



United States Department of the Interior

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

R. Daniels
TAKE
PRIDE IN
AMERICA
R. Smith
In Reply Refer To:

November 9, 1989

P. Smith
RECEIVED
NOV 13 1989
DIVISION OF
OIL, GAS & MINING

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 (OSM) has completed review of the Division of Oil, Gas and Mining's (DOGM's) August 11, 1989, formal amendment (Administrative Record No. UT-515; State Program Amendment Tracking System (SPAT) No. UT-002). DOGM proposed the amendment to the Utah Coal Regulatory Program R-614 Rules in response to OSM's 30 CFR Part 732 letters dated May 12, 1986, June 9, 1987, and November 21, 1988. With the exceptions noted in the enclosure to this letter, OSM finds the proposed State rules to be no less effective than the Federal counterpart regulations and no less stringent than the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

The Director of OSM, subject to public comment, is prepared to approve the proposed rules submitted by Utah if the identified deficiencies are satisfactorily addressed. OSM is prepared to delay its final rulemaking on the proposed rules to allow Utah an opportunity to submit draft proposed rule changes, policy statements, clarifying opinions, or other evidence that the proposed rules are consistent with the Federal standards. Additional information must be submitted no later than one month from the date of this letter. OSM would then reopen the comment period on the new information for 15 days to allow public review of the additional information. If the additional material fully satisfies the concerns outlined here, and is in accordance with SMCRA and no less effective than the Federal regulations, OSM would then publish a final rule announcing the Director's approval of the amendment. The Director's approval of any rules in proposed form is contingent upon the State's adoption of those rules in the form in which they were reviewed by OSM and the public. Should you indicate that DOGM will not submit

Dr. Dianne R. Nielson

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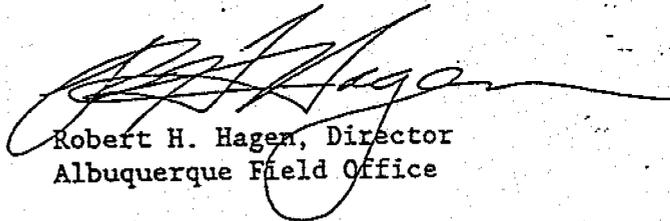
further modifications to address the identified deficiencies, those provisions which contain identified deficiencies would have to be disapproved.

Please note that the analysis of the public roads issue differs from what I had communicated to you in my July 6, 1989, letter. After further agency review, it was determined that 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."

Please advise me at your earliest convenience whether you wish to submit the materials necessary to address OSM's concerns within the next month. If you do not intend to submit additional material, OSM will proceed directly with the publication in the Federal Register of the Director's decision.

As always, I am willing to meet with you to discuss these findings or any other concerns you may have regarding the proposed rules.

Sincerely,



Robert H. Hagen, Director
Albuquerque Field Office

Enclosure

c.c. Branch of State Programs, HQ
Program Evaluation Section, WFO-D
Field Solicitor

enc. to 11/9/89 letter

ISSUES IDENTIFIED BY OSM FOR UTAH'S AUGUST 11, 1989 FORMALLY PROPOSED AMENDMENT (ADMINISTRATIVE RECORD NO. UT-515; SPAT NO. UT-002)

1. R614-100-200

30 CFR 762.5

There appears to be an error in the definition of "fragile lands" in that there are two definitions. It would appear that the first definition should be deleted, because it is an incomplete sentence and is less effective than the Federal regulation.

OK with [unclear]

2. R614-100-200

30 CFR 701.5

Utah's definition of "road" includes 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. . ." 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. The determining factor as to whether a public road is to be regulated is "the extent of mining-related use." Any roads experiencing substantial public use may also be included in the affected area on a case-by-case basis.

POV OK Working Pending

Under Utah's proposed definition of "road," public roads could be excluded from the affected area when the extent of their mining-related use is substantial or when their main use is for mining. Utah must revise its proposed rule to preclude such exclusions and to otherwise conform to the remand of the Federal definition of "affected area."

3. R614-100-200

30 CFR 761.5

Utah's definition of "valid existing rights" (VER) includes language similar to the Federal definition. OSM suspended the Federal definition at 30 CFR 761.5, (c), and (d)(2) in response to the decision of the District Court for the District of Columbia (In re: Permanent Surface Mining regulation Litigation (II) (Civil Action No. 79-1144, D.D.C. 1984 and 1985)). Paragraphs (a) and (d) were suspended insofar as they would authorize use of the "takings" test to determine whether a person has VER. Paragraph (c) was suspended to the extent that it would expand VER under the "needed for, and adjacent to" test, to include lands for which the claimant had not acquired the necessary property rights prior to August 3, 1977.

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OK Working Pending

To be no less effective than the Federal regulation, Utah must amend its program to include at R614-100-200, a "needed for, and adjacent to" test, only in reference to lands for which the

applicant possessed a legally binding conveyance, lease, deed, or contract or other document authorizing the applicant to conduct surface coal mining operations prior to August 3, 1977.

OSM recommends that Utah (1) withdraw the "takings test" from the definition of VER at R614-100-200 until Federal rulemaking is resolved on this issue, and (2) retain its currently approved definition of VER.

(4) R614-103-221 and 222

No Federal counterpart

Utah's proposed rules at R614-103-221 and R614-103-222 are confusing and in conflict with the Federal lands cooperative agreement. As proposed, Rule R614-103-221 states that VER determinations on Federal lands "are reserved to the Secretary, consistent with the terms of a cooperative agreement between the Secretary and Utah pursuant to section 523(c) of the Federal Act." This proposed provision conflicts with Section B. 1. of the cooperative agreement under which DOGM is to make certain VER determinations on Federal lands in SMCRA Section 522(e) areas. As proposed, Rule R614-103-222 states that, VER determinations on non-Federal lands which affect adjacent Federal lands "are the responsibility of the Division consistent with the terms of the cooperative agreement." This proposed provision conflicts with Section B.1. of the cooperative agreement which states that (1) DOGM, with the consultation and concurrence of OSM, will determine whether operations on non-Federal lands within SMCRA Section 522(e)(1) areas will or will not affect Federal lands and (2), where it is determined that operations on such non-Federal lands will affect Federal lands, OSM will make the VER determination. To alleviate these discrepancies between the proposed rules and the cooperative agreement, Utah must either delete its proposed rules at R614-103-221 and 222, or modify them to be consistent with the cooperative agreement.

(5) R614-105-440.441

30 CFR 850.15(b)(2)

This Federal regulation requires "that upon notice of a revocation, the blaster shall immediately surrender to the regulatory authority the revoked certificate." Utah's proposed amendment does not have this requirement and is therefore less effective than the corresponding Federal regulation.

