

*ig mine file*

*Recd  
7-29-91*

BEFORE THE HEARINGS DIVISION  
OFFICE OF HEARINGS & APPEALS  
UNITED STATES DEPARTMENT OF THE INTERIOR  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

PACIFICORP, dba PACIFICORP	)	NOTICE OF VIOLATION
ELECTRIC OPERATIONS, and	)	NO. 91-02-244-001
ENERGY WEST MINING CO.,	)	DEER CREEK MINE,
	)	EMERY COUNTY, UTAH
Petitioners,	)	
	)	
v.	)	
	)	COAL MINING PERMIT
OFFICE OF SURFACE MINING	)	NO. ACT/015/018
RECLAMATION & ENFORCEMENT	)	

PETITION FOR REVIEW AND REQUEST FOR HEARING

Pursuant to 43 C.F.R. Part 4.1100, et seq. and 30 C.F.R. § 843.16, PacifiCorp, dba PacifiCorp Electric Operations ("PacifiCorp") and Energy West Mining Co. ("Energy West") (jointly referred to as "Petitioner"), petition for review of the fact of violation of Notice of Violation No. 91-02-244-001 issued to Petitioner on June 26, 1991, and request a hearing on this matter in Salt Lake City, Utah.

STATEMENT OF FACTS

1. The Utah Division of Oil, Gas & Mining ("State" or "DOGM") issued Deer Creek Mine Permit No. ACT/015/018 to Petitioner on February 7, 1986.

2. On June 26, 1991, Notice of Violation No. 91-02-244-001 ("NOV") was issued by the federal Office of Surface Mining Reclamation and Enforcement ("OSM") to PacifiCorp as permittee and Energy West as operator of the Deer Creek Mine, Emery County, Utah (the "Mine.") A true and correct copy of the NOV is attached hereto as Exhibit "A."

3. The NOV was issued by OSM for failure to first obtain a permit from DOGM prior to engaging in and carrying out any coal mining and reclamation operations. This NOV applies to a portion of Emery County Road No. 304 (also referred to as the Deer Creek Road) extending from the present permit boundary to the entrance of the Huntington Power Plant.

4. The NOV requires the operator to reclaim Emery County's road within eighty (80) days or submit to DOGM a complete and adequate plan to permit and bond the Emery County road within thirty (30) days of issuance of the NOV.

5. Prior to issuing the NOV, OSM issued ten day notice No. 91-02-246-001 ("TDN") to the State, dated March 21, 1991 and received on March 25, 1991, citing the Petitioner for "failure to obtain a permit from the Utah Division of Oil, Gas & Mining prior to engaging in and carrying out any coal mining and reclamation operations" on Emery County Road No. 304 in violation of Utah Administrative Code 614-300-112.400. A true and correct copy of the TDN is attached as Exhibit "B."

6. The State of Utah declined to require the operator to include Emery County Road No. 304 in the Deer Creek permit on

the basis that (1) OSM itself had found the Petitioner to be in compliance when the Deer Creek permit was issued and (2) the State could not make a public road determination until OSM approved the State's pending public road regulations. Letter to Robert H. Hagen dated March 27, 1991, a true and correct copy of which is attached hereto as Exhibit "C."

7. Effective February 25, 1991, the Board of Oil, Gas and Mining adopted emergency rules defining "public road" as follows:

Public road means a road, (a) which has been designated as a public road pursuant to the laws of the jurisdiction which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, and (c) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

A true and correct copy of the Board Order dated February 25, 1991 is attached hereto as Exhibit "D."

8. Although these rules were submitted by DOGM to OSM by letter dated March 1, 1991, they were not approved as a Utah State Program Amendment when the TDN was issued on March 21, 1991. March 27, 1991 letter, attached hereto as Exhibit "C," and the March 1, 1991 letter, a true and correct copy of which is attached hereto as Exhibit "D-1."

9. By letter dated March 28, 1991, the State requested Petitioner to secure a letter from Emery County concerning the public road status of Emery County Road No. 304. A

true and correct copy of the March 28, 1991 letter is attached hereto as Exhibit "E."

10. By letter dated May 21, 1991, the Emery County Road Department stated that Deer Creek Road No. 304 is a public road pursuant to the laws of Emery County and the State of Utah. A true and correct copy of the letter dated May 21, 1991 is attached hereto as Exhibit "F."

11. By letter dated December 18, 1989 from the Emery County Board of Commissioners to Utah Power & Light Company, Petitioner's predecessor, Emery County indicated that road maintenance would continue on the subject road even if Deer Creek mining operations ceased. Attachments to this letter include Emery County road logs from the 1960's, 1970's and 1980's showing county maintenance, a copy of Emery County Encroachment Ordinance 8-7-85A and an encroachment permit application. A true and correct copy of the December 18, 1989 letter and enclosures is attached as Exhibit "G."

12. By letter dated February 6, 1985 to OSM Western Technical Center from the Emery County Board of Commissioners, Emery County confirmed that the subject road was listed on the Emery County road system and maintained as a county road. A true and correct copy of the letter dated February 6, 1985 is attached hereto as Exhibit "H."

13. By letter dated January 29, 1985, from OSM Western Technical Center to Utah Power & Light Company, Petitioner's predecessor in interest, OSM states that the Emery County Road No.

304 meets the definition of public road under state and federal law. A true and correct copy of the January 29, 1985 letter is attached hereto as Exhibit "I."

14. By letter dated September 20, 1984 to DOGM from the Emery County Board of Commissioners, Emery County confirmed that the subject road was listed on the Emery County road system and maintained by the County Road Department. A true and correct copy of the letter dated September 20, 1984 is attached hereto as Exhibit "J."

15. The State of Utah appealed OSM's TDN to W. Hord Tipton, OSM Deputy Director, by letter dated April 29, 1991. A true and correct copy of the letter dated April 29, 1991 is attached hereto as Exhibit "K."

16. By letter dated June 4, 1991, W. Hord Tipton, OSM Deputy Director, denied the State's TDN appeal. A true and correct copy of the June 4, 1991 letter is attached hereto as Exhibit "L."

17. By letter dated June 19, 1991, the State appealed W. Hord Tipton's decision to Harry Snyder, Director of OSM. A true and correct copy of the June 19, 1991 letter is attached hereto as Exhibit "M."

18. The State had received no response to this appeal as of June 26, 1991, when the NOV was issued to Petitioner.

ARGUMENT

I. **EMERY COUNTY ROAD NO. 304 IS A PUBLIC ROAD AND DOES NOT CONSTITUTE SURFACE COAL MINING OPERATIONS SUBJECT TO PERMIT**

The NOV cites Petitioner for failure to permit Emery County Road No. 304 pursuant to 30 C.F.R. § 773.11(a) which provides:

. . . No person shall engage in or carry out any surface coal mining operations, unless such person has first obtained a permit issued by the regulatory authority . . . .  
[emphasis added].

30 C.F.R. § 773.11(a) (1990). In addition, the NOV cites Petitioner for violations of Utah Administrative Code ("U.A.C.") 614-300-112.400 (1990) which provides, ". . . all persons who engage in and carry out any coal mining and reclamation operations will first obtain a permit from the Division . . ."

[emphasis added]. However, Emery County Road No. 304 is a public road and therefore does not meet the definition of "surface coal mining operations" under Section 701(28)(B) of the federal Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S. Code § 1291(28)(B) (1982) or "coal mining and reclamation operations" under § 40-10-3(17)(18) of the Utah Coal Mining and Reclamation Act ("UMCRA").

In Harman Mining Corp. v. OSMRE, 659 F.Supp. 806 (W.D. Va. 1987), federal district Judge Williams ruled that public roads do not constitute "surface coal mining operations" as that term is defined in Section 701(28)(B) of SMCRA. This ruling was specifically confirmed and followed by the Interior Board of Land

Appeals upon review of the matter on remand in Harman Mining Corp. v. OSMRE, 110 IBLA 98 (1989), and is controlling in this case. The regulatory context in which the NOV was issued at the Deer Creek Mine is nearly identical to that arising in Harman. Judge Williams and IBLA adopted the same criteria and analysis to determine that a county road was a public road not subject to permit. As in this case, OSM and state haul road policies were invalidated under Judge Flannery's ruling In re Permanent Surface Mining Regulation Litigation, 320 F.Supp. 1519 (D.C.C. 1985) finding the definition of "affected area" at 30 C.F.R. § 701.5 inconsistent with the definition of "surface coal mining operations" under Section 701(28) of SMCRA. Under the facts in Harman, OSM had not adopted a new rule; therefore, Judge Williams was left with no federal regulation concerning what constitutes a public road. 659 F.Supp. at 810. Similarly in this case, OSM has still neither adopted a new public road policy nor approved Utah's emergency regulations defining public roads.

Without definition under state or federal regulatory programs, Judge Williams looked to Section 701(28) of SMCRA which defines "surface coal mining operations" to include:

The areas upon which [surface coal mining] activities occur or where such activities disturb the natural land surface, such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the use of existing roads to gain access to the site of such activities for haulage . . . . [emphasis added].

Judge Williams rejected a literal interpretation of Section 701(28)(B) of SMCRA on the basis that:

Congress did not anticipate that operators would have to permit interstate highways or four lane state routes nor that they would have to permit every road used to haul coal, whether four lane or two lane, state or county, paved or unpaved, or even public or private.

659 F.Supp. at 811. The strict constructionist view of Section 701(28)(B) of SMCRA was rejected in favor of an examination of the evidence in the record regarding whether the County roads in question were public roads. 659 F.Supp. at 812. Judge Williams reviewed the record to determine public use of the roads, use of public money to construct, improve and maintain the roads and unrestricted access of the public to the roads. In addition, Judge Williams looked to state and county law in determining whether the roads are public. 659 F.Supp. 812. The IBLA closely followed Judge Williams' analysis in making a public road determination resulting from remand of this issue to the U.S. Department of the Interior. Harman Mining Corp. v. OSMRE, 110 IBLA 98. Due to the similarity in factual and regulatory contexts between Harman and this matter, the public road criteria adopted therein controls the determination in this case.

Under the public road criteria developed by Judge Williams in Harman, Emery County Road No. 304 clearly constitutes a public road which is not subject to permit under SMCRA or UCMRA. Correspondence from Emery County concerning this matter provides an abundance of evidence to document the public road

status of the subject road. A letter dated May 21, 1991, from the Emery County Road Department to Petitioner clearly evidences that Emery County Road No. 304 is a public road under the laws of Emery County and the State of Utah. See May 21, 1991 letter attached hereto as Exhibit "F." Public use dates back to 1892 as evidenced on Emery County plats dated November 2, 1901. Id. Historic uses by ranchers, homesteaders and livestock interests is documents in a December 18, 1989 letter from Emery County Commission attached hereto Exhibit "G." Emery County Road No. 304 is classified as a Utah State Class B county road belonging to Emery County under a 1983 Utah Department of Transportation agreement. May 21, 1991 letter. Substantial public expenditures have been made on Emery County Road No. 304 including \$17,724.00 expended in 1990, \$640,152.00 expended in 1989, and \$5,978.00 expended in 1988. Id. Emery County road logs from the 1960's, 1970's and 1980's, attached to the December 18, 1989 letter, demonstrate continuous public maintenance. State construction standards have been applied to Emery County Road No. 304 including AASHTO standards on geometric design of highways and the State of Utah standard specification for road and bridge construction. Letter of May 21, 1991. Finally, the letters dated May 21, 1991 and December 18, 1989 confirm that Petitioner does not have authority to deny public access to Emery County Road No. 304 nor does Petitioner have the rights to maintain or encroach upon Emery County Road No. 304 pursuant to Emery County Encroachment Ordinance No. 8-7-85A.

The Emery County Road Department's May 21, 1991 and December 18, 1989 responses are consistent with a February 6, 1985 letter from the Emery County Board of Commissioners to OSM Western Technical Center regarding Emery County Road No. 304. See February 6, 1985 letter attached hereto as Exhibit "H." This letter confirms that the road is listed on the Emery County road system and that the county receives public funds for its maintenance. Id. In addition, a letter from the Emery County Commission to DOGM dated September 20, 1984, attached hereto as Exhibit "J," also confirms this classification and maintenance by the Emery County Road Department.

In sum, under the public road criteria set forth by Judge Williams in Harman as confirmed and followed by the IBLA, Emery County Road No. 304 is used by the public, maintained with public funds and is outside the jurisdiction and control of the Petitioner. Therefore, Petitioner respectfully requests that the NOV requiring, permitting and/or reclamation of Emery County Road No. 304 be vacated in its entirety.

**II. THE STATE OF UTAH HAS TAKEN APPROPRIATE ACTION IN RESPONSE TO THE TDN**

OSM has inappropriately issued the NOV over the objection of the state regulatory authority after the State took appropriate action in response to the TDN. The State determined that no enforcement action was appropriate in response to the TDN. The IBLA will vacate a notice of violation where the record establishes that the action of the state was "appropriate" under

the specific facts of the case. Harman Mining Corp. v. OSMRE, 110 IBLA 98 (1989); Turner Brothers Inc. v. OSMRE, 99 IBLA 87 (1987). In Harman Mining Corp. v. OSMRE, 110 IBLA 98 (1989), the State of Virginia had taken appropriate action in response to OSM's TDN regarding the permitting of a county road. In that case, the State of Virginia determined that the county road was a public road not subject to permitting and, therefore, took no enforcement action under the TDN. On remand of the OSM's subsequent NOV, the IBLA applied the public road criteria developed in Harman Mining Corp. v. OSMRE, 659 F.Supp. 806 (W.D. Va. 1987), and determined that the state action in response to the TDN was appropriate, thereby vacating OSM's subsequent NOV.

Similarly, in this case in responding to OSM's TDN, the State of Utah indicated that no enforcement action against Petitioner was appropriate. See DOGM letter dated March 27, 1991 attached hereto as Exhibit "C." The State responded to the TDN by noting that OSM had found Petitioner to be in compliance with State and federal law upon review and issuance of the Deer Creek Permit. Id. The State also asserted that OSM's TDN was untimely due to the fact that the State had adopted public road definitions and policies to OSM for approval and OSM approval was pending at the time the TDN was issued. Id. OSM upheld the TDN over the protest of the State by letter dated June 4, 1991, attached hereto as Exhibit "L." However, the State did query the operator regarding the status of Emery County Road No. 304 pursuant to the criteria adopted in its emergency rule making. The response

received by the State clearly corroborates a finding that Emery County Road No. 304 is a public road not subject to permit under the Utah State program. Letter dated May 21, 1991 from Emery County Road Department, attached hereto as Exhibit "F." Therefore, the State's action was appropriate in response to the TDN, the NOV was inappropriately issued and should be vacated.

**III. NEITHER DOGM NOR OSM HAS JURISDICTION OVER EMERY COUNTY ROAD NO. 304**

Correspondence in the record from the Emery County Commission and the Emery County Road Department confirms that Emery County Road No. 304 is a Class B road maintained by Emery County. Letter dated May 21, 1991 from Emery County Road Department; letters dated December 18, 1989, February 6, 1985 and September 20, 1984 from Emery County Commission. Pursuant to Utah Code Ann. § 27-12-22, Class B County roads are within the exclusive jurisdiction and control of the county commission:

27-12-22. County Roads-Class B Roads. All public roads and streets within the state not designated as state highways which are situated outside of incorporated cities and towns, and such roads and streets situated within incorporated cities and towns, have been designated as county roads and those public roads located within a national forest and constructed and/or maintained by the county under agreement with the appropriate federal agency, shall be known as county roads and shall be under the jurisdiction and control of the county commissioners of the respective counties.

Similarly, Emery County has enacted Encroachment Ordinance No. 8-7-85A (the "Ordinance") concerning any activities

affecting the county road right of way. All right of way activity is subject to a permit under this ordinance with final approval subject to the sole discretion of Emery County. A copy of the Ordinance is attached to the Emery County Commission's letter of December 18, 1989. Under the Ordinance, "encroachment" means "the disturbance of any roadway or right of way, whether by upgrading, constructing, reconstruction, surfacing or resurfacing, alignment or realignment, excavation, boring, obstruction, vibrosizing or extraordinary short term use." Clearly, regrading and revegetating Emery County Road No. 304 in connection with reclamation activities would constitute an encroachment under the Ordinance.

In addition to these provisions of state and county law, it is clear that reclamation of a public road under the terms required by the NOV is inconsistent with public policy. Neither Petitioner, OSM or DOGM has jurisdiction or authority to dismantle and reclaim a public roadway. In this regard, OSM's NOV is arbitrary and capricious and in bad faith and may constitute grounds for recovery of Petitioner's attorneys' fees and costs.

In sum, under Utah State law and Emery County Ordinance and sound public policy, neither Petitioner, OSM nor DOGM have jurisdiction or authority to permit and/or reclaim Emery County Road No. 304. Therefore, the NOV must be vacated.

