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January 28, 2003

HAND DELIVERED

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State of New Mexico
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OIL CONSERVATION DIV
03 JAN 28 AM 11: 34

Re: Richardson Operating Company's Revised Response to San Juan Coal Company's Application for a hearing de novo before the Secretary for Commission Order R-11775-B entered in Case 12734 (De Novo)

Dear Ms. Leach:

On behalf Richardson Operating Company, please find enclosed for filing our referenced Revised Response that corrects certain typographical error contained in the original Response filed yesterday. All of Richardson's arguments remain the same and are not affected for these errors.

Very truly yours,

W. Thomas Kellahin
Kellahin & Kellahin

William F. Carr, Esq.
Holland & Hart LLP

Cc by facsimile: Counsel of record

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

IN THE MATTER OF THE APPLICATION OF RICHARDSON OPERATING COMPANY TO ESTABLISH A SPECIAL "INFILL WELL" AREA WITHIN THE BASIN-FRUITLAND COAL GAS POOL AS PROVIDED BY RULE 4 OF THE SPECIAL RULES FOR THIS POOL, SAN JUAN COUNTY, NEW MEXICO.

OIL CONSERVATION COMMISSION CASE NO. 12734 (De Novo), ORDER R-11775-B.
(Request for de novo review by the Secretary of the Energy, Minerals and Natural Resources Department)

RICHARDSON OPERATING COMPANY'S RESPONSE TO APPLICATION FOR REVIEW BY THE SECRETARY OF THE ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT OF THE DECEMBER 19, 2002 ORDER OF THE OIL CONSERVATION COMMISSION AND THE JANUARY 23, 2003 DENIAL OF SAN JUAN COAL COMPANY'S APPLICATION FOR REHEARING AND REQUEST FOR STAY

REVISED

I. INTRODUCTION

San Juan Coal Company's application requests the Secretary to hold a public hearing to determine if an Oil Conservation Commission order authorizing Infill Drilling (the "Order") in a portion of the San Juan Basin ("Infill Area")[1] contravenes the public interest. San Juan's application raises numerous practical and legal questions the Secretary must answer before exercising her discretion:

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[1] The "Infill Area" that is the subject of Commission Order No. R-11775-B is comprised of Sections 4 through 6 of Township 29 North, Range 14 West, NMPM, Section 1 of Township 29 North, Range 15 West, Section 1 of Township 29 North, Range 14 West, Sections 16, 19 –21 and 28-33 of Township 30 North, Range 14 West and Section 36 of Township 30 North, Range 15 West, NMPM, San Juan County, New Mexico, and contains approximately 9600 acres. A plat of the Infill Area is attached hereto as Exhibit 1.

First, should the Secretary hold a hearing to consider whether the Order approving infill development contravenes the "public interest" since no new infill wells are to be drilled on State of New Mexico lands in the Infill Area?

Second, should the Secretary hold a hearing to review infill drilling in an area where 85% of the acreage is federal land under the jurisdiction of the Bureau of Land Management, the federal agency charged by statute with the management and leasing of the oil, gas and coal located thereon?

Third, should the Secretary hold a hearing to revisit issues that were resolved between the BLM and San Juan Coal prior to the issuance of the subject coal leases, by written protocol agreements and lease stipulations which have been clarified and affirmed by rulings of the BLM State Director?

Fourth, should the Secretary call the Order before her to review issues which under these facts involve federal statutes and rules designed to assure safety for mine personnel?

Each of these questions is clearly answered "No" and calls into doubt whether San Juan has raised any "public interest" issue that the Secretary may, or should, bring to a public hearing; and, if the Secretary does call a hearing, has San Juan raised any issue that is within her jurisdiction—does it raise any issue that the Secretary can actually decide?

Since October 2001, San Juan has been attempting to find a regulatory agency willing to limit the number of coal gas wells drilled in the portion of the Infill Area where it holds coal leases. Having been unsuccessful twice before the Bureau of Land Management and also having failed before the Oil Conservation Division and Oil Conservation Commission it now seeks review by the Secretary. San Juan asks the Secretary to enter an area where her jurisdiction, to the extent it exists at all, is severely limited.

To listen to San Juan, it sounds as if the Infill Order, if not set aside, will destroy coal mining in northwest New Mexico and, in its application, draws grossly distorted comparisons between the total benefits from the San Juan Mine and the potential benefits from a single gas well. However, in its zeal to portray the Order as contravening the "public interest" because of its alleged negative impact on the great financial rewards to be obtained from the San Juan Mine, San Juan neglects to explain to the Secretary all facts relevant to the decision she faces. In many ways, what San Juan has not told the Secretary is more important than what it has chosen to disclose.

II. BACKGROUND AND RELEVANT FACTS

A. All Oil and Gas Leases Pre-date the Coal Leases.

It is undisputed that Richardson's oil and gas leases predate San Juan's coal leases. The oil and gas rights have been leased by the state and federal governments over the last five decades with the first leases dating back to 1949. The coal rights in the subject lands were subsequently leased to San Juan by Federal Coal Lease NMNM 28093 (the "Deep Lease") and Federal Coal Lease NMNM 99144 (the Deep Lease Extension") which was effective on March 1, 2001.

B. The "Infill Area" Contains Primarily Federal Oil and Gas Leases.

The "Infill Area" approved by Division Order No. R-11775-B approves infill drilling in a fifteen-section area containing primarily federal minerals. While San Juan observes that the case involves two state leases and two federal leases - it is not a 50-50 ownership split. [2] The

[2] Two State of New Mexico leases covered the coal rights in Section 36 of Township 30 North, Range 14 West and Section 32 of Township 30 North, Range 15 West, NMPM. The remainder of the coal rights in 13 sections within the Infill Area were leased by Federal Coal Leases NMNM 28093 and NMNM 99144.

federal lands encompass thirteen sections of land (8,320 acres) while only two sections are state land (1280 acres). Approximately 85% of the acreage in the Infill Area is federal land.

C. There Is No State Issue For The Secretary to Decide Because No Additional Infill Wells Will be Drilled on State Lands In The Infill Area.

No new infill wells will be drilled pursuant to Commission Order R-11775-B in San Juan's Mine Districts. Twenty-two (22) Pictured Cliffs formation wells are currently completed in the in the Infill Area but only five (5) of these wells are located in San Juan's Mine Districts. Seven new coal gas wells are proposed by Richardson in the Infill Area but only one infill well will be drilled in the San Juan's Mine Districts and it is located on federal land. Richardson proposes to drill one additional well in the San Juan Mine Districts but it will be the first well drilled on the spacing unit and therefore is not an infill well placed at issue by the Commission's Order. This well is the proposed Richardson Federal No. 19-2 to be located in the SE/4 of Section 19, Township 30 North, Range 14 West, NMPM.

D. All Issues Raised by San Juan Involve Matters Arising Under Federal Regulations.

The issues raised by San Juan concern the 300-foot radius pillars of coal that cannot be mined around wells that penetrate the Fruitland formation. Except for the two wells identified in Section C above, all wells penetrating the coal in the area to be mined have already been drilled. The pillars are required by federal Mine Safety and Health Administration ("MSHA") regulations. These pillars, and what to do with them, are issues between San Juan and that federal agency. This issue was correctly addressed by the Oil Conservation Commission in its much-maligned ¶64 of the Order, where it stated:

> "... MSHA regulations require the use of protection pillars or other measures adequate to protect worker safety. The conflict here is not between oil and gas

producers and coal miners, but between San Juan's obligations to its workers under the Act and MSHA regulations and its plan of operations."

The issues San Juan asks the Secretary to review arise under federal statute and regulation and therefore do not warrant review by the Secretary.[3]

E. There Is A Comprehensive Regulatory Scheme Governing Development of Coal Reserves.

San Juan complains that the Commission's Order conflicts with the "public interest" because "no state agency has given due regard for conservation of the coal resource." There is an overall regulatory scheme involving federal and state agencies which exercises "due regard for the conservation of mineral resources," including coal. San Juan overlooks the role of these agencies and especially the BLM. The BLM's responsibilities include planning for the many potential uses of BLM managed lands,[4] leasing the oil, gas and other minerals, including coal, and managing the federal mineral estate.[5] The BLM has exercised this responsibility and developed a program for these minerals that is very different from the position San Juan advocates to limit coalbed methane development. The BLM's position on the development of these competing resources is that the recovery of both should be maximized by the recovery of the gas before San Juan mines the coal and vents, and thereby wastes, the gas.[6] Taken together, the federal and state regulatory programs cover everything from the evaluation of prospective

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[3] If the Secretary decides to review the Commission's Order, she may be required to decide issues related to the effect of fracturing on this coal bearing formation and the resulting need to refrain from mining within 300 feet of a well bore. This issue is squarely within the jurisdiction of the Commission. If she enters a decision that would alter the Commission's order, she will be overriding the Commission and would require the Commission to enter an order that is technically wrong. To change the Commission's decision on these issues would put her in a unique role for she would be the only person at any governmental level that does not recognize the technical expertise of her own Commission. *See Continental Oil Company v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809 (1962); *Amoco Production Company v. Heimann*, 904 F.2d 1405, 1414 (10th Cir. 1990).

[4] Federal Land Policy and Management Act, 43 U.S.C. §1701 et seq.

[5] 43 U.S.C. § 1701(a)(7).

[6] *See* Department of the Interior Memorandum "Policy on Conflicts between Coal Bed Methane (CBM) and Coal Development" dated February 22, 2000, attached hereto as Exhibit 2 .

coal properties prior to leasing, leasing, development of the resource, mine safety and, after mining is complete, the reclamation of the site. There is a comprehensive regulatory scheme for managing these resources.

F. The Issues Raised By San Juan Have Already Been Resolved Between The BLM And San Juan And The Coal Rights Have Been Determined To Be Inferior And Subject To The Oil And Gas Rights.

San Juan did not tell the Secretary about the meetings it had with the BLM prior to the issuance of their coal leases in which the potential conflict between the owners of coal rights and oil and gas mineral owners under the subject lands was discussed. San Juan has not told the Secretary that as a condition precedent to the acquisition of their coal leases from the BLM, San Juan signed an agreement entitled "Protocol for the Mediation of Adverse Impacts on Oil and Gas Revenues" dated September 10, 1998,[7] in which it agreed, among other things, that "valid exiting rights under federal oil and gas leases... will be honored." By signing this Protocol, San Juan agreed to "take all reasonable steps to avoid adverse impacts on oil and gas resource production, gathering and transportation facilities" which might include "mining around existing well bores". The Protocol was not only signed by San Juan, it prepared the agreement. It now takes a position before the Secretary that is inconsistent with this Protocol.

San Juan also neglects to tell the Secretary that prior to the issuance of Federal Coal Lease NMNM 99144[8] in March of 2001, the very issues it now asks the Secretary to consider were again raised with San Juan by the BLM. The issue San Juan now seeks to have reviewed by the Secretary (whether infill drilling should be allowed in this area) was resolved prior to issuance of the lease by making the coal lease subject to preexisting oil and gas leases through

[7] Attached hereto as Exhibit 2.
[8] Attached hereto as Exhibit 4.

the Protocol Agreement and by inclusion of special stipulations in Section 15 of the coal lease which provide:

> "This coal lease is subject to all prior existing rights including the right of oil and gas lessees & [sic] other mineral lessees and surface owners."
>
> "It is solely the responsibility of the coal lessee, not the responsibility of the BLM, to clear the coal tracts of any legal encumbrances or pre-existing land uses that would impede or prevent coal mining on the tract."

While San Juan neglects these important facts, they cannot escape their import.

G. The Issues San Juan Asks The Secretary To Review Are Issues Involving Federal Minerals, Statutes and Rules And Have Previously Been Reviewed By The BLM At San Juan's Request.

San Juan does not tell the Secretary that it has twice sought the BLM's review of the decisions and agreements San Juan made at the time the coal leases were issued. Twice the BLM has said the lease stipulations mean that the coal rights are subject to and inferior to the gas rights.

San Juan first objected to Richardson's applications for permits to drill wells on oil and gas leases within the Infill Area in the fall of 2001. The BLM reviewed the economic and safety concerns raise by San Juan, and by letter dated September 20, 2001, the BLM rejected these arguments, determining that denying the permits "...would constitute an unfair burden on the oil and gas lessees **who have priority rights in developing their associated mineral resources**." (emphasis supplied).

San Juan sought Administrative Review of the BLM's decision. Following the submission of written material and oral arguments, the State Director concluded that (1) the stipulations in the Federal Coal Lease NMNM 99144 recognize "the oil and gas lessees have priority in development of their gas resources"; (2) the Protocol "recognized the senior status of valid existing oil and gas leases"; and (3) San Juan has agreed to these provisions by signing

the oil and gas lease and the Protocol. The BLM further recognized that coalbed methane development could impair coal mining but after reviewing San Juan's arguments stated: "We believe that Richardson has a prior existing right to develop the CBM. This is true even if it would cause reduced recovery of coal reserves, and adversely affect the economics of San Juan's mine. San Juan must adjust its mine plan to provide necessary safety to mine personnel." [9]

The BLM is the agency charged with the management of federal mineral resources in the Infill Area. This statement of the State Director announces the federal program pertaining to the development of both gas and coal on these lands.[10]

San Juan now invites the Secretary to decide issues which long ago were addressed by the BLM and to enter an order inconsistent with the federal coal leases and that would be in conflict with and hostile to the established federal regulatory scheme pertaining to these lands. These orders would have little meaning and would not be honored by the courts.

III. THE SECRETARY SHOULD EXERCISE HER DISCRETION AND DECLINE THE INVITATION TO HOLD A PUBLIC HEARING BECAUSE THERE EXISTS A COMPREHENSIVE REGULATORY SCHEME FOR MANAGING BOTH RESOURCES AT ISSUE, AND THE PUBLIC INTEREST HAS NOT BEEN CONTRAVENED.

A. The Secretary Should Decline San Juan's Invitation to Hold a Hearing.

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[9] Both BLM decisions are attached hereto as Exhibits 5 & 6, respectively.

