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*Act/015/019*

*Recd. 8-15-91*

UNITED STATES OF AMERICA  
DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
HEARINGS DIVISION

PACIFICORP, d/b/a PACIFICORP	)	Docket No. DV-91-10-R
ELECTRIC OPERATIONS, and	)	
ENERGY WEST MINING CO.,	)	Application for Temporary
	)	Relief and Request for
Petitioners,	)	Expedited Hearing
	)	
v.	)	Notice of Violation
	)	No. 91-2-244-2
OFFICE OF SURFACE MINING	)	
RECLAMATION AND ENFORCEMENT,	)	Cottonwood/Wilberg Mine
	)	
Respondent.	)	

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STIPULATION AND AGREEMENT

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The Respondent, Office of Surface Mining Reclamation and Enforcement (OSM), and the Petitioners, PacifiCorp, d/b/a PacifiCorp Electric Operations (PacifiCorp), and Energy West Mining Co. (Energy West), in consideration of the mutual promises, agreements, and covenants expressed herein, hereby stipulate and agree as follows:

1. On June 26, 1991, OSM issued Notice of Violation (NOV) No. 91-2-244-2 on the basis that PacifiCorp as permittee and Energy West as operator violated 30 C.F.R. § 773.11(a), in that said parties failed to obtain a permit from the Utah Division of Oil, Gas and Mining (DOG M) prior to engaging in surface coal mining operations on a portion of Utah State Highway Route 57 extending from the existing permit boundary approximately 13 miles to the receiving scales of the Huntington Preparation Plant (State Highway 57).

2. NOV No. 91-2-244-2 requires PacifiCorp to submit to DOGM a complete and adequate plan to permit and bond State Highway 57 within 30 days of issuance of the NOV or reclaim State Highway 57 within 80 days of issuance of the NOV.

3. PacifiCorp and Energy West contested NOV No. 91-2-244-2 by filing with the Office of Hearings and Appeals on July 26, 1991, an application for review and on August 1, 1991, a request for temporary relief and expedited hearing.

4. OSM hereby agrees to a grant of temporary relief staying enforcement of NOV No. 91-2-244-2 for a period not to exceed 180 days from the date of approval of this stipulation and agreement by the court.

5. PacifiCorp and Energy West hereby waive any right each party may have to an expedited hearing on its request for temporary relief until expiration of the stay described above.

6. At the expiration of the stay, OSM may proceed with enforcement of NOV No. 91-2-244-2 as afforded by law, and PacifiCorp and/or Energy West may seek additional temporary relief from NOV No. 91-2-244-2 as afforded by law.

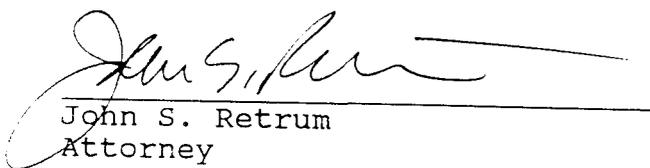
7. OSM does not by this stipulation and agreement admit in any way that PacifiCorp and/or Energy West are legally entitled to temporary relief from NOV No. 91-2-244-2, or admit in particular that PacifiCorp and/or Energy West has shown by its pleadings that there is a substantial likelihood that the findings of the court with regard to the request for temporary relief would be favorable to PacifiCorp and/or Energy West.

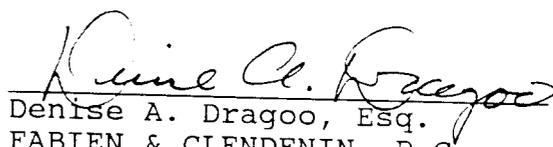
8. The parties agree that upon information and belief, the stay of enforcement of NOV No. 91-2-244-2 will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

9. The parties agree to submit this stipulation and agreement to the court for its approval and request that the court make the terms of the stipulation and agreement an order of the court.

10. If the court does not approve this stipulation and agreement, then OSM shall have 10 additional days from the date of the court's said determination to file a response to PacifiCorp's and Energy West's request for temporary relief and expedited hearing.

Dated this 12th day of August, 1991.

  
\_\_\_\_\_  
John S. Retrum  
Attorney  
U.S. Department of the Interior  
Office of the Solicitor  
Division of Surface Mining  
Denver Field Office  
P.O. Box 25007 (D-105)  
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\_\_\_\_\_  
Denise A. Dragoo, Esq.  
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UNITED STATES OF AMERICA  
DEPARTMENT OF THE INTERIOR  
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OFFICE OF SURFACE MINING	)	
RECLAMATION AND ENFORCEMENT,	)	Cottonwood/Wilberg Mine
	)	
Respondent.	)	

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MOTION TO REDUCE STIPULATION AND AGREEMENT  
TO AN ORDER OF THE COURT

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COMES NOW the Respondent, Office of Surface Mining Reclamation and Enforcement (OSM), and respectfully requests that the court make the terms of the Stipulation and Agreement of the parties dated August 12, 1991, and filed contemporaneously with this motion, an order of the court. As grounds therefor, OSM states as follows:

1. That the court's grant of the relief requested may result in substantial savings of the resources of both the parties and of the court.

2. That upon information and belief, the court's grant of the relief requested will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

3. That the parties have stipulated and agreed to submit the Stipulation and Agreement to the court for its approval and

request that the court make the terms of the Stipulation and Agreement an order of the court.

Dated this \_\_\_\_ day of August, 1991.

Respectfully submitted,

---

John S. Retrum  
Attorney  
U.S. Department of the Interior  
Office of the Solicitor  
Division of Surface Mining  
Denver Field Office  
P.O. Box 25007 (D-105)  
Denver, CO 80225-0007  
Tel. (303) 236-3546

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by regular mail, this \_\_\_\_ day of August, 1991, to the following:

Office of Hearings & Appeals  
U.S. Department of Interior  
6432 Federal Building  
125 South State Street  
Salt Lake City, Utah 84138

Denise A. Dragoo, Esq.  
FABIEN & CLENDENIN, P.C.  
Attorneys for Petitioners  
Twelfth Floor  
215 South State Street  
P.O. Box 510210  
Salt Lake City, Utah 84151

Robert Hagen, Director  
Office of Surface Mining Reclamation & Enforcement  
Albuquerque Field Office  
625 Silver Avenue, S.W.  
Albuquerque, NM 87102

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UNITED STATES OF AMERICA  
DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
HEARINGS DIVISION

PACIFICORP, d/b/a PACIFICORP )  
ELECTRIC OPERATIONS, and )  
ENERGY WEST MINING CO., )  
 )  
Petitioners, )  
 )  
v. )  
 )  
OFFICE OF SURFACE MINING )  
RECLAMATION AND ENFORCEMENT, )  
 )  
Respondent. )

Docket No. DV-91-10-R  
Application for Temporary  
Relief and Request for  
Expedited Hearing  
Notice of Violation  
No. 91-2-244-2  
Cottonwood/Wilberg Mine

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ORDER

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THIS MATTER comes upon the Motion to Reduce Stipulation and Agreement to an Order of the Court, and the court, having reviewed the said motion and the Stipulation and Agreement which is the subject of the motion, and being advised in the premises, finds the same is proper, and therefore:

FINDS AND ORDERS:

1. That the Petitioners, PacifiCorp, d/b/a PacifiCorp Electric Operations (PacifiCorp), and Energy West Mining Co. (Energy West), are hereby granted temporary relief staying enforcement of Notice of Violation (NOV) No. 91-2-244-2 for a period not to exceed 180 days from the date of approval of this stipulation and agreement by the court.

2. That PacifiCorp and Energy West hereby waive any right each party may have to an expedited hearing on its request for temporary relief until expiration of the stay described above.

3. That at the expiration of the stay, the Respondent, Office of Surface Mining Reclamation and Enforcement, may proceed with enforcement of NOV No. 91-2-244-2 as afforded by law, and PacifiCorp and/or Energy West may seek additional temporary relief from NOV No. 91-2-244-2 as afforded by law.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1991.

BY THE COURT:

\_\_\_\_\_  
Administrative Law Judge

RECEIVED

AUG 07 1991

DIVISION OF  
OIL GAS & MINING

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

PACIFICORP, d/b/a PACIFICORP	)	NOTICE OF VIOLATION
ELECTRIC OPERATIONS, and	)	NO. 91-02-244-002
ENERGY WEST MINING CO.,	)	COTTONWOOD/WILBERG MINE,
	)	EMERY COUNTY, UTAH
Petitioners,	)	
	)	
v.	)	
	)	
OFFICE OF SURFACE MINING	)	COAL MINING PERMIT
RECLAMATION & ENFORCEMENT	)	NO. ACT/015/019

APPLICATION FOR TEMPORARY RELIEF AND  
REQUEST FOR EXPEDITED HEARING

Pursuant to 43 C.F.R. Part 4.1260-1265 (1990), PacifiCorp Electric Operations ("PacifiCorp") and Energy West Co. ("Energy West") (jointly referred to as "Applicant") petition for temporary relief from enforcement of Notice of Violation No. 91-02-244-002 ("NOV") pending completion of administrative review, and request an expedited hearing on this matter in Salt Lake City, Utah.

STATEMENT OF FACTS

1. On July 26, 1991, Applicant timely filed a Petition for Review and Request for Hearing ("Petition") under 43 C.F.R. Part 4.1100 and 30 C.F.R. § 843.16 to review the fact of

violation of the NOV. The Statement of Facts and Argument set forth in the Petition is incorporated herein by reference. A true and correct copy of the Petition is attached hereto as Exhibit "A."

2. The NOV was issued on June 26, 1991, 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 to the Petition as Exhibit "A."

3. The NOV was issued by OSM for Applicant's alleged failure to first obtain a permit from the Utah Division of Oil, Gas & Mining ("DOGM") prior to engaging in and carrying out any coal mining and reclamation operations on a portion of the Utah State Highway Route 57 ("State Highway 57") extending from the present mine 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 State Highway 57 within thirty (30) days of issuance of the NOV.

#### ARGUMENT

Pursuant to 43 C.F.R. § 4.1263 (1990), an application for temporary relief must include the following:

(a) A detailed statement setting forth the reasons why relief should be granted;

(b) A showing that there is substantial likelihood that the findings and decision of the administrative law judge will be favorable to the applicant;

(c) A statement that the relief sought will not adversely affect the health or safety of the public or cause significant imminent environmental harm; and

(d) A statement of the specific relief requested.

The Applicant meets these criteria as follows:

**I. LIKELIHOOD OF FAVORABLE FINDINGS AND DECISION ON THE PETITION BEFORE THE ADMINISTRATIVE LAW JUDGE**

Applicant hereby summarizes the evidence and arguments in support of its request for vacation of the NOV attached hereto as Exhibit "A" and incorporated herein by reference. There is a substantial likelihood that the findings and decision of the administrative law judge ("ALJ") regarding these issues will be favorable to the Applicant.

**A. State Highway 57 is a Public Road and Does Not Constitute Surface Coal Mining Operations Subject to Permit.**

As set forth in Exhibit "A," Argument pp. 5-8, incorporated herein by reference, the NOV improperly cites Applicant for failure to permit State Highway 57 as a surface coal mining operation under the Surface Mining Control & Reclamation Act ("SMCRA") and the Utah Coal Mining and Reclamation Act ("UCMRA"). State Highway 57 is a public road not subject to permitting or reclamation as required by the NOV under either SMCRA or UCMRA. Public road criteria has been established by federal District Judge Williams in Harman Mining Corp. v. OSMRE, 659 F.Supp. 806

(W.D.Va. 1987), copy attached as Exhibit "B" and specifically confirmed and followed by the Interior Board of Land Appeals ("IBLA") in Harman Mining Corp. v. OSMRE, 110 IBLA 98 (1989), copy attached as Exhibit "C," and is controlling in this case.

In Harman Mining Corp. v. OSMRE, 659 F.Supp. 806 (W.D. Va. 1987), the mining company sought judicial review under § 526 of SMCRA of an ALJ's denial of its request for temporary relief from OSM's notices of violation concerning the permitting of roads. Judge Williams granted temporary relief where the company established the likelihood of prevailing on a claim that it was not required to permit the cited roads where evidence supported a finding that the roads were public. The court reviewed the record to determine public use of roads, use of public money to construct, improve and maintain the roads, unrestricted public access to the roads and applicable state law in determining whether the roads were public. 659 F.Supp. 812.

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. A May 24, 1991 letter from the Utah Department of Transportation ("UDOT") establishes the public road status of State Highway 57, attached to the Petition as Exhibit "F." 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."

Based upon a review of the record as summarized herein and set forth in the Petition attached as Exhibit "A," there is a substantial likelihood of a favorable decision from the ALJ finding that State Highway 57 is a public road not subject to permitting or reclamation requirements under SMCRA or UCMRA and vacating the NOV.

**B. The State of Utah has Taken Appropriate Action in Response to the TDN.**

Pursuant to an oversight inspection of the Cottonwood/Wilberg Mine, OSM issued Ten-Day Notice No. 91-02-116-003 ("TDN") to the State dated March 15, 1991 for Applicant's alleged failure to obtain a permit for State Highway 57. Although the State took appropriate action in response to the TDN, OSM issued the NOV on June 26, 1991 over the State's objection.

The Petition attached as Exhibit "A" sets forth the record of the State's response to the TDN and its subsequent appeal and argues the appropriateness of this action at pages 8-12. In response to the TDN and pursuant to public road criteria set forth in the State's emergency rulemaking, dated February 25, 1991, the State inquired as to the public road status of State Highway 57. UDOT provided the March 24, 1991 letter attached as Exhibit "F" to the Petition in response to DOGM's

inquiry and this letter supports a finding that State Highway 57 is a public road. In Harman v. OSMRE, 110 IBLA 98 (1989), attached hereto as Exhibit "C," 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 public, not subject to permitting and, therefore, took no enforcement action under the TDN. This IBLA case regarding appropriateness of state action is controlling in this matter and supports a finding that DOGM's response to the TDN was appropriate.

The State of Utah also responded that OSM's TDN was untimely and in bad faith due to the fact that the state had submitted its public road criteria to OSM and OSM approval was pending at the time the TDN was issued. Letter dated March 27, 1991, attached to the Petition as Exhibit "C." The state also responded that OSM itself had found that the Applicant's mining and reclamation plan was in compliance at the time of approval and at mid-term review and renewal. Id.

There is a substantial likelihood that the ALJ's review of the record of the State's response to the TDN will result in a finding that the State's action was appropriate and that the subsequent NOV should be vacated.

C. Neither DOGM Nor OSM Has Jurisdiction Over State Highway 57.

The Petition sets forth the exclusive jurisdiction of UDOT over State Highway 57 at pp. 10-11 of the attached Exhibit "A." By letter of May 24, 1991 attached as Exhibit "F" to the Petition, UDOT states that "no agency, federal or state, other than UDOT, has authority over this roadway and right of way." UDOT jurisdiction over state highways is set forth at Utah Code Ann. § 27-12-11.

Upon a review of the record in this matter, there is a substantial likelihood that the ALJ will find State Highway 57 within the exclusive jurisdiction of UDOT and not subject to permitting or reclamation under SMCRA or UCMRA.

D. The NOV is Barred by the Applicable Statutes of Limitation.

The Petition, attached as Exhibit "A," pp. 11-12, summarized herein, states that the NOV is barred under the applicable statutes of limitation of both state and federal law. A two-year statute of limitations is applicable to UMCRA as set forth at Section 40-8-9(2) of the Utah Mined Land Reclamation Act, incorporated into UMCRA pursuant to Utah Code Ann. § 40-10-4. The federal SMCRA is subject to a five-year statute of limitations set forth at 28 U.S.C. § 2462. Prior to issuance of Judge Flannery's ruling in In Re Permanent Surface Mining Regulation Litigation, 620 F.Supp. 1519 (D.C.C. 1985), OSM had found State Highway 57 to be a public road subject to the Forest Service's jurisdiction and not subject to permitting under SMCRA.

Therefore, under OSM's interpretation of SMCRA, as set forth in the June 26, 1991 NOV, allegedly, Applicant 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 nearly six years following Judge Flannery's ruling. Therefore, there is a substantial likelihood that the NOV is barred by applicable statutes of limitation and must be vacated in its entirety.

E. The NOV is Barred by Waiver, Estoppel and Laches.

The record set forth in the Petition, attached as Exhibit "A," argument at pp. 12-13, shows that until issuance of the NOV, OSM consistently found that State Highway 57 is a public road. By letter dated March 27, 1991, attached to the Petition as Exhibit "C," DOGM states that OSM found Applicant in compliance at the time of approval of the mining and reclamation plan and upon mid-term permit review and upon permit renewal.

This letter combined with OSM's tardiness in issuing the NOV for a period of nearly six years since Judge Flannery's ruling in In Re Permit Surface Mining Litigation, 320 F.Supp. 519 (D.C.C. 1985) establish that the NOV is barred by OSM's waiver, estoppel and laches. This evidence provides a basis for the ALJ's findings that there is substantial likelihood that Applicant will prevail on this argument.

II. **THE RELIEF SOUGHT WILL NOT ADVERSELY AFFECT THE HEALTH OR SAFETY OF THE PUBLIC OR CAUSE SIGNIFICANT IMMINENT ENVIRONMENTAL HARM**

Delay of enforcement of the NOV pending administrative review will not affect the health and safety of the public or

cause significant imminent environmental harm. The NOV was issued for alleged failure to obtain a permit from DOGM prior to engaging in and carrying out any coal mining and reclamation operations. A copy of the NOV is attached to the Petition as Exhibit "A." The NOV does not allege that the health or safety of the public is adversely affected nor does it allege significant imminent environmental harm to land, air or water resources. UDOT currently regulates and controls State Highway 57. Therefore, temporary relief from enforcement of the NOV pending final determination of this matter will not adversely affect the health or safety of the public or cause significant imminent environmental harm to land, air or water resources.

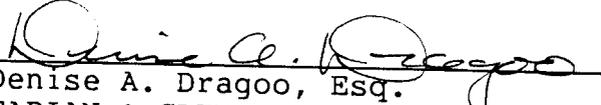
### **III. RELIEF REQUESTED**

Based on the arguments set forth above and in the Petition incorporated herein by reference, Applicant respectfully requests temporary relief from enforcement of the NOV and any subsequent order of cessation resulting from the NOV, pending completion of its administrative appeal. The NOV requires Applicant to either reclaim State Highway 57 within eighty (80) days or submit to DOGM a complete and adequate plan to permit and bond State Highway 57 within thirty (30) days of issuance of the NOV. As set forth in UDOT's letter dated May 24, 1991, attached to the Petition as Exhibit "F," "no agency, federal or state, other than UDOT, has authority over this roadway and right of way." The applicant is caught between two governmental agencies with disparate views of their jurisdiction over State Highway 57.

Applicant seeks temporary relief from the NOV until this dispute can be resolved through administrative appeal.

Due to the fact that reclamation of State Highway 57 is required within 80 days of issuance of the NOV on June 26, 1991, Applicant requests expedited hearing and decision on this matter prior to September 6, 1991.

RESPECTFULLY SUBMITTED this 1ST day of August, 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 APPLICATION FOR TEMPORARY RELIEF AND REQUEST FOR EXPEDITED HEARING to be mailed, via certified mail, return receipt request, this 1st day of August, 1991, to:

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

DAD:080191b

  
Julie McKenzie

EXHIBIT "A"

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.	)	
	)	
OFFICE OF SURFACE MINING	)	COAL MINING PERMIT
RECLAMATION & ENFORCEMENT	)	NO. ACT/015/019

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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 "DOGMA") 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 26<sup>th</sup> day of July, 1991.

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

CERTIFICATE OF MAILING

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

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

Julie A. 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 Pacifcorp Electric Operations		<input checked="" type="checkbox"/> Permittee <input type="checkbox"/> No Permit	9. Date of Inspection June 26, 1991	
3. Mailing Address 324 South State Street, Salt Lake City, UT 84126		Originating Office Address USDI-OSM 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	10. Time of Inspection From 9:00 a.m. To 10:30 a.m.	
7. Operator's Name (If other than permittee) Energy West Mining Company		11. State Permit Number ACT/015/019		
8. Mailing Address P.O. Box 310, Huntington, UT 84528		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.

EN/PR/TEN/011

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

Originating Office: USDI/OSMRE  
Albany Field Office

625 Silver Ave, S.W., Suite 310

Albany, NM 87102

Number: X-911 - 02 - 116 - 063 TV 1

Telephone Number (SUS) 706-1480

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/RECLAMING information to DOGIM for the haulroad noted above.

Date of Notice: 3/15/01  
P 965 799 042

Signature of Authorized Rep.: Henry P Austin  
Print Name and ID: HENRY P. AUSTIN #116

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

For Office Use Only

1a Y Y M M	1b Batch	1c 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 Sample No.

20. Type of Inspection  
\* ADMIN. MEET / TEDN Transmittal

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
  - B  Mountain Top Removal
  - C  Prime Farmlands
  - D  Alluvial Valley Floors
  - E  Anthracite
  - F  Federal Lands
  - G  Indian Lands
  - H  Other

25. Performance Standards (Codes) \* 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  2 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:  
29a.  Number of Completes  
29b.  Number of Partial  
*N/A; TDN ISSUANCE ONLY (SEE MEIR NARRATIVE)*

30. Indicate number of complete and partial inspections required by the State during this annual review period:  
30a.  Number of Completes  
30b.  Number of Partial  
*11*

31. Has inspection frequency been met?  
31a. Yes  No  Completes  
31b. Yes  No  Partial  
*11*

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) # 116  
*HENRY P. AUSTIN*  
Signature of Authorized Representative: *Henry P. Austin* Date: *3/13/91*  
Signature of Reviewing Official: *Gary Smith for SR* Date: *3/14/91*

34. Administrative Information  
a.  Permit Review (Hours)  
b.  Travel Time (Hours)  
c.  Inspection Time (Hours)  
d. *01* • *0* Report Writing Time (Hours)

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. Bangertter  
Governor  
Dee C. Hansen  
Executive Director  
Dianne R. Nielson, Ph.D.  
Division Director

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

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 (DOGMI) 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

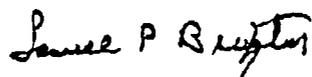
The Division feels the issuance of the TDN after promulgation of the emergency rulemaking denies the Division reasonable time in which to manage and enforce its program. The regulation cited in the TDN reads:

"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  
MI54/24&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. Bangert  
Governor

Don 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/AR/LTR/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

ATTACHMENT 1

MAR 04 1991

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

ALBUQUERQUE FIELD OFFICE

---oo0oo---

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

---oo0oo---

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

FINDINGS OF FACT

THE BOARD, AFTER CAREFUL EXAMINATION FINDS THAT:

1. Utah coal regulatory program rules are required by Public Law 95-87 to be no less effective than the federal program counterpart regulations;
2. The Utah statute, Utah Code Ann. 40-10-6.5, requires as a condition of validity that the rules implementing the Utah coal regulatory program be no more stringent than those required under the counterpart federal program regulations;
3. The Board of Oil, Gas and Mining adopted definitions of "road" and "public road" in Utah Admin. R. 614-100-200 to be effective June 1, 1990 (Attachments A and B);
4. Effective April 12, 1990, the Office of Surface Mining approved the Board's definition of "public road" and disapproved the definition of "road;"
5. On October 1, 1990, the Board of Oil, Gas, and Mining adopted a revised definition of "road" (Attachment A);
6. The Division has developed a proposed "Policy for Implementation of Site Specific Determinations of the Public Status of Roads" (Attachment C);
7. Reconsideration and evaluation of the permit status of those "public roads" cannot proceed in the absence of a definition of "road";

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

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

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

#### CONCLUSIONS OF LAW

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

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

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

#### ORDER

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

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

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

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

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

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

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

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

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

ORDERED this 25th day of February, 1991.

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

Attachment A

Definition of "Road"

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

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

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

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

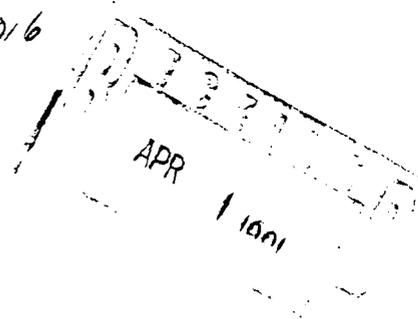
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State of Utah  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

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

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



March 28, 1991

CERTIFIED RETURN RECEIPT REQUESTED  
No. P 540 714 145

Mr. 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.

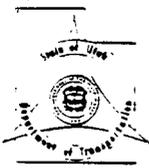
If you have questions concerning the above process, please feel free to call Lowell Braxton or Ron Daniels.

Sincerely,

  
Lowell P. Braxton  
Associate Director, Mining

vb  
cc: D. Nielson  
R. Daniels  
MI78/82&83

EN/RL/LTR/29



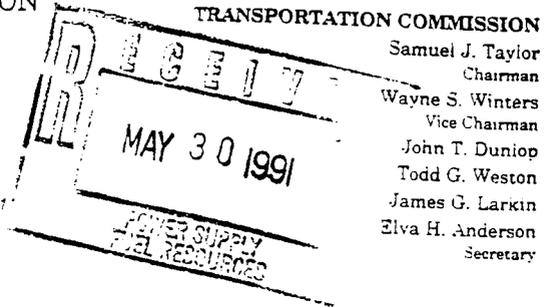
# State of Utah

## UTAH DEPARTMENT OF TRANSPORTATION

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

Route #3 Box 7505  
940 South Carbon Avenue  
Price, Utah 84501  
(801) 637-1100  
(801) 637-9538 (Fax)

May 24, 1991



## TRANSPORTATION COMMISSION

Samuel J. Taylor  
Chairman  
Wayne S. Winters  
Vice Chairman  
John T. Duniop  
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 84130-1203

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, 1982. 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. Bangert  
Governor

Dee 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

EXHIBIT "G"

*Yowell*

*Vicki*

*Please file with appropriate  
FDN's in database*

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 TVI, Deer Creek Mine

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

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

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

Page 2  
Hord Tipton  
April 29, 1991

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

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

Thank you for your consideration of these concerns.

