

big mine file

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

*Recd.
8-30-91
JOGM*

PACIFICORP ELECTRIC OPERATIONS
AND ENERGY WEST MINING CO.,

Petitioners,

v.

OFFICE OF SURFACE MINING
RECLAMATION & ENFORCEMENT

) APPLICATION FOR REVIEW OF
) PROPOSED PENALTY ASSESS-
) MENT, NOTICE OF VIOLATION
) NO. 91-02-244-1; REQUEST
) FOR HEARING; MOTION TO
) CONSOLIDATE
)
) DEER CREEK MINE,
) EMERY COUNTY, UTAH
)
) COAL MINING PERMIT
) NO. ACT/015/018

PETITION FOR REVIEW, REQUEST FOR HEARING
AND MOTION TO CONSOLIDATE

Pursuant to 43 C.F.R. Part 4.1150 and 30 C.F.R. § 845.19, PACIFICORP ELECTRIC OPERATIONS ("PacifiCorp") and ENERGY WEST MINING CO. ("Energy West") (jointly referred to as "Petitioners"), petition for review of the proposed penalty assessment dated July 25, 1991 concerning Notice of Violation No. 91-02-244-1 ("NOV"). Proceedings to contest the fact of violation of the NOV are currently pending herein as Docket No. DV91-9-R and Petitioners request consolidation of this application with those proceedings. Finally, Petitioners request a hearing to review the proposed assessment in Salt Lake City, Utah

to be consolidated with the hearing in Docket No. DV91-9-R currently set for 2:00 p.m. on December 9, 1991.

STATEMENT OF FACTS

1. On June 26, 1991, the NOV was issued by the federal Office of Surface Mining Reclamation & 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".
2. The NOV was issued by OSM for petitioners alleged failure to first obtain a permit from the Utah Division of Oil, Gas & Mining ("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.
3. 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.
4. By letter dated March 28, 1991, the DOGM 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 "B".

5. By letter dated May 3, 1991 from petitioner to Rex Funk, Emery County Road Department, petitioner requested information regarding the public road status of Emery County Road no. 304. A true and correct copy of the letter dated May 3, 1991 is attached as Exhibit "C".

6. By letter dated May 21, 1991, the Emery County Road Department confirmed that Emery County Road no. 304 is a public road under 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 "D".

7. By letter dated June 3, 1991, petitioner forwarded the response of the Emery County Road Department to DOGM. A true and correct copy of the letter dated June 3, 1991 is attached hereto as Exhibit "E".

8. Pursuant to 30 C.F.R. § 845.17 and by letter dated July 11, 1991, petitioner provided OSM with the above-referenced letters dated March 28, 1991 attached hereto as Exhibit "B", May 3, 1991 attached as Exhibit "C", May 24, 1991 attached as Exhibit "D", and June 3, 1991 attached as Exhibit "E". A true and correct copy of the letter dated July 11, 1991 is attached hereto as Exhibit "F".

9. On July 25, 1991, OSM issued a Notice of Proposed Civil Penalty Assessment ("NOPA") concerning the NOV. The NOPA assesses petitioners a \$1,200 penalty and 32 penalty points, including 30 points for "seriousness" and 2 points for

"negligence". A true and correct copy of the NOPA is attached hereto as Exhibit "G".

10. On July 26, 1991, petitioner filed a petition for review and request for hearing concerning the fact of the NOV with the Office of Hearings & Appeals ("OHA") docketed as No. DV91-9-R.

11. By order and notice of hearing dated August 21, 1991, OHA Judge Ramon M. Child set a hearing for Docket No. DV91-9-R at 2:00 p.m. on December 9, 1991.

12. Full payment of the proposed assessment in the form of check no. 0388850 from petitioner made payable to OSM, accompanies this application and petitioner requests that this payment be held in escrow pending final determination of the assessment.

MOTION TO CONSOLIDATE

Petitioners' request that review of the proposed assessment be consolidated with the pending review of the fact of the violation of the NOV set for hearing on December 9, 1991. Such consolidation is in the interest of judicial economy in that the penalty assessment will be vacated if the fact of violation is vacated. In the event that the NOV is not vacated in proceedings concerning the fact of the violation, petitioners request the OHA judge to vacate or reduce the proposed assessment as set forth herein.