[10] When San Juan realized the consequences if the BLM decisions were affirmed by IBLA, it met with the IBLA and dismissed their appeal concluding it was moot as to the four applications for permits to drill involved in that case. San Juan "agreed" that future permit applications would be reviewed on their individual merit and that the current decisions would not be precedent in other factual situations. Nonetheless, these decisions stand as to four permit applications in the Infill Area and describe the federal program pertaining to these lands and minerals. They clearly state a position of the BLM that no one could seriously assert would not apply to future applications to drill in the Infill Area. Furthermore, in this Order, San Juan Coal and the IBLA recognize that the BLM has management prerogatives over the issuance of APD's on federal lands and the decisions concerning the proper administration of competing coal and oil/gas leases on these lands rests with the BLM. The August 27, 2002 IBLA Order is attached hereto as Exhibit 7.

Against the above factual background, the Secretary must consider the single and straightforward issue before her: should she hold a public hearing to determine whether the Commission's Order contravenes the public interest? This is the only decision facing the Secretary at this juncture; nothing more and nothing less.

The Secretary possesses absolute discretion in determining whether to hold a public hearing pursuant to Section 70-2-26.[11] The hearing requested by San Juan is not one of right, but by legislative directive, "may" be granted in the discretion of the Secretary. "May" does not mean "shall". *Thriftway Mktg. Corp. v. State*, 114 N.M. 578, 579, 844 P.2d 828, 829 (N.M. Ct. App. 1992) ("In addition, a fundamental rule of statutory construction states that in interpreting statutes, the words 'shall' and 'may' should not be used interchangeably but should be given their ordinary meaning.") (citation omitted).

The Secretary retains discretion to act according to the dictates of her own judgment and conscience. *Kiddy v Bd. of County Commissioners of Eddy County*, 57 N.M. 145, 149, 255 P.2d 678, 681 (1953). It is well-established that the Secretary's discretion to re-review an issue decided at the Commission level is afforded the utmost deference. *United States v. Pierce Freight Lines*, 327 U.S. 515 (1946).

Here, San Juan attempts to invoke the extra-ordinary relief of a public hearing pursuant to Section 70-2-26, relief which has not been invoked since the statute's enactment in 1977. Does the Secretary wish to be the first to walk down this road? On these facts? Richardson respectfully submits that the Secretary should decline San Juan's invitation to open yet another proceeding just because San Juan is unhappy with the results of the first four proceedings.

[11] Section 70-2-26, as amended in 1987, raises constitutional due process and vagueness issues.

B. The Secretary Should Ignore San Juan's Criteria and Apply Party-Neutral Criteria.

With due sensitivity to the jurisdictional issues previously discussed, the Secretary should also ignore San Juan's self-serving criteria to be employed in deciding whether to hold a hearing. Conveniently, San Juan's criteria are contrived around the two arguments San Juan offers in support of its position. San Juan's proposed second criteria regarding public interest does not ask the question posed by the statute, namely whether the public interest has been "contravened". Instead, San Juan asks merely whether it (San Juan) has raised "important questions about the public interest or the conservation of mineral resources." Application at p. 5. San Juan's criteria is therefore in conflict with the statute and should be disregarded. The more facially neutral criteria that should be applied do not seek to second guess the Division and Commission —those bodies entrusted by the Secretary to decide technical, legal, and industry issues — but are based on the very responsibility of the Department of Energy, Minerals, and Natural Resources, and the BLM: **one**, is there a comprehensive regulatory scheme for managing both resources at issue – coal and CBM gas?; and **two**, has the public interest been contravened by that existing regulatory scheme, and the Commission's order? Only one conclusion follows: a public hearing pursuant to Section 70-2-26 to determine whether the public interest has been contravened is unnecessary and unwarranted.

C. Public Interest Defined.

In its application, San Juan argues *ad nauseam* that the Commission refused to **consider** the "public interest". Application at pgs. 2, 5, 9, 10 (relying on Commission Order, ¶64). Inarguably, San Juan fails to establish that the Commission's Order's **contravenes** the public interest. In other words, even if it is true that Commission failed to explicitly consider the

public interest, which Richardson disputes, it does not follow that the order automatically and necessarily contravenes the public interest.

Section 70-2-26 does not define "public interest", and therefore the term must be given its ordinary and common meaning. *Security Escrow Corp. v. Taxation and Revenue Dept.,* 107 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct. App. 1988). While there is no uniform understanding of what is meant by "public interest", there are a few guiding principles. As a prefatory matter, the very function — the *raison d'etre* — of administrative bodies, like the Oil Conservation Commission, is the protection of public rights. 2 Am Jur 2d, Administrative Law § 2. Indeed, the public interest is an added dimension of every administrative proceeding. *Hackensack v. Winner*, 410 A.2d 1146 (N.J. 1980).

The "public interest" is one which is "shared by citizens generally in affairs of local, state or national government". Black's Law Dictionary (6th ed.) (citing *Russell v. Wheeler*, 439 P.2d 43, 46 (1968)). A business undertaking is not "devoted" to the public interest merely because it produces commodities for and sells to the public. *Chas. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas*, 262 U.S. 522, (1923). Similarly, a business is not affected with a matter of public interest merely because of its size, or because the public has a concern with respect to the way the business is managed. *Tyson & Bro.-United Theatre Ticket Offices v. Banton*, 273 U.S. 418 (1927).

It is self-evident that the subject matter of "energy" is within the purview of the public interest. For example, the Federal Energy Regulatory Commission "FERC" is charged with protection of the public interest as it is affected by the transportation and sale of natural gas within interstate and foreign commerce. *See, e.g.*, 15 U.S.C. § 717(a). This often involves consideration of the public's interest in rate-making. *See, e.g., Mobil Oil Exploration &*

Producing Southeast, Inc. v. United Distr. Co, 498 U.S. 211 (1991). Yet, it is equally self-evident that not all controversies implicating the extraction or production of minerals, as a raw form of energy, directly implicate the public interest. *Continental Oil Co. v. Crutcher*, 434 F. Supp. 464 (E.D. La. 1977) (holding that while controversy over natural gas supply contract, while entailing public energy availability, was a private contractual dispute not directly implicating public interest).

It is universally established that the public interest is served in recognizing and enforcing contracts. *See, e.g., Union Pacific Railway Co. v. Chicago Rock Island Pacific and Railway Co.,* 163 U.S. 564, 603 (1896) (public interest "demands" contracts should be enforced). The public's interest in enforcing contracts is not necessarily diminished just because one party to the contract may suffer economic injury, and consumer customers may be adversely affected. *Coquina Oil Corp., v. Transwestern Pipeline,* 1986 U.S. Dist. LEXIS 20143, *25-26 (D.N.M. 1986). New Mexico courts, too, consistently elevate the public's interest in enforcing private contracts. *Bowen v. Carlsbad Ins. & Real Estate Inc.*, 104 N.M. 514, 517, 724 P.2d 223, 226 (1986); *Cafeteria Operators L.P. v. Coronado – Santa Fe Assoc. L.P.*, 124 N.M. 440, 448, 952 P.2d 435, 443 (N.M. Ct. App. 1997) (public interest involved the right of private parties to be secure in the knowledge that their contract will be enforced).

D. San Juan's Public Interest Analysis is Too Narrow.

San Juan's public interest analysis is not in conflict with these general principles; the analysis, however, is too narrow. The case relied on by San Juan for its public interest analysis — *Young & Norton v. Hinderlider*[12] —while factually distinguishable, establishes the proposition that economic considerations may be an element of a public interest analysis. The case, however, cannot be interpreted to hold that economic considerations are the **primary**

[12] 15 N.M. 666, 110 P.1045 (1915)

factor in such an analysis: Economic considerations are not "conclusive on the question of public interest, [but] we think it should be taken into account." *Id.* at 678. Despite San Juan's obsession with the alleged dominant economics of its operations, and the total ignorance of the prior existing leases and prior Commission and BLM determinations, *Young & Norton*, cannot be read to hold, let alone suggest, that cost savings to one party to two competing projects are determinative. The Court's holding makes clear that increased costs associated with one project in comparison with another competing project is of no import: "the mere fact that irrigation under the former project would cost more per acre than under the latter is not conclusive that the former project should be rejected." *Id.*

The other case relied on by San Juan in support of its purely economic interest argument — *National Indian Youth Council v. Andrus*[13] — also recognizes that cost savings to one party are not determinative in assessing the public interest. There, the Tenth Circuit considered the "public interest" factor of a preliminary injunction. While it is true that the court recognized the economic value of coal mining, more importantly the court recognized that the economic interests must be "balanced" with other interests in determining the public interest. *Id.* at 696. Specifically, the Court recognized that the balance must be struck by looking at all factors weighing in to the public interest (there, environmental damage). The *Andrus* court, did not strike that balance in favor of purely economic interests, but left the determination to the trial court. *Id.*

Public interest, therefore, is not as narrow as San Juan argues. Public interest is not limited to purely economic concerns. Rather, public interest incorporates a multitude of concepts, defined by citizens' shared interest in general affairs. Every business undertaking does not affect the public interest, even if the business and capital invested is large, or the

[13] 623 F.2d 694 (10th Cir. 1980)

public has a concern with respect to the way the business is managed. While "energy" may be within the purview of the public interest, a contractual controversy between producers of competing minerals rarely implicates the public interest. In that case, the public's true interest is in recognizing and enforcing contracts.

E. The Public Interest Is Not Contravened By the Commission's Order.

The determinative issue is not whether San Juan's twenty-one page application previewing "hundreds of millions" in lost revenues, widespread unemployment, and the general demise of the coal industry in New Mexico, raises issues implicating the public interest. The determinative issue is whether or not the Commission's Order, dealing with a handful of infill wells, none of which will be drilled in San Juan's state lease Mine Districts, contravenes the public interest.

The issues raised by San Juan are regulated by a comprehensive regulatory scheme, at both the federal and state level. San Juan's application effectively plucks one order from that comprehensive regulatory scheme, which addresses only the issue of infill drilling of wells in the mining district, and portrays that single order as the bearer of untold calamities. It is San Juan's position, and not the Order, that contravenes the public interest.

Basically, San Juan offers two reasons for its theory regarding the public interest: one, mining safety; and two, economic considerations. *See, e.g.*, San Juan's Application, pgs. 2, 9-12. As to the first, in this case, mining safety is regulated exclusively by the federal government through a comprehensive regulatory scheme, MSHA. The Secretary has no authority in this arena. MSHA regulations, and not the Commission's Order, require that a 300 hundred foot pillar of coal be left around existing well bores. San Juan's Application, pgs. 11-12. As the Commission correctly noted, San Juan's disagreement is with MSHA, and not any

New Mexico state agency. Even the most far-reaching and deepest considerations of the public interest by the Secretary, will have no bearing whatsoever on the MSHA regulations and requirements.

San Juan's second reason —economic considerations — is inextricably intertwined with the first. In other words, San Juan argues that because MSHA requires a 300 hundred foot pillar of coal be left around well bores, it will be forced to leave 300 feet of existing reserves, causing great economic loss. To the extent the well bores already exist, San Juan's complaint is **moot**.

San Juan's "economic" complaint has been addressed within the framework of the comprehensive regulatory scheme. Both the BLM and the Commission concluded that the most economical and practical approach was to first permit production of the coalbed methane gas, then permit coal production. Exhibit 3; Order at ¶¶ 23, 76. If the coal is taken first, as requested by San Juan, the gas will be vented, and there will be no coalbed methane to produce.[14] *Id.* Thus, after accusing the Commission of "plac[ing] [Richardson's] economic interests before all others", San Juan's argument makes crystal clear who seeks to have its interests advanced to the exclusion of others.

In support of its attempt to elevate its purely economic interests, San Juan offers only that it would be "technically difficult, time consuming, and costly", (Application at p. 11) or "extremely cumbersome, time consuming, costly and potentially risky" (Application at p. 12)

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[14] San Juan makes the astonishing claim that under its state leases, "other authority", and the Supreme Court decision in *Amoco Prod. Co. v. Southern Ute Tribe*, 526 U.S. 865, 879 (1999), San Juan has the "right" to vent the coalbed methane gas in the atmosphere. Application at p. 19.
San Juan provides no particulars regarding their "state leases" or "other authority". As to the *Southern Ute Tribe* decision, surely San Juan did not mean to mislead the Secretary regarding the holding of that case. There, the Supreme Court considered only whether Congress conveyed the CBM gas when issuing certain leases under the Coal Lands Act of 1909 and 1910. The Court expressly commented that the issue proffered by San Juan was not before it: "[w]ere a case to arise in which there are two commercially valuable estates and one is to be damaged in the course of extracting the other, a dispute might result, but it could resolved in the ordinary course of negotiation or adjudication. **That is not the issue before us, however**.". 526 U.S. 879 (emphasis supplied).

to work out solutions posed by production of methane gas and the prior rights of Richardson. **Nowhere, however, does San Juan state that it is impossible**. Indeed, as the Commission recognized, San Juan can mine right through the gas well, without creating the MSHA-required pillars, once the coalbed methane is produced, and after the gas well casing is milled out and the wellbore plugged. Order at ¶42. At one point in time, San Juan previously agreed to this approach, but now San Juan wants to change its mind, and disingenuously neglects this important fact in its public interest analysis. Order at ¶ 36.

In short, the comprehensive regulatory scheme in place has effectively dealt with the issues posed by San Juan without contravening the public interest. The scheme concluded that both resources at issue should be preserved to the extent possible. While San Juan may not be happy with the result, it cannot be plausibly argued that the public interest has been contravened.

Finally, San Juan's efforts evince more than an attempt to turn the comprehensive regulatory scheme on its head and to lead the Secretary into federal issues, all because San Juan is not happy with the lawful product of the regulatory scheme. San Jan attempts to breach the very contracts that permit it the right to produce the coal. In other words, San Juan wants to vitiate, violate, and render as mere surplusage, the explicit conditions precedent contained in its leases with the BLM regarding oil and gas interests. San Juan wants to contravene the express agreement it made with the BLM in 1998 to "[honor] the . . . valid exiting rights under federal oil and gas leases . . ."[15] In sum and substance, San Juan asks for the Secretary's assistance in breaching the agreement which requires San Juan to "take all reasonable steps to avoid adverse impacts on oil and gas resource production, gathering and transportation facilities" including

[15] "Protocol for the Mediation of Adverse Impacts on Oil and Gas Revenues" dated September 10, 1998, attached as Exhibit 2.

