

0019

big 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. 91-02-244-002
ENERGY WEST MINING CO.,)	COTTONWOOD/WILBERG MINE,
)	EMERY COUNTY, UTAH
Petitioners,)	
)	
v.)	
)	COAL MINING PERMIT
OFFICE OF SURFACE MINING)	NO. ACT/015/019
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. 91-02-244-002 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 Cottonwood/Wilberg Mine Permit No. ACT/015/019 to Petitioner on July 6, 1989.

2. On June 26, 1991, Notice of Violation No. 91-02-244-002 ("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 Cottonwood/Wilberg 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 Petitioner's alleged 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 Utah State Highway Route 57 ("State Highway 57") extending from the present permit boundary approximately 13 miles south to the receiving scales of the Huntington Preparation Plant.

4. The NOV requires the operator to reclaim State Highway 57 within eighty (80) days or submit to DOGM a complete and adequate plan to permit and bond the highway within thirty (30) days of issuance of the NOV.

5. Prior to issuing the NOV, OSM issued ten day notice No. 91-02-116-003 ("TDN") to the State, dated March 15, 1991 and received on March 18, 1991, citing Petitioner's alleged "failure to first obtain a permit from the Division (DOGM) prior to engaging in and carrying out any coal mining and reclamation operations" on State Highway 57 in violation of Utah Administrative Code 614-300-112.400. A true and correct copy of the TDN is attached as Exhibit "B."

6. DOGM declined to require the operator to include State Highway 57 in the Cottonwood/Wilberg permit on the basis that (1) OSM itself had found the Petitioner to be in compliance when the Cottonwood/Wilberg 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 15, 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 the appropriate regulatory authority concerning the public road status of State Highway 57. A true and correct copy of the March 28, 1991 letter is attached hereto as Exhibit "E."

10. By letter dated May 24, 1991, the Utah State Department of Transportation ("UDOT") stated that State Highway 57 is a highway and that, "no agency, federal or state, other than UDOT, has authority over this roadway and right of way." A true and correct copy of the letter dated May 24, 1991 is attached hereto as Exhibit "F."

11. 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 "G."

12. 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 "H."

13. 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 "I."

14. DOGM had received no response to this appeal as of June 26, 1991, when the NOV was issued by OSM to Petitioner.

ARGUMENT

I. STATE HIGHWAY 57 IS A PUBLIC ROAD AND DOES NOT CONSTITUTE SURFACE COAL MINING OPERATIONS SUBJECT TO PERMIT

The NOV cites Petitioner for failure to permit State Highway 57 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, State Highway 57 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 ("IBLA") 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 Cottonwood/Wilberg 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, State Highway 57 clearly constitutes a public road which is not subject to permit under SMCRA or UCMRA. The May 24, 1991 letter from UDOT establishes the public road status of State Highway 57. The letter confirms that the road was

designated as a state route on October 15, 1982 and is a UDOT state federal aid highway constructed in accordance with UDOT and AASHTO road standards. Id. An average of \$50,000 in public revenue is annually expended on maintaining State Highway 57. Id. Finally, UDOT states that, "no agency, federal or state, other than UDOT, has authority over this roadway and right of way."

In sum, under the public road criteria set forth by Judge Williams in Harman as confirmed and followed by the IBLA, State Highway 57 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 State Highway 57 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 IBLA determined that 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 Cottonwood/Wilberg Permit. Id. Pages 11.1 and 11.2 from the approved Cottonwood/Wilberg Mining and Reclamation Plan ("MRP") attached to the letter of March 27, 1991 specifically reference "State Road 57" and find the Petitioner's operations in compliance with the Utah State Program. The State also asserted that OSM's TDN was untimely due to the fact that the State had adopted public road definitions and policies submitted 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 "G." However, DOGM did query the Petitioner regarding the status of State Highway 57 pursuant to the criteria adopted in its emergency rule

making. The response received by DOGM clearly corroborates a finding that State Highway 57 is a public road not subject to permit under DOGM's program. Letter dated May 24, 1991 from UDOT, 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 UDOT confirms that State Highway 57 is a state route maintained by UDOT. Letter dated May 24, 1991 from UDOT. Pursuant to Utah Code Ann. § 27-12-11, state roads are within the exclusive jurisdiction and control of the Utah State Road Commission:

27-12-21. State Highways - Class A State Roads. All roads and streets within the state which, by legislative action or as otherwise provided by law, are designated as state highways shall be known as class A state roads. The State Road Commission shall have jurisdiction and control over all state highways and said highways shall be constructed and maintained by the commission from funds which shall be made available for that purpose.