Best regards,



Dianne R. Nielson  
Director

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

DN37



# United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement

WASHINGTON, D.C. 20240



JUN 4 1991

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

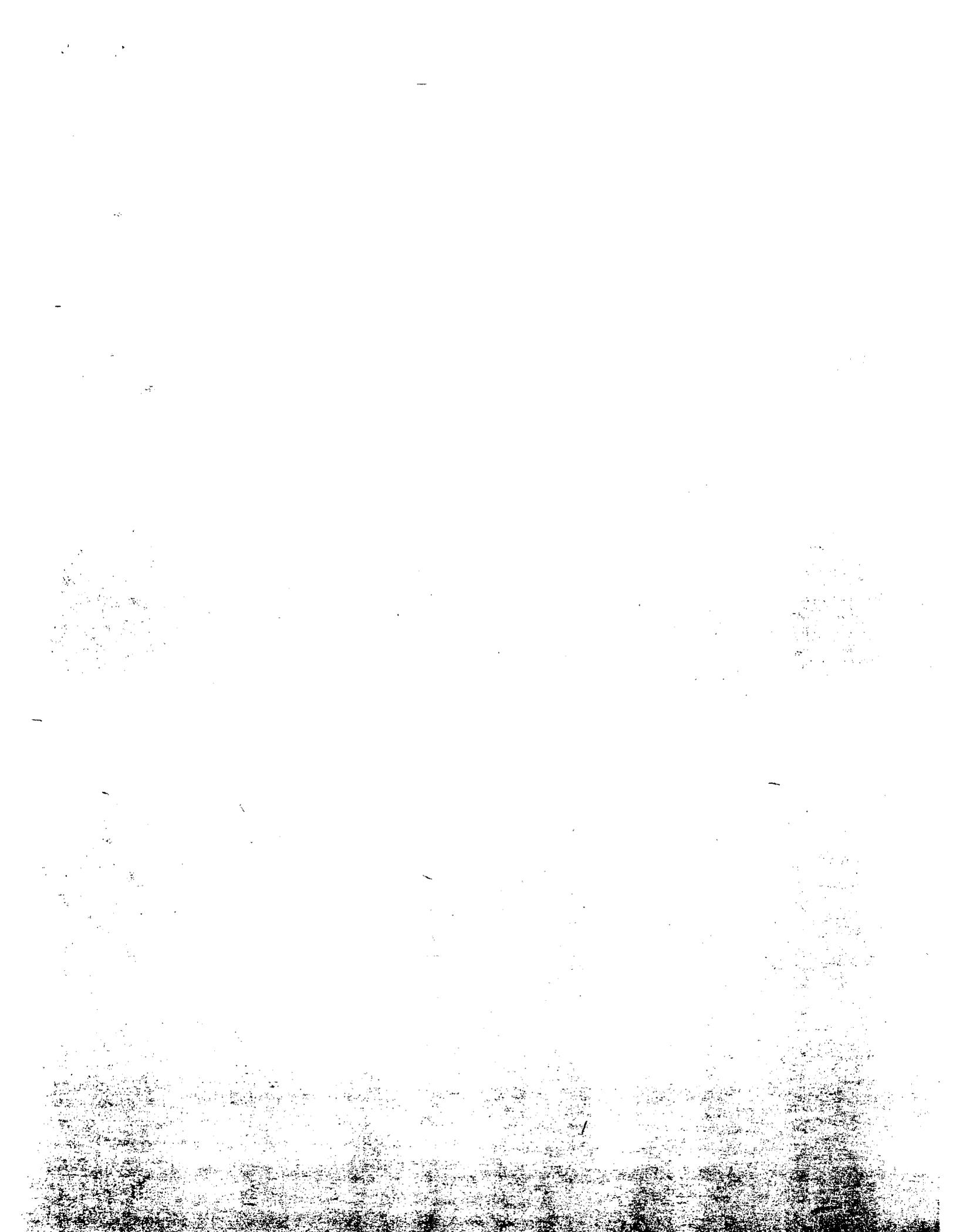
Robert H. Hagen  
Director, Albuquerque Field Office

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. 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

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

In a similar vein, the court rejects defendant's argument that plaintiff was under a duty implied in the law to negotiate a termination agreement in good faith. Of course, it is well settled that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. *See, e.g., Restatement (Second) of Contracts* § 205 at 99; 17 Am. Jur.2d *Contracts* § 256 at 653. *See also Meier's Trucking Co. v. United Const. Co.*, 237 Kan. 692, 704 P.2d 2, 7 (1985) (Holmes, J., dissenting). There is an implied undertaking on the part of each party to the contract that he will not intentionally do anything that will destroy or injure the other party's rights to receive the benefits of the contract. 17 Am. Jur.2d *Contracts* § 256 at 654. Implied covenants, however, are generally not favored by the law and will always be construed narrowly. 17A C.J.S. *Contracts* § 328 at 287. Courts are careful not to imply a term, where the subject thereof is expressly covered by the contract, or as to which the contract is intentionally silent, or which is against the overall intention of the parties as garnered from the entire instrument. *Id.* § 328 at 288-89.

Defendant has failed to come forward with any case law wherein the courts have found a breach of the implied covenant of good faith and fair dealing based on a party's failure to settle a contract dispute or negotiate a termination of a contract. Given the fact that implied covenants are generally disfavored by the courts, we believe that the Kansas Supreme Court would be reluctant to imply a duty to negotiate a termination agreement in good faith, especially here, where the contract specifically allows termination by mere written agreement of the parties.

Even if we were to hold otherwise, we do not believe that the plaintiff's conduct in rejecting defendant's proposed settlement offer and making a counteroffer of \$400,000 to be in bad faith or unfair. The court therefore holds that defendant's breach of the agency agreement is not excused by the plaintiff's claimed failure to negotiate a termination agreement in good faith.

In light of the above, the court concludes that defendant has failed to satisfy its burden of establishing sufficient evidence to withstand plaintiff's motion for summary judgment. Accordingly, the court holds that defendant is liable to plaintiff for breach of the Exclusive Agency Agreement. Because plaintiff's motion for summary judgment does not address the issue of damages, the court will grant plaintiff's motion only with respect to liability, with the issue of damages reserved for trial. The court notes that this case has been set for trial on May 11, 1987, in Topeka, Kansas.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is granted with respect to the issue of liability.



HARMAN MINING  
CORPORATION, Plaintiff,

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT,  
et al. Defendants.

HARMAN MINING  
CORPORATION, Plaintiff,

v.

Donald P. HODEL, Secretary of the  
Interior et al. Defendants.

Civ. A. Nos. 85-0322-A, 86-0197-A.

United States District Court,  
W.D. Virginia,  
Abingdon Division.

May 5, 1987.

Mining company sought review of decisions of administrative law judge denying company's request for temporary relief from notice of violations issued by Office of Surface Mining Reclamation and En-

forcement. The District Court, Glen M. Williams, J., held that: (1) in review of determination by ALJ, district court is required to conduct its own examination of criteria to determine if temporary relief is proper; (2) district court could not utilize federal regulation or state's identical regulation regarding whether mining company must permit roads in order to resolve issue regarding whether company was entitled to temporary relief, where regulations had been declared inconsistent with federal Act, and state's identical regulation, would thus also be invalid; and (3) mining company was entitled to temporary relief where it established likelihood of prevailing on merits of claim that company was not required to permit certain roads as evidence revealed that roads were public.

Motion granted.

#### 1. Administrative Law and Procedure ⊕791

##### Mines and Minerals ⊕92.6

In reviewing decision of ALJ under Surface Mining Act, on merits or any other related order or decision, district court must affirm if findings are supported by substantial evidence on record considered as whole; exception arises when district court considers request for temporary relief pending final determination, where court is directed to conduct its own examination of criteria to determine if temporary relief is proper. Surface Mining Control and Reclamation Act of 1977, § 526(b, c), (c)(1-3), 30 U.S.C.A. § 1276(b, c), (c)(1-3).

#### 2. Mines and Minerals ⊕92.6

In determining whether mining company was entitled to temporary relief from notice of violations issued by Office of Surface Mining Reclamation and Enforcement, district court could not follow either federal regulation which had been held by federal district court to be inconsistent and invalid, or state's identical regulation, as state regulations must be consistent with those of Secretary. Surface Mining Control and Reclamation Act of 1977, §§ 526(a)(1), 701(28), (28)(B), 30 U.S.C.A. §§ 1276(a)(1), 1291(28), (28)(B).

#### 3. Mines and Minerals ⊕92.6

Federal district court was not required to read language of Surface Mining Control and Reclamation Act literally in developing criteria to use in determining whether mining company must permit two roads used for access to surface coal mining operation, where such literal interpretation, which would require that any road or interstate used for coal haulage have permit, would undermine expressed intent of Congress. Surface Mining Control and Reclamation Act of 1977, § 701(28)(B), 30 U.S.C.A. § 1291(28)(B).

#### 4. Administrative Law and Procedure ⊕674

##### Mines and Minerals ⊕92.6

Mining company was entitled to temporary relief from notice of violations issued by Office of Surface Mining Reclamation and Enforcement, where mining company established likelihood of prevailing on merits of claim that it was not required to permit two roads used in coal haulage by presenting evidence that those roads were public based upon public expenditures on roads, and use of roads by public. Surface Mining Control and Reclamation Act of 1977, § 701(28), 30 U.S.C.A. § 1291(28).

Joseph W. Bowman, Grundy, Va., John A. MacLeod, Thomas C. Means, Washington, D.C., for plaintiff.

Charles Gault, Bruce T. Hill, Dept. of Interior, Knoxville, Tenn., for defendants.

#### MEMORANDUM OPINION

GLEN M. WILLIAMS, District Judge.

This decision addresses two separate actions (Civil Action Nos. 85-0322-A and 86-0197-A) in which the plaintiff, Harman Mining Corporation (Harman) seeks review of the decision of an administrative law judge denying plaintiff's request for temporary relief from the Notice of Violations (NOV) issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE or OSM); requests that this court declare OSM's actions unlawful; and asks this court to enjoin defendants, OSMRE, from

enforcing the respective NOVs. This court has jurisdiction under 30 U.S.C. § 1276 and 28 U.S.C. § 1331. The court finds it necessary to relate the specific facts of each action.

CIVIL ACTION NO. 85-0322-A

On March 21, 1985, OSM conducted an oversight inspection at the Krest Mine (formerly L & L Coal No. 9 mine) which the plaintiff owns but operates through a contract miner. On March 25, 1985, OSM issued a Ten-Day Notice No. X-85-13-288-08 to the Virginia Division of Mined Land Reclamation (DMLR) alleging a violation of V771.11, the Virginia state program regulation prohibiting surface coal mining and reclamation operations without a valid permit. OSM claimed that Harman had failed to permit a haulage road called Little Prater Road. The Ten-Day Notice serves as a notification to the state and permittee that a violation exists and gives them an opportunity to take enforcement action. If the state fails within ten (10) days after this notification to take appropriate action to correct the violation or show good cause for such failure, OSM is required to reinspect, and if the violation continues, OSM may issue a NOV or cessation order. DMLR previously had determined that Little Prater Road was a public road under the Virginia State Program and did not require Harman to permit it; therefore, in response to the Ten-Day Notice DMLR noted that it had previously determined that Little Prater Road was a public road and took no further enforcement action with respect to the Ten-Day Notice.

On July 1, 1985, OSM issued NOV 85-13-288-009 alleging that Harman was in violation of the Virginia State Program for failure to permit Little Prater Road and requiring Harman either to obtain a permit or face a cessation order and substantial civil penalties. Harman contested the NOV by filing an application for review on July 26, 1985 and a request for temporary relief on August 2, 1985. On September 26, 1985 Administrative Law Judge Joseph E. McGuire conducted a hearing and orally denied Harman's request for temporary relief. Pursuant to 30 U.S.C. § 1276(a) the

plaintiff commenced this action on October 3, 1985 and on October 11, 1985 the ALJ officially confirmed his oral order denying plaintiff's request for temporary relief; the basis of ALJ McGuire's denial being that Harman was not likely to prevail on the merits. This court, however, granted the plaintiff's request for temporary relief on October 28, 1985.

Specifically, the parties presented the following evidence as to whether Little Prater Road is a public road. It is 1.95 miles in length and connects State Route 604 and State Route 617 in Buchanan County, Virginia. The road provides sole access to two active mines other than Harman's Krest mine and the only access to a cemetery. In addition, the road provides access for the 12-15 private homes located along the stretch at issue. However, the road appears on no official highway map but is shown on a USGS quad map which designates it as a jeep trail. The road is maintained with public funds, however, the parties are in sharp dispute as to the amount expended. The defendant claims that the county provided, from the coal haulroad fund, \$1,125 in gravel to maintain the road in 1981, \$1,065 in 1983, and \$1,125 in 1985. Additionally, defendant contends that the county did not maintain the road, but only provided the gravel to Harman who worked the road. Harman however, contends that the county has contracted for a bridge, paving, ditching and graveling in the amount of \$135,000. In addition, the landowners formally deeded a right-of-way for the road to the county in 1952 and when two county officials (Gary Rose, a member of the Buchanan County Board of Supervisors, and Joe Bland, Buchanan County Administrator) were questioned if Little Prater Road was a public county road, both answered "Yes, sir." Transcript of Proceedings Before the Department of Interior pp. 57 and 85. Lastly, an OSM employee testified that during his brief inspection, he saw little public use of the road; however, plaintiff found in an informal survey that 44 coal haul trucks and 93 passenger vehicles used the road during a ten-hour period.

## CIVIL ACTION NO. 86-0197-A

On December 7, 1983, OSM conducted an inspection at Deel Fork Refuse Area, which Harman operates in Buchanan County, Virginia. As a result, OSM issued a Ten-Day Notice No. X-84-13-73-1 to DMLR on January 30, 1984 alleging a violation of V771-11. OSM claimed that Harman had failed to permit a haulage road called Deel Fork Road. Previously DMLR had determined that Deel Fork Road was a public road under the Virginia State Program which Harman was not required to permit, therefore, DMLR took no further enforcement action with respect to the Ten-Day Notice.

On January 6, 1985, OSM issued NOV 85-13-289-1 alleging that Harman was in violation of the Virginia State Program for failure to permit Deel Fork Road and requiring Harman either to obtain a permit or face a cessation order and substantial civil penalties. To contest the NOV, Harman filed an application for review on February 4, 1985 and a motion for temporary relief on February 7, 1985. On March 26, 1985 Administrative Law Judge Joseph E. McGuire conducted a hearing and received evidence. On July 8, 1986, Judge McGuire denied Harman's temporary relief request and its challenge to the validity of NOV 85-13-289-1. Harman appealed the ALJ's denial of its application for review to the Interior Board of Land Appeals, which appeal is still pending. Pursuant to 30 U.S.C. § 1276(a), Harman commenced this action on August 5, 1986 to appeal the denial of temporary relief. This court granted the plaintiff's request for temporary relief on August 7, 1986.

The parties presented the following evidence at the March 26, 1985 hearing with regard to whether Deel Fork Road is a public road. The disputed section of Deel Fork Road begins at the end of State Route 664 and continues for one-half mile to the upper end of the refuse area. Eight residences use the cited section for access to their homes and two active coal mines use the cited section to reach their mines. Harman deeded its easement rights in the road to the county in 1978. Paul Elswick, a member of the Buchanan County Board of

Supervisors, testified that the road has existed for 20 years and is considered a public road, maintained by public funds. Local resident, John Clevinger, who has lived on Deel Fork Road all his life, testified that the road was constructed and maintained in the same manner as the remaining public roads in Buchanan County. County records indicate that Buchanan County spent \$100 from its general fund for maintenance between 1982 and 1985; that the county spent \$5,000 in Federal Disaster Funds on the entire length of the road (3 miles) in 1984; and that the county spent \$3,000 from Coal Severance tax since 1978. Joseph Bland, Buchanan County Administrator, filed an affidavit with plaintiff's November 8 motion to supplement the record, which stated that the county paid \$31,459.17 to have .26 mile of the cited section paved in October, 1985. Lastly, Joseph W. Bland testified that the county lost 90 percent of its records concerning roads in Buchanan County as a result of the 1977 flood.

## OPINION

[1] The issue before this court is whether this court should temporarily enjoin OSM from enforcing the NOVs at the Deel Fork Refuse Area and the Krest mine. The Surface Mining Act specifically authorizes district courts to review the decision of an ALJ and to grant temporary relief from the NOV. See 30 U.S.C. § 1276(a)(2), (c). The Fourth Circuit has clearly set forth the standard by which the district court shall enjoin the Secretary:

- (1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;
- (2) the person requesting such relief shows that there is substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and
- (3) such relief will not adversely affect the public health or safety or cause significant environmental harm to land, air, or water resources.

*Virginia Surface Mining and Reclamation Association v. Andrus*, 604 F.2d 312, 315 (4th Cir.1979). Indeed, the Fourth Circuit's criteria is the same criteria which Congress adopted in 30 U.S.C. § 1276(c). It is important to note, however, that a district court in reviewing a request for temporary relief applies a different standard of review than a district court which reviews an ALJ's decision on the merits. In reviewing a decision of an ALJ on the merits or any other related order or decision, a district court must affirm if the findings are "supported by substantial evidence on the record considered as a whole." § 1276(b). An exception to this rule arises when a district court considers a request for temporary relief pending final determination. In this instance § 1276(c) directs the court to conduct its own examination of the criteria in § 1276(c) to determine if temporary relief is proper. See § 1276(c)(1), (2), and (3). Accordingly, temporary relief is proper if Harman proves the criteria in § 1276(c). The fact that Harman has conclusively proved criteria 1 and 3 is undisputed. Therefore, this court's ability to issue a preliminary injunction turns upon the satisfaction of criterion 2.

Criterion 2 requires that the party requesting the injunction show that there is a substantial likelihood that he will prevail on the merits. Thus the central issue becomes whether Harman is substantially likely to prevail on the issue that it does not have to permit Deel Fork Road and Little Prater Road. Previously, the standard used to determine when an operator had to permit a road was whether it was a public road for purposes of the Federal Surface Mine and Control Reclamation Act of 1977. 30 C.F.R. § 701.5 (1984)<sup>1</sup> contained the criteria to examine in reaching the decision as to whether the road was public. In addition, the Commonwealth of Virginia in its quest to obtain primacy implemented a coal

haulroad policy to use when determining whether or not a public road would be subject to the permitting requirements of the Federal Surface Mining Control and Reclamation Act. However, Virginia's criteria was identical to 30 C.F.R. § 701.5's criteria defining affected area.

Therefore, it appears logical that this court should apply the criteria contained in Virginia's coal haulroad policy to determine if Harman must permit the roads in issue, however, in *In Re: Permanent Surface Mining Regulation Litigation*, 620 F.Supp. 1519 (D.D.C.1985) (slip opinion), Judge Thomas Flannery remanded the federal regulation (30 C.F.R. § 701.5) to the Secretary as inconsistent with 30 U.S.C. § 1291(28). This action left no federal regulations in effect concerning determination of public road and this situation will continue until the Secretary promulgates new regulations. The Secretary has not yet promulgated new regulations and OSM suspended the remanded regulation on November 20, 1986. See 51 Fed.Reg. 41952.

Under the Act, only the District Court of the District of Columbia has jurisdiction to hear a claim that a regulation is invalid. In essence, the challenge of the validity of a regulation promulgated in conjunction with the Act may only be heard in the District of Columbia District Court. 30 U.S.C. § 1276(a)(1). Therefore, this court must follow Judge Flannery's decision remanding the regulation and finding it invalid. However, Judge Flannery's decision and rationale provide little guidance in this instance in which this court must interpret § 1291(28)(B). Judge Flannery's decision did not interpret § 1291(28)(B) but merely analyzed 30 C.F.R. § 701.5 as being consistent or inconsistent with § 1291(28)(B).

[2] The issue then arises as to what effect the suspended and remanded regulation has on the identical DMLR criteria. Judge Flannery's action in remanding the

1. The definition reads, in pertinent part:

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.

federal regulation also invalidates the Virginia regulation, used to determine if a road is a public road, because it was identical to the invalid federal regulation. *In Re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 519 (D.C.Cir.), cert. denied, 454 U.S. 822, 102 S.Ct. 106, 70 L.Ed.2d 93 (1981) states clearly that state regulations must be consistent with the Secretary's. Since the federal regulation was inconsistent and invalid, Virginia's identical regulation is also invalid. To hold otherwise would allow Virginia's regulation to be inconsistent with the Act.

This conclusion leaves the court with no precedent as to what standard to apply in determining whether Harman is required to permit Deel Fork Road and Little Prater Road. Because there are no valid current federal or state regulations, this court must look to the Act itself. 30 U.S.C. § 1291(28)(B) provides in pertinent part:

'surface coal mining operations' means — [ ] the areas upon which such 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 improvement or use of existing roads to gain access to the site of such activities and for haulage* . . . . (emphasis added).

Therefore, this court must interpret § 1291(28)(B) to develop criteria to use in determining if Harman must permit Deel Fork Road and Little Prater Road.

30 U.S.C. § 1291(28)(B) includes within the definition of "surface coal mining operations" "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. . . ." Whether a road falls within the definition of "surface coal mining operations" is important because it determines whether the operator must permit the road. Unlike the remanded regulations, § 1291(28)(B) contains no exclusions for public roads or otherwise. Therefore, a literal reading and interpretation of § 1291(28)(B) requires an operator to include within the definition of

"surface coal mining operations" *any and every* road used to gain access to the mine or for haulage.

[3] As there are no exceptions in § 1291(28)(B), a literal reading requires that an operator permit an interstate if used for coal haulage. In fact, in many major coal producing counties there would be no roads that are not required to be permitted, not by one but by many operators. This interpretation obviously was not Congress' intent in enacting § 1291(28)(B). A court is not required to adhere to a literal reading of a statute if such a reading would undermine the expressed intent of Congress. *Bob Jones University v. United States*, 461 U.S. 574, 586, 103 S.Ct. 2017, 2025, 76 L.Ed.2d 157 (1983); *Trans Alaska Pipeline Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978); *Food Town Stores, Inc. v. E.E.O.C.*, 708 F.2d 920, 929 (4th Cir.) cert. denied, *Food Lion, Inc. v. E.E.O.C.*, 465 U.S. 1005, 104 S.Ct. 996, 79 L.Ed.2d 229 (1983).

Therefore, this court must go beyond the literal reading of the statute. Implicit in Congress' thinking in enacting 30 U.S.C. § 1291(28) was that generally an operator is not required to permit a public road. Both parties agree that public roads are excluded from being permitted, however, the conflict arises in trying to define and determine whether these particular roads are public roads. 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. The roads in question involve joint use by coal operators and non-coal operators, but the statute does not draw any distinction in defining affected area where there is joint use. Furthermore, the statute lends no guidance in defining affected area when a private road is used jointly for coal and noncoal related use. Even where joint use of a private road by two coal companies exists, the statute was unclear as to which company or companies had to permit the road. The Secretary did not

eliminate this confusion until promulgation of the permanent regulations in July, 1982. See 30 C.F.R. § 700.11(b).

These cases require this court to define what roads Congress intended to include in 30 U.S.C. § 1291(28). However, the law is so vague that no one knows what the current law is. The regulations were the only indications of the scope of the Act and Judge Flannery held the regulations inconsistent with the Act on July 15, 1985. Therefore, the regulations lend no guidance and Judge Flannery's opinion interpreted the regulations in light of 30 U.S.C. § 1291(28) but did not actually interpret the statute. In addition, the Secretary presumably does not know the extent of applicability of 30 U.S.C. § 1291(28) as the Secretary has not promulgated any new regulations concerning this matter since Judge Flannery remanded the previous regulations twenty (20) months ago.

[4] Therefore, this court simply examines the evidence in the record to determine if the roads in question are public roads. OSM presented no evidence at the hearings that the roads are not public other than the statement of one OSM employee who testified that he saw "little public use" during his brief inspections. On the other hand, Harman presented substantial evidence that the roads are public. Specifically, Harman presented testimony of local residents and county officials, all of whom stated that the roads are public. In addition, Harman presented evidence of expenditures which Buchanan County made to maintain the roads. While these amounts are not substantial, the expenditures (made from public funds) provide strong evidence of the public nature of the roads. Lastly Harman presented evidence of the county's substantial expenditures to improve the roads; even stronger evidence of the road's public nature. This evidence, in conjunction with the fact that several private individuals use the roads for access to and from their homes and the fact that other coal mine operations use the roads for access and coal haulage, is more than sufficient to establish that the roads are

public and, therefore, that Harman is not required to permit them.

More importantly, Virginia law indicates that the roads are public.

The test [as to whether a road is public] is not simply how many do actually use [the road], but how many may have a free and unrestricted right in common to use them. If it is free and common to all citizens, then no matter whether it is or is not of great length, or whether it leads to or from a city, village or hamlet, or whether it is much or little used, it is a public road. (Citations omitted).