6. No State counterpart

30 CFR 700.11(d)

The Federal regulation establishes procedures and clarifies the conditions under which a regulatory authority may terminate its jurisdiction over sites mined and reclaimed under an initial or permanent regulatory program for surface coal mining and reclamation operations and coal exploration activities. Under this regulation, the regulatory authority must make a written determination that all applicable reclamation requirements have

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been met before jurisdiction over initial program and coal exploration sites may be terminated. Also, before terminating jurisdiction over permitted and bonded permanent program sites, the regulatory authority must issue a final decision fully releasing the performance bond. In addition, the regulation requires that, in either case, jurisdiction be reasserted if it is demonstrated that the written finding or bond release was based upon fraud, collusion, or misrepresentation of a material fact.

Since the Utah program has no counterpart to this Federal regulation, it needs to be amended to include criteria and procedural requirements no less effective than the Federal regulation.

7. R614-201-400

30 CFR 772.14(a)

This Federal regulation has been expanded to apply to both the sale and commercial use of coal (53 FR 52942, December 29, 1988). Thus, except as provided under 30 CFR 772.14(b) and 700.11(a)(5), any person who intends to commercially use or sell coal extracted under an exploration permit must first obtain a surface coal mining and reclamation operations permit. Utah's proposed rules only apply to the commercial sale of coal. Therefore, to be no less effective than the Federal regulation, Utah will also need to extend this requirement to commercial use.

8. R614-201-400

30 CFR 772.14(b)

This Federal regulation, which allows the commercial use or sale of coal extracted during exploration if the sale or use is solely for testing purposes, has been revised to require that the person conducting the exploration file an application demonstrating that testing is necessary for the development of a surface coal mining operation for which a permit application is to be submitted in the near future (53 FR 52942, December 29, 1988). The application also must demonstrate that the proposed commercial use or sale is solely for testing purposes. It must include specific information identifying the tests to be used, the testing firm, testing locations, reasons for the tests, and the amount of coal necessary for the tests. The applicant must supply evidence that sufficient coal reserves are available to support a mine and that the coal to be removed for testing purposes does not constitute the total minable reserves within the exploration area. Also, the application must include an explanation of why other means of exploration are not adequate to determine the quality of the coal. Utah's proposed rule does not include similar application requirements. Therefore, Utah will need to revise its program to be no less effective than this Federal regulation.

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528.300. Spoil, coal processing waste, mine development waste, and noncoal waste removal, handling, storage, transportation, and disposal areas and structures;

528.310. Excess Spoil. Excess spoil will be placed in designated disposal areas within the permit area, in a controlled manner to ensure mass stability and prevent mass movement during and after construction. Excess spoil will meet the design criteria of R614-301-535. For the purposes of SURFACE COAL MINING AND RECLAMATION ACTIVITIES, the permit application must include a description of the proposed disposal site and the design of the spoil disposal structures according to R614-301-211, R614-301-212, R614-301-412.300, R614-301-512.210, R614-301-512.220, R614-301-514.100, R614-301-528.310, R614-301-535.100 through R614-301-535.130, R614-301-535.300 through R614-301-535.500, R614-536.300, R614-301-542.720, R614-301-553.240, R614-301-745.100, R614-301-745.300, and R614-301-745.400.

528.320. Coal Mine Waste. All coal mine waste will be placed in new or existing disposal areas within a permit area which are approved by the Division for this purpose * Coal mine waste will meet the design criteria of R614-301-536.

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Insert new
sentences

528.321. Return of Coal Processing Waste to Abandoned Underground Workings. For the purposes of UNDERGROUND COAL MINING AND RECLAMATION ACTIVITIES, each plan will describe the design, operation and maintenance of any proposed coal processing waste disposal facility, including flow diagrams and any other necessary drawings and maps, for the approval of the Division and MSHA under R614-301-536.520 and meet the design criteria of R614-301-536.700.

528.322. Refuse Piles. Each pile will meet the requirements of MSHA, 30 CFR 77.214 and 30 CFR 77.215, meet the design criteria of R614-301-210, R614-301-512.230, R614-301-513.400, R614-301-514.200, R614-301-515.200, R614-301-528.320, R614-301-536 through R614-301-536.200, R614-301-536.500, R614-301-536.900, R614-301-542.730, R614-301-553.250, R614-301-746.100, R614-301-746.200, and any other applicable requirements.

horizontal length, and designed in accordance with R614-301-211, R614-301-212, R614-301-412.300, R614-301-512.210, R614-301-512.220, R614-301-514.100, R614-301-528.310, R614-301-535.100 through R614-301-535.130, R614-301-535.500, R614-301-536.300, R614-301-542.720, R614-301-553.240, R614-301-745.100, R614-301-745.300, and R614-301-745.400.

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536. Coal Mine Waste. The permit application will include designs for placement of coal mine waste in new or existing disposal areas within approved portions of the permit area. Coal mine waste will be placed in a controlled manner and have a design certification as described under R614-301-512.

536.100. The disposal facility will be designed using current prudent engineering practices and will meet design criteria established by the Division.

536.110. The disposal facility will be designed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments must be stable under all conditions of construction.

536.120. Sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, will be performed in order to determine the design requirements for foundation stability. The analyses of the foundation conditions will take into consideration the effect of underground mine workings, if any, upon the stability of the disposal facility.

536.200. Coal mine waste will be placed in a controlled manner to:

#18
536.210. Ensure mass stability and prevent mass movement during and after construction;

536.220. Not create a public hazard; and

536.230. Prevent combustion.

536.300. Coal mine waste may be disposed of in excess spoil fills if approved by the Division and, if such waste is:

536.310. Placed in accordance with applicable portions of R614-301-210, R614-301-513.400, R614-301-514.200, R614-301-528.322, R614-301-536.900, R614-301-553.250, and R614-301-746.200;

R614-301-514.100, R614-301-528.310,
R614-301-535.100 through R614-301-535.130,
R614-301-535.500, R614-301-536.300,
R614-301-542.720, R614-301-553.240, and
R614-301-745.100 are met;

745.320. The underdrain system may be constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, provided the resulting underdrain system is capable of carrying anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area and the other requirements for drainage control are met; and

745.330. Surface water runoff from areas adjacent to and above the fill is not allowed to flow onto the fill and is diverted into stabilized diversion channels designed to meet the requirements of R614-301-742.300 and to safely pass the runoff from a 100-year, 6-hour precipitation event.

745.400. Preexisting Benches. The Division may approve the disposal of excess spoil through placement on preexisting benches, provided that the requirements of R614-301-211, R614-301-212, R614-301-412.300, R614-301-512.210, R614-301-512.220, R614-301-514.100, R614-301-535.100, R614-301-535.112 through R614-301-535.130, R614-301-535.300 through R614-301-536.300, R614-301-542.720, R614-301-553.240, R614-301-745.100, R614-301-745.300, and R614-301-745.400 and the requirements of R614-301-535.400 are met.