Furthermore, under Utah's statutory rules of construction, the term "highway" is equivalent to the word "state road." Utah Code Ann. § 68-3-12.

In addition to these provisions of state law, it is clear that reclamation of a state highway 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 State Highway 57. In this regard, OSM's NOV is arbitrary and capricious, in bad faith and may constitute grounds for recovery of Petitioner's attorneys' fees and costs.

In sum, under Utah State law and sound public policy, neither Petitioner, OSM nor DOGM have jurisdiction or authority to permit and/or reclaim State Highway 57. 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 applicable 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."

State Highway 57 has been recognized as a public road by OSM during the permitting and re-permitting of the

Cottonwood/Wilberg Mine. 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 Cottonwood/Wilberg permit was reviewed by state and federal regulatory authorities and reissued effective July 6, 1989. Therefore, the NOV issued more than six years from the date of the alleged violation, is barred by the applicable statutes of limitation 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. Since enactment of SMCRA in 1977 until the recent issuance of the NOV, OSM has consistently found that State Highway 57 is a public road not subject to the permitting or regulatory requirements of SMCRA or UCMRA. Letter dated March 27, 1991, attached hereto as Exhibit "C." OSM did not find State Highway 57 to be a surface coal mining operation when the Cottonwood/Wilberg permit was reviewed by state and federal regulatory authorities and reissued

effective July 6, 1989. The State relied on OSM's determination of the operator's compliance in issuing the Cottonwood/Wilberg permit to Petitioner. This reliance resulted in issuance of a TDN, to the detriment of DOGM. Therefore, OSM is now estopped from issuing either the TDN or the subsequent NOV.

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 State Highway 57. OSM approved reissuance of the Cottonwood/Wilberg permit on February 7, 1986 without requiring regulation of State Highway 57. Therefore, OSM has either waived regulation of State Highway 57 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 26th 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 26th 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

Julie L. McKenzie

DAD:072691b

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

1. Notice of Violation Number
 91-02-244-2

JUN 26 1991 TV 1

2. Name Pacificorp Electric Operations		<input checked="" type="checkbox"/> Permittee <input type="checkbox"/> No Permit		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 Albuquerque, NM 87102	
4. Name of Mine Cottonwood/Wilberg		<input type="checkbox"/> Surface <input checked="" type="checkbox"/> Underground		Telephone Number (505) 766-1486	
5. Telephone Number (801) 363-8851	6. County Emery	State Utah		9. Date of Inspection June 26, 1991	
7. Operator's Name (If other than permittee) Energy West Mining Company				10. Time of Inspection From 9:00 a.m. To 10:30 a.m.	
8. Mailing Address P.O. Box 310, Huntington, UT 84528					
11. State Permit Number ACT/015/019	12. NPDES Number	13. MSHA ID Number 42-00080	14. OSM Mine Number N/A		

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 843.15).

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 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 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 Cottonwood/Wilberg Mine haul road from the present permit boundary (former guard shack location) approximately 13 miles south to the receiving scale of the Hunter Preparation Plant.

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 haul 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/haul 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 to 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.

UNITED STATES DEPARTMENT OF THE INTERIOR
 Office of Surface Mining Reclamation and Enforcement
 MAR 18 1991
TEN-DAY NOTICE

Number: X-91 - 02 - 116 - 003 TV 1

Originating Office: USDI/OSMRE
Albuq. Field Office
625 Silver Ave, S.W.; Suite 310
Albuq, NM 87102
 Telephone Number: (505) 766-1486

Ten-Day Notice to the State of UTAH

You are notified that, as a result of A Complete, Random sample oversight (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: <u>PacificCorp Electric Operations</u> <small>(Or Operator if No Permit)</small>	County: <u>EMERY</u>	<input type="checkbox"/> Surface
Mailing Address: <u>324 South State St., Salt Lake City, UT 84126</u>		<input checked="" type="checkbox"/> Underground
Permit Number: <u>ACT 015 019</u>	Mine Name: <u>Cottonwood/Wilberg</u>	<input type="checkbox"/> Other

NATURE OF VIOLATION AND LOCATION: Failure to first obtain a permit from the Division (DOGIM) 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: RC14-300-112.400

NATURE OF VIOLATION AND LOCATION: Location is Cottonwood/Wilberg haulroad from present permit boundary (former guard shack location) approximately 13 miles south to the receiving scale of the Hunter Prep. Plant.