**IV. THE NOV IS BARRED BY THE APPLICABLE STATUTES OF LIMITATION**

The NOV alleges that Petitioner is in violation of UCMRA and implementing rules at U.A.C. 614-300-112.400 and of SMCRA and implementing rules at 30 C.F.R. § 773.11(a). The NOV is, however, barred under the statutes of limitation of both state and federal law. In enforcing Utah law, OSM is subject to the two year statute of limitations applicable to UMCRA. Pursuant to Section 40-8-9(2) of UMCRA:

No suit, action or other proceeding based upon a violation of this chapter or any rule or order issued under this chapter may be commenced or maintained unless the suit, action or proceeding is commenced within two years of the date of the alleged violation.

This two year statute of limitations is incorporated into UCMRA pursuant to Utah Code Ann. § 40-10-4. The applicable statute of limitations for enforcing violations under SMCRA is set forth at 28 U.S.C. § 2462 as "five years from the date when the claim first accrued."

As indicated in a letter to Petitioner's predecessor, Utah Power & Light Company, dated January 29, 1985, the OSM Western Technical Center found Emery County Road No. 304 met the definition of public road under 30 C.F.R. § 761.5 and DOGM's public road policy adopted on January 27, 1984. Therein, OSM states:

A change in permit boundary to include the road would result in no change in performance standards and no increase in environmental protection. OSM and DOGM have therefore concluded that there is no need to change the permit boundary to include the access road.

Shortly after OSM sent this letter confirming the public road status of Emery County Road No. 304, Judge Flannery entered his decision in In re Permanent Surface Mining Regulation Litigation, 620 F.Supp. 1519 (D.C.C. 1985), remanding 30 C.F.R. § 701.5 and finding OSM's public road policy to be inconsistent with Section 701(28) of SMCRA. Therefore, under OSM's interpretation of SMCRA, as set forth in the June 26, 1991 NOV, Petitioner has been in violation of state and federal law since Judge Flannery's ruling in 1985. However, OSM did not issue its NOV in this matter for some six years following the ruling in In re Permanent Surface Mining Regulation Litigation. During this period, the Deer Creek permit was reviewed by state and federal regulatory authorities and reissued on February 7, 1986. Therefore, the NOV issued more than six years from the date of the alleged violation, is barred by the applicable statute of limitations under both state and federal law and must be vacated in its entirety.

**V. THE NOV IS BARRED BY WAIVER, ESTOPPEL AND LACHES**

If for some reason the NOV is not barred by the statute of limitations under state and federal law, the NOV is barred by the common law doctrines of waiver, estoppel and laches. As indicated above, Emery County Road No. 304 has been used as a public road dating back as far as 1901. Since enactment of SMCRA in 1977 until the recent issuance of the NOV, OSM has consistently found that Emery County Road No. 304 is a public road not subject to permitting or regulatory requirements of SMCRA. Thus,

by letter dated January 29, 1985 from OSM Western Technical Center to Utah Power & Light Company, Petitioner's predecessor in interest, OSM states that Emery County Road No. 304 meets the definition of public road under state and federal law. In addition, OSM did not find Emery County Road No. 304 to be a surface coal mining operation when the Deer Creek permit was reviewed by state and federal regulatory authorities and reissued on February 7, 1986. The State clearly relied on OSM's determination of the operator's compliance in issuing the Deer Creek permit to Petitioner.

A period of more than six years has passed since Judge Flannery's ruling in In Re Permanent Surface Mining Regulation Litigation, 320 F.Supp. 519 (D.C.C. 1985). During the six year period of time since that ruling, OSM failed to promulgate a regulation regarding public roads. However, OSM has adopted a policy regarding Emery County Road No. 304. In its letter of January 29, 1985, OSM states that the Emery County Road No. 304 is a public road not subject to permit. Similarly, OSM approved reissuance of the Deer Creek permit on February 7, 1986 without requiring regulation of Emery County Road No. 304. Therefore, OSM has either waived regulation of Emery County Road No. 304 or has applied a policy of non-regulation for sufficient length of time that it is now barred by waiver or laches from issuing the NOV.

For the reasons stated above, Petitioner requests the Office of Hearings & Appeals to vacate the NOV in its entirety.

DATED this 26<sup>th</sup> day of July, 1991.

  
Denise A. Dragoo, Esq.  
FABIAN & CLENDENIN,  
a Professional Corporation  
Attorneys for Petitioner  
215 South State Street  
Twelfth Floor  
P.O. Box 510210  
Salt Lake City, Utah 84151  
(801) 531-8900

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Petition for Review and Request for Hearing to be mailed, via certified mail, return receipt request, this 26<sup>th</sup> day of July, 1991, to:

Assistant Regional Solicitor for Surface Mining  
United States Department of the Interior  
P.O. Box 25007  
Denver Federal Center  
Denver, Colorado 80225-0007



DAD:072491a

U.S. DEPARTMENT OF THE INTERIOR Office of Surface Mining Reclamation and Enforcement NOTICE OF VIOLATION			Notice of Violation Number <b>RECEIVED</b> 91 02 244	
2. Name Pacificorp Electric Operations			Originating Office Address USDI-OSM	
3. Mailing Address 324 South State Street, Salt Lake City, UT 84126			Albuquerque Field Office 625 Silver Ave., SW, #310	
4. Name of Mine Deer Creek			Albuquerque, NM 87102	
5. Telephone Number (801) 363-8851			Telephone Number	
6. County Emery			State Utah	
7. Operator's Name (If other than permittee) Energy West Mining Company			9. Date of Inspection June 26, 1991	
8. Mailing Address Post Office Box 310, Huntington, UT 84528			10. Time of Inspection From 9:00 <sup>a.m.</sup> To 1:30 <sup>p.m.</sup>	
11. State Permit Number ACT/015/018	12. NPDES Number	13. MSHA ID Number 42-00121	14. OSM Mine Number N/A	
<p>UNDER THE AUTHORITY OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 (P.L. 95-87; 30 U.S.C. 1201), THE UNDERSIGNED AUTHORIZED REPRESENTATIVE OF THE SECRETARY OF THE INTERIOR has conducted an inspection of the above mine on the above date and has found violation(s) of the Act, the regulations or required permit condition(s) listed in the attachment(s). This Notice constitutes a separate Notice of Violation for each violation listed.</p> <p>You must abate each of these violation(s) within the designated abatement time. You are responsible for doing all work in a safe and workmanlike manner.</p> <p>THE UNDERSIGNED AUTHORIZED REPRESENTATIVE HEREBY FINDS THAT THIS NOTICE <input checked="" type="checkbox"/> DOES NOT <input type="checkbox"/> DOES REQUIRE CESSATION OF MINING EXPRESSLY OR IN PRACTICAL EFFECT. Therefore, you <input type="checkbox"/> are <input checked="" type="checkbox"/> are not entitled to an informal public hearing on request, within 30 days after service of this notice (30 CFR 722.15).</p> <p>This Notice shall remain in effect until it expires as provided on the reverse or is modified, terminated, or vacated by written notice of an authorized representative of the Secretary. The time for correction may be extended by an authorized representative for good cause. If you need additional time to correct the violation(s), please contact the field office named above.</p>				
<b>IMPORTANT—Please Read Information on the Back of this Page</b>				
15. Print Name of Person Served Guy Davis		18. Date of Service June 26, 1991		
16. Print Title of Person Served Environmental Engineer		19. Print Name of Authorized Representative Gary L. Fritz		
17. Signature of Person Served Guy Davis		20. Signature of Authorized Representative Gary L. Fritz		ID Number 244

**NOTICE OF VIOLATION (CONTINUATION)**

**NATURE OF PERMIT CONDITION VIOLATED, PRACTICE OR VIOLATION**

Failure to first obtain a permit from the Division (DOGM) prior to engaging in and carrying out any coal mining and reclamation operations.

**PROVISION(S) OF THE REGULATIONS, ACT OR PERMIT VIOLATED**

UCA 40-10-1 et seq.

R614-300-112.400

PL 95-87 Sec. 506(a)

30 CFR 773.11(a)

**PORTION OF THE OPERATION TO WHICH NOTICE APPLIES**

This Notice applies to the Deer Creek Mine access road, from the present permit boundary (boundary lines of Sections 1 & 2, T17S, R7E) to the entrance of the Huntington Power Plant. (Coal yard entrance) SE.

**CORRECTIVE ACTION REQUIRED (Including Interim Steps, if Any)**

- (1) Reclaim within 80 days or submit a complete and adequate plan, in accordance with R614-300 and the State program, to permit and bond the access road identified above to the Utah Division of Oil, Gas and Mining (DOGM) within 30 days of receipt of this Notice.
- (2) Diligently pursue abatement of this Notice (plan approval) not to exceed 80 days from Notice issuance.
- (3) Implement permitting and bonding plan as per plan approval.
- (4) Cease the further construction or improvement of the access road until permitted in accordance with the approved State program.
- (5) Cease any practice or correct any condition resulting in adverse environmental impacts.

**TIME FOR ABATEMENT (Including Time for Interim Steps, if Any)**

- (1) Reclaim within 80 days or submit plan DOGM within 30 days from receipt of this Notice at 4:30 p.m., by the thirtieth day (7/26/91).
- (2) 80 days from receipt of this Notice at 4:30 p.m., by the eightieth day (9/14/91).
- (3) Upon plan approval.

EW 102 / TON 1013

UNITED STATES DEPARTMENT OF THE INTERIOR  
Office of Surface Mining  
Reclamation and Enforcement  
TEN-DAY NOTICE

MAR 27 1981

Originating Office: OSMRE, U.S. DI  
Albuquerque Field Office  
625 Silver Ave. SW, Suite 310  
Albuquerque, NM 87102  
Telephone Number: (505) 766-1486

Number: X-91-02-246-1 TV 1

Ten-Day Notice to the State of Utah - Division of Oil, Gas and Mining

You are notified that, as a result of a federal inspection (e.g. a federal inspection, citizen information, etc.) the Secretary has reason to believe that the person described below is in violation of the Act or a permit condition required by the Act. If the State Regulatory Authority fails within ten days after receipt of this notice to take appropriate action to cause the violation(s) described herein to be corrected, or to show cause for such failure and transmit notice of your action to the Secretary through the originating office designated above, then a Federal inspection of the surface coal mining operation at which the alleged violation(s) is occurring will be conducted and appropriate enforcement action as required by Section 521(a)(1) of the Act will be taken.

Permittee: Pacific Corp Electric Operations County: Emery  Surface  
(Or Operator if No Permit)  
Mailing Address: 324 South State St, Salt Lake City, UT 84120  Underground  
Permit Number: ACT/015/018 Mine Name: Deer Creek  Other

NATURE OF VIOLATION AND LOCATION: Failure to obtain a permit from the Utah Division of Oil, Gas and Mining prior to engaging in and carrying out any coal mining and reclamation operations!  
Section of State Law, Regulation or Permit Condition believed to have been violated: R614-300-112,400

NATURE OF VIOLATION AND LOCATION: Located at The Deer Creek mine access road, from the present permit boundary (boundary of sections 122 T175 R7E) to the entrance to The Huntington  
Section of State Law, Regulation or Permit Condition believed to have been violated:

NATURE OF VIOLATION AND LOCATION: Power Plants  
Section of State Law, Regulation or Permit Condition believed to have been violated:

Remarks or Recommendations: Submit permitting and bonding information to DGM for access road described above.

Date of Notice: 3/21/81 Signature of Authorized Rep.: [Signature]  
od 100-1-# Print Name and ID: Substantive Engineer  
0365-11247

United States Department of the Interior  
Office of Surface Mining  
Mine Site Evaluation Report

For Office Use Only

1a  
Y Y M M

1b  
Batch

1c  
Report

2. Name of Permittee  
Pacific Corp Electric

3. Street Address  
324 S. State St

4. City  
Salt Lake City UT

6. Zip Code  
84124

7. Area Code  
801

8. Telephone Number  
220-2000

9. MSHA Number  
42-00121-910320

10. Date of Inspection  
(Y Y M M D D)

11. State Permit Number  
ACT/0157018

12. Name of Mine  
Deer Creek

13. County Code  
015 UT

14. State Code  
UT

15. Strata

16. State Area Office

17. OSM Field Office No.  
02

18. OSM Area Office No.

19. OSM Sample No.  
0000

20. Type of Inspection (Code)  
50

21. Joint Inspection  
Yes No  
 Yes  No

22. Inspector's ID No.  
246

23. Status  
A  02 Type of Permit  
B  Mine Status (Code)  
C  20 Type of Facility (Code)  
D  14660.0 Number of Permitted Acres  
E  50053.0 Number of Disturbed Acres

24. Type of Activity (check applicable boxes).  
A  Steep Slope  
B  Mountain Top Removal  
C  Prime Farmlands  
D  Alluvial Valley Floors  
E  Anthracite  
F  Federal Lands  
G  Indian Lands  
H  Other

25. Performance Standards (Codes)  
Instructions: Indicate compliance code. For any standard marked 2 or 3 provide narrative to support this determination.  
Standards That Limit the Effects to the Permit Area  
A  Distance Prohibitions  
B  Mining Within Permit Boundaries  
C  Signs and Markers  
D  Sediment Control Measures  
E  Design and Certification Requirements—Sediment Control  
F  Effluent Limits  
G  Surface Water Monitoring  
H  Ground Water Monitoring  
I  Blasting Procedures  
J  Haul/Access Road Design and Maintenance  
K  Refuse Impoundments  
L  Other: Specify Failure to obtain a permit for access road  
Standards That Assure Reclamation Quality and Timeliness  
M  Topsoil Handling  
N  Backfilling and Grading  
O  Following Reclamation Schedule  
P  Revegetation Requirements  
Q  Disposal of Excess Spoil  
R  Handling of Acid or Toxic Materials  
S  Highwall Elimination  
T  Downslope Spoil Disposal  
U  Post Mining Land Use  
V  Cessation of Operations: Temporary  
W  Other

United States Department of the Interior  
Office of Surface Mining  
Mine Site Evaluation Inspection Report

26. State Permit Number

ACT / 015 / 018

27. Date of Inspection  
(Y Y M M D D)

9 / 0 3 / 2 0

28. Yes  No  Do mining and reclamation activities on the site comply with the plans in the permit?  
 If no, provide narrative to support this determination.

29. Indicate number of complete and partial inspections conducted by the State to date for this annual review period:

29a.  Number of Completes

N/A

29b.  Number of Partials

30. Indicate number of complete and partial inspections required by the State during this annual review period:

30a.  Number of Completes

N/A

30b.  Number of Partials

31. Has inspection frequency been met?

Yes No

31a.  Completes

N/A

Yes No

31b.  Partials

32. FEDERAL ENFORCEMENT INFORMATION. [Enter violation number. Check appropriate box(es)]

Ten-Day Notice No.

11-02-24A-001

Notice of Violation No.

Cessation Order No.

Violation Codes

A <input checked="" type="checkbox"/>	Failure to obtain a permit for access road	<input type="checkbox"/>	<input type="checkbox"/>	Authorizations to Operate
B <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Signs and Markers
C <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Backfilling and Grading
D <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Highwall Elimination
E <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Rills and Gullies
F <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Improper Fills
G <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Topsoil Handling
H <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Sediment Ponds
I <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Effluent Limits
J <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Water Monitoring
K <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Buffer Zones
L <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Roads
M <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Dams
N <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Blasting
O <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Revegetation
P <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Spoil on the Downslope
Q <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Mining Without Permit
R <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Exceeding Permit Limits
S <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Distance Prohibitions
T <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Toxic Materials
U <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	Other Violations

33. Name of Authorized Representative (print or type)

Jeffrey L. Zing

Signature of Authorized Representative

Date 4/5/91

Signature of Reviewing Official

Date 4/8/91

34. Administrative Information

- a  04.0 Permit Review (Hours)
- b  03.0 Travel Time (Hours)
- c  04.0 Inspection Time (Hours)
- d  02.0 Report Writing Time (Hours)

March 20, 1991

Permittee: PacifiCorp Electric  
324 S. State St.  
Salt Lake City, UT 84124

Mine: Deer Creek  
Utah Permit No. ACT/015/018

Inspection Type: Partial  
Participants: Bill Malencik, DOGM; Guy Davis, PacifiCorp; Jeff Zingo, OSM/#246.

The purpose of this inspection was to review the conditions of the access road to the mine. Messrs. Malencik, Davis, and I drove to the mine and inspected the road. Following are my findings:

- all of the traffic using the access road from the Huntington power plant to the mine were "mine traffic";
- the road is paved and approximately 30' wide - 50' to 75' with berms;
- the distance from the power plant to the mine gate is approx. 1.6 miles; from the power plant to the permit boundary (at the line between sections 1&2, T17S, R7E) is 0.6 miles;
- according to Mr. Davis the county maintains the road to the mine gate;

On 3/21/91 Ten-Day Notice #91-02-246-1 was issued for failure to obtain a permit for the access road to the mine.

No other action was taken or problems noted during this inspection.



# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Burgarter

Governor

Dee C. Hansen

Executive Director

Dianne R. Nielson, Ph.D.

