

1993

# Hidden Valley Coal Company v. Utah Board of Oil, Gas & Mining and the Utah Division of Oil, Gas and Mining : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

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HIDDEN VALLEY COAL COMPANY, :  
Plaintiff and Appellant, :  
v. : Case No. 930073-CA  
The UTAH BOARD OF OIL, GAS AND : Priority 1  
MINING and the UTAH DIVISION :  
OF OIL, GAS AND MINING, :  
Defendants and Appellees. :

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BRIEF OF APPELLEES

On Appeal From the Third Judicial District Court  
County of Salt Lake, State of Utah

The Honorable Glenn K. Iwasaki  
Third District Court Judge

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### **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(e)(iv)(1992) and Utah Code Ann. § 40-10-30(3)(1986).

### **DETERMINATIVE STATUTES AND RULES**

The applicable statutes are contained in:

- (1) Utah Code Ann. § 40-8-9(2), (Utah Mined Land Reclamation Act, found at Page 29);
- (2) Utah Code Ann. § 40-10-4, (Utah Coal Mining and Reclamation Act, found at Page 29);
- (3) Utah Code Ann. § 40-10-17(2)(d), (Utah Coal Mining and Reclamation Act, attached as Addendum E);
- (4) Utah Admin. R. 645-301-742.113, (regulations under Utah Coal Mining and Reclamation Act, attached as Addendum E);
- (5) Utah Code Ann. § 40-10-17(2)(s), (Utah Coal Mining and Reclamation Act, attached as Addendum F);
- (6) Utah Admin. R. 645-301-353, (regulations under Utah Coal Mining and Reclamation Act, attached as Addendum F); and
- (7) Utah Admin. R. 645-301-354, (regulations under Utah Coal Mining and Reclamation Act, attached as Addendum F).



## INTRODUCTION

Hidden Valley Coal Company requests the Court to overturn an Order of the Board dated July 30, 1992, upholding Notice of Violation 91-26-8-2 issued by the Division on November 22, 1991 (the "NOV"). The Third District Court upheld the NOV on November 4, 1992. For the reasons set forth below, the Board's Order should be affirmed.

## STANDARD OF REVIEW

The provisions of the Utah Coal Mining and Reclamation Act ("UMCRA") are specifically exempted from the provisions of the Utah Administrative Procedures Act ("UAPA"). See Utah Code Ann. § 40-10-31. Therefore, the standard of review for this appeal is governed by the provisions set forth in UMCRA as interpreted by pre-UAPA law.

### A. Questions of Fact.

"An appeal from a rule or order of the board shall be a trial on the record and is not a trial de novo." Utah Code Ann. § 40-10-30. The factual findings of the Board may be overturned only if they are "unsupported by substantial evidence on the record."<sup>1</sup> Utah Code Ann. § 40-10-30(f). The "party challenging

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<sup>1</sup> Since Utah Code Ann. § 40-10-31 specifically exempts UMCRA from UAPA, the Board's findings of fact must be affirmed "if there is evidence of any substance whatever which can reasonably be regarded as supporting the determination made. . . ." Grace Drilling Co. v. Board of Review of Industrial Commission of Utah, 776 P.2d 63, 67 (Utah App. 1989), citing Kennecott Copper Corp. Employees v. Department of Employment Security, 13 Utah 2d 262, 372 P.2d 987, 989 (1962). Accordingly, the more stringent test of examining the "record as a whole" as announced in Grace Drilling is inapplicable to this appeal.

the findings must marshall all of the evidence supporting the findings and show that despite the supporting facts, the agency's findings are not supported by substantial evidence." First Nat'l Bank v. County Board of Equalization, 799 P.2d 1163 (Utah 1990). Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." Boston First Nat. Bank v. County Board of Equalization of Salt Lake County, 799 P.2d 1163 (Utah 1990). See also Pro-Benefit Staffing, Inc. v. Board of Review of Industrial Commission of Utah, 775 P.2d 439 (Utah App. 1989) ("[A]ppellate court will not disturb the board's application of its factual findings to the law unless its determination exceeds the bounds of reasonableness and rationality.").

In undertaking a review of an agency decision, the "appellate court will not substitute its judgment as between two reasonably conflicting views, even though the court might have come to a different conclusion had the case come before it for de novo review." Grace Drilling Co. v. Board of Review of Industrial Commission of Utah, 776 P.2d 63 (Utah App. 1989). "It is the province of the board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the board to draw the inferences." Id.

B. Mixed Questions of Fact and Law.

Since Utah Code Ann. § 40-10-31 exempts UMCRA from the provisions of UAPA, mixed questions of law and fact must be

reviewed pursuant to the pre-UAPA standard. Accordingly, agency decisions involving mixed questions of law and fact or the application of specific factual situations to the legislative enactments under which the agency operates must be upheld so long as they fall within the "bounds of reasonableness and rationality." King v. Industrial Commission of Utah, slip. op., No. 920464-CA, p. 6 n.5 (Utah App. March 18, 1993), citing Savage Industries, Inc. v. Utah State Tax Com'n., 811 P.2d 664, 667 (Utah 1991).<sup>2</sup>

C. Questions of Law.

The "Board's legal determinations may not be overturned unless they are 'clearly erroneous'." Utah Code Ann. § 40-10-30(e).

OVERVIEW OF THE FEDERAL AND UTAH SURFACE  
MINING CONTROL AND RECLAMATION ACT

The Surface Mining Control and Reclamation Act ("SMCRA") was promulgated by Congress to protect the environment from the

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<sup>2</sup> This same standard would apply even under UAPA because the Legislature clearly conferred upon the Board broad discretion in interpreting its rules, especially rules which effect the Division's right to primacy under federal law. See King v. Industrial Commission of Utah, slip. op., No. 920464-CA, p. 6-7. Utah Code Ann. § 40-10-2(1) specifically provides:

It is the purpose of this chapter to:

- (1) Grant to the Board and Division of Oil, Gas and Mining the necessary authority to assure exclusive jurisdiction over non-federal lands in regard to regulation of coal mining and reclamation operations as authorized pursuant to Public Law 95-87.

Utah Code Ann. § 40-10-2(1).

adverse effects of surface coal mining. See 30 U.S.C. § 1202(a),(f). SMCRA contains detailed "environmental protection performance standards" applicable to "all surface coal mining and reclamation operations." 30 U.S.C. § 1251(b). Through the Office of Surface Mining Reclamation and Enforcement ("OSM"), the Secretary of the Interior ("Secretary") is to take steps "necessary to insure compliance with" the Act. 30 U.S.C. § 1211(a),(c)(1).

A. State Primacy.

The states, however, have a significant role to play under SMCRA. The states may elect to implement SMCRA consistent with federal standards. As a "condition of approval," the provisions of the state program must be "no less stringent" than the federal program, and "contain the same or similar procedural requirements relating thereto." See Section 521(d), 30 U.S.C. § 1271(d). To this end, the federal government must reassert control if a state fails to "implement, enforce, or maintain its program." 30 U.S.C. § 1254(a).<sup>3</sup> When the Secretary approves a state program, the state becomes primarily responsible for regulating coal mining and reclamation within its borders.

The State of Utah applied for primacy under SMCRA and the Secretary approved Utah's coal program on January 23, 1981. At that time, Utah assumed primary responsibility for regulating

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<sup>3</sup> Enforcement is carried out by the state agency administering the federally-approved program, with the federal Office of Surface Mining exercising oversight responsibilities. See 30 C.F.R. § 700.5.

coal mining in the State of Utah. Utah's program is set forth in UMCRA and is virtually identical to the provisions of SMCRA. See Utah Code Ann. § 40-10-1 et. seq. (1988).<sup>4</sup>

B. UMCRA's Environmental Performance Standards.

UMCRA requires a coal operator to meet specific environmental performance standards and submit a mining and reclamation plan demonstrating how each performance standard will be met. Utah Code Ann. § 40-10-9. See also 30 U.S.C. §§ 1256-1264, 1265(a). An approved plan is required before an operator may conduct "any surface coal mining operations." 30 U.S.C. § 1256; Utah Code Ann. § 40-10-9. Each mining and reclamation plan must demonstrate that the Act's environmental performance standards will be met and demonstrate what steps the operator will take to ensure total reclamation of the mine site. Utah Code Ann. § 40-10-10; 30 U.S.C. § 1275(d). Among other things, the plan must show how the operator will (1) minimize erosion and (2) revegetate all areas disturbed by mining related activities. See Utah Code Ann. § 40-10-17(2)(d) and Utah Admin. R. 645-301-742.312.1 and 645-301-742.113; and Utah Code Ann. § 40-10-17(2)(s) and Utah Admin. R. 645-301-353 and 645-301-354.

C. Bonding Requirements and Period of Liability.

UMCRA also requires the operator to post a performance bond in an amount sufficient to secure completion of reclamation. The

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<sup>4</sup> Like Congress, the Utah Legislature adopted UMCRA to "[a]ssure that surface coal mining operations are conducted so as to protect the environment" and assure that "reclamation occurs as contemporaneously as possible." Utah Code Ann. § 40-10-2(3) (emphasis added).

operator remains liable and must comply with all provisions of the Act until the bond is entirely released. See Utah Admin. R. 645-301-880.330; SMCRA, 30 U.S.C. § 1259(b). See also National Wildlife Federation v. Lujan, 950 F.2d 765, 770 (D.C. Cir. 1991). Attached as Addendum "A."

There are three phases to Bond Release: Phase I, Phase II and Phase III (Final Bond Release). See Utah Admin. R. 645-301-880.300. The Division may release up to 60 percent of the bond at the completion of Phase I if the operator completes backfilling, regrading and drainage control requirements in accordance with the approved reclamation plan. See Utah Admin. R. 645-301-880.310. Phase II contemplates the release of an additional portion of the bond if the operator has revegetated the disturbed areas. Final Bond Release (Phase III) is not allowed until the operator has successfully completed all reclamation operations under both the permit and the regulations, and a 10 year period has expired during which revegetation was successfully established. Utah Code Ann. § 40-10-15; 30 U.S.C. § 1259(b). See also Utah Admin. R. 645-301-880.320.

Until Final Bond Release, an operator remains liable and must comply with the UMCRA's environmental performance standards. See SMCRA, 30 U.S.C. § 1259(b); Utah Admin. R. 645-301-880.330. See also National Wildlife Federation v. Lujan, 950 F.2d at 770. Attached as Addendum "A."

## STATEMENT OF THE CASE

### A. History of the Mine.

On January 12, 1978, Soldier Creek Coal Company, now known as Hidden Valley Coal Company ("Hidden Valley"), purchased the Hidden Valley Mine property. On October 6, 1978, Hidden Valley approached the Division to obtain a permit to mine coal from the property. R. at 616. Approximately one year later, Hidden Valley submitted a Mining and Reclamation Plan on September 7, 1979 (the "Mining Plan"), which set forth in detail its plans for development and operation of the mine.

The Division approved the Mining Plan on April 14, 1980. R. at 641. Three days later, Hidden Valley began mining operations. R. at 643. Over the next five months, Hidden Valley disturbed over eight acres of previously undisturbed ground, cutting two large pad areas, exposing coal seams, establishing drainage ditches, placing culverts, altering natural runoff and stream flows, installing sediment ponds, and constructing more than three miles of access roads. R. at 1074-1085; 644-647.

In Spring of 1986, Hidden Valley abandoned its intent to continue mining operations and submitted a "Reclamation Plan." R. at 670-678. The Division approved the Reclamation Plan on January 28, 1987. The Reclamation Plan set forth in detail what reclamation activities Hidden Valley would undertake to insure compliance with the Regulations. The Reclamation Plan specifically set forth what steps Hidden Valley would undertake to control erosion on the outcrops of the access roads:

The rills or gullies that may appear during post-reclamation monitoring will be stabilized by filling with soil and rocks. Chronic sites will be stabilized with small gabions or rock check dams.

R. at 614. Attached as Addendum "B."

The Reclamation Plan also set forth Hidden Valley's commitment to seed the outslopes of the access road:

The entire 6.7 acres of disturbed ground will be properly scarified, seeded, fertilized, mulched and covered to provide the best possible opportunity for plant growth. The road fill slopes and some small sites will require hand application of seed, mulch and fertilizer.

R. at 615. Attached as Addendum "C."

After the Division approved the Reclamation Plan, Hidden Valley commenced reclamation work at the Mine. Thereafter, Hidden Valley satisfactorily completed a portion of its reclamation obligations and the Division granted Hidden Valley Phase I Bond Release. The Division has not granted, nor had Hidden Valley requested, either Phase II or Final Bond Release.

B. The NOV is Issued.

The Division inspected the Hidden Valley Mine on November 20, 1991 and determined that Hidden Valley was in violation of several performance standards.<sup>5</sup> Accordingly, the Division issued Notice of Violation 91-26-8-2 on November 22, 1991 (the "NOV").

R. at 602-605. Attached as Addendum "D." The NOV includes two parts.

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<sup>5</sup> To insure that a coal mine is in compliance with UMCRA's performance standards, UMCRA requires the Division to conduct partial inspections of a mine site at least monthly and requires the Division to conduct a complete inspection quarterly. Utah Admin. R. 645-400-131, 132.



Part one was written for Hidden Valley's failure to minimize erosion on the outslopes of the access road as required by Utah Code Ann. § 40-10-17(2)(d) and Utah Admin. R. 645-301-742.113. Attached as Addendum "E." Utah Code Ann. § 40-10-17(2)(d) requires a mining operator to "stabilize and protect all surface areas . . . affected by surface coal mining and reclamation operations to effectively control erosion." Id. Utah Admin. R. 645-301-742.113 requires a mining operator to "[m]inimize erosion to the extent possible." Id.

Part two of the NOV was issued for Hidden Valley's failure to seed and revegetate the outslopes of the access road as required by Utah Code Ann. § 40-10-17(2)(s) and Utah Admin. R. 645-301-353 and 645-301-354. Attached as Addendum "F." Utah Code Ann. § 40-10-17(2)(s) requires a mining operator to:

Establish on the regraded areas and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area.

Id.

C. Informal Appeal.

After the NOV was issued, Hidden Valley petitioned the Division for an informal hearing. On December 20, 1991, the Director of the Division, Dr. Dianne R. Nielson, held an informal hearing to review Hidden Valley's contentions. Hidden Valley was represented by counsel and introduced evidence to support its claims. On January 17, 1992, Dr. Nielson issued an order

upholding the NOV in its entirety. On February 10, 1992, Hidden Valley appealed the Director's decision to the Board.

D. Formal Adjudication Before The Board.

The Chairman of the Board, who was acting in the capacity of a hearing examiner, held a full day evidentiary hearing on June 30, 1992. On July 30, 1992, the Board considered the Chairman's proposed findings of fact and conclusions of law and issued an order upholding the NOV in its entirety. R. at 436. Attached at Addendum "G."

The Board upheld Part one of the NOV finding that Hidden Valley "failed to comply with the Permanent Program standards and the approved Reclamation Plan by failing to adequately construct and maintain erosion control structures on the outslope of the access haul road." R. at 436. The Board's decision was based on uncontroverted testimony that uncontrolled erosion was occurring on the outslope of the mine's access road. R. at 987-992, 995-996, 997-998, 999-1013, 1014-1017. Attached as Addendum "H." The testimony of Hidden Valley's own witness supported the Board's finding that erosion was uncontrolled at the mine. R. at 1203-1204. Attached as Addendum "I".

The Board upheld Part two of the NOV finding that Hidden Valley failed "to comply with the Permanent Program standards and the approved Reclamation Plan by having failed to seed the disturbed area constituting the outslopes of the access road." R. at 436. The Board's finding was based on uncontroverted testimony that Hidden Valley failed to seed the outslopes of the

access road and pad areas. R. at 1014-1017. Attached as Addendum "H". Hidden Valley's own witnesses admitted that the outslopes were never seeded. R. at 1237, 1240, 1165-1166, and 1174. Attached as Addendum "J".

E. Appeal Before the Third District Court.

On August 27, 1992, Hidden Valley appealed the Board's Order to the Third District Court. On October 28, 1992, the Court heard argument on Hidden Valley's appeal. On November 5, 1992, the Third District Court issued a final order rejecting Hidden Valley's legal arguments and upholding the NOV. Attached as Addendum "K." Specifically, the Court upheld "the Board's ruling as to part one of the NOV concerning failure to address the erosion on the outslopes of the reclaimed access road." Order, dated November 5, 1992 at 3. The Court also found "that there is substantial evidence on the record and that indeed it is undisputed that the Appellant failed to re-seed the areas addressed in the Notice of Violation." Id.

F. Hidden Valley Submits an Abatement Plan.

The same day that the Third District Court announced its order from the bench upholding the NOVs, Hidden Valley wrote the Division two letters indicating its intention to abate the violations and to come into compliance with Utah's coal statute. The first letter, dated October 29, 1992, stated:

Also, I presume that Hidden Valley will take appropriate action pursuant to the NOV and therefore I would appreciate it if the Division would not take any emergency action adverse to my client without us first at least talking on the phone. I can assure you that neither myself nor my client have any tricks up our

sleeves for which the Division should have any concerns.

Attached as Addendum "L."

That same day, Hidden Valley submitted a proposed Plan of Abatement. The cover letter to the Abatement Plan stated:

"Enclosed is the Plan of Abatement for the above Cessation Order and Notice of Violation No. N91-26-8-2." Attached as Addendum "M." The proposed Abatement Plan provided that, "[t]he proposed plan is intended to satisfy the violations under NOV N91-26-8-2 recorded at the Hidden Valley reclamation site owned and operated by Hidden Valley Coal Company." Id.

Based on Hidden Valley's representations and its submission of an abatement plan, the Division did not issue a cessation order as it was empowered to do under Utah Admin. R. 645-400-314. Rather, the Division extended the time for compliance to allow Hidden Valley time to finalize the abatement plan. Attached as Addendum "N." Following several discussions with the Division, Hidden Valley submitted an amended "Abatement Plan" on December 14, 1992 "to satisfy two violations that were issued for the reclaimed Hidden Valley Mine under NOV N-91-26-8-2 on November 20, 1991." Attached as Addendum "O."

The Abatement Plan set forth in detail how Hidden Valley intended to control erosion and seed the outslopes of the access road. The Abatement Plan also set forth the time periods within which Hidden Valley would implement remedial measures at the mine. Hidden Valley committed to control erosion on the following dates:

### **SUMMARY OF ARGUMENT**

As a threshold issue, Hidden Valley's appeal is moot because Hidden Valley has complied with the underlying violation by filing an abatement plan and agreeing to abate the violations at the mine. Similarly, Hidden Valley should be estopped from rescinding its commitment to abate the violations.

The evidence clearly supports the findings of the Board and the Third District Court that Hidden Valley was in violation of UMCRA's environmental performance standards at the mine.

The Board and Third District Court also properly determined that the two year statute of limitation period of the Utah Mined Land Reclamation Act is not incorporated into the UMCRA.

Finally, the Board and Third District Court also correctly determined that the Division was not estopped from taking enforcement action at the mine when the Division determined that Hidden Valley was in violation of UMCRA's performance standards and the terms of its own Reclamation Plan.

The proposed work will begin no later than April 1, 1993, and as soon as practical after approval has been obtained, materials have been received, and environmental conditions are acceptable.

Addendum "O" at page 2.

Hidden Valley committed to seed the outcrops as follows:

The Revegetation work will be accomplished when soil conditions permit. Those acceptable soil conditions are defined as less than 10 percent snow cover, frost free in the upper six inches, and sufficiently dry in the upper six inches to not clod when worked. If conditions do not permit seeding by February 1, 1993, an alternative seed mix to that listed below will be submitted for Division approval.

Addendum "O" at 7.

The Division approved Hidden Valley's Abatement Plan on December 19, 1992, and modified the NOV to extend the dates for compliance to conform with the promised dates agreed to in the Hidden Valley Abatement Plan.

#### ARGUMENT

I. HIDDEN VALLEY'S APPEAL IS MOOT BECAUSE IT AGREED TO ABATE THE NOV

It is a basic principle that compliance with an enforcement order moots an appeal of any underlying issues. See, e.g., Keyes v. School District No. 1, Denver, Colo., 895 F.2d 659, 663-664 (10th Cir.), cert. denied, 111 S. Ct. 951 (1990) (An appeal from an order requiring the defendant to submit "plans" was rendered moot because the defendant had fully complied with the order.); Olson v. U.S., 872 F.2d 820, 823 (8th Cir. 1989) ("[A] taxpayer's submission of materials in compliance with an IRS summons renders moot any constitutional objections to compelled submissions."); Butcher v. Bailey, 753 F.2d 465, 471 (6th Cir.

1985)(Compliance with an order requiring the debtor to turn over records mooted an appeal claiming privilege against self-incrimination.); U.S. v. Kis, 658 F.2d 526, 532-535 (7th Cir.), cert. denied, 455 U.S. 1018 (1981)(Compliance with an IRS summons by providing certain documents mooted taxpayer's appeal from the enforcement order.); Van Schaack Holdings, Ltd. v. Fulenwider, 798 P.2d 424, 426-427 (Colo. 1990)(An appeal from an order directing dissolution of a corporation was mooted by dissolution of the corporation pending appeal.).

When the Division issued the NOV on November 20, 1991, it required Hidden Valley to submit an abatement plan demonstrating how it would control erosion and seed the outslopes of the access road. In the final and approved submittal of Hidden Valley's Abatement Plan, Hidden Valley agreed to implement erosion control measures by "not later than April 1, 1993," and agreed to "seed the outslopes of the access roads when soil conditions permit." Addendum O, at 2 and 7.

Since Hidden Valley has complied with the original terms of the NOV by submitting an Abatement Plan, and has committed to commence remedial work, Hidden Valley's appeal is now moot. Accordingly, this Court must dismiss Hidden Valley's appeal.

II. HIDDEN VALLEY IS ESTOPPED FROM REFUSING TO IMPLEMENT ITS ABATEMENT PLAN BECAUSE IT AGREED TO ABATE THE VIOLATIONS.

Hidden Valley is estopped from refusing to abate the violations. The Utah Supreme Court has set forth the elements of estoppel as follows:

Conduct by one party which leads another, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct.

Blackhurst v. Transamerica Ins. Co., 699 P.2d 688 (Utah 1985).

See also Perkins v. Great West Life Assurance Co., 814 P.2d 1125 (Utah App. 1991). Each element will be discussed below.

A. The Conduct of Hidden Valley.

On October 29, 1992, Hidden Valley submitted an Abatement Plan "to satisfy the violations under NOV N91-26-8-2." See Addendum "M." At that time, Hidden Valley announced its intent to resolve the NOV. Indeed, Hidden Valley's attorney expressly stated to the Division that "I can assure you that neither myself nor my client have any tricks up our sleeves for which the Division should have any concerns." See Addendum "L." In the final and approved version of the Abatement Plan, Hidden Valley agreed to implement erosion control measures by "not later than April 1, 1993," and agreed to "seed the outcrops of the access roads when soil conditions permit." See Addendum "O" at 2 and 7.

B. The Division's Reliance on Hidden Valley's Conduct.

When the Third District Court upheld the Board's Order on November 5, 1992, the Division was statutorily authorized to issue a cessation order because the environmental violations remained unabated. See Utah Code Ann. § 40-10-22(1)(c) and Utah Admin. R. 645-400-314. However, based on the representation of Hidden Valley's counsel and Hidden Valley's submission of an Abatement Plan, the Division did not issue a cessation order. Instead, the Division granted Hidden Valley an extended period of



time within which to finalize its Abatement Plan. See Addendum "N." When Hidden Valley committed to implement erosion control measures by "not later than April 1, 1993," and committed to "seed the outslopes of the access roads when soil conditions permit," the Division relied on Hidden Valley's commitment and modified the NOV to extend the dates for compliance to conform with the dates set forth in the Abatement Plan.