*Heninger v. Peery*, 102 Va. 896, 899, 47 S.E. 1013, 1014 (1904); See *Foster v. Board of Supervisors of Halifax County*, 205 Va. 686, 689, 139 S.E.2d 65, 68 (1964) and *Stewart v. Fugate*, 212 Va. 689, 690, 187 S.E.2d 156, 157 (1972). This method of defining public as opposed to private roads is not exclusively Virginia's approach. See also *Sumner County v. Interurban Transp. Corp.*, 213 S.W. 412, 141 Tenn. 493 (1919); *Bradford v. Mosley*, Tex.Com.App., 223 S.W. 171, 173 (1920); *Phillips v. Stockton*, Tex.Civ.App., 270 S.W.2d 266, 270 (1954). The record indicates that there are no restrictions on who may use the roads in question. The roads are open to use by all citizens for any legal purposes. Therefore, the roads are public under Virginia law. As such this court finds that Harman has succeeded in proving that it is likely to prevail on the merits, and this court accordingly grants Harman's motion for a temporary injunction.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

#### ORDER

In accordance with a Memorandum Opinion entered this date, this court hereby GRANTS plaintiff's motion for temporary relief and enjoins the Office of Surface Mining from enforcing NOVs 85-13-288-009 and 85-13-289-1 pending completion of its administrative appeal. The court further ORDERS these cases stricken from the docket.

The Clerk is directed to send certified copies of this Order to counsel of record.

insurer even after entry of final judgment in prior action, warranted Rule 11 sanctions.



Summary judgment motion granted; request for imposition of sanctions granted.

Jannette S. LEE, formerly known as Jannette S. Williamson, Individually and On Behalf of All Other Similarly Situated Persons, Plaintiff,

v.

CRITERION INSURANCE  
COMPANY, Defendant.

No. CV486-314.

United States District Court,  
S.D. Georgia,  
Savannah Division.

May 5, 1987.

Insured, who had previously brought action against insurer to recover for disabilities resulting from automobile accident, filed second suit in state court to recover for disability during different period. Subsequently, in previously filed action, the United States District Court for the Southern District of Georgia, Alaimo, Chief Judge, determined that any injuries insured had sustained were relatively minor and that insured had fully and permanently recovered from any injuries suffered. Subsequently filed action was removed to federal court, and insurer moved for summary judgment on ground of res judicata. The District Court, Edenfield, J., held that: (1) insured's prior action seeking to recover from insurer for disability resulting from automobile accident, and in which issue as to whether insured was entitled to any disability benefits was litigated and issue was "necessarily" resolved against insured, barred insured's subsequent action against insurer, notwithstanding insured's argument that different periods were involved, and (2) insured's counsel's conduct in continuing to proceed in second action against

#### 1. Judgment ⇐585(3)

Defense counsel's elicitation of arguably inconsistent statement from insured as to period for which she sought to recover disability benefits could not support finding that claim litigated in earlier action was insured's disability through date of trial rather than up to date 30 days prior to filing of lawsuit, and because claim brought by insured in subsequent action seeking to recover disability benefits from date of filing of earlier action through date of filing of subsequent action was at least theoretically different from that litigated in earlier action, collateral estoppel principles, rather than res judicata principles, guided court in determining whether subsequent action was barred.

#### 2. Judgment ⇐715(1), 720, 724

Collateral estoppel applies where issue litigated in subsequent proceeding is identical to that involved in prior action, and issue was actually litigated, and determination of issue was "necessary" in prior action.

#### 3. Judgment ⇐724

Insured's prior action seeking to recover from insurer for disability resulting from automobile accident, and in which issue as to whether insured was entitled to any disability benefits was litigated and "necessarily" resolved against insured, barred insured's subsequent action against insurer, notwithstanding insured's argument that different periods were involved.

#### 4. Judgment ⇐663

Judgment in prior action had collateral estoppel effect even though judgment was being appealed.

#### 5. Federal Civil Procedure ⇐2721

Insured's decision to proceed with second action against insurer seeking to recover for disability resulting from automobile

EXHIBIT "C"

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HARMAN MINING CORP.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-1505, 86-1544

Decided August 3, 1989

INDEX CODE:

30 CFR 701.5(c)  
30 CFR 732.17(c) & (d)  
30 CFR 842.12(a)(2)  
30 CFR 843.12(a)(2)  
43 CFR 4.1113

Appeals from two decisions by Administrative Law Judge Joseph E. McGuire. The first decision denied applications for review of and temporary relief from Notice of Violation No. 85-13-289-1 (Hearing Docket No. NX 5-52-R), and assessed a civil penalty of \$1,100 in connection therewith (Hearing Docket No. NX 5-33-P). The second decision denied an application for review of Notice of Violation No. 85-13-288-009 (Hearing Docket No. NX 5-120-R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Roads: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, DSMRE may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. Where, however, the evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by DSMRE.

APPEARANCES: John A. Macleod, Esq., Thomas C. Means, Esq., and R. Timothy McCrum, Esq., Washington, D.C., for Harman Mining Corporation; David P. Parks, Esq., Office of the Field Solicitor, Knoxville, Tennessee, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Harman Mining Corporation (Harman) has appealed from two decisions by Administrative Law Judge Joseph E. McGuire. In his first decision, dated July COPR. (C) WEST 1991 NO CLAIM TO ORIG. U.S. GOVT. WORKS

8, 1986, Judge McGuire denied Harman's applications for review of and temporary relief from Notice of Violation (NOV) No. 85-13-289-1 (Hearing Docket No. NX 5-52-R), issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) for utilizing a portion of Deel Fork Road, located in Buchanan County, Virginia, as a haul road without first having secured the necessary permit from the Virginia Department of Mined Land Reclamation (DMLR). In addition, Judge McGuire denied Harman's petition for review of OSMRE's civil penalty assessment of \$1,100, based upon a total of 31 penalty points, in connection with NOV No. 85-13-289-1 (Hearing Docket No. NX 5-33-P).

In the second decision, dated July 23, 1986, Judge McGuire denied Harman's application for review of NOV No. 85-13-288-009 (Hearing Docket No. NX 5-120-R), [FN1] issued by OSMRE for utilizing Little Prater Creek Road, also located in Buchanan County, Virginia, as a haul road without first having secured a surface coal mining permit from DMLR. The Board docketed Harman's appeals from Judge McGuire's two decisions as IBLA 86-1505 and IBLA 86-1544, respectively. Because these two appeals raise identical legal issues, we have consolidated them for decision.

#### Procedural Background

NOV No. 85-13-289-1 (IBLA 86-1505)

On December 7, 1983, OSMRE Reclamation Specialist William L. Arnett, Jr., conducted an inspection of an access and haul road which begins at the end of State Route 664 and extends approximately one-half mile up Deel Fork and Bull Creek (Deel Fork Road) to the upper end of a refuse area operated by Harman in Buchanan County, Virginia. After an investigation which included the review of records available in the Office of the County Administrator for Buchanan County, Arnett found no evidence that the half-mile portion of the road in question was a public road, and he concluded that Harman should have included it as part of interim permit number 3402-AF, subsequently converted to permanent program permit number 1300468. On January 30, 1984, Arnett issued 10-day Notice No. X-84-13-73-1 to DMLR, advising it that the portion of roadway between State Route 664 and the upper end of Harman's refuse pile should have been included in the permit area. DMLR responded on February 21, 1984, advising that the area in question was a public road under Virginia law and should not be permitted, and asking OSMRE to withdraw the 10-day notice.

On October 29, 1984, OSMRE notified DMLR that enforcement action would be taken on the basis that Deel Fork Road did not meet the criteria for a public road. On January 7, 1985, Arnett issued NOV No. 85-13-289-1 for conducting surface coal mine operations without first having secured the necessary permit. The abatement measures specified in the NOV consisted of either submitting an application for a valid surface coal mining permit to DMLR covering the portion of Deel Fork Road then being used to facilitate coal mining activities on permit No. 1300468, or in the alternative, amending that permit by adding the portion of Deel Fork Road in question to the permit area. Harman was directed to abate the violation by 8 a.m. on February 8, 1985.

On February 1, 1985, Harman timely filed an application for review of the NOU, and on February 6, 1985, it also filed an application for temporary relief from that citation. On February 13, 1985, OSMRE issued a proposed civil penalty assessment in the amount of \$1,100, based upon the assessment of 31 civil penalty points for the violation. On March 12, 1985, Harman filed a timely petition for review of that proposed civil penalty assessment. Judge McGuire consolidated Harman's applications and petition for purposes of hearing and disposition. See 43 CFR 4.1113; 30 U.S.C. s 1268(b) (1982).

By decision dated July 8, 1986, Judge McGuire denied Harman's applications for review of and temporary relief from NOU No. 85-13-289-1, and upheld OSMRE's civil penalty assessment of \$1,100, predicated upon 31 civil penalty points. Judge McGuire ruled that the portion of Deel Fork Road at issue did not satisfy any of the three criteria embodied in 30 CFR 701.5, which defines "affected area" as including every coal and access and haul road utilized in 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." [FN2]

Judge McGuire specifically noted that Harman's "use of the disputed section of Deel Fork Road \* \* \* was not de minimis, or relatively minor," and concluded, in light of Judge Flannery's ruling in *In re Permanent Surface Mining Regulation Litigation*, 620 F.Supp. 1519, 1581-82 (D.D.C.1985), that Harman had failed to show that it meets the public use criteria set forth at 30 CFR 701.5(c) (Administrative Law Judge Decision dated July 8, 1986, at 12).

Harman filed a timely appeal with this Board, challenging Judge McGuire's denial of its application for review of the NOU, and his denial of the related petition for review of the civil penalty assessment of \$1,100. In addition, on August 5, 1986, Harman filed an action in the U.S. District Court for the Western District of Virginia, challenging Judge McGuire's denial of its application for temporary relief. Judge Williams of the district court granted Harman's request for temporary relief on August 7, 1986.

NOU No. 85-13-288-009 (IBLA 86-1544)

Harman is the permittee of L & L No. 9, an underground mine in Buchanan County, Virginia, Permit No. 1200219 (Tr. 15-16). On March 21, 1985, OSMRE Inspector Ronnie Vicars inspected the permit area, determining that Harman was using a 1.5 mile long haul road, also known as Little Prater Creek Road, for surface coal mining operations without having obtained the necessary permit from DMLR. On March 25, 1985, Inspector Vicars issued 10-day Notice No. X-85-13-288-08 to DMLR, requesting that the Commonwealth take enforcement action on Harman's use of this unpermitted haul road. In response to this 10-day notice, DMLR denied that it had jurisdiction over Harman's use of Little Prater Creek Road on the basis that it qualified as a public road under Virginia law. Upon determining that DMLR's response to the 10-day notice did not constitute appropriate action, Inspector Vicars reinspected the site on July 1, 1985, and

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he issued NOV No. 85-13-288-009 to Harman for conducting surface coal mining operations on lands without first obtaining a permit from the approved regulatory authority.

On July 26, 1985, Harman filed an application for review of the NOV, and on August 2, 1985, Harman filed an application for temporary relief from the abatement period specified in the NOV, which had been extended to September 27, 1985.

On September 26, 1985, Judge McGuire conducted a hearing on both applications. At the conclusion of the hearing, the parties jointly requested a ruling on Harman's application for temporary relief from the NOV, and agreed upon a briefing schedule on those issues presented in Harman's application for review of the NOV. Judge McGuire rendered an oral order denying Harman's application for temporary relief from the provisions of NOV No. 85-13-288-009.

By decision dated October 11, 1985, Judge McGuire confirmed his oral order denying Harman's application for temporary relief from NOV No. 85-13-288-009. Judge McGuire noted that Harman had met the first and the third conditions for temporary relief as set forth in section 525(c) of SMCRA, 30 U.S.C. s 1275(c) (1982), i.e., a hearing had been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard, and such relief would not have adversely affected the health or safety of the public or have caused significant, imminent environmental harm to land, air, or water resources. However, as to the second condition, Judge McGuire ruled that Harman had "failed to show that there is a substantial likelihood that the findings of the Secretary will be favorable to it in as much as applicant failed to show that OSM[RE] had improperly issued the NOV at issue" (Decision dated Oct. 11, 1985, at 3).

Judge McGuire's analysis of whether Little Prater Creek Road qualifies as a public road, and is therefore exempt from SMCRA, is set forth below:

A recent memorandum opinion issued by Judge Thomas F. Flannery, of the United States District Court for the District of Columbia, in the matter resolving the remaining issues presented in In Re: Permanent Surface Mining Regulations Litigation III, No. 79-1144 (D.D.C. July 15, 1985), remanded to the Secretary that section of the implementing regulations upon which applicant relies namely, the definition of the term "affected areas" as found at 30 CFR 701.5.

In ruling upon whether the Secretary had unlawfully defined the term "affected areas" at 30 CFR 701.5 to exclude certain roads that Congress intended to be covered by section 701(28) of the Act, Judge Flannery found that the Secretary's rule exempted essentially all public roads if the public's use thereof was more than incidental and was therefore inconsistent with that statutory definitional language found at section 701(28) of the Act.

Even in the absence of that recent ruling, the evidence supports a finding that applicant has failed to show that there was a substantial likelihood that the findings of the Secretary would be favorable to it. Applicant's evidence



86-1505, at 14-15). Second, Harman contends that even if OSMRE had the requisite authority to issue the NOV's, OSMRE erred in concluding that each road in question was not a public road and so failed to qualify for exemption from the permitting requirements of Virginia's permanent program (SOR, IBLA 86-1544, at 11-12; SOR, IBLA 86-1505, at 14).

According to Harman, SMCRA "plainly gives Virginia 'exclusive jurisdiction' to enforce its approved State Program for the regulation of surface coal mining operations within the state. 30 U.S.C. s 1253" (SOR, IBLA 86-1544, at 12; SOR, IBLA 86-1505, at 14-15). Harman argues that through 30 CFR 843.12(a)(2) "the Secretary has purported to expand his statutory authority [under section 521(a)(1) of SMCRA, 30 U.S.C. s 1271(a)(1) (1982) ] to permit also the issuance of a Federal NOV where the state fails to take appropriate action [in response to a 10-day notice] but there is no imminent danger to the public or significant, imminent environmental harm" (SOR, IBLA 86-1544, at 13). Harman insists that it is not questioning the validity of 30 CFR 843.12(a)(2) in these appeals, but rather that it is asking the Board to "construe the regulation so as to harmonize it with the Act it implements" (SOR, IBLA 86-1544, at 13 n. 6). The construction of 30 CFR 843.12(a)(2) which Harman proposes is set forth below:

[T]he regulation cannot, consistent with the Act, be construed to authorize OSM[RE] to substitute itself as the primary enforcer of the applicable law (which is the State Program) or to assert a concurrent enforcement role where the state regulatory authority has taken what it believes to be appropriate action. SMCRA simply does not, and the regulation cannot be construed to, permit OSM[RE] to reject, ignore, second-guess or otherwise disregard the state's determination and to directly issue its own NOV. Nowhere in the Act or in the federal regulations is there any shred of OSM[RE] authority to disregard or otherwise reject the state's enforcement decisionmaking in response to a Ten-Day Notice. [Footnote omitted.] (SOR, IBLA 86-1544, at 13-14).

Harman states that the "only colorable authority" for OSMRE's issuance of the NOV's involved herein is 30 CFR 843.12(a)(2), [FN3] under which OSMRE is authorized to issue an NOV only if "the state fails \* \* \* to take appropriate action to cause the violation to be corrected or to show good cause for such failure." Harman maintains that DMLR "took appropriate action concerning the alleged violation by investigating and determining that the road[s] did not have to be permitted under the Virginia State Program" (SOR, IBLA 86-1544, at 20; SOR, IBLA 86-1505, at 20). In Harman's view, once DMLR timely notified OSMRE of its determination that enforcement action was unnecessary with respect to each of the 10-day notices, OSMRE's jurisdiction over these matters ended.

Secondly, Harman argues that even if the Board rejects its interpretation of 30 CFR 843.12(a)(2), it must reverse Judge McGuire's findings that Deel Fork Road and Little Prater Creek Road are not public roads for purposes of SMCRA. Harman points out that effective March 16, 1984, the Secretary approved Virginia's "Coal Haul Road Policy" as an amendment to the Virginia State program. 49 FR 9898. As amended, the Virginia program provides that a permit

must be obtained for all roads used, constructed, or significantly improved for coal haulage or minesite access, but it exempts from permitting those public roads which satisfy three criteria: "(a) the road has been designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) the road is maintained by public funds and constructed in a manner similar to other public roads in the same classification in the jurisdiction in which it is located; and (c) there is substantial (more than incidental) public use of the road." 49 FR 9898 (Mar. 16, 1984). Harman argues that both roads satisfy these three criteria, exempting them from the permitting requirements.

Harman asserts that whether a road is a "public county road under the laws of Virginia is uniquely within the special competence of local county officials to determine" (SOR, IBLA 86-1544, at 25). The testimony of county officials, Harman argues, was uncontradicted that each "road was and had long been a public county road." *Id.* Harman points to the following Virginia statute as authority for its position that Deel Fork Road and Little Prater Creek Road qualify as public roads:

When a way has been worked by road officials as a public road and is used by the public as such, proof of these facts shall be prima facie evidence that the same is a public road. And when a way has been regularly or periodically worked by road officials as a public road and used by the public as such continuously for a period of 20 years, proof of these facts shall be conclusive evidence that the same is a public road.

Code of Virginia s 33.1-184. Harman concludes that since its "evidence demonstrated that the road had been, at the least, periodically worked by road officials as a public road and had been used by the public as such continuously for a period of some 50 years, Little Prater [Creek] Road has been conclusively proved to be a public road" (SOR, IBLA 86-1544, at 26; see also SOR, IBLA 86-1505, at 23-24).

Moreover, Harman argues with regard to both roads that Judge McGuire's "attempt to portray the road expenditures as insubstantial, although in error, is largely irrelevant." *Id.* Harman contends that "[t]here is no requirement under the Virginia State Program public road exemption or the Code of Virginia s 33.1-184 that road maintenance expenditures be substantial" (SOR, IBLA 86-1544, at 27). Instead, the public road exemption in Virginia "requires only that the road be maintained in a manner similar to other public roads." *Id.*

Harman challenges Judge McGuire's emphasis on the fact that Buchanan County did not own a fee simple interest in either Little Prater Creek Road or Deel Fork Road. Harman argues that the conveyance to Buchanan County of all its ownership rights to the roads extinguished its "private rights" and strengthens the public status of the roads (SOR, IBLA 86-1544, at 29-30; SOR, IBLA 86-1505, at 26-27).

In addition, Harman argues that Judge McGuire erred in applying Judge Flannery's 1985 ruling in *In re Permanent Surface Mining Regulation Litigation, III*, *supra*. Harman contends that Judge McGuire, and this Board, should apply

the three criteria of the Virginia State program to determine the status of Little Prater Creek Road and Deel Fork Road. In Harman's opinion, "[r]egardless of Flannery's ruling on judicial review of the federal surface mining regulations, the relevant provisions of the Virginia State Program are the law regulating surface mining in Virginia until they are changed" (SOR, IBLA 86-1544, at 31 (emphasis in original)). Moreover, Harman argues:

Whatever change in the federal regulations may ultimately result from Judge Flannery's ruling remanding to OSM[RE] the federal definition of the term "affected area," his ruling itself has no direct effect on the Virginia State Program. On the contrary, the Act and the regulations provide that the Virginia State Program, as approved by OSM[RE], remains the law governing surface mining in Virginia unless and until OSM[RE] formally approves a change in that State Program. [Footnote omitted.] (SOR, IBLA 86-1544, at 33-34; SOR, IBLA 86-1505, at 29). Harman maintains that a change in Virginia's program would have to comply with 30 CFR 732.17.

Harman supports its position that the definition of "affected area" in Virginia's program governs until OSMRE formally approves an amendment to that definition with the following statement by OSMRE published on November 20, 1986, in the Federal Register: "State programs will remain in effect until the Director of OSMRE has examined the provisions of each State program to determine whether changes are necessary and has notified the State regulatory authority pursuant to 30 C.F.R. s 732.17(c) and (d) that a State program amendment is required." 51 FR 41958 (Nov. 20, 1986).

Finally, Harman challenges OSMRE's civil penalty assessment of \$1,100 for NOV No. 85-13-289-1, issued in connection with Deel Fork Road. Harman argues that OSMRE acted improperly when it "assigned Harman the maximum of 12 penalty points for negligence, when Harman was at all times acting in accordance with the specific instructions and requirements imposed by DMLR, the primary regulator of SMCRA in Virginia" (SOR, IBLA 86-1505, at 34 (emphasis in original)). According to Harman, this assessment "impermissibly penalizes Harman's reasonable reliance on the actions of the state regulatory authority through a retroactive application of OSM[RE]'s new regulatory constructions and practices." *Id.* at 36.

[1] We again reject the argument that OSMRE lacks authority to issue an NOV in states which have achieved primacy. Section 521(a)(1) of SMCRA, 30 U.S.C. s 1271(a)(1) (1982), when read in conjunction with 30 CFR 842.12(a)(2), confers such authority in clear terms. Section 521(a)(1) of SMCRA provides in pertinent part:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause

said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. [Emphasis added.]

Section 521(a)(1) of SMCRA, 30 U.S.C. s 1271(a)(1) (1982).

The regulation at 30 CFR 843.12(a)(2) sets forth the enforcement alternatives available to OSMRE where the state regulatory authority fails to take "appropriate action" in response to a 10-day notice:

When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under s 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that the appropriate enforcement action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. No additional notification to the State by the Office is required before issuance of a notice of violation, if previous notification was given under s 842.11(b)(1)(ii)(B). [Emphasis added.]

As noted in recent Board decisions, the phrase "appropriate action" is defined neither in SMCRA nor in the regulations promulgated thereunder. See, e.g., *Turner Brothers, Inc. v. OSMRE*, 92 IBLA 320, 323 (1986). [FNa] However, in promulgating 30 CFR 843.12(a)(2), OSMRE stated that "[t]he crucial response of a State is to take whatever action is necessary to secure abatement of the violation." 47 FR 35627-28 (Aug. 16, 1982). The Board concluded in *Turner Brothers, Inc. v. OSMRE*, 92 IBLA at 323, that

use of the word "appropriate" requires OSM[RE] to exercise its discretion in determining whether the state's response to its 10-day notice is such that OSM[RE] must reinspect the site of the violation and issue either an NOV or a CO, depending upon the circumstances. We further find that OSM[RE], in evaluating the state's response to a 10-day notice, must determine whether the response is calculated to secure abatement of the violation. See *Thomas J. FitzGerald*, 88 IBLA 24, 29 (1985).

In *Shamrock Coal Co. v. OSMRE*, 81 IBLA 374 (1984), [FNb] and *Bannock Coal Co. v. OSMRE*, 93 IBLA 225 (1986), [FNc] the respective state regulatory authorities responded to OSMRE's 10-day notices by concluding that no enforcement action was necessary as a matter of state law. Appellants in those cases argued, as Harman argues herein, that OSMRE has no authority to "second-guess" the state regulatory authority when it determines that under its approved program there



must be consistent with the Secretary's. Since the federal regulation was inconsistent and invalid, Virginia's identical regulation is also invalid. To hold otherwise would allow Virginia's regulation to be inconsistent with the Act.

659 F.Supp. at 811.

Judge Williams reasoned that "[b]ecause there are no valid current federal or state regulations, this court must look to the Act itself," and "interpret s 1291(28)(B) to develop criteria to use in determining if Harman must permit Deel Fork Road and Little Prater [Creek] Road." 659 F.Supp. at 811. Section 701(28) of SMCRA defines "surface coal mining operations" to include

the areas upon which such [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 improvement or use of existing roads to gain access to the site of such activities and for haulage \* \* \*.

Judge Williams rejected a literal reading of section 701(28)(B) of SMCRA which would require "that an operator permit an interstate if used for coal haulage." 659 F.Supp. at 811. In his view, "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." Id. Because Judge Flannery ruled that 30 CFR 701.5 was inconsistent with SMCRA, but did not interpret section 701(28)(B) of SMCRA, Judge Williams concluded that his only alternative was to "simply examine the evidence in the record to determine if the roads in question are public roads." 659 F.Supp. at 812. Set forth below are his discussion of the evidence and his conclusion that Deel Creek Road and Little Prater Creek Road are public roads under section 701(28)(B) of SMCRA:

OSM[RE] presented no evidence at the hearings that the roads are not public other than the statement of one OSM[RE] employee who testified that he saw "little public use" during his brief inspections. On the other hand, Harman presented substantial evidence that the roads are public. Specifically, Harman presented testimony of local residents and county officials, all of whom stated that the roads are public. In addition, Harman presented evidence of expenditures which Buchanan County made to maintain the roads. While these amounts are not substantial, the expenditures (made from public funds) provide strong evidence of the public nature of the roads. Lastly Harman presented evidence of the county's substantial expenditures to improve the roads; even stronger evidence of the road's public nature. This evidence, in conjunction with the fact that several private individuals use the roads for access to and from their homes and the fact that other coal mine operations use the roads for access and coal haulage, is more than sufficient to establish that the roads are public and, therefore, that Harman is not required to permit them.

More importantly, Virginia law indicates that the roads are public:

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The test [as to whether a road is public] is not simply how many do actually use [the road], but how many may have a free and unrestricted right in common to use them. If it is free and common to all citizens, then no matter whether it is or is not of great length, or whether it leads to or from a city, village or hamlet, or whether it is much or little used, it is a public road. (Citations omitted).

Henringer v. Peery, 102 Va. 896, 899, 47 S.E. 1013, 1014 (1904); See Foster v. Board of Supervisors of Halifax County, 205 Va. 686, 689, 139 S.E.2d 65, 68 (1964) and Stewart v. Fugate, 212 Va. 689, 690, 187 S.E.2d 156, 157 (1972). This method of defining public as opposed to private roads is not exclusively Virginia's approach. See also Summer County v. Interurban Transp. Corp., 213 S.W. 412, 141 Tenn. 493 (1919); Bradford v. Mosley, Tex.Com.App., 223 S.W. 171, 173 (1920); Phillips v. Stockton, Tex.Civ.App., 270 S.W.2d 266, 270 (1954). The record indicates that there are no restrictions on who may use the roads in question. The roads are open to use by all citizens for any legal purposes. Therefore, the roads are public under Virginia law. As such this court finds that Harman has succeeded in proving that it is likely to prevail on the merits, and this court accordingly grants Harman's motion for a temporary injunction. 659 F.Supp. at 812.