"mining around existing well bores". *Id.* It is San Juan's position, and not the Commission's Order, which seeks to contravene the public interest. New Mexico law, however, will not support their untenable request to breach valid contracts. *Coquina Oil Corp., v. Transwestern Pipeline,* 1986 U.S. Dist. LEXIS 20143, *25-26 (D.N.M. 1986). *Bowen v. Carlsbad Ins. & Real Estate Inc.*, 104 N.M. 514, 517, 724 P.2d 223, 226 (1986); *Cafeteria Operators L.P. v. Coronado – Santa Fe Assoc. L.P.*, 124 N.M. 440, 448, 952 P.2d 435, 443 (N.M. Ct. App. 1997).

IV. CONCLUSION

San Juan contends that it has raised issues regarding the public interest. Under its definition and two-pronged test, it contends that there will be enormous negative economic consequences if the order is not overturned. The facts show something else. The Infill Order permits infill wells on thirteen sections of federal land and two sections of state land. No additional infill wells are going to be drilled on any state land in San Juan Mine Districts.

Even if the Secretary were to exercise her discretion and decide to call a public hearing to review this Order, it is difficult to see what, if anything there is for her to decide.[16] The issues raised are federal issues. The acreage is primarily federal land: 85% of the acreage is federal land governed by the federal government's program pertaining to these lands — a program that will supercede anything the Secretary might decide to do. Furthermore, the core issue San Juan asks the Secretary to review is an issue based on federal statutes and rules. Under federal MSHA requirements to protect the safety of miners, coal cannot be mined within 300 feet of a well bore. Since all but one of the infill wells in the San Juan Mine Districts have already been drilled, there is nothing in the Infill order for the Secretary to decide. The issue is

[16] In its application, San Juan makes a brief request that the Secretary stay the Commission's Order pending the Secretary's decision. Richardson opposes this request for a stay, and incorporates by reference its previously filed response to San Juan's Motion to Stay.

not one for Secretarial review "but between San Juan's obligation to its workers under the Act and MSHA regulations and its plan of operations." This issue involves federal statutes and rules equally applicable on state as well as federal lands.

The Secretary should not allow herself to be used in an attempt of San Juan Coal Company to in any way limit its duties under MSHA, the leases, or the Protocol. San Juan has failed to show how **this order of the Commission** contravenes the public interest. Furthermore, San Juan raises issues that are essentially federal in character, beyond the authority of the Secretary and therefore issues which the secretary should decline to hear.

San Juan invites the Secretary to be the first person in 25 years to walk down this road. Did San Juan tell the Secretary this road meanders through a jurisdictional and factual maze into which she is not required to travel?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 28, 2003 I served a copy of the foregoing document to the following by

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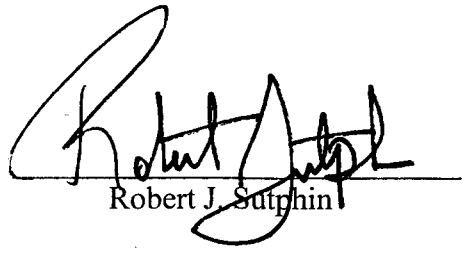

Robert J. Sutphin

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

IN THE MATTER OF THE APPLICATION OF RICHARDSON OPERATING COMPANY TO ESTABLISH A SPECIAL "INFILL WELL" AREA WITHIN THE BASIN-FRUITLAND COAL GAS POOL AS PROVIDED BY RULE 4 OF THE SPECIAL RULES FOR THIS POOL, SAN JUAN COUNTY, NEW MEXICO.

OIL CONSERVATION COMMISSION CASE NO. 12734 (De Novo), ORDER R-11775-B.
(Request for de novo review by the Secretary of the Energy, Minerals and Natural Resources Department)

RICHARDSON OPERATING COMPANY'S RESPONSE TO APPLICATION FOR REVIEW BY THE SECRETARY OF THE ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT OF THE DECEMBER 19, 2002 ORDER OF THE OIL CONSERVATION COMMISSION AND THE JANUARY 23, 2003 DENIAL OF SAN JUAN COAL COMPANY'S APPLICATION FOR REHEARING AND REQUEST FOR STAY

I. INTRODUCTION

San Juan Coal Company's application requests the Secretary to hold a public hearing to determine if an Oil Conservation Commission order authorizing Infill Drilling (the "Order") in a portion of the San Juan Basin ("Infill Area")[1] contravenes the public interest. San Juan's application raises numerous practical and legal questions the Secretary must answer before exercising her discretion:

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[1] The "Infill Area" that is the subject of Commission Order No. R-11775-B is comprised of Sections 4 through 6 of Township 29 North, Range 14 West, NMPM, Section 1 of Township 29 North, Range 15 West, Section 1 of Township 29 North, Range 14 West, Sections 16, 19 –21 and 28-33 of Township 30 North, Range 14 West and Section 36 of Township 30 North, Range 15 West, NMPM, San Juan County, New Mexico, and contains approximately 9600 acres. A plat of the Infill Area is attached hereto as Exhibit 1.

First, should the Secretary hold a hearing to consider whether the Order approving infill development contravenes the "public interest" since no new infill wells are to be drilled on State of New Mexico lands in the Infill Area?

Second, should the Secretary hold a hearing to review infill drilling in an area where 85% of the acreage is federal land under the jurisdiction of the Bureau of Land Management, the federal agency charged by statute with the management and leasing of the oil, gas and coal located thereon?

Third, should the Secretary hold a hearing to revisit issues that were resolved between the BLM and San Juan Coal prior to the issuance of the subject coal leases, by written protocol agreements and lease stipulations which have been clarified and affirmed by rulings of the BLM State Director?

Fourth, should the Secretary call the Order before her to review issues which under these facts involve federal statutes and rules designed to assure safety for mine personnel?

Each of these questions is clearly answered "No" and calls into doubt whether San Juan has raised any "public interest" issue that the Secretary may, or should, bring to a public hearing. And, if the Secretary does call a hearing, has San Juan raised any issue that is within her jurisdiction—does it raise any issue that the Secretary can actually decide?

Since October 2001, San Juan has been attempting to find a regulatory agency willing to limit the number of coal gas wells drilled in the portion of the Infill Area where it holds coal leases. Having been unsuccessful twice before the Bureau of Land Management and also having failed before the Oil Conservation Division and Oil Conservation Commission it now seeks review by the Secretary. San Juan asks the Secretary to enter an area where her jurisdiction, to the extent it exists at all, is severely limited.

To listen to San Juan, it sounds as if the Infill Order, if not set aside, will destroy coal mining in northwest New Mexico and, in its application, draws grossly distorted comparisons between the total benefits from the San Juan Mine and the potential benefits from a single gas well. However, in its zeal to portray the Order as contravening the "public interest" because of its alleged negative impact on the great financial rewards to be obtained from the San Juan Mine, San Juan neglects to explain to the Secretary all facts relevant to the decision she faces. In many ways, what San Juan has not told the Secretary is more important than what it has chosen to disclose.

II. BACKGROUND AND RELEVANT FACTS

A. All Oil and Gas Leases Pre-date the Coal Leases.

It is undisputed that Richardson's oil and gas leases predate San Juan's coal leases. The oil and gas rights have been leased by the state and federal governments over the last five decades with the first leases dating back to 1949. The coal rights in the subject lands were subsequently leased to San Juan by Federal Coal Lease NMNM 28093 (the "Deep Lease") and Federal Coal Lease NMNM 99144 (the Deep Lease Extension") which was effective on March 1, 2001.

B. The "Infill Area" Contains Primarily Federal Oil and Gas Leases.

The "Infill Area" approved by Division Order No. R-11775-B approves infill drilling in a fifteen-section area containing primarily federal minerals. While San Juan observes that the case involves two state leases and two federal leases - it is not a 50-50 ownership split. [2] The

[2] Two State of New Mexico leases covered the coal rights in Section 36 of Township 30 North, Range 14 West and Section 32 of Township 30 North, Range 15 West, NMPM. The remainder of the coal rights in 13 sections within the Infill Area were leased by Federal Coal Leases NMNM 28093 and NMNM 99144.

federal lands encompass thirteen sections of land (8,320 acres) while only two sections are state land (1280 acres). Approximately 85% of the acreage in the Infill Area is federal land.

C. There Is No State Issue For The Secretary to Decide Because No Additional Infill Wells Will be Drilled on State Lands In The Infill Area.

No new infill wells will be drilled pursuant to Commission Order R-11775-B in San Juan's Mine Districts. Twenty-two (22) Pictured Cliffs formation wells are currently completed in the in the Infill Area but only five (5) of these wells are located in San Juan's Mine Districts. Seven new coal gas wells are proposed by Richardson in the Infill Area but only one infill well will be drilled in the San Juan's Mine Districts and it is located on federal land. Richardson proposes to drill one additional well in the San Juan Mine Districts but it will be the first well drilled on the spacing unit and therefore is not an infill well placed at issue by the Commission's Order. This well is the proposed Richardson Federal No. 19-2 to be located in the SE/4 of Section 19, Township 30 North, Range 14 West, NMPM.

D. All Issues Raised by San Juan Involve Matters Arising Under Federal Regulations.

The issues raised by San Juan concern the 300-foot radius pillars of coal that cannot be mined around wells that penetrate the Fruitland formation. Except for the two wells identified in Section C above, all wells penetrating the coal in the area to be mined have already been drilled. The pillars are required by federal Mine Safety and Health Administration ("MSHA") regulations. These pillars, and what to do with them, are issues between San Juan and that federal agency. This issue was correctly addressed by the Oil Conservation Commission in its much-maligned ¶64 of the Order, where it stated:

> "... MSHA regulations require the use of protection pillars or other measures adequate to protect worker safety. The conflict here is not between oil and gas

producers and coal miners, but between San Juan's obligations to its workers under the Act and MSHA regulations and its plan of operations."

The issues San Juan asks the Secretary to review arise under federal statute and regulation and therefore do not warrant review by the Secretary.[3]

E. There Is A Comprehensive Regulatory Scheme Governing Development of Coal Reserves.

San Juan complains that the Commission's Order conflicts with the "public interest" because "no state agency has given due regard for conservation of the coal resource." There is an overall regulatory scheme involving federal and state agencies which exercises "due regard for the conservation of mineral resources," including coal. San Juan overlooks the role of these agencies and especially the BLM. The BLM's responsibilities include planning for the many potential uses of BLM managed lands,[4] leasing the oil, gas and other minerals, including coal, and managing the federal mineral estate.[5] The BLM has exercised this responsibility and developed a program for the development of these minerals that is very different from the position San Juan advocates to limit coalbed methane development. The BLM's position on the development of these competing resources is that the recovery of both should be maximized by the recovery of the gas before San Juan mines he coal and vents, and thereby wastes, the gas.[6] Taken together, the federal and state regulatory programs cover everything from the

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[3] If the Secretary decides to review the Commission's Order, she may be required to decide issues related to the effect of fracturing on this coal bearing formation and the resulting need to refrain from mining within 300 feet of a well bore. This issue is squarely within the jurisdiction of the Commission. If she enters a decision that would alter the Commission's order, she will be overriding the Commission and would require the Commission to enter an order that is technically wrong. To change the Commission's decision on these issues would put her in a unique role for she would be the only person at any governmental level that does not recognize the technical expertise of her own Commission. *See Continental Oil Company v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809 (1962); *Amoco Production Company v. Heimann*, 904 F.2d 1405, 1414 (10th Cir. 1990).

[4] Federal Land Policy and Management Act, 43 U.S.C. §1701 et seq.

[5] 43 U.S.C. § 1701(a)(7).

[6] *See* Department of the Interior Memorandum "Policy on Conflicts between Coal Bed Methane (CBM) and Coal Development" dated February 22, 2000, attached hereto as Exhibit 2 .

evaluation of prospective coal properties prior to leasing, leasing, development of the resource, mine safety and, after mining is complete, the reclamation of the site. There is a comprehensive regulatory scheme for managing these resources.

F. The Issues Raised By San Juan Have Already Been Resolved Between The BLM And San Juan And The Coal Rights Have Been Determined To Be Inferior, And Subject, To The Oil And Gas Rights.

San Juan did not tell the Secretary about the meetings it had with the BLM prior to the issuance of their coal leases in which the potential conflict between the owners of coal rights and oil and gas mineral owners under the subject lands was discussed. San Juan has not told the Secretary that as a condition precedent to the acquisition of their coal leases from the BLM, San Juan signed an agreement entitled "Protocol for the Mediation of Adverse Impacts on Oil and Gas Revenues" dated September 10, 1998,[7] in which it agreed, among other things, that "valid exiting rights under federal oil and gas leases... will be honored." By signing this Protocol, San Juan agreed to "take all reasonable steps to avoid adverse impacts on oil and gas resource production, gathering and transportation facilities" which might include "mining around existing well bores". The Protocol was not only signed by San Juan, it prepared the agreement. It now takes a position before the Secretary that is inconsistent with this Protocol.

San Juan also neglects to tell the Secretary that prior to the issuance of Federal Coal Lease NMNM 99144[8] in March of 2001, the very issues it now asks the Secretary to consider were again raised with San Juan by the BLM. The issue San Juan now seeks to have reviewed by the Secretary (whether infill drilling should be allowed in this area) was resolved prior to issuance of the lease by making the coal lease subject to preexisting oil and gas leases through

[7] Attached hereto as Exhibit 2.
[8] Attached hereto as Exhibit 4.

the Protocol Agreement and by inclusion of special stipulations in Section 15 of the coal lease which provide:

> "This coal lease is subject to all prior existing rights including the right of oil and gas lessees & [sic] other mineral lessees and surface owners."
>
> "It is solely the responsibility of the coal lessee, not the responsibility of the BLM, to clear the coal tracts of any legal encumbrances or pre-existing land uses that would impede or prevent coal mining on the tract."

While San Juan neglects these important facts, they cannot escape their import.