APPLICATION OF STATE LAW

The State of Utah has declined to find petitioners in violation of the Utah program for the alleged violations set forth in the NOV. OSM has proceeded under § 521 of the Surface Mining Control & Reclamation Act, 30 U.S.C. § 1271 ("SMCRA") to issue the NOV, over the objection of the DOGM. OSM has cited petitioners under the Utah coal program for alleged violations of Utah state law and must apply the Utah Coal Mining and Reclamation Act, Utah Code Ann. § 40-10-1, et seq. and civil penalty regulations at Utah Administrative Code § 614-1L-845, et seq. to the proposed assessment. See Laurel Pipeline Co. v. Bethlehem Mines Corp., 624 F.Supp. 538 (W.D. Pa. 1986) (finding that enforcement of the approved state program is vested in the state and, therefore, state law governs in determining federal jurisdiction over its citizen suit action). Similarly, the Office of Hearings & Appeals must apply Utah state law in reviewing the proposed assessment in this matter.

PROPOSED ASSESSMENT

I. SERIOUSNESS.

OSM is proposing to assess petitioners 15 penalty points for "probability of occurrence" and 15 penalty points for "extent of damage." This assessment is improper where, as in this case, the violation charged its mining without a permit. In such cases, the Interior Board of Land Appeals ("IBLA") has ruled that there should be no assessment for "extent of damage" points.

West Virginia Energy Inc., 88 I.D. 831, 835 (1981). In that case, the IBLA vacated all penalty points for "extent of damage" where the violation charged was mining without a permit:

There are two separate methods under 723.12(c)(2) for determining the proper number of extent of damage points to be assessed, each depending upon the geographical extent to which the damage or impact the violated standard is designed to prevent in fact occurs . . . When the violation charged is mining without a permit, there is no permit area against which to judge which of these provisions to apply, so their applicability, at all, is in doubt at the outset. Moreover, the language of these provisions, making the assignment dependent upon the location of the "damage or impact the violated standard is designed to prevent," suggests that they apply to violations of substantive performance standards and not to essentially procedural ones, like mining without a permit. Thus, in this case, no points for extent of damage are appropriate.

33 BD, page 111 at 113.

The NOPA indicates that it is no longer OSM's policy to follow West Virginia Energy, Inc., but cites no authority for this position. The IBLA's position of assessing no points for "extent of damage" as set forth in West Virginia Energy, Inc. has been consistently followed in administrative law judge rulings. JDG, Inc. v. OSM, 515 A.L.J. 338, 339, Surface Mining Law Summary, (1987); King Coal Co. v. OSM, 166 A.L.J. 1253, 1256, Surface Mining Law Summary, (1983); Mountain Enterprises Coal Co. v. OSM, 62 A.L.J. 162, 165, Surface Mining Law Summary, (1981). The IBLA reconfirmed West Virginia Energy, Inc. in C & N Coal Co. Inc., 103 IBLA 48, 63-64 (1988), and

followed the rationale of that decision in vacating "extent of damage" points assessed by OSM.

Therefore, petitioners respectfully request that the seriousness category be reduced to eliminate the extent of damage penalty and reduced to a total of 15 penalty points.

II. NEGLIGENCE.

No penalty points should be assigned for negligence due to the fact that this violation has occurred through no negligence of the petitioners.

OSM has recognized petitioners' lack of fault in this matter in the NOPA as follows:

Information submitted by the operator, and other information documented in the enforcement actions, indicates that the operator had been informed by the State of Utah that the road need not be permitted; even OSM's interpretation on the point seems to have evolved over time; therefore the degree of fault must be low. There is a degree of negligence, though, for not adhering to the definition of surface coal mining operations.

Under the circumstances of this case, the operator has been caught between differing regulatory interpretations of OSM and the State of Utah. As the record indicates, the operator has taken all action required by the State of Utah to determine the public road status of the subject road. The violation occurred through no fault of the operator but rather occurred due to a dispute in interpretation between OSM and the State of Utah. Pursuant to R614-1L-845 (3)(A), violations involving no fault "shall be assigned no penalty points for degree of fault." (Emphasis added.) Therefore, petitioners respectfully

the OHA judge to vacate the two penalty points assessed by OSM for negligence.