In light of Judge Williams' analysis, we conclude that Judge McGuire improperly upheld the NOV's issued as the result of Harman's use of the two roads in question. In his October 11, 1985, decision denying temporary relief from NOV No. 85-13-288-009, in his July 23, 1986, decision denying Harman's application for review of NOV No. 85-13-288-009, and in his July 8, 1986, decision denying Harman's applications for review of an temporary relief from NOV No. 85-13-289-1, Judge McGuire applied the standards for the public road exemption found in Virginia's permanent program regulations, which are identical to the standards in 30 CFR 701.5. [FN5] Our review of Judge McGuire's decisions upholding the NOV's involved herein leads us to the same conclusions reached by Judge Williams in Harman Mining Corp. v. OSMRE, supra. Because of Judge Flannery's remand of 30 CFR 701.5, it was improper for Judge McGuire to apply either that regulation or its Virginia counterpart. Our search for criteria by which to evaluate the status of Little Prater Creek Road and Deel Fork Road leaves us with the terms of section 701(28)(B) of SMCRA. We find Judge Williams' interpretation and application of that statute in granting Harman's requests for temporary relief equally applicable in our consideration of these appeals on the merits.

We conclude that upon receipt of the 10-day notices involved herein, DMLR properly responded to OSMRE that Little Prater Creek Road and Deel Fork Road are public roads which are exempt from the permitting requirements of Virginia's permanent regulatory program. DMLR's responses to the 10-day notices constituted appropriate action under section 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2), and OSMRE's issuance of the NOV's and assessment of civil penalty was improper.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed.

Gail M. Frazier

Administrative Judge

I concur:

Franklin D. Arness

Administrative Judge

Interior Board of Land Appeals

Office of Hearings and Appeals

United States Department of the Interior

FN1 Harman also filed an application for temporary relief from NOV No. 85-13-288-009, which Judge McGuire denied by decision dated Oct. 11, 1985, deciding that Harman was not likely to prevail on the merits. Thereupon, Harman filed a request for temporary relief in the U.S. District Court for the Western District of Virginia under section 526(c) of SMCRA, 30 U.S.C. s 1276(c) (1982), and on Oct. 28, 1985, District Judge Glen M. Williams granted temporary relief from Judge McGuire's decision, ruling that Harman was likely to prevail on the merits.

FN2 This definition of "affected area," which the Department promulgated on Apr. 5, 1983 (48 FR 14821-22), changed in certain respects the Department's previous definition of that term. See 46 FR 61099 (Dec. 15, 1981).

FN3 Harman recognizes that Congress empowered DSMRE with a continuing oversight role, with the authority to take several actions, including (1) issuance of its own cessation order under section 521(a)(1) and (2) of SMCRA, 30 U.S.C. s 1271(a)(1) and (2) (1982); (2) revocation of state primacy under section 521(b) of SMCRA, 30 U.S.C. s 1271(b) (1982); and (3) challenging approval of a surface coal mining permit under sections 513 and 514 of SMCRA, 30 U.S.C. ss 1263 and 1264 (1982).

FN4 Section 526(c) of SMCRA, 30 U.S.C. s 1276(c) (1982), provides as follows:

FN" In the case of a proceeding to review any order or decision issued by the Secretary under this chapter \* \* \* the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if--

FN"(1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

FN"(2) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

FN"(3) such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources."

FN5 As Judge Williams pointed out, Judge Flannery ruled in *In re Permanent Surface Mining Regulation Litigation*, supra, that 30 CFR 701.5 was inconsistent with section 701(28)(B) of SMCRA, on the basis that it exempts "essentially all public roads where public use is more than incidental." 620 F.Supp. at 1582. Judge Flannery stated that 30 CFR 701.5 is irrational on two bases: first, "it does not appear rationally related to the Secretary's concern that interstate highways not be required to be permitted and reclaimed under the Act"; and second, it does not square with the Secretary's own interpretation of section 701(28)(B) of SMCRA, i.e., that Congress intended SMCRA "to cover public roads used for coal haulage and access only when they are directly, rather than incidentally, part of the mining operation." 620 F.Supp. at 1582. In Judge Flannery's opinion, 30 CFR 701.5 "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." 620 F.Supp. at 1582.

FNa) GFS(MIN) 42 (1986)

FNb) GFS(MIN) 106 (1984)

FNc) GFS(MIN) 53 (1986)

FNd) GFS(MIN) 85 (1987)

GFS(MIN) 84 (1989)

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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, ENERGY	)	NO. 91-02-244-002
WEST MINING CO., PETITIONER,	)	COTTONWOOD/WILBERG MINE,
UTAH DIVISION OF OIL, GAS	)	EMERY COUNTY, UTAH
AND MINING, A DIVISION OF	)	
UTAH DEPARTMENT OF NATURAL	)	
RESOURCES, STATE OF UTAH,	)	
PETITIONER & INTERVENOR	)	COAL MINING PERMIT
	)	NO. ACT/015/019
v.	)	
	)	
OFFICE OF SURFACE MINING	)	
RECLAMATION & ENFORCEMENT	)	

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PETITION FOR INTERVENTION

Pursuant to 43 C.F.R. Part 4.1110, the Division of Oil, Gas and Mining, a Division of the Department of Natural Resources, State of Utah, hereinafter "Division," petitions the Office of Hearing and Appeals for leave to intervene in the Petitioners' Request for Review of the fact of violation which is the subject of the Notice of Violation No. 91-02-244-002 issued on June 26, 1991. The Division, as intervenor, seeks to participate in this proceeding as a full party.

STATEMENT OF FACTS

1. The Utah Division of Oil, Gas & Mining ("State" or "DOGM") issued Cottonwood/Wilberg Mine Permit No. ACT/015/019 as a renewal permit 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. On August 23, 1988, OSM, under the provision of 30 C.F.R. 732.17(d), (732 letter) notified DOGM that it was enclosing a list of changes to the federal program that OSM believed Utah would need to address to insure that its program was no less effective than those federal regulations promulgated between October 1, 1983 and June 15, 1988. At page 2 of the list concerning the definition of affected area, and under Utah's Rule R. 614-100-200, as proposed in DOGM's May 6, 1988 informal submittal, the Office of Surface Mining determined that as regards 30 C.F.R. 701.5, Utah's proposed definition of affected area, if adopted as proposed in its May 6, 1988 submittal, would be no less effective than the federal requirements. A true and correct copy of the OSM letter and attachment of August 23, 1988 and the referenced May 6, 1988 informal submittal to OSM are attached hereto as Exhibit "D."

8. In November 21, 1988 correspondence to DOGM, OSM, through its acting director, Robert H. Gentile, enclosed a list of Utah regulations that OSM had now determined to be less effective than, or inconsistent with, federal regulations promulgated between October 1, 1983 and June 15, 1988. This 732 letter was a follow-up to the previous August 23, 1988 letter. OSM stated, with regard to the DOGM definition of affected area

(the same definition contained in the May 1988 letter) and OSM's rulemaking at 51 FR. 41963, November 20, 1986, that " to be no less stringent than SMCRA, Utah must delete the disapproved language or otherwise revise it's proposed definition to include all roads contained within the definition of "surface coal mining operations" in § 701 (28) of SMCRA." A true and correct copy of the November 21, 1988 OSM correspondence with attachment is attached hereto as Exhibit "E."

9. On January 23, 1989, the Office of Surface Mining, in response to the informal submission of Utah's proposed coal rules as submitted by DOGM on May 6, 1988, provided a complete review considering all past amendments and all regulatory reform items contained in OSM's May 12, 1986 and June 19, 1987 30 C.F.R. 732 letters. Additionally, OSM considered the most recent set of regulatory reform items as set forth in OSM's November 21st 30 C.F.R. 732 letter. As part of the January 23, 1982 section 732 process, the Office of Surface Mining, concerning item 25 at page 3 of the OSM response, determined that Utah's definition of affected area at R. 614-100-200 corresponding to 30 C.F.R. 701.5 was resolved. A true and correct copy of the OSM 732 correspondence of January 23, 1989 with attachment is attached hereto as Exhibit "F."

10. On July 18, 1989, OSM again provided corresponded concerning public roads, in the form of a 30 C.F.R. section 732 letter. This 732 letter purported to address all duly promulgated federal rules published in the Federal Register

through June 8, 1988. In this July 18, 1989 section 732 letter, a list of changes for Utah to make was provided. At page 5 of the list, concerning roads and support facilities as promulgated in federal rulemaking in 53 FR. 45190, November 8, 1988, the Office of Surface Mining stated that "since both the current and proposed Utah definitions of road categorically exclude public roads, they are inconsistent with this decision. Therefore, the state needs to revise its definition so that public roads are not categorically exempted from regulation." This letter documents the first OSM conclusion that Utah's rules "categorically excluded public roads". A true and correct copy of the July 18, 1989 732 letter and attachment at page 5 is attached hereto as Exhibit "G."

11. On November 9, 1989, OSM provided DOGM with a 732 letter responding to DOGM's response to OSM's 732 letters dated May 12, 1986, June 9, 1987 and November 21, 1988. OSM, in this correspondence, stated that with the exceptions noted in the enclosure, "OSM finds the proposed state rules to be no less effective than federal counterpart regulations and no less stringent than the Act." Additionally, Robert H. Hagen, Director of the Albuquerque Field Office, noted that his analyses of the public roads issue differed from his earlier communication of July 6, 1989. Director Hagen stated further, "after further agency review it has been determined the approach I had suggested would not satisfy the concerns raised by the 1985 U.S. District Court for the District of Columbia. This ruling had the effect

of suspending the criteria for defining public roads which I pointed out to you in my letter, and which you subsequently removed from your proposed rule defining 'affected area'." The attachment to the November 9, 1989 letter stated that the Director of OSM, subject to public comment, was prepared to approve the proposed rules submitted by Utah if the identified deficiencies were satisfactorily addressed. On page 1 of the attachment to that letter, OSM stated with regard to Utah's definition of roads, that it included "language similar to the federal regulation, except that Utah's definition includes the additional phrase "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 . . ." (emphasis added). Utah was directed to "revise its proposed rule to preclude such exclusions and to otherwise conform to the remand of the federal definition of 'affected area'." A true and correct copy of the November 9, 1989, 732 letter and attachment is attached hereto as Exhibit "H."

12. On November 27, 1989, OSM, through W. Hord Tipton, acting Deputy Director of Operations and Technical Services, enclosed a list of regulations determined by OSM to be less effective or inconsistent with federal regulations promulgated between June 9, 1988 and August 30, 1989. The enclosed list purported to have been modified to address provisions contained in DOGM's August 11, 1989 formal submittal. Page 6, heading D, of this list concerns roads and support facilities relevant to

OSM rulemaking at 53 FR 45190, November 8, 1988, 30 C.F.R. 701.5 and Utah's proposed Rule at R614-100-200. OSM responded by stating that Utah's proposed definition of road included language, regarding public roads, inconsistent with the federal regulations. The Utah proposed definition was found to be inconclusive because it provided for an evaluation of mining related and public uses. Further, the rule was found not to include decision criteria or adequately address the remand of the definition of affected area in In re Permanent Surface Mining. DOGM was informed by this attachment, that in order to comply with the court decision, Utah must retain its current definitions of "road" and "affected area" (without the language previously disapproved). Further, the attachment went on to state "one resolution which OSM has already approved in another state would be to exclude public roads, only if they are built and maintained to the same standards as required for non-public roads within the permit area. Such roads would still have to meet the other three criteria for classification of a public road." (emphasis added) A true and correct copy of the November 27, 1989 section 732 letter and attachment beginning at page 6 are attached hereto as Exhibit "I."

13. 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 and attachments is attached hereto as Exhibit "J."

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

15. In correspondence to the Division from Robert H. Hagen, Director of the OSM Albuquerque Field Office, dated March 5, 1991 new roads criteria was introduced for the first time by OSM as though it had the force of law. A true and correct copy of the March 5th letter is attached hereto as Exhibit "L."

17. 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 "M."

18. 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 "N."

## ARGUMENT

### INTRODUCTION

The state of Utah, Division of Oil, Gas and Mining, Department of Natural Resources, as Petitioner in Intervention, (hereinafter the "Division") appeals the issuance of the Federal NOV in this matter. The Division raises two main points on appeal. The first addresses the authority of the Federal Office of Surface Mining (hereinafter "OSM") to issue an NOV in this matter. The second addresses OSM's application of criteria promulgated by OSM without compliance with the notice and comment procedures called for in § 553 of The Administrative Procedures Act.

THE OFFICE OF SURFACE MINING, WHEN INITIATING ENFORCEMENT ACTION UNDER AN APPROVED STATE PROGRAM, HAS NO INDEPENDENT AUTHORITY TO APPLY AND INTERPRET STATE RULES FOR WHICH THERE IS NO CORRESPONDING FEDERAL RULE.

Assuming, for the purpose of this appeal, that OSM has authority to issue an NOV to a permittee under an approved state program, the issue still remains as to whether or not OSM has authority to make and enforce an interpretation of a state rule when that interpretation is at variance with properly promulgated federal rules and the approved state program.

Following the remand of the definition of affected area as contained in the federal regulations mandated by In re Permanent Surface Min. Regulation Litigation, 320 F. Supp. 519 (D.C.C. 1985) (hereinafter "In re Permanent"), the Division, in response to 30 C.F.R. § 732 requests by OSM, has been seeking approval of amendments to the state program so as to comply with the Surface

Mining Control and Reclamation Act PL95-87 (hereafter the "Act") , the duly promulgated rules of OSM, and relevant decisions of the federal courts and the IBLA. See Exhibits "D", "F", "G", "H" and "I". OSM has not promulgated any rules since the remand of that portion of its definition of affected area concerning roads in In re Permanent. With the exception of its suspension of its definition of affected area, insofar as it excludes roads which are included in the definition of surface coal mining operations at 51 FR. 41960, November 20, 1986, there has been no federal rulemaking concerning the status of public roads.

The only criteria which has the effect of law concerning when a road does not fit within the definition "affected area" is found at 30 C.F.R. § 701.5's definition of "affected area" which includes "every road used for purposes of access to, or for hauling coal to or from, surface coal mining or reclamation operations, unless the road (a) was designated as a public road pursuant to the laws of the jurisdiction in which it was located; and (b) is maintained with public funds, and constructed in a manner as other public roads of the same classification within the jurisdiction;". 30 C.F.R. § 701.5.

The remaining part of the definition is suspended insofar as it excludes roads which are included in the definition of "surface coal mining operations." 51 FR. 41960, Nov. 20, 1986.

Within the limits of the In re Permanent decision, the Secretary is authorized by SMCRA to initiate additional rulemaking. The Secretary has not done so.

The United States District Court for the District of Columbia in In re Permanent, by remanding that portion of the definition of affected area now suspended by the Secretary, rejected a statutory interpretation which would focus upon, at one extreme, a test of the "primary function" use of a coal haulage or access road. On the other hand, the court was troubled by the lack of a logical nexus between the remanded rule and the Secretary's conclusion that Congress "intended the Surface Mining Act to cover public roads used for coal haulage and access only when they are directly, rather than incidentally part of the mining operation." 620 F. Supp. at 1582.

If the Secretary believes that Judge Flannery, in his remand of the rule, made a ruling concerning the correct interpretation of § 701 (2a) of the Act by the use of the word "presumably", (620 F. Supp. at 1582), then the Secretary is free to test that hypotheses by entering into informal rulemaking. However, until the Secretary embarks upon rulemaking, the federal rule cannot be enforced beyond the clear language of the rule as written, and the interpretation of the rule by those charged with interpreting the rule through the adjudicative process; the federal courts and the IBLA. To the extent the Secretary disagrees with the decisions of the IBLA, he is always free, within the established procedures to modify the decisions of the IBLA; this the Secretary has not done.

Presently, the most recent interpretation of "affected area" concerning which public roads are subject to permitting under the

Act and 30 C.F.R. 701.5, "affected area", is that of the U.S. District Court for the Western District of Virginia in Harmon Mining v. Hodel, #86-0198-A (Slip Opinion, June 3, 1987). This Court explicitly held that Judge Flannery's decision in In re Permanent, did not interpret § 1291(28)(B) of the Act, the origin of affected area. Rather, the District Court held that Judge Flannery's decision merely ruled that the remanded language of 30 C.F.R. § 701.5 was inconsistent with § 1291(28)(B). This District Court, interpreted § 1291 (28)(B) and paralleling previous decisions of the IBLA, found the roads in this case to be outside the definition of affected area. Neither the Federal District Court, in Harmon, nor the IBLA on hearing the matter on the merits, strayed from previous IBLA decisions concerning when a road is public and therefore not required to be permitted under the Act. With the exception of the discussion of the regulation in In re Permanent, no one has cited any prior case law addressing the issue of use as a factor concerning public roads under the Act. Rather, the consistent position of OSM, the IBLA and now the District Courts in all enforcement actions has been two fold.

First, there has been a determination of whether a road is a public road as defined within "affected area", and secondly, whether the road is maintained with public funds as set forth within the definition of "affected area". An early IBLA decision, Jewel Smokeless Coal Corp. 4 IBSMA 51, June 18, 1982 in finding that the status of the roads on appeal in that matter

were not public and therefore within the reach of the Act, focused upon two criteria. First, that "mere nominal status for a road or a 'public' road by virtue of its being accepted by a municipal corporation and carried on its list as such, is not sufficient to bring the road within the exclusionary language of 30 C.F.R. 710.5" citing Fetterolf Mining Sales, Inc., 4 IBSMA 29 1982 and Rayle Coal Company, 3 IBSMA 111, 88 Id. 492 (1981). Secondly, the IBLA, after finding that mere nominal public road status was not sufficient, required a confirmative showing that the county in whose name the road nominally was, was actually maintaining the road. The IBLA found this to be the crucial factor. The IBLA also noted in that matter that "the legislative history of the Act indicates that Congress, when considering the appropriate scope of regulation of roads, was concerned primarily with possible burdens upon governmental units, not operators. The exemption then, is for the benefit of the relevant governmental entity, not the operator." Jewel Smokeless Coal Corp., 4 IBSMA 51, June 18, 1982.

The same analysis was applied by the IBLA in Mudfort Coal Corporation, 5 IBSMA 44 (1983), and finally by the U.S. District Court for the western district of Virginia in Harmon Mining Corporation v. Hodell, #86-0198-A (Slip Opinion, June 3, 1987). Indeed, the focus of all reported decisions actually applying the rule and the Act to public roads has focused upon the first two criteria promulgated by the Secretary at 30 C.F.R. 701.5 as they remain after the remand by Judge Flannery.

The Division is presently in the process of gathering data relevant to the above criteria concerning the question of permitability of an access or haul road. The Division has submitted, as a program amendment, a change to its definition of road to mirror the federal rule as it is now extant. The Division has received numerous conflicting informal responses from OSM concerning the adequacy of DOGM's informal and formal attempts to comply with the 732 process concerning the definition of roads. To date, OSM has not approved or disapproved Utah's program amendments regarding roads and public road.

Therefore, the present NOV's as written based upon OSM's most recent ad hoc interpretation of "affected area" as it presently exists in the approved state program. The state's definition of "affected area" differs in no material way from 30 C.F.R. § 701.5. Indeed, OSM bases its federal NOV upon the approved state definition of affected area. OSM, in issuing this subject NOV, has applied new criteria as though the criteria applied had force of law comparable to its rules promulgated after notice and comment, or as refined by adjudication. As demonstrated above, nothing in the Federal Register, nor in the adjudicatory process, provides a legal basis for OSM's application of the new road criteria used in issuing this NOV.

OSM has defined criteria, applied them in an enforcement action in a primacy state, and announced its intent to apply them as though it has the force of law. The new criteria are enunciated for the first time in the March 5th correspondence

from the Albuquerque Field Office to the Division. Exhibit "L". In this correspondence at page 5, Robert H. Hagen, Director of the Albuquerque Field Office, stated:

To be exempt, roads must be constructed for purposes other than mine access or coal haulage, be reconstructed or improved for purposes other than to upgrade the road so that it can be used for mine access or coal haulage, or be an existing road that is affected by only relatively minor impacts from the coal mining related use. Exhibit "L" at page 5. (Emphasis added.)

On May 31, 1991, in response to the Division's request for informal review of the Albuquerque Field Office Director's determination that the Division had not taken appropriate action with regard to the TDN which preceded this NOV, W. Hord Tipton, Deputy Director of Operations and Technical Services, reiterated the criteria first enunciated in the March 5th letter for implementing the original language of § 701 (28)(B) of SMCRA. The criteria, as announced by Mr. Tipton's affirmation of the TDN, considered "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." Exhibit "M" at page 2. After applying OSM's "new rule" concerning the "plain language of the state program counterpart to the definition of 'surface coal mining operations'" OSM, through Mr. Hord Tipton concluded: "these improvements were made by the company to facilitate coal haulage, and is used almost exclusively for access and coal haulage by the coal company." Exhibit "M" at page 2. (Emphasis added.)

In short, OSM, after a five year hiatus in rulemaking, has implemented and applied rules in the guise of criteria to flesh out the "clear language of the statute." The same clear language which Judge Flannery found the Secretary unable to articulate by rulemaking with a logical nexus between the rules and the Act. In fact, it becomes apparent that OSM has adopted the criteria and standard urged upon Judge Flannery by the citizen plaintiffs in the In re Permanent litigation. Even though Judge Flannery rejected this interpretation of the "plain language" of the statute, conceivably, such rulemaking may pass muster upon judicial review of properly promulgated rules by the Secretary. However, these rules are neither the product of notice and comment rulemaking, nor of the common law process of adjudication. As such they do not have the force of law and are not the basis for applying federal enforcement authority in Utah, whose program is approved and by which the state has attained exclusive jurisdiction.

OSM issued the subject NOV by virtue of its authority under 30 C.F.R. § 843.12. The criteria which OSM applied in issuing this NOV is not found in the Act, nor is it found in any federal rule, the applicable program or any condition of the permit. The most that can be said for OSM's position is that they believe the permittee in this instance to be in violation of the most recent ad hoc agency interpretation of the Act.

IF THE CRITERIA ENUNCIATED BY OSM AND APPLIED AS THE BASIS FOR THE ISSUANCE OF THE SUBJECT NOV IS AN INTERPRETIVE RULE OR

STATEMENT OF POLICY IT DOES NOT HAVE THE EFFECT OF LAW AND IS INADEQUATE FOR PREEMPTING STATE ENFORCEMENT OF THE STATE PROGRAM.

"A rule" is an agency statement that the agency intends to be followed. The Administrative Procedure Act provides at 5 U.S.C. § 551(4):

"Rule" means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure or practice requirements of an agency . . .

OSM's ad hoc adoption of criteria as enunciated in the March 5, 1991 letter to the Division, (Exhibit "M"), and the application of that criteria resulting in the NOV in this matter, clearly constitutes a rule as defined at 5 U.S.C. § 551(4). As such, it must comply with 5 U.S.C. § 553 and the notice and comment procedures contained within that statute. If OSM relies upon the exception contained in § 553, excluding interpreting rules, general statements of policy or rules of agency organization procedure or practice, it has not stated a basis in law for issuing a federal NOV.

For a Regulation to have "the force and effect of law", it must have been promulgated pursuant to the statutory procedural minimum found in the A.P.A., Chrysler Corp v. Brown, 441 U.S. 281 (1979). Specifically, the regulations must be substantive or legislative type rules, affecting individual obligations which have been issued by an agency pursuant to statutory authority and promulgated in accordance with the procedural requirements of § 553 of the Administrative Procedures Act. U.S. v. Harvey, 659

F.2d 62, 64 (4th Cir.); citing Morton v. Ruiz, 415 U.S. 199 (1971). Only a substantive or legislative rule has the force of law, while an interpretive rule is merely a clarification or explanation of an existing statute or rule. Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corporation, 589 F.2d 658, 664 (D.C. Cir. 1978).

If OSM seeks only to make a "general statement of policy," and not a binding norm reflecting only what the agency seeks to establish as a policy, OSM need not comply with the notice and comment procedures of § 553. Regular Common Carrier Conference v. United States, 628 F.2d 248, 251 (D.C. Cir. 1980). However, OSM has applied the new ad hoc criteria as a rule with the legal effect of subjecting operators to enforcement and civil penalties and conclusively purporting to interpret not only Utah's state program and rules, but that of all the states.

The inescapable conclusion, after examining the history of OSM's continuing vacillation concerning public roads, following the remand by Judge Flannery, and this NOV, is that OSM wishes to avoid the § 553 notice and comment procedures. While it is not uncommon for administrative agencies to prefer to make law outside the procedures mandated by Congress, it must not be allowed. OSM, like any other administrative agency is bound not only by the precept of its governing statute, but also by those of the APA. In this case, an agency directive to the state of Utah purporting to have the effect of a duly promulgated regulation, has been issued without complying with the

publication requirements of the APA, and therefore, the directive as a basis for the issuance of the NOV is null, void and unenforceable. Rivera v. Patino, 524 F. Supp. 136 (DC Cal. 1981). OSM's attempt to evade § 553 of the APA defeats the purpose of the notice and comment procedure in administrative rulemaking. The requirement of notice and a fair opportunity to be heard is basic to administrative law. See I K. Davis, Administrative Law Treatise § 6.1 at 450 (2d ed. 1978). This purpose is both to allow the agency to benefit from the experience and input of parties who file comments, but also to see to it that OSM maintains a flexible and open attitude towards its own rules. Chocolate Manufacturer's Association of U.S. v. Block, 755 F.2d 1098, 1103 (4th Cir., 1985). Additionally, the purpose of notice and comment is to afford persons, and in this case, the state and its political subdivisions operating under a grant of exclusive jurisdiction to prepare for the effective date of a new rule or rules or take other action which issuance of the rules might require. Rowell v. Andrus, 631 F.2d 699, 703 (10th Cir. 1980); see also, U.S. v. Shelton Coal Corp., 829 F.2d 1336 (4th Cir. 1987).