746. Coal Mine Waste.

746.100. General Requirements.

746.110. All coal mine waste will be placed in new or existing disposal areas within a permit area which are approved by the Division.

746.120. Coal mine waste will be placed in a controlled manner to minimize adverse effects of leachate and surface water runoff on surface and ground water quality and quantity.

746.200. Refuse Piles.

746.210. Refuse piles will meet the requirements of R614-301-512.230, R614-301-515.200, R614-301-528.320, R614-301-536 through

752.210

Needs Statement

Refer to 301-752.210 (this covers exp roads)
301-752.210 is the state equiv. of

END

Discussion

- 9. R614-202-230.232 → 30 CFR 816.150(b) (1)
- R614-301-534.100 → 30 CFR 817.150(b) (1)

The Federal regulations require that each operator control or prevent erosion, siltation, and air pollution attendant upon erosion, including road dust and other dust resulting from vehicular traffic as well as dust occurring on other exposed surfaces. Utah must amend its program for all road classifications to include dust control provisions no less effective than those of the Federal regulations.

- 10. R614-301-352 30 CFR 816.100
- R614-301-553 30 CFR 816.101
- 30 CFR 817.100

Utah's proposed amendment regarding contemporaneous reclamation is less effective than the Federal regulations in that it does not include time and distance standards. In re: Permanent Surface Mining Litigation II (21 ERC 1724, 1744-1746 (D.D.C. October 1, 1984)) prevents OSM from approving State programs that do not specify both time and distance factors defining contemporaneous reclamation. Since 30 CFR 816.100 has been remanded, the earlier 1979 regulation at 30 CFR 816.101(a) has regained currency. Therefore, Utah must revise its proposed amendment at R614-301-352 and R614-301-553 to include backfilling and grading requirements and time and distance requirements that are no less effective than the March 13, 1979, regulations at 30 CFR 816.101(a) (44 FR 15411). These regulations require that rough backfilling and grading shall be completed within 180 days following coal removal and shall not be more than four spoil ridges behind the pit being worked, the spoil from the active pit being considered the first ridge. The regulatory authority may grant additional time for rough backfilling and grading if the permittee can demonstrate, through a detailed written analysis under 30 CFR 780.18(b) (3), that additional time is required.

- 11. R614-301-356.231 30 CFR 816.116(b) (3) (i)
- 30 CFR 817.116(b) (3) (i)

These Federal regulations require that minimum stocking and planting arrangements for areas developed for fish and wildlife habitat, recreation, shelterbelts, or forest products be specified by the regulatory authority after consultation with and approval by the State agencies responsible for the administration of forestry and wildlife programs. Consultation and approval may occur either on a programmatic or a permit-specific basis. Utah's formal submittal requires consultation with and approval by these agencies and thus is no less effective than the Federal regulations. However, Utah's submittal of programmatic standards in its "Vegetation Information Guidelines" does not contain

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documentation that these agencies have concurred with the specific programwide stocking standards and arrangements proposed.

12. R614-301-356.232

30 CFR 816.116(b)(3)(ii)
30 CFR 817.116(b)(3)(ii)

These Federal regulations require that, at the time of final bond release, at least 80 percent of all trees and shrubs used to determine revegetation success have been in place for at least 60 percent of the applicable minimum period of responsibility. Utah proposes at Rule R614-301-356.232 that at the time of final bond release at least 80 percent of the trees and shrubs must have been in place for at least three growing seasons in areas with a 5-year period of responsibility, and at least eight growing seasons in areas with a 10-year period of responsibility." Both because growing seasons do not necessarily equate to calendar years and because winter mortality is a significant consideration, the portion of the proposed rule requiring at least three growing seasons in areas with a 5-year responsibility is less effective than the Federal regulations and must be revised (i.e., three growing seasons are less effective than 3 calendar years, which would be 60 percent of the 5-year responsibility period). The portion of the proposed rule requiring at least eight growing seasons in areas with a 10-year responsibility period is no less effective than the Federal regulations and need not be revised (i.e., eight growing seasons are no less effective than 6 calendar years, which would be 60 percent of the 10-year responsibility period).

13. R614-301-357.300

30 CFR 816.116(c)(4)
30 CFR 817.116(c)(4)

The Federal regulations require that all normal husbandry practices be approved through the State program amendment process. Utah's formal submittal would add several specific husbandry practices along with the authority to add others in the future. To be consistent with the Federal regulations, Utah must revise its submittal to specify that such practices require approval by the Director of OSM, in advance, in accordance with 30 CFR 732.17. The State would need to demonstrate that any specific husbandry practices it proposes for mined lands are customarily performed on similar unmined lands to prevent exploitation, destruction, or neglect of the resource and to maintain the prescribed level of use or productivity. Utah also will need to establish limitations to ensure that the amount or degree to which any practice is applied is equivalent to what is customarily performed on similar unmined lands under equivalent management.

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14. R614-301-411.145

Remove

No Federal counterpart

The meaning of section R614-301-411.145 is unclear. R614-301-411.145 states, "The exceptions set forth in R614-103-235 will apply to all of limitations on adversely affecting certain lands as described in R614-301-411.140". Before OSM can determine whether the proposed provision is no less effective than the Federal regulations, Utah must clarify what this rule requires. It appears that this rule may extend the waiver provisions of R614-103-235 to the areas where mining is prohibited or limited under 30 CFR 761.11(c).

15. R614-301-420

Statement needed - the rules require for R446-1-4.5.4 of the plan for air quality control
Ut Air Quality 30 CFR 780.15(b) (fugitive dust control)

This Federal regulation requires that, for all surface mining operations not covered by 30 CFR 780.15(a) (30 CFR 780.15 covers mines located West of the 100th meridian that produce more than 1,000,000 tons of coal), the application shall contain an air-pollution control plan which includes (1) an air-quality/monitoring program, if required by the regulatory authority, to provide sufficient data to evaluate the effectiveness of the fugitive-dust-control practices required under 30 CFR 780.15(b)(2) and (2) a plan for fugitive dust-control-practices, as required under 30 CFR 816.95. R614-301-422 requires that the application contain a description of coordination and compliance efforts that have been undertaken by the applicant with the Utah Bureau of Air Quality. Utah requires a description of, but does not require a plan for, fugitive-dust-control practices, as required under 30 CFR 816.95. Therefore, to be no less effective than the Federal regulations, Utah must amend its program to include this requirement.