C. Detriment to the State and Environment.

If Hidden Valley is allowed to revoke its commitment to implement abatement procedures, erosion will continue at the mine site, another planting season will be missed, and the environment will continue to suffer. See R. at 998-999, 1000-1002, 1006, 1007-1008. Attached as Addendum "H." See also Affidavit of William Malencik, attached as Addendum "P"; Affidavit of Susan White, attached as Addendum "Q."

If seeding does not take place within the next few weeks, there will be insufficient soil moisture to assure successful revegetation until the next planting season. See Affidavit of Susan White, attached as Addendum "Q." In the meantime, lack of seed on the disturbed areas will allow further loss of topsoil through sheet, rill and gully erosion. This limited topsoil is required for successful revegetation. Accordingly, if Hidden Valley does not seed in the very near future, the potential for successful revegetation will be diminished. Id.

If Hidden Valley fails to mitigate erosion on the outslopes of the access roads, uncontrolled runoff will continue from the

road onto the outslope and will facilitate continued gully erosion, and the consequent deepening and widening of the erosion channels. R. at 998-999, 1000-1002, 1006, 1007-1008. Attached at Addendum "H." See also Affidavit of William Malencik, attached as Addendum "P." Further deposition of sediment into Ivie Creek, a tributary of the Colorado River drainage system, will also continue. Id. Finally, erosion will result in additional soil loss which will reduce the potential for the effective revegetation of the mine site. Id.

Hidden Valley should be held to its word, and required to implement abatement procedures at the mine.

III. HIDDEN VALLEY HAS FAILED TO MARSHALL THE EVIDENCE.

A party challenging the factual findings of an administrative agency must "marshall all of the evidence supporting the findings and show that despite the supporting facts, the agency's findings are not supported by substantial evidence." Boston First Nat. Bank v. County Board of Equalization of Salt Lake County, 799 P.2d 1163 (Utah 1990). "The marshalling requirement is equally applicable under the substantial evidence test." Heinecke v. Department of Commerce, 810 P.2d 459 at n.8 (Utah App. 1991). See also Grace Drilling Co. v. Board of Review of Industrial Commission of Utah, 776 P.2d 63, 68 (Utah App. 1989); Adams v. Board of Review of Indus. Com'n, 776 P.2d 639, 641 (Utah App. 1989). This Court has explained the rule as follows:

Our insistence on compliance with the marshalling requirement is not a case of exalting hypertechnical adherence to form over substance. A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research. The marshalling requirement provides the appellate court the basis from which to conduct a meaningful review of facts challenged on appeal.

See State v. Larsen, 828 P.2d 487, 491 (Utah App. 1992).

Failure to marshal the evidence will result in the reviewing court affirming the agency's findings of fact:

[Appellant] argued only selected evidence favorable to [his] position, without presenting any of the evidence supporting the trial court's findings. [Appellant's] approach does not begin to meet the marshalling burden [he] must carry. Because [Appellant] failed to marshal evidence in support of the trial court's findings and show how they are clearly erroneous, we affirm the factual findings of the trial court.

State v. Larsen, 828 P.2d at 491 (citations omitted).

Because Hidden Valley has argued only selective evidence favorable to its position, and more often than not attempted to distort to Record, the factual findings of the Board must be affirmed.<sup>6</sup>

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<sup>6</sup> One of Hidden Valley's many attempts to misconstrue the record can be found at page 6 of its Brief. There, Hidden Valley contends that "[t]he Division introduced minimal, weak evidence regarding the seeding and vegetation at the Mine Site. This evidence consisted of testimony that William Malencik, the Division Reclamation Specialist, made a "visual inspection" of the Mine Site and did not see any seeds. R.1014." Brief of Appellant at 6. Hidden Valley not only fails to fairly characterize the testimony of Mr. Malencik, see R. at 1014-1017, but fails to inform this Court of the admissions of Hidden Valley's own witnesses that the outcrops of the access road were never seeded. R. at 1237, 1240, 1165-1166, and 1174. As Joe Jarvis, Hidden Valley's consultant testified:

IV. THE DIVISION ESTABLISHED A PRIMA FACIE CASE.

Contrary to the unsupported assertions of Hidden Valley, the Division clearly established a prima facie case that Hidden Valley was in violation of the relevant performance standards.<sup>7</sup>

A. Erosion on the Out slopes.

The Board upheld part one of the NOV finding that Hidden Valley "failed to comply with the Permanent Program standards and the approved Reclamation Plan by failing to adequately construct

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Q. Are you aware of a regulation that requires the seeding and revegetation of all disturbed areas.

A. Yes.

Q. Were the out slopes which you have testified as disturbed areas, have they ever been seeded and have they been revegetated?

A. They're not seeded, they're not revegetated.

R. at 1237. Attached as Addendum "J."

<sup>7</sup> In a proceeding concerning a petition for review of an NOV, "[t]he ultimate burden of persuasion as to the fact of the violation rests with the petitioner for review." Intersouth Mineral Co. Inc. v. OSMRE, 118 IBLA 14, 17 (1991). See also Rith Energy, Inc. v. OSMRE, 119 IBLA 83, 86 (1991). The Division does have the burden of going forward to establish a prima facie case as to the fact of the violation. Rith Energy, Inc. v. OSMRE, 119 IBLA 83, 86 (1991); Intersouth Mineral Co., Inc. v. OSMRE, 118 IBLA 14, 17 (1991); Turner Brothers, Inc. v. OSMRE, 98 IBLA 395, 398 (1987); Calvert and Marsh Coal Co. v. OSMRE, 95 IBLA 182, 191 (1987). "A prima facie case is made when sufficient evidence is presented to establish the essential facts and which will justify, but not compel, a finding" of violation. S&M Coal Co. v. OSMRE, 79 IBLA 350, 91 I.D. 159, 161 (1984). If the Division's evidence is not overcome by a preponderance of the evidence, the NOV will be affirmed. Id. at 86; Innovative Development of Energy, Inc. v. OSMRE, 110 IBLA 119, 123 (1989); Coal Energy, Inc. v. OSMRE, 105 IBLA 385, 387-88 (1988); Turner Brothers Inc. v. OSMRE, 95 IBLA 182, 191 (1987). See also 43 CFR 4.1171(b).

and maintain erosion control structures on the outslope of the access haul road." R. at 436, 438.<sup>8</sup> The Board's decision was based on the testimony of the Division's inspector, William Malencik, that uncontrolled erosion was occurring at three specific areas on the outslopes of the access road. R. at 987-992, 995-996, 997-998, 999-1013. Attached as Addendum "H." Mr. Malencik testified as follows:

BY MR. RICHARDS:

Q. When you issued the violation for the erosion, did you believe, in your opinion, that Hidden Valley had minimized erosion to the extent practical?

A. They took some steps, but in my opinion, they didn't do enough to minimize erosion.

\* \* \* \* \*

Q. . . . . What happens if erosion isn't curtailed or prevented?

A. You'll erode -- in this particular case two things will happen: One, you have a limited amount of soil so what you're doing is minimizing the chance for vegetal cover that would help ameliorate the erosion problem; the second, this road that's left here, and so you're going to have head cutting back into this road; and the third thing is this particular channel, erosion channel is going

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<sup>8</sup> On page 2 of its Brief, Hidden Valley contends that the Division introduced no evidence that the Diversions were unstable. In support of this argument, Hidden Valley points to testimony of its consultant that the water bars on the access road were stable. Hidden Valley's emphasis on the stability of the water bars is irrelevant. The NOV was not written because the water bars were unstable, but written because three specific gullies were eroding the outslope of the access road. The testimony was conclusive that the gullies were continuing to erode, and therefore were unstable. R. at 987-992, 995-996, and 999-1013.

to continually get deeper until it hits something that is not as susceptible to erosion like bedrock; and the third thing -- the fourth thing, you're putting sediment in Ivie Creek --

R. at 998. Attached as Addendum "H." Mr. Malencik testified about erosion gully number one as follows:

Q. What does picture five and six - what's a picture of five and six? Is that gully number one?

A. Yes.

\* \* \* \* \*

Q. And what does that picture demonstrate to you?

A. It shows that both banks are unstable. It shows the depth of that gully is 26 -- approximately 26 inches deep, 58 inches wide, and I've measured the length of that gully as 19 feet.

\* \* \* \* \*

Q. Once again, is this accelerated or geologic erosion?

A. It's accelerated erosion.

Q. If left untreated what will happen to that road?

A. It will keep eroding down until it hits bedrock or until it reaches an equilibrium with the channel where it's discharging.

Q. Is it undercutting the road?

A. Yes. That's why they placed the rock to stop the head cut.

Q. Is it transporting sediment?

A. Yes.

R. at 1000-1001. Attached as Addendum "H."

Mr. Malencik testified about the second erosion gully as follows:

Q. Are these pictures taken of gully number two as marked on your map?

A. Yes.

Q. What do they show?

A. Top photo shows a gully that's about 57 inches deep, 82 inches wide and about 50 feet long.

Q. Is that continuing to erode?

A. Yes. And you can see where I have my hand, there's a large boulder and that boulder is starting to be -- or a rock and that rock is starting to undercut and lower on the lower photo.

\* \* \* \* \*

Q. Is this accelerated erosion?

A. Yes.

Q. Continues to erode?

A. Yes.

\* \* \* \* \*

Q. Is this road being undercut by the erosional process?

A. It will eventually be. As you can see, this rock, its starting to make a head cut up the channel.

Q. Is it transporting sediment?

A. Yes.

Q. Where's it being transported to?

A. Ephemeral channel, then to Ivie Creek and then to the Colorado River system.

R. at 1004-1006. Attached as Addendum "H."

Mr. Malencik's testified similarly about the third erosion gully:

Q. Let's turn to pictures nine and ten. Are those pictures of gully three as marked on your map?

A. Yes.

Q. Why is this gully eroding?

A. Same reason. The gully number two is eroding.

Q. Is this accelerated or natural erosion?

A. Accelerated.

Q. Is the erosion increased because of the surface disturbances caused by Hidden Valley?

A. Yes.

Q. Did you take measurement of these gullies?

A. Yes, 54 inches deep, 79 inches wide, and about 50 feet long.

Q. It's continuing to erode?

A. Yes.

Q. What will happen if the erosion's left untreated.

A. Same as gully number two.

Q. Road undercut?

A. Road undercut.

Q. Sediment transported to Ivie Creek and then to Colorado?

A. Yeah.

R. at 1006-1007. Attached as Addendum "H."

In addition to the testimony of the Division's inspector, Hidden Valley's own expert witness, Karla Knoop, supported the



Board's finding that erosion is continuing to occur at the mine.

R. at 1203 and 1204. Ms. Knoop testified as follows:

BY MR. RICHARDS:

Q. Was there incremental erosion between '87 and '89?

A. Yes?

Q. So these gullies were continuing to erode?

A. Probably.

\* \* \* \* \*

Q. Were they -- were you and the Division aware that this was a continuing problem in 1989?

A. Well, we were aware that the erosion had continued and that it -- the integrity of the road would be at stake if something was not done.

\* \* \* \* \*

Q. And you knew that the erosion was increasing?

A. We knew that it had the potential to increase, yeah.

Q. And then in 1989 you testified that the erosion did, in fact, increase?

A. Uh-huh.

R. at 1203-1204. Attached as Addendum "I."

The testimony was also uncontroverted that Hidden Valley did not take reasonable steps to control the erosion problem.<sup>9</sup> R. at 1002, 1003, 1004-1005, and 1008, 1010-1012. Attached as Addendum "H." Mr. Malencik testified as follows:

BY MR. RICHARDS:

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<sup>9</sup> On page 2-3 of its Brief, Hidden Valley points to the efforts it undertook to control erosion on the road itself. This argument is irrelevant to the real issue of what steps it undertook to control erosion on the out slopes of the access road.

Q. Are there other reasonable steps that Hidden Valley could undertake that would prevent erosion?

A. Yes.

Q. Could you state for the record what some of those would be?

A. Like diverted the water to other areas to minimize.

Q. You could redirect the drainage from going onto the road?

A. That's correct.

Q. What others could they --

A. Stabilize the channel.

Q. How would they stabilize the channel?

A. By riprapping.

Q. Riprapping various sized boulders that would shape the channel?

A. Shape the channel, riprap the sides so there's a place for water to run, place energy dissipators if the velocity is extreme.

Q. You mentioned rock gabions earlier.

A. Yes.

Q. Are all these things you mentioned common ways in the industry to minimize erosion?

A. Yes.

Q. Are they frequently used in mining plans?

A. Yes.

R. at 1003-1004. See also R. at 1002, 1005, 1008, 1010-1012.

Attached as Addendum "H." Indeed, the testimony was uncontroverted that Hidden Valley did not even implement the

remedial measures it agreed to implement in its Reclamation Plan.

See R. at 614, and 1009. Attached as Addendum "B" and "H." As

Mr. Malencik testified:

BY MR. RICHARDS:

Q. What did Hidden Valley agree to do in the reclamation plan to stabilize erosion on chronic sites?

A. Chronic sites will be stabilized with small gabions or rock check dams.

Q. Have they place small gabions?

A. No.

Q. You testified earlier they placed some check dams. Has that been sufficient?

A. No. They're ineffective.

Q. You already testified earlier they had not placed enough soil or rocks into the channels to be effective?

A. That's correct. These rock check dams are about a foot high and they're placed right at the crest of the slope, and so as far as minimizing erosion, its basically acting as an energy dissipator when it hits there, but as soon as it hits, its dropping sediment, and as soon as the sediment is dropped in the water, then you've increased the capacity to -- of that water and runoff to be more erosive.

Q. So Hidden Valley has not undertaken activities on the ground which they agreed to do in the reclamation plan?

A. That's correct?

R. at 1012-1013. Attached as Addendum "H."

B. Failure to seed the Out slopes of the Access Road.

The evidence is also uncontroverted that Hidden Valley failed to seed the outslopes of the access road.<sup>10</sup> The Board upheld Part two of the NOV finding that Hidden Valley failed "to comply with the Permanent Program standards and the approved Reclamation Plan by having failed to seed the disturbed area constituting the outslopes of the access road." R. at 436. The Board's finding was based on uncontroverted testimony that Hidden Valley failed to seed the outslopes of the access road. R. at 1014-1017. Attached as Addendum "H." See also R. at 1237, 1240, 1165-1166, and 1174. Attached as Addendum "J". The Division's Inspector testified as follows:

BY MR. RICHARDS:

- Q. Would you go to the map and show the Chairman what areas were not seeded or revegetated?
- A. This is a road -- these are the road outslopes and this areas was not seeded and there are two pads constructed. . . .
- Q. So basically it's just this outslope that we've been taking about. It's the material that was taken to make the road dumped over the side --
- A. That's right.

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<sup>10</sup> On page 6 of its Brief, Hidden Valley again attempts to misconstrue the Record. There, Hidden Valley points to several citations in the Record where witnesses testified generally that certain areas of the mine had in fact been seeded. The Division does not disagree with these statements. This testimony, however, is irrelevant to the issue of whether the outslopes of the access road had been seeded. For the uncontroverted testimony that the outslopes of the access road were never seeded, see R. at 1014-1017, 1237, 1240, 1165-1166, 1174. Attached as Addendum "H" and "J."

Q. -- they have not seeded? How do you know that those areas had not been seeded? Did you make a visual inspection?

A. Yes.

Q. Did you make a determination that it had not been seeded by what you saw on the ground?

A. Yes. I didn't see any sign of any of the seeding species.

Q. Did a representative of Hidden Valley ever inform you that the areas had not been seeded?

A. Yes. . . . We inquired and said, "Has all the disturbed areas been seeded," and we specifically asked about the outslope of the road and she responded, "No, they had never been seeded,". . .

Q. In your opinion, has Hidden Valley's failure to seed the outslopes that you've identified on your sketch a violation of the regulations?

A. Yes.

R. at 1014 and 1015-1016. Attached as Addendum "H."

In addition to the testimony of the Division's inspector, Hidden Valley's own witnesses admitted that the outslopes were never seeded. R. at 1237, 1240, 1165-1166, and 1174. Attached as Addendum "J." Hidden Valley's consultant, Joe Jarvis, testified as follows:

BY MR. RICHARDS:

Q. Are you aware of a regulation that requires the seeding and revegetation of all disturbed areas.

A. Yes.

Q. Were the outslopes which you have testified as disturbed areas, have they ever been seeded and have they been revegetated?

A. They're not seeded, they're not revegetated.

R. at 1237.<sup>11</sup> Attached as Addendum "J." Hidden Valley's mine manager, Lee Edmonson, also admitted that the road outslopes were never seeded:

A. Yes. The Plan calls for seeding or the seeding of road -- the plan mentions something about road fill slopes being seeded or -- here it is, required some hand application of seed, mulch and fertilizer. Obviously, that wasn't done. . . .

R. at 1174 (Emphasis added). Attached as Addendum "J."

The Division clearly met its prima facie burden of establishing the existence of the violations at the mine.

V. THE DIVISION'S ISSUANCE OF THE NOV WAS NOT BARRED BY THE STATUTE OF LIMITATIONS SET FORTH IN THE UTAH MINED LAND RECLAMATION ACT.

A. UMCRA Has No Limitation Period for Enforcement Actions.

Hidden Valley argues that the NOV is invalid because any enforcement action against the mine was barred by the limitations period set forth in the Utah Mined Land Reclamation Act.<sup>12</sup> Although this limitation period applies to non-coal minerals

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<sup>11</sup> Interestingly, on Page 6 of its Brief, Hidden Valley uses this citation to support the proposition that "The outslopes are seeded. R. 1237." Brief of Appellant at 6.

<sup>12</sup> The two year statute of limitation period set forth in the Utah Mined Land Reclamation Act states:

No suit, action or other proceeding based upon a violation of this chapter or any rule or order issued under this chapter may be commenced or maintained unless the suit, action or proceeding is commenced within two years of the date of the alleged violation.

Utah Code Ann. § 40-8-9(2).

regulated under an unrelated statute, Hidden Valley nonetheless contends that the limitation period is incorporated into UMCRA pursuant to Section 40-10-4:

The Utah Mined Land Reclamation Act (Chapter 8 of Title 40), and the rules and regulations adopted under it, where appropriate, and not in conflict with the provisions of this chapter or the rules and regulations adopted under it, shall be applicable to coal mining operations and reclamation operations.

Utah Code Ann. § 40-10-4(emphasis added). Hidden Valley's argument is without merit.

Section 40-10-4 incorporates provisions of the Utah Mined Land Reclamation Act only when doing so would not be "inconsistent" with its provisions. Since the Utah Legislature did not place a time limit within which the Division must bring enforcement actions under UMCRA, it would clearly be inconsistent to incorporate the two year limitation period. See United States v. Tri-No Enterprises, Inc., 819 F.2d 154, 158 (7th Cir. 1987); United States v. Hartselle Mining Corporation, slip op. at p.4 (N.D. Alabama September 25, 1990)(Attached as Addendum "R."); Pacificorp. v. Office of Surface Mining Reclamation and Enforcement, slip. op. No. DV-5-R (U.S. Office of Hearings and Appeals March 27, 1992)("Pacificorp. I")(Attached as Addendum "S."); Pacificorp. v. Office of Surface Mining Reclamation and Enforcement, slip. op. No. DV91-10-R at p. 4 (U.S. Office of Hearings and Appeals January 17, 1992)("Pacificorp. II")(Attached as Addendum "T."). As the Department of the Interior has stated:

State regulation cannot be consistent with both SMCRA and the State program, each of which lacks a statute of

limitations, if a statute of limitations from another pre-existing statute is incorporated by reference.

Pacific Corp. I, slip op. at pp. 6-7 (U.S. Office of Hearings and Appeals March 27, 1992). Attached as Addendum "S."

Several cases are directly on point. Indeed, the Department of Interior, the federal agency with federal oversight of Utah's coal program, has specifically held that the two year statute of limitation set forth in the Utah Mined Land Reclamation Act provision is not incorporated into UMCRA. In Pacificorp I, a coal operator alleged that the Utah Mined Land Reclamation Act's limitation period applied to UMCRA. The United States Department of the Interior rejected the claim stating:

Applicant's contention cannot stand scrutiny . . . .  
[I]t would be inappropriate and in conflict with the provisions of Chapter 10 of Title 40 of the Utah Code to incorporate by reference the 2-year statute of limitations where neither Congress nor the Utah State Legislature has otherwise placed a statute of limitations on enforcement actions. . . .

Id. Attached as Addendum "S." The Department of Interior took the identical position in Pacificorp II. Attached as Addendum "T."

A similar argument was also rejected by the Federal District Court for the District of Alabama. See United States v. Hartselle Mining Corporation, slip op. at p.4 (N.D. Alabama September 25, 1990). Attached as Addendum "R." There, a coal operator alleged that an OSM enforcement action was barred by both federal and state statute of limitations periods. The federal district court rejected the argument stating:



Defendants also allege without elaboration that the instant suit is barred by the "applicable statute of limitations." As plaintiff pointed out . . . , SMCRA does not prescribe any limitations period applicable to enforcement actions under Section 1271(c). It is well settled that Congress may create a right of action without restricting the time within which that rights may be exercised. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977). There is no evidence that Congress intended one of its independent, general statutes of limitations to apply, and the court fails to find that implied absorption of a state statute of limitations would be inconsistent with the underlying policies of the federal statute. Defendant's argument that this action is time-barred is, therefore, without merit.

Id. Attached as Addendum "R."<sup>13</sup>

The Board of Oil, Gas and Mining adopted a rule in 1980 that the Statute of Limitation provision of the Utah Mined Land

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<sup>13</sup> Hidden Valley's sole argument why the statute of limitations set forth in the Utah Mined Land Reclamation Act should apply to UMCRA is the recollection of Division employee Ronald Daniels that an Assistant Attorney General for the State of Utah, Barbara Roberts, had taken that position in an informal assessment conference. Brief of Appellant at 29. As a matter of law, the incorrect legal interpretation of a non-employee, which was never appealed to the Board, and which was in direct conflict with the Board's own rules, cannot form the basis for applying the limitation period in a manner in conflict with both State and Federal law. See Morton International, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581, 595 (Utah 1991). As the Utah Supreme Court has stated:

To do otherwise would bind the Commission by the unappealed decisions of its subordinate. It is the Commission that has been granted authority to administer the tax code. Morton has provided no evidence that the Commission itself has acted contrary to the position it has taken in the instant case.

Morton, 814 P.2d at 595. Like the Commission in Morton, the Board has never taken the position that the limitation period of the Utah Land Reclamation Act was applicable the UMCRA. Rather, it has done just the opposite. In 1980, the board specifically adopted a Rule finding that the limitation period did not apply. See UMC 900(a)(ix)(1980). Attached as Addendum "U" and "V." In the present case, the Board again reaffirmed its position that the law was inapplicable. R. 425-426.

Land Reclamation Act was inconsistent with UMCRA. See UMC 900(a)(ix)(1980). Attached as Addendum "U." A copy of UMC 900(a)(ix)(1980) superimposed side by side with Utah Code Ann. § 40-8-9(1980) is attached as Addendum "V."<sup>14</sup>

Incorporating the two year limitation period would also violate federal law. Utah's right to primacy under SMCRA (UMCRA's federal parent act) is contingent on the fact that UMCRA law is no less stringent than SMCRA. See SMCRA, § 521(d), 30 U.S.C. § 1271(d).<sup>15</sup> See also Annaco, Inc. v. Hodel, 675 F. Supp. 1052 (E.D. Ky. 1987). Congress, however, placed no limitation period on OSM's enforcement of SMCRA's requirements. See United States v. Tri-No Enterprises, 819 F.2d at 158; United States v. Hartselle Mining Corporation, slip op. at p.4 (N.D. Alabama

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<sup>14</sup> In 1987 the Utah Mined Land Reclamation Act, Utah Code Ann. § 40-8-9, was amended and the numbering system altered. Thus, UMC 900(a)(ix) no longer correctly correlates with Section 40-8-9. A copy of UMC 900(a)(ix) super-imposed against Utah Code Ann. § 40-8-9 (1987) is attached as Addendum "W." Rule UMC 900(a)(ix), however, was never amended and the Board never changed its determination that the two year limitation period was not incorporated into UMCRA. Hidden Valley attempts to mislead this Court by comparing Rule UMC 900(a)(ix) as drafted in 1980 against Utah Code Ann. § 40-8-9 as amended in 1987 rather than comparing it against Utah Code Ann. § 40-8-9 as originally drafted in 1980. See Addendum "V."

