FILED
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SECRETARY, BOARD OF
OIL, GAS & MINING

BEFORE THE BOARD OF OIL, GAS AND MINING

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF PACIFICORP AND ENERGY WEST MINING COMPANY, PETITIONERS, FOR REVIEW OF THE DECISION BY THE DIVISION OF OIL, GAS AND MINING TO CHANGE THE INTER-PRETATION OF COAL RULES GOVERNING THE BONDED AREAS LOCATED AT TRAIL MOUNTAIN MINE, ACT/015/009; DES-BEE-DOVE MINE, ACT/015/017; DEER CREEK MINE, ACT/015/018; COTTONWOOD/ WILBERG MINE, ACT/015/019, FOLDER #2, EMERY COUNTY, UTAH.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Docket No. 2000-001 Cause No. ACT/015/009 ACT/015/017 ACT/015/018 ACT/015/019

Pursuant to the Request for Agency Action ("Petition") of PacifiCorp and Energy West Mining Company, (collectively "PacifiCorp"), this cause came before the Board of Oil, Gas and Mining ("Board") on February 23, 2000. Chairman Dave D. Lauriski recused himself and assigned Thomas B. Faddies to serve as acting chairman for purposes of the hearing. All other members of the Board participated in the hearing: Stephanie Cartwright, Elise L. Erler, W. Allan Mashburn, Raymond Murray, and James Peacock. Philip C. Pugsley, Assistant Attorney General, appeared on behalf of the Board, in place of Patrick J. O'Hara, Assistant Attorney General, who recused himself.

John S. Kirkham and David L. Mortensen of the law firm Stoel Rives LLP represented PacifiCorp; and appearing as witnesses for PacifiCorp were Scott Child, Property Management Administrator for Interwest, a wholly-owned subsidiary of PacifiCorp; and Charles A. Semborski, Geology/Permitting Supervisor for Energy West.

Thomas A. Mitchell, Assistant Attorney General, appeared on behalf of the Division of Oil, Gas and Mining ("Division"); and Mary Ann Wright, Associate Director of Mining for the Division appeared as a witness for the Division.

NOW THEREFORE, the Board, having considered the Request for Agency Action, the testimony of the witnesses and the arguments and exhibits presented at the February 23, 2000 hearing and being fully advised, now makes and enters the following:

FINDINGS OF FACT

1. Due and regular notice of the time, place and purpose of the February 23, 2000, hearing was given to all interested parties as required by law and the rules and regulations of the Board.

2. The Board has jurisdiction over the subject matter of this Petition pursuant to the provisions of Utah Code Ann. § 40-10-6 (1998 & Supp. I 1999), and has jurisdiction over all interested parties.

3. PacifiCorp is a corporation duly authorized to transact business in the State of Utah.

4. PacifiCorp has obtained permits for and operates the Trail Mountain Mine, ACT/015/009 ("Trail Mountain Mine"); the Des-Bee-Dove Mine, Act/015/017 ("Des-Bee-Dove Mine"); the Deer Creek Mine, ACT/015/018 ("Deer Creek Mine"); and the

Cottonwood/Wilberg Mine, ACT/015/019 ("Cottonwood Mine") (collectively the "Four Coal Mines"), Folder #2, Emery County, Utah.

5. The Four Coal Mines and the lands covered by this Petition are located in Utah.

6. The original permit was issued on the Trail Mountain Mine on February 19, 1985. Although the Trail Mountain Mine covers some or all of nine Sections (approximately 3,540 acres), the area actually disturbed by mining operations is restricted to approximately 10.59 acres in Section 25. PacifiCorp has previously provided a reclamation bond covering only the disturbed area. In addition to providing a reclamation bond, PacifiCorp maintains liability insurance with respect to operations at the Trail Mountain Mine.

7. The original permit to operate the Des-Bee-Dove Mine was issued on August 29, 1985. Although the Des-Bee-Dove Mine covers some or all of eight Sections (approximately 2,760 acres), the area actually disturbed by mining operations is restricted to approximately 78 acres in parts of Sections 25, 26, 35 and 36. PacifiCorp has previously provided a reclamation bond covering only the disturbed areas. In addition to providing a reclamation bond, PacifiCorp maintains liability insurance with respect to operations at the Des-Bee-Dove Mine.

8. On February 7, 1986, PacifiCorp received a permit to operate the Deer Creek Mine. Although the Deer Creek Mine covers all or a part of forty-two Sections (approximately 18,866 acres), the area actually disturbed by mining operations is restricted to approximately 95.79 acres. PacifiCorp has previously provided a reclamation bond covering

only the disturbed areas. In addition to a reclamation bond, PacifiCorp maintains liability insurance with respect to operations at the Deer Creek Mine.

9. On July 6, 1989, PacifiCorp received a permit to operate the Cottonwood Mine. Although the Cottonwood Mine covers all or a part of thirty-one Sections (approximately 10,600 acres), the area actually disturbed by mining operations is restricted to approximately 101.74 acres. PacifiCorp has previously provided a reclamation bond covering only the disturbed areas. In addition to a reclamation bond, PacifiCorp maintains liability insurance with respect to operations at the Cottonwood Mine.

