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State of Utah

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DIVISION OF OIL, GAS AND MINING

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December 30, 1993

Robert H. Hagen, Director
Office of Surface Mining
Reclamation and Enforcement
Suite 1200, 505 Marquette N.W.
Albuquerque, New Mexico 87102

Re: Notice of Violation (NOV) 93-020-190-005 (TV1), Des-Bee-Dove Mine, ACT/015/017, Folders #2 and #5, Emery County, Utah

Dear Bob:

I am writing in response to your December 20, 1993 letter to Lowell Braxton concerning a federal NOV recently issued at the Des-Bee-Dove mine. I appreciate your follow-up of Lowell's phone calls to you last week.

I must convey to you, in the strongest possible terms, the degree of my concern with your decision to initiate a federal enforcement action at the Des-Bee-Dove mine in light of the history of state enforcement at the mine and the interactions between our agencies. As we have discussed from time to time, disagreements concerning implementation of the Utah coal program are inevitable but, as we've also discussed, selecting the proper forum for resolution will allow us to resolve them without compromising the effectiveness of the coal regulatory program. Because the distance between our agencies affords an opportunity to play us against one another, I have endeavored to avoid airing programmatic disputes between us in public fora. OSM's current course at the Des-Bee-Dove mine and the rationale articulated in your December 20th letter, however, will make public conflict unavoidable.

My understanding of your December 20th letter is that a new TDN is not a prerequisite to federal enforcement action because the Albuquerque field office never found DOGM's response to TDN 91-02-370-4 to be adequate. It has been over two years since the Deputy Director of OSM stated that DOGM had ". . .taken

appropriate action to resolve the TDN issue without the need for federal intervention, ... " I am unable to read Mr. Tipton's letter to say anything other than the questions addressed by the TDN have been addressed and that TDN 91-02-370-4 is closed. The rationale of your letter is either that Washington office determinations are not binding on the Albuquerque field office, or that a procedural mistake made by DOGM in 1991 can provide a basis to disregard the requirements of federal law and regulation two- and one-half years after the fact. This legal argument is cast against the background of an extraordinary cooperative endeavor between DOGM, the operator, the Soil Conservation Service, the County Extension Service, and a half-dozen experts from academia to find stabilization techniques which will work in the Mancos Shale. During this time, the operator has implemented every suggestion made by the work group. In my view, this is a case which has no basis for prosecution in law or in fact.

Two issues are raised by the current federal NOV. The first is whether SMCRA allows OSM to substitute its own judgement for DOGM's determinations and separately enforce the Utah coal regulatory program. OSM's current actions undercut the authority of DOGM to enforce its coal regulatory program. This is a philosophical and legal issue which can only be appropriately resolved by litigation or negotiation between us or, preferably, between the primacy states as a group and the new director of OSM.

The second more pressing issue is whether OSM can resurrect a closed two- and one-half-year-old Ten-Day Notice as the basis for a federal enforcement action without a new Ten-Day Notice, consultation with DOGM, or prior expression of concern of any kind. Setting aside the programmatic issues, I believe that the Des-Bee-Dove federal NOV is fatally flawed procedurally. More troubling to me, however, is the appearance that OSM is willing to construct a convoluted, hyper-technical rationale to cut DOGM out of the regulatory process, and substitute itself as the enforcement agent for the Utah coal regulatory program, rather than choosing the programmatically correct course of issuing a new TDN or a 733 letter. Notwithstanding my strong aversion to publicly disclosing our internecine disputes, I cannot allow the process of issuance of the Des-Bee-Dove federal NOV to go unchallenged.

I am writing to request that you reconsider the issuance of the Des-Bee-Dove federal NOV and, instead, follow the procedures clearly established by federal law and regulations and the Utah coal regulatory program. If you believe that a violation exists at the Des-Bee-Dove site, allow DOGM to respond by describing the

efforts that have been undertaken since 1991. The current NOV is the wrong tool to apply to fix whatever concerns OSM has.

Very truly yours,

James W. Carter
Director

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