<sup>15</sup> Section 521(d) states:

As a condition of approval of any state program submitted pursuant to section 503 [Section 1253] of the Act, the enforcement provisions thereof shall, at a minimum, incorporate sanctions no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto . . . .

Section 521(d), 30 U.S.C. § 1271(d).

September 25, 1990) ("SMCRA does not prescribe any limitation period applicable to enforcement actions."). Attached as Addendum "R." If this Court were to adopt Hidden Valley's argument, the Division would be limited by a two year enforcement period, whereas OSM would have no such limitation. Accordingly, Utah's program would be significantly less stringent than federal law and Utah would lose authority to regulate coal mining within the State.

B. Even Assuming The Existence of A Statute of Limitations on Enforcement Actions, It Would Not Apply Because Two years Has Not Passed Between The Violation And Commencement Of The Enforcement Action.

Hidden Valley argues that since erosion may have begun on site prior to the writing of the NOV, the Division is now time barred from bringing an enforcement action.<sup>16</sup> Hidden Valley's argument is without merit. The statute of limitation period which Hidden Valley seeks to apply in this case bars an enforcement action within two years of the date of the "alleged violation." In this case, a violation did not exist when erosion first began to occur on the property. Rather, the violation occurred when Hidden Valley failed to "[m]inimize erosion to the extent possible." Utah Admin. R. 645-301-742.113.

The Record is clear that prior to November 1991, erosion had not increased to the point that Hidden Valley was in violation of

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<sup>16</sup> Interestingly, Hidden Valley's admission that erosion was in fact occurring is in direct conflict with its argument that the Division did not make a prima facie case that erosion existed on the site.

the Regulations.<sup>17</sup> It was only after Hidden Valley failed to prevent the significant increase in erosion after April and May of 1991, that Mr. Malencik determined on his November 1991 inspection Hidden Valley was in violation of the Regulations. R. at 997. Within one day of that determination, Mr. Malencik issued the NOV. Accordingly, even assuming the existence of a limitation period, the Division's enforcement action would be timely because the Division commenced enforcement action within two years "of the alleged violation." Utah Code Ann. § 40-8-9(2).

C. Hidden Valley's Statute Of Limitations Claim Fails Because The Violations Are Continuing.

Finally, Hidden Valley's statute of limitation claim fails because the violations are continuing. R. at 987-992, 995-996, 997-998, and 999-1013. Attached as Addendum "H." As such, any limitation period would not bar the Divisions enforcement action. See Pacificorp II, slip. op. No. DV91-10-R at p. 4 ("It is sufficient to say in response to this ground for dismissal that the violation is a continuing one, and that no statute of limitations acts as a bar to correcting the alleged transgressing conduct."). Attached as Addendum "T."

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<sup>17</sup> Indeed, every inspection by Division personnel prior to the issuance of the NOV consistently determined that erosion had not increased to the point that Hidden Valley was in violation of the Regulations. R. at 804-954. Mr. Malencik specifically testified that as of April 1991, erosion on the out slopes on the roads had yet to evolved to the point where Hidden Valley was in violation of the Regulations. R. at 1029.

VI. THE DIVISION IS NOT ESTOPPED FROM TAKING ENFORCEMENT ACTION.

Hidden Valley also alleges that the Division is estopped from taking enforcement action. There is no basis in either law or fact to support Hidden Valley's arguments.

A. Hidden Valley Is Not Entitled To Allege Estoppel.

As a general rule, "estoppel may not be asserted against the State." Plateau Mining Company v. Utah Division of State Lands and Forestry, 802 P.2d 720 (Utah 1990). See also Prows v. State of Utah, 822 P.2d 764, 769 (Utah 1991); Ehlers & Ehlers Architects v. Carbon County, 805 P.2d 789, 792 (Utah App. 1991); Eldredge v. Utah State Retirement Board, 795 P.2d 671 (Utah App. 1990). The United States Supreme Court has explained the rationale behind this rule as follows:

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60 (1984). The only exception to the general rule is when the "rule's application would result in injustice, and there would be no substantial adverse effect on public policy." Plateau Mining, 802 P.2d at 728. Obviously, estoppel cannot be asserted in the present case. Hidden Valley is presently in violation of the standards set forth by Utah's coal law to protect the environment and the public from the adverse effects of coal mining. To allow Hidden Valley to walk away from the

damage it caused to the environment during its coal mining activities would severely undermine the Legislature's mandate that the environment be protected from the adverse effects of coal mining. Utah Code Ann. § 40-10-2(3).

B. The Facts Do Not Support A Claim of Estoppel.

The facts underlying Hidden Valley's allegations do not support a claim of estoppel. The elements of estoppel are:

(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Plateau Mining, 802 P.2d at 728.

Hidden Valley has not met the first prong of the Plateau Mining test because the Division never misled Hidden Valley into thinking that it would not have to comply with the pertinent regulations. R. at 1206. There is simply not a shred of evidence that the Division ever informed Hidden Valley that it would not have to minimize erosion or seed the outcrops of the access road. Rather, the facts are in direct conflict with Hidden Valley's assertion.<sup>18</sup> The Record is clear that the

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<sup>18</sup> It is particularly difficult to understand how Hidden Valley decided that it would not have to minimize erosion and seed all disturbed areas when Hidden Valley specifically agreed to do these things in its own reclamation Plan. R. at 614, 615, 1009-1010, and 1016. Attached as Addendum "B" and "C."

As to the prevention of erosion, Hidden Valley stated in its Reclamation Plan: "The rills or gullies that may appear during post-reclamation monitoring will be stabilized by filling with soil and rock. Chronic sites will be stabilized with small gabions or rock check dams." R. at 614 and 1009-1010. Attached as Addendum "B" and "H."

Division consistently warned Hidden Valley that erosion was becoming a concern and gave Hidden Valley an opportunity to correct the problem before it gave rise to a violation. R. at 996-997, 999-1013. Attached as Addendum "H." See also R. at 831, 833, 835, 854, 874, 889, 921, 924, and 935. Attached as Addendum "X."

As early as September 3, 1987, the Division noted "[o]utslope erosion on the access road at water bar locations." R. at 833. On December 8, 1987, the Division again warned Hidden Valley that the "haul road outslopes . . . needed to be watched for any future erosion." R. at 835. On August 9, 1988, the Division noted that "[s]econd water bar diversion upwards from lower road switchback is developing some minor erosion on outslope bank." R. at 854.

One year later, as erosion continued, an inspection report documented a conversation to the effect that "Mr. Rains was contacted on March 8, 1988 regarding the Division's concerns of additional erosion and stabilization of the area." R. at 874. Several months later, an inspection report documented another conversation between the Division and the Operator:

The mine site and surrounding areas have received several high intensity storms since the first inspection. While some concern exists over the storm

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As to seeding the site, Hidden Valley's Reclamation Plan provided: "The entire 6.7 acres of disturbed ground will be properly scarified, seeded, fertilized, mulched and covered to provide the best possible opportunity for plan growth. The road fill slopes and some small sites will require hand application of seed, mulch and fertilizer." See R. at 615 and 1016 (emphasis added). Attached as Addendum "C" and "H."

intensity, nevertheless the operator advised the Division of his intention to perform maintenance work in order to avoid future failure of environmental control measures that may result in adverse action by the Division.

R. at 889 (emphasis added). On Oct. 15, 1990, the Division admonished Hidden Valley for its failure to control the erosion problem, "[t]he second water bar down from top of road continues to head cut. This requires repair." R. at 921. One month later, the Division again notified Hidden Valley that "[t]he head cut near the top of road requires additional monitoring." R. at 924. Finally, the Division warned Hidden Valley of the problem on April 26, 1991, when it stated in an inspection report that "[t]he outslope drainage areas need to be watched specifically when high intensity storms hit the mine area." R. at 935.

It was only after erosion significantly increased in April 1991, that the Division determined that Hidden Valley had failed to minimize erosion. R. at 995-1013. Attached as Addendum "H." As Mr. Malencik testified:

BY MR. RICHARDS:

Q. Okay. Prior to November did you ever inform the operator that there was an erosion problem?

A. Yes.

Q. Did you issue an inspection report on April 26, 1991 specifically pointing out that erosion should be watched?

A. Yes.

Q. In your opinion, did erosion increase between April and November?



A. Yes.

R. at 995. Attached as Addendum "H."

Q. You have already testified that erosion was an evolving process and you pointed out to the operator in April 1981 [sic: 1991] that it should be watched. Did it increase?

A. Yes.

Q. And did it increase significantly by November?

A. Yes.

R. at 997. Attached as Addendum "H."

The testimony of Hidden Valley's own consultant, Karla Knoop, contradicts Hidden Valley's assertion that the Division misled Hidden Valley into thinking that it would not have to control the erosion on the outcrops of the access roads:

BY MR. RICHARDS

Q. You stated that there was a major event in 1987?

A. Yes.

\* \* \* \* \*

Q. Mr. Stirba has referred to three areas as the N.O.V. erosion sites. Did erosion occur in 1987 based on that event at those sites?

A. Yes.

Q. You testified that you undertook some activities to control erosion at the three N.O.V. sites during 1987?

A. We did do work at those sites to control and protect the integrity of the roadway above those.

\* \* \* \* \*

Q. Were you working with the Division personnel at this time --

A. Yes.

Q. -- as to how to do that?

A. Yes.

Q. And did the Division and Hidden Valley work together to try and design a program that could minimize the erosion?

A. Yes.

Q. So it would be fair to say that you and the Division were well aware that these three sites constituted an erosion problem in 1987?

A. Yes.

Q. You testified that there was an event in 1989; is that true?

A. Uh-huh.

\* \* \* \* \*

Q. Was there incremental erosion between '87 and '89?

A. Yes?

Q. So these gullies were continuing to erode?

A. Probably.

\* \* \* \* \*

Q. Were you working with the Division at this time?

A. Yes.

Q. Were they -- were you and the Division aware that this was a continuing problem in 1989?

A. Well, we were aware that the erosion had continued and that it -- the integrity of the road would be at stake if something was not done.

\* \* \* \* \*

Q. And you knew the erosion was increasing?

A. We knew that it had the potential to increase, yeah.

Q. And then in 1989 you testified that the erosion did, in fact, increase?

A. Uh --huh.

R. at 1201-1206. Attached as Addendum "Y."

The facts simply do not support Hidden Valley's assertion that the Division misled it into thinking that it would not have to comply with the regulations and the terms of its own Reclamation Plan.<sup>19</sup>

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<sup>19</sup> The only evidence Hidden Valley has introduced to support its estoppel argument is a series of inspection reports issued by the Division prior to the issuance of the NOV in November 1991. These reports cannot form the factual basis for estoppel. First, there is not one statement in any of these reports that suggested to Hidden Valley that it would not have to comply with the regulations. Second, the reports were all issued prior to the time the Division determined that there was even a violation. (It is not the appearance of erosion that gives rise to a violation but rather the failure to "[m]inimize erosion to the extent possible" that gives rise to a violation. Utah Admin. R. 645-301-742.113).

Finally, even assuming that the inspection reports could be viewed as an indication of the Division's intent not to cite Hidden Valley for past violations, these reports cannot form the basis for estoppel of violations occurring in the future. See Carlsen v. State Department of Social Services, 722 P.2d 775, 777-778 (Utah 1986) (Letter from State Office of Recovery Services advising father that the Office did not "at this time" seek reimbursement for public assistance paid former wife did not waive Office's right to seek reimbursement since letter did not say that the Office waived the right to do so in the future).

Finally, a claim of estoppel cannot be supported because there is no evidence in the Record that the second and third elements of the Plateau Mining test have been met. The record is simply devoid of any evidence suggesting that (1) Hidden Valley took any action in reliance on any statement by the Division or (2) was injured by relying on any such statement. Accordingly, there is no factual basis to support Hidden Valley's claim of estoppel.

C. Phase I Bond Release Does Not Support A Claim of Estoppel.

The Division's grant of Phase I Bond Release can not form the basis for a claim of estoppel.<sup>20</sup> The law is absolutely clear that until Final Bond Release, an operator is required to comply with UMCRA's environmental performance standards. See SMCRA, 30 U.S.C. § 1259(b); Utah Admin. R. 645-301-880.330. See also National Wildlife Federation v. Lujan, 950 F.2d 765, 770 (D.C. Cir. 1991). Attached as Addendum "A." As the D.C. Circuit has stated:

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<sup>20</sup> As stated earlier, there are three phases to Bond Release: Phase I, Phase II and Phase III (Final Bond Release). See Utah Admin. R. 645-301-880.300. The Division may release up to 60 percent of the bond at the completion of Phase I if the operator completes backfilling, regrading and drainage control requirements in accordance with the approved reclamation plan. See Utah Admin. R. 645-301-880.310. Phase II contemplates the release of an additional portion of the bond if the operator has revegetated the disturbed areas. Final Bond Release (Phase III) is not allowed until the operator has successfully completed all reclamation operations under both the permit and the regulations. See Utah Admin. R. 645-301-880.320.

until bond release the operator is still liable, and an attempt to terminate jurisdiction sooner would violate the terms of the Act.

National Wildlife Federation v. Lujan, 950 F.2d 765, 770 (D.C. Cir. 1991). Indeed, an operator's request for Final Bond Release prior to satisfaction of all reclamation requirements would constitute a misrepresentation because a request of Final Bond Release has the implicit assumption that all regulatory requirements have been satisfied. As the D.C. Circuit has stated:

[T]he filing of an application for bond release is in itself a representation that the operator has satisfied his reclamation obligations since an operator is not entitled to release from the bond unless he has met those obligations . . . . If an operator applies for release but has not fulfilled his obligations, he is guilty of misrepresentation by the very fact of making an application. This is a reasonable way of implementing the Act's condition "[t]hat no bond shall be fully released until all reclamation requirements of this chapter are fully met." 30 U.S.C. § 1269(c)(3).

National Wildlife Federation v. Lujan, 950 F.2d at 768-770 (emphasis added).

The Division has not granted Hidden Valley Final Bond Release. The Division has not even granted Phase II Bond Release. To grant either would have been premature because Hidden Valley has not yet requested either Phase II or Final Bond Release, and more importantly, Hidden Valley has not completed its reclamation obligations and is in violation of the Act's environmental performance standards. Since two phases of Bond Release still remain before Hidden Valley can be released from

liability under UMCRA, Hidden Valley could not have been misled into thinking that its reclamation liabilities were complete.<sup>21</sup>

#### CONCLUSION

There is no dispute that environmental violations exist at the Hidden Valley mine. There is also no dispute that Hidden Valley has agreed to abate the violations. Yet Hidden Valley asks this Court to relieve it from its reclamation obligation and its written agreement and to remove the mechanism created by Legislature to force a coal operator to remedy environmental violations. Hidden Valley should be required to do both what it agreed to do and what it is statutorily obligated to do. Accordingly, the Board and Division of Oil, Gas and Mining respectfully request the Court to uphold the NOV in its entirety, or in the alternative to dismiss Hidden Valley's appeal as moot.

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<sup>21</sup> It is doubtful that even Final Bond Release could form the basis for estoppel. Indeed, the D.C. Circuit has specifically stated that the Regulatory Authority must reassert jurisdiction over a coal operator if it in fact turns out that an operator had not fulfilled its reclamation obligations at the time of Final Bond Release:

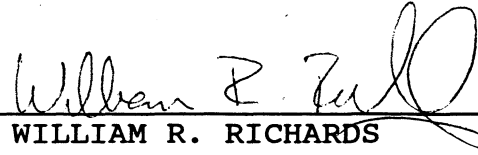
When it turns out that the operator had in fact not fulfilled its reclamation obligations at the time of release, the Secretary's interpretation of "misrepresentation" ensures that jurisdiction will be reasserted." 30 C.F.R. § 700.11(d)(2).

National Wildlife Federation v. Lujan, 950 F.2d at 768-770 (emphasis added). Attached as Addendum "A."

DATED this 5<sup>th</sup> day of April, 1993.

STATE OF UTAH  
DIVISION OF OIL, GAS AND MINING

BY:



WILLIAM R. RICHARDS  
THOMAS A. MITCHELL  
Attorneys for Defendants and  
Appellees

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing BRIEF OF APPELLEES to be mailed by certified mail, postage prepaid, the 5th day of April 1993, to the following:

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William F. Pull



Tab A

First, the EPA explains that it plans to include all of the applicable statutory requirements in each permit and to enforce each permit fully. RCRA permits are subject to full public notice and comment. 40 C.F.R. §§ 124.10–124.19 (1990). Therefore, members of the public can ensure that proposed permits include all the requisite terms by submitting comments and participating in public hearings, *see id.* §§ 124.10–124.14, and by seeking administrative, *see id.* at § 124.19, and judicial, *see* 42 U.S.C. § 6976(b) (1988), review of each final permit. Next, the EPA points out that it can cure mistakes occurring in final permits by modifying<sup>12</sup> or revoking and reissuing<sup>13</sup> them, or by terminating them if it finds that the permittee misrepresented or failed to disclose material facts in the permit issuance process, *see* 40 C.F.R. § 270.43(a)(2) (1990), or that “the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination.” *Id.* § 270.43(a)(3). Finally, the EPA stresses that the shield provision in no way limits its enforcement authority to respond to instances where the “handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6973(a) (1988).

Notwithstanding the permit-shield provision, then, the EPA retains sufficient flexibility to properly carry out its statutory responsibilities. Moreover, the insulating effect of the provision is limited both in scope and duration. The shield rule does not apply to self-implementing statutory provisions or to the regulatory restrictions on land disposal, and it can only preclude enforcement of standards omitted by mistake for up to ten years, the maximum permit term. We therefore uphold the per-

mit-shield rule as a reasonable, self-imposed constraint on the Agency’s enforcement discretion.

### III. CONCLUSION

Because the EPA failed to provide adequate notice and opportunity for comment with regard to the mixture and derived-from rules and with regard to the leachate monitoring requirement, we vacate these rules and remand them to the Agency. We uphold the EPA’s definition of “treatment” as consistent with clear congressional intent. Finally, we find the permit-shield regulation, as applied to the enforcement activities of the EPA, to fall within the Agency’s discretion under RCRA.

The petitions for review are therefore granted in part and denied in part.

*So ordered.*



NATIONAL WILDLIFE FEDERATION,  
et al., Appellees,

v.

Manuel LUJAN, Jr., Secretary,  
Department of the Interior,  
et al., Appellants.

Nos. 90–5352, 90–5354, 90–  
5356 and 90–5358.

United States Court of Appeals,  
District of Columbia Circuit.

Argued Sept. 23, 1991.

Decided Dec. 10, 1991.

As Amended Dec. 10, 1991.

Environmental group challenged rule making by Department of the Interior un-

12. The EPA may modify a permit, among other reasons, to account for: material and substantial additions or alterations to the permitted facility or activity; new information that would have justified the inclusion of different conditions at the time of the permit’s issuance; or changes in the standards or regulations on which the permit was based. *See* 40 C.F.R. § 270.41(a) (1990).

13. The EPA may modify or revoke and reissue a permit if:

(1) Cause exists for termination under § 270.43, and the Director determines that modification or revocation and reissuance is appropriate.

(2) The Director has received notification (as required in the permit, *see* § 270.30(1)(3)) of a proposed transfer of the permit.  
40 C.F.R. § 270.41(b) (1990).

der the Surface Mining Control and Reclamation Act. The United States District Court for the District of Columbia, Thomas A. Flannery, J., invalidated some regulations, and Secretary appealed. The Court of Appeals, Randolph, Circuit Judge, held that: (1) Act did not require perpetual regulatory jurisdiction, and (2) regulation terminating regulatory jurisdiction upon release of performance bond was reasonable interpretation of Act that was not arbitrary and capricious departure from prior policy.

Reversed in part.

#### 1. Mines and Minerals ⇐92.6

Surface Mining Control and Reclamation Act does not require that regulatory jurisdiction over surface coal mining and reclamation operations continue forever. Surface Mining Control and Reclamation Act of 1977, §§ 520, 521, 30 U.S.C.A. §§ 1270, 1271.

#### 2. Mines and Minerals ⇐92.6

Department of the Interior surface mining reclamation regulation permitting termination of regulatory jurisdiction over surface coal mining and reclamation operation following fulfillment by operator of all legal requirements and release of operator's performance bond was reasonable interpretation of the Surface Mining Control and Reclamation Act that was not arbitrary and capricious change from prior practice. Surface Mining Control and Reclamation Act of 1977, §§ 101-908, 30 U.S.C.A. §§ 1201-1328.

#### 3. Mines and Minerals ⇐92.16

District court order holding invalid Department of the Interior surface mining reclamation regulation seeking to reduce frequency of inspection at "abandoned sites," on ground that regulation fell below minimum inspection schedule established in Surface Mining Control and Reclamation Act, did not prohibit new rule making by Secretary, where regulations were remanded to be withdrawn "or revised." Surface Mining Control and Reclamation Act of 1977, §§ 517, 517(c), 30 U.S.C.A. §§ 1267, 1267(c).

Appeals from the United States District Court for the District of Columbia.

Dirk D. Snel, Atty., Dept. of Justice, with whom Richard B. Stewart, Asst. Atty. Gen., Alfred T. Ghiorzi, Edward J. Shawaker, and Jacques B. Gelin, Attys., Dept. of Justice, Washington, D.C., were on the brief, for appellants Secretary of the Interior, et al., in 90-5352, 90-5356 and 90-5358.

J. Michael Klise, with whom John A. Macleod, Thomas C. Means and Harold P. Quinn, Jr., Washington, D.C., for Nat. Coal Ass'n, and Edward M. Green and Stuart A. Sanderson, Washington, D.C., for American Min. Congress, were on the brief, for appellants Nat. Coal Ass'n and American Min. Congress in 90-5354.

L. Thomas Galloway, with whom Glenn P. Sugameli and Thomas J. FitzGerald, Washington, D.C., were on the brief, for appellees in 90-5352, 90-5354, 90-5356 and 90-5358.

Lawrence G. McBride, Washington, D.C., was on the brief, for amicus curiae Interstate Min. Compact Com'n urging that the District Court's order be reversed and the Secretary's rule be reinstated.

Before WALD, D.H. GINSBURG and RANDOLPH, Circuit Judges.

Opinion for the court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

Surface coal mining is a temporary use of the land. When mining ends the land must be restored. After revegetation is complete, and sufficient time has passed to ensure its success—5 years in the east, 10 years in the arid west—a mine operator who has fulfilled all legal requirements is entitled to have his performance bond released. The principal question in this case is whether under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1988), regulatory jurisdiction may then be terminated. The Secretary of the Interior issued regulations so providing. See 52 Fed.Reg. 24,092 (1987) (Notice

of Proposed Rulemaking); 53 Fed.Reg. 44,356 (1988) (Final Rule). The district court, at the behest of the National Wildlife Federation and others ("NWF"), struck them down. *National Wildlife Fed'n v. Interior Dep't*, 31 Env't Rep.Cas. (BNA) 2034, 2040-41, 1990 WL 134495 (D.D.C.1990). Because we find the Act silent on the issue presented and the Secretary's interpretation permissible, we reverse.<sup>1</sup>

As night follows day, litigation follows rulemaking under this statute. Since the Act's passage in 1977, in cases challenging regulations, our opinions have described in considerable detail the Act's structure and operation.<sup>2</sup> We shall assume familiarity with those opinions. In brief, the Act is intended to protect the environment from the adverse effects of surface coal mining while ensuring an adequate supply of coal to meet the nation's energy requirements. 30 U.S.C. § 1202(a), (f). Section 501(b) directs the Secretary to promulgate regulations establishing regulatory procedures and performance standards "conforming to the provisions of" the Act (30 U.S.C. § 1251(b)). Section 515 contains detailed "environmental protection performance standards" applicable to "all surface coal mining and reclamation operations." 30 U.S.C. § 1265. Through the Office of Surface Mining Reclamation and Enforcement ("OSMRE"), the Secretary is to take steps "necessary to insure compliance with" the Act. 30 U.S.C. § 1211(a), (c)(1). The states too have a significant role to play. After an interim period of federal regulation, states had the option of proposing plans for implementing the Act consistent with federal standards on non-federal lands. When the Secretary approved the programs submitted by the states, those states became

primarily responsible for regulating surface coal mining and reclamation in the non-federal areas within their borders. 30 U.S.C. § 1253. In states not having an approved program, the Secretary implemented a federal program. 30 U.S.C. § 1254(a), (b). The "permanent program" regulations issued under section 501(b) set standards for federally-approved state programs and for the federal program that takes effect when a State fails to "implement, enforce, or maintain" its program. 30 U.S.C. § 1254(a). Enforcement is carried out by the "regulatory authority," that is, the state agency administering the federally-approved program, the Secretary administering a federal program, or OSMRE conducting oversight of state programs. See 30 C.F.R. § 700.5.