16. R614-301-526.220

30 CFR 780.38
30 CFR 784.30

The Federal regulations require each applicant for a surface or underground coal mining and reclamation permit to submit a description of plans and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall include a map, appropriate cross sections, design drawings, and specifications sufficient to demonstrate how each facility will comply with the applicable performance standards. To be no less effective than the Federal regulations, Utah needs to revise its submittal to add these requirements.

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17. R614-301-527.200
R614-301-542.600

30 CFR 780.37(a)
30 CFR 784.24(a)

The Federal regulations require that the permit application include plans and drawings containing certain specific information for each road to be constructed, used, or maintained

R614-301-521.176

within the proposed permit area. The proposed rules contain most of these requirements, but not all of them. To be no less effective than the Federal regulations, the State rules must require that applications include drawings and specifications for any stream fords to be used as temporary construction routes. Applications must also include plans and schedules for the removal and reclamation of all roads not approved as part of the postmining land use.

- 18. R614-301-528.320 30 CFR 816.81(a)
- R614-301-536 30 CFR 817.81(a)
- R614-301-536.200
- R614-301-746.110

OSM suspended 30 CFR 816.81(a) in response to the District Court decision (In re: Permanent Surface Mining Litigation II, July 15, 1985 Mem. op. at 26-27) insofar as it allows end dumping or side dumping of coal-mine waste. Utah's proposed rule at R614-301-528.320 dealing with coal-mine waste requires that (1) all coal-mine waste be placed in new or existing disposal areas within a permit area that are approved by the Division for this purpose and (2) coal-mine waste disposal areas will meet the design criteria of R614-301-536. The wording of Utah's proposed rule is identical to the suspended Federal regulation. To be consistent with the court decision, Utah must revise its proposed amendment to prohibit placement of coal mine waste by end or side dumping.

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Revising

- 19. R614-301-553.700 30 CFR 816.104
- R614-301-553.800 30 CFR 816.105

On October 1, 1984, the U.S. District Court (In re: Permanent Surface Mining Litigation II, 21 ERC at 1746) remanded OSM's thin overburden (30 CFR 816.104(a)) and thick overburden (30 CFR 816.105(a)) regulations. Because of this remand, the 1979 versions of the regulations at 30 CFR 816.104(a) and 30 CFR 816.105(a) have regained currency. Therefore, make them no less effective than the Federal regulations, Utah must revise its proposed Rules R614-301-553.700 and R614-301-553.800 to include requirements equivalent to those in the March 13, 1979, regulations at 30 CFR 816.104(a) and 30 CFR 816.105(a).

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- 20. Vegetation Information Guidelines *We will submit*

Utah did not include appendix B of the "Vegetation Information Guidelines" in its amendment. Utah must formally submit this appendix.

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- 21. Vegetation Information Guidelines 30 CFR 816.116(a)(1)

Although the "Vegetation Information Guidelines" do provide revegetation success standards and specific vegetation sampling techniques as required under 30 CFR 816.116(a)(1), OSM identified

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Needs statement (attached) p1, 2, 3

deficiencies in the guidelines as follows.

The "Reference Areas" subsection (1.a.) of the "Methods" section states that "a revegetation success standard must still be established for revegetation types less than 1 acre in size; however, the guidelines do not state what this standard is or how it will be determined. Utah must identify the success standards for vegetation types that are less than 1 acre in size.

The "Methods" section under part 2 discusses the use of "range sites" for determining revegetation success. The discussion does not address the size criteria to be used to determine revegetation success standards for the range sites. Utah must provide this information.

The "Sample Adequacy" section of appendix A states that "a maximum sample size is also listed for each method that is only applicable for establishing vegetation reference areas." Technically, setting a maximum limit on the size of samples defeats the purpose of using a sample-adequacy formula. Therefore, this discussion of maximum sample size should be deleted from the guideline.

22 *Don* R614-301-728

*Need to develop
statement (attached)*

30 CFR 780.21(f)
30 CFR 784.14(e)



In response to the remand of these regulations in In re: Permanent Surface Mining Regulation Litigation II (July 15, 1985), OSM has largely retained the language promulgated on September 26, 1983, but has revised the preamble (53 FR 36394, September 19, 1988) to clarify that a probable hydrologic consequences (PHC) determination must address all mining activities associated with the permit area for which authorization is sought, not just those expected to occur during the term of the permit. If Utah places temporal rather than spatial limitations on the coverage of the PHC determination, it will need to revise the wording of Rule R614-301-728 accordingly. However, if Utah provides a written statement of policy to the effect that it will interpret its provisions in a manner identical to that of the revised preamble, no wording changes to this rule will be necessary.

23. R614-301-733.210

30 CFR 780.25(c) ✓
30 CFR 784.16(c)

R614-301-533.100

30 CFR 816.49(a)(3)
30 CFR 817.49(a)(3)
53 FR 43584, October 27, 1988

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These Federal regulations require that all structures that (1) impound coal-mine waste, (2) meet the criteria of 30 CFR

77.216(a), or (3) are located where failure would be expected to cause loss of life or serious property damage be designed, constructed, and maintained to have a minimum seismic safety factor of 1.2 and a minimum static safety factor of 1.5 for the normal pool with steady-state seepage saturation conditions. Impoundments not meeting the size or other criteria of 30 CFR 77.216(a), except for coal-mine waste, and located where impounding structure failure would not be expected to cause loss of life or serious property damage must be designed, constructed, and maintained to have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions. To be no less effective than the Federal regulations, Utah must amend its program to include these provisions.

24. R614-301-742.222, .223

30 CFR 816.46(c)(2)
30 CFR 817.46(c)(2)

R614-301-743.130, .300

30 CFR 816.49(a)(8), (c)(2)
30 CFR 817.49(a)(8), (c)(2)
53 FR 43584, October 27, 1988

These Federal regulations include revised spillway design requirements for siltation structures and impoundments. To be no less effective than the Federal regulations, Utah must amend its program to include these requirements.

25. R614-301-742.412
R614-301-527.230

30 CFR 816.150(e)

The Federal regulations require that the permittee maintain roads to meet the performance standards and any additional criteria established by the regulatory authority. They also require that, in the event of damage due to a catastrophic event, a road be repaired as soon as practicable after the damage has occurred. To be no less effective than the Federal regulations, the Utah program must be amended to include these requirements for all road classifications.

26. R614-301-742.423.1
R614-301-742.423.4

30 CFR 816.151(d)
30 CFR 817.151(d)

The Federal regulations require that each primary road be constructed or reconstructed and maintained to provide adequate control of surface-water drainage. This drainage-control system shall be designed to safely pass the peak runoff from a 10-year, 6-hour or greater precipitation event. The proposed Utah submittal requires use of this standard "unless otherwise specified by the Division." To be no less effective than the Federal regulations, Utah must revise its proposed amendment to specify that the 10-year, 6-hour precipitation event is the standard for road drainage control systems unless a greater event

is specified by the regulatory authority.