10. Prior to 1996, the Division approved permit applications and renewals which provided performance bonds for the portion of the permit area which was actually disturbed by the mining operations ("disturbed area") only; the Division did not require performance bonds for the entire permit area.

11. In 1996-1997, the Division came to the conclusion that its previous interpretation of the law, and practice of requiring performance bonds provided by permittees to cover only that portion of a permit area constituting the disturbed area was based upon an incorrect interpretation of the law, and began requiring permittees renewing their permits to list the entire permit area as the area covered by the performance bond. The change in the interpretation of the law and practice applied only to the area of land covered by the performance bond. The amount of the performance bond continued to be based solely on the estimated cost of reclaiming the disturbed area.

12. This fundamental change in the interpretation of the regulations and practice was made by the Division upon the advice of counsel, but without consulting the Board and without public notice or the solicitation of comments from any interested parties.

13. This fundamental change in the interpretation of the law and practice was not based upon a change in any State or Federal law or regulation.

14. On November 10, 1999, the Division sent a letter to PacifiCorp announcing that "[t]he Division's interpretation of the coal rules concerning bonding of a coal permit is that the bonded area is equal to the entire permit area." The Division's letter requested that PacifiCorp amend the reclamation bond documents for the Cottonwood/Wilberg mine, as well as the Trail Mountain, Des-Bee-Dove, and Deer Creek mines, to reflect this interpretation.

15. Although reclamation bonds covering only the disturbed area had previously been accepted by the Division for the Four Coal Mines, the interpretation contained in the letter from the Division would result in a refusal to accept a bond that does not cover the entire permit area.

16. The definition of the term "coal mining and reclamation operations" as used in the Utah Rules is found at Utah Admin. Code R645-100-200.

17. The definition of the term "surface coal mining operations" as used in the Code of Federal Regulations is found at 30 C.F.R. 700.5.

18. On December 7, 1999, PacifiCorp filed the Petition, challenging the Division's change in the reclamation bond requirements.

19. On a vote of four in favor and one opposed,[1] the Board decided to grant the Petition and approve PacifiCorp's permits which provide performance bonds for the disturbed area only.

CONCLUSIONS OF LAW

A. The Utah statutes and regulations providing for the regulation of surface coal mining and reclamation operations have been conditionally approved by the Office of Surface Mining Reclamation and Enforcement and the State of Utah has "assumed exclusive jurisdiction" over the regulation of surface coal mining and reclamation operations in the State of Utah based upon a finding that the Utah statute and regulations satisfy the requirements of the Surface Mining Control and Reclamation Act of 1977, as amended.

B. The Utah rules dealing with performance bonds by law may not be more stringent than the corresponding federal statutes and regulations unless the Board has satisfied the requirements of Utah Code Ann. § 40-10-6.5(3).

C. The area of land included within the terms "surface coal mining and reclamation operations" as found at Utah Code Ann. § 40-10-5 and "coal mining and reclamation operations" as found at Utah Admin. Code R645-100-200 can be no more stringent and therefore no more extensive than the area of land included within the term "surface coal mining operations" as defined at 30 C.F.R. 700.5.

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[1] Although the Acting Chairman, Thomas B. Faddies, participated in the deliberation, he did not vote on the Petition.

D. Utah Code Ann. § 40-10-15 requires that the performance bond cover "that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations."

E. A performance bond which describes only the "disturbed area" within the permit area of the Four Coal Mines satisfies the requirements of Utah Code Ann. § 40-10-15.

F. A performance bond which describes only the "disturbed area" within the permit area of the Four Coal Mines satisfies the requirements of Utah Administrative Rule R645-301-850.

ORDER

Based upon the Findings of Fact and Conclusions of Law set forth above, IT IS HEREBY ORDERED THAT:

1. The requirement to post reclamation performance bonds covering the entire permit area with respect to the Four Coal Mines as such requirement is contained in the Division's letter of November 10, 1999 is hereby vacated;

2. The Division shall confirm in writing to PacifiCorp that PacifiCorp has satisfied the requirements of the Utah statutes and regulations by posting performance bonds which cover only the "disturbed area" with respect to the Four Coal Mines;

3. The Division may not refuse to approve a permit or grant a permit renewal on the basis that the reclamation performance bond fails to cover the entire permit area; and

4. The Board retains exclusive and continuing jurisdiction over all matters covered by this Order and over all parties affected thereby, and reserves exclusive and continuing jurisdiction to make further orders as may be appropriate and which are authorized by statute and regulation.

ISSUED AND SIGNED this 13 day of July, 2000.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING

Thomas B. Faddies
Acting Chairman

Approved as to form:

UTAH ATTORNEY GENERAL'S OFFICE

Thomas A. Mitchell
Attorney for the Division of Oil, Gas & Mining

STOEL RIVES LLP

John S. Kirkham
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing "Findings of Fact, Conclusions of Law and Order" to be mailed with postage prepaid, this 13 day of July, 2000, to the following:

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