The primary means of ensuring compliance is the permit system established in sections 506 through 514 and section 515(a). 30 U.S.C. §§ 1256-1264, 1265(a). A permit is required for "any surface coal mining operations."<sup>3</sup> 30 U.S.C. § 1256. Summaries of applications for permits must be published, and objections may be submitted by local agencies or by "any person having an interest which ... may be adversely affected" by a proposed operation. 30 U.S.C. § 1263. Each application must include a reclamation plan. Section 507(d), 30 U.S.C. § 1257(d). A reclamation plan describes the present use of the land, proposed and possible post-mining uses of the land, and what steps the operator will take to ensure the viability of the latter. Among other things, the plan must show how the operator will achieve soil reconstruction and revegetation of the mined area. Section 508, 30 U.S.C. § 1258.<sup>4</sup> A

1. The Secretary also asks us to vacate the portion of the district court's opinion requiring him to withdraw or revise 30 C.F.R. § 840.11(g)-(h) and 30 C.F.R. § 842.11(e)-(f). Those regulations, which the Secretary here concedes were invalid as promulgated, Brief for the Secretary at 32, governed inspection of abandoned sites. The Secretary believes the district court's opinion would prevent any further rulemaking on the subject of abandoned site inspections.

2. *National Wildlife Fed'n v. Lujan*, 928 F.2d 453 (D.C.Cir.1991); *National Wildlife Fed'n v. Hodel*, 839 F.2d 694 (D.C.Cir.1988); *In re Permanent*

*Surface Mining Regulation Litig.*, 653 F.2d 514 (D.C.Cir.), *cert. denied*, 454 U.S. 822, 102 S.Ct. 106, 70 L.Ed.2d 93 (1981); *In re Surface Mining Regulation Litig.*, 627 F.2d 1346 (D.C.Cir.1980).

3. *Apart from the minor exceptions set forth in section 528*, 30 U.S.C. § 1278.

4. The revegetation standards require that an operator establish "a diverse, effective and permanent vegetative cover" over the area after mining has ceased. 30 U.S.C. § 1265(b)(19). By the terms of the Act, the operator "assume[s] the

permit application can only be approved if it demonstrates that "all requirements" of the Act have been satisfied and that "reclamation as required by [the Act] ... can be accomplished." 30 U.S.C. § 1260.

Section 509 requires the operator to post a performance bond in an amount sufficient to secure completion of reclamation. The operator and the surety remain liable under the bond for the duration of the surface mining and reclamation operation and until the end of the "revegetation period" (5 or 10 years) prescribed by section 515(b)(20). 30 U.S.C. § 1259(b). At that time, the operator may petition the regulatory authority for release of the bond. The petition must be published, and is subject to the same opportunities for comment and hearing as the permit application. 30 C.F.R. § 800.40(a)(2), (b)(2). Further, "[n]o bond shall be fully released ... until reclamation requirements of the Act and the permit are fully met." *Id.* § 800.40(c)(3).

Prior to this rulemaking, the relationship between bond release and continuing regulatory jurisdiction was unclear. 53 Fed. Reg. 44,356 (1988). State authorities would decline to act on violations reported after bond release, even when the allegation was that the bond had been released improperly. In some such cases, OSMRE would reassert jurisdiction directly. *Id.* This led to confusion about whether a site was or was not subject to the Act. In order to end this confusion, the Secretary promulgated the rules at issue, which specify when regulatory jurisdiction over a site terminates. *Id.* Thus, 30 C.F.R. § 700.11(d)(1) provides that

responsibility" for success of the revegetation program for 5 years (10 years in the arid Western states) after the revegetation standard is first met. 30 U.S.C. § 1265(b)(20).

5. The full text of 30 C.F.R. § 700.11(d) reads:

(1) A regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, when:

(i) The regulatory authority determines in writing that under the initial program, all requirements imposed under subchapter B of this chapter have been successfully completed; or

(ii) The regulatory authority determines in writing that under the permanent program,

"a regulatory authority may terminate its jurisdiction ... over [a] reclaimed site" when (and only when) the authority determines (either independently or pursuant to a bond release) that "all requirements imposed" have been completed.<sup>5</sup> *Id.* By tying termination of jurisdiction to bond release, the Secretary sought to resolve doubts about the former, while imposing minimum standards for the latter on the state authorities.

In the district court NWF claimed that it was "premature" to terminate regulatory jurisdiction at the time of bond release. Complaint of National Wildlife Federation at 14, Civ. No. 88-3345 (D.D.C. filed Nov. 17, 1988). The district court interpreted NWF's complaint not simply as an objection to timing, but as an attack on "the concept of terminating jurisdiction." *National Wildlife Fed'n v. Interior Dep't*, 31 Env't Rep.Cas. (BNA) at 2039. Seizing on language found in section 521 of the Act, 30 U.S.C. § 1271, the court noted that the Secretary was under "an ongoing duty ... to correct violations ... without limitation." 31 Env't Rep.Cas. (BNA) at 2040. The court also believed that allowing termination of jurisdiction would "hinder" the Act's goal of "protect[ing] the environment." *Id.* at 2041. In view of these considerations, the court believed it proper to interpret Congress' silence on the precise question of termination of jurisdiction as a call for perpetual regulation. *Id.*

[1] The district court's opinion and NWF's claim of prematurity suffer from

all requirements imposed under the applicable regulatory program have been successfully completed or, where a performance bond was required, the regulatory authority has made a final decision in accordance with the State or Federal program counterpart to part 800 of this chapter to release the performance bond fully.

(2) Following a termination under paragraph (d)(1) of this section, the regulatory authority shall reassert jurisdiction under the regulatory program over a site if it is demonstrated that the bond release or written determination referred to in paragraph (d)(1) of this section was based upon fraud, collusion, or misrepresentation of a material fact.

the same flaw. Section 521 cannot be read to express or assume that regulatory jurisdiction over a surface coal mining and reclamation operation must continue forever. It is true that section 521 requires the regulatory authority to "take ... action" "whenever" a violation occurs, 30 U.S.C. § 1271(a)(1) (emphasis added). But by "action," section 521 means primarily the issuance of an order requiring "cessation of surface coal mining and reclamation operations." 30 U.S.C. § 1271(a)(2). Section 521(a)(2) also empowers the Secretary to impose other "affirmative obligations" on the operator; these, however, are to be exacted "in addition to the cessation order," 30 U.S.C. § 1271(a)(2). It thus appears that Congress contemplated enforcement actions only during mining and reclamation operations. If the site were no longer the scene of a "surface coal mining and reclamation operation," and it could not be by the time the bond is released, it would be difficult to see how section 521 could nevertheless continue to apply. The regulation, then, cannot be upheld or struck down solely by reference to Congress' intent, at least not as that intent was expressed in section 521.

NWF also argues that section 520 of the Act, the citizen suit provision, requires everlasting regulatory jurisdiction. Brief of Appellees at 21. That section gives any person having an interest that is, or may be, adversely affected a cause of action "against ... any ... person who is alleged to be in violation of ... this subchapter." 30 U.S.C. § 1270. NWF appears to believe that if a post-bond release site is no longer a "surface coal mining and reclamation operation" subject to regulation under section 521, then the former operator of the site could not be subject to the civil suit provisions of section 520. We have trouble following NWF's argument. Congress may or may not have intended that citizens'

suits could be brought at any time after operations ceased, a matter about which we express no opinion. However, nothing in the regulation at issue even applies to section 520 citizens' suits. See 53 Fed.Reg. 44,358 (1988).<sup>6</sup> And Congress gave no indication that section 520 should control the rest of the Act. It is therefore of no moment that citizens' suits might be unconstrained by any statute of limitations.

[2] Because the Act "does not evince a clear congressional intent on the issue" whether regulatory jurisdiction may terminate, "the question becomes whether the Secretary's regulation is based on a permissible interpretation of the Act." *National Wildlife Fed'n v. Lujan*, 928 F.2d 453, 459 (D.C.Cir.1991). NWF has two fallback positions. First, even if Congress did not expressly require perpetual regulatory jurisdiction, the regulation is not a reasonable interpretation of the Act. In support, NWF cites instances in which OSMRE has re-asserted jurisdiction after a state authority has improperly released a bond.<sup>7</sup> Second, NWF argues that the existence of such cases, and OSMRE's practice of re-asserting jurisdiction when necessary, render this regulation an arbitrary and capricious change from prior practice. *Id.* The district court accepted these arguments, at least in part, stating that "it would be better for the government to have the power to deal" with violations coming to light after bond release. 31 Env't Rep.Cas. (BNA) at 2041.

The court's point is not well-taken. The confusion engendered by the prior policy necessitated the instant rulemaking. It cannot be "arbitrary and capricious" to formulate a new policy when faced with clear evidence (evidence cited by NWF here) of the inadequacy of the old one. More importantly, the regulation itself clearly

6. Counsel for the Secretary reaffirmed this interpretation at oral argument, stating that the Secretary has not addressed the status of citizen suits, and that the issue is still open. We further note that because the citizens' suit provision seems to speak to the district courts, not the Secretary, it is not clear that we would defer to the Secretary's interpretation were he to offer one. See *Adams Fruit Co. v. Barrett*, 494 U.S.

638, 110 S.Ct. 1384, 1390, 108 L.Ed.2d 585 (1990); cf. *Wagner Seed Co. v. Bush*, 946 F.2d 918, 922-924 (D.C.Cir.1991).

7. Bond release in such cases was "improper" because violations had existed at the time of release.

speaks to the concerns voiced by the district court and NWF. "[T]he regulatory authority *shall* reassert jurisdiction if ... the bond release ... was based upon fraud, collusion, or misrepresentation." 30 C.F.R. § 700.11(d)(2) (emphasis added). The question is whether the effect of the regulation comports with the statutory scheme. We believe that it does in light of the language of the regulation and the interpretation provided in both the preamble and the Secretary's brief here.

The preamble adopts an objective standard, stating that jurisdiction must be reasserted whenever "any reasonable person could determine" that fraud, collusion or misrepresentation had occurred. 53 Fed. Reg. 44,359 (1988). The Secretary's brief not only adopts this standard but also clarifies its scope:

It is important to note in this connection that the filing of an application for bond release is in itself a representation that the operator has satisfied his reclamation obligations since an operator is not entitled to release from the bond unless he has met those obligations.... If an operator applies for release but has not fulfilled his obligations, he is guilty of misrepresentation by the very fact of making an application.

Brief for the Secretary at 27 n. 11. This is a reasonable way of implementing the Act's condition "[t]hat no bond shall be fully released until all reclamation requirements of this chapter are fully met." 30 U.S.C. § 1269(c)(3). The condition implies that *after* reclamation requirements are met, the bond *may* be "fully released." *Id.* When it turns out that the operator had in fact not fulfilled its reclamation obligations at the time of release, the Secretary's interpretation of "misrepresentation" ensures that jurisdiction "shall" be reasserted. 30 C.F.R. § 700.11(d)(2).

NWF apparently believes that because, under the regulations, it is possible for some operators to avoid liability for violations of the Act that are undiscovered or undiscoverable at the time of bond release, the regulations improperly fail to promote the Act's purpose: protection of the environment. The Act, however, was a compromise, designed both to protect the envi-

ronment and to ensure an adequate supply of coal to meet the nation's energy requirements. See 30 U.S.C. § 1202(a), (f). The Secretary struck a reasonable balance between these competing interests in his interpretation of the Act (and, as noted above, responded to NWF's concerns about unabated environmental harm by adding 30 C.F.R. § 700.11(d)(2)).

The regulation also strikes a reasonable balance between the gradual increase, due to improving technology, in what legitimately may be demanded of an operator, and an operator's need for certainty regarding closed sites. "It would not be appropriate ... to require operators who had ... met the standards of their permits and the applicable regulatory program to ... reclaim [closed sites] in accordance with new technology." 53 Fed. Reg. 44,361 (1988).

In short, we find the regulation consistent with the goals of the Act and a reasonable interpretation of it. Furthermore, the factors supporting "the concept of terminating jurisdiction," 31 Env't Rep.Cas. (BNA) at 2039, buttress the Secretary's decision to use bond release as the point at which termination occurs. Until bond release the operator is still liable, and an attempt to terminate jurisdiction sooner would violate the terms of the Act. Nothing in the statute speaks in fixed temporal terms of regulation after bond release. Under the regulation that is the point at which the regulatory authority must "sign off" on the reclamation project. Bond release also has the advantage of being an independently identifiable point in time. For these reasons the Secretary's choice was not arbitrary or capricious. Accordingly, we reverse the district court's judgment insofar as it invalidated 30 C.F.R. § 700.11(d).

[3] There remains only the question whether the portion of the district court's opinion dealing with 30 C.F.R. § 840.11(g)-(h) and 30 C.F.R. § 842.11(e)-(f) must be vacated to allow the Secretary to engage in what he terms "curative rulemaking." Brief for the Secretary at 29. The cited regulations sought to reduce the frequency of inspection at what the Secretary termed "abandoned sites." 31 Env't Rep.Cas.

(BNA) at 2042. The district court noted that the language of section 517(c), 30 U.S.C. § 1267(c),<sup>8</sup> expressly set a minimum inspection schedule for mining operations, and that the regulations fell below the minimum. Accordingly, the court held the regulations invalid. The Secretary concedes the correctness of this reading of the statute. Brief for the Secretary at 32. The Secretary wishes, however, to re-define "abandoned sites" to include only those sites where "a permit has either 'expired or been revoked.'" *Id.* (citations omitted). He asserts that such a reading is permissible in light of the "covered by each permit" language of section 517, and that the district court's ruling must be vacated to allow him to promulgate a new regulation.

We express no view about the validity of the Secretary's proposed reading. The significant point on this appeal is that the district court's decision does not stand in the way of the Secretary's adopting it in a new rulemaking. The district court expressly relied on the language of section 517(c), and applied it to the regulation's definition of "abandoned site." 31 Env't Rep.Cas. (BNA) at 2042, 2044. In light of the conflict between the Act and the regulation, the district court remanded the regulation to the Secretary "to be withdrawn or revised." *Id.* at 2068 (emphasis added). We cannot understand why, in the face of this statement, the Secretary would think new rulemaking might be inconsistent with the district court's judgment.<sup>9</sup>

The portion of the district court's opinion striking down 30 C.F.R. § 700.11(d) is reversed. We decline to vacate the portion of the district court's opinion remanding to the Secretary 30 C.F.R. §§ 840.11(g)-(h) and 842.11(e)-(f).

*It is so ordered.*



8. "The inspections by the regulatory authority shall (1) occur on an irregular basis averaging not less than one partial inspection per month and one complete inspection per calendar quarter for the ... operation covered by each permit...." 30 U.S.C. § 1267(c).

Mabel A. KING, Appellant,

v.

James F. PALMER, Director, D.C.  
Department of Corrections, et  
al.

Mabel A. KING

v.

James F. PALMER, Director, D.C.  
Department of Corrections, et  
al., Appellants.

Nos. 89-7027, 89-7028.

United States Court of Appeals,  
District of Columbia Circuit.

Argued En Banc Feb. 27, 1991.

Decided Dec. 13, 1991.

As Amended Dec. 13, 1991.

After judgment in employer's favor in sex discrimination suit was reversed, 778 F.2d 878, the United States District Court for the District of Columbia, Louis F. Oberdorfer, J., entered judgment in favor of employee and awarded attorney fees. Employer appealed. The Court of Appeals, 906 F.2d 762 found that employee was entitled to 100% contingency enhancement of award of attorney fees. Upon granting rehearing en banc, the Court of Appeals, Silberman, Circuit Judge, held that reasonable lodestar fee awarded under federal fee-shifting statutes could not be enhanced to compensate prevailing party for initial risk of loss.

Reversed.

Harry T. Edwards, Circuit Judge, with whom Mikva, Chief Judge, and Wald and

9. An attempt to re-promulgate the same regulation would of course be governed by principles of *res judicata* and *stare decisis*. Cf. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).



Tab B

~~water-barring of the road and filling of the small roadside ditch  
the discharge into this culvert will be eliminated.~~

UMC 817.103 Backfilling and Grading: Covering Coal and Acid- and  
Toxic-Forming Materials

~~Coal or other associated materials are not readily evident on the  
site. Should any of these materials be discovered during  
excavation and backfilling they will be placed against the coal  
seams and covered with other non-toxic materials. There is no  
water drainage from the coal seams or adits. Therefore, acid mine  
drainage and related toxic elements would not be discharged from  
the site. See letter in Appendix Ia.~~

UMC 817.106 , Regrading or Stabilizing Rills and Gullies

The existing rills in the road surface will be eliminated with  
water-barring and ripping of the road surface. The rills or  
gullies that may appear during post-reclamation monitoring will  
be stabilized by filling with soil and rocks. Chronic sites will  
be stabilized with small gabions or rock check dams.

Tab C

VI. Revegetation - Including Seeding, Mulching, Planting, Irrigation, Etc.

UMC 817.111 Revegetation: General Requirements

The entire 6.7 acres of disturbed ground will be properly scarified, seeded, fertilized, mulched and covered to provide the best possible opportunity for plant growth. The road fill slopes and some small sites will require hand application of seed, mulch and fertilizer. The reclamation work is scheduled for late fall, 1986.

The proposed fertilization rate is based upon lab analysis of composite soil samples secured in March, 1986. Additional soil samples will be taken after topsoil materials are spread on the "B" seam pad and from mixed materials on "A" seam pad. These later analyses will be used to determine the actual fertilization rates.

Irrigation is not planned.

It is not contemplated that there will be a pest or disease control problem.

Cattle grazing during the revegetation process will be limited by



NO. N 91-26-8-2

To the following Permittee or Operator:

Name Cal Chat Co.  
 Mine Hidden Valley ☐ Surface ☒ Underground ☐ Other  
 County Emery State Ut Telephone \_\_\_\_\_  
 Mailing Address 1801 University Drive, Phoenix, Arizona 85034  
 State Permit No. ACT/015/007  
 Ownership Category ☐ State ☐ Federal ☒ Fee ☐ Mixed  
 Date of inspection November 20, 1991, 19\_\_\_\_\_  
 Time of inspection 8 ☒ a.m. ☐ p.m. to \_\_\_\_\_ ☐ a.m. ☐ p.m.  
 Operator Name (other than Permittee) Lee Edmonson  
 Mailing Address Same As Above

Under authority of the Utah Coal Mining and Reclamation Act, Section 40-10-1 et seq., Utah Code Annotated, 1953, the undersigned authorized representative of the Division of Oil, Gas & Mining has conducted an inspection of above mine on above date and has found violation(s) of the act, regulations or required permit condition(s) listed in attachment(s). This notice constitutes a separate Notice of Violation for each violation listed.

You must abate each of these violations within the designated abatement time. You are responsible for doing all work in a safe and workmanlike manner.

The undersigned representative finds that cessation of mining is ☐ is not ☒ expressly or in practical effect required by this notice. For this purpose, "mining" means extracting coal from the earth or a waste pile, and transporting it within or from the mine site.

This notice shall remain in effect until it expires as provided on reverse side of this form, or is modified, terminated or vacated by written notice of an authorized representative of the director of the Division of Oil, Gas & Mining. Time for abatement may be extended by authorized representative for good cause, if a request is made within a reasonable time before the end of abatement period.

Date of service/mailling Nov 22, 1991 Time of service/mailling 4 ☐ a.m. ☒ p.m.

Lee Edmonson  
 Permittee/Operator representative

Environmental Engineer  
 Title

Mailed  
 Signature

Wm. J. Malencik  
 Division of Oil, Gas & Mining representative

Rec. Spec.  
 Title

Wm. J. Malencik  
 Signature

# 26  
 Identification Number

SEE REVERSE SIDE

WHITE-DOGM YELLOW-OSM PINK-PERMITTEE/OPERATOR GOLDENROO-NOV FILE

DOC-11/NOV-1

an equal opportunity employer

EXHIBIT

/85

cc: Ms. Karla Knoop.

602

notice of violation



## NOTICE OF VIOLATION NO. N 91-26-8-2

Violation No. 1 of 2

### Nature of violation

Failure to maintain diversions to be stable  
Failure to minimize erosion to the extent possible.

### Provisions of act, regulations or permit violated

R-614-301-742.312.1  
R-614-301-742.113

### Portion of operation to which notice applies

Road outslope and upslope i.e. disturbed areas

### Remedial action required (including any interim steps)

Submit a plan to stabilize diversions and minimize erosion.  
Coordinate with Town Museum

### Abatement time (including interim steps)

5 p.m. December 20, 1991.



## NOTICE OF VIOLATION NO. N 91-26-8-2

Violation No. 2 of 2

### Nature of violation

- Failure to clearly mark with perimeter markers all disturbed areas.
- Failure to seed and revegetate all disturbed areas.

### Provisions of act, regulations or permit violated

R-614-301-521.251

R-614-301-354

### Portion of operation to which notice applies

- Road and stream disturbed outcrops
- Road upslopes

### Remedial action required (including any interim steps)

- Seed the specified disturbed areas not previously seeded.
- Rebuild the road.
- Seed and reseed to be completed as specified in the Mining & Reclamation Plan
- Coordinate with Susan White.

### Abatement time (including interim steps)

5pm December 20, 1991.



Tab E

(2) Liability under the bond shall be for the duration of the surface coal mining and reclamation operation and for a period coincident with the operator's responsibility for revegetation requirements in Section 40-10-17. The bond shall be executed by the operator and a corporate surety licensed to do business in the state, except that the operator may elect to deposit cash, negotiable bonds of the United States government, or negotiable certificates of deposit of any bank organized or transacting business in the United States. The cash deposit or market value of the securities shall be equal to or greater than the amount of the bond required for the bonded area.

(3) The division may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the division the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond the amount.

(4) Cash or securities so deposited shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. The securities shall be security for the repayment of the negotiable certificate of deposit.

(5) The amount of the bond, surety, or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the division from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes.

1979

**40-10-16. Relief of performance bond, surety, or deposit — Inspection and evaluation of reclamation work — Action on application for relief of bond — Objections — Formal hearing or informal conference.**

(1) The division shall adopt and promulgate rules and regulations providing for the release of all or part of a performance bond, surety, or deposit which will include the following requirements:

(a) filing of a request with the division by the operator; and

(b) advertisement by the operator designed to give public notice of the release and the reclamation steps taken by the operator.

(2) Upon receipt of the notification and request, the division shall within 30 days conduct an inspection and evaluation of the reclamation work involved. The evaluation shall consider, among other things, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of continuance of future occurrence of the pollution, and the estimated cost of abating the pollution. The division shall notify the operator in writing of its decision to release or not to release all or part of the performance bond or deposit within 60 days from the filing of the request, if no public hearing is held pursuant to Subsection (6), and if there has been a public hearing held pursuant to Subsection (6), within 30 days thereafter.