Section of State Law, Regulation or Permit Condition believed to have been violated: _____

NATURE OF VIOLATION AND LOCATION: _____

Section of State Law, Regulation or Permit Condition believed to have been violated: _____

Remarks or Recommendations: Submit permitting/ROWING information to DOGIM for the haulroad noted above.

Date of Notice: <u>3/15/91</u> <u>certified mail #</u> <u>P 965 799 042</u>	Signature of Authorized Rep.: <u>Henry P. Austin</u> Print Name and ID: <u>HENRY P. Austin #116</u>
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United States Department of the Interior
Office of Surface Mining
Mine Site Evaluation Inspection Report

For Office Use Only

1a	1b	1c
Y Y M M	Batch	Report

2. Name of Permittee

PACIFICORP ELECTRIC

3. Street Address

324 SOUTH STATE ST

4. City

SALT LAKE

5. State

UT

6. Zip Code

84126

7. Area Code

801

8. Telephone Number

363-8851

9. MSHA Number

42-00080-

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

910228

11. State Permit Number

ACT 015 019

12. Name of Mine

Cottonwood/Wilberg

13. County Code

015

14. State Code

UT

15. Strata

16. State Area Office

17. OSM Field Office No.

02

18. OSM Area Office No.

19. OSM ** ADMIN. MEET / TDN TRANSMITTED* Sample No. (Code)

Yes

No

22. Inspector's ID No.

116

23. Status

A 01

Type of Permit

B A

Mine Status (Code)

C 20

Type of Facility (Code)

D 11508.0

Number of Permitted Acres

E 00042.5

Number of Disturbed Acres

24. Type of Activity (check applicable boxes).

A Steep Slope

E Anthracite

B Mountain Top Removal

F Federal Lands

C Prime Farmlands

G Indian Lands

D Alluvial Valley Floors

H Other

25. Performance Standards (Codes) ** see narrative **

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 _____

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 015 019

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

9 1 0 2 2 8

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:

N/A: TDN ISSUANCE ONLY (SEE MEIR NARRATIVE)

29a. Number of Completes

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

30b. Number of Partials

31. Has inspection frequency been met?

Yes No

ii

Yes No

31a. Completes

31b. Partials

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

Ten-Day Notice No.

Notice of Violation No.

Cessation Order No.

Violation Codes

91-02-116-003

A <input type="checkbox"/>	<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 checked="" 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)

HENRY P. AUSTIN # 116

Signature of Authorized Representative

Henry P. Austin

Date

3/13/91

Signature of Reviewing Official

Gary J. Smith for SR

Date

3/14/91

34. Administrative Information

a <input checked="" type="checkbox"/>	Permit Review (Hours)
b <input checked="" type="checkbox"/>	Travel Time (Hours)
c <input checked="" type="checkbox"/>	Inspection Time (Hours)
d <input type="checkbox"/>	Report Writing Time (Hours)

01.0

This Minesite Evaluation Inspection Report (MEIR) is intended to transmit issuance of Ten-Day Notice 91-02-116-003 which is being issued for failure to first obtain a permit from the Division (DOGM) prior to engaging in and carrying out any coal mining and reclamation operations. This violation applies to the Cottonwood/Wilberg Mine haulroad from the present permit boundary at the former guard shack location, approximately 13 miles south to the receiving scale of the Hunter Preparation Plant.

This TDN is issued as a result of the complete, random sample oversight inspection conducted at the Cottonwood/Wilberg Mine on 2/27 & 28 / 1991. Refer to MEIR completed on 3/6/91 for narrative on this inspection.

To partially recap the inspection, we drove from the mine to the Hunter Prep. Plant making general observations of the haulroad distances and configuration. It is approximately 13 miles from the former guard shack location where the road enters the minesite, to the Hunter Prep. Plant. Approximately 5 miles south of the mine, the haulroad, which is designated state highway 57, intersects state highway 29. This 5 mile stretch appears to be bordered exclusively by Bureau of Land Management right of way and surrounding lands. The only intersecting road is a permitted haulroad to the Des Bee Dove mine and state highway 57 dead ends at the Cottonwood/Wilberg mine.

State highway 29 provides access east to Orangeville and west to Joe's Valley Reservoir.

State highway 57 south of intersecting 29 runs approximately 7.5 miles to the receiving scale of the Hunter Prep. Plant (Unpaved spur off 57 to Prep. Plant) and eventually intersects state highway

10. This 7.5 mi. stretch is bordered predominately by small farm pastures. It is intersected by two paved roads, one running east towards Orangeville, and one running southwest.

