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STN-50-529 Palo Verde Nuclear Station, Unit 2, Arizona Publi 05000529
STN-50-530 Palo Verde Nuclear Station, Unit 3, Arizona Publi 05000530
AUTH.NAME AUTHOR AFFILIATION
VAN BRUNT,E.E. Arizona Public Service Co.
RECIP.NAME RECIPIENT AFFILIATION
MIRAGLIA,F.J. NRC - No Detailed Affiliation Given

SUBJECT: Forwards response to NRC 820305 ltr requesting addl info re util authority to restrict access to exclusion area per SER Section 2.1.2.

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ARIZONA PUBLIC SERVICE COMPANY

STA. _____ P.O. BOX 21666 - PHOENIX, ARIZONA 85036

April 1, 1982
ANPP-20605 - JMA/KWG

Mr. F. J. Miraglia
Nuclear Regulatory Commission
Washington, D.C. 20555

Subject: Palo Verde Nuclear Generating Station
(PVNGS) Units 1, 2 and 3
Docket Nos. STN-50-528/529/530
File: 82-056-026

Reference: Letter from F. J. Miraglia to E. E. Van Brunt, Jr., dated March 5, 1982; subject: Exclusion Area Access Control

Dear Mr. Miraglia:

In the referenced letter you requested additional information regarding what authority Arizona Public Service will have to restrict access to the properties described in the PVNGS SER Section 2.1.2. Attached is our response.

If you have any questions, please contact me.

Very truly yours,

E.E. Van Brunt

E.E. Van Brunt, Jr.
APS Vice President
Nuclear Project
ANPP Project Director

EEVBJr/KWG/de
Attachment
cc: P.L. Hourihan (w/a)
R.L. Greenfield (w/a)
E. Licitra (w/a)
A.C. Gehr (w/a)

B001
S1/1

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, Edwin E. Van Brunt, Jr., represent that I am Vice President Nuclear Projects of Arizona Public Service Company, that the foregoing document has been signed by me on behalf of Arizona Public Service Company with full authority so to do, that I have read such document and know its contents, and that to the best of my knowledge and belief, the statements made therein are true.

Edwin E. Van Brunt

Edwin E. Van Brunt, Jr.

Sworn to before me this 1 day of APRIL, 1982.

John M Allen

Notary Public

My Commission expires:

23 JAN 83

Joint Applicants' Authority To Determine

Activities Within The Exclusion Area

In Section 2.1.2 of the Final Safety Analysis Report ("FSAR") for the Palo Verde Nuclear Generating Station ("PVNGS"), Joint Applicants identify two parcels of land within the exclusion area for PVNGS as to which they do not own all of the rights to oil, gas and minerals. Joint Applicants state that in respect of the following described parcels:

> The Southeast quarter (SE-1/4) of Section Twenty-Eight (28), Township One North (T1N), Range Six West (R6W) of the Gila and Salt River Base and Meridian (referred to in the FSAR and herein as Parcel B); and
>
> The West quarter (W-1/4) of Section Two (2), Township One South (T1S), Range Six West (R6W) of the Gila and Salt River Base and Meridian (referred to in the FSAR and herein as Parcel C);

there are outstanding reservations for a 50% interest in respect of Parcel B and a 1/16th interest in respect of Parcel C in any oil, gas or minerals therein.

In a letter from Frank J. Miraglia, Chief, Licensing Branch No. 3, Division of Licensing, Nuclear Regulatory Commission, to E. E. Van Brunt, Jr., Vice President - Nuclear Projects, Arizona Public Service Company, dated March 5, 1982, Joint Applicants were requested to provide information on how they "will have the authority, lacking mineral rights

to those parcels, to exclude the owners from removing property or prevent undermining of the surface of the exclusion area." The following discussion responds to this request.

Parcel B

As shown in Figure 2.1-4 of the FSAR, Parcel B is located in the northwest corner of the exclusion area. The parcel was acquired in 1974 pursuant to an agreement dated February 26, 1974, between Margaret R. T. Morgan as Seller and Arizona Public Service Company ("APS") as Purchaser. The agreement provided that the conveyance by the Seller would contain, among other exceptions and reservations, the following:

> "Reservation to Seller, her heirs and assigns of fifty percent (50%) of all oil, gas and other mineral deposits and geothermal resources recovered from or developed on the property conveyed; provided, however, Seller, her heirs and assigns shall have no right of ingress or egress to or from said property conveyed or to install any facilities for the purpose of recovering or developing oil, gas or other mineral deposits or geothermal resources without the written consent of Purchaser, its successors or assigns."

This reservation was included in the warranty deed for Parcel B.

The express language of the reservation not only prohibits any ingress or egress to or from Parcel B for the purpose of recovering or developing oil, gas or other min-

eral deposits or geothermal resources, but also prohibits the installation of any facilities for such purpose.