G. The Issues San Juan Asks The Secretary To Review Are Issues Involving Federal Minerals, Statutes and Rules And Have Previously Been Reviewed By The BLM At San Juan's Request.

San Juan does not tell the Secretary that it has twice sought the BLM's review of the decisions and agreements San Juan made at the time the coal leases were issued. Twice the BLM has said that the lease stipulations mean that the coal rights are subject to and inferior to the gas rights.

San Juan first objected to Richardson's applications for permits to drill wells on oil and gas leases within the Infill Area in the fall of 2001. The BLM reviewed the economic and safety concerns raise by San Juan, and by letter dated September 20, 2001, the BLM rejected these arguments, determining that denying the permits "...would constitute an unfair burden on the oil and gas lessees **who have priority rights in developing their associated mineral resources**." (emphasis supplied).

San Juan sought Administrative Review of the BLM's decision. Following the submission of written material and oral arguments, the State Director concluded the stipulations in the Federal Coal Lease NMNM 99144 recognize "the oil and gas lessees have priority in development of their gas resources," the Protocol "recognized the senior status of valid existing oil and gas leases," and San Juan has agreed to these provisions by signing the oil and

gas lease and the Protocol. The BLM further recognized that coalbed methane development could impair coal mining but after reviewing San Juan's arguments stated: "We believe that Richardson has a prior existing right to develop the CBM. This is true even if it would cause reduced recovery of coal reserves, and adversely affect the economics of San Juan's mine. San Juan must adjust its mine plan to provide necessary safety to mine personnel." [9]

The BLM is the agency charged with the management of federal mineral resources in the Infill Area. This statement of the State Director announces the federal program pertaining to the development of both gas and coal on these lands.[10]

San Juan now invites the Secretary to decide issues which long ago were addressed by the BLM and to enter an order inconsistent with the federal coal leases and that would be in conflict with and hostile to the established federal regulatory scheme pertaining to these lands. These orders would have little meaning and would not be honored by the courts.

III. THE SECRETARY SHOULD EXERCISE HER DISCRETION AND DECLINE THE INVITATION TO HOLD A PUBLIC HEARING BECAUSE THERE EXISTS A COMPREHENSIVE REGULATORY SCHEME FOR MANAGING BOTH RESOURCES AT ISSUE, AND THE PUBLIC INTEREST HAS NOT BEEN CONTRAVENED.

A. The Secretary Should Decline San Juan's Invitation to Hold a Hearing.

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[9] Both BLM decisions are attached hereto as Exhibits 5 & 6, respectively.

[10] When San Juan realized the consequences if the BLM decisions were affirmed by IBLA, it met with the IBLA and dismissed their appeal concluding it was moot as to the four applications for permits to drill involved in that case. San Juan "agreed" that future permit applications would be reviewed on their individual merit and that the current decisions would not be precedent in other factual situations. Nonetheless, these decisions stand as to four permit applications in the Infill Area and describe the federal program pertaining to these lands and minerals. They clearly state a position of the BLM that no one could seriously assert would not apply to future applications to drill in the Infill Area. Furthermore, in this Order, San Juan Coal and the IBLA recognize that the BLM has management prerogatives over the issuance of APD's on federal lands and the decisions concerning the proper administration of competing coal and oil/gas leases on these lands rests with the BLM. The August 27, 2002 IBLA Order is attached hereto as Exhibit 7.

Against the above factual background, the Secretary must consider the single and straightforward issue before her: should she hold a public hearing to determine whether the Commission's Order contravenes the public interest? This is the only decision facing the Secretary at this juncture; nothing more and nothing less.

The Secretary possesses absolute discretion in determining whether to hold a public hearing pursuant to Section 70-2-26.[11] The hearing requested by San Juan is not one of right, but by legislative directive, "may" be granted in the discretion of the Secretary. "May" does not mean "shall". *Thriftway Mktg. Corp. v. State*, 114 N.M. 578, 579, 844 P.2d 828, 829 (N.M. Ct. App. 1992) ("In addition, a fundamental rule of statutory construction states that in interpreting statutes, the words 'shall' and 'may' should not be used interchangeably but should be given their ordinary meaning.") (citation omitted).

The Secretary retains discretion to act according to the dictates of her own judgment and conscience. *Kiddy v Bd. of County Commissioners of Eddy County*, 57 N.M. 145, 149, 255 P.2d 678, 681 (1953). It is well-established that the Secretary's discretion to re-review an issue decided at the Commission level is afforded the utmost deference. *United States v. Pierce Freight Lines*, 327 U.S. 515 (1946).

Here, San Juan attempts to invoke the extra-ordinary relief of a public hearing pursuant to Section 70-2-26, relief which has not been invoked since the statute's enactment in 1977. Does the Secretary wish to be the first to walk down this road? On these facts? Richardson respectfully submits that the Secretary should decline San Juan's invitation to open yet another proceeding just because San Juan is unhappy with the results of the first four proceedings.

[11] Section 70-2-26, as amended in 1987, raises constitutional due process and vagueness issues.

B. The Secretary Should Ignore San Juan's Criteria and Apply Party-Neutral Criteria.

With due sensitivity to the jurisdictional issues previously discussed, the Secretary should also ignore San Juan's self-serving criteria to be employed in deciding whether to hold a hearing. Conveniently, San Juan's criteria are contrived around the two arguments San Juan offers in support of its position. San Juan's proposed second criteria regarding public interest does not ask the question posed by the statute, namely whether the public interest has been "contravened". Instead, San Juan asks merely whether it (San Juan) has raised "important questions about the public interest or the conservation of mineral resources." Application at p. 5. San Juan's criteria is therefore in conflict with the statute and should be disregarded. The more facially neutral criteria that should be applied do not seek to second guess the Division and Commission —those bodies entrusted by the Secretary to decide technical, legal, and industry issues — but are based on the very responsibility of the Department of Energy, Minerals, and Natural Resources, and the BLM: **one**, is there a comprehensive regulatory scheme for managing both resources at issue – coal and CBM gas?; and **two**, has the public interest been contravened by that existing regulatory scheme, and the Commission's order? Only one conclusion follows: a public hearing pursuant to Section 70-2-26 to determine whether the public interest has been contravened is unnecessary and unwarranted.

C. Public Interest Defined.

In its application, San Juan argues *ad nauseam* that the Commission refused to **consider** the "public interest". Application at pgs. 2, 5, 9, 10 (relying on Commission Order, ¶64). Inarguably, San Juan fails to establish that the Commission's Order's **contravenes** the public interest. In other words, even if it is true that Commission failed to explicitly consider the

public interest, which Richardson disputes, it does not follow that the order automatically and necessarily contravenes the public interest.

Section 70-2-26 does not define "public interest", and therefore the term must be given its ordinary and common meaning. *Security Escrow Corp. v. Taxation and Revenue Dept.,* 107 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct. App. 1988). While there is no uniform understanding of what is meant by "public interest", there are a few guiding principles. As a prefatory matter, the very function — the *raison d'etre* — of administrative bodies, like the Oil Conservation Commission, is the protection of public rights. 2 Am Jur 2d, Administrative Law § 2. Indeed, the public interest is an added dimension of every administrative proceeding. *Hackensack v. Winner*, 410 A.2d 1146 (N.J. 1980).

The "public interest" is one which is "shared by citizens generally in affairs of local, state or national government". Black's Law Dictionary (6th ed.) (citing *Russell v. Wheeler*, 439 P.2d 43, 46 (1968)). A business undertaking is not "devoted" to the public interest merely because it produces commodities for and sells to the public. *Chas. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas*, 262 U.S. 522, (1923). Similarly, a business is not affected with a matter of public interest merely because of its size, or because the public has a concern with respect to the way the business is managed. *Tyson & Bro.-United Theatre Ticket Offices v. Banton*, 273 U.S. 418 (1927).

It is self-evident that the subject matter of "energy" is within the purview of the public interest. For example, the Federal Energy Regulatory Commission "FERC" is charged with protection of the public interest as it is affected by the transportation and sale of natural gas within interstate and foreign commerce. *See, e.g.*, 15 U.S.C. § 717(a). This often involves consideration of the public's interest in rate-making. *See, e.g., Mobil Oil Exploration &*

Producing Southeast, Inc. v. United Distr. Co, 498 U.S. 211 (1991). Yet, it is equally self-evident that not all controversies implicating the extraction or production of minerals, as a raw form of energy, directly implicate the public interest. *Continental Oil Co. v. Crutcher*, 434 F. Supp. 464 (E.D. La. 1977) (holding that while controversy over natural gas supply contract, while entailing public energy availability, was a private contractual dispute not directly implicating public interest).

It is universally established that the public interest is served in recognizing and enforcing contracts. *See, e.g., Union Pacific Railway Co. v. Chicago Rock Island Pacific and Railway Co.,* 163 U.S. 564, 603 (1896) (public interest "demands" contracts should be enforced). The public's interest in enforcing contracts is not necessarily diminished just because one party to the contract may suffer economic injury, and consumer customers may be adversely affected. *Coquina Oil Corp., v. Transwestern Pipeline,* 1986 U.S. Dist. LEXIS 20143, *25-26 (D.N.M. 1986). New Mexico courts, too, consistently elevate the public's interest in enforcing private contracts. *Bowen v. Carlsbad Ins. & Real Estate Inc.*, 104 N.M. 514, 517, 724 P.2d 223, 226 (1986); *Cafeteria Operators L.P. v. Coronado – Santa Fe Assoc. L.P.*, 124 N.M. 440, 448, 952 P.2d 435, 443 (N.M. Ct. App. 1997) (public interest involved the right of private parties to be secure in the knowledge that their contract will be enforced).

D. San Juan's Public Interest Analysis is Too Narrow.

San Juan's public interest analysis is not in conflict with these general principles; the analysis, however, is too narrow. The case relied on by San Juan for its public interest analysis — *Young & Norton v. Hinderlider*[12] —while factually distinguishable, establishes the proposition that economic considerations may be an element of a public interest analysis. The case, however, cannot be interpreted to hold that economic considerations are the **primary**

[12] 15 N.M. 666, 110 P.1045 (1915)

factor in such an analysis: Economic considerations are not "conclusive on the question of public interest, [but] we think it should be taken into account." *Id.* at 678. Despite San Juan's obsession with the alleged dominant economics of its operations, and the total ignorance of the prior existing leases and prior Commission and BLM determinations, *Young & Norton*, cannot be read to hold, let alone suggest, that cost savings to one party to two competing projects are determinative. The Court's holding makes clear that increased costs associated with one project in comparison with another competing project is of no import: "the mere fact that irrigation under the former project would cost more per acre than under the latter is not conclusive that the former project should be rejected." *Id.*

The other case relied on by San Juan in support of its purely economic interest argument — *National Indian Youth Council v. Andrus*[13] — also recognizes that cost savings to one party are not determinative in assessing the public interest. There, the Tenth Circuit considered the "public interest" factor of a preliminary injunction. While it is true that the court recognized the economic value of coal mining, more importantly the court recognized that the economic interests must be "balanced" with other interests in determining the public interest. *Id.* at 696. Specifically, the Court recognized that the balance must be struck by looking at all factors weighing in to the public interest (there, environmental damage). The *Andrus* court, did not strike that balance in favor of purely economic interests, but left the determination to the trial court. *Id.*

Public interest, therefore, is not as narrow as San Juan argues. Public interest is not limited to purely economic concerns. Rather, public interest incorporates a multitude of concepts, defined by citizens' shared interest in general affairs. Every business undertaking does not affect the public interest, even if the business and capital invested is large, or the

[13] 623 F.2d 694 (10th Cir. 1980)

public has a concern with respect to the way the business is managed. While "energy" may be within the purview of the public interest, a contractual controversy between producers of competing minerals rarely implicates the public interest. In that case, the public's true interest is in recognizing and enforcing contracts.

E. The Public Interest Is Not Contravened By the Commission's Order.

The determinative issue is not whether San Juan's twenty-one page application previewing "hundreds of millions" in lost revenues, widespread unemployment, and the general demise of the coal industry in New Mexico, raises issues implicating the public interest. The determinative issue is whether or not the Commission's Order, dealing with a handful of infill wells, none of which will be drilled in San Juan's state lease Mine Districts, contravenes the public interest.

The issues raised by San Juan are regulated by a comprehensive regulatory scheme, at both the federal and state level. San Juan's application effectively plucks one order from that comprehensive regulatory scheme, which addresses only the issue of infill drilling of wells in the mining district, and portrays that single order as the bearer of untold calamities. It is San Juan's position, and not the Order, that contravenes the public interest.

Basically, San Juan offers two reasons for its theory regarding the public interest: one, mining safety; and two, economic considerations. *See, e.g.*, San Juan's Application, pgs. 2, 9-12. As to the first, in this case, mining safety is regulated exclusively by the federal government through a comprehensive regulatory scheme, MSHA. The Secretary has no authority in this arena. MSHA regulations, and not the Commission's Order, require that a 300 hundred foot pillar of coal be left around existing well bores. San Juan's Application, pgs. 11-12. As the Commission correctly noted, San Juan's disagreement is with MSHA, and not any

New Mexico state agency. Even the most far-reaching and deepest considerations of the public interest by the Secretary, will have no bearing whatsoever on the MSHA regulations and requirements.

San Juan's second reason —economic considerations — is inextricably intertwined with the first. In other words, San Juan argues that because MSHA requires a 300 hundred foot pillar of coal be left around well bores, it will be forced to leave 300 feet of existing reserves, causing great economic loss. To the extent the well bores already exist, San Juan's complaint is **moot**.

San Juan's "economic" complaint has been addressed within the framework of the comprehensive regulatory scheme. Both the BLM and the Commission concluded that the most economical and practical approach was to first permit production of the coalbed methane gas, then permit coal production. Exhibit 3; Order at ¶¶ 23, 76. If the coal is taken first, as requested by San Juan, the gas will be vented, and there will be no coalbed methane to produce.[14] *Id.* Thus, after accusing the Commission of "plac[ing] [Richardson's] economic interests before all others", San Juan's argument makes crystal clear who seeks to have its interests advanced to the exclusion of others.

