AND

WHEREAS, THE COUNTY AND SWISHER ARE DESIROUS OF ENTERING INTO AN AGREEMENT WHEREBY SWISHER WOULD HAVE UNLIMITED USE OF SAID ROAD FOR ITS COAL MINE OPERATION;

NOW THEREFORE, IT IS AGREED AS FOLLOWS:

1. SWISHER SHALL HAVE THE RIGHT TO USE SAID ROAD IN ITS COAL MINE OPERATION WITHOUT ANY RESTRICTION BY THE COUNTY AS TO WEIGHT, SIZE OF VEHICLES OR WITH RESPECT TO TYPE OF USE, PROVIDED THAT SUCH USE IS REASONABLE AND PRUDENT.

2. SAID ROAD BEGINS AT THE WEST BOUNDARY OF STATE HIGHWAY 50 AND 6 AND PROCEEDS WESTERLY THEREFROM A DISTANCE OF APPROXIMATELY 12.05 MILES TO A POINT FORMERLY REFERRED TO AS STATE MILE-POST NO. -0-.

3. DURING THE LIFE OF THIS AGREEMENT SWISHER SHALL:

- (A) MAINTAIN THE PRESENT EXISTING BLACKTOP ON SAID ROAD IN A STATE OF REPAIR EQUAL TO THE CONDITION OF SAID BLACKTOP AT THE DATE OF THIS AGREEMENT.
- (B) MAINTAIN THE PRESENT EXISTING GRAVEL PORTION OF SAID ROAD IN A STATE OF REASONABLE REPAIR.
- (C) REMOVE ALL SNOWFALL FROM SAID ROAD WITHIN A REASONABLE TIME AFTER THE ACCUMULATION THEREOF.
- (D) COMPLY WITH ALL REASONABLE REQUESTS OF THE COUNTY WITH RESPECT TO IMPLEMENTATION OF NECESSARY SAFETY FEATURES ON SAID ROAD.

- (E) CAUSE ITS INSURANCE CARRIER TO ISSUE A CERTIFICATE OF LIABILITY INSURANCE COVERING SWISHER'S USE OF SAID ROAD SHOWING THE COUNTY AS A CO-INSURED WITH RESPECT TO LIABILITY. SAID POLICY SHALL BE IN AN AMOUNT NOT LESS THAN \$ 250,000 SINGLE LIMIT COVERAGE. SAID CERTIFICATE SHALL NOT BE TERMINATED BY SAID INSURANCE CARRIER EXCEPT UPON ITS GIVING THIRTY (30) DAYS PRIOR WRITTEN NOTICE TO THE COUNTY.
- (F) INDEMNIFY AND HOLD THE COUNTY HARMLESS ON ACCOUNT OF ANY AND ALL LIABILITY ARISING OUT OF SWISHER'S USE OF SAID ROAD.
- (G) NOT RESTRICT IN ANY WAY WHATSOEVER THE PUBLIC'S USE OF SAID ROAD.

4. THE TERM OF THIS AGREEMENT SHALL BE SO LONG AS SWISHER OR ITS SUCCESSORS OR ASSIGNS PRODUCES COAL FROM THE GORDON CREEK AREA.

5. IF THE PARTIES ARE UNABLE TO AGREE AS TO ANY OF THE TERMS OF THIS AGREEMENT, ANY SUCH DISAGREEMENT SHALL BE SUBMITTED TO ARBITRATION AND THE DECISION OF THE ARBITRATOR SHALL BE FINAL AND CONCLUSIVE AS TO EACH OF THE PARTIES AND EACH SHALL ABIDE BY HIS DECISION. FOR PURPOSES OF THIS ARBITRATION PROVISION, IT IS AGREED THAT THE DISTRICT JUDGE OF THE SEVENTH JUDICIAL DISTRICT, STATE OF UTAH, OR HIS NOMINEE, SHALL ACT AS ARBITRATOR HEREUNDER.

6. THIS AGREEMENT SHALL BE BINDING UPON THE SUCCESSORS AND ASSIGNS OF SWISHER.

IN WITNESS WHEREOF THE PARTIES HERETO HAVE SET THEIR HANDS TO THIS INSTRUMENT AS OF THE DAY AND YEAR FIRST ABOVE WRITTEN.