As to the prohibition against ingress or egress, the language in the reservation is not limited to the surface estate of Parcel B. Any recovery or development activities which invade any part -- whether surface or subsurface -- of Parcel B are prohibited. Likewise as to the prohibition against the installation of any facilities, the language in the reservation is not limited to the installation of facilities on Parcel B. Rather, the Seller is prohibited from installing <u>any</u> facilities <u>anywhere</u> for the purpose of conducting recovery or development activities on or under Parcel B.

In the event that the Seller ever attempted to prospect for or develop oil, gas or other mineral deposits or geothermal resources without the consent of the Joint Applicants, and if Joint Applicants were unsuccessful in prohibiting such activities under the language of the sales agreement and the warranty deed, Joint Applicants could either purchase such mineral rights or, if necessary, bring a condemnation proceeding against the Seller through the Salt River Project Agricultural Improvement and Power District ("SRP"), one of the participants in PVNGS. As an agricultural improvement district, SRP may bring such proceeding pursuant to Section 45-939 of the Arizona Revised Statutes (A.R.S. §45-939). Pursuant to such statute, "all

laws of the state relating to the exercise of the right of eminent domain and the taking of private property for public purposes and obtaining immediate possession thereof shall apply to the proceedings." (Emphasis added.)

Parcel C

Parcel C is located in the southeast corner of the exclusion area. On December 19, 1958, the State of Arizona granted to one Benjamin Youngker a Certificate of Purchase for Parcel C, reserving to the State "one-sixteenth of all gas, oil, metals and mineral rights." The reservation of a 1/16th interest was also included in the patent recorded in 1974 when APS purchased Parcel C. The reservation was made by the State pursuant to Section 37-231(C) of the Arizona Revised Statutes which required that "all sales, grants, deeds or patents to any state lands sold between July 9, 1954, and [March 18, 1968,] shall be subject to and shall contain a reservation to the state of an undivided one-sixteenth of all oil, gases, . . . metals, minerals . . . ."[1/]

In determining the rights of the State in and to Parcel C, it is important to know whether the State reserved a mineral interest or a royalty interest. If the State

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1/ Pursuant to A.R.S. §37-231(E), all state lands sold after March 18, 1968, shall be sold with the reservation in the State of all oil, gas, metals and minerals.

reserved a mineral interest, then as a concurrent owner, it shares in all rights, including the right to enter the land for the purpose of exploration and development. If, on the other hand, the State simply reserved a royalty interest, it does not have the right to explore and develop. Rather, it only has the right to receive 1/16th of the oil, gas, metals, or minerals, or value thereof, as, if and when produced, free of costs of production. 1 H. Williams and C. Meyers, Oil and Gas Law §§301-02 (1981) (hereinafter cited as "Williams and Meyers").

Ordinarily, the reservation of "all gas, oil, metals and mineral rights" would be construed to create a mineral interest. See id. §304.2. However, (1) two Arizona Supreme Court decisions respecting the reservation of mineral rights by the State Land Department, (2) the statute authorizing the reservation of a 1/16th interest, and (3) the State Land Department's own policy respecting such reservation suggest the need for a closer examination.

In Campbell v. Flying V Cattle Company, 25 Ariz. 577, 220 P.2d 417 (1923), the State Land Department, the agency charged with administration of all laws relating to lands and interests in lands owned by the State, inserted in a certificate of purchase of State land, after the sale had been consummated, a provision reserving minerals to the State. The Court reviewed the Public Land Code pursuant to which the sale was made, and found that the Code did not

grant the State authority to reserve the minerals in the land it sold. The Court stated that the State Land Department is a creature of law and has no powers other than those conferred by law. Because the State Land Department did not have the requisite authority, the reservation was held by the Court to be void.

In State v. Drew, 83 Ariz. 91, 316 P.2d 1108 (1957), the Arizona Supreme Court held that a 1945 reservation of all gas, oil, minerals and mineral rights was void, regardless of the fact that the notice of sale stated that the patent was to contain such reservation. The Court reiterated its reasoning from the Flying V Cattle Company case that the statute giving the State Land Department the power to sell did not authorize such reservation.

The Flying V Cattle Company and Drew cases make clear that the State Land Department has no powers other than those conferred upon it by the Arizona Legislature. Accordingly, it is to the statutes that one must look to determine the effect to be given to the State's reservation respecting Parcel C.