(3) The division may release in whole or in part the bond or deposit if the division is satisfied the reclamation covered by the bond or deposit or portion of them has been accomplished as required by this chapter according to the schedule set forth in the division's implementing regulations, but no bond shall be fully released until all reclamation requirements of this chapter are finally met.

(4) If the division disapproves the application for release of the bond or portion of it, the division shall

notify the permittee in writing, stating the reasons for disapproval and recommending corrective actions necessary to secure the release and allowing opportunity for a public hearing.

(5) When any application for total or partial bond release is filed with the division, the division shall notify the municipality in which a surface coal mining operation is located by certified mail at least 30 days prior to the release of all or a portion of the bond.

(6) (a) Any person with a valid legal interest which might be adversely affected by release of the bond or the responsible officer or head of any federal, state, or local governmental agency which has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation, or is authorized to develop and enforce environmental standards with respect to these operations shall have the right to file written objections to the proposed release from bond with the division within 30 days after the last publication of the above notice.

(b) If written objections are filed and a formal hearing requested, the board shall inform all the interested parties of the time and place of the hearing and hold a public hearing within 30 days after the request for the hearing. The date, time, and location of these public hearings shall be advertised by the board in a newspaper of general circulation in the locality for two consecutive weeks, within 30 days after the request for the hearing.

(c) For the purpose of formal hearing the board shall have the authority and is hereby empowered to administer oaths, subpoena witnesses or written or printed materials, compel the attendance of witnesses or production of the materials, and take evidence including, but not limited to, inspections of the land affected and other surface coal mining operations carried on by the applicant in the general vicinity. A verbatim record of each public hearing required by this chapter shall be made and a transcript made available on the motion of any party or by order of the board.

(d) Without prejudice to the rights of the objectors, the applicant, or the responsibilities of the division pursuant to this section, the division may establish an informal conference to resolve these written objections.

1981

**40-10-17. Performance standards for all coal mining and reclamation operations — Additional standards for steep-slope surface coal mining — Variances.**

(1) Any permit issued pursuant to this chapter to conduct surface coal mining shall require that the surface coal mining operations will meet all applicable performance standards of this chapter, and such other requirements as the division shall promulgate.

(2) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operations as a minimum to:

(a) Conduct surface coal mining operations so as to maximize the utilization and conservation of the solid fuel resource being recovered so that re-affecting the land in the future through surface coal mining can be minimized.

(b) Restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or

better uses of which there is reasonable likelihood, so long as the use or uses does [do] not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicant's declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation, or is violative of federal, state, or local law.

(c) Except as provided in Subsection (3) with respect to all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials) and grade in order to restore the approximate original contour of the land with highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this chapter); but in surface coal mining which is carried out at the same location over a substantial period of time where the operation transects the coal deposit and the thickness of the coal deposits relative to the volume of the overburden is large and where the operator demonstrates that the overburden and other spoil and waste materials at a particular point in the permit area or otherwise available from the entire permit area is insufficient, giving due consideration to volumetric expansion, to restore the approximate original contour, the operator, at a minimum, shall backfill, grade, and compact (where advisable) using all available overburden and other spoil and waste materials to attain the lowest practicable grade but not more than the angle of repose, to provide adequate drainage and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region. In surface coal mining where the volume of overburden is large relative to the thickness of the coal deposit and where the operator demonstrates that due to volumetric expansion the amount of overburden and other spoil and waste materials removed in the course of the mining operation is more than sufficient to restore the approximate original contour, the operator shall, after restoring the approximate contour, backfill, grade, and compact (where advisable) the excess overburden and other spoil and waste materials to attain the lowest grade but more than the angle of repose, and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region and that the overburden or spoil shall be shaped and graded in such a way as to prevent slides, erosion, and water pollution and is revegetated in accordance with the requirements of this chapter.

(d) Stabilize and protect all surface areas, including spoil piles affected by the surface coal mining and reclamation operation to effectively control erosion and attendant air and water pollution.

(e) Remove the topsoil from the land in a separate layer, replace it on the backfill area, or if not utilized immediately, segregate it in a separate pile from other spoil, and when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful cover by quick growing

plant or other means thereafter so that the topsoil is preserved from wind and water erosion, remains free of any contamination by other acid or toxic material, and is in a usable condition for sustaining vegetation when restored during reclamation; except if topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate, and preserve in a like manner the other strata which is best able to support vegetation.

(f) Restore the topsoil or the best available subsoil which is best able to support vegetation.

(g) For all prime farmlands as identified in implementing regulations to be mined and reclaimed, specifications for soil removal, storage, replacement, and reconstruction, the operator shall, as a minimum, be required to:

(i) Segregate the A horizon of the natural soil, except where it can be shown that other available soil materials will create a final soil having a greater productive capacity, and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water erosion or contamination by other acid or toxic material;

(ii) Segregate the B horizon of the natural soil, or underlying C horizons or other strata, or a combination of these horizons or other strata that are shown to be both texturally and chemically suitable for plant growth and that can be shown to be equally or more favorable for plant growth than the B horizon, in sufficient quantities to create in the regraded final soil a root zone of comparable depth and quality to that which existed in the natural soil, and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water erosion or contamination by other acid or toxic material;

(iii) Replace and regrade the root zone material described in Subsection (2)(g)(ii) above with proper compaction and uniform depth over the regraded spoil material; and

(iv) Redistribute and grade in a uniform manner the surface soil horizon described in Subsection (2)(g)(i).

(h) Create, if authorized in the approved mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities only when it is adequately demonstrated that:

(i) The size of the impoundment is adequate for its intended purposes;

(ii) The impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Public Law 83-566 (16 U.S.C. 1006);

(iii) The quality of impounded water will be suitable on a permanent basis for its intended use and that discharges from the impoundment will not degrade the water quality below water quality standards established pursuant to applicable federal and state law in the receiving stream;

(iv) The level of water will be reasonably stable;

water below applicable Utah and federal water quality standards,

733 223 The water level will be sufficiently stable and be capable of supporting the intended use,

733 224 Final grading will provide for adequate safety and access for proposed water users,

733 225 The impoundment will not result in the diminution of the quality and quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial, recreational or domestic uses, and

733 226 The impoundment will be suitable for the approved postmining land use

733 230 The Division may authorize the construction of temporary impoundments as part of coal mining and reclamation operations

733 240 If any examination or inspection discloses that a potential hazard exists, the person who examined the impoundment will promptly inform the Division according to R645-301-515 200

734 Discharge Structures Discharge structures will be constructed and maintained to comply with R645-301-744

735 Disposal of Excess Spoil Areas designated for the disposal of excess spoil and excess spoil structures will be constructed and maintained to comply with R645-301-745

736 Coal Mine Waste Areas designated for the disposal of coal mine waste and coal mine waste structures will be constructed and maintained to comply with R645-301-746

737 Noncoal Mine Waste Noncoal mine waste will be stored and final disposal of noncoal mine waste will comply with R645-301-747

738 Temporary Casing and Sealing of Wells Each well which has been identified in the approved permit application to be used to monitor ground water conditions will comply with R645-301-748 and be temporarily sealed before use and for the purposes of SURFACE COAL MINING AND RECLAMATION ACTIVITIES protected during use by barricades, or fences, or other protective devices approved by the Division These devices will be periodically inspected and maintained in good operating condition by the operator conducting SURFACE COAL MINING AND RECLAMATION ACTIVITIES

740 Design Criteria and Plans

741 General Requirements Each permit application will include site-specific plans that incorporate minimum design criteria as set forth in R645-301-740 for the control of drainage from disturbed and undisturbed areas

742 Sediment Control Measures

742 100 General Requirements

742 110 Appropriate sediment control measures will be designed, constructed and maintained using the best technology currently available to

742 111 Prevent, to the extent possible, additional contributions of sediment to stream flow or to runoff outside the permit area,

742 112 Meet the effluent limitations under R645-301-751, and

742 113 Minimize erosion to the extent possible

742 120 Sediment control measures include practices carried out within and adjacent to the disturbed area The sedimentation storage capacity of practices in and downstream from the disturbed areas will reflect the degree to which successful mining and reclamation techniques are applied to reduce erosion and control sediment Sediment control measures consist of the utilization of proper mining and reclamation methods and sediment control practices, singly or in

combination Sediment control methods include, but are not limited to

742 121 Retaining sediment within disturbed areas,

742 122 Diverting runoff away from disturbed areas,

742 123 Diverting runoff using protected channels or pipes through disturbed areas so as not to cause additional erosion,

742 124 Using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds and other measures that reduce overland flow velocities, reduce runoff volumes or trap sediment,

742 125 Treating with chemicals, and

742 126 For the purposes of UNDERGROUND COAL MINING AND RECLAMATION ACTIVITIES, treating mine drainage in underground sumps

742 200 Siltation Structures

742 210 General Requirements

742 211 Additional contributions of suspended solids and sediment to streamflow or runoff outside the permit area will be prevented to the extent possible using the best technology currently available

742 212 Siltation structures for an area will be constructed before beginning any coal mining and reclamation operations in that area and, upon construction, will be certified by a qualified registered professional engineer to be constructed as designed and as approved in the reclamation plan

742 213 Any siltation structures which impounds water will be designed, constructed and maintained in accordance with R645-301-512,240, R645-301-514 300, R645-301-515 200, R645-301-533 100 through R645-301-533 600, R645-301-733 220 through R645-301-733 224, and R645-301-743

742 214 For the purposes of UNDERGROUND COAL MINING AND RECLAMATION ACTIVITIES, any point-source discharge of water from underground workings to surface waters which does not meet the effluent limitations of R645-301-751 will be passed through a siltation structure before leaving the permit area

742 220 Sedimentation Ponds

742 221 Sedimentation ponds, when used, will

742 221 1 Be used individually or in series,

742 221 2 Be located as near as possible to the disturbed area and out of perennial streams unless approved by the Division, and

742 221 3 Be designed, constructed, and maintained to

742 221 31 Provide adequate sediment storage volume,

742 221 32 Provide adequate detention time to allow the effluent from the ponds to meet Utah and federal effluent limitations,

742 221 33 Contain or treat the 10-year, 24-hour precipitation event ("design event") unless a lesser design event is approved by the Division based on terrain, climate, or other site-specific conditions and on a demonstration by the operator that the effluent limitations of R645-301-751 will be met,

742 221 34 Provide a nonclogging dewatering device adequate to maintain the detention time required under R645-301-742 221 32

742 221 35 Minimize, to the extent possible, short circuiting,

742 221 36 Provide periodic sediment removal sufficient to maintain adequate volume for the design event,

742 221 37 Ensure against excessive settlement,

742 221 38 Be free of sod, large roots, frozen soil, and acid- or toxic forming coal-processing waste, and

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drill holes, the amount of explosives used per hole, and the order and length of delay in the blasts;

(iii) Limit the type of explosives and detonating equipment, the size, the timing and frequency of blasts based upon the physical conditions of the site so as to prevent injury to persons, damage to public and private property outside the permit area, adverse impacts on any underground mine, and change in the course, channel, or availability of ground or surface water outside the permit area;

(iv) Require that all blasting operations be conducted by trained and competent persons, and to implement this requirement, the division shall promulgate regulations requiring the training, examination, and certification of persons engaging in or directly responsible for blasting or the use of explosives in surface and coal mining operations;

(v) Provide that upon the request of a resident or owner of a man-made dwelling or structure within one-half mile of any portion of the permitted area, the applicant or permittee shall conduct a preblasting survey of the structures and submit the survey to the division and a copy to the resident or owner making the request, the area of which survey shall be decided by the division and shall include such provisions as promulgated.

(p) Insure that all reclamation efforts proceed in an environmentally-sound manner and as contemporaneously as practicable with the surface coal mining operations; but where the applicant proposes to combine surface mining operations with underground mining operations to assure maximum practical recovery of the mineral resources, the division may grant a variance for specific areas within the reclamation plan from the requirement that reclamation efforts proceed as contemporaneously as practicable to permit underground operations prior to reclamation:

(i) If the division finds in writing that:

(A) The applicant has presented, as part of the permit application, specific, feasible plans for the proposed underground mining operations;

(B) The proposed underground mining operations are necessary or desirable to assure maximum practical recovery of the mineral resource and will avoid multiple disturbance of the surface;

(C) The applicant has satisfactorily demonstrated that the plan for the underground mining operations conforms to requirements for underground mining in the jurisdiction and that permits necessary for the underground mining operations have been issued by the appropriate authority;

(D) The areas proposed for the variance have been shown by the applicant to be necessary for the implementing of the proposed underground mining operations;

(E) No substantial adverse environmental damage, either onsite or offsite, will result from the delay in completion of reclamation as required by this chapter;

(F) Provisions for the offsite storage of spoil will comply with Subsection 40-10-17(2)(v).

(ii) If the board has adopted specific regulations to govern the granting of the variances in accordance with the provisions of this Subsection (2)(p) and has imposed such additional requirements as deemed necessary;

(iii) If variances granted under this Subsection (2)(p) are to be reviewed by the division not more than three years from the date of issuance of the permit; and

(iv) If liability under the bond filed by the applicant with the division pursuant to Section 40-10-15 shall be for the duration of the underground mining operations and until the requirements of Subsection 40-10-17(2) and Section 40-10-16 have been fully complied with.

(q) Insure that the construction, maintenance, and post-mining conditions of access roads into and across the site of operations will control or prevent erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or public or private property.

(r) Refrain from the construction of roads or other access ways up a stream bed or drainage channel or in such proximity to the channel so as to seriously alter the normal flow of water.

(s) Establish on the regraded areas and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved post-mining land use plan.

(t) Assume the responsibility for successful revegetation, as required by Subsection (2)(s), for a period of five full years after the last year of augmented seeding, fertilizing, irrigation, or other work in order to assure compliance with Subsection (2)(s), except in those areas or regions of the state where the annual average precipitation is 26 inches or less, then the operator's assumption of responsibility and liability will extend for a period of 10 full years after the last year of augmented seeding, fertilizing, irrigation, or other work; but when the division approves a long-term intensive agricultural post-mining land use, the applicable five or 10-year period of responsibility for revegetation shall commence at the date of initial planting for this long-term intensive, agricultural post-mining land use, except when the division issues a written finding approving a long-term, intensive, agricultural post-mining land use, as part of the mining and reclamation plan, the division may grant exception to the provisions of Subsection (2)(s).

(u) Protect offsite areas from slides or damage occurring during the surface coal mining and reclamation operations and not deposit spoil material or locate any part of the operations or waste accumulations outside the permit area.

(v) Place all excess spoil material resulting from coal surface mining and reclamation activities in a manner that:

(i) Spoil is transported and placed in a controlled manner in position for concurrent

341.210. Species and amounts per acre of seeds and/or seedlings to be used. If fish and wildlife habitat will be a postmining land use, the criteria of R645-301-342.300 apply.

341.220. Methods to be used in planting and seedling;

341.230. Mulching techniques, including type of mulch and rate of application;

341.240. Irrigation, if appropriate, and pest and disease control measures, if any; and

341.250. Measures proposed to be used to determine the success of revegetation as required in R645-301-356.

341.300. The Division may require greenhouse studies, field trials, or equivalent methods of testing proposed or potential revegetation materials and methods to demonstrate that revegetation is feasible pursuant to R645-300-133.710.

342. Fish and Wildlife. Each application will contain a fish and wildlife plan for the reclamation and postmining phase of operation consistent with R645-301-330, the performance standards of R645-301-358 and include the following:

342.100. Enhancement measures that will be used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat. Such measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and the replacement of perches and nest boxes. Where the plan does not include enhancement measures, a statement will be given explaining why enhancement is not practicable.

342.200. Where fish and wildlife habitat is to be a postmining land use, the plant species to be used on reclaimed areas will be selected on the basis of the following criteria:

342.210. Their proven nutritional value for fish or wildlife;

342.220. Their use as cover for fish or wildlife; and

342.230. Their ability to support and enhance fish or wildlife habitat after the release of performance bonds. The selected plants will be grouped and distributed in a manner which optimizes edge effect, cover, and other benefits to fish and wildlife.

342.300. Where cropland is to be the postmining land use, and where appropriate for wildlife- and crop-management practices, the operator will intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

342.400. Where residential, public service, or industrial uses are to be the postmining land use, and where consistent with the approved postmining land use, the operator will intersperse reclaimed lands with greenbelts utilizing species of grass, shrubs, and trees useful as food and cover for wildlife.

350. Performance Standards.

351. General Requirements. All coal mining and reclamation operations will be carried out according to plans provided under R645-301-330 through R645-301-340.

352. Contemporaneous Reclamation. Revegetation on all land that is disturbed by coal mining and reclamation operations, will occur as contemporaneously as practicable with mining operations, except when such mining operations are conducted in accordance with a variance for combined SURFACE and UNDERGROUND COAL MINING AND RECLAMATION ACTIVITIES issued under R645-302-280. The

Division may establish schedules that define contemporaneous reclamation.

353. Revegetation: General Requirements. The permittee will establish on regraded areas and on all other disturbed areas, except water areas and surface areas of roads that are approved as part of the postmining land use, a vegetative cover that is in accordance with the approved permit and reclamation plan.

353.100. The vegetative cover will be:

353.110. Diverse, effective, and permanent;

353.120. Comprised of species native to the area, or of introduced species where desirable and necessary to achieve the approved postmining land use and approved by the Division;

353.130. At least equal in extent of cover to the natural vegetation of the area; and

353.140. Capable of stabilizing the soil surface from erosion.

353.200. The reestablished plant species will:

353.210. Be compatible with the approved postmining land use;

353.220. Have the same seasonal characteristics of growth as the original vegetation;

353.230. Be capable of self-regeneration and plant succession;

353.240. Be compatible with the plant and animal species of the area; and

353.250. Meet the requirements of applicable Utah and federal seed, poisonous and noxious plant; and introduced species laws or regulations.

353.300. The Division may grant exception to the requirements of R645-301-353.220 and R645-301-353.230 when the species are necessary to achieve a quick-growing, temporary, stabilizing cover, and measures to establish permanent vegetation are included in the approved permit and reclamation plan.

353.400. When the approved postmining land use is cropland, the Division may grant exceptions to the requirements of R645-301-353.110, R645-301-353.130, R645-301-353.220 and R645-301-353.230. The requirements of R645-302-317 apply to areas identified as prime farmland.

354. Revegetation: Timing. Disturbed areas will be planted during the first normal period for favorable planting conditions after replacement of the plant-growth medium. The normal period for favorable planting is that planting time generally accepted locally for the type of plant materials selected.

355. Revegetation: Mulching and Other Soil Stabilizing Practices. Suitable mulch and other soil stabilizing practices will be used on all areas that have been regraded and covered by topsoil or topsoil substitutes. The Division may waive this requirement if seasonal, soil, or slope factors result in a condition where mulch and other soil stabilizing practices are not necessary to control erosion and to promptly establish an effective vegetative cover.

356. Revegetation: Standards for Success.

356.100. Success of revegetation will be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the extent of cover of the reference area or other approved success standard, and the general requirements of R645-301-353.

356.110. Standards for success, statistically valid sampling techniques for measuring success, and approved methods are identified in the Division's "Vegetation Information Guidelines, Appendix A."

356.120. Standards for success will include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation pa-

rameters of ground cover, production, or stocking. Ground cover, production, or stocking will be considered equal to the approved success standard when they are not less than 90 percent of the success standard. The sampling techniques for measuring success will use a 90-percent statistical confidence interval (i.e., one-sided test with a 0.10 alpha error).

356.200. Standards for success will be applied in accordance with the approved postmining land use and, at a minimum, the following conditions:

356.210. For areas developed for use as grazing land or pasture land, the ground cover and production of living plants on the revegetated area will be at least equal to that of a reference area or such other success standards approved by the Division.

356.220. For areas developed for use as cropland, crop production on the revegetated area will be at least equal to that of a reference area or such other success standards approved by the Division. The requirements of R645-302-310 through R645-302-317 apply to areas identified as prime farmland.

356.230. For areas to be developed for fish and wildlife habitat, recreation, shelter belts, or forest products, success of vegetation will be determined on the basis of tree and shrub stocking and vegetative ground cover. Such parameters are described as follows:

356.231. Minimum stocking and planting arrangements will be specified by the Division on the basis of local and regional conditions and after consultation with and approval by Utah agencies responsible for the administration of forestry and wildlife programs. Consultation and approval will be on a permit specific basis and will be performed in accordance with the "Vegetation Information Guidelines" of the division.

356.232. Trees and shrubs that will be used in determining the success of stocking and the adequacy of plant arrangement will have utility for the approved postmining land use. At the time of bond release, such trees and shrubs will be healthy, and at least 80 percent will have been in place for at least 60 percent of the applicable minimum period of responsibility. No trees and shrubs in place for less than two growing seasons will be counted in determining stocking adequacy.

356.233. Vegetative ground cover will not be less than that required to achieve the approved postmining land use.

356.240. For areas to be developed for industrial, commercial, or residential use less than two years after regrading is completed, the vegetative ground cover will not be less than that required to control erosion.

356.250. For areas previously disturbed by mining that were not reclaimed to the requirements of R645-200 through R645-203 and R645-301 through R645-302 and that are remined or otherwise redisturbed by coal mining and reclamation operations, at a minimum, the vegetative ground cover will be not less than the ground cover existing before redisturbance and will be adequate to control erosion.

356.300. Siltation structures will be maintained until removal is authorized by the Division and the disturbed area has been stabilized and revegetated. In no case will the structure be removed sooner than two years after the last augmented seeding.

356.400. When a siltation structure is removed, the land on which the siltation structure was located will be revegetated in accordance with the reclamation plan and R645-301-353 through R645-301-357.

357. Revegetation: Extended Responsibility Period.

357.100. The period of extended responsibility for successful vegetation will begin after the last year of augmented seeding, fertilization, irrigation, or other work, excluding husbandry practices that are approved by the Division in accordance with paragraph R645-301-357.300.

357.200. Vegetation parameters identified in R645-301-356.200 will equal or exceed the approved success standard during the growing seasons for the last two years of the responsibility period. The period of extended responsibility will continue for five or ten years based on precipitation data reported pursuant to R645-301-724.411, as follows:

357.210. In areas of more than 26.0 inches average annual precipitation, the period of responsibility will continue for a period of not less than five full years.

357.220. In areas of 26.0 inches or less average annual precipitation, the period of responsibility will continue for a period of not less than ten full years.

357.300. The Division may approve selective husbandry practices, such as weed and brush control, fencing, and water developments or other practices once they have been incorporated into the Utah program, in accordance with 30 CFR 732.17 as being normal husbandry practices, excluding augmented seeding, fertilization, or irrigation, without extending the period of responsibility for revegetation success and bond liability, if such practices can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success. Approved practices will be normal conservation practices within the region for unmined lands having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and any pruning, reseeding and/or transplanting specifically necessitated by such actions.

358. Protection of Fish, Wildlife, and Related Environmental Values. The operator will, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and will achieve enhancement of such resources where practicable.

358.100. No coal mining and reclamation operation will be conducted which is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act of 1973. The operator will promptly report to the Division any state- or federally-listed endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the Division will consult with appropriate state and federal fish and wildlife agencies and, after consultation, will identify whether, and under what conditions, the operator may proceed.

358.200. No coal mining and reclamation operations will be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator will promptly report to the Division any golden or bald eagle nest within the permit area of which the operator becomes aware. Upon notification, the Division will consult with the U.S. Fish and Wildlife Service and the Utah Division of Wildlife Resources and, after consultation, will identify whether, and under what conditions, the operator may proceed.

