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August 18, 2006

John R. Baza
Division Director
Division of Oil, Gas, and Mining
1534 West North Temple, Suite 1210
P.O. Box 145801
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Incoming
C/041/0002

Jerry D. Olds, P.E.
Utah State Engineer
P.O. Box 146300
Salt Lake City, UT 84114-6300

RE: Material Damage Finding, North Water Spring (Pines 105), Canyon Fuel Company, LLC, SUFCO Mine, C/041/0002

Dear Mssrs. Baza and Olds:

The Emery Water Conservancy District Board of Trustees requested that we write to you concerning correspondence dated May 22, 2006 from the Utah Division of Oil, Gas, and Mining drafted by D. Wayne Hedberg, and sent to Canyon Fuel Company, LLC. The Board of Trustees includes representatives from Huntington-Cleveland Irrigation Co., Cottonwood Creek Consolidated Irrigation Co., Ferron Canal and Reservoir Co., Muddy Irrigation Co., and three at-large representatives, thus representing all of the irrigation companies and other water users in Emery County. The Board had several areas of concern with the May 22 letter, as summarized below. A copy of letter, with the attachment referred to in the letter, is enclosed.

The Board's first concern involves the water rights section of the May 19, 2006 Technical Memorandum attached to Mr. Hedberg's letter. Mine subsidence has apparently interfered with and stopped the flow of North Water spring in the Muddy Creek drainage. The Technical Memorandum, authored by Steve Fluke, contains this paragraph:

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WATER RIGHTS

> No State-appropriated water rights are currently adjudicated for the North Spring. I met with Emily McMurtrey of the Utah Division of Water Rights to discuss the water rights in the Emery allotment area. According to Ms. McMurtrey, it appears that the individual water rights for the Emery allotment are combined in Supplemental Group No. 618240 for the use of stock watering a total of 1,367 stock units. For some unknown reason, the North Water spring was not included in the 1981 inventory for this group. Because the North Water spring is not State-appropriated water, then R645 rules requiring replacement of water rights do not apply (R645-731.800).

This paragraph causes concern for several reasons. First, many springs are tributary to the Muddy Creek and other streams that furnish water to District water users. The relevant basin is designated as being fully appropriated. The appropriated rights of water users in this basin do not require that each spring or stream be designated as a source of the appropriated rights, as long as these sources are tributary to Muddy Creek. This concept is well recognized in Utah water law. An extensive analysis of this very concept is found in *Salt Lake City v Silver Fork Pipeline Corporation*, 2000 UT 3, 5 P.3d 1206.

The technical memo does not discuss whether the water source that feeds North Water spring is tributary to Muddy Creek. Without such an analysis, the conclusion reached in the memo may be incorrect. The Board requests that more complete analysis be made by Division of Water Rights before information is provided to DOGM in addressing water rights interference questions in the future.

Second, the District is concerned whether the District or other water users must file appropriations for each such spring or source that may be tributary to the respective streams and rivers in Emery County in order to protect already perfected downstream rights. The Board is concerned that such a concept was followed in this instance. A similar concept was recently presented by a representative of the Water Rights regional office, stating that "a water right begins at the point of diversion." If this is the policy of the Division of Water Rights, the District may need to identify each tributary source to the streams from which its rights are diverted and file applications to appropriate as a protective measure. As noted above, such a concept seems to be contrary to long-standing Utah law.

Third, the rule referred to in this paragraph, R645-731.800, does not currently appear in the Utah Administrative Code. We are therefore not able to identify the rule relied on by the author of the technical memo to exempt water rights replacement in this instance.

Finally, the paragraph reflects use of a different procedure than contemplated in the

Memorandum of Understanding between Water Rights and Oil, Gas, and Mining. If the above paragraph correctly reports the interaction between your offices, the Board is concerned that the written-request/written-response procedures in the MOU were not followed in this instance. The MOU between your divisions allows for a procedure for written exchange of information that would assure a more complete analysis and public review of that process. The District Board requests that the prescribed procedure be followed in the future.