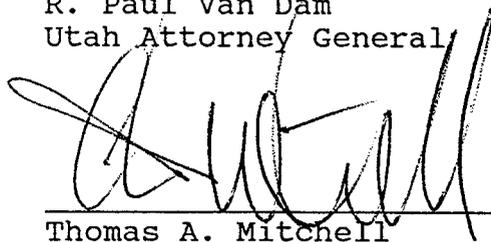
CONCLUSION

The prolonged § 732 process reflects OSM's continued failure to respond to the remand in In re Permanent, by avoiding the § 553 rulemaking authorized by the Act. OSM has needlessly distorted issues of state primacy and jurisdiction, and shut out public comment by all affected parties, when a simple exercise of its delegated rulemaking powers are available to address OSM's purported enforcement of the Act. These anomalous and disturbing results can be traced solely to OSM's reluctance and failure to promulgate rules.

In conclusion, the consequence of OSM's strenuous attempts to avoid the reach of § 553 of the Administrative Procedures Act has been to preclude the opportunity for notice and comment by the affected parties and to unlawfully preempt Utah's exclusive jurisdiction to enforce its state program.

DATED this 9 day of September, 1991.

Respectfully submitted,  
R. Paul Van Dam  
Utah Attorney General



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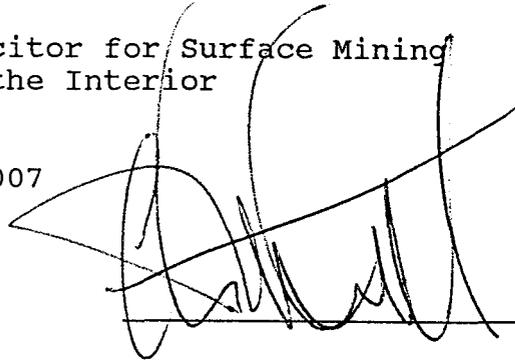
Thomas A. Mitchell  
Assistant Attorney General  
Attorney for Intervenors  
355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing PETITION FOR INTERVENTION to be mailed by certified mail, postage prepaid, the 9 day of September 1991 to:

Denise Dragoo  
Fabian & Clendenin  
215 South State  
Salt Lake City, Utah 84111

Assistant Regional Solicitor for Surface Mining  
United States Dept. of the Interior  
P O Box 25007  
Denver Federal Center  
Denver, Colorado 80225-007



A handwritten signature in black ink, written over a horizontal line. The signature is highly stylized and cursive, with large loops and flourishes. It appears to be the signature of the Assistant Regional Solicitor for Surface Mining mentioned in the text to the right.

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

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

JUN 26 1991 TV 1

2. Name  Permittee  
 No Permit  
Pacificorp Electric Operations

Originating Office Address

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

USDI-OSM

4. Name of Mine  Surface  Other (Specify)  Underground  
Cottonwood/Wilberg

Albuquerque Field Office  
625 Silver Ave., SW, #310

Albuquerque, NM 87102

5. Telephone Number  
(801) 363-8851

6. County  
Emery

State  
Utah

Telephone Number

(505) 766-1486

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

9. Date of Inspection

June 26, 1991

8. Mailing Address  
P.O. Box 310, Huntington, UT 84528

10. Time of Inspection

From 9:00 a.m. To 10:30 a.m.

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  
TEN-DAY NOTICE

Originating Office: USDI/OSMRE  
Alameda Field Office

625 Silver Ave, S.W.; Suite 310

Albuquerque, NM 87102

Number: X-91 - 02 - 116 - 063 TV - 1

Telephone Number: (505) 716-1480

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: PacificCorp Electric Operations

County: EMERY

Mailing Address: 324 South State St. Salt Lake City, UT 84126

Permit Number: ACT 015 019

Mine Name: Cottonwood/Wilberg

Surface

Underground

Other

NATURE OF VIOLATION AND LOCATION: Failure to first obtain a permit from the Division (DOGEM) prior to engaging in and carrying out any coal mining and reclamation operations.

Section of State Law, Regulation or Permit Condition believed to have been violated: R614-300-112.400

NATURE OF VIOLATION AND LOCATION: 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/receiving information to DOGEM for the haulroad noted above.

Date of Notice: 3/15/01  
P 965 799 042

Signature of Authorized Rep.: Henry P Austin

Print Name and ID: HENRY P. AUSTIN #116

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

For Office Use Only

1a  
Y Y M M

1b  
Batch

1c  
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)  
9 10 22 8

11. State Permit Number  
ACT 015 019

12. Name of Mine  
Cottonwood/Wilbergy

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 Sample No.

20. Type of Inspection  
\* ADMIN. MEET / TDA Transmittal

21. Inspector's ID 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

B  Mountain Top Removal

C  Prime Farmlands

D  Alluvial Valley Floors

E  Anthracite

F  Federal Lands

G  Indian Lands

H  Other

25. Performance Standards (Codes: \* 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  2 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

31a.  Completes

Yes  No

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
91-02-114-003			
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) # 116

Signature of Authorized Representative

Signature of Reviewing Official

Date

Date

34. Administrative Information

a  Permit Review (Hours)

b  Travel Time (Hours)

c  Inspection Time (Hours)

d  Report Writing Time (Hours)

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

0. 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

EXHIBIT "C"

*file*

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

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

355 West North Temple  
3 Trade Center, Suite 350  
Salt Lake City, Utah 84180-1203  
801-638-5340

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 (DOG M) 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

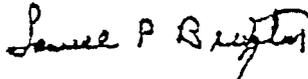
The Division feels the issuance of the TDN after promulgation of the emergency rulemaking denies the Division reasonable time in which to manage and enforce its program. The regulation cited in the TDN reads:

"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  
MI54/24&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 site 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.



EXHIBIT "D"

United States Department of the Interior

OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENT  
SUITE 310  
625 SILVER AVENUE, S.W.  
ALBUQUERQUE, NEW MEXICO 87102

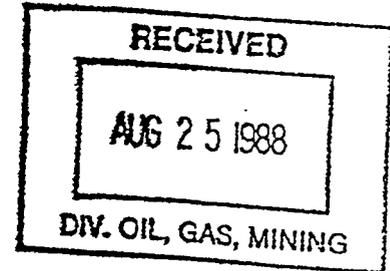


In Reply Refer To:

4480  
SFP

AUG 23 1988

Dr. Dianne R. Nielson, Director  
Division of Oil, Gas and Mining  
Department of Natural Resources  
3 Triad Center, Suite 350  
355 West North Temple  
Salt Lake City, UT 84180-1203



Dear Dr. Nielson:

The Office of Surface Mining Reclamation and Enforcement (OSMRE), under the provisions of 30 CFR 732.17(d), has the responsibility to notify States of all changes in the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and the Federal regulations promulgated pursuant to that SMCRA which may make it necessary for a State to modify its regulatory program to remain consistent with all Federal requirements. To allow for more efficient use of both State and Federal resources, OSMRE has, in the past, provided such notification on a periodic basis rather than immediately after the promulgation of each new Federal rule.

The last such general notification covered all Federal rule revisions published in the Federal Register through October 1, 1983. Since that time, as noted in the Director's letter dated April 4, 1988, a number of other rule changes have occurred, creating a need for further evaluation of State program adequacy. Enclosed is a list of changes that we believe Utah will need to make to ensure that its program remains no less effective than those Federal regulations promulgated between October 1, 1983 and June 15, 1988. Where appropriate, this list also addresses all proposed amendments concerning these provisions submitted to date.

OSM Reg 7  
OSMRE would appreciate your review of the enclosed list and your comments on any of the proposed required amendments. In order to expedite this regulatory reform process, your comments should be submitted to the Albuquerque Field Office no later than September 27, 1988. Upon review of the State's comments, OSMRE will notify Utah of any required amendments to the State regulatory program, pursuant to 30 CFR 732.17(d). In accordance with 30 CFR 732.17(f), Utah will then have 60 days to submit either proposed written amendments or a description of amendments to be proposed, together with a timetable for enactment. These amendments can be in

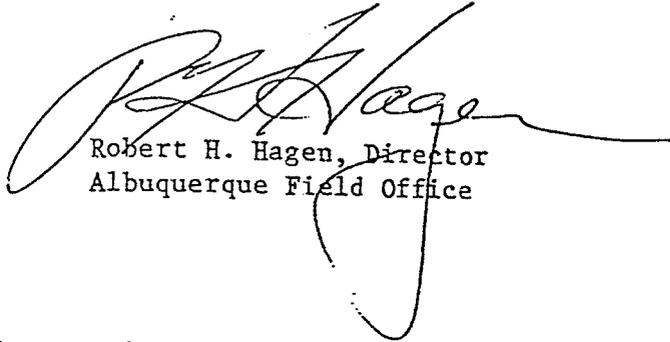
Dr. Dianne R. Nielson

2

the form of statutory revisions, regulatory revisions, policy statements, or other means which will render the Utah program no less effective than the Federal requirements.

If you have any questions, please feel free to call me.

Sincerely,

A handwritten signature in black ink, appearing to read "R. H. Hagen", written over the typed name and title.

Robert H. Hagen, Director  
Albuquerque Field Office

Enclosures

cc: Raymond Lowrie, Assistant Director  
Western Field Operations, OSMRE

James Litzinger, Acting Chief  
Division of Regulatory Programs

UTAH

Regulatory Reform Review II

Reclamation Fee Permit Condition  
(49 FR 27493, July 5, 1984)

30 CFR 773.17(g)

R614-300-147 (proposed)

Utah's approved program lacks a counterpart to the Federal provision requiring continued payment of reclamation fees during the permit term. However, proposed rule R614-300-147, as submitted May 6, 1988, includes the necessary condition. Therefore, provided the provision is adopted as proposed, no further changes are needed.

Certification Requirements; Authority of Land Surveyors  
(50 FR 16194, April 24, 1985)

30 CFR 780.14(c)

R614-301-512.100 (proposed)  
SMC/UMC 783.25

The Federal rule adds a requirement that structures listed in 30 CFR 780.14(b)(6) be certified by qualified professionals. Utah's approved program does not include a corresponding provision. The Utah submittal of May 6, 1988 contains the necessary reference; therefore, provided this provision is adopted as proposed, no further changes are needed.

Removal of Adverse Physical Impact Definition and Certain Performance Standards Concerning Remining Operations  
(51 FR 41734, November 18, 1986)

30 CFR 701.5

R614-100-200 (proposed)

The revised Federal rule removes the definition of "adverse physical impact." In its May 6, 1988 informal submission, Utah proposed to add this definition to its program. Utah needs to remove the definition before resubmitting the amendment.

Definition of "Affected Area"  
(51 FR 41963, November 20, 1986)

30 CFR 701.5

R614-100-200 (proposed)  
SMC/UMC 700.5

In response to the decision in In re: Permanent Surface Mining Regulation Litigation II (Civil Action No. 79-1144, D.D.C., July 15, 1985), on

November 20, 1986, OSMRE suspended the definition of "affected area" insofar as it excluded roads which are included within the definition of "surface coal mining operations." Roads that experience substantial (more than incidental) public use may no longer be categorically excluded, as they are in the current (partially disapproved) definition. In its May 6, 1988 informal submittal, Utah has proposed a definition of "affected area" definition that, if adopted as proposed, will be no less effective than Federal requirements.

Subsidence Control and Protection  
(52 FR 4860, February 17, 1987)

30 CFR 784.20

UMC 784.20  
R614-301-525.100 (proposed)

In the introduction to this section (third sentence) the conjunction "or" was changed to "and" to clarify that a subsidence control plan is required only if structures or renewable resource lands exist within the proposed permit area or adjacent area and if subsidence could cause material damage or diminution of the value or foreseeable use of the land. This corrects a typographical error in the original rule and revises it to eliminate confusing and contradictory language. In its current rule at UMC 784.20 Utah properly uses the conjunction "and;" however, this is changed to "or" in its May 6, 1988 informal submittal at R614-301-525.100. Utah is encouraged to modify its proposed rule by replacing "or" with "and."

30 CFR 784.20(d)

R614-301-525.130 (proposed)

The language in this subsection, which clarifies that the regulatory authority may require monitoring as part of the subsidence control plan, was previously codified as paragraph (5) of former subsection (d) [now subsection (e)] and thus could be interpreted as not applying to areas where mining methods involving planned subsidence are to be used. Reorganization of this section eliminates this interpretive possibility. Utah's May 6, 1988 informal submittal modifies the current rule but still retains the potential for confusion in interpretation. Utah should modify its proposed rule or clarify that it has the authority to require monitoring as part of any subsidence control plan regardless of the type of mining proposed.

"Previously Mined Area" Definition and Finding  
(52 FR 17526, May 8, 1987)

30 CFR 701.5

R614-100-200 (proposed)

This Federal rule revokes the definition of "previously mined area" to limit its applicability to either lands mined prior to the effective date of SMCRA or to lands mined after that date under one of the exemptions provided by SMCRA. In its May 6, 1988 informal submittal, Utah provides a definition very similar to the revised Federal definition; however, in doing so it uses



55 W. North Temple • 3 Triad Center • Suite 350 • Salt Lake City, UT 84180-1203 • 801-538-5340

May 6, 1988

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

  
Dear Mr. Hagen:

Re: Division of Oil, Gas and Mining, Proposed Coal Rules

Attached for your informal review is a copy of the proposed coal rules. On April 28, 1988, the Board of Oil, Gas and Mining authorized the Division of Oil, Gas and Mining to proceed with formal rulemaking. The rulemaking process will commence on May 15, 1988, and continue until July 15, 1988. On that date, if adopted by the Board, the rules will become final or renoticed for additional public comment if there are substantive changes. When finally adopted by the Board, the finalized copy will be submitted as a formal program amendment.

This package of rules incorporates all of the modifications published in the Federal Register through February 10, 1988, and will simplify application preparation by the operator, review of application by Division staff, provide for effective inspection and enforcement and on the ground compliance. The package incorporates a cross-reference from the Utah numbering system to 30 CFR and from 30 CFR to Utah's system to facilitate your review.

I would like to extend an invitation to you and members of your staff to meet and allow us to explain the organization and intent that are encompassed by these reformatted rules.

If I can be of further assistance, please contact me.

Best regards,



Dianne R. Nielson  
Director

vb  
Attachment  
cc: K.E. May  
0772Q-34

"Acid Drainage" means water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity discharged from an active, inactive, or abandoned coal mining and reclamation operation, or from an area affected by coal mining and reclamation operations.

"Acid-Forming Materials" means earth materials that contain sulfide minerals or other materials which, if exposed to air, water, or weathering processes, form acids that may create acid drainage.

"Act" means Utah Code Annotated 40-10-1 et seq.

"Adjacent Area" means the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations, including probable impacts from underground workings.

"Administratively Complete Application" means an application for permit approval or approval for coal exploration, where required, which the Division determines to contain information addressing each application requirement of the State Program and to contain all information necessary to initiate processing and public review.

"Adverse Physical Impact" means, with respect to a highwall created or impacted by REMINING, conditions such as sloughing of material, subsidence, instability, or increased erosion of highwalls, which occur or can reasonably be expected to occur as a result of remining and which pose threats to property, public health, safety, or the environment.

"Affected Area" means any land or water surface area which is used to facilitate, or is physically altered by, coal mining and reclamation operations. The affected area includes the disturbed area; any area upon which coal mining and reclamation operations are conducted; any adjacent lands the use of which is incidental to 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 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, coal mining and reclamation operations; and the area located above underground workings. The affected area will include every

road used for purposes of access to, or for hauling coal to or from, 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.

"Agricultural Use" means the use of any tract of land for the production of animal or vegetable life. The uses include, but are not limited to, the pasturing, grazing, and watering of livestock, and the cropping, cultivation, and harvesting of plants.

"Alluvial Valley Floors" means the unconsolidated stream-laid deposits holding streams with water availability sufficient for subirrigation or flood irrigation agricultural activities, but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits formed by unconcentrated runoff or slope wash, together with talus, or other mass-movement accumulations, and windblown deposits.

"Applicant" means any person seeking a permit, permit revision, and renewal, transfer, assignment, or sale of permit rights from the Division to conduct coal mining and reclamation operations or, where required, seeking approval for coal exploration.

"Application" means the documents and other information filed with the Division under the R614 Rules for the issuance of permits; revisions; renewals; and transfer, assignment, or sale of permit rights for coal mining and reclamation operations or, where required, for coal exploration.

"Approximate Original Contour" means that surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls, spoil piles, and coal refuse piles having a design approved under the R614 Rules and prepared for abandonment. Permanent water impoundments may be permitted where the Division has determined that they comply with R614-301-413.100 through R614-301-413.334, R614-301-512.240, R614-301-514.300, R614-301-515.200, R614-301-533.100 through R614-301-533.600, R614-301-542.400, R614-301-733.220 through R614-301-733.224, R614-301-743, R614-302-270 through R614-302-271.400, R614-302-271.600, R614-302-271.800, and R614-302-271.900.



United States Department of the Interior  
 OFFICE OF SURFACE MINING  
 Reclamation and Enforcement  
 WASHINGTON, D.C. 20240

TAKE  
 PRIDE IN  
 AMERICA

UT-497

NOV 21 1988

RECEIVED-CALM

NOV 25 1988

ALM

Dr. Dianne R. Nielson  
 Director, Division of Oil, Gas  
 and Mining  
 Department of Natural Resources  
 355 West North Temple  
 3 Triad Center, Suite 350  
 Salt Lake City, Utah 84180-1201

Dear Dr. Nielson:

Enclosed is a list of the Utah regulations that the Office of Surface Mining Reclamation and Enforcement (OSMRE) has determined are now less effective than or inconsistent with the Federal regulations promulgated between October 1, 1983, and June 15, 1986. I appreciate your cooperation in evaluating the proposed list of required amendments that was recently sent to your office for review and comment. Your comments, as contained in your letter of October 28, 1988 to Mr. Robert Hagen, have been considered in revising this list.

Pursuant to 30 CFR 732.17(f)(1), please submit within 60 days of this letter, either written proposed amendments or a description of amendments to be proposed to address the identified deficiencies, and a timetable for enactment. This description may be a brief statement concurring with the enclosed list or it may include other explanatory material. The timetable should include the dates by which you intend to submit the amendments and a schedule for the State rulemaking procedures.

Should you have any questions or if OSMRE can be of additional assistance, please do not hesitate to contact Mr. Robert Hagen, Director of the Albuquerque Field Office.

Sincerely,

/s/ Robert H. Gentile

Acting Director

Enclosure

bcc: OSMRE Record; OSMRE Reading  
 DEP Record; RDM; AD/PP Reading  
 SOL/DSM; AD/WFO; EIR; AFO  
 Deputy Director; Director  
 DRP:ESP:DRICE:MD:11/15/88:WP:UTAH:TR.732

UTAH

RECEIVED-OSM

NOV 25 1988

Regulatory Reform Review II

Reclamation Fee Permit Condition

ALBUQUERQUE FIELD OFFICE

(49 FR 27493, July 5, 1984)

30 CFR 773.17(g)

SMC/UMC 786.27

R614-300-147 (proposed)

①  
Utah's approved program lacks a counterpart to the Federal rule specifying that permits must include a condition requiring continued payment of reclamation fees during the permit term. However, proposed rule R614-300-147, as informally submitted May 6, 1988, includes the necessary condition. If this rule is adopted as proposed, no further changes will be needed.

Restriction on Financial Interests of  
State Employees

(51 FR 37118, October 17, 1986)

30 CFR Part 705

SMC/UMC Part 705

R614-100-200 (proposed)

R614-101 (proposed)

②  
The Federal rules have been revised to require that members of multiple interest boards and commissions who perform a function or duty under SMCRA file statements of employment and financial interests. In addition, members of such boards and commissions must recuse themselves from proceedings which may affect their direct or indirect financial interests. The currently approved Utah program lacks counterpart provisions. However, the May 6, 1988, informal submission, as modified on August 24, 1988, proposes revisions which partially address these concerns. Rather than revising the definition of "employee" in R614-100-200 to include Board members, Utah has elected to revise certain provisions of R614-101 to specify their applicability to Board members. This approach is no less effective than the Federal rules; however, to be consistent, Utah will need to revise the definition of "performing any function or duty under this Act" in R614-100-200 to also include Board members and it should similarly revise R614-101-340, 341, 342, 343 and 400 to apply to Board members as well as employees.

Removal of Adverse Physical Impact Definition and Certain Performance Standards Concerning Remining Operations

(51 FR 41734, November 18, 1986)

30 CFR 701.5	SMC/UMC 700.5
30 CFR 816.106	SMC 816.101 and 102
30 CFR 817.106	UMC 817.101
	R614-301-553.530 (proposed)
	R614-100-200 (proposed)

3) The revised Federal rule removes the definition of "adverse physical impact" and related performance standards allowing incomplete highwall elimination in remining operations. Utah's current program does not include these provisions; therefore, no change is needed. However, in its May 6, 1988, informal submission, Utah proposes to add this definition and the related performance standards to its program. Utah will need to remove these provisions before the amendment can be considered no less effective than the Federal rules.

Definition of "Affected Area"

(51 FR 41963, November 20, 1986)

30 CFR 701.5	SMC/UMC 700.5
	R614-100-200 (proposed)

4) In response to the decision in In re: Permanent Surface Mining Regulation Litigation II (Civil Action No. 79-1144, D.D.C., July 15, 1985), on November 20, 1986, OSMRE suspended the definition of "affected area" insofar as it excludes roads which are included within the definition of "surface coal mining operations." Roads that experience substantial (more than incidental) public use may no longer be categorically excluded, as they were in the State's current definition prior to its partial disapproval on December 3, 1985 [30 CFR 944.15(f)]. In its May 6, 1988, informal submission, Utah has again proposed a definition of "affected area" which includes the previously disapproved language. To be no less stringent than SMCRA, Utah must delete the disapproved language or otherwise revise its proposed definition to include all roads contained within the definition of "surface coal mining operations" in Section 701(28) of SMCRA.

Subsidence Control and Protection

(52 FR 4860, February 17, 1987)

30 CFR 784.20	UMC 784.20
	R614-301-525.100 (proposed)

5  
In the third sentence of the introduction to this section of the Federal rule, the conjunction "or" has been changed to "and" to clarify that a subsidence control plan is required only if structures or renewable resource lands exist within the proposed permit area or adjacent area and if subsidence could cause material damage or diminution of the value or foreseeable use of the land. This corrects a typographical error in the original rule and revises it to eliminate confusing and contradictory language. Utah's current rule at UMC 784.20 properly uses the conjunction "and;" however, the May 6, 1988, informal submittal (R614-301-525.100) changes "and" to "or." To avoid misinterpretation, Utah should modify this proposed rule by replacing "or" with "and."

30 CFR 784.20(d)

R614-301-525.130 (proposed)

6  
The language in this subsection, which clarifies that the regulatory authority may require monitoring as part of the subsidence control plan, was previously codified as paragraph (5) of former subsection (d) [now subsection (e)] and thus could be interpreted as not applying to areas where mining methods involving planned subsidence are to be used. Reorganization of this section of the Federal rule eliminates this interpretive possibility. The wording of Utah's current rule at UMC 784.20 is clear and no revision is necessary. However, Utah's May 6, 1988, informal submittal modifies this rule to copy the imprecise language of the previous Federal rule. Therefore, Utah needs to modify this proposed rule or otherwise clarify that it has the authority to require monitoring as part of any subsidence control plan regardless of the type of mining proposed.

"Previously Mined Area" Definition and Finding

(52 FR 17526, May 8, 1987)

30 CFR 701.5

SMC/UMC 700.5  
SMC 816.102(a)  
R614-100-200 (proposed)

1  
This Federal rule revises the definition of "previously mined area" to limit its applicability to either lands mined prior to the effective date of SMCRA or to lands mined after that date under one of the exemptions provided by SMCRA. Utah's current program lacks a definition of this term; however, at SMC 816.102(a), it does use this term and provide special backfilling and grading provisions for operations on such areas. Therefore, to be no less effective than the Federal rules, Utah will need to either define this term in a manner similar to the Federal definition or otherwise limit the applicability of these special provisions to the areas included in the Federal definition. In its May 6, 1988, informal submittal, Utah provides a definition very similar to the revised Federal definition; however, it uses the term "Act," which is elsewhere defined as the Utah statute. To be no less effective than the Federal

definition, and to be in accordance with the decision in In re: Permanent II, Utah needs to reference SMCRA rather than the State Act in this definition.

30 CFR 773.15(c) (12)

SMC/UMC 786.19  
R614-300-133 (proposed)

8  
The revised Federal rule adds a new required finding for permit approval. This finding requires the regulatory authority to determine that, for a proposed remining operation where the applicant intends to reclaim to the lesser standards applicable to remining operations, the site of the proposed operation is a previously mined area as defined in the regulations. Neither Utah's current rules nor its proposed revisions include this finding, which must be added to be no less effective than the Federal requirements.