Based on the inspection and this inspectors experience in the area, by far the predominant use of the 13 mi. stretch described is to facilitate coal haulage from the mine to the Hunter Power Plant. As such, the haulroad is part of the coal mining and reclamation operations occuring at the mine and must be permitted.

TDN issuance was briefly discussed with Bill Malencik, DOGM , via telephone on 3/12/91.



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

EXHIBIT "C"

file

Norman H. Bergerter
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
801-638-6340

March 27, 1991

CERTIFIED RETURN RECEIPT REQUESTED
No. P 540 714 138

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 X91-02-116-3 TV1, PacifiCorp Electric Operations, Cottonwood/Wilberg Mine,
ACT/015/019, Folder #5, Emery County, Utah

This letter is in response to the above-referenced Ten-Day Notice, certified copy received March 18, 1991.

Number 1 of 1 reads: "Failure to first obtain a permit from the Division (DOGM) prior to engaging in and carrying out any coal mining and reclamation operations." Location: Cottonwood/Wilberg haul road from present permit boundary (former guard shack location) approximately 13 miles south to the receiving scale of the Hunter Prep. Plant. Regulation citation: R614-300-112.400.

Division Response:

I have enclosed pages 11.1 and 11.2 from the approved MRP. The MRP, as approved by OSM, clearly differentiates haul roads from state road 57 (11.1, paragraph 4).

On page 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 rule making 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
M154/24&25

XI. ROADS**11.1 Description of Applicant's Proposal**

Access roads will be used in conjunction with the operation of facilities at the main Wilberg portal area in Grimes Wash, the Cottonwood fan portal site, and the waste rock disposal site. The roads at the main Wilberg portal area already exist and are in use; roads at the Cottonwood fan portal site and waste rock disposal site are proposed.

There are five facility roads at the main Wilberg portal area, identified as follows:

- a. Haul road
- b. Truck turn-around
- c. Service road
- d. Portal road
- e. Fan access road

All of the roads, except the fan access road are asphalt surfaced. Adequate drainage is provided using roadside ditches and culverts.

The haul road is a continuation of the plant access highway, State Road No. 57. It is 28 feet wide with a grade of 8 to 12 percent. The haul road ends at the truck turn-around loop, also 28 feet wide. The truck turn-around loop has a gradient ranging from level to a 12 percent transition with the haul road. The haul road and truck turn-around are used for transportation of coal and hence are defined as Class I roads.

The service road starts at the junction of the haul road and truck turn-around and terminates at the upper storage area. The service road is 20 feet wide with a grade of 12 percent. Turn-outs are provided from the service road to the plant silo area and the lower and upper parking lot in addition to the upper storage area. The service road is planned for greater than six months use and hence is defined as a Class II road.

The portal road starts at the upper storage area and follows the mine track extension at a six percent grade to the elevation of the mine portals. The fan access road is a dirt road at variable width providing access from the mine portal road to the mine ventilation fan. The road was constructed along an existing alignment and is essentially level. The portal road and fan access road are defined as Class II roads.

The proposed access road at the Cottonwood fan portal site will utilize an existing road that originally served the Old Johnson Mine. This road will be cleared of rubble and extended approximately 600 feet to provide access to the fan portal and equipment. The existing road has an 85-foot section with a grade of 17 percent; this will be regraded to provide a maximum grade for the new road of eight percent. The proposed access road is defined as a Class II road. The applicant does not state how this road will be surfaced. Adequate drainage is provided through roadside ditches and culverts.

Small roads will be constructed from the main haul road to provide access to the waste rock disposal site. These roads will have a maximum length of approximately 500 feet and will be essentially level.

11.2 Evaluation of Compliance of Proposal

UMC 817.150 Roads: Class I: General

The applicant has complied with the requirements of this section.

UMC 817.151 Roads: Class I: Location

The applicant has complied with the requirements of this section.

UMC 817.152 Roads: Class I: Design and Construction

Large sections of the haul roads of the main Wilberg portal area have grades that exceed ten percent. These grades have been approved by DOGM in a construction variance granted to the applicant. The applicant is, thus, in compliance with part (a).

The applicant meets all other requirements of this section.

UMC 817.153 Roads: Class I: Drainage

The applicant is in compliance with this section.

UMC 817.154 Roads: Class I: Drainage

The asphalt surfacing of the haul road and truck turn-around meet all requirements of this section.

UMC 817.155 Roads: Class I: Maintenance

The applicant has complied with the requirements of this section.

UMC 817.156 Roads: Class I: Restoration

The applicant meets the requirements of this section.

UMC 817.160 Roads: Class II: General

The applicant has complied with the requirements of this section.