27. R614-301-743.130, .200

30 CFR 816.49(a)(8)(ii)
30 CFR 817.49(a)(8)(ii)
53 FR 43584, October 27, 1988

These Federal regulations require that spillway design event standards for impoundments be consistent with those of 30 CFR 816.46(c)(2) and 30 CFR 817.46(c)(2). The previous Federal regulations at 30 CFR 816.49(b)(7) and 30 CFR 817.49(b)(7), which required that permanent impoundment spillways be designed and constructed to pass the peak runoff from the 50-year, 6-hour precipitation event, have been removed. Utah's proposed rule at R614-301-743.200 allows spillways for permanent impoundments meeting the criteria of 30 CFR 77.216(a) to be designed to pass the peak runoff from the 50-year rather than the 100-year storm. To be no less effective than the Federal regulations, Utah must amend its program to require the 100-year storm design standard.

28. R614-301-746.312

30 CFR 816.84(b)(2)
30 CFR 817.84(b)(2)

These Federal regulations require that structures meeting the criteria of 30 CFR 77.216(a) and either constructed of coal-mine waste or intended to impound coal-mine waste have sufficient spillway and/or storage capacity to safely pass or control the runoff from the probable maximum precipitation of a 6-hour or greater precipitation event or of a larger event as specified by the regulatory authority. To be no less effective than the Federal regulations, Utah must amend its program to include this requirement.

29. R614-301-746.340

30 CFR 816.84(f)
30 CFR 817.84(f)

The Federal regulations specify that, for impounding structures constructed of or impounding coal mine waste, at least 90 percent of the water stored during the design precipitation event be removed within 10 days following that event. Utah's formal submittal contains only design drawdown requirements. Therefore, to be no less effective than the Federal regulation, Utah needs to revise its program to include a performance standard requiring actual drawdowns.

30. R614-301-762

30 CFR 816.150(f)
30 CFR 817.150(f)

The Federal regulations require that roads that are not to be retained as part of the approved postmining land use be reclaimed in accordance with the approved reclamation plan as soon as practicable after they are no longer needed for mining and reclamation operations. The Utah submittal includes most of the

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specific provisions of these regulations; however, to be no less effective, Utah must require that road reclamation include the removal or disposal of road-surfacing materials that are incompatible with postmining land use and revegetation requirements.

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31. R614-302-270
R614-302-271

30 CFR 785.16

OSM suspended 30 CFR 785.16 in response to the District Court decision (In re: Permanent Surface Mining Litigation II, July 15, 1985 Mem. op. at 132) insofar as it authorized variances from approximate original contour for surface coal mining operations in areas which were not steep slope areas. Utah's proposed rule at R614-302-271 does not specify that this variance from AOC is only allowed for operations in steep slope mining areas. To be consistent with the court decision, Utah must revise its proposed amendment to allow variances from AOC only for operations in steep slope mining areas.

32. R614-402-210 and 420

30 CFR 846.12
30 CFR 846.17

There appears to be an inconsistency between proposed civil penalty rules at the R614-401 rules and the proposed individual civil penalty rules at R614-402. Under the proposed R614-401 rules, DOGM would assess civil penalties and the Board would hear appeals on them. Under the proposed R614-402 rules, the Board would both assess and hear appeals on individual civil penalties. For consistency of procedures between the proposed rules at R614-402-210 and 420, Utah should revise Rule R614-402 to indicate that DOGM will assess individual civil penalties. In addition, there is a potential conflict of interest when the Board hears appeals of its own penalty assessments. Utah should revise proposed Rule R614-402 to be consistent with the separation of duties indicated in proposed Rule R614-401.

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Ownership and Control (53 FR 38868, October 3, 1988)

A-1. No State counterpart

30 CFR 773.5

This Federal regulation defines the phrases "owned or controlled" and "owns or controls." Utah must amend its program to include similar definitions or other provisions ensuring that these terms will be interpreted in a manner no less effective than this Federal regulation.

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R614-300-100

A-2. R614-300-132.100

30 CFR 773.15(b) (1)

This Federal regulation prohibits the issuance of a permit without conditions where the applicant, any person owned or controlled by the applicant, or any person who owns or controls the applicant is currently in violation of SMCRA, any State or Federal law or regulation enacted pursuant to SMCRA, or any State or Federal laws, rules, or regulations pertaining to air or water environmental protection. (With respect to the last category, only violations incurred in connection with a coal mining operation need be considered.) The Federal regulation similarly prohibits permit issuance when the parties listed above owe delinquent civil penalty or abandoned mine land reclamation (AMLR) fees or when they have forfeited bond and the underlying violations have not been corrected.

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Utah's proposed amendment does not contain counterparts to the underlined language and the provisions concerning civil penalties, AMLR fees and bond forfeitures. Therefore, the program must be amended to include equivalent prohibitions.

The Federal regulation also establishes the conditions under which a violation may be presumed as being corrected to the satisfaction of the agency with jurisdiction over the violation. If DOGM wishes to use a similar presumption, it must amend its program to include restrictions no less effective than those of the Federal regulation.

A-3. R614-300-132.120

30 CFR 773.15(b) (1) (ii)

This Federal regulation previously allowed issuance of a permit if the permit applicant was pursuing a direct administrative or judicial appeal to contest the validity of a violation that would otherwise preclude issuance. The regulation has been revised to require that, if the initial judicial review authority affirms the violation, the applicant shall, within 30 days of that action, submit proof that the violation has been or is being corrected in a satisfactory manner. The Federal regulation previously required only that this proof be submitted "promptly" rather than "within 30 days" as required in the revised regulation.

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The proposed amendment includes language similar to the superseded Federal regulation and thus will need to be revised to reflect this change to be no less effective.

A-4. R614-300-132.200

30 CFR 773.15(b)(2)

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This Federal regulation specifies that any permit issued in a situation where a person is in the process of either correcting or appealing an outstanding violation shall be issued solely on a conditional basis. Utah's proposed amendment does not require conditional issuance in this case. To be no less effective than the Federal regulation, Utah must add this provision.

A-5. R614-300-132.300

30 CFR 773.15(b)(3)

This Federal regulation extends the prohibition on permit issuance to situations where the operator specified in the application or anyone who owns or controls the applicant, controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations of such nature and duration and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the program. Utah's proposed rule does not prohibit permit issuance under these situations. To be no less effective than this Federal regulation, Utah must revise its program to include this expanded prohibition.

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Permit Information Requirements (53 FR 8982, March 2, 1989)

B-1. No State counterpart

30 CFR 773.15(e)

This Federal regulation requires that, after application approval but prior to permit issuance, the regulatory authority reconsider its approval based on a review of any new violations and compliance information submitted pursuant to 30 CFR 778.13(i) and 778.14(d). To be no less effective than the Federal regulations, Utah must amend its program to include these requirements.