In 1954 the Arizona Legislature amended the statute respecting the sale of State lands (now A.R.S. §37-231) to require the State Land Department to reserve an undivided one-sixteenth of all oil, gases and minerals. A.R.S. §37-231(C). The amendment also included additional provisions, which, as subsequently amended, read as follows:

"1. For the purpose of promoting the sale of state lands and the more active cooperation of the owner of the soil, and to facilitate the development of its mineral resources, the state constitutes the purchaser of the land, its agent for the purposes specified in this section, and in consideration hereof, relinquishes to and vests in the purchaser of the state land an undivided fifteen-sixteenths of all oil, gas and the value thereof which may be upon or within any state land purchased after July 9, 1954 and before the effective date of this section.

2. The purchaser of the soil may sell or lease to any person, firm or corporation the oil and gas and other minerals which may be on or in the land, upon terms and conditions the purchaser and the owner deem best, subject to the provisions and reservations of this section, but the lessee or purchaser shall pay to the state an undivided one-sixteenth of the mineral produced or the value thereof at the well or mine as determined by the state land department.

3. Upon discovery of oil and gas in paying quantities on land adjoining state lands purchased under the authority of this section, the purchaser or his lessee shall drill and produce all wells necessary to protect the land so purchased from drainage by wells on lands in which the state has no royalty interest, or has a lesser royalty interest. If the purchaser or his lessee fails to protect against such drainage, the state, acting through the state land department, may, three months after demand therefor in writing by the state land department to such purchaser and his lessee, enter upon such lands and drill all wells necessary to protect the state against such drainage." A.R.S. §37-231(C).

With respect to Paragraph (1), it is noted that the State makes the purchaser of the land "its agent for the purposes specified in this section." One of the specified purposes is to facilitate the development of the State's mineral resources. Thus, the State gives to the purchaser of the land the authorization to act on behalf of the State with respect to the development of the State's mineral resources. By making the purchaser the State's agent, there is at least the possibility that the Legislature intended the purchaser to have the exclusive right to conduct development activities. If so, then the interest of the State is simply a royalty interest.

That the Legislature did in fact intend for the State to reserve only a royalty interest is confirmed by Paragraphs (2) and (3). Paragraph (2) states that the purchaser or his lessee shall pay to the State 1/16th of the mineral produced or the value thereof. One of the means of distinguishing a royalty interest from a mineral interest is to consider the quantum of production to which the owner of the interest is entitled. The owner of a 1/16th royalty is entitled to one out of 16 barrels of oil produced, free of the costs of production. The owner of a 1/16th mineral interest is entitled to 1/16th of production less 1/16th of the costs of production. Williams and Meyer §303. In light of the foregoing, Paragraph (2), which does not permit the purchaser to deduct the cost of production, seems to describe a royalty interest rather than a mineral interest.

Paragraph (3) addresses the situation involving the discovery of oil and gas on land adjacent to State lands purchased under Section 37-231. It is important to focus on the language used by the Legislature. Paragraph (3) provides that the purchaser of the State land shall drill all wells necessary to protect such land from drainage by wells on lands in which the State has no royalty interest, or has a lesser royalty interest. Paragraph (3) thus makes clear that the interest of the State in the purchased land is a royalty interest[2/], and not a mineral interest.[3/]

2/ There is a limited exception to this conclusion. Paragraph (3) authorizes the State to enter upon Parcel C to protect against drainage if the purchaser fails to do so within three months after demand therefor.

As a practical matter, the discovery of oil and gas in or near Parcel C would be extremely unlikely. Except for a small section in the northeast part of the State, Arizona has long been regarded by geologists as devoid of oil and gas deposits.

Furthermore, even if exploration or development activities were conducted on or under Parcel C, the potential impact to PVNGS would be insignificant. The closest safety-related facility to Parcel C is the spray pond for Unit 3, which is more than 5000 feet from the northwest corner of Parcel C.

3/ As noted in footnote 1, lands sold after March 18, 1968, must contain a reservation in the State of all oil, gas, metals and minerals. As to such lands, the Arizona Legislature has also authorized the State Land Department to lease its interest when such is deemed in the best interest of the State. A.R.S. §37-231(E) (1), (2). The authority to issue leases indicates that the State's reservation in lands sold after March 18, 1968, is a reservation of a mineral interest.

Based on the foregoing, the State's reservation in Parcel C is the reservation of a royalty interest and not a mineral interest. Therefore, except as noted in footnote 2, the State has no right to conduct any exploration or development activities on or under Parcel C.

In further support of this conclusion, the State Land Department has informed Joint Applicants that it has not issued any oil, gas or mineral leases respecting lands in which the State reserved a 1/16th interest in all gas, oil, metals or mineral rights during the 28 years since Section 37-231(C) became effective. This policy indicates that the State Land Department itself considers its reservation in lands sold between 1954 and 1968 to be the reservation of a royalty interest and not a mineral interest.

CONCLUSION

Based on the foregoing, it is concluded that Joint Applicants' authority to determine all activities within the exclusion area is not impaired by the fact that Joint Applicants do not own all of the mineral rights to Parcels B and C.