Division Director

355 West North Temple

3 Triad Center, Suite 350

Salt Lake City, Utah 84180-1203

801-538-5340

March 27, 1991

CERTIFIED RETURN RECEIPT REQUESTED  
No. P 540 714 141

Mr. Robert H. Hagen, Director  
Albuquerque Field Office  
Office of Surface Mining  
Reclamation and Enforcement  
Suite 310, Silver Square  
625 Silver Avenue, S.W.  
Albuquerque, New Mexico 87102

Dear Mr. Hagen:

Re: TDN X91-02-246-001 TV1, PacifiCorp Electric Operations, Deer Creek Mine,  
ACT/015/018, Folder #5, Emery County, Utah

This letter is in response to the above-referenced Ten-Day Notice, certified copy received March 25, 1991.

Number 1 of 1 reads: "Failure to obtain a permit from the Utah Division of Oil, Gas and Mining prior to engaging in and carrying out any coal mining and reclamation operations located at the Deer Creek Mine access road, from the present permit boundary (boundary of Sections 1 and 2, T175, R7E) to the entrance to the Huntington Power Plant." Regulation citation: R614-300-112.400

Division Response:

I have enclosed pages 11.1 and 11.2 from the Decision Document. The MRP, as approved by OSM, clearly differentiates haul roads from state highway 31 (11.1, paragraph 4).

On pages 11.2, OSM made a finding that the applicant was in compliance with the requirements of the regulations at the time of approval. Subsequent to permit approval, this permit has undergone reviews at the mid-permit term and renewal. OSM did not object to the permit renewal.

Subsequent to the renewal, DOGM's Board modified by emergency rulemaking the definition of "road" and "public road" (2-25-91). You were notified of this emergency rulemaking by letter from the Division Director dated March 1, 1991.

Page 2  
Mr. Robert H. Hagen  
March 27, 1991

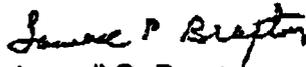
The Division feels the issuance of the TDN after promulgation of the emergency rulemaking denies the Division reasonable time in which to manage and enforce its program. The regulation cited in the TDN reads:

"All persons who engage in and carry out any coal mining and reclamation will first obtain a permit from the Division. The applicant will provide all information in an administratively complete application for review by the Division in accordance with R614-300 and the state program."

The adequacy of the original permit and OSM's findings of compliance with respect to roads have not been a subject of enforcement heretofore. The Division has established and implemented a policy and action plan for reviewing roads under the new rule. In the past, OSM has provided sufficient time for DOGM to implement new rules. Failure of OSM to provide such time in this instance is an arbitrary and capricious action on OSM's part.

The TDN should be withdrawn pending Utah's review under the emergency and finally approved formal rule.

Sincerely,



Lowell P. Braxton  
Associate Director, Mining

Enclosures  
cc: P. Grubaugh-Littig  
D. Haddock  
J. Helfrich  
M154/28&29

Revegetation is considered feasible, though difficult, on steep slopes. The quality of the planting medium, coupled with the low average annual precipitation, support this premise. It is likely that several years will be required before vegetative cover approaches assumed premining levels. However, the applicant has proposed to use plant species and employ revegetation techniques which are appropriate, given projected post-grading conditions, for attaining revegetation goals. The commitment to irrigate if initial plantings fail significantly increases the feasibility of revegetation. Results of test plot studies will aid in determining the potential success of revegetation and, through appropriate modifications where necessary in the final revegetation plan, increase the feasibility of revegetation.

## XI. ROADS

### 11.1 Description of Applicant's Proposal

There are three facility roads at the Deer Creek Mine operation, identified as follows: (1) public road providing access to the mine, (2) coal facilities access road, and (3) mine fan access road.

The mine access road is asphalt-surfaced, and extends three miles from State Highway 31 in Huntington Canyon. This road is owned and operated by the Emery County Board of Commissioners (February 6, 1985 letter from Clyde Conover, Chairman, Emery County Board of Commissioners, to Melvin Shilling, OSM/WTC; decision document letters of concurrence). All road maintenance and repairs are the responsibility of the Emery County Road Department. A general road plan is shown on Drawings J-18 and J-19 (PAP, Vol. VII). The road width averages 20 feet, with an average road gradient of approximately eight percent until it nears the facility area. A 1,000-foot length of road from the truck loadout to the parking lot has a gradient of 18 percent. Steep, narrow canyon terrain allows no leeway for a more gradual gradient. Within the disturbed area, runoff is collected in open ditches, slot drains, and catch basins and routed through the sediment pond. Road drainages outside the portal area beyond the mine gate are maintained by the Emery County Road Department. The County has authorized UP&L's use of this road for mine access.

The coal facilities access road is a 1,000-foot-long winding gravel road up Elk Canyon which provides access to major components of the coal handling circuit. It has variable width and a grade up to approximately 25 percent; the overall grade is approximately nine percent. The road is utilized daily at low speeds by coal handling facilities labor and service personnel. Road construction was limited mainly to shallow blade work in the existing canyon soils. Runoff from this road is collected in open ditches and carried to the sediment pond.

The mine fan access road is a 1,500-foot-long gravel road winding up Deer Creek Canyon behind the office-bathhouse to the mine ventilation fan. Road gradient averages approximately 20 percent. Travel on this road is limited to once a day at low speed. The road width averages 12 feet. Drainage from the mine fan access road is collected in an open ditch in the "disturbed" drainage system.

## 11.2 Evaluation of Compliance of Proposal

Steep canyon terrain allows no leeway for a more gradual gradient. Based on topographic and other information submitted by the applicant, it appears that major construction of a complying roadway would increase environmental degradation. Its limited use at low speeds satisfies safety considerations, and the additional benefit associated with upgrading of the road does not justify the potential environmental damage. The applicant meets the requirements of Section 515 (b)(17) of SMCRA concerning access roads.

## XII. ALLUVIAL VALLEY FLOORS

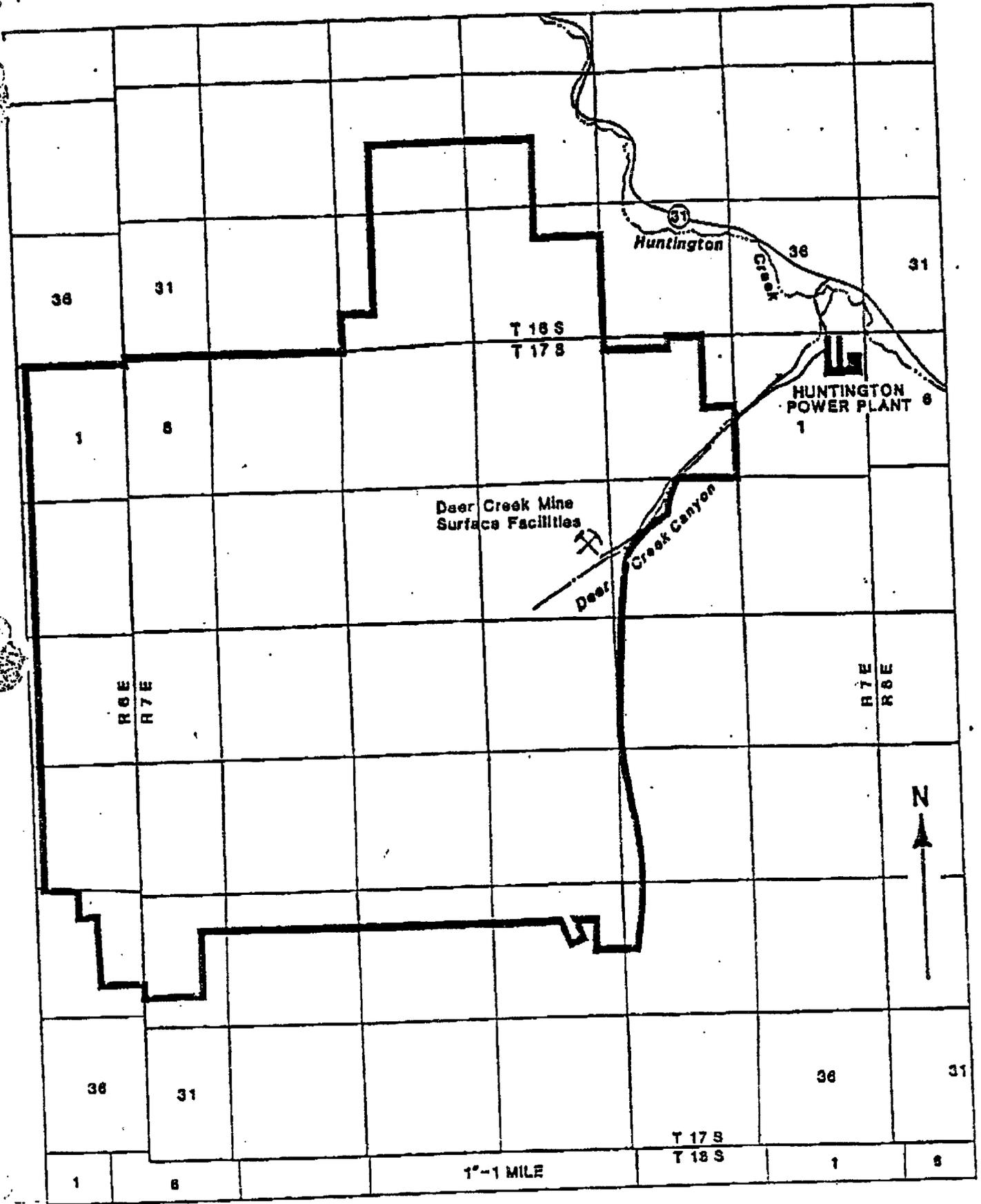
### 12.1 Description of Applicant's Proposal

The facilities of the Deer Creek Mine are situated in narrow canyons with steep sides and valley slopes. The canyons lack topsoil and do not contain irrigible land which could be used for agriculture purposes. The canyons in which the surface facilities are located contain colluvial deposits from mass movements, slope wash, debris erosion, and sheet runoff. The area is classified as an upland nonirrigible area, and therefore is not an alluvial valley floor. Disturbance or interruption of aquifers within the underground mine complex will have no effect on downstream alluvial valley floors, insomuch as the water will eventually reach the downstream portions of the drainage system. Both surface- and ground-water quality at the Deer Creek Mine is good, as well as water discharged from the mine (Probable Hydrologic Consequences; and Cumulative Hydrologic Impact Assessment Summary, Attachment A of this document).

### 12.2 Evaluation of Compliance of Proposal

#### UMC 785.19 Underground Coal Mining Activities on Areas or Adjacent to Areas Including Alluvial Valley Floors in the Arid or Semiarid Areas of Utah

As there are no alluvial valley floors on or adjacent to the permit area, and underground disturbance of aquifers will not affect downstream alluvial valley floors, the applicant is in compliance with this section.



Deer Creek Mine Permit Area

ATTACHMENT 1

MAR 04 1991

BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH

ALBUQUERQUE FIELD OFFICE

---oo0oo---

<b>MODIFICATION BY EMERGENCY</b>	:	<b>NOTICE OF</b>
RULEMAKING REGARDING	:	EMERGENCY
UTAH ADMIN. R. 614-100-200,	:	RULEMAKING
DEFINITIONS OF "ROAD" AND	:	
"PUBLIC ROAD"	:	

---oo0oo---

The Board of Oil, Gas and Mining has determined that the definition of "road" and "public road" in Utah Admin. R. 614-100-200 warrants modification by emergency rulemaking and further explanation by the Board as to its purpose and intent in adopting these rules.

FINDINGS OF FACT

THE BOARD, AFTER CAREFUL EXAMINATION FINDS THAT:

1. Utah coal regulatory program rules are required by Public Law 95-87 to be no less effective than the federal program counterpart regulations;

2. The Utah statute, Utah Code Ann. 40-10-6.5, requires as a condition of validity that the rules implementing the Utah coal regulatory program be no more stringent than those required under the counterpart federal program regulations;

3. The Board of Oil, Gas and Mining adopted definitions of "road" and "public road" in Utah Admin. R. 614-100-200 to be effective June 1, 1990 (Attachments A and B);

4. Effective April 12, 1990, the Office of Surface Mining approved the Board's definition of "public road" and disapproved the definition of "road";

5. On October 1, 1990, the Board of Oil, Gas, and Mining adopted a revised definition of "road" (Attachment A);

6. The Division has developed a proposed "Policy for Implementation of Site Specific Determinations of the Public Status of Roads" (Attachment C);

7. Reconsideration and evaluation of the permit status of those "public roads" cannot proceed in the absence of a definition of "road";

8. Mine plans approved by the Division of Oil, Gas and Mining and the Office of Surface Mining designate certain roads as "public roads" not subject to permitting under the Utah coal regulatory program;

9. Despite sufficient time and in violation of its own regulations concerning time frames for action on a program amendment, the Office of Surface Mining has failed to approve or deny the proposed program amendment for the definition of "road"; and

10. As a result of the failure of the Office of Surface Mining to take action, the Utah coal regulatory program rules contain no definitions for "road" and no exclusion of a public road from the definition of a "road" or "affected area";

#### CONCLUSIONS OF LAW

1. The Federal District Court decisions, In Re: Permanent Surface Mining Regulation Litigation (II), 620 F. Supp. 1519, 1581-82 (D.D.C. 1985) as modified by National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988) and Harmon Mining Corporation v. Office of Surface Mining Reclamation and Enforcement, 659 F. Supp. 806 (W.D. Va. 1987) did not find a requirement of inclusion of public roads in the definition of a road under § 701(28)(B) of SMCRA;

2. The existing Utah criteria concerning whether a road's nonmining use is substantial (more than incidental) has been expressly rejected and remanded in In Re: Permanent Surface Mining Regulation Litigation (II), SMCRA, and must therefore be removed from Utah Admin. R. 614-100-200 definition of "public road" as required by 51 Fed. Reg. 41960, Nov. 20, 1986; and

3. 30 C.F.R. § 701.5 provides for the exclusion of certain public roads from regulation. Therefore, the Utah coal regulatory program rules are improperly promulgated because they are more stringent than the federal counterpart regulations. Therefore, in the absence of enforceable rules for the definitions of "road" and "public road," the Utah coal regulatory program rules are less effective than the federal program counterpart regulations.

#### ORDER

NOW THEREFORE, so as to be in compliance with State and Federal law, this Board does enter into emergency rulemaking, whereby:

1. The definition of "road" as presented in proposed rulemaking in DAR File #10936, having been offered for public comment on July 26, 1990, and adopted by the Board on October 1, 1990, is to be made effective immediately, pursuant to this emergency rulemaking. The Board takes this action irrespective of the statement in Utah Admin. R. 614-100-130 regarding the effective date;

2. The definition of "public road," as amended and stated in Attachment B, is to be made effective immediately, pursuant to this emergency rulemaking;

3. Published concurrently with this notice is a Division of Administrative Rules notice of emergency rulemaking which officially enters the October 1, 1990 definition of "road" into effective rule status for a period of one hundred and twenty days from the date of this Order, with intent to complete formal rulemaking within that time period;

4. Published concurrently with this notice is a Division of Administrative Rules notice of emergency rulemaking which officially enters the amended definition of "public road" (Attachment B) into effective rule status for a period of one hundred and twenty days from the date of this order, with intent to complete formal rulemaking within that time period;

5. The effect of this emergency rulemaking is to grant to the Division the ability to effectively regulate coal haul roads in the State of Utah. Further, it provides an articulable basis for individual evaluations of roads as to their public status to determine whether or not they are subject to permitting;

6. The Division shall implement its "Policy for the Implementation of Site Specific Determinations of the Public Status of Roads" (Attachment C);

7. The Division shall develop an action plan for evaluating mine roads for permitting requirements; and

8. In accordance with the Utah Administrative Rulemaking Act (U.C.A. 63-46a-7) and Rule R2-4-8, the temporary (emergency) rule changes to R614-100-200 will be made subject to the regular rulemaking process and open for public comment at a regular hearing before the Board.

ORDERED this 25th day of February, 1991.

  
Gregory P. Williams, Chairman  
Board of Oil, Gas and Mining

Attachment A

Definition of "Road"

Adopted by Board of Oil, Gas and Mining, June 1, 1990  
Disapproved by Office of Surface Mining, April 12, 1990  
Rescinded by Board of Oil, Gas and Mining, October 1, 1990

**"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. A road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include public roads when an evaluation of the extent of the mining related uses of the road to the public uses of the road has been made by the Division or roads within the immediate mining-pit area.**

Adopted by the Board of Oil, Gas and Mining, October 1, 1990,  
pending approval by the Office of Surface Mining  
No action by the Office of Surface Mining as of February 20, 1991

**"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. A road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include ~~{public roads when an evaluation of the extent of the mining related uses of the road to the public uses of the road has been made by the Division or}~~ roads within the immediate mining-pit area~~af.}~~ and may not include public roads as determined on a site specific basis.**

ATTACHMENT B

Definition of "Public Road"

Adopted by Board of Oil, Gas and Mining, June 1, 1990  
Approved by Office of Surface Mining, April 12, 1990

"Public Road" means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, (c) for which there is substantial (more than incidental) public use, and (d) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

Amended and adopted by Board of Oil, Gas and Mining as emergency rule, February 25, 1991  
Proposed to Office of Surface Mining for program amendment,  
February 25, 1991

"Public Road" means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, ~~((c) for which there is substantial (more than incidental) public use, )~~ and ~~((d)~~ (c) which meets road construction standards for other public roads of the same classification in the local jurisdiction.