B-2. No State counterpart

30 CFR 773.17(i)

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This Federal regulation requires a new condition which must be included in each permit issued. The condition requires that, in the absence of a legal stay, within 30 days after issuance of a cessation order for operations conducted under the permit, the permittee notify the regulatory authority of any changes that have occurred in the ownership and control information submitted at the time of application (as required by 30 CFR 778.13(c)) or since submittal of the last update of this information. For existing permits, if this information was not submitted at the time of application, it must be supplied within 30 days of issuance of the cessation order. In either case, if no change has occurred, the condition requires that the permittee supply a

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statement to that effect. Utah must amend its program to include this requirement to be no less effective than the Federal regulation.

B-3. R614-301-112.200

30 CFR 778.13(b)

The Federal regulation requires that the information requirements apply to the person who will pay the AMLR fees, not just to the applicant and the applicant's resident agent. In addition, the Federal regulation requires that the permit application include these persons' employer identification numbers and specifies that the regulatory authority must request their social security numbers, although compliance with the request is voluntary. To be no less effective than the Federal regulations, Utah must amend its program to include these requirements.

B-4. R614-301-112.300

30 CFR 778.13(c)

This Federal regulation applies to each person who owns or controls the applicant, as defined at 30 CFR 773.5. It requires that the application include the employer identification number of each such person. The regulatory authority also must request the social security number of each such person, although compliance with the request is voluntary.

In addition, the Federal regulation requires that the application include certain information pertaining to each such person's:

- o Ownership or control relationship to the applicant, including percentage of ownership and location in the organizational structure;
- o Position title, date assumed and, pursuant to 30 CFR 773.17(i), date of departure;
- o Additional names or numbers (employer identification number, Federal or State permit number, and MSHA number with date of issuance) under which the person owns or controls a surface coal mining and reclamation operation or, within the 5 years preceding the date of application, previously owned or controlled such an operation; and
- o Pending permit applications, as required by former paragraph (d).

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To be no less effective than the Federal regulations, Utah must require all of this information for all persons who own or control the applicant.

B-5. No State counterpart

30 CFR 778.13(d)

This Federal regulation requires that, for any surface coal

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mining and reclamation operation owned or controlled by either the applicant or any person who owns or controls the applicant, the permit application include the operation name, address, identifying numbers (including the employer identification number, Federal or State permit number, and MSHA number), the date of issuance of the MSHA number, and the name of the regulatory authority. In addition, the application must specify the operation's ownership or control relationship to the applicant, including the percentage owned by the applicant or person who owns or controls the applicant, and the applicant's or other person's location in the operation's organizational structure.

To be no less effective than the Federal regulations, Utah must revise its program to include these information requirements.

B-6. No State counterpart

30 CFR 778.13(i)

*working under review
R6-301-112.9d*

This Federal regulation specifies that, after an applicant is notified that his or her application is approved, but before the permit is issued, the applicant shall, as applicable, update, correct, or indicate that no change has occurred in the ownership and control and applicant identification information submitted with the application (i.e., the information required by paragraphs (a) through (d) of this section).

To be no less effective than the Federal regulations, Utah must amend its program to include these requirements.

B-7. No State counterpart

30 CFR 778.13(j)

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R6-301-112.9d*

This Federal regulation requires that the applicant submit the information required by 30 CFR 778.13 and 778.14 (identification of interest and violation and compliance information) in any format prescribed by OSM.

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To be no less effective than the Federal regulations, Utah must amend its program to include this requirement.

B-8. R614-301-113

30 CFR 778.13(c)

This Federal regulation has been revised by adding language requiring that each permit application include a list of all unabated cessation orders and unabated air or water quality violation notices received prior to the date of the application by any surface coal mining and reclamation operation owned or controlled by either the applicant or any person who owns or controls the applicant. The regulation continues to require that the application include a list of all violation notices (not just cessation orders) received by the applicant during the 3-year period preceding the application date. In addition, the list of information required for each violation notice or cessation order

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has been expanded to include the identifying numbers for the operation (including, at a minimum, the Federal or State permit number, and MSHA number), the date of issuance of the notice or order and the MSHA number, and the name of the person to whom the notice or order was issued.

To be no less effective than the Federal regulation, Utah must amend its program to include these requirements.

B-9. No State counterpart 30 CFR 778.14(d)

This Federal regulation requires that, after an applicant is notified that his or her application is approved, but before the permit is issued, the applicant, as applicable, shall update, correct, or indicate that no change has occurred in the information previously submitted under this section.

To be no less effective than the Federal regulation, Utah must amend its program to include this requirement.

B-10. No State counterpart 30 CFR 843.11(g)

This Federal regulation requires that, within 60 days of the issuance of a cessation order, the regulatory authority notify all owners and controllers identified pursuant to 30 CFR 778.13(c).

To be no less effective than the Federal regulation, Utah must amend its program to include a procedural requirement similar to that in the Federal regulation.

Permit Rescission (53 FR 18438, April 28, 1989)

C-1. No State counterpart 30 CFR 773.20

This Federal regulation establishes criteria for determining when a permit has been improvidently issued. The regulation also requires that the regulatory authority (1) review a permit whenever it has reason to believe that the permit has been improvidently issued and (2) take certain remedial measures if it determines that the permit has been so issued.

To be no less effective than the Federal regulation, Utah must amend its program to include these provisions.

In addition, Utah should note that the meaning of the term "violations review criteria" as used in 30 CFR 773.20(b)(1) will vary depending on the date of issuance of the permit on which the violation occurred. It will also vary depending upon whether the regulatory authority issuing that permit was a State or Federal entity. Furthermore, it is not necessarily confined to the criteria established in R614-300-132, the State counterpart to 30

CFR 773.15(b). The preamble to this regulation (54 FR 18438, April 28, 1989) contains an extensive discussion of this matter and should be consulted for further details.

C-2. No State counterpart

30 CFR 773.21

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This Federal regulation specifies the procedures to be followed in rescinding improvidently issued permits. To be no less effective than the Federal regulation, Utah must include the same or similar procedures in its program.