358.300. Nothing in the R645 Rules will authorize the taking of an endangered or threatened species or



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

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IN THE MATTER OF NOTICE OF	:	ORDER
VIOLATION N91-26-8-2, HIDDEN	:	
VALLEY MINE, EMERY COUNTY,	:	DOCKET NO. 92-005
UTAH	:	CAUSE NO. ACT/015/007
	:	

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On June 30, 1992, the above entitled matter came before the Hearing Examiner, Chairman James W. Carter. Representing the Board of Oil, Gas and Mining's Examiner ("Examiner") was Thomas A. Mitchell, Esq., Assistant Attorney General. Representing the Division of Oil, Gas and Mining ("DOGM") was William R. Richards, Esq., Assistant Attorney General, and representing the Respondent Hidden Valley Mine was Peter Stirba, Esq. The Board considered the Examiner's recommended Findings of Fact and Order at their regularly scheduled hearing on July 22, 1992 and adopted it with the modifications contained herein.

FINDINGS OF FACT

1. NOV 91-26-8-2, parts one and two, was issued on November 20, 1991. There was an assessment conference and fact of violations hearing resulting in the final Division assessment on December 20, 1991.

2. The Petitioner timely appealed the final Division assessment and findings and paid the total assessment in the

amount of \$760.00 for part one of two, and \$460.00 for part two of two into the Division.

3. The Respondent, Hidden Valley Mine, is subject to the jurisdiction of the Board of Oil, Gas and Mining pursuant to Utah Statute, Utah Code Ann. § 40-10-3 (1953, as amended).

4. On September 7, 1979, Hidden Valley's predecessor, Soldier Creek Coal Company (Soldier Creek), submitted a Mining and Reclamation Plan for the land which is the subject of these enforcement proceedings. In that plan Soldier Creek stated that it intended to develop an underground coal mine by June of 1981 which was intended to produce approximately 500,000 tons per year for 40 years.

5. On April 14, 1980, the Division of Oil, Gas and Mining approved Soldier Creek's Mining and Reclamation Plan pursuant to the State Coal Program's interim regulations.

6. On April 17, 1980, surface mining operations commenced at the Hidden Valley Mine pursuant to the approved Mining and Reclamation Plan. These operations included the construction and paving of a 2.5 mile road; construction of an access road to two portal areas where pads were constructed adjacent to coal seams; construction of portal entry face ups; top soil removal from the surface; sediment pond construction and installation of drainage diversions.

7. On January 23, 1981, the Utah State Coal Program was approved by the federal government with Utah as a primacy state, and the Utah Permanent Program Regulations became effective.

8. On March 23, 1981, Soldier Creek informed the Division for the first time that the Hidden Valley mine would temporarily suspend operations.

9. By letter dated May 24, 1985, the Division notified Soldier Creek that it must elect to either permit the Hidden Valley Mine under the Permanent Program Regulations or reclaim the mine in accordance with the approved plan and Permanent Program Regulations.

10. After September 15, 1985, Hidden Valley elected to cease mining operations and reclaim the mine site. In May, 1986, the Respondent filed a Reclamation Plan incorporating the Permanent Program reclamation standards, which plan was approved by the Division.

11. Reclamation of the mine site was undertaken by Respondent, and Phase I bond release was authorized by the Division on May 24, 1988.

12. Subsequent to Phase I bond release, the Respondent has failed to comply with the Permanent Program standards and with the approved Reclamation Plan by failing to adequately construct and maintain erosion control structures on the outslope of the access haul road.

13. The Respondent has failed to comply with the Permanent Program standards and the approved Reclamation Plan by having failed to seed the disturbed area constituting the outslopes of the access road.

14. The Respondent has failed to comply with the Permanent Program standards and the approved Reclamation Plan by having failed to place disturbed area boundary markers at the toe of the slope of the disturbed area below the access road, and instead has placed them at the edge of the road above the disturbed area.

15. The violations which are the subject of this enforcement proceeding are continuing violations, and constitute a current and ongoing basis for enforcement.

16. The Respondent has not changed its position or incurred any detriment in reliance upon any act or statement of the Division or its inspection and permitting staff.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the Respondent and the Hidden Valley Mine pursuant to Utah Code Ann. § 40-10-3. This provision of the Utah Coal Statute provides that an operator comes within the jurisdiction of the Board and the Division when the operator mines or intends to mine 250 tons of coal within any 12-month period.

2. The intent of an operator to mine is to be determined by an objective standard based upon the acts and representations of the operator during relevant time periods. The Board concludes that Hidden Valley possessed the requisite intent to conduct mining activities, subjecting itself to the jurisdiction of the Utah Coal Statute.

3. The Board concludes that the Permanent Program standards apply to the Respondent because the operator neither permanently ceased operations nor abandoned the intent to mine prior to the Permanent Program becoming effective, and because Hidden Valley specifically agreed to application of the Permanent Program rules in its 1986 Reclamation Plan.

4. The Board concludes the Division has made a prima facie case to support the issuance of the NOV's which are the subject of this enforcement action. The Board further concludes that Hidden Valley has not carried its burden of proof to rebut the Division's prima facie case.

5. The Board concludes that the statute of limitations provision contained in the Utah Mined Land Reclamation Act is not incorporated by reference under Utah Code Ann. § 40-10-1 et seq. because it is inconsistent with the approved federal program as well as less stringent. Further, the Board concludes that even if there were an applicable statute of limitations, the statute has not begun to run because the violations are continuing.

6. The Board concludes that the Respondent has not proven the elements of estoppel necessary to avail itself of that affirmative defense.

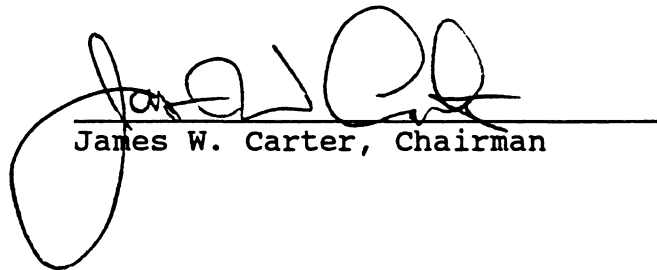
#### ORDER

1. The Division's action in issuing the NOV subject to this enforcement action should be upheld.

2. The Division's penalty assessments are upheld as to all parts of the NOV, with the exception of that part relating to the placement of the disturbed area boundary markers, where the negligence points should be reduced to zero. Final assessment for part two of two of the violation is reduced from \$460.00 to \$330.00.

ISSUED AND SIGNED this 30<sup>th</sup> day of July, 1992.

STATE OF UTAH  
BOARD OF OIL, GAS AND MINING



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James W. Carter, Chairman

Tab H



1 arguments on those.

2 THE HEARING OFFICER: All right, good. Well, let's  
3 establish the facts.

4 MR. RICHARDS: I'd like to call William Malencik as  
5 my first witness.

6 (Discussion off the record.)

7 THE HEARING OFFICER: We need to have this witness  
8 sworn.

9 MR. RICHARDS: Yeah. I guess we're going to have  
10 to do it individually.

11 WILLIAM J. MALENCIK,  
12 having been duly sworn was examined and testified  
13 as follows:

14 DIRECT EXAMINATION

15 BY MR. RICHARDS:

16 Q. Will you state your full name for the record,  
17 please?

18 A. William J. Malencik.

19 Q. What's your present title?

20 A. Reclamation Specialist.

21 Q. Could you tell the Chairman your educational  
22 background?

23 A. I graduated from Utah State University with a  
24 degree in forestry and a minor in range management.

25 Q. Could you briefly explain your work experience

1 prior to employment with the Division?

2 A. Prior to college I worked two years in a coal  
3 mine in the summertime and after college I went to work  
4 for the Bureau of Land Management. I worked on the  
5 western slope of the Colorado and I worked in Nevada. I  
6 worked in several capacities as a staff specialist and  
7 as a district manager.

8 Q. For whom did you work with during this time  
9 you were a staff specialist and a district manager?

10 A. I worked with the forestry program, the soil  
11 and watershed program, the range improvement program,  
12 the weed control program, and the range management  
13 program.

14 Q. Is that the Bureau of Land Management of  
15 Nevada?

16 A. That's the Bureau, yes, in Colorado. Then I  
17 moved to -- then I moved to Nevada and I was a watershed  
18 specialist in the State office where I had  
19 responsibilities as a staff specialist of the State  
20 Director for six Nevada districts involving about  
21 49 million acres of public lands. And that program  
22 included Public Law 566, small watershed program, the  
23 range improvement program, the watershed program, and  
24 the weed control program.

25 After that I was promoted in about 1968 with the

1 passage of N.E.P.A. as the chief of the Planning and  
2 Environmental Coordination Staff, and in that connection  
3 I provided guidance to the six districts on the N.E.P.A.  
4 procedures and the planning procedures under F.L.P.A.  
5 passed in 1976 that required the Bureau of Land  
6 Management to develop a planning system and identify  
7 those lands that would be transferred out of public  
8 ownership and those lands that should be retained in  
9 public ownership.

10 After that I was promoted to the Division of  
11 Technical Services where I had a law enforcement staff,  
12 the appraisal staff, the lands and minerals  
13 adjudicators, the fire management group, the cartography  
14 and a map making group. After that I was promoted to  
15 the Associate State Director of Nevada.

16 Q. At the Bureau of Land Management again?

17 A. At the Bureau of Land Management.

18 Q. When were you -- do you have any other -- did  
19 you stay in that capacity prior to your employment with  
20 the Division?

21 A. Yes.

22 Q. Okay. When were you first employed by the  
23 Division?

24 A. March 9, 1987.

25 Q. And in what capacity were you first employed?

1           A.    As a reclamation specialist.

2           Q.    Could you briefly tell the Chairman what your  
3 jobs entail as a reclamation specialist?

4           A.    I was primarily an inspector and then later  
5 with the reorganization my main responsibility was a  
6 lead inspector, but I worked on permit renewals, permit  
7 amendments, and new permit applications, and  
8 occasionally looked into public complaints.

9           Q.    Approximately how many years then have you  
10 worked in the field of resource conservation management  
11 mining activities?

12          A.    Over 40 years.

13          MR. RICHARDS: I would move to have him qualified  
14 as an expert.

15          THE HEARING OFFICER: Any objection, Mr. Stirba?

16          MR. STIRBA: No.

17          THE HEARING OFFICER: All right. We'll do that.

18 BY MR. RICHARDS:

19          Q.    Did you conduct an inspection at the Hidden  
20 Valley Mine?

21          A.    Yes, I did.

22          Q.    Did that result in the issuance of the N.O.V.  
23 which is the basis of this appeal?

24          A.    Yes.

25          Q.    Did you conduct that inspection on November

1 19, 1991?

2 A. Yes.

3 Q. Why did you conduct that inspection?

4 A. That was an oversight and inspection.

5 Q. Could you briefly describe what an oversight  
6 inspection is?

7 A. Under the style of operation under F.L.P.A.,  
8 State has primacy but we're evaluated by the Office of  
9 Surface Mining and they periodically select at random  
10 mines that they had accompanied the Utah coal mine  
11 inspectors to see that we're meeting the requirements of  
12 S.M.R.C.A and Utah State Coal Mining Rules and  
13 Regulations.

14 Q. Who accompanied you on this inspection?

15 A. OSM inspector, Mitch Rawlings, and Karla Knoop  
16 of JBR who represented CalMat.

17 Q. Did your inspection result in the issuance of  
18 Notice of Violation in 92-26-8-2?

19 A. Yes.

20 Q. I'd like to show you what's been marked as  
21 Exhibit 1.

22 Q. Is that N.O.V. 92-26-8-2?

23 A. Yes.

24 Q. Are there two parts to that N.O.V.?

25 A. Yes.

1           Q.    Could you briefly in a summary fashion explain  
2 what part one of the violation was written for?

3           A.    Part one was written for failure to maintain a  
4 stabilized diversion and failure to minimize erosion to  
5 the extent possible.

6           Q.    What was part two of the violation written  
7 for?

8           A.    Part two of the violation was written for not  
9 marking all the disturbed areas and not revegetating and  
10 seeding all the disturbed areas.

11          Q.    As to the erosion and failure to maintain  
12 stable diversions, what was the remedial action that you  
13 required in the N.O.V.?

14          A.    Required them to submit a plan.

15          Q.    A plan which would suggest how they would  
16 handle the erosion?

17          A.    That's correct.

18          Q.    So you didn't mandate any specific techniques  
19 or procedures they should undertake?

20          A.    No.

21          Q.    Did they ever submit that plan?

22          A.    No.

23          Q.    What remedial action did you require for  
24 failure to seed and revegetate the outslopes?

25          A.    Requested that they follow the plan and seed

1 the disturbed areas that had not previously been seeded.

2 Q. Have they done that, to your knowledge?

3 A. No.

4 Q. Okay. Why don't we get into the N.O.V. in  
5 more specifics now, and let's just take part one of the  
6 N.O.V. and discuss it. As you stated earlier, part one  
7 was written for failure to minimize erosion to the  
8 extent practical; is that true?

9 A. That's correct.

10 Q. Could you briefly tell the Chairman what the  
11 rules require regarding erosion and what rule that is?  
12 Is that Rule 604-301-742.113?

13 A. Yes. That is part of the sediment control  
14 section of regulations and minimizing erosion is part of  
15 that particular section, and in the following parts the  
16 regulations spell out what steps can be taken to  
17 minimize erosion.

18 For example, diverting water so you -- the water  
19 will not be running over critical areas; for example,  
20 like the outslope of the road, providing stabilized  
21 channels, riprapping channels, check dams, straw bales,  
22 gabions.

23 Q. Could you briefly explain --

24 A. Energy dissipators.

25 Q. Can you briefly explain what a gabion is and

1 an energy dissipator is?

2 A. A gabion is a rock basket that's filled -- I  
3 mean, a wire basket that's filled with rock and they're  
4 generally used and placed on the site and in the bottom  
5 in providing protection and the wire holds the rocks so  
6 the rock can't wash away.

7 Q. So is the purpose of a gabion or a check dam  
8 or a riprap, is it to dissipate the energy so it would  
9 prevent sediment from being eroded?

10 A. That's correct. You're providing artificial  
11 protection so you're protecting the soils from erosion.

12 Q. When you issued the violation for the erosion,  
13 did you believe, in your opinion, that Hidden Valley had  
14 minimized erosion to the extent practical?

15 A. They took some steps but, in my opinion, they  
16 didn't do enough to minimize erosion.

17 Q. Okay. We'll get back to that in a bit. Why  
18 don't you -- for the Chairman's benefit, let's briefly  
19 discuss the area using the map showing why the erosion  
20 occurred where, where it occurred, and perhaps giving  
21 some opinions on why it occurred?

22 A. This is a sketch that I took from the permit  
23 and map.

24 Q. Now, when you refer to the permitted map, is  
25 that the map submitted by Hidden Valley and part of



1     their approved plan?

2           A.     That's correct.  And what I'll -- that's a  
3     real busy map and just to give you a fast explanation,  
4     this is a State Highway that was later dedicated to  
5     Emery and Sevier County and comes off the main highway  
6     about two and a half miles, and this is the road that  
7     was constructed, a half mile of road that was  
8     constructed in 1980.

9           This right here is a barrier steel fence post to  
10    prevent vehicles from getting down into the reclaimed  
11    area.  This is gully number one and this particular road  
12    is not a cut slope road.  There's ephemeral drainage  
13    coming here.  There's a protection fence here that  
14    precludes anyone from driving should they get past the  
15    barrier.  And then from this point on we've got a cut  
16    slope road.  And what you have with a cut slope road --  
17    maybe I can go into that a little later.

18          Q.     Why don't you go into it right now, just take  
19    your time.

20          A.     A cut slope, what we've got is -- this is  
21    probably an exaggeration but here's the -- this is the  
22    ephemeral.

23          Q.     For the record, what does ephemeral mean?

24          A.     That means the water is not a perennial  
25    stream.  It's not an intermittent stream, but when

1 you're getting high intensity storms you usually have  
2 runoff in that type of a storm. So this is basically  
3 what happened in connection with a cut slope operation.

4 So this particular area here would be undisturbed.  
5 And if I describe that area, it's a slick rock type of  
6 an area, kind of like a tin roof, very impermeable to a  
7 rain drop, so you're getting high, high runoff in that  
8 area. This is a road that's about 30 to 40 feet wide  
9 and all this is down -- this is downcast material. With  
10 the steepness of that slope, it's a 70 percent slope  
11 which equates to about a one and a half to one -- this  
12 is heighth and this is vertical.

13 Q. When you refer to downcast material, is that  
14 material that has been cut out of the natural slope and  
15 placed on the other side to make the road?

16 A. That's correct.

17 Q. Does the process of cutting the road increase  
18 the angle of the slope, of the down slope?

19 A. Yes.

20 Q. What's the geologic or engineering term for  
21 that down slope area? Is that referred to as an  
22 outslope?

23 A. Outslope. So really when you look -- when you  
24 look at the construction here, before you had a normal  
25 drain pattern and flow.

1           MR. STIRBA: Now I'm going to object. I don't mind  
2 some explanation but there was no pending question, and  
3 I'd rather it proceed by way of question and answer  
4 rather than just have him testify without any pending  
5 question.

6           MR. RICHARDS: Okay. That's fair enough.

7           THE HEARING OFFICER: Okay.

8 BY MR. RICHARDS:

9           Q. When they cut that road and the road was an  
10 access road down to the pad areas and portal areas of  
11 the mine site, correct?

12          A. Correct.

13          Q. Did that increase the potential for erosion?

14          A. Yes.

15          Q. Could you please explain how that would  
16 happen?

17          A. The erosion process is loss of soil material  
18 and that process is a two-step process: One is  
19 detachment of that soil particle and the second is  
20 transportation of that soil particle. So if we look --  
21 and if we look to the schematic here, we'd have the  
22 undisturbed soil and we'd have detachment by rain drop  
23 and we'd have detachment by runoff, and this is what  
24 we'd have is total soil loss.

25          So this is detachment on this side. Over on this

1 He's not a hydrologist. He's a direct relations  
2 specialist and he's talking about a situation that, I  
3 think, would require the expertise of a hydrologist.

4 MR. RICHARDS: Okay. I will withdraw the question  
5 as to the natural runoff.

6 Q. But the water bar and the road, would that  
7 serve to increase the amount of water going over the  
8 outslope?

9 A. Yes.

10 Q. Okay. Is the erosion that was occurring over  
11 the outslope natural or geologic erosion or would you  
12 describe that as accelerated erosion?

13 A. I'd describe that as accelerated erosion.

14 Q. And why would you do that?

15 A. Primarily because of the man-made disturbance.

16 Q. On your schematic earlier you stated that one  
17 of the elements of the erosion process was the soil  
18 type. Is there any -- is the soil type of the downcast  
19 material, does that increase the amount of erosion?

20 A. Yes. It's loose material. It isn't compacted  
21 material.

22 Q. And, thus, it is much more likely to erode?

23 A. That's correct.

24 Q. Is erosion a continuing evolutionary process?

25 A. Yes.

1 Q. Is it possible to go to an area, say, two  
2 years ago and not see erosion, come back for two years  
3 later and see erosion?

4 A. Yes.

5 Q. It's continually evolving?

6 A. Yes, unless there's some protection provided.

7 Q. Okay. Prior to November did you ever inform  
8 the operator that there was an erosion problem?

9 A. Yes.

10 Q. Did you issue an inspection report on April  
11 26, 1991 specifically pointing out that erosion should  
12 be watched?

13 A. Yes.

14 Q. In your opinion, did erosion increase between  
15 April and November?

16 A. Yes.

17 Q. Why is that?

18 A. I think the area -- I believe the area was hit  
19 with high intensity storms and I have two pieces of  
20 information that would back that up. In April and  
21 September in the mine about --

22 MR. STIRBA: Well, I'm going to object. He can't  
23 testify to facts that he doesn't know anything about.

24 THE WITNESS: I did --

25 MR. STIRBA: He just asked him a question and, I

1 think, he testified he believed there were high  
2 intensity storms. Well, first of all, that's  
3 objectionable but basically unless he was present with  
4 those storms, I don't think he can testify to them.

5 MR. RICHARDS: I don't think it's highly relevant.  
6 I think his testimony is admissible. He received  
7 information from operators which he can testify to which  
8 support his opinion the erosion was increased due to  
9 excess runoff. I don't think it's relevant so I won't  
10 get into it.

11 BY MR. RICHARDS:

12 Q. But when you went out there was the erosion  
13 greater in November than it was in March -- I mean, in  
14 April?

15 A. Could I have a conference with you?

16 Q. I don't think so.

17 THE HEARING OFFICER: Well, no. You think just --

18 THE WITNESS: Will you state the question again?

19 MR. RICHARDS: Sure.

20 Q. You already testified that erosion was an  
21 evolving process and you pointed out to the operator in  
22 April 1981 that it should be watched. Did it increase?

23 A. Yes.

24 Q. And did it increase significantly by November?

25 A. Yes.

1 Q. Thank you. These are just general questions  
2 and we'll get into the specific gully areas in a  
3 second. What happens if erosion isn't curtailed or  
4 prevented?

5 A. You'll erode -- in this particular case two  
6 things will happen: One, you have a limited amount of  
7 soil so what you're doing is minimizing the chance for  
8 vegetal cover that would help ameliorate the erosion  
9 problem; the second, this road that's left here, and so  
10 you're going to have head cutting back into this road;  
11 and the third thing is this particular channel, erosion  
12 channel is going to continually get deeper until it hits  
13 something that is not as susceptible to erosion like  
14 bedrock; and the third thing -- the fourth thing, you're  
15 putting sediment down in Ivie Creek --

16 Q. What --

17 A. -- which is a tributary of the Colorado River.

18 Q. You testified that the erosion process would  
19 continue to undercut the road?

20 A. Yes.

21 Q. Is it your opinion that it might undercut the  
22 road that would prevent it from being used for the post  
23 land mining use that Hidden Valley requested?

24 A. That road is -- like I said, it's a wide road  
25 in a post-mining land use. There is livestock grazing,

1 so you really don't need a road that wide for livestock  
2 grazing. But, you know, if the area were ever to be  
3 mined again, well, that road would be real valuable  
4 because they wouldn't have to go in and do a lot of  
5 expense to reconstruct the road.

6 Q. Thank you. I'd like to show you what has been  
7 marked group Exhibit 2. Could you identify those?

8 A. These are photos I've taken during the  
9 inspection and some of the inspec -- some of the other  
10 photos were taken --

11 (Discussion off the record.)

12 MR. STIRBA: Sir, could you repeat it?

13 THE WITNESS: These photos were taken on -- by me  
14 on November the 19th and then Karla and Tom Munson and I  
15 went down and some of the photos were taken at that  
16 time.

17 BY MR. RICHARDS:

18 Q. I think you've done a sufficient job of  
19 explaining sort of the background so why don't we skip  
20 picture one, two, three and four and turn to picture  
21 five.

22 And just as a little background, could you go to  
23 your sketch and tell the Chairman what three areas were  
24 where the erosion gullies you cited in the N.O.V.?

25 A. The first is above the fence and this is not



1 on the cut slope road. This is gully number one.

2 Q. Could you point out gully number two and three  
3 while you're up?

4 A. Gully number two below the fence on the cut  
5 slope road and then gully number three.

6 Q. Okay. You can sit down. What does picture  
7 five and six -- what's a picture of five and six? Is  
8 that gully number one?

9 A. That's gully number one.

10 Q. And that's indicated on your sketch?

11 A. Yes.

12 Q. What does that picture demonstrate to you?

13 A. It shows both banks are unstable. It shows  
14 the depth of that gully is 26 -- approximately 26 inches  
15 deep, 58 inches wide, and I've measured the length of  
16 that gully as 19 feet.

17 You'll notice that there have been some rocks  
18 placed at the upper end of that photo to stop the head  
19 cut, but you can see soil material that has caved off  
20 the bank and lies perched in the bottom of the channel  
21 just waiting to be washed by the next storm.