It appears that the water from North Water springs intercepted by the surface cracking will now discharge into a different drainage basin than the Muddy Creek drainage. The SUFCO Mine report entitled "Mine Water Discharge at UPDES 003A - North Fork of Quitchupah Creek," the mining operation that caused the surface cracking in this instance, shows that discharges from the portal have increased from 63.0 acre feet per month in May, 1994 to 473.8 af/month in May, 2006. Other months have shown even higher flows, with a flow of 584.1 af in July, 2004. The mine appears to be intercepting flows that would otherwise contribute to the flow of Muddy Creek. The District board members are deeply concerned about the cumulative effect of such large transbasin diversions. In the *Silver Fork* case, the Utah Supreme Court said:

> If nearly .5 c.f.s. of water intercepted in the mine would naturally flow into the creek but for the existence of the mine, it is reasonable to infer that Salt Lake has suffered, or will eventually suffer, a diminution in its water right of approximately 362 acre-feet of water each year. This evidence is sufficient to support the trial court's finding of substantial interference.

2000 UT 3, ¶28. The discharge from May, 1994 has increased from 1.02 cubic feet per second to 7.71 cfs in May, 2006. If the Utah Supreme Court found "substantial interference" in only .5 cfs and 362 acre feet per year, there is cause for concern here.

Finally, the letter from Mr. Hedberg imposes no time limitations for implementation of either the temporary or permanent mitigation plans. The letter sets deadlines for submitting the mitigation plans, but not for the mitigation activity. The loss of water from one drainage to another suggests that rather aggressive schedules should be imposed on the mine operator.

The Water Conservancy District welcomes discussion on these concerns and invites your response. We are encouraged that both of you and the staff in your respective divisions have been attentive to the concerns of water users, as evidenced by the November 18, 2005 Memorandum of Understanding. Even though the MOU clearly states that it creates no rights enforceable by any party, it still provides a useful framework for interest parties such as the District.

We request that you contact Jay Mark Humphrey, manager of the Emery Water

Conservancy District, at (435) 381-2311, or respond in writing either to me or directly to Mr. Humphrey. Thank you for your addressing our concerns.

Sincerely yours,

WADDINGHAM & PETERSON, P.C.

Warren H. Peterson

WHP/lh

Enclosure

cc Michael R. Styler

COPY

MEMORANDUM OF UNDERSTANDING

BETWEEN

UTAH DIVISION OF OIL, GAS AND MINING

AND

UTAH DIVISION OF WATER RIGHTS

FOR

COAL MINING OPERATIONS

Utah Department of Natural Resources, Division of Oil, Gas and Mining ("DOGM") and Division of Water Rights ("DWRi") hereby revise the Memorandum of Understanding dated January 21, 1980, effective this 18th day of Nov. 2005.

ARTICLE I - PURPOSE

This Memorandum of Understanding provides an operating agreement by which DOGM and DWRi shall execute their respective responsibilities concerning regulation of the environmental impacts of surface and underground coal mining operations in the State of Utah to: avoid duplicative efforts; work in close coordination; and respond to mutual issues in a timely manner.

This is an agreement with the sole intent of coordinating permitting, compliance and enforcement activities, and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in any administrative proceeding or litigation with the state, nor does it relieve any entity from their obligation in acquiring necessary permits or approvals from the agencies party to this agreement.

ARTICLE II - POLICY

DOGM is the designated regulatory authority for the State of Utah responsible for implementation and enforcement of a statewide program for the regulation of coal mining and reclamation operations under Utah Coal Mining and Reclamation Act, Utah Code Ann. §§ 40-10-1 et seq., (2005) and regulations at R645-1 et seq., Utah Administrative Code (2005). DWRi is the designated regulatory authority for the State of Utah responsible for the appropriation and distribution of water (surface and underground), dam safety, stream alteration, well drilling, and other water right activities under Utah Code Ann. §§ 73-1 to -6 (2005) and regulations at Utah Administrative Code R655-1 et seq. (2005).

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It is the mutual desire of DOGM and DWRi to work in harmony for the common purpose of assisting the public and carrying out the statutory mandates of DOGM and DWRi.

ARTICLE III - ADMINISTRATION

A. Permit Reviews

1. Upon submission of an administratively complete application for a permit or a change to an approved coal mining and reclamation plan to DOGM, DOGM will notify DWRi.

2. If DWRi requires additional information, DWRi will contact DOGM for such information.

3. DWRi will review state appropriated water rights within the permit area.

4. DWRi will assist DOGM in identifying potential impacts to state appropriated water from the proposed coal mining activities.

B. Inspections/Citizen Complaints

1. DOGM shall perform the requisite compliance inspections at each mine site. DOGM and DWRi will work cooperatively to share inspection information, as necessary. If there are safety issues involving a dam or pond encountered during a DOGM compliance inspection, DOGM will notify DWRi. Conversely, if DWRi notes any issues during a dam safety inspection, DWRi will notify DOGM.