In support of its attempt to elevate its purely economic interests, San Juan offers only that it would be "technically difficult, time consuming, and costly", (Application at p. 11) or "extremely cumbersome, time consuming, costly and potentially risk" (Application at p. 12) to

[14] San Juan makes the astonishing claim that under its state leases, "other authority", and the Supreme Court decision in *Amoco Prod. Co. v. Southern Ute Tribe*, 526 U.S. 865, 879 (1999), San Juan has the "right" to vent the coalbed methane gas in the atmosphere. Application at p. 19.
San Juan provides no particulars regarding their "state leases" or "other authority". As to the *Southern Ute Tribe* decision, surely San Juan did not mean to mislead the Secretary regarding the holding of that case. There, the Supreme Court considered only whether Congress conveyed the CBM gas when issuing certain leases under the Coal Lands Act of 1909 and 1910. The Court expressly commented that the issue proffered by San Juan was not before it: "[w]ere a case to arise in which there are two commercially valuable estates and one is to be damaged in the course of extracting the other, a dispute might result, but it could resolved in the ordinary course of negotiation or adjudication. **That is not the issue before us, however**.". 526 U.S. 879 (emphasis supplied).

work out solutions posed by production of methane gas and the prior rights of Richardson. **Nowhere, however, does San Juan state that it is impossible**. Indeed, as the Commission recognized, San Juan can mine right through the gas well, without creating the MSHA-required pillars, once the coalbed methane is produced, and after the gas well casing is milled out and the wellbore plugged. Order at ¶42. At one point in time, San Juan previously agreed to this approach, but now San Juan wants to change its mind, and disingenuously neglects this important fact in its public interest analysis. Order at ¶ 36.

In short, the comprehensive regulatory scheme in place has effectively dealt with the issues posed by San Juan without contravening the public interest. The scheme concluded that both resources at issue should be preserved to the extent possible. While San Juan may not be happy with the result, it cannot be plausibly argued that the public interest has been contravened.

Finally, San Juan's efforts evince more than an attempt to turn the comprehensive regulatory scheme on its head and to lead the Secretary into federal issues, all because San Juan is not happy with the lawful product of the regulatory scheme. San Jan attempts to breach the very contracts that permit it the right to produce the coal. In other words, San Juan wants to vitiate, violate, and render as mere surplusage, the explicit conditions precedent contained in its leases with the BLM regarding oil and gas interests. San Juan wants to contravene the express agreement it made with the BLM in 1998 to "[honor] the . . . valid exiting rights under federal oil and gas leases . . ."[15] In sum and substance, San Juan asks for the Secretary's assistance in breaching the agreement which requires San Juan to "take all reasonable steps to avoid adverse impacts on oil and gas resource production, gathering and transportation facilities" including

[15] "Protocol for the Mediation of Adverse Impacts on Oil and Gas Revenues" dated September 10, 1998, attached as Exhibit 2.

"mining around existing well bores". *Id.* It is San Juan's position, and not the Commission's Order, which seeks to contravene the public interest. New Mexico law, however, will not support their untenable request to breach valid contracts. *Coquina Oil Corp., v. Transwestern Pipeline,* 1986 U.S. Dist. LEXIS 20143, *25-26 (D.N.M. 1986). *Bowen v. Carlsbad Ins. & Real Estate Inc.*, 104 N.M. 514, 517, 724 P.2d 223, 226 (1986); *Cafeteria Operators L.P. v. Coronado – Santa Fe Assoc. L.P.*, 124 N.M. 440, 448, 952 P.2d 435, 443 (N.M. Ct. App. 1997).

IV. CONCLUSION

San Juan contends that it has raised issues regarding the public interest. Under its definition and two-pronged test, it contends that there will be enormous negative economic consequences if the order is not overturned. The facts show something else. The Infill Order permits infill wells on thirteen sections of federal land and two sections of state land. No additional infill wells are going to be drilled on any of this land in San Juan Mine Districts.

Even if the Secretary were to exercise her discretion and decide to call a public hearing to review this Order, it is difficult to see what, if anything there is for her to decide.[16] The issues raised are federal issues. The acreage is primarily federal land: 85% of the acreage is federal land governed by the federal government's program pertaining to these lands — a program that will supercede anything the Secretary might decide to do. Furthermore, the core issue San Juan asks the Secretary to review is an issue based on federal statutes and rules. Under federal MSHA requirements to protect the safety of miners, coal cannot be mined within 300 feet of a well bore. Since all of the infill wells in the San Juan Mine Districts have already been drilled, there is nothing in the Infill order for the Secretary to decide. The issue is not one

[16] In its application, San Juan makes a brief request that the Secretary stay the Commission's Order pending the Secretary's decision. Richardson opposes this request for a stay, and incorporates by reference its previously filed response to San Juan's Motion to Stay.

for Secretarial review "but between San Juan's obligation to its workers under the Act and MSHA regulations and its plan of operations." This issue involves federal statutes and rules equally applicable on state as well as federal lands.

The Secretary should not allow herself to be used in an attempt of San Juan Coal Company to in any way limit its duties under MSHA, the leases, or the Protocol. San Juan has failed to show how **this order of the Commission** contravenes the public interest. Furthermore, San Juan raises issues that are essentially federal in character, beyond the authority of the Secretary and therefore issues which the secretary should decline to hear.

San Juan invites the Secretary to be the first person in 30 years to walk down this road. Did San Juan tell the Secretary this road meanders through a jurisdictional and factual maze into which she is not required to travel?

Respectfully submitted,

HOLLAND & HART LLP

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William F. Carr
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KELLAHIN & KELLAHIN

By: _____
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CERTIFICATE OF SERVICE

I certify that on January 27, 2003 I served a copy of the foregoing document to the following by

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☒ Fax

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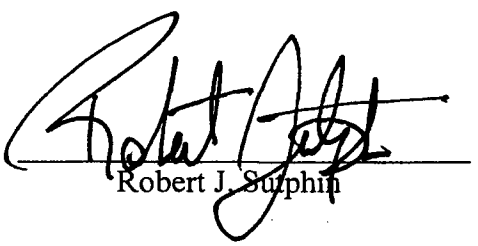
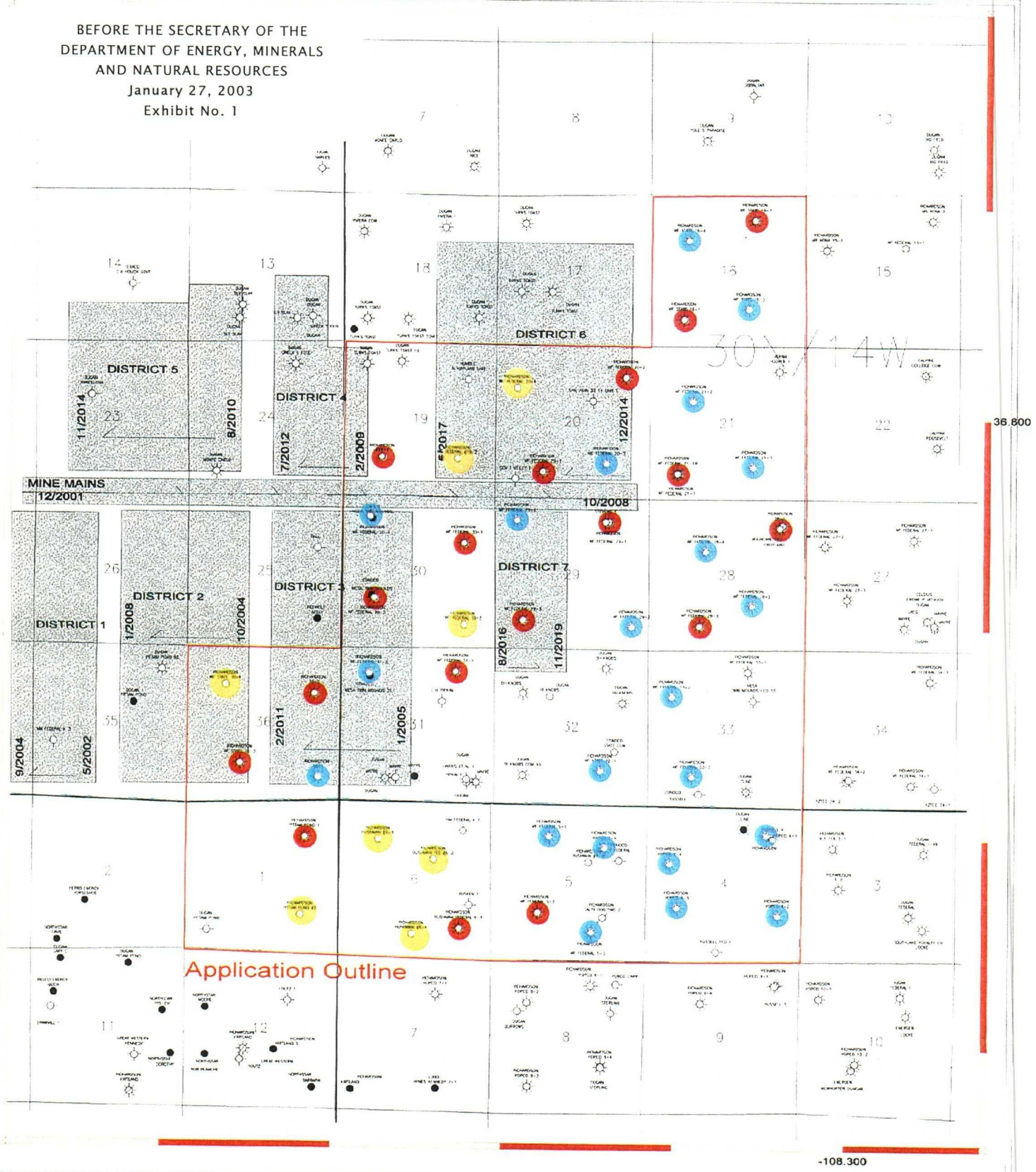


Robert J. Sutphin

BEFORE THE SECRETARY OF THE
DEPARTMENT OF ENERGY, MINERALS
AND NATURAL RESOURCES
January 27, 2003
Exhibit No. 1



LEGEND

- PROPOSED LOCATION
- FRUITLAND COAL RECOMP.
- FRUITLAND COAL PRODUCERS

N

RICHARDSON OIL COMPANY

WEST FARMINGTON PROJECT
San Juan County, New Mexico
Projected Mining Area

REH	9/23/02
Scale: 1:24000.	

PROTOCOL FOR THE MEDIATION OF ADVERSE IMPACTS ON OIL AND GAS REVENUES

This protocol sets forth the commitments made by the San Juan Coal Company (SJCC) regarding potential impacts which its underground coal mining operations may have on oil and gas production, gathering or transportation. This protocol is entered into for the purpose of documenting SJCC's proposed actions to mitigate adverse impacts and allow the Bureau of Land Management to analyze impacts of leasing underground coal reserves in its land use planning process.

Affected Areas

The lands to be affected by mining which are subject to the terms of this Protocol are located in San Juan County, New Mexico and are described as follows:

Township 30 North, Range 14 West, NMPM

Section 17:	All
Section 18:	All
Section 19:	All
Section 20:	All
Section 29:	All
Section 30:	All
Section 31:	All

Township 30 North, Range 15 West, NMPM

Section 13:	S1/2
Section 14:	S1/2
Section 23:	All
Section 24:	All
Section 25:	All
Section 26:	All
Section 35:	All

General Principles

SJCC will conduct its operations in a manner consistent with the legally mandated principles of multiple use of federal lands and mineral reserves. SJCC will use its best efforts to achieve maximum economic recovery of federal resources. Valid existing rights under federal oil and gas leases as well as the 40 acre private oil and gas lease

located on the NW 1/4 N W 1/4 of Section 18, which predate SJCC's coal leases, will be honored.

Commitments

1) SJCC will take all reasonable steps to avoid adverse impacts on oil and gas resource production, gathering and transportation facilities. These steps may include, but are not limited to, mining around existing well bores, moving existing facilities, and relocating power lines, pipelines or roads which may be affected by subsidence. Costs for avoidance measures for facilities with rights senior to SJCC will be paid by SJCC.

2) Adverse impacts will be considered to have occurred when a demonstrable loss of revenue from the facility occurs If SJCC's coal mining activities adversely impact an oil and gas producer with rights which are senior to SJCC, then steps to mitigate those impacts will be taken as follows:

   a) If the adverse impacts can best be mitigated by paying damages for decreased production, SJCC will pay fair market value for appropriate mitigation measures.

   b) If the adverse impact requires that production permanently cease, SJCC will compensate the producer for the fair market value of lost production. Fair market value will be the projected future net cash flow, i.e., Gross projected revenues, less applicable royalties and over riding royalties, taxes and cost of production, gathering, transporting, processing and shrinkage, discounted at a rate equal to the prevailing prime interest rate during the prior month that the analysis is performed plus two percentage points. The projected net cash flow will be determined using the following parameters:

      i) Working and net revenue interest, operating costs, gas analysis, and run and or settlement statements supplied by the producer.

      ii) A gas price equal to the higher of the previous twelve month Inside FERC index for the San Juan Basin or the average one year contract available from three gas marketers. All prices will be adjusted for the current rates for field transportation, gathering, processing and shrinkage.

      iii) An oil price equal to the higher of the previous twelve month average oil price received for like gravity oil in the San Juan Basin or the average of a one year contract available for

at least three crude oil purchasers. The price used will be adjusted for any standard deductions.

iv) Produce prices will be escalated at three (3) percent and direct operating expenses will be escalated at four (4) percent.

v) SJCC will be authorized to audit and confirm all data and information provided under paragraphs 2(b)(i)(ii)(iii) and (iv).

vi) If it is legally determined that a payment to the royalty and/or over riding royalty interest holder, or severance tax to the state of New Mexico is required as a result of the cessation of production, a payment will be based on the projections in 2b discounted at a rate equal to the prevailing prime interest rate during the prior month that the analysis is performed plus two percentage points.

c) In the event SJCC and the oil and gas interest holder do not agree to a value for mitigation using the factors described in paragraph 2 (a) and (b), then the parties will enter into binding arbitration using a mutually agreeable neutral third party to resolve the dispute.

d) SJCC shall pay for the direct, actual costs to reroute power lines, pipe lines or roads with senior rights to SJCC where necessary to avoid adverse impacts.