State of Utah  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangert  
Governor  
Dee C. Hansen  
Executive Director  
Dianne R. Nielson, Ph.D.  
Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-538-5340

ATTACHMENT C

DIVISION OF OIL, GAS AND MINING  
POLICY FOR THE IMPLEMENTATION OF SITE SPECIFIC  
DETERMINATIONS OF THE PUBLIC STATUS OF ROADS  
UNDER R614-100-200

Effective Date: February 25, 1991  
Authorized By: Dianne R. Nielson  
Director

Summary Determination

The purpose of this memorandum is to provide direction for Division staff in determining if an "access and/or haulage road" is a "public road" in the context of coal mining and reclamation operations under the Utah Coal Regulatory Program, Utah Code Ann. § 40-10-1 et seq. and Utah Admin. R. 614 et seq. If such a road is determined to be a "public road," it will not be subject to permitting under the Program.

Attempts to establish specific criteria which a road must meet in order to qualify as a public road have proved unworkable. Each road must be evaluated on a case-by-case basis. It is possible, however, to delineate criteria which will be considered in conducting that case-by-case determination. With that distinction in mind, the following procedure will be used to evaluate roads associated with existing and proposed Mining and Reclamation Plans. Roads associated with Reclamation Only Plans and operations in final reclamation and bond release will not be reevaluated or redesignated under this policy.

1. Identify all roads, located within the boundary of the permit area and providing access to the permit area, which will be used in conjunction with operations under the Mining and Reclamation Plan. (Roads which are presumptively subject to permitting.)
2. Consider the status or use of the road with respect to the following criteria:
  - a. Whether the road is designated as a public road pursuant to the laws of the jurisdiction in which it is located;

- b. Whether the road is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction;
  - c. Whether the road meets road construction standards for roads of the same classification in the local jurisdiction; and
  - d. Whether the permittee has authority to deny access.
3. Consider other relevant state statutes or case law on the subject of public roads.
  4. Consider other relevant facts and circumstances regarding the particular road, including existing performance standards made a part of a land use permit.
  5. Prepare a written finding as to whether the road is or is not a public road and therefore does or does not need to be permitted. Include rationale and documentation which form the basis for the determination.

#### Background

The necessity for a determination regarding permitting of a road associated with a coal mining and reclamation operation is dictated by the requirement in Utah Code Ann. § 40-10-3(18)(b) as well as § 701(28)(B) of SMCRA, where "surface coal mining operations" are defined as:

The areas upon which the activities occur or where the activities disturb the natural land surface. These [Such] areas shall also include any adjacent land the use of which is incidental to the activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activities and for haulage... (emphasis added)

Utah developed public road classification criteria February 24, 1984, which paralleled the federal criteria adopted by OSM April 5, 1983 (48 Fed. Reg. 14,814). Subsequently, the District Court for the District of Columbia (Judge Flannery) remanded the portion of the rule, the definition of "Affected Area," which dealt with public roads. In re Permanent Surface Mining Regulation Litigation, 620 F. Supp. 1519, 1581-82 (D.D.C. 1985), modified subnom., National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988). As a result, that portion of Utah's definition of "Affected Area" was also remanded under its rules on December 3, 1985. In 1985, OSM proposed to rewrite the rule defining "Affected Area." That did not occur. Instead, on November 20, 1986, (51 Fed. Reg. 41,960) OSM suspended any

possible exclusion for public roads from the definition. Road standards were clarified by OSM on November 11, 1988 (53 Fed. Reg. 45,190). In its last rulemaking, OSM stated that road classification and the jurisdictional reach of federal land management agencies regarding roads must be determined on a case-by-case basis.

The crux of the matter is that SMCRA states that every road used to gain access to a mine or for haulage related to the operations must be permitted. As John Kunz, Interior Department Staff Attorney in the Division of Surface Mining, noted in his June 13, 1990, Solicitor's Memorandum:

However, common sense dictates that in enacting § 701(28)(B), the Congress never intended that certain public roads be permitted. (p. 4)

The court, in Harman Mining Corp. v. Office of Surface Mining Reclamation and Enforcement, 659 F. Supp. 806 (W.D. Va. 1987) addressed the problem when it determined that:

Obviously, Congress did not anticipate that operators would have to permit interstate highways or four-lane state routes, nor that they would have to permit every road used to haul coal, whether four-lane or two-lane, state or county, paved or unpaved, or even public or private.

#### Factors Unique to the Utah Coal Program

The land use and management patterns of the western United States public domain and national forest lands differ markedly from other parts of the country. Land use, including use of roads, is guided by a number of entities, not the least of which are the federal land management agency and the county/state government. Furthermore, management of and changes in land use are prescribed in federal regional Resource Management Plans and Forest Management Plans. The public's use of lands in the vicinity of coal mining operations is generally not restricted, except where public safety requires. As such, the disturbed area of the mine is closed to the public and the balance of the national forest or public domain land adjacent to and associated with the mine is open to the public. Because of the significantly smaller "disturbed area" associated with an underground mining operation (constituting all operations in Utah) public access is significantly increased as compared to surface mines. Due to the multiple (open) use policy, public access to and maintenance of roads, which also access coal mines in Utah, is the rule, rather than the exception. Public bodies (federal, state, and county) maintain some degree of control over the majority of roads for the benefit of the public.

## Discussion Of Procedure

As set forth in the first paragraph of this memorandum the methodology for determining whether or not to permit a road begins with the presumptive determination that all roads are subject to permitting which are constructed, reconstructed, improved or maintained to provide access to the mine site or for haulage. This is in recognition of the clear statutory language set forth in Utah Code Ann. § 40-10-3(18)(b), and § 701(28)(B) of SMCRA. The criteria set forth and discussed below are applied to roads which meet the statutory definition of areas where, "surface coal mining operations" occur on or disturb the natural land surface.

The criteria as set forth below are used to determine when a road has become so "public" that the statutory purpose of permitting is no longer applicable.

In his June 13, 1990, Memorandum, Kunz specifically considered the use of criteria in designating public roads.

In the past, DOGM and OSM have unsuccessfully attempted to develop an exhaustive set of criteria to define what constitutes a public road. Because of the diverse facts potentially involved, this approach appears to be misguided. Rather, it is apparent that DOGM and OSM could better apply general criteria in a case-by-case approach to determine what roads should be permitted. (p. 17)

This recommendation forms the basis for the consideration of roads on a case-by-case basis using general criteria and other relevant information, as defined in the above Summary. The criteria described in the above Summary are based on Utah's definition of "Public Road" (Utah Admin. R. 614-100-200). These are the same basic criteria suggested in the Kunz Memorandum, with one notable exception, as discussed below.

When the procedure described in the above Summary is utilized, the following factors will be considered.

Whether the road is designated as a public road pursuant to the laws of the jurisdiction in which it is located (2.a)

Definitions provided in Utah Code will be used in making determinations. Under Utah Admin. R. 614-100-200, the Board has approved the following definitions:

"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. a road consists of the entire area within the right-of-way including the roadbed, shoulders,

parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include roads within the immediate mining-pit area and may not include public roads as determined on a site specific basis.

And

"Public road" means road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, (c) for which there is substantial (more than incidental) public use, and (d) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

The definition of "Road" is pending approval by OSM as a part of the Round II Rules package. The Board has recently deleted part (c) of the definition of public road, as a result of an emergency rulemaking.

Under Utah Code Ann. § 27-12-2(8), the definition of public road is further clarified:

"Public highway" means any road, street, alley, lane, court, place, viaduct, tunnel, culvert, or bridge laid out or erected as such by the public, or dedicated or abandoned to the public, or made such in an action for the partition of real property, and includes the entire area within the right-of-way.

In applying the criteria, there are initially two types of roads subject to designation as public roads:

1. Roads which are designated as a federal, state, or county roads by the respective agency with jurisdiction, and
2. Roads on national forest or public domain land which are authorized under existing law by the land management agency as roads with public access, although the road may not be specifically designated as a public road.

In the first case, the specific designation of a road as a federal, state, or county road will be grounds for an initial determination that the road is a public road and not subject to permitting. The remaining criteria will be considered with the intent of determining if there are any factors which are contrary to the initial determination that the road need not be

permitted. This approach recognizes that, in designating the road as a federal, state, or county road, the road must meet certain standards. Authority and responsibility (liability) rest with the government agency.

If the road is not designated as a federal, state, or county road, the initial determination will be that it is not a public road. The remaining criteria will be applied, again on a **case-by-case basis, to determine if there are any considerations which support determining the road to be a public road, not subject to permitting.**

Whether the road is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction (2.b)

When evaluating construction, reconstruction, improvements, and maintenance, consideration should be given to:

- Who has authority and responsibility for maintenance,
- Who performs the work,
- Who pays for the work,
- Who will be responsible for the maintenance of the work, and
- Whether the work is being done in lieu of other payments such as taxes or fees.

The issue here is not so much funding as it is authority and responsibility. If the road is designated as a federal, state, or county road, the maintenance is the ultimate responsibility of that government agency. For instance, the county may make arrangements with the coal operator to clear snow from the road in the winter. The arrangement is made out of convenience (operator has equipment nearby as opposed to county equipment which is 15 miles away), requirements for privatization of government services (such as snow removal), or other reasons. However, the responsibility (and liability) ultimately rest with the county.

One might argue that, if the operator maintains a road at no cost to the county, the road is not a public road and is therefore subject to permitting. Two contravening considerations arise. If the county is not overseeing or managing the maintenance, it may be failing to discharge its responsibility and protect itself from liability. However, it has not transferred jurisdiction (authority) or responsibility. The road is still a public road. On the other hand, if maintenance by the private entity (the operator) is monitored by the county, one might conclude that the county negotiated a very favorable deal for its constituents--reduced tax payer burden without reduced service. Again, jurisdiction (authority) and responsibility rest with the county. The road is a public road, not subject to

permitting.

Whether the road meets road construction standards for other public roads of the same classification in the local jurisdiction (2.c)

In order for a road to be designated as a federal, state, or county road, it must meet certain construction criteria. Furthermore, maintenance or reconstruction is conducted in accordance with certain standards.

Therefore, consideration of construction standards is subject to the same tests for authority and responsibility. Failure of the agency to enforce appropriate construction standards may be an act of bad faith, but it does not negate the authority and responsibility of the government for the road. The road is still a public road.

Under a different scenario, the county may enter into an agreement with the BLM for construction or maintenance of a road on public domain land. The BLM may impose county road standards. The question then is: If the road is not designated as a public road by the federal, state, or county, but county standards of maintenance are used for the work performed by the county, is it a public road? Who has authority and responsibility for the road? Again, that question would be answered based on the specific case and in consideration of relevant information.

Pre-existing special use road permits by a land management agency which reflect the land management agency's determination and implementation of performance/design standards as well as reclamation requirements and appropriate bonding provide a sufficient basis for not attempting to extend Division jurisdiction for road permitting purposes. Because the federal statute concerns itself with the impact of the surface effect of coal mining, the pre-existing federal land management disposition of impacts to the environment related to special use permits should be granted great weight by the Division in its permitting decisions.

Whether the effect of the mining use of the road is relatively minor in comparison to the other uses of the road

This criterion is proposed by the Kunz Memorandum and included in the state's initial definition of "Public Road." However, based on court rulings, this criterion is not to be used in the evaluation. As set forth above, this concept is subsumed in the original determination regarding which roads should be evaluated in the first instance.

Of particular concern as one considers this issue is

the application of a criterion addressing "more than incidental use" of a road. The court's ruling in National Wildlife Federation v. Hodel recognized the problem when it stated:

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 section 701(28) [of SMCRA] in exempting essentially all public roads where public use is more than incidental. . . . 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. (emphasis added)

There is an important distinction in the ruling. That is the distinction between the road being incidental to mining (or mining having a de minimis impact on the road) as opposed to incidental use of the road. Judge Flannery ordered the definition to be remanded because, instead of focusing on whether the road was "directly, rather than incidentally, part of the mining operation," the definition focused on "whether public use is more than incidental." When a road is reviewed for consideration as a public road exempt from permitting, the road status, not just use, should be considered.

Furthermore, it is important to understand that Judge Flannery did not establish or otherwise give deference to a road criterion which evaluated incidental or de minimis use. He simply rejected OSM's argument for the criterion. The Kunz Memorandum recognizes this when it states with respect to the remand:

Judge Flannery was not attempting to definitively define criteria that must be used to determine what constitutes a public road. (emphasis added)

More recently in Harman Mining Corp. v. Office of Surface Mining Reclamation and Enforcement, the court considered numerous factors or criteria in determining that the road in question qualified as a public road and was not subject to permitting. The criteria used by the court in its analysis included:

- Jurisdiction,
- Responsibility for maintenance,
- Construction standards, and

• Public Access

The incidence of public versus private use was not a basis for the decision although evidence of use was introduced by parties. The IBLA has since adopted the analysis of the court in Harman Mining Corp. v. Office of Surface Mining Reclamation and Enforcement in its determinations regarding public roads, placing no weight on evidence of incidence of use. Therefore, to use a criterion based on "incidental use" for the Utah Program is inconsistent with case law. This criterion, as currently stated in the Utah rule, will not be weighed in the determination of public road status and permitting requirements. Furthermore, the clause (part c of the Public Road definition) has been deleted by the Board through emergency rulemaking, in order to ensure that the Utah program is no less effective than and no more stringent than the federal program.

Consider other relevant state statutes or case law on the subject of public roads (3)

Consider any other relevant facts and circumstances regarding the particular situation (4)

The Kunz Memorandum provides a list of suggested criteria which could be used in the case-by-case evaluation (p. 16-17). Those criteria mirror those listed in the above Summary. However, Kunz is also careful to avoid inappropriately prescriptive terms.

The listed criteria must not be considered in a vacuum. ...Accordingly, the listed criteria must be considered in the context of (the) statutory provision. (p. 16)

In addition, other relevant State statutory or case law on the subject of public roads should properly be considered in the decision-making process. As the facts and circumstances of a particular situation dictate, other relevant factors should also properly be considered. (p. 17)

For example, one consideration would be whether the coal operator has the authority to deny the public access to the road. In the context of the disturbed area of the mine, when located on public domain or national forest land, it is clear that the operator can, for health/safety reasons, deny the public access to the "public land" during the life of mine. Now, consider public access in the context of a road. If a road on public domain or national forest land provides for public access, can the operator deny access to the road by the public if the operator desires to have sole use of the road, or would the operator be required to construct a separate road? If public access cannot be denied, then a road is a public road.

ATTACHMENT 2

Surface Mining Control and Reclamation Act  
30 CFR §701.5: Definitions

Utah Coal Mining and Reclamation Act  
Utah Admin. R. 614-100-200: Definitions

Public Road - no definition

Affected Area means any land or water surface area which is used to facilitate, or is physically altered by, surface coal mining and reclamation operations. The affected area includes the disturbed area; any area upon which surface coal mining and reclamation operations are conducted; any adjacent lands the use of which is incidental to surface coal mining and reclamation operations; all areas covered by new or existing roads used to gain access to, or for hauling coal to or from, surface coal mining and reclamation operations, except as provided in this definition; any area covered by surface excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, shipping areas; any areas upon which are sited structures, facilities, or other property material on the surface resulting from, or incident to, surface coal mining and reclamation operations; and the area located above underground workings. 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.

Public Road means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, and (c) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

Road means a surface right-of-way for purposes of travel by land vehicles used in surface coal mining and reclamation operations or coal exploration. A road consists of the entire area within the right-of-way, including the roadbed, shoulders, parking and side areas, approaches, structures, ditches and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations or coal exploration, including use by coal hauling vehicles to and from transfer, processing, or storage areas. The term does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas.

Road means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. a road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include roads within the immediate mining-pit area and may not include public roads as determined on a site specific basis.

### ATTACHMENT 3

"Public Road" means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, ~~((e) for which there is substantial (more than incidental) public use), and~~ ~~((d)~~ (c) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. A road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include roads within the immediate mining-pit area and may not include public roads as determined on a site specific basis.



# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangert  
Governor  
Doe C. Hansen  
Executive Director  
Dianne R. Nielson, Ph.D.  
Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-538-5340

EXHIBIT "D-1"

EW/PR/02/9A UT-610

RECEIVED-OSM

MAR 04 1991

ALBUQUERQUE FIELD OFFICE

March 1, 1991

Mr. Robert H. Hagen, Director  
Albuquerque Field Office  
Office of Surface Mining  
Reclamation and Enforcement  
Suite 310, Silver Square  
625 Silver Avenue, S.W.  
Albuquerque, New Mexico 87102

Dear Mr. Hagen:

**Re: Notice of Rulemaking and Request for Program Amendment**

Attached is the Notice of Emergency Rulemaking (Attachment 1) by the Board of Oil, Gas and Mining regarding the definitions of "public road" and the effective date of the definition of "road." As noted in the Order, the emergency rulemaking is effective for 120 days, during which time the Board will proceed with formal rulemaking and public comment and adopt final rules.