22 Q. Where's the flow -- why is that gully  
23 occurring, number one?

24 A. We've got a road -- again, we have a water bar  
25 there, the water coming off the undisturbed area.

1 Q. Does it hit the road?

2 A. And it hits the road.

3 Q. Is it concentrated?

4 A. And it's concentrated causing erosion.

5 Q. Hits the water bar, then goes over the  
6 outslope?

7 A. That's correct.

8 Q. Once again, is this accelerated or geologic  
9 erosion?

10 A. It's accelerated erosion.

11 Q. If left untreated what will happen to that  
12 road?

13 A. It will keep eroding down until it hits  
14 bedrock or until it reaches an equilibrium with the  
15 channel where it's discharging.

16 Q. Is it undercutting the road?

17 A. Yes. That's why they placed the rock to stop  
18 the head cut.

19 Q. Is it transporting sediment?

20 A. Yes.

21 Q. Where does it transport sediment?

22 A. It's transporting it into the ephemeral  
23 channel, into this ephemeral channel here. See, the  
24 drainage coming in here and then down here and then into  
25 Ivie Creek and then ultimately into the Colorado River

1 system.

2 Q. So we are transporting sediment again into --  
3 through into the ephemeral drainage?

4 A. Yes.

5 Q. I believe you testified that Hidden Valley  
6 placed some rock at the top?

7 A. Yes.

8 Q. What type of rock is that?

9 A. That rock was angular riprap.

10 Q. Was it effective?

11 A. It stopped the head cut.

12 Q. And what happened after that? Did the erosion  
13 continue?

14 A. The erosion continued on the embankments  
15 sloughing.

16 Q. Was the water diverted around the head cut and  
17 then formed in another channel? How did the erosion  
18 continue?

19 A. No. It just -- what happened is it just -- it  
20 just flowed and so it provided -- it saved -- it  
21 prevented the head cut from enlarging and lengthening  
22 the gully.

23 Q. Did it prevent the continued erosional  
24 process, however?

25 A. No.

1           Q.    In your opinion, was the rock they placed  
2           there adequate to prevent erosion to the extent  
3           possible?

4           A.    No.

5           Q.    Are there other reasonable steps that Hidden  
6           Valley could undertake that would prevent erosion?

7           A.    Yes.

8           Q.    Could you state for the record what some of  
9           those would be?

10          A.    Like diverted the water to other areas to  
11          minimize.

12          Q.    You could redirect the drainage from going  
13          onto the road?

14          A.    That's correct.

15          Q.    What others could they --

16          A.    Stabilize the channel.

17          Q.    How would they stabilize the channel?

18          A.    By riprapping.

19          Q.    Riprapping various sized boulders that would  
20          shape the channel?

21          A.    Shape the channel, riprap the sides so there's  
22          a place for water to run, place energy dissipators if  
23          the velocity is extreme.

24          Q.    You mentioned rock gabions earlier.

25          A.    Yes.

1           Q.    Are all these things you mentioned common ways  
2 in the industry to minimize erosion?

3           A.    Yes.

4           Q.    Are they frequently used in mining plans?

5           A.    Yes.

6           Q.    Let's discuss the secondary on your map, and  
7 I'll refer you to pictures seven and eight. Are these  
8 pictures taken of gully number two as marked on your  
9 map?

10          A.    Yes.

11          Q.    What do they show?

12          A.    Top photo shows a gully that's about 57 inches  
13 deep, 82 inches wide and about 50 feet long.

14          Q.    Is that continuing to erode?

15          A.    Yes. And you can see where I have my hand,  
16 there's a large boulder and that boulder is starting to  
17 be -- or a rock and that rock is starting to undercut  
18 and lower on the lower photo.

19          Q.    At picture eight?

20          A.    Picture eight. You can see where there has  
21 been river rock placed in the channel as a supposedly or  
22 purportedly to protect that channel but you can see --

23          Q.    Did it do that? Was that effective?

24          A.    No. You can see the river rock is washed --  
25 washed away and a new channel's been cut in the river

1 rock as stacked on the side of the channel.

2 Q. Is river rock commonly used in the industry to  
3 prevent erosion?

4 A. No, no, they do not because when you're  
5 getting high velocity waters, why the rock just starts  
6 to erode.

7 Q. It just does not weigh enough to serve as an  
8 energy dissipator to the water?

9 A. That's correct.

10 Q. And that's well-known within the industry?

11 A. Yes.

12 Q. Is this accelerated erosion?

13 A. Yes.

14 Q. And, once again, why -- is this erosion --  
15 explain quickly why the erosion is caused here? Where  
16 does the water come from?

17 A. We have a large sandstone area that's subject  
18 to high runoff. It's coming down and hitting the road  
19 and the water bar and then cascading off and  
20 concentrated on the road outslope causing erosion.

21 Q. Have you testified as to the length and width  
22 and depth of this?

23 A. Yes.

24 Q. You testified earlier that Hidden Valley had  
25 taken some steps, placed some river rock there. We're

1 not sure why they did. Were they adequate to curtail  
2 this erosinary process?

3 A. No.

4 Q. Continues to erode?

5 A. Yes.

6 Q. Are there other reasonable steps which could  
7 be undertaken? You testified about various steps. Are  
8 there other -- are they the similar steps?

9 A. Yes, very similar.

10 Q. And they would be effective?

11 A. Yes.

12 Q. Is this road being undercut by the erosinary  
13 process?

14 A. It will eventually be. As you can see, this  
15 rock, it's starting to make a head cut up the channel.

16 Q. Is it transporting sediment?

17 A. Yes.

18 Q. Where's it being transported to?

19 A. Ephemeral channel, then to Ivie Creek and then  
20 to the Colorado River system.

21 Q. In your opinion, has Hidden Valley undertaken  
22 steps to the extent possible to minimize erosion?

23 A. No.

24 Q. Let's turn to pictures nine and ten. Are  
25 those pictures of gully three as marked on your map?

1 A. Yes.

2 Q. Why is this gully eroding?

3 A. Same reason. The gully number two is eroding.

4 Q. Water comes off the undisturbed area, hits the  
5 road, concentrated the water bar, and then is tossed  
6 over the downcast slope, the outslope?

7 A. That's correct.

8 Q. Is this accelerated or natural erosion?

9 A. Accelerated.

10 Q. Is the erosion increased because of the  
11 surface disturbances caused by Hidden Valley?

12 A. Yes.

13 Q. Did you take measurements of these gullies?

14 A. Yes. 54 inches deep, 79 inches wide and about  
15 50 feet long.

16 Q. It's continuing to erode?

17 A. Yes.

18 Q. What will happen if the erosion's left  
19 untreated?

20 A. Same as gully number two.

21 Q. Road undercut?

22 A. Road undercut.

23 Q. Sediment transported to Ivie Creek and then to  
24 Colorado?

25 A. Yeah.



1 Q. Has Hidden Valley undertaken any steps to  
2 minimize erosion?

3 A. They've placed a small rock check dam at the  
4 crest of the outslope.

5 Q. Has that been sufficient to curtail the  
6 erosion process?

7 A. No. They also placed some river rock.

8 Q. I believe you testified earlier that that  
9 river rock is not a normal procedure within the industry  
10 to prevent erosion?

11 A. That's correct.

12 Q. So, in your opinion, these steps were not  
13 adequate to curtail erosion?

14 A. That's correct.

15 Q. And you testified earlier that there were many  
16 steps commonly used within the industry that could be  
17 used that would curtail the erosion?

18 A. That's correct.

19 Q. I'd like to show you what's been marked as  
20 Exhibit 3. Do you recognize this document?

21 A. Yes.

22 Q. That is that part of Hidden Valley's  
23 reclamation plan which was submitted and approved in May  
24 of 1986?

25 A. That is correct.

1 Q. What does this part of the plan refer to?

2 A. It refers to what action the permit will take  
3 relative to stabilizing rills and gullies.

4 Q. What's a rill and what's a gully?

5 A. A rill is a -- let me certify it this way.  
6 There's sheet erosion and gully erosion and sheet  
7 erosion is the gradual removal of the surface soil  
8 without any evidence of rills and then a rill is  
9 normally from nine -- around nine inches deep.

10 Regulations identify -- previous regulations  
11 identified rills nine inches and above and then gullies  
12 are wide waterways caused by erosion.

13 Q. Can a rill become a gully?

14 A. Yes, a rill can become a gully.

15 Q. A rill's a baby gully?

16 A. That's right.

17 Q. Would you read the last paragraph and tell me  
18 what that says and --

19 A. Okay.

20 Q. -- read the entire paragraph into the record?

21 A. This is UMC 817 -- my eyeballs are kind of  
22 shortened out. I'll put my glasses on. UMC 817.106,  
23 regrading or stabilizing rills and gullies. The  
24 existing rills in the road surface will be eliminated  
25 with water-barring and ripping of the road surface. The

1 rills or gullies that may appear during post-reclamation  
2 monitoring will be stabilized by filling with soil and  
3 rock. Chronic sites will be stabilized with small  
4 gabions or rock check dams.

5 Q. You testified earlier that Hidden Valley has  
6 indeed placed water bars and have they ripped the road?

7 A. Yes.

8 Q. Has that helped minimize the erosion on the  
9 road itself?

10 A. It --

11 MR. STIRBA: I'm going to object; irrelevant.  
12 We're not concerned about the erosion on the road.

13 MR. RICHARDS: Okay, fine.

14 Q. Has that served to concentrate the water and  
15 put it over to the outslope?

16 A. Yes.

17 Q. The statement that rills and gullies may  
18 appear during post-reclamation monitoring, is that a  
19 normal sort of statement? I mean, people realize that  
20 erosion is a evolutionary process that needs to be  
21 addressed during the bond period?

22 A. That's correct.

23 Q. Did Hidden Valley submit this as their  
24 proposed plan, how to curtail erosion that may develop  
25 during post-reclamation monitoring?

1           A.     Yes.

2           THE HEARING OFFICER:  Let me ask a question here.

3           Which document is this from?  This is from the

4           reclamation?

5           MR. RICHARDS:  This is the reclamation plan of

6           1986.  I intend to introduce both the mining plan and

7           the reclamation plan into evidence, but as I'm sure

8           Peter can state, 99 percent of that stuff's really

9           irrelevant to this hearing.

10          MR. STIRBA:  I won't say 99 percent.

11          THE HEARING OFFICER:  All right.

12          MR. RICHARDS:  Some percent.

13          BY MR. RICHARDS:

14               Q.     Did rills and gullies appear during

15               post-reclamation monitoring --

16               A.     Yes.

17               Q.     -- as anticipated?

18               A.     Yes.

19               Q.     Did Hidden Valley place soil and rocks into

20               the gullies -- gullies one, two and three -- sufficient

21               to minimize erosion?

22               A.     No.

23               Q.     Yet they, themselves, in '86 said they would

24               undertake to do that?

25               A.     Yes.

1 Q. Would you describe one, two and three as a  
2 chronic site?

3 A. Well, as far as all three, in my opinion, are  
4 chronic sites.

5 Q. Because they're increasing to erode there are  
6 going to be problems that simply will not go away, there  
7 are sites that may take --

8 MR. STIRBA: I'm going to object. It's leading and  
9 suggestive.

10 MR. RICHARDS: Fine. We've already testified to  
11 chronic.

12 Q. What did Hidden Valley agree to do in the  
13 reclamation plan to stabilize erosion on chronic sites?

14 A. Chronic sites will be stabilized with small  
15 gabions or rock check dams.

16 Q. Have they placed small gabions?

17 A. No.

18 Q. You testified earlier they placed some check  
19 dams. Has that been sufficient?

20 A. No. They're ineffective.

21 Q. You already testified earlier they had not  
22 placed enough soil or rocks into the channels to be  
23 effective?

24 A. That's correct. These rock check dams are  
25 about a foot high and they're placed right at the crest

1 of the slope, and so as far as minimizing erosion, it's  
2 basically acting as an energy dissipator when it hits  
3 there, but as soon as it hits, it's dropping sediment,  
4 and as soon as the sediment is dropped in the water,  
5 then you've increased the capacity to -- of that water  
6 and runoff to be more erosive.

7 Q. So Hidden Valley has not undertaken activities  
8 on the ground which they agreed to do in the reclamation  
9 plan?

10 A. That's correct.

11 Q. Let's go to part two of the N.O.V. You  
12 testified earlier, I believe, that part two is ready for  
13 failure to mark disturbed areas and failure to see and  
14 revegetate all disturbed areas; is that true?

15 A. That's correct.

16 Q. What do the rules require regarding the  
17 marking of disturbed areas?

18 A. The rules require that all disturbed areas be  
19 marked with a perimeter marker.

20 Q. That's simply pounding in a stake at the point  
21 where the area is disturbed and not disturbed?

22 A. That's correct.

23 Q. Relatively simple procedure?

24 A. That's correct.

25 Q. What do the rules require regarding seeding

1 and revegetating of disturbed areas?

2 A. The rules require that all disturbed areas  
3 would be revegetated or seeded.

4 Q. You have to seed first, then actually the rule  
5 requires that that seed take?

6 A. Yes.

7 Q. Would you go to the map and show the Chairman  
8 what areas were not seeded or revegetated?

9 A. This is a road -- these are the road outslopes  
10 and this area was not seeded and there are two pads  
11 constructed. This is a pad on the "A" seam and a pad on  
12 the "B" seam and when the portals were phased up in  
13 1980, the material was pushed over from the "B" seam and  
14 also pushed over from the "A" seam.

15 Q. So basically it's just this outslope that  
16 we've been talking about. It's the material that was  
17 taken to make the road dumped over the side --

18 A. That's right.

19 Q. -- they have not seeded? How do you know that  
20 those areas had not been seeded? Did you make a visual  
21 inspection?

22 A. Yes.

23 Q. Did you make a determination that it had not  
24 been seeded by what you saw on the ground?

25 A. Yes. I didn't see any sign of any of the

1 seeding species.

2 Q. Did a representative of Hidden Valley ever  
3 inform you that the areas had not been seeded?

4 A. Yes. And in presence of Mitch Rawlings after  
5 we looked at the disturbed markers and the disturbed  
6 markers were on the road and not at the toe of the  
7 disturbed area.

8 We inquired and said, "Has all the disturbed areas  
9 been seeded," and we specifically asked about the  
10 outslope of the road and she responded, "No, they had  
11 never been seeded," together with these areas and the  
12 disturbed markers are right along the crest of the hill.

13 Q. In your opinion, has Hidden Valley's failure  
14 to seed the outslopes that you've identified on your  
15 sketch a violation of the regulations?

16 A. Yes.

17 Q. I'd like to show you what's been marked as  
18 Exhibit 4. Could you state for the record what that is?

19 A. This is part of the reclamation plan.

20 Q. Is that the same reclamation plan that  
21 Exhibit 3 came from?

22 A. Yes.

23 Q. That was approved in May of 1986?

24 A. That's correct.

25 Q. Submitted by Hidden Valley?



1           A.    Yes.

2           Q.    Would you read the first full paragraph into  
3 the record and state what that says?

4           A.    Paragraph UMC 817.111, Revegetation: General  
5 requirements. The entire 6.7 acres of disturbed ground  
6 will be properly scarified, seeded, fertilized, mulched  
7 and covered to provide the best possible opportunity for  
8 plant growth. The road fill slopes --

9           Q.    And what's the road fill slope?

10          A.    You're looking at the outslope or looking at  
11 the outslope of the road.

12          Q.    Okay.

13          A.    And some small sites will require hand  
14 application of seed, mulch and fertilizer. The  
15 reclamation work is scheduled for late fall 1986.

16          Q.    As you testified, Karla Knoop, --

17          A.    Yes.

18          Q.    -- a representative of Hidden Valley, informed  
19 you, however, that none of that hand seeding of the  
20 outslopes had occurred?

21          A.    That's correct.

22          MR. STIRBA: For the record, that wasn't his  
23 testimony, but are you saying now that it was Karla  
24 Knoop who told you that?

25          THE WITNESS: Yes.

1 MR. STIRBA: Okay.

2 BY MR. RICHARDS:

3 Q. I believe you also testified that based on a  
4 physical examination of the property you determined that  
5 the area had not been seeded, as well?

6 A. Yes. I might say that was -- that was stated  
7 to me in the presence of Mitch Rawlings, the Office of  
8 Surface Mining.

9 Q. So, to the best of your knowledge, Hidden  
10 Valley has not completed what they agreed to do in the  
11 reclamation plan?

12 A. That's correct.

13 MR. RICHARDS: That's all the questions I have on  
14 direct.

15 THE HEARING OFFICER: All right. Mr. Stirba?

16 MR. STIRBA: Okay. Thank you, Mr. Chairman.

17 CROSS-EXAMINATION

18 BY MR. STIRBA:

19 Q. Good morning, Mr. Malencik.

20 A. Good morning.

21 Q. It's true that CalMat had responded and  
22 submitted a reclamation plan to the Division; is that  
23 correct?

24 A. That's correct.

25 Q. And it's also true that that was submitted in

Tab I

1           A.    No.  That event removed the particles that we  
2 placed in 1987, some of those were removed out of the  
3 gullies in 1989.

4           Q.    That was the riprap?

5           A.    Right.

6           Q.    And so would it be your testimony that the  
7 riprap you placed in 1987 was ineffective?

8           A.    No.  Some of it stayed in place, some of it  
9 did not.

10          Q.    Was there incremental erosion between '87 and  
11 '89?

12          A.    Yes.

13          Q.    So these gullies were continuing to erode?

14          A.    Probably.

15          Q.    You testified that you did some other work  
16 during 1989, and I can't honestly remember what you  
17 stated.  Did you do other work during 1989?

18          A.    Yes.

19          Q.    And what work was that?

20          A.    We did work all throughout the entire site.  
21 We, again, reconstructed the water bars and we placed  
22 additional large rock in the outfall areas.

23          Q.    Were you working with the Division at this  
24 time?

25          A.    Yes.

1           Q.    Were they -- were you and the Division aware  
2   that this was a continuing problem in 1989?

3           A.    Well, we were aware that the erosion had  
4   continued and that it -- the integrity of the road would  
5   be at stake if something was not done.

6           Q.    So in 1987 -- 1987, the Division -- did the  
7   Division ever inform you that this was not an erosional  
8   problem?

9           A.    They never informed us that it was or it  
10   wasn't.

11          Q.    Okay. You were working with them to control  
12   the erosion; is that true?

13          A.    They knew what we were doing, yes.

14          Q.    And you knew the erosion was increasing?

15          A.    We knew that it had the potential to increase,  
16   yeah.

17          Q.    And then in 1989 you testified that the  
18   erosion did, in fact, increase?

19          A.    Uh-huh.

20          Q.    Then, again, in placing -- you were  
21   undertaking other activities to try and reduce the  
22   amount of erosion, correct?

23          A.    Not necessarily. We were taking activities to  
24   protect the road so that there would not be further  
25   future erosion of the road surface.

**Tab J**

1 under Revegetation, General Requirements.

2 A. Okay. You're starting in the middle of the  
3 paragraph.

4 Q. Right. I'm sorry.

5 A. Okay.

6 Q. It's the second line down there, it says:  
7 "The road fill slopes and some small sites will require  
8 hand application of seed, mulch and fertilizer."

9 A. Yes.

10 Q. Is it your testimony that Hidden Valley has  
11 actually seeded the outslopes?

12 A. No.

13 Q. Okay. So, in other words, then Hidden Valley  
14 has not complied with what they promised to do in its  
15 own reclamation plan; is that true?

16 A. That's not true.

17 Q. Didn't you just say that they haven't seeded  
18 the out -- you haven't seeded the outslopes? Right here  
19 it says: "The road fill slopes will require hand  
20 application of seed."

21 MR. STIRBA: Object. It's argumentative.

22 THE HEARING OFFICER: I think he's entitled to an  
23 answer to that one. Have they or haven't they done what  
24 -- well, --

25 MR. RICHARDS: I believe he's -- actually, he's

1 already answered that they have, correct?

2 MR. STIRBA: No. Mr. Chairman, just so that it's  
3 clear, there's going to be -- somebody's going to  
4 testify with some expertise about that very issue, but  
5 he did testify that yes, that was in the plan and no,  
6 they haven't fulfilled any -- that they have fulfilled  
7 all promises made to the Division. That's what he's  
8 testified to.

9 THE HEARING OFFICER: I think he also testified  
10 that he was not aware that anyone had applied seed,  
11 mulch or fertilizer to the road fill slopes.

12 MR. STIRBA: That's correct.

13 THE HEARING OFFICER: All right. So that's the  
14 record.

15 BY MR. RICHARDS:

16 Q. Earlier you testified that the basic decision  
17 why you didn't continue to mine this property was the  
18 quality of the coal; is that true?

19 A. That's not exactly what I said but --

20 Q. Well, phrase what you --

21 A. There is no continuation of mining anything.  
22 The company never mined the property.

23 Q. But earlier you seemed to say that the  
24 underlying reason for not mining further was the quality  
25 of coal?



1 road that leads from the State Highway back to the  
2 property and, I believe, that same contractor was  
3 employed by the company to build the road.

4 Q. Was there anything else done other than  
5 building the road because the contractor was there?

6 A. Just general regrading of the area down near  
7 the creek. There was a fair amount of material to  
8 dispose of, not only the road outslope but some of that  
9 material was stockpiled in various places down near the  
10 creek.

11 Q. Now, you were asked about the plan in -- 1986  
12 plan. Counsel read you a provision that dealt with  
13 seeding certain areas. Do you remember that?

14 A. Yes.

15 Q. And you testified that that's what the plan  
16 says, correct?

17 A. Yes.

18 Q. And then you testified that that seeding had  
19 not occurred; is that true?

20 A. Correct.

21 Q. And then you testified that you -- that  
22 basically the company has fulfilled the promises made to  
23 the Division under the plan, remember that?

24 A. Yes.

25 Q. Could you explain to the Chair what you meant

1 in saying that you have fulfilled the obligations under  
2 the plan, even though, apparently, there might be a  
3 conflict between what the plan states and what you just  
4 testified to?

5 A. Yes. The plan calls for seeding or the  
6 seeding of road -- the plan mentions something about  
7 road fill slopes being seeded or -- here it is, required  
8 some hand application of seed, mulch and fertilizer.

9 Obviously, that wasn't done. We were on the site  
10 with the contractor representing the company,  
11 consultants representing the company. I believe the  
12 Division was in and out of the site during all of this  
13 period of activity. And we did everything the Division  
14 wanted done; otherwise, I don't think they would have  
15 given us the bond release that we'd complied with all of  
16 the phase one work.

17 Q. Are you aware of the Division ever objecting  
18 up until November of 1991 to the way the outslopes were  
19 dealt with in terms of seeding or vegetation?

20 A. I've never heard anything or seen anything in  
21 our files from the Division relating to the road  
22 outslopes not being seeded.

23 MR. STIRBA: Okay. Thank you. That's all I have.

24 THE HEARING OFFICER: Okay. Recross on that?

25 RECROSS-EXAMINATION

1 stream bed that had been modified previously by  
2 construction was it will be accepted as it is now,  
3 modified and reclamation based upon that and that was  
4 not changed either.

5 BY MR. RICHARDS:

6 Q. Are you aware of a regulation that requires  
7 the seeding and revegetation of all disturbed areas?

8 A. Yes.

9 Q. Were the outslopes which you have testified as  
10 disturbed areas, have they ever been seeded and have  
11 they been revegetated?

12 A. They're not seeded, they're not revegetated.

13 Q. Did you help design the erosion runoff system  
14 that we've heard testified today on the road?

15 A. No. I'm sorry, that's not in my expertise.

16 Q. Were you -- would you be aware of the fact  
17 that water bars were constructed on the road which would  
18 direct the water off the road over the outslope?

19 A. Yes, I'm aware of that.

20 Q. But you didn't construct --

21 A. No.

22 Q. You weren't involved in the construction of  
23 that, but you were aware that water would be coming out  
24 of the bars down over the outslope?

25 A. Yes.

1 know, the pushing of materials and sediments by -- not  
2 sediments, but anyway loosening of materials into the  
3 drainage at the foot of the slopes into those because  
4 they're hard to stand on; in fact, most places you can't  
5 stand on. They're too steep.