3) SJCC will be responsible for paying for plugging wells which are subject to this protocol that must be mined through in the course of its mining operations. Said wells must have been completed in accordance with BLM regulations and must have been determined to be capable of producing in paying quantities per BLM guidelines.

This Protocol is submitted to the Bureau of Land Management on this 10th day of September 1998.

SAN JUAN COAL COMPANY

By Chris S Ellyson

UNITES STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
http://www.blm.gov

February 22, 2000

In Reply Refer To:
3100 (310) N

EMS TRANSMISSION 02/22/2000
Instruction Memorandum No. 2000-081
Expires: 09/30/20001

To: All State Directors

From: Assistant Director, Minerals, Realty and Resource Protection

Subject: Policy on Conflicts between Coal Bed Methane (CBM) and Coal Development

Issue:

Conflicts between federal oil and gas and federal coal lessees have historically involved oil and gas resources contained in reservoirs much deeper than the coal. When faced with this type of conflict, the lessees have still been able to develop both resources without significant loss of either resource. However, because of the recent interest in CBM development, we are faced with a new conflict involving oil and gas lessees who produce or want to produce CBM from coal that is expected to be surface-mined by a coal lessee. In this situation, if the coal is surface-mined before the CBM is extracted, the CBM is vented. Conversely, the viability of the coal resource is dependent on systematic development within compulsory diligence requirements, and coal resources may be lost if development of the CBM resource significantly delays coal mining.

A development conflict between coal and CBM could prevent the maximum recovery of either resource. Therefore, the Bureau's policy is to optimize the recovery of both resources and ensure the public receives a reasonable return. If the lessees recover the resources in an optimally cooperative way, they will be able to recover more of the resources than if they produce each resource without regard for the other. Therefore, BLM's policy will be to encourage agreements between lessees or use BLM authority to minimize loss of publicly-owned resources. This IM establishes BLM's policy to optimize benefits to the public and establish procedures to address CBM and surface-mined coal development conflicts.

Policy/Action:

To the greatest extent possible, BLM will work to achieve three principal goals in resolving development conflicts between coal lessees and oil and gas lessees. The three goals are:

- Protect the rights of each lessee under the terms of its lease, the Mineral Leasing Act and the implementing regulations, including those concerning conservation of natural resources.

- Optimize the recovery of both resources

- Optimize the return to the public while protecting public safety and the environment and minimizing impacts on local communities.

Implementation:

The BLM will achieve these policy goals either by facilitating an agreement between the lessees or by exercising authorities provided in the leases and regulations, as described below. This policy will not diminish the Secretary's authority to manage the public lands in accordance with all appropriate statutes.

- The BLM's preferred action is to encourage and assist coal lessees and oil and gas lessees in their efforts to reach an accommodation agreement independently which will achieve the goals of this policy. The BLM should facilitate and support the lessees' efforts to reach such an agreement. If both lessees request it, BLM will "review" the accommodation agreement to ensure it complies with lease terms, regulations, and this policy. The BLM will notify the lessees if the accommodation agreement conflicts with lease terms or regulations.

  Alternatively, the parties to the accommodation agreement may request BLM "approval" of the agreement. The BLM may approve a cooperative development agreement between the lessees if the agreement ensures conservation of the resources and is in the public interest. The Regional or Field Solicitor should review the agreement before approval.

- Even though BLM may review or approve an accommodation agreement, BLM retains the right to take any additional action described below to ensure optimum recovery of the resources.

- Where BLM determines that an imminent loss of some or all of the CBM resource may occur as a result of conflicts between CBM and coal production, the BLM will consider requests from oil and gas lessees for royalty reductions to encourage the greatest ultimate recovery and to conserve the resources.

- If the conflicting lessees cannot reach an agreement or the agreement conflicts with BLM's policy objectives, BLM may use all pertinent lease terms and regulations to optimize recovery of both resources. Federal laws, regulations and lease terms applicable to federal mineral development provide authority to the Secretary, upon determination that it is in the public interest, to regulate the development of leased resources, to conserve natural resources, to encourage the greatest ultimate recovery, and to protect the

interests of the United States. Sections 17 and 39 of Mineral Leasing Act give BLM authority to require cooperative development and suspend operations of oil and gas lessees, respectively. Lease provisions and regulations allow BLM to direct the rate of oil and gas development (43 CFR 3162.2, Sec. 4 of the standard oil and gas lease form, and certain provisions of the model unit agreement). For coal, BLM has the authority to suspend lease operations (Sec. 39 and 43 CFR 3483.3), to ensure Maximum Economic Recovery (MER) (43 CFR 3484.1(b)(1)) through approval of a Resource Recovery and Protection Plan (R2P2) (43 CFR 3482), and to order immediate cessation of mining operations for non-compliance with the regulations or lease terms (43 CFR 3486.3). These laws and regulations give BLM the authority to carry out this policy through approval of lease development activities and enforcement of lease terms.

Use of Lease Provisions and Regulations:

We cannot develop guidance that can explicitly address every situation. Therefore, BLM must be flexible when addressing unforeseen situations. The BLM personnel are expected to use appropriate judgment when applying this policy. To optimize resource development, BLM may:

- Direct rates of CBM exploration and development to maximize CBM gas production prior to coal development, consistent with existing regulations and lease terms;
- Use its lease and regulatory authority over conventional oil, gas or CBM development, as appropriate, to:
  - Direct rates of production,
  - Issue orders to produce or plug wells that are not producing in paying quantities. Leases without production in paying quantities may be terminated if the existing wells are not returned to production in paying quantities, and
  - Issue suspensions and orders to plug and abandon producing wells as mining approaches;
- Use regulatory authority to grant CBM royalty rate reductions to promote the greatest ultimate recovery and conserve the CBM resource;
- Make assessments for any avoidable loss of resource, if the lessee does not timely develop CBM in advance of mining, where it is economically feasible to do so;
- Direct the coal lessee to analyze all possible mining plans to allow optimum recovery of CBM and deeper hydrocarbons, as part of the R2P2 approval;
- Make assessments for avoidably bypassed coal when provided for by a stipulation in the lease; and

- Suspend the coal lease or coal operations to allow optimum recovery of CBM.

The BLM will also consider financial impacts to the Federal Government when deciding if any of the actions outlined above are in the public interest. The BLM may consider an offer from a lessee to indemnify the Federal Government from claims by the conflicting lessee before taking any of the actions described above.

Alternatives for Future Leasing:

To the greatest extent possible, every new coal or oil and gas lease should contain reasonable stipulations that will facilitate resolution of future development conflicts. These stipulations should:

- Clarify that the lessee's right to develop its minerals may be junior to existing development rights for other minerals on the same lands;
- Require that BLM approve all operations or agreements that would impair the recovery of other mineral resources;
- Require that the resource be produced, to the greatest extent possible, in a manner which facilitates the optimal recovery of all resources;
- Indemnify the Federal Government against liability for interference with mineral production from a conflicting lease.

Signed by:
Carson W. Culp
Assistant Director
Minerals, Realty and Resource Protection

Authenticated by:
Robert M. Williams
Directives, Records
& Internet Group,WO540

BEFORE THE SECRETARY OF THE
DEPARTMENT OF ENERGY, MINERALS
AND NATURAL RESOURCES
January 27, 2003
Exhibit No. 4

Form 3400-12
(April 1986)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

COAL LEASE

PART I. LEASE RIGHTS GRANTED

This lease, entered into by and between the UNITED STATES OF AMERICA, hereinafter called lessor, through the Bureau of Land Management, a

(Name and Address)

San Juan Coal Company
300 W. Arrington, Suite 200
Farmington, NM 87401

hereinafter called lessee, is effective *(date)* MAR 1 2001, for a period of 20 years and for so long thereafter as coal is produced in commerc quantities from the leased lands, subject to readjustment of lease terms at the end of the 20th lease year and each 10-year period thereafter.

Sec. 1. This lease is issued pursuant and subject to the terms and provisions of the:

☒ Mineral Lands Leasing Act of 1920, Act of February 25, 1920, as amended, 41 Stat. 437, 30 U.S.C. 181-287, hereinafter referred to as the Act

☐ Mineral Leasing Act for Acquired Lands, Act of August 7, 1947, 61 Stat. 913, 30 U.S.C. 351-359;

and to the regulations and formal orders of the Secretary of the Interior which are now or hereafter in force, when not inconsistent with the expr and specific provisions herein.

Sec. 2. Lessor, in consideration of any bonuses, rents, and royalties to be paid, and the conditions and covenants to be observed as herein set fo hereby grants and leases to lessee the exclusive right and privilege to drill for, mine, extract, remove, or otherwise process and dispose of the c deposits in, upon, or under the following described lands:

T. 30 N., R. 14 W., NMPM
sec. 17, ALL;
sec. 18, ALL;
sec. 19, ALL;
sec. 20, ALL;
sec. 29, ALL;
sec. 30, ALL;
sec. 31, Lots 1-4,
N½,N½S½;

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N.M.S.O. SANTA FE

containing 4,483.88 acres, more or less, together with the right to construct such works, buildings, plants, structures, equipment and applian and the right to use such on-lease rights-of-way which may be necessary and convenient in the exercise of the rights and privileges granted, subjec the conditions herein provided.

PART II. TERMS AND CONDITIONS

Sec. 1. (a) RENTAL RATE - Lessee shall pay lessor rental annually and in advance for each acre or fraction thereof during the continuance of the lease at the rate of $ 3.00 for each lease year.

(b) RENTAL CREDITS - Rental shall not be credited against either production or advance royalties for any year.

Sec. 2. (a) PRODUCTION ROYALTIES - The royalty shall be * percent of the value of the coal as set forth in the regulations. Royalties are due to lessor the final day of the month succeeding the calendar month in which the royalty obligation accrues.

(b) ADVANCE ROYALTIES - Upon request by the lessee, the authorized officer may accept, for a total of not more than 10 years, the payment of advance royalties in lieu of continued operation, consistent with the regulations. The advance royalty shall be based on a percent of the value of a minimum number of tons determined in the manner established by the advance royalty regulations in effect at the time the lessee requests approval to pay advance royalties in lieu of continued operation.

Sec. 3. BONDS - Lessee shall maintain in the proper office a lease bond in the amount of $ 14,000. The authorized officer may require an increase in this amount when additional coverage is determined appropriate.

Sec. 4. DILIGENCE - This lease is subject to the conditions of dilig development and continued operation, except that these conditions excused when operations under the lease are interrupted by strikes, elements, or casualties not attributable to the lessee. The lessor, in public interest, may suspend the condition of continued operation u payment of advance royalties in accordance with the regulations existence at the time of the suspension. Lessee's failure to produce c in commercial quantities at the end of 10 years shall terminate lease. Lessee shall submit an operation and reclamation plan pursu to Section 7 of the Act not later than 3 years after lease issuance.

The lessor reserves the power to assent to or order the suspension of terms and conditions of this lease in accordance with, inter a Section 39 of the Mineral Leasing Act, 30 U.S.C. 209.

Sec. 5. LOGICAL MINING UNIT (LMU) - Either upon approval by lessor of the lessee's application or at the direction of the lessor, t lease shall become an LMU or part of an LMU, subject to the provisi set forth in the regulations.

The stipulations established in an LMU approval in effect at the tim LMU approval will supersede the relevant inconsistent terms of t lease so long as the lease remains committed to the LMU. If the LMU which this lease is a part is dissolved, the lease shall then be subjec the lease terms which would have been applied if the lease had not b included in an LMU.

*12½ percent of the value of the coal removed by surface methods or

Sec. 6. DOCUMENTS, EVIDENCE AND INSPECTION - At such times and in such form as lessor may prescribe, lessee will furnish detailed statements showing the amounts and quality of all products removed and sold from the lease, the proceeds therefrom, and the amount used for production purposes or unavoidably lost.

Lessee shall keep open at all reasonable times for the inspection of any duly authorized officer of lessor, the leased premises and all surface and underground improvements, works, machinery, ore stockpiles, equipment, and all books, accounts, maps, and records relative to operations, surveys, or investigations on or under the leased lands.

Lessee shall allow lessor access to and copying of documents reasonably necessary to verify lessee compliance with terms and conditions of the lease.

While this lease remains in effect, information obtained under this section shall be closed to inspection by the public in accordance with the Freedom of Information Act (5 U.S.C. 552).

Sec. 7. DAMAGES TO PROPERTY AND CONDUCT OF OPERATIONS - Lessee shall comply at its own expense with all reasonable orders of the Secretary, respecting diligent operations, prevention of waste, and protection of other resources.

Lessee shall not conduct exploration operations, other than casual use, without an approved exploration plan. All exploration plans prior to the commencement of mining operations within an approved mining permit area shall be submitted to the authorized officer.

Lessee shall carry on all operations in accordance with approved methods and practices as provided in the operating regulations, having due regard for the prevention of injury to life, health, or property, and prevention of waste, damage or degradation to any land, air, water, cultural, biological, visual, and other resources, including mineral deposits and formations of mineral deposits not leased hereunder, and to other land uses or users. Lessee shall take measures deemed necessary by lessor to accomplish the intent of this lease term. Such measures may include, but are not limited to, modification to proposed siting or design of facilities, timing of operations, and specification of interim and final reclamation procedures. Lessor reserves to itself the right to lease, sell, or otherwise dispose of the surface or other mineral deposits in the lands and the right to continue existing uses and to authorize future uses upon or in the leased lands, including issuing leases for mineral deposits not covered hereunder and approving easements or rights-of-way. Lessor shall condition such uses to prevent unnecessary or unreasonable interference with rights of lessee as may be consistent with concepts of multiple use and multiple mineral development.

Sec. 8. PROTECTION OF DIVERSE INTERESTS, AND EQUAL OPPORTUNITY - Lessee shall: pay when due all taxes legally assessed and levied under the laws of the State or the United States; accord all employees complete freedom of purchase; pay all wages at least twice each month in lawful money of the United States; maintain a safe working environment in accordance with standard industry practices; restrict the workday to not more than 8 hours in any one day for underground workers, except in emergencies; and take measures necessary to protect the health and safety of the public. No person under the age of 16 years shall be employed in any mine below the surface. To the extent that laws of the State in which the lands are situated are more restrictive than the provisions in this paragraph, then the State laws apply.