#### Coal Preparation

(52 FR 17724, May 11, 1987)

30 CFR 700.5  
30 CFR 701.5

SMC/UMC 700.5  
SMC/UMC 843.15(a)  
R614-100-200 (proposed)

9  
The Federal definitions of "surface coal mining operations," "coal preparation" and "coal preparation plant" have been revised to clarify that coal preparation and processing need not involve the separation of coal from its impurities, nor do such activities and facilities have to be located at or near the mine site to be subject to regulation. Both Utah's current and proposed rules contain corresponding definitions no less effective than the revised Federal rules. However, the Utah program currently contains a definition of "mining" at SMC/UMC 843.15(a) which includes only the extraction and transportation of coal, not its processing, cleaning, concentrating or preparation. To be no less effective than the corresponding Federal rule at 30 CFR 843.15(a), Utah must revise this definition to include the listed coal preparation activities. In its May 6, 1988, informal submission, Utah has proposed to do so. If this change is adopted as proposed, no further revisions appear necessary.

#### Definition of "Fragile Lands"

(52 FR 18792, May 19, 1987)

30 CFR 762.5

SMC/UMC 762.5  
R614-100-200 (proposed)

10  
This Federal rule revises the definition of "fragile lands" by deleting the phrase limiting such lands to those "that could be damaged beyond an operator's ability to repair or restore, or be destroyed by surface coal

mining operations." Utah's existing definition includes language no less effective than the Federal requirements. However, in its May 6, 1988, informal submittal, Utah proposes to modify this definition by adding the phrase "that could be damaged beyond an operator's ability to repair or restore." To be no less effective than the Federal rule, Utah will need to delete this qualifier from its definition prior to submittal as a formal amendment.

Mountaintop Removal Permitting Requirements

(52 FR 39182, October 20, 1987)

30 CFR 785.14(c) (1)

SMC 785.14(c)

SMC 816.133

R614-302-223.100 (proposed)

11  
This revised Federal rule clarifies that an application for a mountaintop removal operation must include the plans and assurances specified in Section 515(c) (3) (B) of SMCRA. Utah's current program at SMC 785.14(c) and SMC 816.133 is no less effective than the revised Federal rule. However, in its May 6, 1988, informal submittal, Utah has proposed to delete these application requirements from SMC 816.133 (now R614-301-413). Therefore, Utah needs to modify its proposed rules to insure that requirements no less stringent than those of Section 515(c) (3) (B) of SMCRA are included in its program.

Fish and Wildlife

(52 FR 47352, December 11, 1987)

30 CFR 780.16

30 CFR 784.21

SMC 779.20/780.16

UMC 783.20/784.21

R614-301-322 (proposed)

R614-301-333 (proposed)

R614-301-342 (proposed)

12  
On February 21, 1985 (50 FR 7274), OSMRE reinstated its permit application requirements concerning fish and wildlife at 30 CFR 779.20, 780.16, 783.20 and 784.21 and began a revision process which culminated in the final rule published on December 11, 1987. This rule consolidated and revised the previous requirements and added a new provision requiring that the regulatory authority supply the fish and wildlife resource information and protection and enhancement plan contained in the application to the appropriate U.S. Fish and Wildlife Service office within 10 days of receipt of a request from the Service. As specified in 30 CFR 944.12(a) (7), the corresponding Utah regulations have been affirmatively disapproved and are not considered to be part of the Utah program. However, the State's August 24, 1988, informal submission

contains proposed rules which, if adopted as proposed, will render Utah's program no less effective than the revised Federal rules. No further changes appear necessary.

30 CFR 816.97(b)  
30 CFR 817.97(b)

SMC 816.97  
UMC 817.97  
R614-300-358.100 (proposed)

13  
The revised Federal rules prohibit mining activities which "are likely to" (rather than "will") jeopardize endangered or threatened species or their habitats. In addition, when the operator reports the presence of State or Federally-listed endangered or threatened species within the permit area, the revised rules require the regulatory authority to consult with the appropriate State and Federal fish and wildlife agencies to identify whether and under what conditions the operator may proceed. The State program currently lacks corresponding provisions. However, the State's August 24, 1988, informal submission contains language which, if adopted as proposed, will be no less effective than the Federal requirements. No further changes appear necessary.

#### Unsuitability Petition Process

(52 FR 49322, December 30, 1987)

30 CFR 764.15(a) (3), (a) (8)

SMC/UMC 764.15  
R614-103-431.300 (proposed)  
R614-103-431.800 (proposed)

14  
As revised, this Federal rule no longer contains language authorizing the regulatory authority to suspend the processing of petitions. Utah's existing rule does not allow for such suspensions and is therefore no less effective than the revised Federal rule. However, in its May 6, 1988, informal submittal, Utah proposes to add suspension authority. To be no less effective than the Federal rule, Utah must revise its proposal to delete this authority.

#### Performance Bonds

(53 FR 994, January 14, 1988)

30 CFR 800.5(c)

SMC/UMC 800.5 (C)  
R614-100-200 (proposed)

15  
The revised Federal definition of "self-bond" requires that, when an applicant's self-bond is being guaranteed by another corporation, the indemnity agreement be signed by both the applicant and the corporate guarantor (parent or non-parent). The previous definition required only that one of these parties sign the agreement, as does the current Utah

definition. The self-bond definition included in Utah's May 6, 1988, informal submission is similarly deficient and must be revised to require the signature of both parties.

30 CFR 800.23(e) (2)

UMC 800.23(E)  
R614-301-860.350 (proposed)

16  
This Federal rule has been revised to require that all self-bond indemnity agreements be accompanied by an affidavit certifying that the agreement is valid under all applicable State and Federal laws. It also requires that any guarantor provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the indemnity agreement. Since neither the existing nor the proposed Utah rules contain such a requirement, Utah must revise its program to be no less effective than the revised Federal requirements.

30 CFR 800.40(a) (2)

UMC 800.40(A) (2)  
SMC 800.40(A) (2)  
R614-301-880.120 (proposed)

17  
This revised Federal rule requires that public notices of bond release applications include the permittee's name. Since neither the existing nor the proposed Utah rules include this requirement, Utah must revise its program accordingly.

#### Individual Civil Penalties

(53 FR 3664, February 7, 1988)

30 CFR Part 846

None

18  
Utah has no counterpart to this new Federal rule; accordingly, it will need to revise its program in the manner discussed below:

a) o 30 CFR 846.5

Utah will need to either adopt definitions of "knowingly," "willfully," and "violation, failure or refusal" no less effective than those of the Federal rules or demonstrate that existing State provisions are no less inclusive or effective than the Federal definitions. The definition of "violation, failure, or refusal" must include imminent harm cessation orders, notices of violation, failure-to-abate cessation orders, orders to show cause why a permit should not be suspended or revoked, and orders in connection with a civil action for relief.

b) o 30 CFR 846.12

Utah will need to demonstrate that it has the authority to assess an individual civil penalty against the same group of persons and for the same reasons as those listed in paragraph (a) of this Federal rule.

c) o 30 CFR 846.14

At a minimum, Utah must consider the criteria set forth in paragraph (a) of this Federal rule when calculating penalty amounts. In addition, Utah must provide for a penalty of up to \$5,000 for each violation and must be able to deem each day of continuing violation a separate violation for which a separate individual civil penalty may be assessed.

d) o 30 CFR 846.17

Utah needs to provide the same extent of notice to the individual as in paragraph (a) of the Federal rule. In addition, it needs to include effective dates for assessments and standards for service no less effective than those established in paragraphs (b) and (c) of the Federal rule.

e) o 30 CFR 846.18

Utah needs to include payment due dates no less effective than those set forth in paragraphs (a) through (c) of the Federal rule. Where an abatement agreement exists, Utah should provide for withdrawal of the penalty if abatement or compliance is satisfactory.



# United States Department of the Interior

OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENT  
SUITE 310  
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ALBUQUERQUE, NEW MEXICO 87102

cc R Daniels  
R Smith

In Reply Refer To:

4480

SFP

K May  
DR Nielson

JAN 23 1989

RECEIVED  
JAN 26 1989

DIVISION OF  
OIL, GAS & MINING

Dr. Dianne R. Nielson, Director  
Division of Oil, Gas and Mining  
Department of Natural Resources  
355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, UT 84180-1203

Dear Dr. Nielson:

The informal submission of Utah's Proposed Coal Rules as submitted by Utah Division of Oil, Gas and Mining (DOGM) on May 6, 1988, and as revised by DOGM in its changes submitted to the Board of Oil, Gas and Mining on July 15, 1988, has been reviewed by the Office of Surface Mining Reclamation and Enforcement (OSMRE). The complete review is enclosed. OSMRE's review considered all past amendments approved to the Utah Coal Rules, the distinguishing features of the Utah Coal Rules when originally approved in 1982, and all regulatory reform items contained in the OSMRE letters of May 12, 1986, and June 9, 1987, sent to Utah pursuant to 30 CFR 732.17. Additionally, as you requested, OSMRE considered the most recent set of regulatory reform items as discussed in OSMRE's November 21, 1988, 30 CFR Part 732 letter to you. The remaining changes contained in the informal submittal were viewed to be State-initiated changes and were compared to the existing counterpart in the Federal Regulations for a "no less effective than" determination.

The status of regulatory reform 30 CFR 732.17 items are discussed first, followed by a discussion of other components of the informal submission that were found to be "less effective than the Federal Regulations." Any rules not discussed were found to be "no less effective than the Federal counterpart." The items related to the 30 CFR Part 732 letter are discussed regardless of their acceptability status so that a record can be established to track these items to final resolution. To facilitate the process, OSMRE has assigned numbers to each deficiency item identified in the May 12, 1986 and November 21, 1988 30 CFR Part 732 letters. The items discussed in the June 9, 1987 letter sent to you under 30 CFR 732.17 were numbered. Copies of the May and November letters are attached that contain the new numbering scheme. Please use this numbering in all future correspondence that references items in individual 30 CFR Part 732 letters.

Dr. Dianne R. Nielson

2

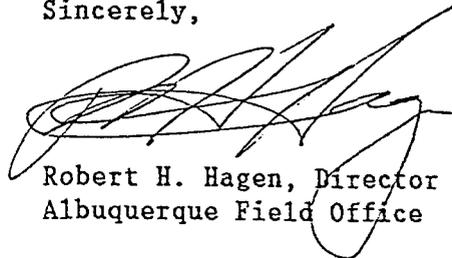
The 18 items itemized in the November 21, 1988 30 CFR Part 732 letter are not reiterated in this issue letter. Instead, they are incorporated into this issue letter by reference, and should also be addressed in your next submission.

Because OSMRE has invested a substantial amount of effort into reviewing the informal submission, I ask that any future revisions or changes made to the amendment package prior to the formal submission or in the formal submission be explicitly identified; the recent revisions submitted to the Utah Board followed this format with all additions and deletions underlined and interlined, respectively. That format was very helpful and will continue to yield greatest efficiency by preempting the need for another OSMRE side-by-side comparison, as all changes will be explicitly identified and the remaining parts will have already been evaluated by this informal review.

Since this review is of an informal submission, it is considered preliminary and other issues may be identified later. It should be noted, however, that OSMRE did try to be as inclusive as possible with this review, in order to minimize the degree of effort required in the future.

If there are any questions, please contact Vernon E. Maldonado at (505) 766-1486.

Sincerely,



Robert H. Hagen, Director  
Albuquerque Field Office

Enclosures

I. STATUS OF THE REGULATORY REFORM ITEMS IDENTIFIED IN OSMRE'S MAY 12, 1986 LETTER SENT TO UTAH PURSUANT TO 30 CFR 732.17

Two-Acre Exemption

- Item 1. R614-100-400 30 CFR 700.11(b)  
Resolved
- Item 2. R614-100-400 30 CFR 700.11(a)(2)  
Resolved

Availability of Records

- Item 3. R614-400-142 30 CFR 840.14(b)  
Resolved

Small Operator Assistance

- Item 4. R614-302-246.124 30 CFR 795.6(a)(2)(iv)  
Resolved
- Item 5. R614-302-246.130 30 CFR 795.6(a)(3), (a)(4)  
Resolved
- Item 6. R614-302-247.44 30 CFR 795.7(d)(4)  
Resolved
- Item 7. R614-302-293.213 30 CFR 795.12(a)(3)  
Resolved

Experimental Practices (48 FR 9478, 3/4/83)

- Item 8. R614-302-212 30 CFR 785.13(b)  
Resolved
- Item 9. R614-302-216 30 CFR 785.13(b)(4)  
Resolved
- Item 10. R614-300-120; 302-213 30 CFR 785.13(c)  
Resolved

Item 11.	R614-302-215	30 CFR 785.13(e)
	Resolved	
Item 12.	R614-302-217	30 CFR 785.13(g)
	Resolved	
Item 13.	R614-302-213	30 CFR 784.13(h)
	Resolved	

Use of Explosives

Item 14.	R614-301-524.100 through .760	30 CFR 816.61(d)/817.61(d)
	Resolved	
Item 15.	R614-301-524.310	30 CFR 816.62(a)/817.62(a)
	Resolved	
Item 16.	R614-301-524.350	30 CFR 816.62(e)/817.62(e)
	Resolved	
Item 17.	R614-301-524.440	30 CFR 816.64(a)(1)
	Resolved	
Item 18.	R614-301-524.621, .622	30 CFR 816.67(b)(1)(i), (ii)/ 817.67(b)(1)(i), (ii)
	R614-301-524.631, .632	30 CFR 816.67(b)(2)(i), (ii)/ 817.67(b)(2)(i), (ii)
	Resolved	
Item 19.	R614-301-524.641	30 CFR 816.67(d)(1)/816.67(d)(1)
	Resolved	
Item 20.	R614-301-524.641, .642	30 CFR 816.67(d)(2)/817.67(d)(2)
	Resolved	
Item 21.	R614-301-524.650	30 CFR 816.67(d)(3)/817.67(d)(3)
	Resolved	

- Item 22. R614-301-524.652 30 CFR 816.67(d)(3)(ii)/  
817.67(d)(3)(ii)  
Resolved
- Item 23. R614-301-524.670, .680 30 CFR 816.67(d)(5), (6)/  
817.67(d)(5), (6)  
Resolved
- Item 24. R614-301-524.742, .745, 30 CFR 816.68(g), (j), (o), (p)/  
.750, .760 817.68(g), (j), (o), (p)  
Resolved

Definitions

- Item 25. R614-100-200 30 CFR 700.5, 701.5  
Resolved

Auger Mining

- Item 26. R614-302-245.221 30 CFR 819.15(b)(1)  
Resolved
- Item 27. R614-302-245.424 30 CFR 819.19(b)(4)  
Resolved

Prime Farmland

- Item 28. R614-302-314.120 30 CFR 785.17(c)(1)(ii)  
Resolved
- Item 29. R614-301-221 30 CFR 785.17(b)(1)  
Resolved
- Item 30. R614-302-313.200 30 CFR 785.17(b)(3)  
Resolved
- Item 31. R614-302-317.431 30 CFR 823.12(c)(1)  
Resolved
- Item 32. R614-302-317.622 30 CFR 823.15(b)(2)  
Resolved

Item 33. R614-302-317.625, .626, 30 CFR 823.15(b)(5),(6),(7),(8)  
.627, .628

Resolved

Topsoil, Reclamation Plan, Topsoil Substitution

Item 34. R614-301-231.300 30 CFR 780.18(b)(4);  
784.13(b)(4)

Resolved

Backfilling and Grading

Item 35. R614-301-553.140 30 CFR 816.102(a)(4)/817.102(a)(4)

Resolved

Item 36. R614-302-234.300 30 CFR 816.107(c)(4)/817.107(c)(4)

Resolved

Subsidence, Concurrent Surface and Underground Contemporaneous  
Reclamation

Item 37. R614-301-525.110 30 CFR 784.20(a)

Resolved

Item 38. R614-301-525 30 CFR 784.20(b)

Resolved

Item 39. R614-301-524.120 30 CFR 784.20(c)

Resolved

Item 40. R614-301-525.160 30 CFR 784.20(g)

Resolved

Item 41. R614-301-525.240 30 CFR 817.121(d)  
through .243, .250

Resolved

Item 42. R614-301-525.250 30 CFR 817.121(e)

Resolved

Item 43. R614-301-525.270 30 CFR 817.121(g)

Resolved

Alluvial Valley Floors

Item 44. R614-302-293.213 30 CFR 822.13(a)(3)

Resolved

Buffer Zones, Fish, Wildlife, and Related Environmental Values

Item 45. R614-301-731.612, .620, 30 CFR 816.57(a)(1)/817.57(a)(1)  
.660, .661

Resolved

Item 46. R614-301-358.100 30 CFR 816.97(b)/817.97(b)

Resolved

Item 47. R614-301-358.200 30 CFR 816.97(c)/817.97(c)

Resolved

Item 48. R614-301-342.400 30 CFR 816.97(h)/817.97(h)

Resolved

Item 49. R614-301-322; -330 30 CFR 779.20; 783.20; 780.16; 784.21

Resolved

Excess Spoil Fills

Item 50. R614-301-512.210 30 CFR 816.71(b)/817.71(b)

Resolved

Item 51. R614-301-535.130 30 CFR 816.71(e)(2)/817.71(e)(2)

Resolved

Item 52. R614-301-745.113 30 CFR 816.71(e)(5)/817.71(e)(5)

Resolved

Item 53. R614-301-514.120 30 CFR 816.71(h)(2)/817.71(h)(2)

Resolved

Item 54. R614-301-514.240 30 CFR 816.71(h)(3)(i),(ii),(iii)/  
817.71(h)(3)(i),(ii),(iii)  
Resolved

Bonding and Insurance Requirements

Item 55. R614-301-812.700 30 CFR 800.4(g)  
Resolved

Revegetation

Item 56. R614-301-244.200; -353 30 CFR 816.111(a)(3)  
thru -355  
Resolved

Item 57. R614-301-244.200; -353 30 CFR 816.111(b)  
thru -355  
Resolved

Item 58. R614-301-356.100 30 CFR 816.116(a)/817.116(a)

The State rule repeats the wording used in the Federal regulation that requires the "Regulatory Authority" to select standards for success and statistically valid sampling techniques for measuring revegetation success and to include these standards in its regulatory program. However, Utah has not provided any indication that standards for success and statistically valid sampling techniques for measuring revegetation success have been selected. The standards may be incorporated into the coal rules as a rule or as a guideline that is cited within the coal rules and enforced as regulation. The standards and sampling techniques are subject to review and public comment. [See Federal Register (preamble) Vol. 48, No. 172, September 2, 1983]. If Utah's draft "Revegetation Guideline" is intended to be used for this purpose, then the guideline should be submitted to OSMRE as an amendment. OSMRE will review the guideline to verify that it contains all the appropriate "fixed requirements."

*Revised 1/11/84  
JPH*

Rule 614-301-356.110 is less effective than the Federal requirements of 30 CFR 816.116(a)(1).

Revegetation

Item 59. R614-301-356 thru -357 30 CFR 816.116(b)(3)(i),(ii),(iii)/  
817.116(b)(3)(i),(ii),(iii)  
Resolved

Coal Exploration

- Item 60. R614-100-200 30 CFR 701.5  
Resolved
- Item 61. R614-201-310 30 CFR 772.12(a)  
Resolved
- Item 62. R614-201-200, -210, -225 30 CFR 772.11(b)(5)  
Resolved
- Item 63. R614-201-320, -321 thru 30 CFR 772.12(b)(6)  
327.900  
Resolved
- Item 64. R614-201-320, -321 thru 30 CFR 772.12(b)(7)  
327.900  
Resolved
- Item 65. R614-201-320, -321 thru 30 CFR 772.12(b)(8)(iv), (b)(12)  
327.900

Contents of Major Coal Exploration Permit Applications

The proposed State regulation details the information required in the narrative description of the proposed exploration area, and requires a detailed reclamation cost estimate in addition to the requirements of the Federal regulation. The wording of this part of the proposed State rule is no less effective than the counterpart Federal regulation. The following aspects of the proposed rule are less effective than the Federal counterpart.

-- The State regulation does not require a description of "any other information which the regulatory authority may require regarding known or unknown historic or archaeological resources" as required by the Federal regulations at 30 CFR 772.12(b)(8)(iv); therefore, it is less effective than the Federal regulation. ✓

-- The State regulation does not require a map showing "the location of . . . underground openings" as required by the Federal regulation at 30 CFR 772.12(b)(12); therefore, it is less effective than the Federal regulation.

- Item 66. R614-201-332, -333 30 CFR 772.12(b)(1)  
Resolved

Item 67. R614-201-350, -351, -352 30 CFR 772.12(e)(1)

#### Notice and Hearing on Major Coal Exploration

The proposed State regulation does not require that the Division notify commenters, in writing, of its decision on the application; therefore, it is less effective than the Federal regulation. The amendment must be revised to provide written notification of the Division's decision to commenters.

Item 68. R614-202-230, -231, -236 30 CFR 815.15(a)

Resolved

Item 69. R614-202-240 thru 244.300 30 CFR 815.15(e)

Resolved

Item 70. R614-201-200, -210, -225 30 CFR 772.11(b)(3)

#### Requirements for Major Coal Exploration

Minor Coal Exploration during which 250 tons of coal or less will be removed requires Division approval and issuance of a permit. The counterpart Federal regulation [30 CFR 772.11(a)] requires submittal of a notice of intent, but does not require approval and issuance of a permit by the regulatory authority. The requirement for permitting such exploration is no less effective than the counterpart Federal regulation.

However, the requirement for a narrative or map describing the exploration area was suspended in the Federal regulation by OSMRE in response to a Federal District Court decision. The effect of the suspension was to require a narrative describing the exploration area or a map and a narrative (i.e., in all cases a narrative is required). The proposed State regulation is inconsistent with the Federal regulation, as suspended by the court, in that a narrative describing the exploration area is not required in all cases.

Item 71. R614-201-200, -210, -225 30 CFR 772.11(b)(3)

Item number 70 was erroneously assigned two numbers. Item numbers 70 and 71 are the same issue. Please see the discussion under item number 70 above, and otherwise disregard Item 71.

#### Areas Unsuitable for Coal Surface Mining

Item 72. R614-103-236 30 CFR 761.11(c); 12(f)(1),(2)

OSMRE's regulation specifies how the regulatory authority will review the applications for permits to determine whether the operations are limited or prohibited. Section (f) requires that the regulatory authority, when it determines that proposed operations will adversely affect any publicly owned park or any place included in the National Register of Historic Places, shall transmit applicable parts of the application to the agencies with jurisdiction over the resources, and

seek approval of that agency. The permit for coal mining and reclamation operations will not be issued unless jointly approved by all agencies.

The Utah rule nearly mirrors the Federal regulation; however, before the rule can be determined as no less effective than the Federal regulation, the State needs to modify their rule to remove reference to "publicly owned" National Register places. All sites on the Register, regardless of ownership, are protected.

- Item 73. R614-103-200.230; .233 30 CFR 761.12(b)(2)  
Resolved
- Item 74. R614-103-235.100 thru 30 CFR 761.12(e)(2),(3)  
.300  
Resolved
- Item 75. R614-103-442.100 thru .600; 30 CFR 764.13(b)(1)(i)  
Resolved
- Item 76. R614-103-423.100 to 423.400 30 CFR 764.13(c)(1)(i),(ii)  
Resolved
- Item 77. R614-103-423.700; .710; .720; 30 CFR 764.13(c)(1)(iv)  
.730

#### Contents of Petitions for Termination

The proposed State regulation and the Federal regulation at 30 CFR 764.13(c)(1)(iv) require that a petition, to terminate an unsuitability petition, include allegations of fact and supporting evidence not contained in the record of the designation proceedings. The Federal regulation also requires that for areas previously and unsuccessfully proposed for termination, significant new allegations of facts and supporting evidence must be presented in the petition. Allegations and supporting evidence should also be specific as to the basis for which the designation was made and tend to establish the basis for terminating the designation. The parts of the petitioned area and petitioner's interests to which the allegation applies should be identified.

- Item 78. R614-103-420.422.100 thru 30 CFR 764.13(b)(i),(iv), and (c)(2)  
.630, and .423 excluding  
.423.100 thru .800

#### Contents of Petition for Designation of Lands Unsuitable

The Federal regulation, at 30 CFR 764.13(b)(2), gives the regulatory authority the flexibility to request, on a case-by-case basis, supplementary information which is readily available in addition to the mandatory information required in a designation petition. The proposed State regulation absolutely limits the information requirements of a termination petition to the minimum requirements of the Federal

and State regulations. Petitioners may submit supplementary information at their discretion, but the State cannot request that such supplementary information be submitted. See also the discussion on this topic in part III, Item 9 of this issue letter.

In addition, the proposed State regulation has an apparent typographical error in the list of items that must be provided in a petition; "R614-103-423.600" should be "R614-103-423.700."

Item 79. R614-103-432.100 30 CFR 764.15(b)(1)

#### Notification of Receipt of a Complete Petition

The wording of the proposed State regulation is nearly identical to the counterpart Federal regulation except the proposed State regulation requires notification within 15 days of a petition being determined complete instead of "promptly after a petition is received." Notification must be made "promptly after a petition is received" and should be independent of the completeness determination process.

#### Hydrology

Item 80. R614-100-200; -301-729.100, 30 CFR 701.5; 780.21(g)  
.200

Resolved

Item 81. R614-301-723 30 CFR 780.21(a); 784.14(a)

Resolved

Item 82. R614-301-724.500 30 CFR 780.21(b)(3); 784.14(b)(3)

Resolved

Item 83. R614-301-727 30 CFR 780.21(e)

Resolved

Item 84. R614-301-728 30 CFR 780.21(f); 784.14(e)

Resolved

Item 85. R614-301-728.400, 30 CFR 780.21(f)(4), (g)(2)  
301-729.200 784.14(e)(4), (f)(2)

Resolved

Item 86. R614-301-731 30 CFR 780.21(h); 784.14(g)

Resolved

Item 87. R614-301-731.211, .212,  
.223

30 CFR 780.21(i),(j)/784.14(h),(i)

#### Surface- and Ground-Water Monitoring

The proposed State regulations do not require quarterly submission of monitoring data, including analytical results from each sample taken during the reporting period; instead, they require the submission of monitoring data according to schedules approved by the Division. Without requiring quarterly monitoring as a minimum, the proposed State rules are less effective than the counterpart Federal regulations. OSMRE will consider an alternative to quarterly monitoring for problem scenarios that prevent accessibility of monitoring sites, due to the prevalence of extreme weather conditions during certain months. The State may provide other justification for why its proposed rule is no less effective than the Federal regulation and under what circumstances that less frequent than quarterly monitoring would be allowed. However, the State must require that the overall monitoring plan be designed in a manner adequate to define premine, operational, and postmine hydrologic characteristics and to identify and quantify impacts.