CARBON COUNTY, A BODY POLITIC

BY *Charles K. ...*  
COMMISSIONER

BY *...*  
COMMISSIONER

BY *...*  
COMMISSIONER

SWISHER COAL COMPANY, A CORPORATION

BY *...*  
ITS PRESIDENT

AMENDMENT TO AGREEMENT

THIS AMENDMENT TO AGREEMENT MADE AND ENTERED INTO THIS 18 DAY OF AUGUST, 1975 BY AND BETWEEN CARBON COUNTY, A BODY POLITIC, HEREINAFTER REFERRED TO AS "COUNTY", AND SWISHER COAL COMPANY, A CORPORATION HAVING ITS PRINCIPAL OFFICE AT 349 CRESTVIEW DRIVE, PRICE, UTAH, HEREINAFTER REFERRED TO AS "SWISHER",

WHEREAS, ON JULY 3, 1975 THE PARTIES ENTERED INTO THAT CERTAIN AGREEMENT DATED JULY 3, 1975, A COPY OF WHICH IS HERETO ATTACHED AND BY THIS REFERENCE MADE A PART HEREOF; AND

WHEREAS, THE PARTIES HERETO NOW DESIRE TO AMEND A CERTAIN PROVISION IN SAID AGREEMENT;

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. PARAGRAPH 4 OF SAID AGREEMENT IS HEREBY AMENDED TO READ AS FOLLOWS: "THE TERM OF THIS AGREEMENT SHALL BE SO LONG AS SWISHER OR ITS SUCCESSORS OR ASSIGNS PRODUCES COAL FROM THE GORDON CREEK AREA, OR FOR A PERIOD OF FIFTY (50) YEARS CALCULATED FROM JULY 3, 1975, WHICHEVER EVENT OCCURS FIRST. IT IS FURTHER AGREED THAT IF THE FIFTY (50) YEAR PERIOD EXPIRES AND COAL IS STILL BEING PRODUCED BY SWISHER OR ITS SUCCESSORS OR ASSIGNS FROM THE GORDON CREEK AREA THIS AGREEMENT SHALL AUTOMATICALLY RENEW FOR AN ADDITIONAL FIFTY (50) YEAR PERIOD, OR SO LONG AS SWISHER OR ITS SUCCESSORS OR ASSIGNS PRODUCES COAL FROM THE GORDON CREEK AREA, WHICHEVER EVENT OCCURS FIRST".

2. IT IS AGREED BETWEEN THE PARTIES THAT THE FOREGOING FIFTY (50) YEAR PERIOD IS INSERTED AS AN AMENDMENT IN ORDER TO CONFORM WITH THE LEGAL REQUIREMENTS OF UTAH CODE ANNOTATED 17-5-39.

IN WITNESS WHEREOF, THE PARTIES HERETO HAVE SET THEIR HANDS TO THIS INSTRUMENT AS TO THE DAY AND YEAR FIRST ABOVE WRITTEN.

- 1 -

8-19-75  
Executed copy of  
this amendment sent  
to Max Robb

CARBON COUNTY, A BODY POLITIC

BY *Wade Kachula*  
COMMISSIONER

BY *Wm. J. Taylor*  
COMMISSIONER

BY *James P. Swisher*  
COMMISSIONER

SWISHER COAL COMPANY, A CORPORATION

BY *Wm. Swisher*  
ITS PRESIDENT

SECOND AMENDMENT TO AGREEMENT

THIS SECOND AMENDMENT TO AGREEMENT ("SECOND AMENDMENT") MADE AND ENTERED INTO THIS 25th DAY OF NOVEMBER, 1981 BY AND BETWEEN CARBON COUNTY, A BODY CORPORATE AND POLITIC ("COUNTY") AND BEAVER CREEK COAL COMPANY, A CORPORATION, FORMERLY KNOWN AS SWISHER COAL COMPANY ("BEAVER CREEK"),

WITNESSETH:

WHEREAS, THE PARTIES ENTERED INTO THAT CERTAIN AGREEMENT DATED JULY 3, 1975 ("AGREEMENT"); AND

WHEREAS, THE AGREEMENT WAS AMENDED BY THE PARTIES BY THAT CERTAIN AMENDMENT TO AGREEMENT DATED AUGUST 18, 1975 ("FIRST AMENDMENT"); AND