Lessee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and the rules, regulations, and relevant orders of the Secretary of Labor. Neither lessee nor lessee's subcontractors shall maintain segregated facilities.

Sec. 9. (a) TRANSFERS

- [X] This lease may be transferred in whole or in part to any person, association or corporation qualified to hold such lease interest.
- [ ] This lease may be transferred in whole or in part to another public body or to a person who will mine the coal on behalf of, and for the use of, the public body or to a person who for the limited purpose of creating a security interest in favor of a lender agrees to be obligated to mine the coal on behalf of the public body.
- [ ] This lease may only be transferred in whole or in part to another small business qualified under 13 CFR 121.

Transfers of record title, working or royalty interest *must* be approved in accordance with the regulations.

(b) RELINQUISHMENT - The lessee may relinquish in writing at any time all rights under this lease or any portion thereof as provided in the regulations. Upon lessor's acceptance of the relinquishment, lessee shall be relieved of all future obligations under the lease or the relinquished portion thereof, whichever is applicable.

Sec. 10. DELIVERY OF PREMISES, REMOVAL OF MACHINERY, EQUIPMENT, ETC. - At such time as all portions of this lease are returned to lessor, lessee shall deliver up to lessor the land leased, underground timbering, and such other supports and structures necessary for the preservation of the mine workings on the leased premises or deposits and place all workings in condition for suspension or abandonment. Within 180 days thereof, lessee shall remove from the premises all other structures, machinery, equipment, tools, and materials that it elects to or as required by the authorized officer. Any such structures, machinery, equipment, tools, and materials remaining on the leased lands beyond 180 days, or approved extension thereof, shall become the property of the lessor, but lessee shall either remove any or all such property or shall continue to be liable for the cost of removal and disposal in the amount actually incurred by the lessor. If the surface is owned by third parties, lessor shall waive the requirement for removal, provided the third parties do not object to such waiver. Lessee shall, prior to the termination of bond liability or at any other time when required and in accordance with all applicable laws and regulations, reclaim all lands the surface of which has been disturbed, dispose of all debris or solid waste, repair the offsite and onsite damage caused by lessee's activity or activities incidental thereto, and reclaim access roads or trails.

Sec. 11. PROCEEDINGS IN CASE OF DEFAULT - If lessee fails to comply with applicable laws, existing regulations, or the terms, conditions and stipulations of this lease, and the noncompliance continues for 30 days after written notice thereof, this lease shall be subject to cancellation by the lessor only by judicial proceedings. This provision shall not be construed to prevent the exercise by lessor of any other legal and equitable remedy, including waiver of the default. Any such remedy or waiver shall not prevent later cancellation for the same default occurring at any other time.

Sec. 12. HEIRS AND SUCCESSORS IN INTEREST - Each obligation of this lease shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

Sec. 13. INDEMNIFICATION - Lessee shall indemnify and hold harmless the United States from any and all claims arising out of the lessee's activities and operations under this lease.

Sec. 14. SPECIAL STATUTES - This lease is subject to the Clean Water Act (33 U.S.C. 1252 et. seq.), the Clean Air Act (42 U.S.C. 4274 et. seq.), and to all other applicable laws pertaining to exploration activities, mining operations and reclamation, including the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et. seq.).

Sec. 15. SPECIAL STIPULATIONS -

1. The lessee shall comply at its own expense with all reasonable orders of the Secretary respecting diligent operations, prevention of waste, and protection of non-coal resources.

2. This coal lease is subject to all prior existing rights including the right of oil and gas lessees & other mineral lessees and surface users.

3. It is solely the responsibility of the coal lessee, not the responsibility of BLM, to clear the coal tract of any legal encumbrances or pre-existing land uses that would impede or prevent coal mining on the tract.

ec. 15. SPECIAL STIPULATIONS (Cont'd.) -

4. No portion of the 1998 Coal Leasing Area Resource Plan Amendment shall be construed to require BLM to act in the role of a party to mediation or mitigation efforts between eral or surface interest holders.

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BUR. OF LAND MGMT.
N.M.S.O. SANTA FE

THE UNITED STATES OF AMERICA

SAN JUAN COAL COMPANY
Company or Lessee Name

By

(Signature of Lessee)

(Signing Officer)

President
(Title)

Carsten F. Goff
Acting, State Director
(Title)

February 06, 2001
(Date)

FEB 23 2001
(Date)

Title 18 U.S.C. Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction.

This form does not constitute an information collection as defined by 44 U.S.C. 3502 and therefore does not require OMB approval.

GPO 854-476

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Farmington Field Office
1235 La Plata Highway, Suite A
Farmington, New Mexico 87401

IN REPLY REFER TO:
NM NM 99144 ((Coal, GC)
NM NM 99003 (O & G, GC)
3100/3400 (07100)

RECEIVED SEP 2 [illegible] 2001

September 20, 2001

CERTIFIED–RETURN RECEIPT REQUESTED
7106 4575 1292 2684 0142

BEFORE THE SECRETARY OF THE
DEPARTMENT OF ENERGY, MINERALS
AND NATURAL RESOURCES
January 27, 2003
Exhibit No. 5

Mr. Lynn Woomer
BHP Billiton
San Juan Coal Company
P.O. Box 561
Waterflow, NM 87421

RE: Protest of Applications for Permit to Drill (APDs)

Dear Mr. Woomer:

The Bureau of Land Management (BLM) acknowledges the receipt of your letter dated August 31, 2001, protesting the issuance of APDs to Richardson Operating Company and Dugan Production Corporation. The area of concern identified in your correspondence involves properties covered by valid existing oil and gas leases listed below.

Richardson Operating Company	Secs. 30 and 31, T. 30 N., R. 14 W., San Juan County
Dugan Production Corporation	Sec. 24, T. 30 N., R. 15 W., and Secs. 17, 18 and 19, T. 30 N., R. 14 W., San Juan County

The protest requests that the BLM refrain from issuing APDs unless certain stipulations are placed on the operators. BHP also requests that the Operators refrain from hydraulically fracturing the coal seams. These requests were made in order to mitigate certain safety concerns associated with subsequent underground coal mining of the oil and gas leases.

There are three specific safety issues mentioned: 1) the presence of steel casing in the basal coal seam and the adverse impact on the continuous mining machines (CMs); 2) the potentially adverse impacts of hydraulic fracturing on roof stability; and 3) the increased risk of spontaneous combustion occasioned by hydraulic fracturing.

The BLM appreciated the opportunity to meet with BHP-Billiton on Friday, September 14, 2001, to discuss the safety concerns and review a rather comprehensive ventilation plan for the mine.

After reviewing the safety issues in detail, it is difficult to quantify the risks associated with degassing of the basal coal seam of the Fruitland Coal horizon by conventional drilling and completion techniques utilized by the oil and gas operators. There are many publications which attempt to address the safety concerns raised by BHP-Billiton with conflicting opinions as to severity and magnitude. The BLM acknowledges the concern for the health and safety of the underground mining workforce and believes that the safety issues should be addressed by the mine safety plan developed by BHP-Billiton.
Your proposed conditions to be imposed upon the operators (e.g. milling of casing, pressure coring, and lack of well stimulation) would add significant costs to the operators thereby rendering the leases uneconomic to

develop. This would constitute an unfair burden on the oil and gas lessees who have priority rights in developing their associated mineral resource. All properties alluded to fall within the Deep Lease Extension with the exception of Sec. 24, T. 30 N., R. 15 W. The BLM reminds BHP-Billiton of Special Stipulation 3 of coal lease NM NM 99144 (The Deep Lease Extension) issued March 1, 2001, which reads:

> "It is solely the responsibility of the coal lessee, not the responsibility of BLM, to clear the coal tract of any legal encumbrances or pre-existing land uses that would impede or prevent coal mining on the tract."

The BLM cannot encumber the issuance of APDs with unreasonable conditions of approval that render the lessees' operations uneconomic. Consequently, the APDs on Federal oil and gas lease NM-99003 in Secs. 30 and 31, T. 31 N., R. 14 W. are approved. There are several steel-cased well bores already existing on the coal leases with the potential for several more in the foreseeable future with subsequent issuance of additional APDs to the operators. In the interest of mitigating the perceived safety threat to the underground mining operations, the BLM strongly encourages BHP-Billiton to reach a settlement with the oil and gas operators in the area as quickly as possible.

Under provisions of 43 CFR 3165.3, you may request an Administrative Review, before the State Director either with or without oral presentation, or the action described above. Such a request, including all supporting documentation, shall be filed in writing with the State Director, Bureau of Land Management (NM-93000), P.O. Box 27115, Santa Fe, New Mexico 87502-0115 within 20-business days of the date this notice was received or considered to have been received. Such request shall not result in a suspension of the action unless the reviewing official so determines. Procedures governing appeals from instructions, orders or decisions are contained in 43 CFR 3165.4 and 43 CFR 4.400 ***et seq.***

If you have any questions regarding the above, please contact Dave Mankiewicz at (505) 599-6387.

Sincerely,

Steve Henke
Acting Field Manager

cc:
(7106 4575 1292 2684 0159)
Richardson Operating Company
1700 Lincoln, Suite 1700
Denver, CO 80203

(7106 4575 1292 2684 0166)
Dugan Production Corporation
P.O. Box 420
Farmington, NM 87499

(7106 4575 1292 2684 0173)
Mr. Steve Hayden
New Mexico Oil Conservation Division
1000 Rio Brazos Road
Aztec, NM 87410

1-9-02

United States Department of the Interior

Bureau of Land Management
New Mexico State Office
1474 Rodeo Road
P.O. Box 27115
Santa Fe, New Mexico 87502-0115
www.nm.blm.gov

IN REPLY REFER TO:
SDR 02-01
3160 (93000)
NMNM 99144
NMNM 99003

CERTIFIED MAIL RETURN RECEIPT REQUESTED
7001 0360 0001 0168 1013

San Juan Coal Company
c/o Modrall, Sperling, Roehl, Harris & Sisk
500 Fourth St. NW
Bank of America Centre, Suite 1000
Albuquerque, NM 87102

Decision Dismissing Protest of Issuance of Applications for Permits To Drill in Vicinity of Coal Mine and Approval of APD's

Decision Remanded; Request for Stay Dismissed as Moot
Request for Stay of Approval of Further Applications Dismissed

By letter dated October 18, 2001, Modrall, Sperling, Roehl, Harris & Sisk, P.A., as agent for San Juan Coal Company (San Juan), requested a Stay Pending Administrative Review and State Director Review (SDR) of a September 20, 2001, Decision of the Farmington Field Office (FFO). That Decision dismissed San Juan's August 31, 2001, protest of the issuance of applications for a permit to drill (APD's) in areas where San Juan has plans to mine. The decision also approved four Richardson Operating Company (Richardson) APD's. San Juan also requested the opportunity to present its arguments orally. The oral presentation occurred on November 19, 2001.

On October 29, 2001, we received a Reply to San Juan's request for administrative review from Richardson and on November 7, 2001, this office received a Reply from Dugan Production Corporation (Dugan). Dugan is an affected party through its existing oil and gas leases, and its current and proposed coalbed methane (CBM) development program. During the oral presentation on November 19, 2001, San Juan expanded upon its written arguments. Following San Juan's presentation, Richardson presented its oral arguments.

BEFORE THE SECRETARY OF THE
DEPARTMENT OF ENERGY, MINERALS
AND NATURAL RESOURCES
January 27, 2003
Exhibit No. 6

Facts:

San Juan requested that Richardson's drilling operations be curtailed in the following lands:
T. 30 N., R. 14 W., N.M.P.M., San Juan County, New Mexico
Secs. 17-19, 30, 31; and

T. 30 N., R. 15 W., N.M.P.M.
Sec. 24.

These lands are located within San Juan's "Deep Lease" and "Deep Lease Extension," NMNM 28093 and NMNM 99144, respectively.

Leasing of the Federal oil and gas estate has occurred in this area since the first 'oil permit' was issued in 1923. There are seven active oil and gas leases in effect within the above-described area. Six of the leases were issued 27-33 years ago, and are held by production from other wells. Richardson operates lease NMNM 99003, obtained at a competitive lease sale in 1997. One well within the lease has produced since October 1999. Dugan operates two leases within the area.

Coal has been mined for residential use since the late nineteenth century. Large-scale surface mining began in 1958. Western Coal Company initiated surface mining of coal in 1973. The "Deep Lease," later acquired by San Juan, was issued to Western Coal Company in April 1980. San Juan's "Deep Lease Extension" was issued effective March 1, 2000, with a term of 20 years.

Section 15 of the lease has the following special stipulations:

"1. The lessee will comply at its own expense with all reasonable orders of the Secretary respecting diligent operations, prevention of waste, and protection of non-coal resources.

2. This coal lease is subject to all prior existing rights, including the right of oil and gas lessees and other mineral lessees and surface users.

3. It is solely the responsibility of the coal lessee, not the responsibility of the Bureau of Land Management (BLM), to clear the coal tract of any legal encumbrances or pre-existing land uses that would impede or prevent coal mining on the tract."

We have minutes of four of the monthly meetings facilitated by the FFO, held between January and May 2001, in which San Juan, Richardson and Dugan met in an effort to optimize recovery of both coal and CBM, as well as potential gas reserves in deeper horizons. San Juan originally encouraged degassing prior to mining. In fact, it was this position that prompted the FFO to send demand letters to both Richardson and Dugan, requiring development of the CBM prior to mining as a means of recovering gas that otherwise would be lost. San Juan now opposes development of the CBM, due to safety concerns expressed by its ventilation engineer.

Richardson submitted four APD's that triggered the August 31, 2001, protest from San Juan. After the September 20, 2001, decisions, Richardson drilled all four wells.

San Juan's Arguments:

Our review of the oral presentation, written material submitted by San Juan and Richardson, and case record data, demonstrated that this dispute has been ongoing for over a year. There are four main issues in the dispute, as articulated by San Juan.