III. GOOD FAITH.

OSM fails to assign petitioners any good faith points under the proposed assessment. Petitioners have demonstrated good faith by taking action at the request of the State of Utah to determine the public road status of Emery County Road no. 302. OSM improperly asserts that "efforts of an operator prior to NOV issuance" cannot be accorded good faith credit. In this case, the operator took action in response to the request of the State of Utah which was attempting to respond to a ten-day notice regarding this issue. The operator's efforts to determine the regulatory status of the public road were taken promptly at the request of the State as demonstrated in the correspondence attached hereto as Exhibits B, C, D & E.

In addition, in that Emery County Road no. 304 is a public road, subject to maintenance and control by Emery County, the operator is without jurisdiction to proceed with the permitting and reclamation required to abate the NOV. By establishing the public road status of Emery County Road no. 304, petitioner has taken all steps which it can to comply with the NOV. Emery County will not allow the petitioners to take further action under the NOV to reclaim a county road. Under these circumstances, the operator has done all that can be done and should be accorded maximum good faith points.

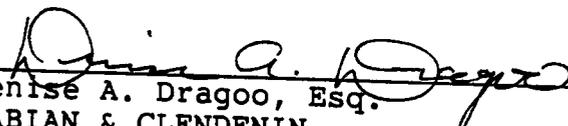
IV. DETERMINATION OF AMOUNT OF PENALTY.

OSM has penalized petitioners \$1,200 for a proposed assessment of 32 points. Pursuant to R614-1L-845.14, an assessment of 32 points under state law, equates to a fine of \$440, not \$1,200. OSM has cited the operator for a violation of state law and should apply the State's point system for penalties. Therefore, the penalty should be reduced from \$1,200 to \$440 and, if the points are reduced, the determination of the new penalty should be made in accordance with the schedule set forth at R614-1L-845.14.

CONCLUSION

For the above-state reasons, petitioners request that the proposed assessment for the NOV be vacated or reduced. Petitioners request a refund of all or a portion of the assessment which it paid to OSM as a condition of review. Petitioners request that review of the proposed penalty assessment be consolidated with the pending proceedings concerning the fact of the violation. Finally, petitioners request a hearing on these consolidated matters in Salt Lake City, Utah, on December 9, 1991.

Respectfully submitted this 27th day of August, 1991.


Denise A. Dragoo, Esq.
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Petitioners
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, Request for Hearing and Motion to Consolidate to be mailed, via certified mail, return receipt request, this 27TH day of August, 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:082691a

PACIFIC POWER ♦ UTAH POWER

920 S.W. Sixth Avenue
Portland, Oregon 97204

1407 West North Temple
Salt Lake City, Utah 84140

DATE 08/20/91

CHECK NO. 0388850

MELLON BANK

60-160

PITTSBURGH, PA

0433



AMOUNT \$*****1,200.00**

PAY TO THE ORDER OF: U S DEPARTMENT OF THE INTERIOR
OFFICE OF SURFACE MINING
P.O. BOX 360292-M
PITTSBURGH, PA 15251

⑈0388850⑈ ⑆043301601⑆ 129 3618⑈

Pacific Power (503) 464-5283

PAYEE

PAYEE NO.

DATE

CHECK NO.

Utah Power (801) 220-2919

U S DEPARTMENT OF THE INT

60961

08/20/91

0388850

INVOICE NUMBER	DATE	PURCHASE DOCUMENT	AMOUNT	DISCOUNT/ADJUSTMENTS	NET AMOUNT
CR102929	08/07/91		1200.00		1200.00
ASSESSMENT FEE PAYMENT					
FEDERAL VIOLATION 91-2-244-1 DEER CREEK MINE					
ESCROW CHECK WITH THE OFFICE OF SURFACE MINING					
CHECK TOTAL					1200.00

RETURN TO -
J BLAKE WEBSTER
OUC X4584

U.S. DEPARTMENT OF THE INTERIOR
Office of Surface Mining Reclamation and Enforcement
NOTICE OF VIOLATION