The Division hereby requests the Office of Surface Mining to initiate a program amendment for the definitions of "road" and "public road."

As the Division developed its policy and action plan for determining the permitting of roads and particularly the exemption for public roads, it became clear that the Division could not implement the plan absent a definition of "road" and a revision in the definition of "public road." As directed in the Board Order, the Division has finalized the policy and is finalizing the action plan for conducting reviews of existing roads.

In accordance with OSM's State Program Amendment Guidelines, the following responses are provided:

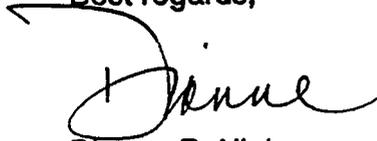
1. The section-by-section comparison is presented in Attachment 2.
2. This sub-section is included in the section-by-section comparison.
3. The requirement for change is stated above. The Division cannot perform the required reviews of roads and public road exemptions without the definitions of "road" and "public road."
4. Implementation of the review of the public road exemption was requested by OSM. Because OSM has failed to take action on the Board's previously-proposed definition of "road", and because of case law regarding the definition of "public road," the Board initiated emergency rulemaking and the Division is requesting a program amendment.

Page 2  
Mr. Robert H. Hagen  
March 1, 1991

5. Deletion/addition language is delineated in Attachment 3.
6. The definitions submitted are subject to formal rulemaking notice and could **be amended during formal rulemaking. The emergency rule is effective for 120 days. The Division will notify OSM when formal rulemaking is complete.**
7. Legal opinion not provided. See the policy statement, Attachment C of Emergency Order, for discussion and interpretation of case law.

**Please let me know if ycu have any questions.**

Best regards,

A handwritten signature in cursive script, appearing to read "Dianne".

Dianne R. Nielson  
Director

vb  
Attachments  
MI84/1&2



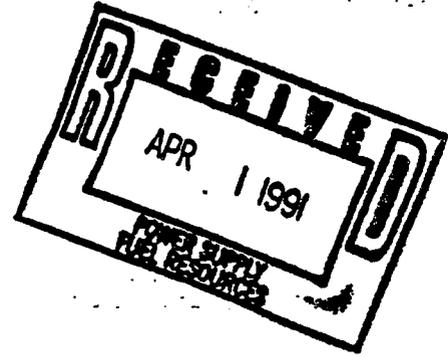
# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangerter  
Governor  
Dee C. Hansen  
Executive Director  
Dianne R. Nielson, Ph.D.  
Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-538-5340

EXHIBIT "B"



March 28, 1991

**CERTIFIED RETURN RECEIPT REQUESTED**  
No. P 540 714 144

Mr. Blake Webster, Permitting Administrator  
PacifiCorp Electric Operations  
P. O. Box 26128  
Salt Lake City, Utah 84126-0128

*Blake*

Dear Mr. Webster:

Re: Deer Creek Mine, PacifiCorp Electric Operations, ACT/015/018, Emery County, Utah

Effective February 25, 1991, the Board of Oil, Gas and Mining adopted emergency rules dealing with the definition of "Public Road" and "Road." These terms as defined in the emergency rulemaking are:

"Public Road" means a road, (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, and (c) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. A road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches and surface. The term includes access and haul roads constructed, used, reconstructed, improved or maintained for use in coal exploration, or within the affected areas of coal mining and reclamation operations, including use by coal hauling vehicles leading to processing or storage areas. The term does not include roads within the immediate mining-pit area and may not include public roads as determined on a site specific basis.

In order to make a finding that a road is a "public road" and not permissible under the Utah Coal Regulatory Program, DOGM must conduct a site-specific analysis of roads leading to permitted sites. I am asking for information on the Deer Creek road between Highway 31 and the Deer Creek Mine, crossing portions of Section 36, Township 16 South, Range 7 East and portions of Sections 1, 2, 10 and 11, Township 17 South, Range 7 East, SLBM.

Page 2  
Mr. Blake Webster  
March 28, 1991

In order to facilitate this analysis, you will need to secure a signed letter from Emery County discussing the following topics:

1. The above-referenced road is /is not a public road pursuant to the laws of that jurisdiction.
2. Designation of a public road:
  - a. When was the designation first established?
  - b. In which governmental system is the road included?
  - c. How is it classified within the public road system, and are there similar roads within the jurisdiction?
3. What public funds have been expended in maintaining the road for the following years:
  - a. 1990
  - b. 1989
  - c. 1988
4. How maintenance expenditures compare with other public roads of the same classification within the jurisdiction?
5. How construction standards for this road compare with roads of similar classification within the jurisdiction?
6. Whether PacifiCorp Electric Operations has the ability to deny public access to any of this road?

Please provide the requested information within 60 days of receipt of this letter.

If you have questions concerning the above process, please feel free to call Lowell Braxton or Ron Daniels.

Sincerely,

  
Lowell P. Braxton  
Associate Director, Mining

vb  
cc: D. Nielson  
R. Daniels  
MI78/80&81



# Emery County Road Department

P.O. Box 889  
Castle Dale, Utah 84513

Phone (801) 381-5450 or 381-2550  
Fax (801) 381-5239

May 21, 1991

J. Blake Webster  
PacifiCorp.  
324 South State  
Salt Lake City, Utah 84126-0128

Dear Mr. Webster:

In response to your letter of May 3, 1991 we submit the following in reference to Deer Creek Road #304. Using the questionnaire format which you enclosed I'll respond accordingly.

1. **QUESTION:** The above referenced road is/is not a public road pursuant to the laws of that jurisdiction.

**ANSWER:** The referenced road is a public road pursuant to the laws of Emery County and the State of Utah.

2. Designation of a public road:

- a. **QUESTION:** When was the designation first established?

**ANSWER:** Our records indicate public use at least as far back as 1892 as noted on Emery County Plat dated November 2, 1901. Other transactions are on file including a Right-of-Way deed granted by Bryon and Nida Howard (Howard Ranch/refer to Road Supervisor's letter to Val Payne dated December 18, 1989) to the State Road Commission of Utah on October 3, 1946. The Right-of-Way granted the state permission to relocate and reconstruct Highway 31 with proper reattachment of Deer Creek road to the new construction.

- b. **QUESTION:** In which government system is the road included?

**ANSWER:** Emery County Road #304 (Deer Creek Road) is a Utah State Class B county road belonging to Emery County.

Letter to J. Blake Webster  
PacifiCorp  
May 21, 1991  
Page Two

c. **QUESTION:** How is it classified within the public road system and are these similar roads within the jurisdiction?

**ANSWER:** Deer Creek Road #304 is classified as a general use public roadway under authority of Emery County. All of Emery County's roads are classified general use public roads in compliance with the Regulations Governing Class B and Class C Road Funds (Utah Department of Transportation Agreement 1983).

3. **QUESTION:** What public funds have been expended in maintaining the roads in the following years:

a. 1990:

**ANSWER:** Records indicate \$17,724 expended 1990.

b. 1989:

**ANSWER:** Records indicate \$640,152 expended 1989.

c. 1988:

**ANSWER:** Records indicate \$5,978 expended 1988.

4. **QUESTION:** How maintenance expenditures compare with other public roads of the same classification within the jurisdiction?

**ANSWER:** Expenditures seem comparable to other public roads receiving heavy haul traffic combined with general use.

5. **QUESTION:** How construction standards for this road compare with roads of similar classifications within the jurisdiction?

**ANSWER:** As public roads are rehabilitated, as was the Deer Creek road in 1989, all applicable construction standards are subscribed to (re: AASHTO Standards on Geometric Design of Highways and the State of Utah Standard Specification for Road and Bridge Construction). Because of the recent rehabilitation efforts in 1989 Deer Creek Road is superior in design to most of our older existent public roads and comparable to others of later rehabilitation conforming to applicable design and construction standards.

Letter to J. Blake Webster  
PacifiCorp  
May 21, 1991  
Page Three

6. **QUESTION:** Whether Pacific Corp Electric Operations has the ability to deny public access to any o this road?

**ANSWER:** Pacific Corp does not have authority to deny public access to any portion of Deer Creek Road #304 nor does Pacific Corp have rights to maintenance or encroachment per Emery County Encroachment Ordinance #8-7-85A. Emery County has repeatedly responded over past years, to the inquiries as to whether Deer Creek Road #304 is a county and now particularly as to whether it is a public road or not.

We hope that the above information will be sufficient to deter further inquiry which consumes much time and effort in proving that which is common historic fact as pertaining to Emery County's legal right to the above subject road as recognized by the Utah Code.

If we can be of further assistance please contact us.

Sincerely,

  
Rex Funk,  
Road Supervisor

cc Commissioner Dixie Thompson  
Val Payne, UP&L Mining Division

EM/RR/FM-VK/007

EXHIBIT "G"



**Emery County Board of Commissioners**

P.O. Box 629  
Castle Dale, Utah 84513  
Telephone (801) 381-2119

Clyde W. Thompson, Commission Chairman  
Duane L. Collard, Commissioner  
Jerry D. Mangum, Commissioner  
Bruce C. Funk, Clerk

December 18, 1989

Val Payne  
UP&L Mining Division  
P. O. Box 310  
Huntington, Utah 84528

Dear Mr. Payne,

In response to your inquiry as to Emery County's future plans concerning Deer Creek Road (#3-04) in the event of cessation of mine operations; we submit the following for your consideration:

1. Whether mining operations continue or cease normal maintenance service will continue "business as usual". Naturally mining activities cause impact to roadways and service intervals are more frequent; the converse is true also i.e., little or no mining activities; less frequent maintenance requirements. However because this is a general use B Class revenue road future plans are to continue service in order to stay eligible for funding. Because we were in full compliance with the State and Federal regulations governing maintenance our recent Deer Creek Road project became a reality. Incidentally we wish to thank UP&L Mining Division for their assistance on this much needed project.
2. Bearing in mind that historically "the chicken came before the egg" you may or may not be familiar with the fact that the Deer Creek Road as we know it today is in reality the end product of diverse historic impacts. This road is the old North Trail "to the top of the mountain" used from earliest times by ranchers as the route from the north side of the mountain to the top where the summer ranges were located. Stories by "old timers" are still heard telling of the harrowing trips and roping calves from off the ledges. I am told that the old south trail is still visible from the south side of the mountain.

Use of this roadway precedes mining activities. Where the Utah Power & Light substation and truck scales are located is in fact the former Byron Howard Ranch homestead site. The house was located by the scale site with corrals up by the substation. It was Mr. Howard who later founded the old Deer Creek mine. As mining activity commenced the trail began to be improved as a haulway. Commissioner Mangum worked the ranch as a young boy and later bladed on the roadway for the mine. Sometime later Mack McKinnon purchased the old ranch and mine enterprise changing the name to American Fuel Company.

December 18, 1989  
Page Two

Many subsequent owners have impacted this roadway over the years; the largest being Peabody Coal Company. From the county's point of view this road has never been (until recently) structured to accommodate the activity it receives so a total rehabilitation was timely and necessary.

3. Hunters frequent this area so continued maintenance reflects this aspect of use also.
4. Grazing in and around this area must also be taken into consideration as well.
5. "Touring" as the local past time continues to bring visitors and the curious onto this roadway at surprising intervals; further justifying the general use classification and function. The old mine sheds, portal and other structural "oddities" still visible continue to draw the nostalgia buffs and the curious. New additions such as belt lines, coal handling and the generating facility have a certain appeal which visitors can't resist.
6. Traditional county value on this road is of prime importance too. Historically it is one of our oldest revenue roads and would be kept open, regardless, for economic purposes and general use. Again the validity of this position has already been mentioned from the old North Trail aspect thence to ranch endeavors and on to mining enterprises; all impacting this roadway simultaneously. When our road log and identification program formally began in the 1960's this old road was called Deer Creek #H-18. Enclosed are copies of the log listings starting in the 1960's on thru the current 1988 log. I am told that before the convenient road log format each grader operator kept his own list on whatever was convenient.

So in conclusion whether you continue mining operations or not bears only on the maintenance service aspect. This road would be "kept open for business" to accommodate hunters, cattlemen, visitors, history buffs and power plant employees, while generating valuable road funds to Emery County.

Now I would like to change to another aspect concerning your plans for this road. It has come to our attention that you are considering posting this roadway with your mine I.D. at your permit boundary? I wish to advise that Emery County has an active Encroachment Ordinance #8-7-85A governing any activities within county road right-of-way. All right-of-way activity is subject to a permit process with final approval subject to Emery County.

December 18, 1989  
Page Three

Please realize that any object placed within our road right-of-way creates a Tort liability for Emery County. Since we must comply with the Federal and UDOT regulations governing signing we are asking you to formally apply for permission using the prescribed methods. Enclosed is a copy of our Ordinance #8-7-85A and an application. Be advised that sign design criteria must be in full compliance with the current Traffic Control Devices Manual as well as the DOT.

What immediately comes to mind is the prospect of vehicle driver confusion. It is widely known that Emery County's authority and maintenance ends up at your gate just past the belt line overpass; but below the offices. This is reflected in our logs not to mention the State's B Class road maps. The moment that we allow you to post a mine I.D. sign well below the old entrance denoting (I presume) "Private Property" or "No Trespass" certain problems are set in motion. One problem is that we violate the 1983 B Class Road eligibility requirements governing revenue roads which would cause this portion of the roadway from the traditional gate entrance down to your proposed new location to be deleted from our network. However a general advisory sign merely noting say for example: "Deer Creek Mine ahead one mile" could be acceptable if in compliance with the UTCOD.

A few years back the UP&L generating facility got us into "hot water" by illegally posting a private property sign in the vicinity of the Coal Handling yard. We of course had the sign removed and reminded Utah Power & Light that Deer Creek Road is Emery County's not Utah Power & Light's!

We are asking to preview your design proposal so please enclose your sketches with the application. This is not a new process for UP&L as in times past permits have been granted for the water lines to the mine as well as the attachment for the new truck scales down at the generating facility. We must know the scope of your endeavor and the probable impact to Emery County before permission can be granted.

Confusing the general public creates a very high accident risk potential for which the county is responsible. If we have vehicles stopped in or along the roadway reading your signs and/on turning around in the middle of this 8% grade roadway the obvious comes to mind. Mine employees are often clocked doing 60 mph on this road at shifts end. I know that we have had trouble slowing traffic for routine maintenance activities in times past.

Strict adherence to State and Federal regulations keeps Emery County eligible for future funding for maintenance and improvements; so naturally we are very protective concerning impacts to our road network.

December 18, 1989  
Page Four

We of course wish to continue our good relationship and will expediently consider your requests as we receive them. Thank you for recognizing our process and we hope to be of service to you. If you need road related questions answered please contact Rex Funk who is our Road Department Supervisor at 381-5450, he will be delighted to help.