1. **Who has the priority right to develop his lease(s)?**

San Juan admits that its lease postdates the oil and gas leases. However, it states that its plan of development predates any drilling plans filed by either company, and that BLM should look at actual plans of development, not merely lease issuance dates. In addition, San Juan states that the BLM is bound to consider the more valuable resource from the standpoint of public needs; coal is more valuable and returns more in royalties to the public.

In its oral presentation, San Juan stated that the Resource Management Plan Amendment for Coal Leasing effectively modified the lessees' potential to develop their existing oil and gas leases.

2. **Development of the CBM will result in safety hazards to mining equipment and personnel**

San Juan made several statements regarding increased safety hazards if CBM development occurs prior to mining. The hazards result from the actual steel well casing itself, fire might be caused through mining equipment striking the casing and creating a spark that ignites coal fines or methane. There is an additional risk for spontaneous combustion of the coal if CBM completion techniques include hydraulic fracturing of the coal. San Juan states that hydraulic fracturing of the carbonaceous shale overlying the coal could result in further risk to equipment and employees if it weakens the roof of the mine. If the coal is de-watered and de-gassed ahead of mining, the coal will be more susceptible to oxygen adsorption through an opened cleat system, thereby increasing the risk for spontaneous combustion.

3. **Development of the CBM will result in a major economic loss to San Juan**

San Juan states that development of the CBM would result in reduced recovery of coal. San Juan states that underground mine safety regulations require that no mining occur within 300 feet from any existing wells. This would reduce coal recovery by 300,000 tons around each well. It would also require San Juan to reposition its equipment around each well, which is both time consuming and expensive. If there is more than one well within a particular mining block, it might make that block uneconomical to develop, resulting in the loss of three million tons of coal.

might make that block uneconomical to develop, resulting in the loss of three million tons of coal.

4. The BLM planning and environmental documents are flawed and do not comply with FLPMA

San Juan states that the 1998 Farmington Resource Management Plan Amendment (RMPA) for coal leasing activity is flawed, in that it did not consider the coal versus CBM conflict, nor provide a method to resolve the conflict. The Environmental Assessments (EA's) prepared for Richardson's APD's do not consider alternatives to drilling that were developed in the RMPA.

Richardson's and Dugan's Arguments

Richardson states that its rights are senior to San Juan's, and that the 'first in time, first in right' concept is not outmoded. Richardson cites the stipulations attached to the "Deep Lease Extension" lease, and states that they are controlling; these lease terms were attached in an attempt to eliminate arguments over priority in coal versus CBM resource development. Richardson notes that, in spite of those stipulations, San Juan has failed to conduct due diligence by taking steps necessary to minimize legal and technological risks to the mine, and instead has passed the burden to BLM and Richardson.

Richardson states that its oil and gas lease predates the RMPA, and thus, it cannot alter valid existing rights. Richardson adds that it actively participated in commenting on the RMPA to be sure BLM was aware of the potential adverse effects to its plans to develop the coalbed methane.

Richardson and Dugan disagree with San Juan's conclusion that the EA's failed to consider all reasonable alternatives, including alternative well locations, and a no-action alternative.

Dugan identifies its lease interests, and notes that they predate San Juan's lease. Dugan noted that it currently operates 18 wells within the subject area; the wells produce 850 MMBTU/day. Dugan describes the infrastructure needed to produce the gas, and its investment of more than $6 million.

Dugan also notes that the development potential of CBM has only surfaced recently, and that advances in technology have made recovery of CBM economical in this under pressured area. Dugan notes those existing regulations would allow it to drill an additional 24 wells within the subject area, and that if well density is increased, 38 additional CBM wells could be drilled.

Analysis and Response

Following is our response to each argument:

1. Priority

We find no justification for San Juan's argument that we should consider the date that plans of development were approved, in lieu of actual lease issuance dates. The terms of San Juan's coal lease provide our rationale, that the oil and gas lessees have priority in development of their gas resources.

San Juan's coal lease contained special stipulations as a means of resolving future development conflicts. Section 15 of the lease states that it is San Juan's sole responsibility to resolve conflicts with prior oil and gas lessees. The terms clearly state that the oil and gas leases are valid existing rights, and that San Juan is solely responsible for removing impediments to coal mining.

In addition, the Protocol for the Mediation of Adverse Impacts on Oil and Gas Revenues, signed by San Juan, recognizes the senior stature of valid existing oil and gas leases. By signing the lease form and the protocol, San Juan agreed to those provisions. The protocol committed San Juan to honor existing Federal and fee oil and gas leases, and to avoid or mitigate adverse impacts to the oil and gas lessees. San Juan agreed to compensate the oil and gas lessees by paying damages for decreased production. If production would permanently cease, San Juan would compensate the lessees for the fair market value of lost production.

Finally, San Juan's asserted that the RMPA for Coal Leasing effectively modified the oil and gas lessees' potential to develop their existing oil and gas leases. This is untrue – the BLM cannot retroactively constrain development by applying new, restrictive stipulations to existing leases. We do agree with San Juan that the Plan requires that future drilling activity would be coordinated with the BLM and mining company.

2. Safety

We agree with the September 20, 2001, FFO decision letter that the risks of degassing the coal seam are difficult to quantify. San Juan presented only its concerns about potential safety hazards. San Juan presented no data that demonstrate that hydraulic fracturing of the coal would increase the potential for spontaneous combustion, or weaken the mine roof. San Juan's arguments regarding potential safety hazards if CBM development preceded mining may be addressed by underground mine safety rules requiring the 300 foot buffer around existing wells.

3. Economics

We agree that Richardson's CBM development plans could impair coal mining, and could force San Juan to bypass recoverable coal reserves. Nonetheless, San Juan could mine through a well location if it milled out the casing prior to mining. While San Juan states that this is a slow and expensive procedure, it would maximize the economic recovery of the coal resource. San Juan implies that Richardson and Dugan are filing APD's to jeopardize its mining operations, then holding out on a settlement to obtain " . . . many multiples of such value . . . " The BLM has seen no evidence of the two companies filing APD's merely to impede underground mining, or force an unfair buyout. Rather, Richardson and Dugan appear to be proposing drilling operations, and carrying out development in an attempt to recover CBM prior to mining. Evidently, the two companies are unconvinced, as is the BLM, that there would be recoverable CBM following mining, such that they might obtain some economic benefit of their leases post mining.

4. **The 1998 FFO Resource Management Plan Amendment and individual EA's for Richardson's CBM wells are flawed.**

We believe the RMPA adequately addresses the oil and gas development versus coal mining issue. It offers a sufficient range of alternatives for the BLM to consider.

The State Office examined the Environmental Assessment (EA) prepared by Permits West, Inc. (Richardson's contractor), dated August 16, 2001. We also reviewed the Finding of No Significant Impact (FONSI) and Decision Record, completed by the FFO on August 29, 2001, and approved September 4, 2001.

We find that the EA did not comprehensively address all issues regarding other mineral resources and potential conflicts. Similarly, the FONSI should have recognized the lack of such analysis. Specifically, there was no analysis of potential impacts to the coal resource. We note that the EA were prepared prior to San Juan's protest letter. At that time, degassing of the coal was considered as a positive effect.

Decision

This decision has been coordinated with our Field Solicitor in Santa Fe, and Department of the Interior solicitors in Washington, D.C.

We understand San Juan's concerns regarding mine safety and the economic costs of remediating well bores within its mine area. It is unfortunate that San Juan only recently recognized the potential adverse impacts of CBM development on its ability to mine the coal. The BLM had encouraged our lessees to accelerate development of the CBM in advance of mining to ensure recovery of methane that otherwise would be lost, and to reduce the safety threat of methane degassing during mining operations.

7

We believe that Richardson has a prior existing right to develop the CBM. This is true even if it would cause reduced recovery of coal reserves, and adversely affect the economics of San Juan's mine. San Juan must adjust its mine plan to provide necessary safety to mine personnel. Accordingly, we sustain the FFO decision with regard to: 1) priority; 2) safety; and 3) economics.

We disagree with San Juan's fourth argument that the APD approvals do not comply with the 1998 Coal Leasing RMPA. The Decision Record for the RMPA was issued after the effective date of Richardson's oil and gas lease. The RMPA cannot unreasonably constrain development of pre-existing rights.

We agree with San Juan that the EA's do not address alternatives to oil and gas development identified in the 1998 RMPA. We herein remand the case to FFO for review of the EAs prepared for the Richardson wells.

The FFO must ensure that cumulative impacts to the coal resource are analyzed, and consider alternatives that would reduce adverse impact to coal development. After the FFO have completed its analysis, and reported its conclusions to the State Director, we will decide this last issue.

The request for the State Director to stay FFO approval of the Richardson APD's is rendered moot by the completion of all four wells prior to our receipt of the SDR request. The request to stay approval of other applications within the area identified is dismissed as premature. We cannot stay applications prior to their approval.

This Decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and Form 1842-1 (copy attached). If an appeal is taken, your notice of appeal must be filled in this office within 30 days from your receipt of this decision. The appellant has the burden of showing that the Decision appealed from is in error.

If you wish to file a petition for stay of the effectiveness of this Decision during the time that your appeal is being reviewed by the Board, the petition for stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed on the attached (Form 1842-1). Copies of the notice to appeal and petition for stay must be submitted to each party named in the Decision and to the Interior Board of Land Appeals, and to the appropriate office of the solicitor

(see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that the stay should be granted.

Sincerely,

Carsten F. Goff
Deputy State Director
Division of Resource Planning,
Use and Protection

/Enclosure

cc:
WO(310)
MSO(920)
WSO(920)
USO(920)
NM(010)
NM(020)
NM(030)
NM(040)
NM(050)
NM(060)
NM(070)
NM(080)
NM(090)
NM(930)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
801 N. Quincy St. Suite 300
Arlington, VA 22203

703 235 3750 AUG 27 2002 703 235 8349 (fax)

IBLA 2002-173	:	SDR 02-01
	:	
SAN JUAN COAL COMPANY	:	Coalbed Methane
	:	
	:	Dismissed

ORDER

San Juan Coal Company has appealed from two decisions of the New Mexico State Office, Bureau of Land Management (BLM), dated December 17, 2001, and January 9, 2002, involving its protests against approval of applications for permits to drill coalbed methane wells submitted by Richardson Operating Company in areas where San Juan has plans to mine coal. On August 15, 2002, counsel for appellant and BLM filed a joint stipulated motion for dismissal of the above-captioned appeal, and the Board finds no reason why the motion should be denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

James F. Roberts
Administrative Judge

I concur:

James R. Kleiler
Acting Administrative Judge

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

SAN JUAN COAL COMPANY,)
)
Appellant.)

IBLA No. 2002-173

STIPULATED MOTION FOR DISMISSAL

San Juan Coal Company ("San Juan") and the New Mexico State Office of the Bureau of Land Management ("BLM"), through their counsel of record, jointly move for dismissal of this appeal, and as grounds for such motion state as follows:

1. This appeal seeks review of the December 17, 2001 and January 9, 2002 decisions of the State Director of the New Mexico State Office ("State Director's Decisions"), affirming the grant of four permits to drill to Richardson Operating Company.

2. Counsel for the BLM and for San Juan have conferred concerning the status of this matter, including any precedential effect of the State Director's Decisions on future actions in light of the paragraph near the conclusion of the December 17, 2001 State Director's Decision which states:

> The request for the State Director to stay FFO approval of the Richardson APDs is rendered moot by the completion of all four wells prior to our receipt of the SDR request. The request to stay approval of other applications within the area identified is dismissed as premature. We cannot stay applications prior to their approval.

3. Counsel have discussed the mootness and ripeness concerns raised by the facts recited in this portion of the State Director's Decision. Those concerns appear to make it appropriate that the Board dismiss this action.

4. In filing this appeal, San Juan's counsel were concerned that despite the jurisdictional issues, the grant of a right of appeal in the State Director's decision (at p. 7)

made it necessary to appeal, since failure to do so could have been interpreted as acquiescence in all of the rationale of the decision and in the possibility that such rationale would thereby become final policy and precedent within New Mexico.

5. In discussions with counsel for BLM, San Juan has been advised that in BLM's and the Field Solicitor's view, the approval of the four APDs at issue in this case establishes no significant legal precedent because, *inter alia*, future APDs must be adjudicated on their own facts and existing and future Field Office Managers and State Directors retain their management prerogatives to make their own decisions on APDs and other issues that may be presented in the future. Moreover, BLM and the Field Solicitor regard the issues presented and resolved by the State Director's decision as being unrelated to BLM's future decisions concerning the proper administration of competing coal and oil/gas leases. Accordingly, the policies which frame those decisions will not be constrained by the outcome or language of the State Director's decision.

6. In addition, the mootness and ripeness issues outlined above may complicate the ability of this Board to grant San Juan concrete relief in the nature of denial or stay of a pending permit to drill a coalbed methane well which conflicts with San Juan's coal leases.

7. For these reasons, San Juan and BLM request that this appeal be dismissed.

Dated this 14th day of August, 2002.

Respectfully submitted,

ALFERS & CARVER

By: _____

Craig R. Carver
Equitable Bldg., Suite 340
730 Seventeenth St.
Denver CO 80202

Telephone: (303) 592-7674

and

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
Larry P. Ausherman
Walter E. Stern
P.O. Box 2168
Albuquerque, NM 87103-2168
Telephone: (505) 848-1800

Attorneys for San Juan Coal Company

8/13/02

Arthur Arguedas
Field Solicitor
U.S. Department of the Interior
2968 W. Rodeo Park Dr. #2070
Santa Fe, NM 87505-6351

Stipulated Motion for dismissal.DOC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 14, 2002, a true and correct copy of the foregoing STIPULATED MOTION FOR DISMISSAL was sent to the following by United States mail, certified mail, return receipt requested:

Ms. Laura Lindley
Bjork, Lindley, Danielson & Little
1600 Stout, Suite 1400
Denver, CO 80202

Mr. John A. Dean, Jr.
Curtis & Dean
P.O. Box 1259
Farmington, NM 87499-1259

By: Mary Young