Notice of Violation Number
RECEIVED
91 02 244

JUN 26 1991 TV 1

2. Name Permittee
Pacificorp Electric Operations No Permit

Originating Office Address
USDI-OSM
Albuquerque Field Office
625 Silver Ave., SW, #310
Albuquerque, NM 87102
Telephone Number

3. Mailing Address
324 South State Street, Salt Lake City, UT 84126

4. Name of Mine Surface Other (Specify) 7
Deer Creek Underground

5. Telephone Number (801) 363-8851
6. County Emery
State Utah

7. Operator's Name (if other than permittee)
Energy West Mining Company

9. Date of Inspection
June 26, 1991
10. Time of Inspection
From 9:00 a.m. To 1:30 p.m.

8. Mailing Address
Post Office Box 310, Huntington, UT 84528

11. State Permit Number ACT/015/018	12. NPDES Number	13. MSHA ID Number 42-00121	14. OSM Mine Number N/A
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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.

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.

THE UNDERSIGNED AUTHORIZED REPRESENTATIVE HEREBY FINDS THAT THIS NOTICE DOES NOT DOES REQUIRE CESSATION OF MINING EXPRESSLY OR IN PRACTICAL EFFECT. Therefore, you are are not entitled to an informal public hearing on request, within 30 days after service of this notice (30 CFR 722.15).

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.

IMPORTANT—Please Read Information on the Back of this Page

15. Print Name of Person Served Guv. 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 <i>Guv. Davis</i>	20. Signature of Authorized Representative <i>Gary L. Fritz</i>
	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) etc.

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 eighth day (9/14/91).
- (3) Upon plan approval.



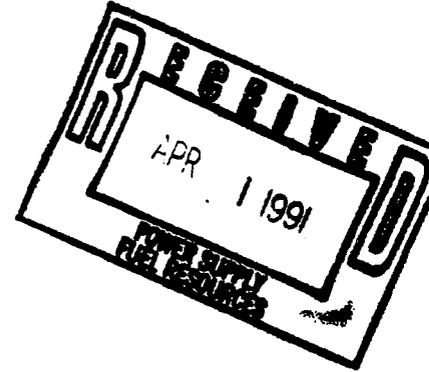
Norman H. Bangertter
Governor

Dee C. Hansen
Executive Director

Dianne R. Nielson, Ph.D.
Division Director

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

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



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

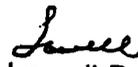
In order to facilitate this analysis, you will need to secure a signed letter from Emery County discussing the following topics:

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.

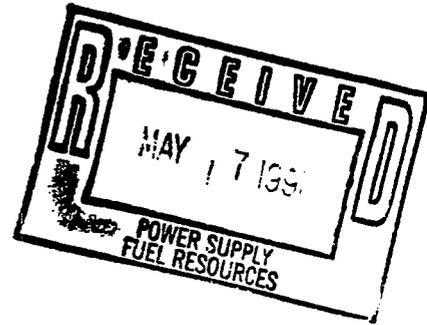
Sincerely,


Lowell P. Braxton
Associate Director, Mining

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

PACIFIC POWER • UTAH POWER

324 South State
P.O. Box 26128
Salt Lake City, Utah 84126-0128



● PACIFICORP
ELECTRIC OPERATIONS GROUP

May 3, 1991

Mr. Rex Funk
Supervisor
Emery County Road Department
PO Box 889
Castle Dale, Utah 84513

Dear Mr. Funk:

Thank you for your participation in the recent OSM Hearing on Public Roads. Your response on such short notice is appreciated. Further information on the public road issue is required by the agencies.

Attached please find a copy of a letter from the Utah Division of Oil, Gas and Mining requesting information regarding the county road that provides access to the Deer Creek coal mine. As indicated in the letter, the request involves the Deer Creek road between Highway 31 and the Deer Creek Mine, crossing portions of Section 36, T16S, R7E and portions of Sections 1, 2, 10 and 11, T17S, R7E, SLBM.

Please provide the information listed on page 2 of the attached letter.

We would appreciate your response by May 27. If you have questions, please call me at 220-4584 or Val Payne at 653-2312.