Kindest Regards,

*Clyde Thompson / yw*  
Clyde Thompson,  
Chairman

cc Rex Funk, Road Supervisor

Exhibit - Copy of earliest Road Log  
available from 1960's

DISTRICT NO. 1  
HUNTINGTON DIVISION

NAME OF ROAD	ROAD NO.	LOCATION	MILES
KILLPACK-COLLARD	H-1	N of H	3.4
WILSON-BROWN	H-2	N of H	2.1
NORTH C. CANAL	H-3	W of U276	1.6
SHERMAN SPUR	H-4	N of H-1	0.6
MILL ROAD	H-5	W of H	4.3
BRASHER-YOUNG LOOP	H-6	SW of H	4.6
A. CLEGG-GUYMON SPUR	H-7	S of H-6	0.3
MAJOR SPUR	H-8	S of H-6	1.8
POWELL-GUYMON SPUR	H-9	S of H-6	0.5
ATWOOD-YOUNG	H-10	N of H	0.5
TUCKER-COOK SPUR	H-11	N of H-5	0.5
ALLRED-ANDERSON SPUR	H-12	E of H	0.8
LAWRENCE RIVER ROAD	H-13	E of H	3.9
GRANGE SPUR	H-14	E of H-13	2.0
MOHRLAND ROAD	H-15	N of H	4.9
BURMA	H-16	NW of H	9.0
JOHN-BRASHER	H-17	W of U10	0.2
DEER CREEK	H-18	CANYON	3.0
GIBBS SPUR	H-19	E of U10	0.8
GORDON-GUYMON	H-20	W of U10	0.3
BEAR CANYON	H-21	CANYON	1.2
TRAIL CANYON	H-22	CANYON	0.3
RILDY CANYON	H-23	CANYON	2.0
MILL FORK CANYON	H-24	CANYON	0.5
ART-ANDERSON LOOP	H-25	E of H-6	0.2
ROWLEY ROAD	H-26	W of H	0.5
SHERMAN-LARSON	H-27	W of U276	0.3
SOUTH CANAL ROAD	H-28	S of H	3.9
WEST FLAT	H-29	W of H	1.2
OLD LAWRENCE	H-30	SW of H	2.6
HUNT	H-31	S of H	0.2
B-JENSEN	H-32	S of U155	0.2

H. Jensen

H. 3 3/4 1/2

EMERY

COUNTY

ROAD

LOG

**EMERY COUNTY ROAD DEPARTMENT  
Area 3 HUNTINGTON**

<b>NO.</b>	<b>NAME OF ROAD</b>	<b>LOCATION</b>	<b>MILES</b>
3-01	Hiawatha	W of U10 2m N of Huntington	12.0
3-02	Mohrland Canyon	3-01 to Pine Spring	4.9
3-03	Burma	S of 3-02 to U31	9.0
3-04	Deer Creek	S of U31 7m W of Huntington	3.0
3-05	Bear Creek	N of U31 9m W of Huntington	1.2
3-06	Rilda & Trail Canyon	N & S of U31 10m W of Huntington	2.3
3-07	Mill Road	S of U31 4m W of Huntington	4.3
3-08	West Flat	S of 3-07 1m W of Huntington	1.2
3-09	Tucker/Cook Spur	N of 3-07 1m W of Huntington	0.4
3-10	West Center Street	W of Huntington	0.5
3-11	Huntington South Flat Loop	SW of Huntington to U10	4.6
3-12	Major Spur	S of Huntington	1.8
3-13	Guymon Wash Spur	S of 3-12 1m S of Huntington	0.5
3-14	A Clegg/Guymon Spur	S of 3-11 ¾m SW of Huntington	0.3
3-15	Ailred Anderson Spur	NE of Huntington	0.8
3-16	North Huntington School Bus Loop	N of U10 ½m N of Huntington	2.8
3-17	Sherman Larsen	W of 3-01 1m W of Huntington	0.3
3-18	Wilson Brown	N of U31 ½m W of U10 Jct.	2.1
3-19	Sherman	N of 3-16	0.6
3-20	Gibbs Spur	E of U10 1½m N of Huntington	0.8
3-21	West Huntington Lake	N of 3-16 ½m N of U10	0.2
3-22	South Canal Road	S of 3-11 to 3-37 3m SW of Huntington	3.8

*Exhibit - Copy of 1970's Road Log  
ENTRY.*

**Emery County Road Department**

**ROAD LOG**

EXHIBIT - Copy of 1988 Road Log  
ENTRY

PROPERTY OF THE  
EMERY COUNTY ROAD DEPARTMENT

00212	Airport Road East of U10 to Cleveland Gravel, Asphalt 1m	3.370
00213	Fotter Spur North of 2-12 2m East of U10 Native	0.540
00214	Eden Spur North of U155 West of Cleveland Gravel	1.000
00215	Desert Lake to Lawrence Tan Seeps South of 1-10 to 3-32 Native	7.660
00216	Flat Top and Dinosaur Spur East of 2-15 1.5m South of Junction Native	19.160
00217	Adams Spur West of U155 1m North of Cleveland Gravel	0.490
00218	Allred East of U155 1m North of Cleveland Gravel	0.160
00219	Joe Oveson Bus Loop & spur East & West of U155 3m N of Cleveland Gravel	2.830
00220	Wilson Spur East of U155 5m North of Cleveland Native	0.290
00221	Industrial Road South of 2-12 1m East of U10 to U155 Gravel 0.50m Native 0.45m	0.950
00301	Hiawatha West of U10 2m North of Huntington Lignen & Asphalt 7.42m Gravel 3.11m	10.530
00302	Mohrland Canyon 3-01 to Pine Spring Native 7.38m, Asphalt 1.70m, Gravel .20m	9.280
00303	Eurma South of 3-02 to U31 Native	8.720
00304	Deer Creek South of U31 7m West of Huntington Asphalt	2.480 -
00305	Bear Creek North of U31 9m West of Huntington Asphalt	0.670
	<del>_____</del> <del>_____</del>	<del>_____</del>
00307	Native Mill Road South of U31 4m West of Huntington Gravel 3.30m, Asphalt 0.42m	3.720
00308	West Flat South of 3-07 1m West of Huntington Native	1.150
00309	Tucker/Cook Spur North of 3-07 1m West of Huntington Native	0.350

ATTACHMENT B  
EMERY COUNTY-BLM ROAD MEMORANDUM

November, 5, 1980

Number	Name	Design Class	Maintenance Respon.	Hazard Periods (1)	Nominal Vehicle (2)	ROW	Width	Miles	Termination Points
728 (3-04)	Deer Creek	SN-16	County	W/W	LT Any			2.0	S36 16S 07E S11 17S 07E
7112 (3-05)	Bear Creek	DL-16	County	None	Any			1.5	S26 16S 07E S25 16S 07E
7118	Meetinghouse	DL-18	County	W/W	Any			1.5	S35 16S 07E S02 17S 07E
7100	Mohrland	SL-12	County	W/W	LT			7.0	S17 16S 08E S09 16S 07E
6726	Poison Spring Bench	SL-8	BLM	W/W	LT			8.0	S01 16S 08E S27 16S 09E
7101	Poison Spring North Stub	SL-08	BLM	W/W	LT			2.0	S27 16S 09E S21 16S 09E
7102	Poison Spring South Stub	SL-08	BLM	W/W	LT			3.0	S34 16S 09E S17 16S 09E
7103	Poison Spring Bench Allotment	SL-08	BLM	W/W	LT			3.0	S06 16S 09E S08 16S 09E

(1) W/W - Hazardous when wet; may be closed by snow.

(2) LT - Pickups or high clearance vehicles recommended.

(3) Portion of county in 13S R06E, 14S R06 and 07E, and 15S, R06 and 07E not covered because area lies within Forest Service boundary.

Applicant: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

ROADWAY ENCROACHMENT APPLICATION

\_\_\_\_\_ (Applicant) hereby applies for a permit to encroach upon a roadway within Emery County known as \_\_\_\_\_

for the purpose of \_\_\_\_\_

Said encroachment is proposed at the following location upon said roadway: \_\_\_\_\_

and is described as \_\_\_\_\_

Applicant proposes work to begin on \_\_\_\_\_, 19\_\_\_\_ and to be completed on or before \_\_\_\_\_, 19\_\_\_\_.

A processing fee of ~~\$10~~ <sup>waived</sup> is tendered with this Application.

Applicant agrees to comply with all laws, ordinances and regulations of all governmental agencies, including, but not limited to Emery County, as well as instructions of the Emery County Road Department Supervisor or his indicated representative.

Fees in the amount of \_\_\_\_\_ and a bond in the amount of \_\_\_\_\_ be in force for a period of \_\_\_\_\_ years, are hereby tendered, or will be tendered before a Permit is issued.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Applicant: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

AN ORDINANCE REGULATING ROADWAY RIGHT-OF-WAY ENCROACHMENT

WHEREAS, Emery County is experiencing pronounced population growth and mineral development; and

WHEREAS, industrial development will require the improvement of County roads, and

WHEREAS, said growth and development necessitate frequent encroachment upon County roads for vibroseising and for the installation of utilities; and

WHEREAS, it is the declared public policy of Emery County to minimize cost to the County by requiring costs of road improvements be paid by those who disproportionately use the roadway, and

WHEREAS, the County is without adequate regulations to uniformly control such encroachments; and

WHEREAS, a new ordinance concerning road encroachment is necessary,

NOW, THEREFORE, be it ordained by the Emery County Commission that the following be enacted as law regulating roadway right-of-way encroachments:

Section I: DEFINITIONS

A. Encroachment means the disturbance of any roadway or right-of-way, whether by upgrading, constructing, reconstruction, surfacing or resurfacing, alignment or realignment, excavation, boring, obstruction, vibroseising, or extraordinary short-term use.

B. Supervisor means the Emery County Road Department Supervisor or any representative duly appointed by him.

C. Applicant means every natural person, partnership, corporation, firm, association or legal entity seeking to encroach upon an existing County roadway.

D. Annual Blanket Permit means an encroachment permit issued for a period of one calendar year to Applicants who, of necessity, may make numerous

encroachments. This Permit is designed to alleviate the necessity of securing a performance and completion bond for each encroachment.

E. Existing County Roadway means any roadway listed on the Emery County road system in the Emery County Road Log together with the right-of-way therefor and any other right-of-way over which Emery County has acquired, by any means, the right of passage.

F. New Construction means any activity which changes the current condition of the roadway or right-of-way including the placement of poles, culverts, pipelines or other lines in, on or under the roadway or right-of-way in a new location and including the upgrading, construction reconstruction, surfacing or resurfacing of any roadway together with the necessary effects on the right-of-way.

G. Maintenance means that work occasioned by the ordinary course of business, other than new construction, which requires an encroachment as defined herein, made necessary to repair, replace or modify existing structures including, but not limited to, poles, culverts, pipelines and other lines.

H. Permit as stated herein means the written permission given an Applicant by Supervisor authorizing a certain encroachment as indicated in the Permit.

I. Permittee means a natural person, partnership, corporation, firm, association or legal entity who has applied for and has received a Permit as provided for herein.

## Section II: PERMITS FOR ROADWAY ENCROACHMENT

A. There shall be two types of permits issued pursuant to this Ordinance:

1. A regular Encroachment Permit.
2. An Annual Blanket Permit.

B. The procedure for obtaining a regular encroachment permit shall be

as follows:

1. Any party desiring to encroach upon an existing Emery County roadway must first make Application for a Permit by fully completing an Application form or a Utility Line Agreement Form provided by the Emery County Road Department. A non-refundable processing fee of \$ \_\_\_\_\_ shall be paid at the time Application is made. Supervisor shall review the completed application and shall notify Applicant within a reasonable time of any deficiencies.
2. Upon acceptance by Supervisor of the Application or Utility Line Agreement, Supervisor shall issue to Applicant a Permit for roadway encroachment. Applicant shall fully comply with the terms of said Permit, including any special provisions required by Supervisor as conditions of issuance.

C. The Supervisor may issue Annual Blanket Permits pursuant to application made therefore. A nonrefundable processing fee of \$ \_\_\_\_\_ shall be paid at the time application is made. The Supervisor shall determine the performance and completion bond required and said bond or other reasonable assurance shall be received by the Supervisor before an Annual Blanket Permit is issued. Holders of Annual Blanket Permits may, as directed by Supervisor, be required to provide a liability policy, as required by Section IV, for the calendar year corresponding with the permit year.

D. No permit shall be required hereunder where the encroachment involved constitutes maintainence, as defined herein. All other aspects of this Ordinance, including, but not limited to, liability insurance, notice, fees and minimum construction standards, shall apply to any encroachment of any County roadway.

E. An encroachment permit shall be required for any new construction.

### Section III: BOND REQUIRED

A. Applicant, upon receipt of notice of acceptance of Application for encroachment, and before the issuance of a Permit, shall secure and deliver to Supervisor a performance and completion bond or other reasonable assurance to insure the restoration of the site.

The amount of the bond required, except for those holding an Annual Blanket Permit, shall be in at least the following amounts:

1. Hard Surface Street: \$5,000 minimum
2. Gravel Surface Street: \$3,000 minimum
3. Dirt Surface Street: \$3,000 minimum
4. Resurfacing and/or realignment of roadway: \$3,000 minimum
5. New Construction or maintenance within right-of-way: \$3,000 minimum

B. Supervisor is authorized and directed to review each Application as to location, duration, and extent of encroachment together with all other pertinent factors. Upon such review Supervisor shall determine the amount of the bond required together with notification of acceptance of the Application for encroachment.

C. Bonds given pursuant to this Section shall remain in force and effect for a period of either one or three years from the date the job was completed. Bonds are required for a three-year period when the roadway or right-of-way is disturbed or when any object, including but not limited to utility lines or culverts, is placed beneath the surface of the roadway or right-of-way. Bonds in all other cases shall be for a one-year period.

### Section IV: LIABILITY INSURANCE

When in the judgment of Supervisor the same is advisable, Applicant, upon acceptance of the Application for encroachment by Supervisor, but before the issuance thereof, shall secure and deliver to Supervisor a policy of

insurance or other reasonable assurance, providing liability coverage in at least the amount of \$500,000. Said policy is to remain in force and effect until Applicant is released.

#### Section V: ENCROACHMENT PROCEDURE

A. Once an Applicant has obtained a Permit he may begin work. Said work shall progress in a prompt and orderly fashion and shall be performed in a good workman like manner.

B. The encroachment must be completed within the time requested by Permittee and allowed by Supervisor. Supervisor may extend the completion date upon request. Failure by the Permittee to complete the permitted work by the completion date may result in the forfeiture of its bond.

C. Excavation operations shall be conducted in such a manner that a minimum amount of interference or interruption of road traffic will result. Inconvenience to residents and businesses fronting on public roads shall be minimized. Suitable, adequate and sufficient barricades shall be available and used where necessary to prevent accidents involving property or persons. Barricades must be in place until all excavator's equipment is removed from site and excavation has been backfilled and proper temporary gravel surface is in place. From sunset to sunrise all barricades and excavations must be clearly outlined by acceptable warning lights, lanterns, flares, and other devices. Police and fire departments shall be notified at least 24 hours in advance of any planned excavation requiring road closures or detour.

#### Section VI: NOTICE AND EMERGENCY EXCAVATIONS

The Board of Emery County Commissioners recognizes that from time to time emergency conditions may arise requiring encroachment upon County roadways. Should such conditions exist an Applicant may proceed with the encroachment and then make Application for encroachment during the next working day. The encroachment may continue, so long as application has been made, until

Applicant is ordered by Supervisor to cease encroachment. If Application for encroachment is made during the next working day Applicant will incur no penalty. If Application for encroachment is not made during the next working day, all fees will be twice the amount indicated.

#### Section VII: NOTICE REGARDING MAINTENANCE

A. When encroachment for maintenance is necessary, the person, partnership, corporation, firm, association or legal entity intending to engage in the encroachment shall notify Supervisor, in writing, ten (10) working days before the encroachment is made.

B. Supervisor shall, upon receipt of a notice pursuant to paragraph A of this Section, and in no event later than two (2) working days from the date notification is received, notify the party giving notice of the bond required, the necessity of any liability insurance and the amount of fees to be deposited.

#### Section VIII: FEES

A. Applicant, subsequent to making application for an encroachment permit or giving notice pursuant to Section VII, shall deposit with the Supervisor an amount specified by Supervisor. Fees which are subject of this section will be utilized to compensate the County for costs incurred for inspecting and reviewing the plans for the intended encroachment, the work in progress and the completed project.

B. All fees required to be paid hereunder shall be paid and received at the office of the Emery County Road Department in the Emery County Courthouse. All bonds, insurance policies or other documents required by this Ordinance to be delivered by Applicant must be delivered to and deposited with the Emery County Road Department at its office in the Emery County Courthouse.

C. Fees required pursuant to Section VII, paragraph B, shall be deposited at the office of the Emery County Road Department in the Emery County

Courthouse no later than two (2) working days before the encroachment is initiated.

#### Section IX: MINIMUM CONSTRUCTION STANDARDS

A. New construction shall be completed according to the plans and specifications submitted by Applicant and approved by Supervisor. Maintenance and new construction shall, in no event, be less than the following minimum standards.

1. Preparation. The pavement, sidewalk, driveway, or other surface shall be cut vertically along the lines forming the trench in such a manner as to not damage the adjoining pavement or hardsurfacing. An undercut level at the rate of one inch per foot of thickness will be provided at the proposed junction between the old and new surfaces. The portion to be removed shall be broken up in a manner that will not cause damage to the pavement outside the limits of the trench. However, any pavement damaged by operations outside the limits of the trench shall be replaced. All waste material resulting from the excavation shall be removed immediately from the site of the work.

2. Backfill.

a. Material for backfill will be of a select nature. All broken concrete, peat, decomposed vegetable or other matter and similar materials obtained from excavation will be removed from the site prior to beginning of backfilling. All backfill will be placed in layers not over eight (8) inches loose measure in thickness. Compaction will be obtained by mechanical rollers, mechanical tampers or similar means. Material for backfilling will have optimum moisture to insure compaction to a degree equivalent to that

of the undisturbed ground in which the trench was dug. Jetting or internal vibrating methods of compacting sand fill or similar methods of compacting sand or similar granular free draining materials will be permitted.

- b. The density (dry) of the backfill under pavements, sidewalks, curbs, or other structures will be not less than that existing prior to excavation. The fill shall be restored and placed in a good condition which will prevent settling.

3. Restoration of Surfaces.

- a. General. All road surfacing, curbs, gutters, sidewalks, driveways, or other hard surfaces falling in the line of the excavation which must be removed in performance of the work shall be restored in kind by the Permittee, unless otherwise directed by the Supervisor, in accordance with the specifications contained herein governing the various types of surfaces involved.

- b. Protection of Paved Surfaces. In order to avoid unnecessary damage to paved surfaces, track equipment shall use pavement pads when operating on or crossing paved surfaces.

- c. Time. In traffic lanes of paved roads, the excavator shall provide temporary gravel surfaces or cold mulch in good condition immediately after backfill has been placed, and shall complete permanent repairs on the road, sidewalk, curb, gutter, driveway and other surfaces, within five (5) days from the date of completion of the backfill except for periods:

- (1) When permanent paving material is not available.

(2) When an extension of time is granted by Supervisor.

d. Temporary Repair. If temporary repair has been made on paved road with gravel and a permanent repair cannot be made within the time specified above due to any of the above-mentioned conditions, then the Permittee is required to replace the gravel with cold mulch as soon as possible.