R614-380-164

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EXHIBIT "Y"

II-732

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United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement

WASHINGTON, D.C. 20240

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ALBUQUERQUE FIELD OFFICE

Dianne R. Nielson, Ph.D.
Department of Natural Resources
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, Utah 84180-1203

Dear Dr. Nielson:

Enclosed is a list of Utah regulations that the Office of Surface Mining Reclamation and Enforcement (OSM) has determined are now less effective than or inconsistent with the Federal regulations promulgated between June 9, 1988, and August 30, 1989. I appreciate your review of the proposed list of required changes sent to your office on July 18, 1989, and the comments included in your response dated August 16, 1989. While we agree that amendments required by this letter should be processed separately from Utah's rewritten coal rules, please note that the enclosed list has been modified to address all provisions contained in the August 11, 1989, formal submittal. *But not the 11/9/89 letter.*

For those items identified as needing further revision, 30 CFR 732.17(f)(1), requires that you submit to this office, within 60 days of this letter, either proposed written amendments or a description of the proposed amendments, and a timetable for enactment. This description may be as brief as a statement concurring with the enclosed list or it may include other explanatory material. The timetable should include a schedule of State rulemaking procedures and dates by which you intend to submit the amendments.

If you have any questions or if OSM can be of additional assistance, please contact Mr. Robert Hagen, Director of the Albuquerque Field Office.

Sincerely,

Acting W. Hord Tipton

Deputy Director
Operations and Technical Services

Enclosure

bcc: OSM Record; OSM Reading(2)
DRP Record; RDIM; AD/PP; Director; DD/OTS
Director, Albuquerque FO; AD/WFO, SOL/DSM
DRP:BSP:FFOX:dw:11/21/89 SFP-3-1 wp(Utah.P3)
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D. Roads and Support Facilities

(53 FR 45190, November 8, 1988)

D-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. However, such activities are subject to the performance standards applicable to the construction process. Utah's August 11, 1989, submittal deletes the reference to pioneer roads and revises the definition to include language similar to the Federal rule. ✓

However, Utah's proposed definition of "road" includes language regarding public roads inconsistent with the Federal regulations. The proposed definition provides for an "evaluation" of mining-related and public uses. Besides being inconclusive, this proposed "evaluation" does not include decision criteria or adequately address the remand of the definition of "affected area" in In re: Permanent Surface Mining Regulation Litigation II (Civil Action No. 79-1144 D.D.C., July 15, 1985). In order to comply with the court decision, Utah must retain its current definitions of "road" and "affected area" (without the language previously disapproved) or redefine these terms to clearly require that every road which is part of the mining operation to be permitted and regulated regardless of whether it is a "public" road. The court has ruled that a road experiencing substantial public use may not be excluded from regulation on that basis alone; rather, the decision must consider the impact of mining-related use on the road. 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 are required for non-public roads within the permit area. Such roads would still have to meet the other three criteria for classification a public road.

D-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 Federal rules require that the permit application include plans and drawings containing certain specific information for each road to be constructed, used or

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

ALBUQUERQUE FIELD OFFICE

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MODIFICATION BY EMERGENCY RULEMAKING REGARDING UTAH ADMIN. R. 614-100-200, DEFINITIONS OF "ROAD" AND "PUBLIC ROAD"	:	NOTICE OF EMERGENCY RULEMAKING
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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 B. Williams, Chairman
Board of Oil, Gas and Mining

Attachment A

Definition of "Road"

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

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

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

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

ATTACHMENT B

Definition of "Public Road"

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

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

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

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



State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

Norman H. Bangertter

Governor

Dee C. Hansen

Executive Director

Dianne R. Nielson, Ph.D.

Division Director

355 West North Temple

J 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

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 oaf 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.



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

Lowell
file roads

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

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

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

RH
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:

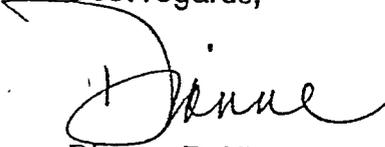
1. The section-by-section comparison is presented in Attachment 2.
2. This sub-section is included in the section-by-section comparison.
3. The requirement for change is stated above. The Division cannot perform the required reviews of roads and public road exemptions without the definitions of "road"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



Dianne R. Nielson
Director

vb
Attachments
MI84/1&2



EXHIBIT "L"

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:

March 5, 1991

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 (OSM) has reviewed the Division of Oil, Gas and Mining (DOGGM) November 8, 1990, draft policy for regulation of coal mining roads and has the following comments:

Background

Most of the coal mines in Utah have access and haul roads that are not permitted because DOGM has classified these roads as public roads. In July 1985, a Federal Court ruled that categorical exclusion of public roads from regulation was inconsistent with Section 701(28) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). On December 3, 1985, OSM disapproved a proposed State program amendment to the extent that it included such an exclusion. OSM has been working with DOGM since 1985 to get the appropriate roads permitted. However, no agreement has yet been reached. OSM has deferred action on the last amendment submitted by DOGM until such time when an acceptable policy is developed. A draft Federal Register notice announcing this decision is presently undergoing agency review.

Present Approved State Program Provisions

Those provisions of the approved Utah Coal Regulatory Program that specifically address access and haul roads are the following definitions in R614-100-200:

Affected area. This term "means any land or water surface which is used to facilitate, or is physically altered by, coal mining and reclamation operations." This area "includes all areas covered by new or existing roads used to gain access to or for hauling coal from coal mining and reclamation operations * * *;"

Coal mining and reclamation operations. This term "means (a) activities conducted on the surface of lands in connection with a surface coal mine * * * or surface impacts incident to an underground mine; * * * and (b) the areas upon which the activities described under part (a) of this definition occur or where such activities disturb the natural land surface. These areas * * * 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 those activities and for the haulage and excavation * * *;" and

Roads. "The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal mining and reclamation operations * * *."

Please note that Utah's regulations (R614-100-200), as promulgated and published by the State, contain the following statement regarding the definition of roads:

"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 * * *."

The Director of OSM, in the Federal Register notice of April 12, 1990, disapproved this exemption.

R614-300-112.400 requires that "all persons who engage in and carry out coal mining and reclamation operations will first obtain a permit." The permit area, as defined at R614-100-200, "means the area of land * * * which will include the area of land upon which the operator proposes to conduct coal mining and reclamation operations under the permit * * *." Therefore, the State program, as presently approved, not only provides the authority to regulate coal mining access and haul roads, it requires regulation of such roads.

To determine whether Utah has abused its discretion in its decision to regulate or not regulate a particular road, OSM must rely on the approved State program and: (1) The definition of surface coal mining operations in Section 701(28) of SMCRA; (2) the Federal regulations and guidance in the preambles to the Federal regulations; and (3) the guidance in any court decisions interpreting the Act and regulations.

Summary of Draft DOGM Policy

As stated on its first page, the draft policy provides

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 * * *. If such a road is determined to be a "public road," it will not be subject to permitting under the program.

Under proposed procedures summarized on the same page of the draft policy, roads associated with existing and proposed mining and reclamation plans would be evaluated on a case-by-case basis. DOGM would first

[i]dentify 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.)