Sincerely,

J. Blake Webster
Permitting Administrator

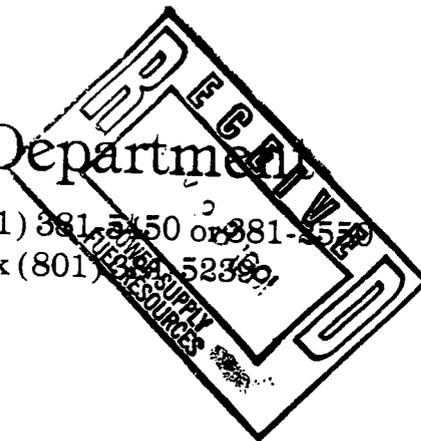
VP/do
Enclosure



Emery County Road Department

P.O. Box 889
Castle Dale, Utah 84513

Phone (801) 381-5450 or 381-5570
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

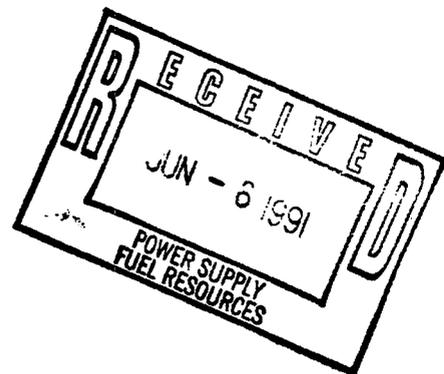
cc Commissioner Dixie Thompson
Val Payne, UP&L Mining Division

PACIFIC POWER • UTAH POWER

324 South State
P.O. Box 26128
Salt Lake City, Utah 84126-0128

PACIFICORP
ELECTRIC OPERATIONS GROUP

June 3, 1991



Mr. Lowell P. Braxton
Associate Director, Mining
State of Utah
Department of Natural Resources
Division of Oil, Gas and Mining
355 West North Temple
- 3 Triad Center, Suite 350
Salt Lake City, UT 84180-1203

Re: MINE ACCESS ROADS, PACIFICORP ELECTRIC OPERATIONS,
DEER CREEK MINE, ACT/015/018 AND COTTONWOOD/WILBERG
MINE, ACT/015/019, EMERY COUNTY, UTAH

Dear Mr. Braxton:

I am enclosing information in response to your letter of March 28, 1991 regarding the above referenced matter as well as a copy of a letter received from Mr. Rex Funk, Emery County Road Supervisor, in which the Deer Creek road is discussed. I understand that Mr. Archie Hamilton, Utah Department of Transportation, has submitted information regarding the Cottonwood/Wilberg road (Highway 57) directly to you. I hope this material sufficiently addresses your questions.

If you require further information, please call me at 220-4584 or Val Payne at 653-2312.

Sincerely,

A handwritten signature in cursive script that reads "Val Payne".

J. Blake Webster
Permitting Administrator

VP/sh/1630

Enclosures

cc: Val Payne, with enclosures

file

PACIFICORP
ELECTRIC OPERATIONS

ONE UTAH CENTER

201 SOUTH MAIN • SUITE 2100 • SALT LAKE CITY, UTAH 84140-0021 • (801) 220-2000

VIA TELECOPY

(505) 766-2609

and

VIA CERTIFIED MAIL
-RETURN RECEIPT REQUESTED

July 11, 1991

Mr. Gary Fritz
United States Department of Interior
Office of Surface Mining
Albuquerque Field Office
625 Silver Avenue, S.W.
Suite 310, Silver Square
Albuquerque, New Mexico 87102

RE: Notice of Violations
91-02-116-003 (Cottonwood/Wilberg Mine) and
91-02-246-001 (Deer Creek Mine)

Dear Mr. Fritz:

PacifiCorp Electric Operations ("PacifiCorp") hereby submits information concerning the above-entitled Notices Of Violations ("NOVs") for considered in determining the facts surrounding the alleged violations and the amount of the penalties. This information is submitted pursuant to 30 C.F.R. § 845.17. PacifiCorp protests issuance of these NOVs due to the fact that both involve public roads which are not required to be permitted under either the Utah Coal Mining & Reclamation Act or the federal Surface Mining Control & Reclamation Act. PacifiCorp cooperated with the Utah Division of Oil, Gas & Mining ("DOGMA") to confirm the public road status of State Highway Route 57 and the Emery County Road well prior to the issuance of the above-stated NOVs. In this regard, we provide the following enclosed correspondence:



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



United States Department of the Interior



OFFICE OF SURFACE MINING
Reclamation and Enforcement
Brooks Towers
1020 15th Street
Denver, Colorado 80202
July 25, 1991

NOTICE OF PROPOSED CIVIL PENALTY ASSESSMENT (NOPA)

Pacificorp Electric Operations
324 South State Street
Salt Lake City UT 84126

RE: Citation: Notice of Violation 91-2-244-1
Operation/Permit: Deer Creek / not permitted

Dear Sir/Madam:

Under the authority of THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, 30 U.S.C. 1201 et seq., on June 26, 1991, you were issued **Notice of Violation N91-2-244-1**.

In accordance with 30 CFR Part 845, you are hereby issued a proposed civil penalty assessment for this violation, in the amount of:

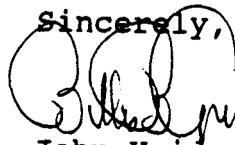
\$1,200.00

Carefully read this letter and the enclosed information concerning the requirements for payment of civil penalty assessments. Information regarding the requirements for obtaining informal and formal administrative review of the proposed penalty is also enclosed.

If the enclosed Assessment Worksheet shows that good faith in achieving compliance was not considered in making the assessment, you may request a modified assessment based on consideration of good faith. To request consideration of good faith, you must show that extraordinary measures were taken to abate the violation(s) in the shortest possible time and that abatement was achieved before the time set for abatement. Your request should be made in writing, after the violation(s) have been abated, and should be addressed to the State Programs Branch at the address above.

If you have any questions, you may call Randal Pair of our Field Assessment Unit, at (303) 844-5659.

Sincerely,


John Heider, Chief
State Programs Branch

Enclosures

ASSESSOR #: RP

ASSESSMENT WORKSHEET

NOV # N91-2-244-1
CO # _____
PERMIT # ACT/015/018 (UT)

Company Name / Permittee: Pacificorp Electric Operations

VIOLATION 1 of 1

	POINTS
1. History of Previous Violations:	<u>0</u>
2. Seriousness (Part A or B)	
A. (1) Probability of Occurrence:	<u>15</u>
(2) Extent of Actual or Potential Damage:	<u>15</u>
B. Obstruction to Enforcement:	<u>N/A</u>
TOTAL Seriousness:	<u>30</u>
3. Negligence:	<u>2</u>
4. Good Faith:	<u>N/A</u>
TOTAL POINTS:	<u>32</u>
ASSESSMENT:	<u>\$1,200.00</u>

VIOLATION ___ of ___ POINTS

1. History of Previous Violations:	<u>X</u>
2. Seriousness (Part A or B)	
A. (1) Probability of Occurrence:	<u>X</u>
(2) Extent of Actual or Potential Damage:	<u>X</u>
B. Obstruction to Enforcement:	<u>--</u>
TOTAL Seriousness:	<u>X</u>
3. Negligence:	<u>XX</u>
4. Good Faith:	<u>--</u>
TOTAL POINTS:	<u>XX</u>
ASSESSMENT:	<u> </u>

Assessor #: RP

Page 1 of 2

ASSESSMENT EXPLANATION

NOV # N91-2-244-1

CO # _____

Company Name / ~~Permittee~~: Pacificorp Electric Operations

Violation # 1 of 1

Points

History of Previous Violations:

0

Seriousness: (Part A or B)

A. Event: performing specific acts without regulatory approval, which approval is necessary to prevent or minimize adverse impacts of surface coal mining and reclamation operations on the environment and on public health and safety.