WHEREAS, THE PARTIES DESIRE TO FURTHER AMEND THE AGREEMENT;

NOW, THEREFORE IT IS AGREED AS FOLLOWS:

1. DURING THE LIFE OF THE AGREEMENT THE COUNTY SHALL:

A. FURNISH AND DELIVER AS NECESSARY ALL PIT RUN GRAVEL NECESSARY TO MAINTAIN THE ROAD; AND

B. FURNISH AND DELIVER, AS NECESSARY, CRUSHED GRAVEL IN AN AMOUNT NOT TO EXCEED 500 TONS PER YEAR.

2. EXCEPT AS HEREIN AMENDED, ALL OTHER TERMS, CONDITIONS AND COVENANTS OF THE AGREEMENT AND FIRST AMENDMENT SHALL REMAIN IN FULL FORCE AND EFFECT.

CARBON COUNTY

BY Leo Vanden

CHAIRMAN-CARBON  
COUNTY COMMISSION

BEAVER CREEK COAL COMPANY

BY \_\_\_\_\_

## XI. Definitions

Citizen plaintiffs and environmental groups next claim that the Secretary has unlawfully defined the term "affected areas" at 30 C.F.R. § 701.5 (1984) to exclude certain roads that they contend Congress intended to be covered by the Act. The definition reads, in pertinent part:

The affected area shall include every road used for purposes of access to, or for hauling coal to or from, surface coal mining and reclamation operations, unless the road (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use.

The citizen plaintiffs complain that this definition is flatly inconsistent with the broad definition of surface coal mining operations in § 701(28), 30 U.S.C. § 1291(28), of the Act, which includes "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities, and for haulage." They further argue that the definition fails to implement properly the requirement of § 528(2), 30 U.S.C. § 1278(2), of the Act that only commercial "operations that affect two acres or less" be exempted from the provisions of the Act because a broad roads exemption will necessarily increase the number of operations that can take advantage of the two-acre exception.

The gist of the citizen plaintiffs' complaint is that although it is clear that not every road used for access or haulage must be included as an affected area, the Secretary has

drawn the line too far in favor of exempting certain roads. They believe that Congress intended the Act to cover those roads whose primary function or use was for coal haulage or access and did not mean to exempt those public roads merely because public use is more than incidental. In order to support this "primary function" approach the citizen plaintiffs rely on a colloquy between Senators McClure and Baker that the court finds unpersuasive on the issue of whether Congress intended a primary function approach.

On the other hand, the court is troubled by the rule insofar as its statutory basis is § 701(28), which includes in the definition of surface coal mining operations lands affected by the use of existing roads to gain access to the site of surface mining activities and for haulage. The Secretary acknowledges that "a road is part of a surface coal mining operation if it is built, used, or upgraded for access to the site of the mining operation or for haulage of coal." Sec. Res. at 169. Nevertheless, he contends that not every road when used to some degree for coal haulage or mine access falls within the definition of surface coal mining operation. The court accepts this premise because section 701(28) by its own terms includes only lands affected by, among other things, the use of existing roads. Presumably then, when hauling or access are among many uses made of a road, such as an interstate highway, the effect from the mining use is de minimis, or relatively minor, and thus the road need not be included as part of the surface coal mining operation. But the Secretary's rule goes far beyond what is

called for by § 701(28) in exempting essentially all public road where public use is more than incidental. This definition does not square with the statutory language and thus this aspect of the definition must be remanded as inconsistent with law.

Further, the court finds that the rule is irrational in that it does not appear rationally related to the Secretary's concern that interstate highways not be required to be permitted and reclaimed under the Act or the Secretary's conclusion that Congress "intended the Surface Mining Act to cover public roads used for coal haulage and access only when they are directly, rather than incidentally, part of the mining operation." Sec. Res. at 171. The rule the Secretary created, however, excludes far more than interstate highways where the proportion of hauling and access can be expected to be relatively small. Nor does the rule concern itself with whether the road is in some way directly, rather than incidentally, part of the mining operation. Instead, the rule focuses curiously on whether the public use is more than incidental, in which case the road is exempt. The rule does not bear a logical nexus to the Secretary's goal in promulgating it, or to the Secretary's own stated understanding of what the law requires. It must be remanded.