2. Other than Claims of Impact to Water Rights, Section C (below), citizen complaints relative to stream alterations, well drilling and dams will be directed to DWRi.

C. Claims of Impact to Water Rights

1. When a party claims coal mining and reclamation operations have impacted their water rights, DOGM may advise the permittee and request the permittee to provide a prompt reply to the claim. DOGM will then investigate the claim and may submit a written request to DWRi for a

written determination from DWRi of the potentially affected parties and the nature and status of the water rights. If DOGM determines that the coal mining or reclamation operations have interrupted, diminished or contaminated a state appropriated water right, DOGM will notify DWRi and will advise DWRi of the permittees' proposed actions to replace any impacted state-appropriated water rights.

When DOGM requests assistance from DWRi with claims of impact, DOGM will clearly state, in writing, the timeline for response according to the coal rules. DWRi will use its best efforts to provide a written response within the time requested.

D. Water Rights Applications

1. When DWRi receives water rights applications involving mining operations, DWRi will notify DOGM and will consult with them to ensure applicable DOGM regulations are followed and appropriate environmental protection methods are incorporated.

2. DWRi will notify DOGM of citizens' claims of impacts to a water right by a coal mining and reclamation operation.

E. Stream Alterations

1. When a mine application involves activities in or near a natural stream regulated by DWRi as per Utah Code Ann. § 73-3-29 (2005) and Utah Admin. Code R655-13 (2005), pertaining to Stream Alterations, DOGM will notify DWRi and consult with them to ensure that appropriate approvals are obtained and that the regulations in those sections are followed.

2. When DWRi receives a stream alteration application that involves mining operations, DWRi will notify DOGM and will consult with them to ensure applicable DOGM regulations are followed and appropriate environmental protection methods are incorporated.

F. Well Drilling

1. When a mine application involves well drilling activities that are regulated by DWRi which may include water monitoring wells, mine dewatering, and production wells as per Utah Code Ann. § 73-3-1 et seq. (2005) and Utah Admin. Code R655-4 (2005), pertaining to Water Well Drilling, DOGM will notify DWRi and consult with them to ensure that appropriate approvals are obtained and that the regulations in those sections are followed.

2. When DWRi receives a well drilling application that involves mining operations such as water monitoring wells, mine dewatering or coal exploration, DWRi will notify DOGM and will consult with them to ensure applicable DOGM regulations are followed and appropriate environmental protection methods are incorporated.

G. Safety of Dams

1. When a mine application involves dams or impoundments that are regulated by DWRi as per Utah Code Ann. §§ 73-2-22 and 73-5a-1 et seq. (2005), and Utah Admin. Code R655-10, R655-11, and R655-12 (2005), pertaining to Dam Safety, DOGM will notify DWRi and consult with them to ensure that appropriate approvals are obtained and that the regulations in those sections are followed.

2. When DWRi receives a dam application or plans for a dam or impoundment involving mining operations, DWRi will notify DOGM and will consult with them to ensure applicable DOGM regulations are followed and appropriate environmental protection methods are incorporated.

ARTICLE IV – EXISTING AUTHORITY

Nothing in this Memorandum of Understanding, nor in the above-mentioned laws and regulations concerning coal mining and reclamation (Utah Code Ann. §§ 40-10-1 et seq. (2005)), shall interfere with DWRi's administration of Utah Code Ann. §§ 73-1-1 to -6. Nothing in this Memorandum of Understanding, nor in the above-mentioned laws and regulations concerning

water rights (Utah Code Ann. §§ 73-1-1 et seq. (2005)), shall interfere with DOGM's administration of Utah Code Ann. §§ 40-10-1 et seq. (2005).

ARTICLE IV - TERMINATION

This Memorandum of Understanding shall become effective when signed by the designated representatives of the parties. The memorandum shall remain in force until terminated by mutual agreement or by either party upon thirty (30) days written notice to the other party. Amendments to this agreement may be proposed by either party and shall be adopted upon written agreement by all parties.

This Memorandum of Understanding is approved this 18th day of Nov. 2005 by the following:

DIVISION OF OIL, GAS AND MINING
DIRECTOR

Jerry D. Olds
DIVISION OF WATER RIGHTS
DIRECTOR

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