(1) **Probability of Occurrence:**

The operator did conduct surface coal mining and reclamation operations on an unpermitted haulroad; therefore the event has occurred. 15

(2) **Extent of Actual or Potential Damage:**

No actual damage was evidenced. Potential damages from the unpermitted operations would be in an area for which no assessment of potential impacts had been made, and no mitigating measures specified, or a determination made whether surface coal mining operations might be allowed. The potential damage is out of a permitted area, and has the potential to be of the highest order. 15

The operator submitted information citing an IBSMA decision, West Virginia Energy, Inc., 88 ID. 831, 835 (1981), requesting that 0 points be assessed for extent of damage. OSM's current assessment policy, which post-dates the cited decision, indicates that extent of damage points should be assigned. As noted above, the event the regulation is intended to prevent does involve substantive performance standards, and is not only procedural.

TOTAL Seriousness:

30

B. Obstruction to Enforcement:

N/A

Negligence:

2

Information submitted by the operator, and other information documented in the enforcement actions, indicates that the operator had been informed by the State of Utah that the road need not be permitted; even OSM's interpretation on the point seems to have evolved over time; therefore the degree of fault must be low. There is a degree of negligence, though, in not adhering to the definition of surface coal mining operations.

Good Faith:

N/A

The operator submitted information requesting assessment of good faith points, based on the efforts the operator had taken to obtain a regulatory decision that the road need not be permitted. Efforts of an operator prior to NOV issuance are addressed under negligence. Good faith is to be directed to efforts made after NOV issuance to abate the violation.

Good faith may be assessed at a later time if appropriate information is received regarding the required abatement measures in the NOV.



United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
BROOKS TOWERS
1020 15TH STREET
DENVER, COLORADO 80202



Office of Surface Mining
Western Service Center
1020 15th Street
Denver, CO 80202

ATTENTION: John Heider, Chief
State Programs Branch

Pursuant to 30 CFR 845.18, I request a conference to review the proposed assessment for violations of Notice of Violation(s) # N91-2-244-1 and/or Cessation Order(s) # ____.

My telephone number is () _____.

(Signature)

(Date)

(Please Print Name and Title)

(Name of Permittee or Operator)

(Address of Permittee or Operator)

Provided your request is received within 30 days as provided in 30 CFR 845.18, you will be contacted by a conference officer in order to arrange the time and place of the conference.

Pursuant to 30 CFR 845.18(b)(2), at least 5 days prior to the conference, notice of the time and place of the conference must be posted at the OSM field office that has jurisdiction over the mine. Any person has the right to participate in the conference.

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS



PENALTY FOR PRIVATE
USE, \$300

SENDER INSTRUCTIONS

- Print your name, address and ZIP Code in the space below.
- Complete items 1, 2, 3, and 4 on the reverse.
 - Attach to front of article if space permits, otherwise affix to back of article.
 - Endorse article "Return Receipt Requested" adjacent to number.

Print Sender's name, address, and ZIP Code in the space below.

RETURN
TO →

STATE OF UTAH
NATURAL RESOURCES
OIL, GAS, & MINING
3 TRIAD CENTER, SUITE 350
SALT LAKE CITY, UTAH 84180-1203

DCM VB TDN 90-02-224-6 (TV1) ACT/015/018

<p>● SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.</p> <p>Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.</p> <p>1. <input checked="" type="checkbox"/> Show to whom delivered, date, and addressee's address. (Extra charge) 2. <input type="checkbox"/> Restricted Delivery (Extra charge)</p>	
<p>3. Article Addressed to:</p> <p>ROBERT H HAGEN DIR ALBUQUERQUE FIELD OFFICE OFFICE OF SURFACE MINING R & E STE 310 SILVER SQ 625 SILVER AVE SW ALBUQUERQUE NM 87102</p>	<p>4. Article Number P 540 714 070</p> <p>Type of Service:</p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Insured <input checked="" type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail <input type="checkbox"/> Return Receipt for Merchandise</p> <p>Always obtain signature of addressee or agent and <u>DATE DELIVERED</u>.</p>
<p>5. Signature — Addressee X</p>	<p>8. Addressee's Address (ONLY if requested and fee paid)</p>
<p>6. Signature — Agent X <i>Wilson Henry</i></p>	
<p>7. Date of Delivery <i>MAY 11 1989</i></p>	

PS Form 3811, Apr. 1989

★ U.S.G.P.O. 1989-238-815

DOMESTIC RETURN RECEIPT