4. Restoring Bituminous, Concrete or Asphalt road surfaces.

a. Temporary grade surface. Where excavations are made in paved areas, the surface shall be replaced with a temporary gravel surface. The gravel shall be placed deep enough to provide a minimum of six (6) inches below the bottom of the bituminous or concrete surface. Normally, this will require nine (9) inches of gravel for bituminous surfaces, twelve (12) inches of gravel for concrete, and concrete base for asphalt wearing surfaces. The gravel shall be placed in the trench at the time it is backfilled. The temporary gravel surface shall be maintained by balding, sprinkling, rolling, and adding gravel, to maintain a safe, uniform surface satisfactory to Supervisor until the final surface is laid. Excess material shall be removed from the premises immediately. Material for use on temporary gravel surfaces shall be obtained from sound, tough, durable gravel or rock meeting the following requirements for grading:

Passing 1-inch sieve	100%
Passing 3/4-inch sieve	85% - 100%
No. 4 sieve	45% - 65%
Passing No. 10 sieve	30% - 50%
Passing No. 200 sieve	5% - 10%

b. Bituminous surface. The exposed edges of existing pavement shall be primed with Type MC-1 Bituminous material or better. The type, grade, and mixture of the asphalt to be used for road surface replacement shall be approved by Supervisor. The thickness shall be equal to the adjacent surface thickness but not less than three (3) inches. The complete surface shall not deviate more than one-half (1/2) inch between old and new work.

5. Concrete Surfaces. The sub-base for concrete surfaces shall be sprinkled with clean water just before placing the concrete. Joints and surfaces shall be made to match the original surfaces. The thickness of concrete shall be equal to the adjacent concrete but in no case less than six (6) inches thick. The mixing, cement, water content, proportion, placement, and curing of the concrete will be approved by the Supervisor. In no case shall the concrete have less compressive strength than 3,000 pounds per square inch at the end of 28 days.

6. Concrete Base, Bituminous Wearing Surfaces. This type of surfacing shall be constructed as above described.

7. Gravel Surfaces. Trenches excavated through gravel-surfaced area, such as gravel roads, shoulders and unpaved driveways, shall have the gravel restored and maintained as described in paragraph 5 of this part, except that the gravel shall be a minimum of one inch more than the thickness of the existing gravel.

B. Relocation and Protection of Utilities. An excavator shall not interfere with any existing utility without the written consent of the Supervisor and without advance notice to the owner of the utility. If it becomes necessary to relocate an existing utility, it shall be done by its

owner unless the owner otherwise directs. No utility, whether owned by a governmental entity by a private enterprise, shall be removed to accommodate the Permittee unless the cost of such work shall be borne by the Permittee or an expressly written agreement is made whereby the utility owner and the excavator make other arrangements relating to such costs. The Permittee shall support and protect by timbers or otherwise all pipes, conduits, poles, wires, or other apparatus which may be in any way affected by the excavation work, and shall do everything necessary to support, sustain and protect them under, over, along, or across the work. In case any of the pipes, conduits, poles, wire, or apparatus should be damaged (and for this purpose pipe coating or other encasement or devices are to be considered as part of a substructure), they shall be repaired by the agency or person owning them, but the utility owner shall be reimbursed for the expense of such repairs by the Permittee. It is the intent of this part that the Permittee shall assume all liability for damage to substructures, and any resulting damage or injury to anyone because of such substructure damage and such assumption of liability shall be deemed a contractual obligation which the Permittee accepts upon acceptance of an excavation permit. The County need not be made a party to any action because of this part. The Permittee shall inform itself as to the existence and location of all underground utilities and protect the same against damage.

C. Jetting Pipe. Jetting pipe by means of water under pressure, or compressed air, is permitted only when approved by the Supervisor.

#### Section X: ENCROACHMENT UNLAWFUL

A. It shall be unlawful for any person to encroach upon any Emery County roadway without having first obtained a current Permit from Supervisor.

B. It shall be unlawful for anyone to encroach upon any Emery County roadway, for maintenance purposes, without first notifying Supervisor, as required by Section VII, and depositing any bond, liability policy or fees as

required by Supervisor.

C. Any party who encroaches upon an Emery County road without a valid Permit shall be guilty of a misdemeanor.

D. Any entity, whether public or private, who engages agents, general contractors, or subcontractors for a project that requires roadway encroachment shall require said agents, general contractors, or subcontractors to comply with the provisions of this Ordinance. Any entity violating this provision is guilty of a misdemeanor.

#### Section XI: CATTLEGUARDS

1. Applicant must file a detailed application and request, stating the exact location on the County Road involved and its official name with the Emery County Road Department.
2. The applicant will be required to supply the proper specified design and width of grill, as well as other materials, including but not limited to concrete, rebar, wings, fence posts and gates, as needed.
  - a. The grill work must meet and be interchangeable with the Powder River U-54 type (without cleanout feature). These plans and specifications must meet the Emery County Road Supervisor's approval before any permits will be issued and before installation of said cattleguard takes place.
  - b. Applicant will purchase all materials, including but not limited to hardware, needed to fabricate the bases when required by the supervisor. Supervisor will work out details with applicant regarding arrangements with material suppliers, so as to properly schedule construction of the base modules.
  - c. Applicant will install gate and hook fence to cattleguard.

3. Emery County Road Department will supply the labor to fabricate the bases and install them using U-5" type grills (or acceptable substitute) provided by applicant at the permitted site.

a. Emery County Road Department will thenceforth assume maintenance and upkeep on this unit as long as the road is part of the County system.

#### Section XII: REVOCATION AND SEVERABILITY

All ordinances for the regulation of roadway right-of-way encroachment and providing penalty for the violation thereof, passed prior to the passage of this Ordinance, are hereby revoked and repealed to the extent such ordinance is less stringent than the provisions herein, and any clause contained herein which shall be declared, by court of competent jurisdiction, to be unconstitutional or contrary to the laws of the State of Utah, shall in no way nullify any other part of this Ordinance.

#### Section XIII: INJUNCTION

Supervisor may request initiation of the proper legal proceeding, in a court of competent jurisdiction, to obtain an injunction against any natural person, partnership, corporation, firm, association or legal entity violating this Ordinance.

#### Section XIV: EMERGENCY CLAUSE AND EFFECTIVE DATE

The Emery County Commission finds and declares it is necessary for the immediate preservation of peace, health, and safety of the residents of Emery County that this Ordinance become effective upon its passage and publication.



147 West North Temple  
P.O. Box 899  
Salt Lake City Utah 84110

*Val -  
Example  
of Process  
Application*

June 24, 1986

Mr. Rex Funk  
Superintendent  
Emery County Road Department  
P. O. Box 889  
Castle Dale, Utah 84513

Re: Roadway Encroachment Permit Application

Dear Mr. Funk:

Submitted is Utah Power & Light Company's application for a roadway encroachment permit accompanied with a check in the amount of \$10.00 to cover the processing fee.

Said permit application is to allow UP&LCO permission to encroach the right of way of the Deer Creek Canyon county road during the installation of an eight inch (8") water supply line traversing from the Huntington Plant raw water pond to the Deer Creek Mine.

Enclosed is a map showing the route of the eight inch (8") pipeline along with two 8½" x 11" drawings of typical cross-sections.

Work is anticipated to commence on or about July 2, 1986.

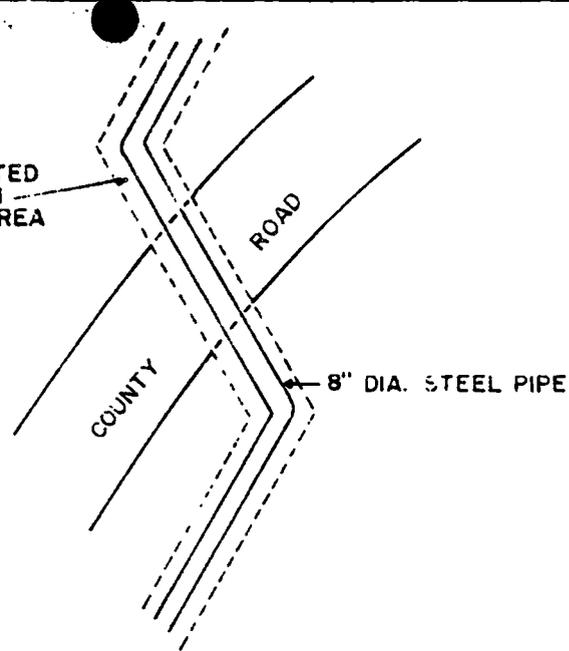
If you have any question please call me at 535-4225.

Sincerely,

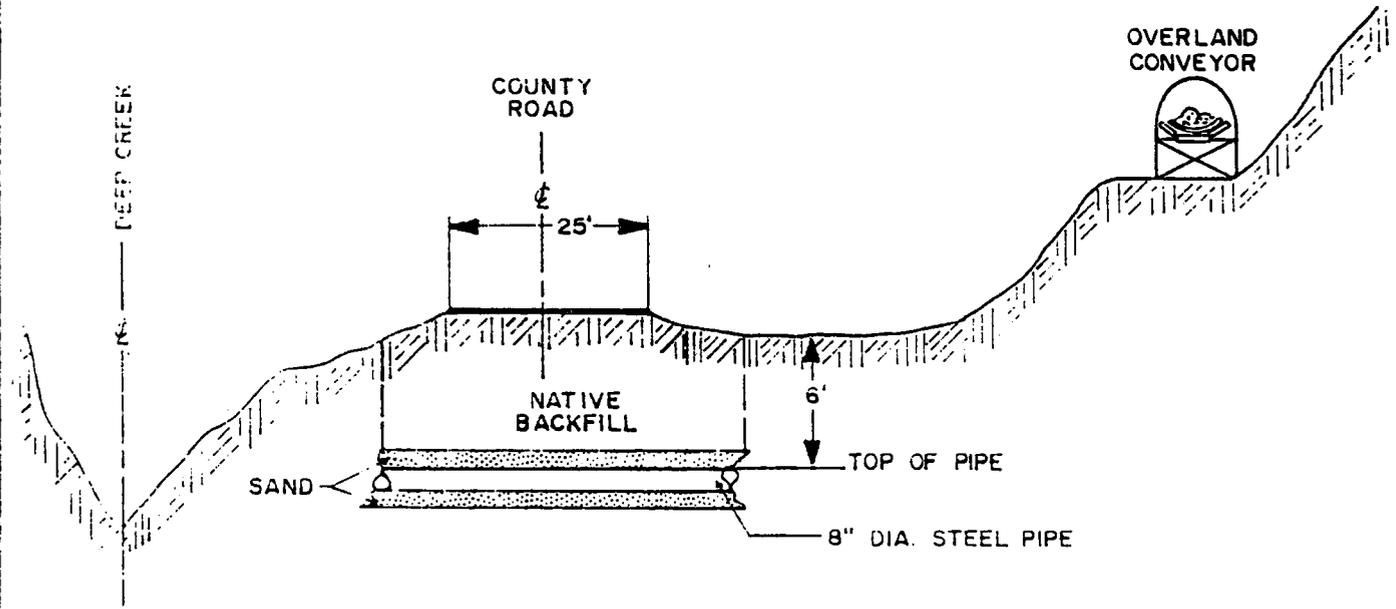
C. E. Shingleton  
Director of Permitting,  
Compliance & Services  
Mining Division

CES:SMC:bb:5437  
Enclosure

2' WIDE  
EXCAVATED  
TRENCH  
WORK AREA

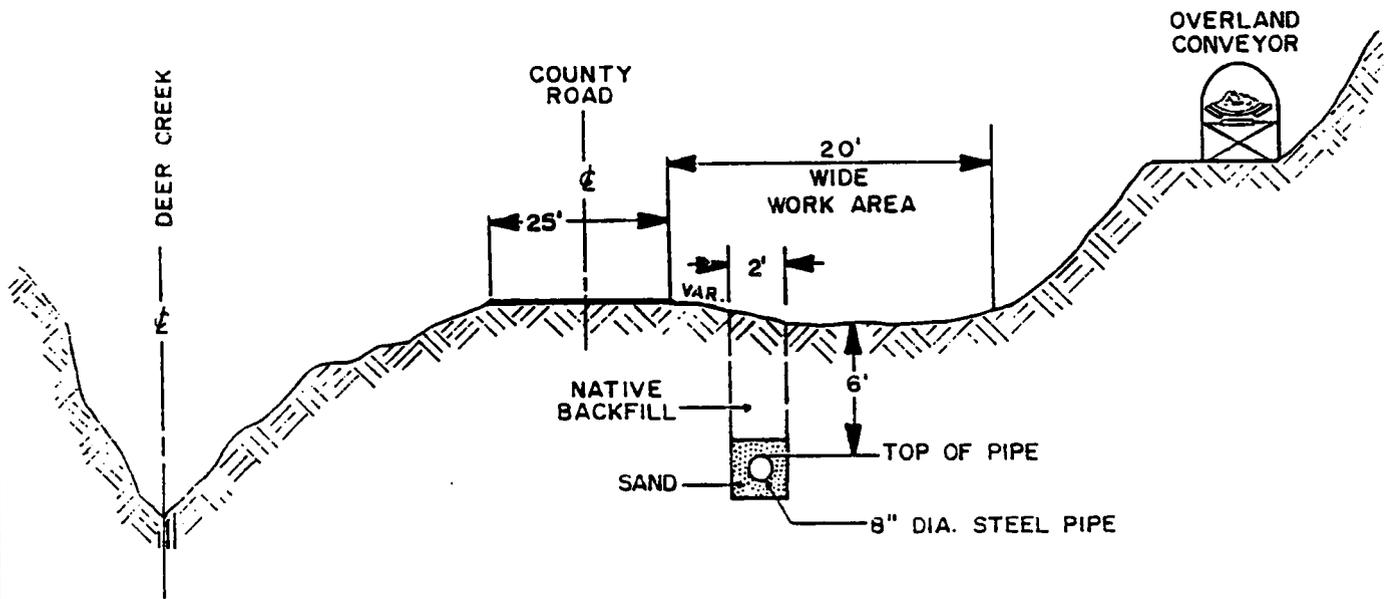


PLAN VIEW



OVERLAND  
CONVEYOR

DEER CREEK COAL MINE EMERY COUNTY, UTAH	
TYPICAL ROADWAY CROSSING & PLAN VIEW OF THE 8" STEEL WATER SUPPLY LINE	
UTAH POWER & LIGHT COMPANY MINING DIVISION-SALT LAKE CITY, UTAH 84110	
DATE JUNE 24, 1986	BY LJ GUM
SCALE NONE	FIGURE 2



DEER CREEK COAL MINE EMERY COUNTY, UTAH	
TYPICAL ROADSIDE CROSS SECTION OF THE 8" STEEL WATER SUPPLY LINE	
UTAH POWER & LIGHT COMPANY MINING DIVISION-SALT LAKE CITY, UTAH 84110	
DATE JUNE 24, 1986	BY LJ GUM
SCALE NONE	FIGURE 1

Applicant: Utah Power & Light Company  
Mining Division  
Address: P. O. Box 899  
Salt Lake City, Utah 84110  
Telephone: (801) 535-4225

APPLICATION AND PERMIT  
for  
ROADWAY ENCROACHMENT  
APPLICATION

Utah Power & Light Company (Applicant ) hereby applies  
for a permit to encroach upon a roadway within Emery County known  
as the Deer Creek Canyon county road for the purpose  
of installing an underground water pipeline.

Said encroachment is proposed at the following location upon said  
roadway: See attached Dwg. #CM-10673-DR,  
and is described as see attached drawing.

Appliant proposes work to begin on July 2, 1986 and to  
be completed on or before October 1, 1986. Applicant  
acknowledges that any change in purpose or location requires an  
amended application.

A processing fee of \$10 is tendered with this Application.

Applicant agrees to comply with all laws, ordinances and  
regulations of all governmental agencies, including, but not  
limited to, Emery County, as well as instructions of the Emery  
County Road Department Supervisor or his indicated representative.  
Applicant acknowledges receipt of a copy of Ordinance No. 7-6-83C.

Appliant acknowledges that certain fees will be due before  
any permit is issued. Fees will be calculated according to the  
Emery County Roadway Right-of-Way Encroachment Ordinance,  
Ordinance No. 7-6-83C.

DATED this 24th day of June, 1986

Applicant: Utah Power & Light Company  
Mining Division  
By: C. E. Shingleton  
C. E. Shingleton  
Title: Director of Permitting,  
Compliance & Services



# Emery County Road Department

P.O. Box 889  
Castle Dale, Utah 84513

Phone (801) 381-5450  
or  
381-2550

*53547*

PERMIT

Permit #193611

Application having been made by Utah Power & Light Company through C. E. Shingleton, Director, its authorized agent and fees and a bond in the above-mentioned amount having been received, reviewed and accepted, and the Application having been reviewed and accepted, permission is hereby granted Applicant to proceed with installation an underground water pipeline at the following location, Deer Creek Canyon Road, #3-04.