UMC 817.161 Roads: Class II: Location

The applicant has complied with the requirements of this section.



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

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, Utah 84180-1203
801-538-5340

EW/PR/ATR/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:

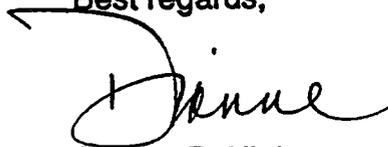
1. The section-by-section comparison is presented in Attachment 2.
2. This sub-section is included in the section-by-section comparison.
3. The requirement for change is stated above. The Division cannot perform the required reviews of roads and public road exemptions without the definitions of "road" 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 you have any questions.

Best regards,

A handwritten signature in cursive script, appearing to read "Dianne", with a long horizontal flourish extending to the left.

Dianne R. Nielson
Director

vb
Attachments
MI84/1&2

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;

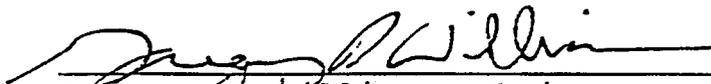
5. The effect of this emergency rulemaking is to grant to the Division the ability to effectively regulate coal haul roads in the State of Utah. Further, it provides an articulable basis for individual evaluations of roads as to their public status to determine whether or not they are subject to permitting;

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 D. 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~~[-.]~~ 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

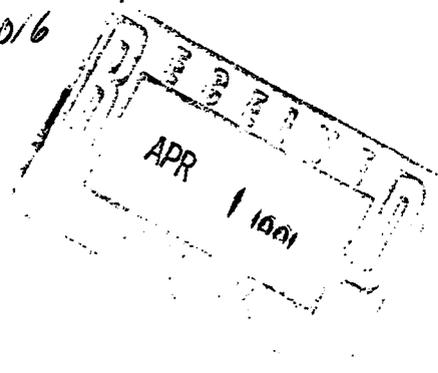
"Public Road" means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, ~~((e) for which there is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

EN/PR/4/10/6



State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MININGNorman H. Bangertter
GovernorDee C. Hansen
Executive DirectorDianne R. Nielson, Ph.D.
Division Director355 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 145Mr. Blake Webster, Permitting Administrator
PacifiCorp Electric Operations
P. O. Box 26128
Salt Lake City, Utah 84126-0128*Blake*
Dear Mr. Webster:Re: Cottonwood/Wilberg, PacifiCorp Electric Operations, ACT/015/019, 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 Highway 57 between Highway 29 and the Cottonwood/Wilberg Mine, crossing portions of Section 27, 34 and 35, Township 17 South, Range 7 East and portions of Sections 2, 11 and 14, Township 18 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
MI78/82&83

EW/AR/LTR/029



State of Utah

UTAH DEPARTMENT OF TRANSPORTATION

Eugene H. Findlay, C.P.A.
Director
Howard Richardson
Assistant Director
Steve R. Noble
District Four Director

Route #3 Box 75C5
940 South Carbon Avenue
Price, Utah 84501
(801) 637-1100
(801) 637-9538 (Fax)

May 24, 1991

TRANSPORTATION COMMISSION

Samuel J. Taylor
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Todd G. Weston
James G. Larkin
Elva H. Anderson
Secretary



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

RE: Cottonwood/Wilberg, PacificCorp Electric Operations,
ACT/015/019, Emery County, Utah

Dear Sirs,

In response to your request of PacificCorp, the following information is provided:

1. The above referenced roadway is a State highway, Route 57.
2. It was designed a State Route on October 15, 1932. It is a U.D.O.T. State Federal Aid Secondary. There are other roads with similar designations.
3. Various maintenance activities have been provided to this route with an average of \$50,000.00 expended annually.
4. These maintenance expenditures are average with this type of system.
5. It was constructed to U.D.O.T. and A.A.S.H.T.O. Secondary road standards.
6. No agency, Federal or State, other than U.D.O.T. has authority over this roadway and right-of-way.

Respectfully yours,

Archie Hamilton
L. Archie Hamilton
Asst. District Director

cc: D. Nielson
R. Daniels
J. Blake Webster
Dixie Thompson
Steve Noble
Howard Richardson
Rex Funk



Norman H. Bangertar
Governor
Dee C. Hansen
Executive Director
Dorrie R. Nielson, Ph.D.
Division Director

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, Utah 84180-1203
801-538-5340

EXHIBIT "G"

Yowell

Vicki

*Please file with appropriate
FDN's in notebook*

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 TVI, 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

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

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

JUN 20 1991

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
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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