For roads that meet this threshold criterion, DOGM would then

[c]onsider the status or use of the road with respect to [four other] criteria.

Current OSM Interpretation

Under Section 701(28) of SMCRA and a corresponding provision of the Federal regulations at 30 CFR 701.5, "surface coal mining operations" subject to the requirement for a permit 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 its regulatory definition of the term "affected area" at 30 CFR 701.5, OSM originally interpreted Section 701(28) of SMCRA as excluding certain public roads. However, the definition of "affected area" was successfully challenged in In re: Permanent Surface Mining Regulation Litigation (In re: Permanent), 620 F. Supp. 1519, 1581-82 (D.D.C. 1985), modified sub nom., National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir.).

Pursuant to court order in that case, on November 20, 1986 (51 Federal Register 41953), OSM suspended the definition of "affected area" "to the extent that it excludes public roads which are included in the definition of 'surface coal mining operations.'" OSM said,

The suspension will have the effect of including in the "affected area" 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 regulated activities or for haulage.

Thus, in determining which mine-related roads potentially are subject to permitting, OSM currently relies on the applicable language of the definition of "surface coal mining operations" at Section 701(28) of SMCRA and the corresponding provision of the Federal regulations at 30 CFR 701.5. Consistent with the court's decision in In re: Permanent and OSM's November 20, 1986, suspension notice, this potentially includes certain public roads.

Threshold Criterion

For the following reasons, DOGM's threshold criterion is not in accordance with SMCRA or consistent with the Federal regulations or the approved State program.

First, the procedure to "[i]dentify all roads, located within the boundary of the permit area and providing access to the permit area" presumes that the boundaries of the permit area are known in advance. In fact, as the ultimate purpose of applying the threshold criterion is to determine the boundaries of the permit area as it relates to roads, it is not possible to specify this boundary in advance.

Second, DOGM's threshold criterion is directed only at road "use." It fails to account for road construction and improvement. This is not in accordance with the definition of "surface coal mining operations" at Section 701(28) of SMCRA, consistent with 30 CFR 701.5 of the Federal regulations, or consistent with the approved State program.

Third, DOGM's threshold criterion is directed only at those roads "providing access to the permit area," whereas SMCRA, the Federal regulations, and the State program encompass both "access" and "haulage."

Remaining Criteria

As discussed previously, OSM interprets the definition of "surface coal mining operations" at Section 701(28) of SMCRA as potentially including certain public roads. The remaining criteria of the draft policy, however, would exclude from the requirement for a permit any "public road." This approach is not in accordance with SMCRA or consistent with either the Federal regulations or the approved State program.

DOGM appears to base this deference to a road's "public" status on the decision of the United States District Court for the Western District of Virginia in Harman Mining Corp. v. OSMRE, 659 F. Supp. 806 (W.D. Va. 1987), and the related Interior Board of Land Appeals (IBLA) decision in Harman Mining Corp. v. OSMRE, 110 IBLA 98. In view of In re: Permanent, however, in which the United States District Court for the District of Columbia determined that OSM's definition of "affected area" improperly excluded from regulation some public roads which are included in the SMCRA definition of "surface coal mining operations," OSM cannot accept DOGM's narrow reading of either of these Harman decisions as dispositive of the issue. Instead, OSM is constrained to apply these decisions only to the limited factual context considered by the court and the IBLA.

Conclusion

Under DOGM's draft policy, it would appear that very few, if any, coal mining access and haul roads in the State would be subject to the requirement for a permit. For the above reasons, this exclusion of "public roads" is unacceptable to OSM.

It is not OSM's intention to extend regulatory jurisdiction into the existing public road network where the use of that road is only incidental to the coal mining operation, and the effect from the mining-related use is relatively minor. 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.

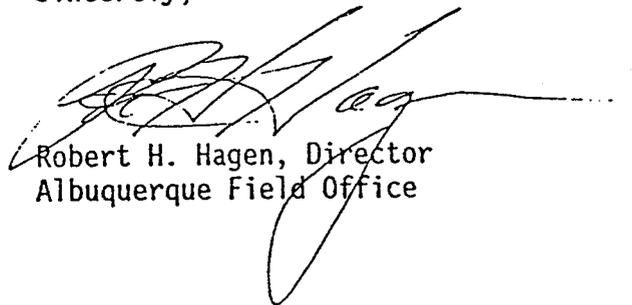
As stated earlier, OSM believes that there is adequate authority and a regulatory obligation for DOGM to proceed with permitting access and haul roads in accordance with the approved State program. While policy guidance would facilitate DOGM's regulatory activities, it is not a prerequisite to regulation. OSM will continue to work with DOGM on a

Dr. Dianne R. Nielson

6

policy; however, OSM will also, at the time of an inspection, notify the State whenever OSM has reason to believe that a violation of the approved State program regarding permitting of access and haul roads exists.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. H. Hagen', with a long horizontal line extending to the right.

Robert H. Hagen, Director
Albuquerque Field Office



United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement

WASHINGTON, D.C. 20240



JUN 4 1991

JUN 20 1991

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

Dear Dr. Nielson:

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

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

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

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

case-by-case basis by the regulatory authority relying on the plain language of the State program counterpart to the definition of "surface coal mining operations" under section 701(28)(B) of the Surface Mining Control and Reclamation Act (SMCRA). The Utah counterpart at 40-10-3.(18)(b) is identical to the definition in section 701(28)(B) of SMCRA. Both definitions specifically state that surface coal mining operations include "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage...."

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

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

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

Dianne R. Nielson, Ph.D.

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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

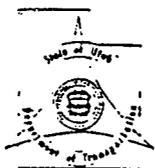
Nina Rose Hatfield
Assistant Deputy Director
Operations and Technical Services

Carl C. Close
Assistant Director, Eastern Support Center

Raymond Lowrie
Assistant Director, Western Support Center

Joel Yudson
Assistant Solicitor, Regulatory Programs

EN/PR/LRP/29



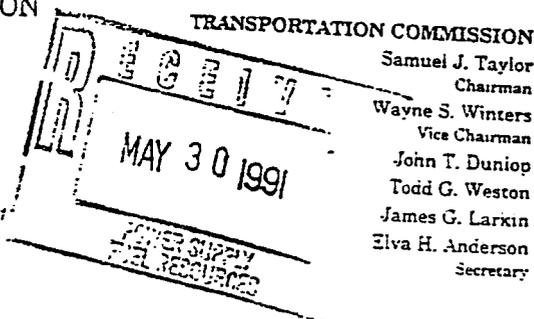
State of Utah

UTAH DEPARTMENT OF TRANSPORTATION

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

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

May 24, 1991



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

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

Dear Sirs,

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

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

Respectfully yours,

Archie Hamilton
L. Archie Hamilton
Asst. District Director

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