Item 88. R614-301-623;-624;-724.300

30 CFR 780.22(a),(b)/784.22(a),(b)

Resolved

Item 89. R614-301-731.211,.212,.223

30 CFR 816.41(a)/817.41(a)

#### Protection of the Hydrologic Balance

The proposed State regulation at R614-301-731 addresses the requirements of 30 CFR 780.21(h) but does not address the requirements of 816.41(a) as required by item No. 89 of the May 12, 1986, Part 732 letter. The proposed State rule is less effective than 816.41(a), as it does not incorporate the requirement that all surface mining and reclamation activities be conducted to:

(1) Minimize disturbance of the hydrologic balance within the permit and adjacent areas; (2) prevent material damage to the hydrologic balance outside the permit area; (3) assure the protection or replacement of water rights; and (4) support the approved postmining land uses in accordance with the approved permit and performance standards.

Item 90. R614-301-731.223,.323

30 CFR 816.41(c)(2),(e)(2)/  
817.41(c)(2),(e)(2)

#### Noncompliance Notification

The proposed State rule is equivalent to the counterpart Federal regulation except for the schedule proposed for submission of monitoring reports. Without incorporating the minimum requirement for quarterly monitoring reports, the proposed State rule is less effective than the counterpart Federal regulation. (See the discussion above for the surface- and ground-water monitoring, item No. 87).

Item 91.	R614-301-731.400	30 CFR 816.41(g)/817.41(g)
	Resolved	
Item 92.	R614-301-731.500	30 CFR 816.41(i); 817.41(h)
	Resolved	
Item 93.	R614-301-742.310	30 CFR 816.43(a)/817.43(a)
	Resolved	
Item 94.	R614-301-742.321	30 CFR 816.41(b)(1)/817.43(b)(1)
	Resolved	
Item 95.	R614-301-742.324	30 CFR 816.43(b)(4)
	Resolved	
Permanent and Temporary Impoundments		
Item 96.	R614-100-200	30 CFR 701.5
	Resolved	
Item 97.	R614-301-513.200; -743.110	30 CFR 816.49(a)(1)/817.49(a)(1)
	Resolved	
Item 98.	R614-301-743.120 which cites R614-301-512	30 CFR 816.49(a)(2)/817.49(a)(2)
	Resolved but problems remain that are discussed in part II.	
Item 99.	R614-301-743.120	30 CFR 816.49(a)(4)/817.49(a)(4)
	Resolved	
Item 100.	R614-301-533.220	30 CFR 816.49(a)(5)(ii)/ 817.49(a)(5)(ii)
	Resolved	
Item 101.	R614-301-533.300	30 CFR 816.49(a)(6)/817.49(a)(6)
	Resolved	
Item 102.	R614-301-514.310; -743.140	30 CFR 816.49(a)(10)/817.49(a)(10)
	Resolved	

Item 103.	R614-301-515.200; -733.240	30 CFR 816.49(a)(12)/817.49(a)(12)
	Resolved	
Item 104.	R614-301-733.222	30 CFR 816.49(b)(2)/817.49(b)(2)
	Resolved	
Item 105.	R614-301-743.200, .300	30 CFR 816.49(b)(7), (c)(2)/ 817.49(b)(7), (c)(2).
	Resolved	

Coal Mine Waste

Item 106.	R614-100-200	30 CFR 701.5
	Resolved	
Item 107.	R614-301-230	30 CFR 816.81(c)(1)/817.81(c)(1)
	Resolved	
Item 108.	R614-301-746	30 CFR 816.83/817.83
	Resolved	
Item 109.	R614-301-746.220	30 CFR 816.83(c)/817.83(c)
	Resolved	
Item 110.	R614-301-514.200; .300	30 CFR 816.83(d)/817.83(d)
	Resolved	
Item 111.	R614-301-514.210	30 CFR 816.83(d)(1)/817.83(d)(1)
	Resolved	
Item 112.	R614-301-514.230	30 CFR 816.83(d)(2)/817.83(d)(2)
	Resolved	
Item 113.	R614-301-514.240	30 CFR 816.83(d)(3)/817.83(d)(3)
	Resolved	
Item 114.	R614-301-746.311	30 CFR 816.83(b)(1)/817.83(b)(1)
	Resolved	

- Item 115. R614-301-746.330 30 CFR 816.84(b)(2)  
Resolved
- Item 116. R614-301-746.330 30 CFR 816.84(d)/817.84(d)  
Resolved

Siltation Structures

- Item 117. R614-301-356.300 30 CFR 816.46(b)(5)/817.46(b)(5)  
Resolved
- Item 118. R614-301-742.221.31, .32, .36 30 CFR 816.46(c)(1)(iii)(A), (B), (F)/  
817.46(c)(1)(iii)(A), (B), (F)  
Resolved
- Item 119. R614-301-~~227.227~~.34 30 CFR 816.46(c)(1)(iii)(D)/  
742.221 ? 817.46(c)(1)(iii)(D)  
Resolved

Permitting

- Item 120. R614-none 30 CFR 773.12  
R614-300-113 (logically)

Coordination With Other Laws

The Federal regulation states that the regulatory authority will, to avoid duplication, provide for the coordination of review and issuance of permits with applicable requirements of specific Federal laws listed in 30 CFR 773.12. The proposed State rules do not contain such a provision.

- Item 121. R614-300-121.100 thru .320 30 CFR 773.12(a)(iii)  
Resolved
- Item 122. R614-301-124.100 thru 30 CFR 773.12(d)(3)  
.330  
Resolved
- Item 123. R614-301-124.100 thru 30 CFR 773.12(d)(3)(iii)  
.330  
Resolved

Item 124. R614-300-131.200 30 CFR 773.15(a)(2)  
Resolved

Item 125. R614-300-140, -141 thru 30 CFR 773.17(g)  
-147  
Resolved

Item 126. R614-303-300; -310 thru 30 CFR 774.17(b)(1)(ii)  
360  
Resolved

Item 127. R614-303-300; -310 thru 30 CFR 774.17(d)(1)  
360  
Resolved

Item 128. R614-303-300; -310 thru 30 CFR 774.17(e)(1)  
360  
Resolved

Item 129. R614-303-300; -310 thru 30 CFR 774.17(e)(2)  
360  
Resolved

Item 130. R614-301-100 thru -150 30 CFR 777.13(b)  
Resolved

Item 131. R614-301-100 thru -150 30 CFR 778.14(c)  
Resolved

II. STATUS OF THE REGULATORY REFORM ITEMS IDENTIFIED IN OSMRE'S JUNE 9, 1987 LETTER SENT TO UTAH PURSUANT TO 30 CFR 732.17

Item 1. R614-103-236

30 CFR 761.12(f)(1) and (2)

See Item 72, Section I of this Issue letter - Cultural Resources

OSMRE's regulation specifies how the regulatory authority (RA) will review the applications for permits to determine whether the operations are limited or prohibited. Section (f) requires that the RA, when it determines that proposed operations will adversely affect any publicly owned park or any place included in the National Register of Historic Places, shall transmit applicable parts of the application to the agencies with jurisdiction over the resources, and seek approval of that agency. The permit for the coal mining and reclamation operations will not be issued unless jointly approved by all agencies. The Utah rule nearly mirrors the Federal regulation; however, before the rule can be determined as no less effective than the Federal regulation, the State needs to modify their rule to remove reference to "publicly owned" National Register places. All sites on the Register, regardless of ownership, are protected.

Item 2. R614-201-323.100

30 CFR 772.12(b)(8)(iv)

Permit Requirements

The Federal regulation calls for the applicant to submit information on cultural resources, including sites listed or eligible for listing on the National Register of Historic Places and known archaeological sites located within the proposed exploration area. The regulation further indicates that the regulatory authority may require additional information on known or unknown historic or archaeological resources. The State rule covers all the information requirements except for providing the authority to the State to request additional information. To be no less effective than the Federal regulation, Utah must expand their rule to provide this flexibility. (See also Part I, Item 65 of this Issue letter - Contents of Major Coal Exploration Applications for Permit)

Item 3. R614-(None)

30 CFR 773.12

Regulatory coordination with requirements under other laws.

The Federal regulation requires coordination, during the issuance of permit, with the applicable requirements of the Archaeological Resources Protection Act of 1979. The requirement is limited to Federal and Indian lands.

Utah has no specific counterpart regulation nor can the requirement be found in their Act.

In that Utah has a cooperative agreement with OSMRE to regulate operations on Federal lands, Utah's program or cooperative agreement must reflect how the State will coordinate with the Archaeological Resources Protection Act of 1979 as it applies to Federal lands. The logical place to consider this Act is in the State's cooperative agreement with OSMRE. The State program is less effective than the Federal program without this provision.

- Item 4. R614-300-133.600 30 CFR 773.15(c)(11)  
Resolved
- Item 5. R614-301-411.140 and 411.143 30 CFR 779.12(b),  
30 CFR 784.12(b)  
Resolved
- Item 6. R614-301-411.142 and 411.144 30 CFR 780.31,  
30 CFR 784.17  
Resolved

III. ASPECTS OF THE UTAH INFORMAL SUBMISSION, IDENTIFIED AS LESS EFFECTIVE THAN THE FEDERAL REGULATIONS, THAT ARE NOT 30 CFR 732-LETTER ISSUES

Item 1. R614-100-200 30 CFR 701.5

Adverse Physical Impact

The definition of "Adverse Physical Impact" was suspended by OSMRE (50 FR 258) on January 3, 1985. The definition was suspended for failure to require all persons conducting surface coal mining and reclamation operations to use all reasonably available spoil to backfill highwalls in all remaining situations.

The proposed rule is verbatim to the suspended Federal regulation defining this term. To be no less effective than the counterpart Federal regulation, the State must also suspend or delete its rule.

Item 2. R614-100-200 30 CFR 710.5

Applicant

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation, including the use of the term "permit revision." However, unlike the Federal program, the State program does not define "permit revision" except in a very limited context.

The State program uses "permit change" as the synonymous counterpart for what 30 CFR refers to as a "permit revision." The State program at R614-303-220 also categorizes a "permit change" as either a "Significant Permit Revision" or a "Permit Amendment." Whenever the terms "permit revision" or "revision of the permit" are used in the State rules, the meaning implies reference to a "Significant Permit Revision" as defined at R614-303-220. Such an interpretation makes the term "permit revision" less inclusive than the Federal counterpart, thereby rendering this proposed rule less effective than the Federal counterpart. (See also Part II, "Revision of Permit," of this issue letter.)

Item 3. R614-100-200 30 CFR 701.5

Application

The proposed State rule is nearly identical to the counterpart Federal regulation including the use of the term [permit] "revisions." However, the State program does not define [permit] "revisions" except in a very limited context.

The proposed State rules use the term "permit change" as the synonymous counterpart to the term "permit revision" used in the Federal regulations. The proposed State rule at R614-303-220 also categorizes a "permit change" as being either (1) a "Significant Permit Revision;" or (2) a "Permit Amendment." Whenever "permit revision," "revision," or "revision of the permit" are used in the proposed State program, it would be interpreted to mean a "Significant Permit Revision" as defined at R614-303-220. Such a reading would make the term [permit] "revisions" less

inclusive than the Federal counterpart by not including "Permit Amendments" and, therefore, the proposed rules are less effective than the Federal regulations.

Item 4. R614-100-200

30 CFR 700.5

#### Coal Mining and Reclamation Operations

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation defining "surface coal mining operations." However, the term "coal mining and reclamation operations" is used in many places in the State program in the same way that the Federal term "surface coal mining and reclamation operations" is used in the Federal regulations. Discussions with DOGM representatives indicate that the proposed term "coal mining and reclamation operations" is intended to replace the two Federal terms "surface coal mining operations," and "surface coal mining and reclamation operations" (i.e., combine the two terms). To accomplish that combining of terms, the definition of "coal mining and reclamation operations" must also include "all activities necessary and incidental to the reclamation of the operations."

The proposed State rule defining "coal mining and reclamation operations" is less effective than the Federal counterpart because the definition is less inclusive than the Federal counterparts.

Item 5. R614-100-200

30 CFR 762.5

#### Substantial Legal and Financial Commitments

With one exception, the wording of the proposed State rule is nearly identical to the counterpart Federal regulation. The exception is that the State definition does not contain the discussion of the example following the definition. The example expands the Federal definition by allowing "costs of acquiring the coal in place or the right to mine it without an existing mine" as constituting "substantial legal and financial commitments in a surface coal mining operation."

The State rule is less effective than the Federal regulation because "costs of acquiring the coal in place or the right to mine it without an existing mine" could constitute "substantial legal and financial commitments in a surface coal mining operation" under the State program definition.

Item 6. R614-none  
R614-103-230 (logically)

30 CFR 761.12(c)

#### Procedure for Operations on Federal Lands Within the National Forest

The proposed State rules do not contain provisions for obtaining the determination and findings of the Secretary of the Interior or, in the case of a mine on Federal land under the jurisdiction of the U.S. Forest Service, determinations and findings of the Secretary of the Interior and the Secretary of Agriculture that the mining is permissible under 30 CFR 761.11(b). These determinations and findings are required before acting on the permit application, pursuant to the cooperative agreement executed under 30 CFR Subchapter D.

Although the Federal regulations require the applicant to "submit a permit application to the Director for processing under Subchapter D" (the Federal lands program), the cooperative agreement with Utah supersedes this requirement by allowing the State to process permit applications under the Federal lands program. However, prior to approval of the permit application by the State, the State must receive the Secretary's determination and the findings required by Section 522(e)(2) of the Federal Act.

Utah must amend the proposed rules to incorporate Secretarial approval under 30 CFR 761.11(b), to be no less effective than the Federal regulations.

Item 7. R614-103-231 30 CFR 761.12(a)

#### Determination if Operations are Prohibited or Limited on Lands to be Disturbed

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation except that the proposed State rule references Section 40-10-24(4) in the State Act as the counterpart to 30 CFR 761.11 which is referenced in the Federal regulations. Section 40-10-24(4) of the State Act differs from the Federal regulations in the following ways:

-- Section 40-10-24(4)(a) prohibits surface coal mining operations "on any lands where this activity is precluded by Public Law 95-87." The Sections of Public Law 95-87 being referenced are 522(c)(1) and (2). The Federal regulations at 30 CFR 761.11(a) and (b) are substantively the same as those sections of the Act except that "study rivers or study river corridors as established in any guidelines pursuant to the "Wild and Scenic Rivers Act" are added as lands where surface coal mining operations are prohibited. The proposed State rules are less effective than the Federal regulations because study rivers or study river corridors as established in any guidelines pursuant to the Wild and Scenic Rivers Act are not specifically included as lands prohibited from mining.

-- Section 40-10-24(4)(c) and (d) are counterparts to 30 CFR 761.11(d), (e), (f), and (g) and the language is substantively the same except that the Federal regulations require that the specified distances are to be "measured horizontally." The proposed State rules are less effective than the Federal regulations because distances could be measured at angles off the horizontal.

Item 8. R614-103-232 30 CFR 761.12(b)(1)

#### Rejecting Applications for Operations on Prohibited or Limited Lands

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation except that the proposed State rule references Section 40-10-24(4)(a) and (d) in the State Act as the counterpart to 30 CFR 761.11(a), (f), or (g) which is referenced in the Federal regulations. Section 40-10-24(4)(a) and (d) of the State Act differs from the Federal regulations in the following ways:

-- Section 40-10-24(4)(a) prohibits surface coal mining operations "on any lands where this activity is precluded by Public Law 95-87." The Sections of Public Law 95-87 being referenced are 522(c)(1) and (2). The Federal regulations at 30 CFR 761.11(a) and (b) are substantively the same as those sections of the Act except

that "study rivers or study river corridors as established in any guidelines pursuant to the "Wild and Scenic Rivers Act" are added as lands where surface coal mining operations are prohibited. The proposed State rules are less effective than the Federal regulations because study rivers or study river corridors as established in any guidelines pursuant to the Wild and Scenic Rivers Act are not specifically included as lands prohibited from mining.

-- Section 40-10-24(4)(d) is the counterpart to 30 CFR 761.11(e), (f), and (g) and the language is substantively the same except that the Federal regulations require that the specified distances are to be "measured horizontally." The proposed State rules are less effective than the Federal regulations because distances could be measured at angles off the horizontal.

Item 9. R614-103-422.700 30 CFR 764.13(b)(1)(v)

#### Contents of a Petition for Designating Lands Unsuitable

The Federal regulation and the proposed State rule require that a petition must include allegations of fact and supporting evidence which tend to establish that the petitioned area is unsuitable. The Federal regulation states that each of the allegations should be specified as to the mining operation, if known, and the parts of the petitioned area and petitioner's interests to which the allegations apply. The proposed State rule contains no similar provision. Because the proposed State rule does not require similar specificity, it is less effective than the Federal regulation.

Item 10. R614-103-432.200 30 CFR 764.15

#### Hearing on Completeness of a Petition

In response to a Federal District Court decision on December 30, 1987, OSMRE promulgated new regulations that removed 30 CFR 764.15 of the Federal regulations, the Federal counterpart to this section of the proposed State rule. The option of conducting a hearing on completeness of a petition was removed because the completeness determination required to be in a petition is present. The provision for public hearing on the merits of a petition remains and provides the public with the opportunity to comment on the adequacy of the allegations within the petition. This section of the proposed State rule is inconsistent with the Federal regulations.

Item 11. R614-103-432.300 30 CFR 764.15(b)(2)

#### Notification of Receipt of Complete Petition

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation except the proposed State rule requires notification within 15 days after the notice provided for in R614-103-432.100 [which is less effective than the Federal regulation as identified in OSMRE's May 12, 1986, 30 CFR 732 letter (item 79)]. Although the notification would occur within 30 days after a petition is determined complete, the required change in the requirement at R614-103-432.100, upon which this proposed regulation is dependent, will affect the timing of the notice of a complete petition, as stated in this proposed State rule.

There are no other substantive differences in the wording of the proposed State rule and the counterpart Federal regulations.

Item 12. R614-103-441

30 CFR 764.17(a)

#### Hearing Requirements

Under the Federal regulation, a hearing must be held in the locality of the petition area (unless all petitioners and intervenors agree that a hearing need not be held). Under the proposed State rule, a hearing at the locality of the petition area would not be held unless requested, in writing, by an interested party (a hearing in Salt Lake City must be held under any circumstance). Because the proposed State rule does not "default" to requiring a hearing in the locality of the petition area, it is less effective than the Federal regulation.

The Federal regulation provides that the regulatory authority may subpoena witnesses as necessary. The proposed State rule contains no such provision, and therefore, is less effective than the Federal regulation.

The Federal regulations require that no person shall bear the burden of proof or persuasion. The proposed State rule states that the hearing will be fact-finding in nature, but does not explicitly state that no person shall bear the burden of proof or persuasion in the course of "finding facts." Therefore, the proposed State rule is less effective than the Federal regulation.

The Federal regulation requires that all relevant parts of the data base and inventory system and all public comments received during the public comment period shall be included as part of the public record (at least by reference). The proposed State rule contains no such provision, and therefore, is less effective than the Federal regulation [the provision would be a logical part of R614-103-433 - Record Keeping. This requirement also occurs at 30 CFR 764.19(c)].

There are no other substantive differences in the wording of the proposed State rule and the counterpart Federal regulations.

Item 13. R614-103-455

30 CFR 764.19(c)

#### Judicial Review of Decision on a Petition

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation except that the Federal regulation requires that all relevant parts of the data base and inventory system and all public comments received during the public comment period shall be included in the record. The proposed State rule and 40-10-30 of the Utah code contain no such provision, and therefore, are less effective than the Federal regulation (the provision would be a logical part of R614-103-433 - Record Keeping). This requirement also occurs at 30 CFR 764.19(c).

There are no other substantive differences in the wording of the proposed State rule and the counterpart Federal regulations.

Item 14.(a) R614-104-112 including  
112.110 through .500

30 CFR 865.11(a)(2)(i),  
(ii),(iii),(iv),(v)

#### Protection of Employees

The wording of the proposed State rule is nearly identical to the Federal regulation except in 112.400 and 112.500. In each case the word "and" has been added requiring all elements be present before the provisions in 112.100-112.500 would be applicable. Adding "and" at these locations make the State amendment less protective of employees.

Item 14.(b) R614-104-310

30 CFR 865.13(a)

#### Protection of Employees

The wording of the State rule eliminates the requirement of filing the application for review with the Board (Federal Office of Hearings and Appeals) and notification to the employee and alleged discriminating person that the complaint would be investigated. This omission makes the State rules less effective in the review process than the counterpart Federal regulations. The Federal requirement that "Within 7 days after receipt of any application for review, the Office shall \* \* \* investigate the complaint," must be incorporated into the State rule.

Item 14.(c) R614-104-530

30 CFR 865.15(c)

#### Protection of Employees

The Federal regulations under 865.15(c) state "upon a finding of violation of 865.11 of this part, the Secretary shall order the appropriate affirmative relief including, but not limited to, the rehiring or reinstatement of the employee 'or representative of employees' to his former position with compensation."

State rule R614-104-530 states "upon a finding of violation of R614-104-100, the Board will order the appropriate affirmative relief including, but not limited, to the rehiring or reinstatement of the employee to his or her former position with compensation."

The elimination of the words "or representative of employees" makes the State rules less protective of representatives of employees than the counterpart Federal regulations.

Item 15. R614-200-120 through 123

30 CFR 772.11(a), .12(a)

#### Categories of Coal Exploration

The proposed State rule establishes three categories for coal exploration. "Coal Exploration Within an Approved Permit Area" is coal exploration that substantially disturbs the natural land surface within an approved permit area, and it requires Division designation and approval as a permit change (i.e., permit amendment or significant permit revision). This section of the proposed State rules R614-200-120 has no direct counterpart in the Federal regulations. However, the limiting phrase "that substantially disturbs the natural land surface" as it was used in defining

coal exploration removing 250 tons of coal or less was suspended on November 20, 1986 by 51 FR 41961, in response to a Federal District Court decision. The effect of the suspension was to require regulation of coal exploration regardless of whether or not it substantially disturbs the natural land surface.

The proposed State rule, R614-200-121, is inconsistent with the Federal regulations in that it does not contain provisions for regulating coal exploration that does not substantially disturb the natural land surface within an approved permit area.

"Minor Coal Exploration" is coal exploration that substantially disturbs the natural land surface outside an approved permit area during which 250 tons of coal or less will be removed. Division approval and issuance of a permit is required for this category of exploration. The requirement for permitting such exploration is no less effective than the counterpart Federal regulation. Although the counterpart Federal regulation [30 CFR 772.11(a)] requires submittal of a notice of intent, it does not require approval and issuance of a permit by the regulatory authority. However, the limiting phrase, "that substantially disturbs the natural land surface," was suspended in 30 CFR 772.11 on November 20, 1986, by 51 FR 41961.

The effect of the suspension was to require regulation of coal exploration regardless of whether or not it substantially disturbs the natural land surface. The proposed State rule, R614-200-122, is inconsistent with the Federal regulations in that it does not contain provisions for regulating coal exploration that does not substantially disturb the natural land surface outside an approved permit area.

"Major Coal Exploration" as described in R614-200-123 is coal exploration that substantially disturbs the natural land surface outside an approved permit area during which more than 250 tons of coal will be removed, and it requires DOGM's approval and issuance of a permit. The counterpart Federal regulation [30 CFR 772.11(a)] states that any person who intends to conduct coal exploration outside a permit area during which more than 250 tons of coal will be removed or which will take place on lands designated unsuitable for mining shall submit an application for approval and issuance of a permit by the regulatory authority. The proposed State rule at R614-201-310 is consistent with the language of the Federal regulation. The proposed State rule at R614-200-123, however, is inconsistent with the Federal regulation and is also inconsistent with State rule R614-210-310 and, consequently, is less effective than the Federal regulation.

Item 16.	R614-202-230 including 231 through 236	30 CFR 815.15(a), (b), (d), (f), and (j)
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#### Operational Performance Standards for Coal Exploration

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation except the proposed State rules do not require compliance with certain performance requirement contained in the Federal regulations. The following proposed State rule must be included in the references identified in R614-202-232 for it to be no less effective than the Federal Regulation (R614-301-534.200). The following proposed State rules must be included in the references identified in R614-202-235 for it to be no less effective than the Federal regulation: R614-301-513.600, R614-301-731.800, R614-301-733.225 through 733.240, and R614-301-743.

There are no other substantive differences in the wording of the proposed State rule and the counterpart Federal regulations.

Item 17. R614-202-240 including 30 CFR 815.15(c),(e),(g),  
241 through 244.300 and (h)

#### Reclamation Performance Standards for Coal Exploration

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation except the proposed State rules state that if the land use is intensive agriculture, planting the crops normally grown in the area will meet all requirements for revegetation (R614-202-232); the Federal regulation states that planting the crops normally grown will meet only the revegetation requirement to seed or plant the area to the same seasonal variety native to the area. The proposed State rules are less effective than the Federal regulation because they do not require areas, where the land use is intensive agriculture, to be revegetated in a manner that encourages prompt revegetation and recovery of a diverse, effective, and permanent vegetative cover capable of stabilizing the soil surface from erosion.