- Stipulation Requirements:
1. Notification of when project is completed.
  2. Bore under asphalt surfaces where pipe crosses roadway.

DATED this 30th day of June, 1936.

*Ray P. Chamberlain*

Superintendent

Emery County Road Department

By *Carol J. Ware, Mgr.*

### INSPECTION AND RELEASE

Supervisor having inspected said site on *Nov. 24*, 19*86*, finds the following deficiencies which must be corrected before release can be considered:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Submitted 2nd  
Permit (copy)  
to UP & L Jul 21-56*

*Ray P. Chamberlain*

Superintendent

Emery County Road Department

By *RC*



## Emery County Board of Commissioners

P.O. Box 629  
 Castle Dale, Utah 84513  
 Telephone (801) 381-2119

Rue P. Ware, Commission Chairman  
 Bevan K. Wilson, Commissioner  
 Clyde Conover, Commissioner  
 Bruce C. Funk, Clerk

February 6, 1985

Melvin Shilling  
 Chief, Mining Analysis Division  
 Western Technical Center  
 Office of Surface Mining  
 Reclamation and Enforcement  
 Brooks Towers  
 1020 15th Street  
 Denver, Colorado 80202

Dear Mr. Shilling:

This correspondence is in response to the questions in your letter of December 7, 1984.

The subject roads are listed on the Emery County Road System. The County receives Class B funds concerning the roads. To receive the funds, concerning any given road, that road must be on the County System. The County, therefore, claims rights of way concerning these roads.

The County has in the past, and will continue, to maintain the subject roads as they are part of our County Road System. The County will maintain these roads until they become separated from the County Road System.

We trust this correspondence is sufficient. Should you have further questions, please submit them.

Yours truly,

*Clyde Conover*  
 Clyde Conover, Chairman  
 Emery County Board of Commissioners

CC/par

cc Ron Barney



United States Department of the Interior  
 OFFICE OF SURFACE MINING  
 Reclamation and Enforcement  
 BROOKS TOWERS  
 1020 15TH STREET  
 DENVER, COLORADO 80202

JAN 29 1985

Mr. Chris Shingleton  
 Utah Power and Light Company  
 P.O. Box 899  
 Salt Lake City, Utah 84110

Dear Mr. Shingleton:

The Office of Surface Mining (OSM), Western Technical Center has reviewed the issue of the Deer Creek Mine access road relative to permit area requirements. Our review considered verbal comments expressed in our meeting of January 4, 1985. OSM finds that the Deer Creek Mine access road, as specified in the Deer Creek Mine permit application package, substantively meets the definition of a public road as outlined in 30 CFR 761.5 and the Utah Division of Oil, Gas and Mining (DOG M) public roads policy adopted on January 27, 1984.

The above finding is based on the current ownership, use, and maintenance of the access road, and the December 30, 1983, opinion of Administrative Law Judge Torbett vacating certain road violation issues in Virginia. A change in permit boundary to include the road would result in no change in performance standards and no increase in environmental protection. OSM and DOGM have therefore concluded that there is no need to change the permit boundary to include the access road.

Based on this conclusion, the second item of OSM's December 20, 1984, deficiency letter should be disregarded. All other permit application deficiency issues as outlined in our letter of December 20, 1984, remain applicable. If you have any questions, please call Louis Hamm or Walter Swain at (303) 844-3806.

Sincerely,

*Richard E. Dawes*

Allen D. Klein  
 Administrator

Western Technical Center

cc: Robert Hagen, OSM - Albuquerque Field Office  
 Dianne Nielson, DOGM  
 Mary Boucek, DOGM  
 Bill Zeller  
 Morgan Moon  
 Jim Atwood  
 Bob Willey  
 Val Payne



United States Department of the Interior  
OFFICE OF SURFACE MINING  
Reclamation and Enforcement  
BROOKS TOWERS  
1020 15TH STREET  
DENVER, COLORADO 80202

EM/PR/GK/604

DEC 7 1984

Mr. Rue P. Ware, Chairman  
Emery County Board of Commissioners  
P.O. Box 629  
Castle Dale, Utah 84513

Dear Mr. Ware:

The Office of Surface Mining (OSM), Western Technical Center has received your letter of September 20, 1984, concerning responsibility for and maintenance of the roads serving the Deer Creek mine (approximately three miles long from Highway 31 to the Deer Creek portal), and the Des-Bee-Dove mine (7.7 miles long on Danish Bench) in Emery County. To assist us in completing permit actions on those mines, we are asking you to answer questions which remain:

1. Does Emery County own the right-of-way to all or part of these roads? If the County owns the right-of-way to only part(s), please specify which part(s).
2. Does Emery County accept the post-mining responsibility for these roads, including maintenance? Please understand that the regulatory authority must have a commitment from the County regarding post-mining responsibility in order to complete the reclamation requirements of the mining applications. If it is later determined to be appropriate, the County may change their post-mining plans and notify the regulatory authority and the mine operator prior to reclamation.
3. Does Emery County currently have all responsibility for maintenance of these roads? If not, who does?

Your timely response would be most appreciated. If you have any questions, please call either Louis Hamm or Walter Swain at (303) 844-3806.

Sincerely,

*William J. Krain, acting for*  
Melvin Shilling  
Chief, Mining Analysis Division  
Western Technical Center

cc: Robert Hagen, OSM - Albuquerque Field Office.  
Dianne Nielson, DOGM  
Mary Boucek, DOGM  
Chris Shingleton, Utah Power and Light



## Emery County Board of Commissioners

P.O. Box 629  
 Castle Dale, Utah 84513  
 Telephone (801) 381-2119

Rue P. Ware, Commission Chairman  
 Bevan K. Wilson, Commissioner  
 Clyde Conover, Commissioner  
 Bruce C. Funk, Clerk

September 20, 1984

Office of Surface Mining  
 Division of Oil, Gas & Mining  
 4241 State Office Building  
 Salt Lake City, Utah 84114

Gentlemen:

In the matter of determining responsibility and maintenance of certain roads associated with mining complexes within Emery County, please be advised that the road serving the Deer Creek Mine (3.0 miles) and the road to the Des-Bee-Dove Mine located on Danish Bench (7.7 miles) are part of the County Class B road system and are maintained by the County Road Department.

Respectfully,

Rue P. Ware, Chairman  
 Emery County Board of Commissioners

RPW/par

RECEIVED

SEP 26 1984

MINING AND  
 EXPLORATION



# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangertter  
Governor

Dee C. Hansen  
Executive Director

Darvne R. Nelson, Ph.D.  
Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84160-1203  
801-538-5340

April 29, 1991

W. Hord Tipton  
Deputy Director  
Office of Surface Mining  
Department of the Interior  
1951 Constitution Avenue NW  
Washington D.C. 20240

Dear Mr. Tipton:

Re: Appeals of Ten-Day Notice Responses  
TDN 91-02-246-2 TV2, Crandall Canyon Mine  
TDN 91-02-116-3 TV1, Cottonwood/Wilberg Mine  
TDN 91-02-246-1 TV1, Deer Creek Mine

The purpose of this letter is to appeal the inappropriate responses by OSM-Albuquerque to the above-referenced TDNs which have been issued to the Division. The initial Division response to the TDNs and AFO's responses to the Division are attached. Also attached is OSM's April 18, 1991 letter regarding roads.

The Division hereby requests that you vacate the TDNs and forego any further TDNs regarding permitting of roads until the state and OSM have completed their review and approval decisions concerning rulemaking/program amendments. The justification for this recommendation is presented in the initial responses from the Division (attached) and the following reaction to the AFO's responses.

1. The AFO's misinterpretation of the status of the record on haul roads in Utah is disingenuous at best and borders on dishonest.
2. AFO assumes that the Division has already made decisions regarding roads. This is simply not true. The purpose of the state rulemaking is to provide authority and information for such reviews.
3. AFO was informed by the Division in March that the draft roads policy which it reviewed in its March 5, 1991 letter was not the same policy which was referenced in the state's rulemaking. AFO had been sent a copy of the final policy and proposed rule. Bob Hagen informed me that he was aware of the distinction

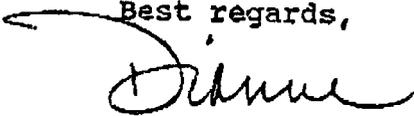
Page 2  
Hord Tipton  
April 29, 1991

between the draft and final policies and that any comments on the final policy would be reserved for the program amendment review. However, AFO continues to reference the draft policy and its March 5, 1991 letter rather than the final policy. There are important differences.

4. The Division has not categorically excluded public roads from permitting.
5. The Board's emergency rule puts the state in compliance with its own rules and statutes and allows the Division to make the requests for information which are necessary to evaluate the roads in question.
6. The Division can take no other action in response to the TDNs until the rulemaking/program amendment process is complete. Furthermore, OSM has received comment from more than one respondent to the program amendment, stating that any road permitting actions taken by the Division during the term of the emergency rulemaking should be overturned. This should extend to TDN responses.

Thank you for your consideration of these concerns.

Best regards,

  
Dianne R. Nielson  
Director

lsj  
cc: R. Hagen  
T. Mitchell  
L. Braxton  
R. Daniels

DN37



# United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement

WASHINGTON, D.C. 20240



JUN 4 1991

JUN 20 1991

Dianne R. Nielson, Ph.D.  
 Director, Division of Oil, Gas,  
 and Mining  
 3 Triad Center, Suite 350  
 355 West North Temple  
 Salt Lake City, Utah 84180-1203

Dear Dr. Nielson:

This is in response to your April 29, 1991, request for informal review of the Albuquerque Field Office (AFO) Director's determination that your agency has not taken appropriate action or shown good cause for not taking appropriate action with respect to ten-day notice (TDN) numbers 91-02-116-003 (PacifiCorp Electric's Cottonwood/Wilberg Mine) and 91-02-246-001 (Deer Creek Mine, respectively). The ten-day notices allege that the permittee failed to first obtain a permit from your agency prior to engaging in and carrying out any coal mining and reclamation operations, in accordance with Utah regulations at R614-300-112.400. The surface coal mining and reclamation operations in question pertain to haul and access roads.

In your request for review, you ask that I vacate the TDN's because your agency can take no further action in response to the TDN's until your pending program amendment concerning new definitions of "road" and "public road" is finalized by the Office of Surface Mining Reclamation and Enforcement. You maintain that approval of this proposed amendment is necessary before your agency can request information needed to evaluate the roads in question. Finally, you contend that issuance of the TDN's so soon after promulgation of emergency rulemaking and submission of the program amendment denies your agency reasonable time in which to manage and enforce its program.

Notwithstanding your proposed program amendment, I cannot vacate the TDN's since I am charged by regulation to dispose of each TDN appeal before me by affirming, reversing, or modifying the written determination of the Field Office Director based on the facts surrounding the alleged violation(s). Moreover, I cannot agree with your argument that your agency is without authority under the approved Utah program to make a determination whether the roads in question need to be permitted.

The determination of whether a particular road associated with a mining operation is required to be permitted must be made on a

case-by-case basis by the regulatory authority relying on the plain language of the State program counterpart to the definition of "surface coal mining operations" under section 701(28)(B) of the Surface Mining Control and Reclamation Act (SMCRA). The Utah counterpart at 40-10-3.(18)(b) is identical to the definition in section 701(28)(B) of SMCRA. Both definitions specifically state that surface coal mining operations include "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...."

In applying the Utah definition to the instant cases, I considered all available facts in the record such as the purpose of construction, who constructed the roads, the relationship of the roads to the existing public road system, the current use of the roads, and the reconstruction, improvement, and maintenance of the roads. In the case of the Cottonwood/Wilberg Road (State Highway 57), the record shows that State Highway 57 was engineered and constructed in 1977-1978 for the purpose of facilitating coal haulage from the mine to the Hunter Preparation Plant, and was paid for by the coal company and secondary revenues. Surfacing improvements were made in 1987 and 1989 due to the impacts of haulage by the primary user, the coal company. These improvements were financed through a surcharge tax to the State by mineral developers. Use of the 5-mile stretch above the State Highway 29 intersection is almost exclusively for coal haulage and access to the mine, and while the 8-mile stretch from State Highway 29 south to the Hunter Preparation Plant receives light use from local farming, recreation, and power plant activities, its predominant use remains coal haulage from the mine to the power plant.

In the case of the Deer Creek Road (Emery County Road No. 3-04), the record shows that the road begins at State Highway 31, passes the entrance to the Huntington Power Plant, continues 0.6 miles to the permit boundary, and then continues another 1 mile within the permit boundary to the Deer Creek Mine gate where the road dead ends. County Road 3-04 was reconstructed with asphalt in 1989-1990 due to deterioration from the primary user, the coal company. This reconstruction was paid for by a surcharge tax on mineral developers to the State, which reallocated funds to the county. Further, the 0.6 miles of the road addressed in the TDN is used almost exclusively for mine-related activities, and according to the county road authority, the Deer Creek Mine is considered the primary user of the road.

Based on the foregoing facts, and in the absence of any specific information provided by your agency which would demonstrate that the roads do not fall within the definition of "surface coal

Dianne R. Nielson, Ph.D.

3

mining operations," I find that both roads are within the jurisdictional reach of the Utah program. Accordingly, I hereby affirm the determination of the Albuquerque Field Office Director and order a Federal inspection. That inspection will address the need to revise the permits to include the roads referenced in the ten-day notices.

Sincerely,  
W. Hord Tipton

W. Hord Tipton  
Deputy Director  
Operations and Technical Services

cc: PacifiCorp Electric  
324 S. State Street  
Salt Lake City, Utah 84124

Robert H. Hagen  
Director, Albuquerque Field Office

Nina Rose Hatfield  
Assistant Deputy Director  
Operations and Technical Services

Carl C. Close  
Assistant Director, Eastern Support Center

Raymond Lowrie  
Assistant Director, Western Support Center

Joel Yudson  
Assistant Solicitor, Regulatory Programs



# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangerter  
Governor  
Dee C. Hansen  
Executive Director  
Dianne R. Nielson, Ph.D.  
Division Director

355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-538-5340

JUN 20 1991

June 19, 1991

Harry Snyder, Director  
Office of Surface Mining  
1951 Constitution Avenue, N.W.  
Washington, D.C. 20240

Dear Mr. Snyder:

The purpose of this letter is to formally record with the Office of Surface Mining (OSM) the state protest of the Hord Tipton denial of Utah's informal appeals requesting vacation of TDN 91-02-246-002 (Genwal Mine), TDN 91-02-116-003 (Cottonwood/Wilberg Mine), and TDN 91-02-246-001 (Deer Creek Mine). These TDNs were issued by the Albuquerque Field Office for failure to permit roads. The information concerning these TDNs and their informal appeals should be available in the Washington Office. However, should it not be available, please notify me, and I will immediately see that copies of the necessary information are supplied.

This protest of the issuance of the TDNs and Hord Tipton's reaffirmation is based on the following facts:

1. The Tipton response criticized the Division for failing to provide any additional information regarding the subject roads. However, the Division's appeals in all three cases were based on the fact that OSM was preempting the state's enforcement of its regulatory program. Therefore, the state's appeals were not directed to specific data concerning the individual roads.
2. The data which was provided by OSM in Hord Tipton's responses to the appeals and which formed the basis for his denial of the appeals, are incomplete and inaccurate.
3. The Tipton response implies that permit decisions were never made on the subject roads. In fact, all three mines are federal mines, and OSM issued a permit separate and distinct

from that issued by Utah for each mine. In each case, at the time of initial permit issuance and renewal, OSM either determined or concurred with the Division determination that each road is a public road not subject to permitting. Since that time, OSM has failed to define changes in its regulations or the state program which would support issuance of a notice of violation in contradiction to the original findings.

4. The state has continued to attempt to establish rules revisions and criteria which would form a basis for review of the initial permit determinations for these and other public roads. This process has been preempted by OSM's TDNs.
5. The criteria which the Tipton review cites for roads determinations have not been legally available for reviewing previous public roads permit decisions due to delays by OSM in approval of program amendments.

Utah's program includes definitions of "affected area", "roads", and "public roads." The definitions are nested such that "affected area" includes the term "roads," and "roads" includes the term "public roads." The criteria set forth in the Tipton response are included in the definition of "public road." However, OSM has failed to approve or disapprove the state's definition of "roads", although the program amendment has been before OSM since last fall. Absent a definition of "road", there is no operational connection between the definitions of "affected area" and "public roads." Therefore, the state has had no way to legally use "public roads" criteria to reevaluate the permit status of public roads.

6. The issuance of TDNs has heightened the conflict while preempting the state's authority to conduct case-by-case reviews of prior permit decisions which were originally made by or endorsed by OSM. A vacation of these TDNs will not preclude OSM's review of the Division's roads determinations during oversight.

Page 3  
Mr. Harry Snyder  
June 19, 1991

Preemption of the state's enforcement of its regulatory program is an important issue, one which is fundamental to the concept of state primacy. Thank you for your consideration of this protest by the State of Utah.

Best regards,



Dianne R. Nielson  
Director

kak  
cc: H. Tipton  
R. Hagen  
T. Mitchell  
L. Braxton  
Nevada Electric Investment Company  
PacifiCorp

DN91