There are no other substantive differences in the wording of the proposed State rule and the counterpart Federal regulations.

Item 18. R614-none, 30 CFR 773.11(a)  
R614-300 (logically)

#### Requirements to Obtain Permits

The Federal regulation requires that no person shall engage in, or carry out, any coal mining and reclamation operations unless such person has first obtained a permit issued by the regulatory authority. The proposed State rules do not contain such a provision. Without this requirement, the proposed State rules are less effective than the Federal regulations.

Item 19. R614-300-124 including 30 CFR 773.13(d)  
124.100 through 124.330

#### Public Availability of Permit Applications

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation except for two provisions. The Federal regulation requires that all revisions be made available for public inspection and copying whereas the proposed State rule (R614-300-124.100) in restating the language of the Federal regulation (specifically, by using the word "revision" instead of "permit change"), excludes permit amendments from being available for public inspection and copying. The Federal regulation allows information required under Section 508 of the Federal Act to be held as confidential under certain circumstances whereas the proposed State rule (R614-300-124.320) references Section 40-10-10 of the State Act in lieu of Section 508 of the Federal Act. Section 40-10-10 of the State Act is not the counterpart to Section 508 of the Federal Act, and most of the information required under Section 40-10-10 cannot be kept confidential. For these reasons, the proposed State rules are less effective than the Federal regulations and less stringent than the Federal Act.

There are no other substantive differences in the wording of the proposed State rule and the counterpart Federal regulations.

The same deficiencies were identified in OSMRE's May 12, 1986, 30 CFR 732 letter (items 122 and 123).

Item 20. R614-300-131.100 30 CFR 773.15(a)(1)

#### Requirements for Review of Permit Applications

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation, except that the Federal regulation requires that the regulatory authority review applications for all revisions; the proposed State rule, by using the word "revision" instead of "permit change," excludes applications for permit amendments from being reviewed by the regulatory authority. As proposed, the State rule is less effective than the Federal regulation.

The proposed State rule references R614-300-132.200 as the rule for hearings; it should properly be changed to R614-300-210.

Item 21. R614-300-133.100 thru 30 CFR 773.15(c)  
.750

#### Written Findings for Permit Application Approval

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation, except that the Federal regulation requires that for proposed remaining operations a written finding be made that the site of the operation is a previously mined area [30 CFR 773.15(c)(12)]; the proposed State rule does not require that such a finding be made. By not including a requirement for this finding, the proposed State rule is less effective than the Federal regulation.

Item 22. R614-300-210 thru -223 30 CFR 775.11, .13

#### Administrative and Judicial Review of Permits

The wording of the proposed State rule is nearly identical to the counterpart Federal regulation, except that the proposed State rule (R614-300-212.300) requires that hearings be conducted under the terms of the State's rules. The proposed State rules are not inconsistent with the requirements of 30 CFR 775.11(b)(3). However, the proposed State rules do not prohibit ex parte contacts between the Board and representatives of the parties appearing before the Board; therefore, the proposed State regulation is less effective than the Federal regulation.

The Federal regulation at 30 CFR 775.11(b)(4) requires that the hearing authority issue and furnish parties to the hearing with the order, the written findings of fact, and conclusions of law of the hearing authority within 30 days after the close of the record. The proposed State rules require the same notification, but no time period is specified; therefore, the proposed State regulation is less effective than the Federal regulation.

The Federal regulation at 30 CFR 775.11(b)(5) requires that the burden of proof be on the party seeking to reverse the decision of the regulatory authority. The proposed State rule is less effective than the Federal regulation because it does not have an analogous provision to explicitly specify where the burden of proof resides.

Item 23.(a) R614-301-200

30 CFR 779.21, 783.21

#### Minimum Requirements for Soils Information

The wording in this section of the proposed State rules deviates from the Federal counterpart. The proposed State rule addresses soils information requirements only for areas to be disturbed. This coincides with the Federal regulation for underground mining but not with the regulation governing surface mining. The proposed State rule does not include the Federal requirement for submission of soils information from the entire permit area for surface mining operations. To be no less effective than the Federal counterpart, the State rule must be expanded to include those additional requirements specified in the counterpart Federal regulations. The proposed State rule as written is less effective than the Federal counterpart.

Item 23.(b) R614-301-211

30 CFR 779.21(a), 783.21(a)

#### Description of Premining Resources

The proposed State rule requires a description of the premining soil resources within the proposed coal mining and reclamation plan disturbance area for those areas governed by R614-301-221, Investigation of Prime Farmland. The counterpart Federal regulation requires "soil resource information" on the entire permit area for surface mines and on the disturbance areas for underground mines.

To be no less effective than the Federal regulations, the proposed State rule must be modified to include soil resource information from other mine areas in addition to those associated with prime farmland.

Item 24. R614-301 including  
301-356 through 301-357

30 CFR 816.116 and,  
817.116 [except  
816.116(a)(1) and  
817.116(a)(1)]

#### Revegetation: Standards for Success

The State rules are verbatim to the Federal counterpart, except for rules R614-301-357.210 and .220. Subparts .210 and .220 are identical to first sentences of 30 CFR 816.116(c)(2) and (3), and 817.116(c)(2) and (3); however, the Federal regulations also require that: vegetation parameters shall equal or exceed the success standards during the last growing season of the 5-year responsibility period and the last 2 consecutive years of the 10-year responsibility. The State rule omits these requirements; as a result, rules R614-301-357.210 and 220 are less effective than the Federal counterparts 30 CFR 816.116(c)(2) and (3), and 817.116(c)(2) and (3). The remaining parts of R614-301-356 and 357 are no less effective than the Federal counterparts.

The May 12, 1986, 30 CFR Part 732 letter, identified an issue (No. 59) concerning Utah's previous rules [SMC 816.116(b)(3)(iv) and UMC 817.116(b)(3)(iv)]. The April 1988 amended rule (R614-301-356.230 through 232) resolves issue No. 59.

Item 25.	R614-301-420	30 CFR 740.13(b)(3)(iii)(E) and 30 CFR 750.12(d)(2)(vi)
	R614-(none)	30 CFR 780.15
	R614-(none)	30 CFR 784.26
	R614-(none)	30 CFR 816.95(a)
	R614-(none)	30 CFR 817.95(a)

#### Air Quality

The proposed State rule requires that coal mining and reclamation operations be conducted in compliance with the requirements of the Clean Air Act and any other applicable Utah or Federal statutes and regulations containing air quality standards. The application must contain a description of coordination and compliance efforts which have been undertaken by the applicant with the Utah Bureau of Air Quality. This proposed rule has no direct SMCRA counterpart, but relates to 30 CFR 740.13(b)(3)(iii)(E) and 750.12(d)(2)(vi), which pertain to permitting on Federal and Indian lands, respectively. These regulations require a description of probable changes in air quality resulting from surface coal mining operations and any necessary measures to comply with applicable Federal laws for air quality protection.

The proposed State rules lack counterpart rules to 30 CFR 780.15 and 784.26 (Air Pollution Control Plan), 816.95(a) and 817.95(a) (Stabilization of Surface Areas) governing surface and underground coal mines, respectively. Although an operator may be capable of demonstrating compliance with applicable State or Federal ambient air quality standards, a plan for fugitive dust control practices is required, and an ambient air quality monitoring program may need to be required by the State regulatory authority in order to provide sufficient data to evaluate the effectiveness of fugitive dust control practices.

Because the proposed State rules do not contain these provisions, the proposed rules are less stringent than SMCRA and less effective than the Federal regulations.

Item 26.	R614-301-512.100, .160	30 CFR 780.14(b)(10),(c); .25(a)(1)(i),(2)(i),(3)(i); 784.16(a)(1)(i),(2)(i),(3)(i); .23(c)
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#### Certification of Cross Sections and Maps

Federal regulation 780.14(c) requires certification of each explosive storage and handling facility; the proposed State rule omits these structures from the certification requirement. To be no less effective than the Federal regulation, the State rules must require certification for explosive storage and handling facilities.

Item 27. R614-301-515

30 CFR 816.131(b)/817.131(b)

Temporary Cessation of Operations

Wording of the proposed State rule is nearly identical to the counterpart Federal regulation, except that the State rule requires a notice of intention to cease or abandon operations to be filed before undergoing a temporary cessation of coal mining and reclamation operations for a period of 90 days or more, or as soon as it is known that a temporary cessation will extend beyond 90 days. ✓

Counterpart Federal regulations require such a notification for a temporary cessation of 30 days or more. The State rule should specify the shorter time period of 30 days to be no less effective than the Federal regulation.

Item 28. R614-301-521.143,  
528.340,  
536.600

30 CFR 784.19, 780.35

*Mine's member.*

Mine Maps and Permit Area Maps, Noncoal Waste, and Mine Development Waste

The proposed State rules separate the rules governing the placement of underground development waste into three sections, R614-301-521.143, 528.340, and 536.600. The proposed State rules do not require that operators comply with the requirements and standards for the disposal of excess spoil when disposing of underground development waste. To be no less effective than the Federal regulations, each of these State rules must cross reference the other underground development waste regulations and also require that the excess spoil requirements be satisfied when disposing of underground development waste.

Item 29. R614-301-524.200

30 CFR 816.61(d)/817.61(d)

Blast Design

Section 524.200 limits the need for a blast design for "blasts that are more than five pounds of blasting agent or explosives." The Federal regulations do not have this limitation. To be no less effective than the Federal rule, Utah must delete the five pound minimum for blasts within the vicinity of certain building and underground mines as defined in section 524.200.

Item 30. R614-301-537.100

30 CFR 780.37(b)  
784.24(b)

Regraded Slopes - Geotechnical Analysis

Because of a misprint or word processing error, the proposed rule is not understandable. It is not clear which Federal regulation is being addressed or mirrored by the proposed State rule. According to the cross index to the proposed rules, Appendix I, dated April 1, 1988, the counterpart Federal regulations are 780.37(b) and 784.24(b). These Federal regulations; however, pertain to transportation facilities. In any case, the rule is confusing and grammatical errors need to be corrected before OSMRE can adequately review this rule. On this

basis, it must be concluded that the proposed State rule is less effective than the Federal program requirements.

Item 31. R614-301-541.400

30 CFR 780.18(a)

#### Reclamation Plan

The proposed State rule does not form a complete sentence; it reads, "The plan for the reclamation of the lands within the proposed permit area, showing how the applicant will comply with R614-301, and the environmental protection standards of the State Program." The Federal regulation specifies that "Each application shall contain a plan for reclamation of the lands within the proposed permit area \* \* \*." Therefore, the proposed State rule is less effective than the counterpart Federal regulation.

Item 32. R614-301-743.120 which cites  
R164-301-512

30 CFR 816.49(a)(2)

#### Impoundment Design Certification

The proposed State rules are substantially equivalent to the Federal regulations requiring that the professional engineer or surveyor be experienced in the design and construction of impoundments and therefore comply with the 30 CFR Part 732 letter requirement. However, the proposed State rules do not require that impoundments be certified by a qualified registered professional engineer certify that the impoundments have been designed using current, prudent engineering practices. Therefore, the proposed State rules are less effective in this respect than the counterpart Federal regulation.

Item 33. R614-301-747.000 through .300,  
-542.740 through .742

30 CFR 816.89

#### Disposal of Noncoal Mine Waste

The proposed State rules included two sections: one titled Disposal of Noncoal Mine Waste (R614-301-542.740) and one titled Noncoal Waste (R614-301-528.330). It is OSMRE's understanding that the rules titled disposal of Noncoal Mine Waste are to address disposal and handling methods and that the rules titled Noncoal Waste are to identify the materials that constitute noncoal waste. The former of which is incomplete. The proposed State rule should incorporate all the Federal requirements and also be cross referenced, to be no less effective than the Federal counterpart regulation for this subject.

Item 34. R614-301-800

30 CFR 800.1, Scope and Purpose

#### Bonding and Insurance

The proposed State rule indicates that the rules in R614-301-800 set forth the requirements for bonding and insurance under the State program.

The counterpart Federal regulation at 30 CFR 800.1 indicates that the regulations in

Part 800 set forth the bonding and insurance requirements of the regulatory program in accordance with the Act.

The State's omission of "in accordance with the Act" (U.C.A. 40-10-1 et seq) renders the State rule less effective than the counterpart Federal regulation. Reference to the Act in the Federal regulation demonstrates that the regulatory authority has the legal authority by statute to require performance bonds and liability insurance from coal mining permittees.

Item 35. R614-301-820.100

30 CFR 800.11(a)

#### Requirement to File a Bond

The proposed State rule states that bonds are conditioned on the faithful performance of all the requirements of the State Program, the permit, and the reclamation plan. The counterpart Federal regulation includes the requirements of the Act in addition to the regulatory program, permit and reclamation plan. The State's omission of reference to the Act renders the rule less effective. The State Program relies on the existence of the State statute to demonstrate the State's legal authority to regulate coal mining. Explicit reference to the Act in the Federal regulation demonstrates that the regulatory authority has legal authority to condition bonds on the performance of all requirements of the Act in addition to the regulatory program permit and reclamation plan.

Item 36. R614-301-820.310

30 CFR 800.13(a)(1)

#### Bond Liability

The proposed State rule requires that liability under the bond be coincident with the operator's extended liability period, or if later, until the reclamation requirements of the State program and permit are met. However, the counterpart Federal regulation requires that in addition to meeting the reclamation requirements of the regulatory program and permit, the operator must meet the reclamation requirements of the Act. The State's omission of a reference to the requirements of the Act renders the State regulation less effective than the counterpart Federal regulation.

Because it is the State law which provides legal authority to the State regulatory authority to enforce reclamation requirements by statute, limiting the requirements in the State rule to the State program and permit is less effective than requiring reclamation performance in accordance with the State program, the permit, and the Act.

Item 37. R614-301-840.300

30 CFR 800.16(c)

#### Bond Conditions

The proposed State rule requires that bonds be conditioned on performance of all requirements of the State Program, the Division, and approved permit including the reclamation plan.

The counterpart Federal regulation requires that bonds be conditioned not only on performance of all requirements of the regulatory program, permit, and reclamation plan, but also on performance of the requirements of the Act and the entire Chapter on performance bonding (Subchapter J-part 800). The State's omission that bonds be conditioned on performance in accordance with the Act and all bonding regulations renders the State regulation less effective than the counterpart Federal regulation. Additionally it is not clear what is meant by "requirements of the Division" with respect to the terms and conditions of bonds.

Item 38. R614-301-860.232.2

30 CFR 800.21(c)(2)(ii)

#### Real Property Collateral Bonds

The proposed State rule is nearly identical to the counterpart Federal regulation. However, the Federal regulation requires that appraisals to determine the value of real property be independent appraisals conducted by certified appraisers. The proposed State rule does not require an independent appraisal and is therefore less effective than the counterpart Federal regulation. The Federal regulation requires independent appraisals in order to avoid any control or intent to control the certified appraiser by the permittee/property owner.

Item 39. R614-301-860.260

30 CFR 800.21(f)

#### Persons with Interest in Collateral (Bond)

The proposed State rule is nearly identical to the counterpart Federal regulation. However, the State's rule does not clearly convey that persons who want to be notified about actions on the bond must make a written request to this effect and submit it to the Division at the time the collateral is offered.

Item 40. R614-301-880.110

30 CFR 800.40(a)(1)

#### Release of Performance Bonds

The proposed State rule requires that the operator submit an "appropriate reclamation evaluation" prior to submittal of a bond release application. The rule further states that after the filing of the "evaluation" an inspection will be made.

An explanation is required from the State about what constitutes "appropriate reclamation evaluations" under this proposed State rule. Apparently the evaluations are made and prepared by the permittee. The intent of the Federal regulation is to require that applications for bond release be filed during seasons that allow the regulatory authority to conduct an evaluation of the reclamation within 30 days (or as weather permits).

The proposed State rule requiring the filing of "reclamation evaluations" prior to applications for release is independent from the regulatory timeframe requirements for the release application advertisement and inspection. Further explanation and clarification from the State is required about how this rule interfaces with the remaining requirements to release performance bonds, before OSMRE can determine if it is no less effective than the Federal regulations.

Item 41. R614-301-880.120

30 CFR 800.40(a)(2)

#### Release of Performance Bonds (Public Notice)

The proposed State rule is nearly identical to the counterpart Federal regulation. However, the Federal regulation as revised requires that the advertisement for bond release include the permittee's name. The addition of the permittee's name helps the public more readily identify the permit. The State rule is less effective than the counterpart Federal regulation.

Item 42. R614-302-317.310 through .330

30 CFR 823.11(a),(b)

#### Applicability of Prime Farmland Performance Standards

Federal regulations 30 CFR 823.11(a) and (b) were suspended on February 21, 1985; therefore, the proposed State counterpart rules R614-302-317.310 through .330 should be deleted from the State rules.

The suspended Federal regulations identified conditions or structures (i.e., coal preparation plants, water bodies approved for postmining land use, etc.) that were not applicable to prime farmland consideration. The previous Federal regulations, which are now in effect again, do not allow for such considerations.

Consequently, the proposed State rules are less effective than the current Federal regulations.

Item 43. R614-(none),  
R614-302-320 (logically)

30 CFR 785.11

#### Special Categories of Mining - Anthracite Surface Mining

The proposed State rules do not incorporate provisions for the regulation of surface mining of anthracite coal. Utah has agreed to submit such an amendment prior to consideration for approval of any such mining activities. Also, a logical place should be reserved for inserting such rules into the proposed Utah coal rules.

Item 44. R614-302-324.000 through .250

30 CFR 785.19(d)(1),(2)

#### Alluvial Valley Floors

The proposed rules follow the counterpart Federal regulations of 1983 almost verbatim. However, this section of the 1983 Federal regulations was remanded due to pending legal actions, and the regulation now in effect is the March 13, 1979 permanent regulatory program regulation (44 FR 15311-15463), which details the application contents for operations affecting designated alluvial valley floors. This regulation defines the data required in the permit application, such as geologic, hydrologic, soils, vegetation, and geomorphic information.

The proposed State rule should be revised to correspond with the requirements of the counterpart Federal regulation now in effect.

## Permit Changes

The Federal regulation (1) provides for revisions of permits during the permit term; (2) requires that any increases in permit area, except for incidental boundary revisions, be made by application for a new permit; (3) requires that regulatory authorities establish time periods for the review and decision on permit revisions and guidelines for determining the "significance" of permit revisions; and (4) identifies the criteria for approval of permit revisions.

The proposed State rule (R614-303-221 through 222) provides for revisions of permits during the permit term and requires that any increases in permit area, except for incidental boundary revisions, be made by application for a new permit, as is required by the counterpart Federal regulation.

The proposed State rule (R614-303-223 through 227) establishes the guidelines for determining the "significance" of permit changes (revisions) as required by the Federal regulation by identifying the criteria for categorizing permit changes as "significant permit revision" or "permit amendments." However the proposed State rule has a potential conflict between R614-303-223 and R614-303-224. In R614-303-223 Incidental Boundary changes, which are undefined in the State's proposed rules, are categorized as Permit Amendments. However, the criteria in R614-303-224 defining Significant Permit Revisions could apply to areas being added to the permit area as Incidental Boundary Changes. To eliminate the potential conflict, the proposed State rule should define Incidental Boundary Changes as being the extension of the permit area that, among other things, does not meet the criteria for a Significant Permit Revision.

The proposed State rules (R614-303-228 and R614-300-131.111) establish the time period for the review of permit changes as required by the Federal regulations.

The proposed State rule does not contain any provision defining the criteria for approval that is a counterpart to the Federal regulation at 30 CFR 774.13(c). The Federal regulation requires that before an application for permit revision (i.e., permit change--being either a significant permit revision or a permit amendment) is approved, the applicant must affirmatively demonstrate and the regulatory authority must find, in writing, that: (1) reclamation as required by the Federal Act and the regulatory program can be accomplished; (2) the application for a revision (permit change) complies with all requirements of the Federal Act and the regulatory program, and the applicable requirements under 30 CFR 773.15(c) that are pertinent to the revision (permit change) are met. [The proposed State counterpart to 30 CFR 775.15(c), R614-300-122, makes that section applicable only to a Significant Permit Revision; only the findings listed above (1 and 2) would be made for Permit Amendments.] The proposed State rule is less effective than the counterpart Federal regulation because it does not contain the requirements of 30 CFR 774.13(c).

The Federal regulation definition of "surface coal mining operations" states:

"\* \* \* such activities include \* \* \* in-situ distillation or retorting; leaching or other chemical or physical processing; and \* \* \*."

The State definition of "coal mining and reclamation operations" states:

"\* \* \* such activities include \* \* \* in-situ distillation; or retorting, leaching, or other chemical or physical processing; and \* \* \*."

The changes causes retorting to be grouped with leaching or other chemical or physical processing, rather than to be grouped with in-situ distillation. Such change does not affect the effectiveness of the State program because retorting, whether in-situ or otherwise, is still covered in the definition.

Item 46. R614-301-322.220

30 CFR 780.16, 816.97

#### Fish and Wildlife Resources

Although organized differently than the Federal regulations, the State rules are the same as the Federal regulations, with the exception of minor editorial differences. Section R614-301-322.220 of the State regulation omits "wintering area" as an example of habitats of unusually high value. Because the remainder of the State rules are identical to the Federal regulations, this deletion is assumed to be a typographical error. However, this omission should be included in the State submittal. If the omission was intended, the State should explain why the reference to "wintering areas" was deleted.



EXHIBIT "G"

# United States Department of the Interior

OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENT  
SUITE 310

625 SILVER AVENUE, S.W.  
ALBUQUERQUE, NEW MEXICO 87102



In Reply Refer To:

cc L Brayton  
R Daniels  
R Smith  
ARN

July 18, 1989

RECEIVED  
JUL 20 1989

Dr. Dianne R. Nielson, Director  
Division of Oil, Gas and Mining  
Department of Natural Resources  
3 Triad Center, Suite 350  
355 West North Temple  
Salt Lake City, UT 84180-1203

DIVISION OF  
OIL, GAS & MINING

6/27 Doornletter  
U.A.R. #512

Dear Dr. Nielson:

Under 30 CFR 732.17(d), the Office of Surface Mining Reclamation and Enforcement (OSMRE) is required to notify States of all changes in Federal regulations that may make it necessary for a State to modify its regulatory program to remain consistent with all Federal requirements. Pursuant to 30 CFR 732.17(e), OSMRE also must notify States when it determines that such amendments are in fact required.

To allow for more efficient use of both State and Federal resources, OSMRE has in the past provided such notification on a periodic basis rather than immediately after the promulgation of each new Federal rule. The last such general notification covered all Federal rule revisions published in the Federal Register through June 8, 1988. Since that time, a number of other rule changes have occurred, creating a need for further evaluation of State program adequacy.

Enclosed is a list of changes that we believe Utah need to make as a result of the promulgation of these Federal regulations. Where appropriate, this list also addresses all proposed amendments concerning these provisions submitted to date. We would appreciate your review of this list, with any comments provided no later than August 16, 1989. Please note that this list is proposed, not final, and that at this time we are only seeking your comments on its accuracy. Following receipt of your comments, if any, or upon the due date we will revise the list as

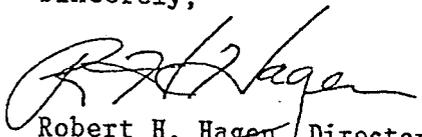
Dr. Dianne R. Nielson

2

necessary and prepare the formal notification pursuant to 30 CFR 732.17(e). Only then will you be required to submit a schedule for rulemaking. Should you believe no amendment is necessary with respect to specific items on the list, you may submit an explanation at any time in the process.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Robert H. Hagen, Director  
Albuquerque Field Office

Enclosure

E. Roads and Support Facilities  
(53 FR 45190, November 8, 1988)

Note: The new Federal regulations differentiate between primary and ancillary roads. Generally, these compare to the current Utah classification system as follows:

Primary roads: Utah's Class I and Class II roads.

Ancillary roads: Utah's Class III roads.

E-1. 30 CFR 701.5

SMC/UMC 700.5  
R614-100-200 (proposed)

The definition of "road" has been revised to mean a surface right-of-way constructed, used, reconstructed, improved or maintained for travel by land vehicles, including mining equipment, used in surface coal mining and reclamation operations or coal exploration. The term encompasses all appurtenant structures used or built within the right-of-way and includes rights-of-way used by coal hauling vehicles to reach transfer, processing and storage areas. However, the definition does not include ramps and routes of travel within the immediate mining area (any areas subject to frequent surface changes) or excess spoil or coal mine waste disposal areas. Also, pioneer roads (roads constructed for the purpose of providing the access needed to construct a primary or ancillary road) are not included since they are merely part of the process of constructing a primary or ancillary road. Such activities are subject to the performance standards applicable to the construction process, but not those standards applicable to completed primary or ancillary roads. While the current Utah definition of "road" references the now-defunct classification system, the March 15, 1989 and May 5, 1989, informal submittals delete this reference and revise the definition to include language similar to the Federal rule. However, the revised definition also retains the categorical exclusion for public roads. In re: Permanent Surface Mining Regulation Litigation II (Civil Action No. 79-1144 D.D.C., July 15, 1985) remanded the Federal definition of "affected area" to the extent that it excluded certain public roads from regulation. Since both the current and proposed Utah definitions of road categorically exclude public roads, they are inconsistent with this decision. Therefore, the State needs to revise its definition so that public roads are not categorically exempted from regulation.

E-2. 30 CFR 780.37(a)  
30 CFR 784.24(a)

SMC 780.37  
UMC 784.24  
R614-301-527-200 (proposed)  
R614-301-542.600 (proposed)

These new Federal rules require that the permit application include plans and drawings containing certain specific information for each

817.150 (f)