6 MR. STIRBA: Thank you.

7 MR. RICHARDS: Just two quick questions.

8 THE HEARING OFFICER: Mr. Richards?

9 RECROSS-EXAMINATION

10 BY MR. RICHARDS:

11 Q. But your testimony was that the outslopes had  
12 not been seeded?

13 A. That's right.

14 Q. And your testimony is you were aware the  
15 regulations require all disturbed areas to be seeded?

16 A. Not seeded by our interests. They've been  
17 seeded by natural efforts.

18 Q. But you've never seeded them?

19 A. No.

20 Q. And it's your testimony that the regulations  
21 require the seeding and revegetation of disturbed areas?

22 A. That's true. And what you've got to consider  
23 one thing here is that in this plan there's a variance  
24 for the road and the action taken in to contain the road  
25 as we -- as the road alignment, I should say, was to

Tab K

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IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

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In the Matter of	)	
	)	
HIDDEN VALLEY COAL COMPANY,	)	Case No. <u>920904813CV</u>
	)	
Appellant,	)	
	)	
vs.	)	
	)	
the UTAH BOARD OF OIL, GAS AND	)	Judge <u>Glen K. Iwasaki</u>
MINING and the UTAH DIVISION	)	
OF OIL, GAS AND MINING,	)	
	)	
Appellee.	)	

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ORDER

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The above entitled matter came before this Court on Wednesday, October 28, 1992, for oral argument on Appellant Hidden Valley's appeal from a formal adjudicatory decision of the Board of Oil, Gas and Mining.

On appeal, this Court has applied the standard of judicial review set forth under Utah Code Ann. § 40-10-30. The review of this matter is a review of the record in the tribunal below, and not a trial de novo. This Court has applied the criteria for review of the Board's final decision set forth at Utah Code Ann.

§ 40-10-30 to the issues raised by Appellant in its Brief. Based on this review, the Court rules as follows:

Appellant has contested the Board's jurisdiction under Utah Code Ann. § 40-10 et seq. This Court finds that Appellant had the requisite intent to mine 250 tons of coal or more. This finding is based upon the evidence in the record evidencing the Appellant's contemporaneous statements at the time of surface disturbance, and the prolonged period during which Appellant continued to submit itself to the jurisdiction of the Board of Oil, Gas and Mining and the Division of Oil, Gas and Mining under the state's coal program. Therefore the Division of Oil, Gas and Mining has jurisdiction over Appellant's surface coal mining reclamation operations.

The Appellant has contested the enforcement actions taken by the Division of Oil, Gas and Mining based on its argument that the statute of limitations in Utah Code Ann. § 40-8 et seq. are applicable to Utah Code Ann. § 40-10 et seq. The Court finds that the Board's conclusion of law that this statute of limitation is inconsistent with the Utah Coal Statute is correct. Therefore, Appellant's argument that the Division of Oil, Gas and Mining's enforcement is time-barred is erroneous.

The Appellant has contested the applicability of the Utah State permanent program under the state coal statute, Utah Code Ann. § 40-10 et seq. The Court finds that the Board's application of the law to the facts in this matter was correct

and that the permanent program performance standards apply to the Appellant.

The Appellant has argued that the enforcement actions taken by the Division of Oil, Gas and Mining in this matter were barred by the equitable principles of estoppel. This Court finds that the elements of estoppel have not been met and that the enforcement actions of the Division of Oil, Gas and Mining in this matter are not barred by this doctrine. This Court finds that the Board correctly applied the legal elements of the doctrine of estoppel, and that the record below supports the finding that Appellant took no acts in reliance upon the inspection reports to which Appellant points as being the basis for the application of the doctrine of estoppel.

Concerning the issue of whether or not there was a prima facie showing made of the elements of the Notices of Violation (NOVs) in this matter, the Court upholds the Board's ruling as to part one of the NOV concerning failure to address the erosion on the outcrops of the reclaimed access road. The Court finds that the record contains substantial evidence on this matter.

Concerning part two of the NOV addressing the failure to re-seed disturbed areas, the Court finds that there is substantial evidence on the record and that indeed it is undisputed that the Appellant failed to re-seed the areas addressed in the Notice of Violation.

Concerning the final portion of part two of the NOV, addressing the improperly located perimeter markers, the Court



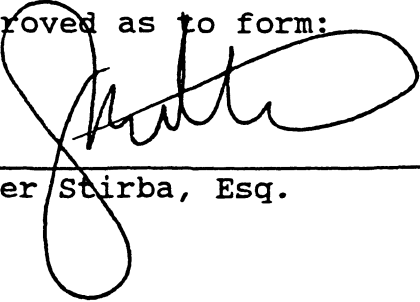
overturns the findings of the Board as to a prima facie showing and determines that the record does not contain substantial evidence as to the location of the perimeter markers being in violation of the plan or permanent program performance standards under the state's Coal Act. The Court does not find that the Appellant was in compliance in this respect, but only determines that there was a failure of the Division to make a prima facie showing in the record below as to this element.

This Order disposes of and finalizes all matters raised on appeal by the Appellant from the decision of the Board of Oil, Gas and Mining in this matter.

SO ORDERED this 5<sup>th</sup> day of November, 1992.

  
Judge Glen K. Iwasaki

Approved as to form:

  
\_\_\_\_\_  
Peter Stirba, Esq.

Tab L

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TELECOPIER TRANSMISSION SHEET

October 29, 1992

TO: William R. Richards  
Assistant Attorney General  
Division of Oil, Gas & Mining  
359-3940

THIS TRANSMISSION TOTALS 2 PAGES INCLUDING THIS COVER SHEET.

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---

Re: *Hidden Valley Coal Company*

Dear Bill:

Would you please make sure that the proposed Order is first submitted to me for my approval pursuant to Rule 4-501 as it is just simpler that way.

Also, I presume that Hidden Valley will take appropriate action pursuant to the NOV and therefore I would appreciate it if the Division would not take any emergency action adverse to my client without us first at least talking on the phone. I can assure you that neither myself nor my client have any tricks up our sleeves for which the Division should have any concerns.

I look forward to receiving your proposed Order. I appreciate your kind comments after today's hearing.

Very truly yours,

PETER STIRBA

PS/kg

**Tab M**

LAW OFFICES  
STIRBA & HATHAWAY  
A PROFESSIONAL CORPORATION  
SUITE 1150  
215 SOUTH STATE STREET  
SALT LAKE CITY, UTAH 84111

MARGARET H. OLSON

October 29, 1992

10/30/92  
ce L Barta  
P. G. Barta  
T. Mitchell  
W. Richards  
J. R. N.  
TELEPHONE: (801) 364-8300  
FACSIMILE: (801) 364-8355

Copy Tom M.  
Susan

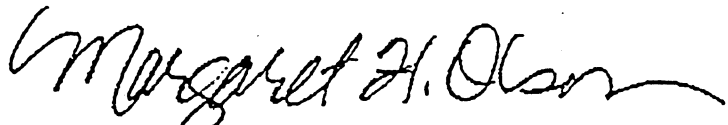
Dianne Nielson  
DIVISION OF OIL, GAS & MINING  
Three Triad Center  
355 West North Temple  
Salt Lake City, Utah 84180

Re: *Hidden Valley Coal Company / Abatement of C92-26-1-2*

Dear Director Nielson:

Enclosed is the Plan of Abatement for the above Cessation Order and Notice of Violation No. N91-26-8-2 prepared by JBR Consultants Group. Please notify me immediately if this does not meet the requirements of your Cessation Order.

Very truly yours,

  
MARGARET H. OLSON

MHO/kg  
Enclosure

**RECEIVED**

OCT 29 1992

DIVISION OF  
OIL GAS & MINING

**HIDDEN VALLEY COAL COMPANY**  
**PLAN FOR ABATEMENT**  
**OF**  
**NOTICE OF VIOLATION NO. N91-26-8-2**

**September 28, 1992**

Submitted by

Hidden Valley Coal Company  
1801 University Drive  
Phoenix, Arizona 85034

Prepared by

JBR Consultants Group  
8160 South Highland Drive, A-4  
Sandy, Utah 84093

## HIDDEN VALLEY COAL COMPANY

### NOV ABATEMENT PLAN

#### Introduction

The proposed plan is intended to satisfy the violations under NOV N-91-26-8-2 recorded at the Hidden Valley reclamation site owned and operated by Hidden Valley Coal Company. The Hidden Valley site is considered difficult to stabilize due to the inherent instability of the landscapes and soils and the erratic scattered precipitation events that include intense convection storms. Thus, significant plant growth is short-lived and erratic and erosion events from convection storms are characteristic of this terrain.

Following several heavy precipitation events that caused erosion in the reclaimed areas, the repairs and modifications of reclamation techniques have somewhat stabilized the site considering the natural erosion rate in the area. The seeded vegetation has responded to spring moisture in 1991 and 1992 and has become established on the roadbed and the fill slopes of A and B seams. In particular, species seeded only in 1986 during the initial revegetation efforts have now appeared five growing seasons later as immature plants.

The establishment of any seeded plant species in the roadbed has been difficult even with repeated seeding, fertilizing, mulching and covering with netting. Now that some desirable vegetation is becoming established, we will avoid further disturbances on the roadbed. This would include the prohibition against bringing machinery onto the roadbed, either to alter waterbar outfalls or to aid in revegetation.

The following sections describe plans to abate the two violations within the constraints given above. The first addresses the violation for erosion of road slopes and the second addresses seeding of disturbed areas associated with the road.



### Erosion Control

Hidden Valley Coal Company plans to abate the first violation by performing repair work on the outfall locations using non-mechanical, hand labor. A description of the repair work follows.

First, the outfalls will be groomed or shaped within the confines of the existing gulleys by rearranging loose rock and slump features. Due to the nature of the unengineered fill in which these gulleys occur, the reshaping will not result in a uniform channel down the steep slope, but will provide the best possible "foundation" for further repairs.

Next, small, porous check dams will be installed at frequent intervals along the outfall channels. These dams will be constructed of a fiber barrier using a product equivalent to the fiberdam material constructed by Synthetic Industries. The material is a flexible, moldable mass of fibers that, although irregular in shape, can be molded to fit within a non-uniform cross sectional area. It will be shaped to about a 1-foot thickness, with maximum height approximately two feet. The center of the dams will be lower than the edges, functioning as a spillway. The dams will be held in place with wooden or metal stakes.

The function of these porous dams will be to reduce velocity of runoff in the outfall, causing deposition of sediments behind and within the fiber dams. Water will pass through the dams, as well as over the spillways; the porous nature of the dams will not block flow or set up conditions whereby forces against the dams are excessive. Allowing water to pass through the dams also reduces the chance of erosion around the edges of the dams, causing failure. Over time, sediments will eventually clog the dams. This, in combination with deposition behind the dams, will in effect, build back up the gulley floor to some reasonable elevation. The retention of the fine sediments will, in turn, allow greater moisture retention and these areas will have a greater opportunity for plant colonization.

These dams will be spaced closely down the channel, at a distance determined from field conditions. As needed, a synthetic fiber erosion matting may be laid in the channel between the check dams to provide additional protection.

The goal of the repair work is to enable development of a series of steps down the outfall, with the flat sections vegetated and the steep sections stabilized.

### **Revegetation**

The revegetation techniques to answer the second violation will be limited to hand distribution methods only. The history of revegetation at Hidden Valley has shown that seedings only respond when sufficient moisture is available during the spring growing season. The use of mulching, netting and erosion blankets has not significantly altered the local environment conditions to foster plant growth. Thus, the revegetation attempts will utilize hand methods to increase moisture retention without severely damaging the surface of the steep slopes.

The areas requested for seeding will be broadcast seeded with the included seed mixture.

1. The sites requested for seeding and pitting will be done by broadcast seeding and pitting with a pulaski hand tool at the rate of one pit per square yard.
2. The sites requested for seeding, pitting, mulching and netting will be broadcast seeding after pitting as described in #1. The use of mulch and netting has not been beneficial at Hidden Valley.
3. The sites requested for seeding, pitting, mulching, crimping will not be revegetated. This site was seeded prior to the 1986 reclamation work, and through natural succession, is now progressing towards a natural colonized site.

The revegetation work will be accomplished in the fall, 1992 season when soil conditions permit. Those acceptable soil conditions defined as less than 10% snow cover, frost free in the upper six inches and is sufficiently dry in the upper six inches to not clod when worked.

The following seed mixture and rates will be used:

<u>Common Name</u>	<u>Scientific Name</u>	PLS
		<u>lbs/acre</u>
Indian ricegrass	<i>Oryzopsis hymenoides</i>	3
Russian wildrye	<i>Elymus junceus</i>	3*
Ephraim crested wheat	<i>Agropyron cristatum</i>	3**
squirreltail	<i>Sitanion hystrix</i>	1
yellow sweetclover	<i>Melilotus officinalis</i>	3
fourwing saltbush	<i>Atriplex canescens</i>	3
shadscale	<i>Atriplex confertifolia</i>	2
winterfat	<i>Ceratoides lanata</i>	3
		Total <u>21.0</u>

\* exotic used in first mixture in 1986

\*\* exotic but an excellent soil binder and better suited for this site than other native seeds available

This mixture varies from that listed in the Interim Plan. The species selection is based on what has grown and survived at Hidden Valley in the last five years.

**Tab N**



# State of Utah

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Norman H. Bangerter  
Governor

Dee C. Hansen  
Executive Director

Dianne R. Nielson, Ph.D.  
Division Director

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

November 17, 1992

CERTIFIED MAIL  
Return Receipt Requested  
P 074 975 191

FAXED 11-17-92

Mr. Lee Edmonson  
CALMAT Company  
Properties Division  
1801 East University Drive  
Phoenix, Arizona 85034

United States Corporation Company  
600 Deseret Plaza Building  
15 E. First South  
Salt Lake City, Utah 84111

Dear Mr.  Edmonson:

Re: Response to Abatement Plan for NOV 91-26-8-1 and CO 92-26-1-2, Hidden Valley Mine, Hidden Valley Coal Company, ACT/015/007, Folder #2, Emery County, Utah

We have reviewed your submission dated October 29, 1992. Based on our phone conversation today, the Division is requesting that you submit additional information and plan amendments, as indicated below within 15 days of receipt of this letter. Work must be completed in the field within 30 days of approval by the Division, unless the Division determines that field conditions justify a delay in implementation. Failure to meet either of these deadlines will reinstate the failure to abate cessation order.

There are two parts to the violation. Part one deals with erosion, part two deals with the failure to seed all disturbed areas.

**Part 1 of 2**

Nature of violation:

(1) Failure to maintain diversions to be stable pursuant to Utah Admin. R. 645(614)-301-742.312.1.

(2) Failure to minimize erosion to the extent possible pursuant to Utah Admin. R. 645(614)-301-742.113.

Hidden Valley's abatement plan for part one of the violation does not adequately address how Hidden Valley will stabilize diversions and minimize erosion to the extent possible on the outslopes of the access roads as required by the pertinent regulations cited above. The information submitted for abatement does not comply with the currently approved plan and lacks sufficient detail.

**Part 2 of 2**

Nature of violation:

(1) Failure to seed and revegetate all disturbed areas pursuant to Utah Admin. R. 645(614)-301-354.

Hidden Valley's abatement plan for part two of the violation does not adequately address how Hidden Valley will seed and revegetate the disturbed areas as required by the pertinent regulation cited above. For example, the proposed revegetation plan does not clearly state where seeding will take place. The NOV requires that the following disturbed areas will be seeded and revegetated: (1) the access road; (2) the outslopes of the access road; and (3) the stream disturbed outslopes. The abatement plan also contains statements inconsistent with abatement of the violation such as at page three of the abatement plan: "The sites requested for seeding, pitting, mulching, crimping will not be revegetated."

To be technically complete, Hidden Valley's plan must contain specific, detailed, and supported procedures for abatement of the violations which will bring the Hidden Valley mine into regulatory compliance. The submission should also demonstrate why the work being performed does not require restarting the bond clock.

We also note that the abatement plan proposes to abate the violation by utilizing procedures or methods that are not contained in the approved reclamation plan. Hidden Valley must

Page 3  
Lee Edmonson  
November 17, 1992

either act in accordance with the currently approved plan or provide an amendment to the plan together with a justification as to why it is not prudent and feasible to follow the approved plan. Any changes to the approved plan to abate either part of NOV 91-26-8-1 will be considered amendments and must be submitted to the Division in the proper format to amend the approved plan.

Amendments should be in page format for inclusion in the Rulemaking Plan, and can be submitted in conjunction with the plan for abatement of the NOV.

If you have any questions or want to discuss the proposed plan further, please contact me.

Best regards,

A handwritten signature in cursive script, appearing to read "Dianne", with a large, sweeping initial "D" that loops around the first part of the name.

Dianne R. Nielson  
Director

kak  
cc: P. Littig ✖  
cc by fax: Denise Dragoo  
Peter Stirba  
DN92-85

Tab O



HIDDEN VALLEY COAL COMPANY  
PLAN FOR ABATEMENT  
OF  
NOTICE OF VIOLATION  
N91-26-8-2

December 8, 1992

Submitted by  
Hidden Valley Coal Company  
1801 University Drive  
Phoenix, AZ 85034

Prepared by  
JBR Consultants Group  
8160 S. Highland Dr., A-4  
Sandy, UT 84093

HIDDEN VALLEY COAL COMPANY  
NOV ABATEMENT PLAN

Introduction

The proposed plan is intended to satisfy two violations that were issued for the reclaimed Hidden Valley Mine under NOV N-91-26-8-2 on November 20, 1991. The Hidden Valley site is owned and operated by Hidden Valley Coal Company. It is considered a difficult site to reclaim due to the inherent instability of the landscape and soils, and due to the erratic, scattered precipitation events that include intense convection storms. Significant plant growth can be short-lived, and erosion events from convection storms are characteristic of this terrain.

Following several heavy precipitation events that caused erosion in the reclaimed areas, repairs were made to the site, using modifications of original reclamation techniques in some areas. This has provided some stability to the site considering the natural erosion rate in the area. The seeded vegetation responded well to spring moisture in 1991 and 1992. Perennial plants have become established on the roadbed and the A- and B-seam fill slopes, in spite of six years of drought in the region. In particular, species seeded only in 1986 during the initial revegetation efforts have now appeared five growing seasons later as immature plants. A recently completed vegetation survey (attached as an appendix to this report) provides evidence of vegetation success.

The establishment of any seeded plant species in the roadbed has been difficult even with repeated seeding, fertilizing, mulching and covering with netting. Now that some desirable vegetation is becoming established, we will avoid further mechanical disturbances on the roadbed, either to alter water bar outfalls or to aid in revegetation.

The following sections describe plans to abate the two violations within the constraints given above. The first addresses the violation for erosion of road slopes and the second addresses seeding of disturbed areas associated with the road. Some of the procedures and methods proposed below differ from those described in the approved Hidden Valley Mine Reclamation Plan; a plan amendment has also been prepared.

### Erosion Control

Hidden Valley Coal Company plans to abate the first violation by performing repair work on the water bars and the outfall locations using non-mechanical, hand labor. Use of equipment would not significantly increase the chances for success of the repairs. Even if equipment usage was considered acceptable from a re-disturbance standpoint, the same type of structures would be proposed as are proposed below; equipment would simply allow more dirt and rock to be moved faster. However, given the nature of the slope to be worked, equipment would only be able to access the upper third of the outfalls in most instances; hand work would be required for the majority of the outfall lengths. The detriment to vegetation by bringing in equipment is not acceptable for the benefits gained.

The proposed work will begin no later than April 1, 1993, and as soon as practical after approval has been obtained, materials have been received, and environmental conditions are acceptable. Conditions necessary for work to proceed are (1) no snow cover (for safety reasons it is not possible to work on the steep, unstable slope when snow is present), (2) ground not frozen such that digging is possible, and (3) moisture content such that fill slope materials are workable without forming clods. It is planned that a two-person labor crew will be supervised by a designated professional in accomplishing the proposed work. Level of effort is anticipated to be approximately one month for the crew to

accomplish the repairs. Given the non-uniform conditions within and among water bars, and given the non-standard materials and techniques proposed, close technical supervision of the crew will be necessary. In addition, is it anticipated that a product representative of the proposed material will be onsite during the initial stages of the repair work to provide guidance.

It is important to note that each of the water bar outfalls has eroded to a different level and configuration. At a given outfall, condition varies along the outfall length as well. In addition, particle size of the outfalls ranges from very fine textured clays up to large boulders and bedrock. Given the above, field fitting of the proposed structures will be essential to insure the greatest chance of success. The information provided below provides as much specificity as possible regarding dimensions and methods proposed. It is expected that the height, width, and thickness of structure will vary, as well as the distance between structures.

Next, it is important to note that the proposed techniques are thought to provide the best possible chance of success given the inherent constraints of site topography, substrate and climate. The natural, undisturbed watersheds above the roadway contribute sediment-laden runoff to the disturbed area, as evidenced by deposition in the water bars. Consequently, some erosion and sediment contribution to the ephemeral channel at the base of the slope is a natural phenomenon. The proposed treatments are not expected to eliminate all erosion from the disturbed area, nor are they expected to prevent all sediment contribution to the ephemeral drainage. Instead, they are expected to provide a measure of stability such that erosion will be minimized to the extent possible. Every effort will be made to insure that structures are installed properly and maintained after installation.

A description of the repair work follows.

First, the outfalls will be groomed or shaped within the confines of the existing gullies by rearranging loose rock and slump features. The side slopes of gullies - where steep, undercut or unstable - will be laid back to a gentler angle. Smaller boulders will be strategically placed within the gully, or will be removed. Larger boulders will be pried loose and rolled downhill where possible and desirable. Due to the nature of the unengineered fill in which these gullies occur, the reshaping will not result in a uniform channel down the steep slope, but will provide the best possible "foundation" for further repairs.

Next, small, porous check dams will be installed at frequent intervals along the outfall channels. These dams will be constructed of a fiber barrier using a product equivalent to the fiberdam material constructed by Synthetic Industries. Manufacturer's recommendations (attached at the end of this report) for material installation will be followed. The material is a flexible, moldable mass of fibers that, although irregular in shape, can be molded to fit within a non-uniform cross sectional area. It will be shaped to about a one-foot thickness, with maximum height approximately two feet. The center of the dams will be lower than the edges and will function as a spillway. The dams will be held in place with 18- 24-inch long metal rebar stakes. A schematic cross section showing the check dam treatment follows this report.

These dams will be spaced closely down the outfall; distance between dams will not be uniform, but is expected to range between approximately 5 - 15 feet. Generally, they will be spaced such that the downstream toe of a given dam will be at approximately the same elevation as the maximum potential elevation of sediments deposited behind the next dam downstream. The level to which sediments can be deposited above a dam is dependant upon the

spillway elevation, the gradient above the dam, and particle size of the sediments. This level will not be known exactly; instead, visual estimation of dam location will be done using professional judgement. Presence of bedrock or large boulders will further affect spacing.

Where feasible, a synthetic fiber erosion matting will be laid in the channel between the check dams to provide additional protection. In areas where large rock may preclude placement of matting, the rock itself will serve as protection.

The function of these porous dams will be to reduce velocity of runoff in the outfall, causing deposition of sediments behind and within the fiber dams. Water will pass through the dams, as well as over the spillways; the porous nature of the dams will not block flow or set up conditions whereby forces against the dams are excessive. Allowing water to pass through the dams also reduces the chance of erosion around the edges of the dams, causing failure. Over time, sediments will eventually clog the dams. This, in combination with deposition behind the dams, will in effect, build back up the gully floor to some reasonable elevation. The retention of the fine sediments will, in turn, allow greater moisture retention and these areas will have a greater opportunity for plant colonization. The result will be a series of steps down the outfall, with the flat sections vegetated and the steep sections stabilized.

In addition, a continuation of ongoing work on the water bars themselves will be done. Level of effort will be greater than in the past, in an attempt to maintain retention potential for sediments and runoff water. This work will entail removal of sediments deposited in the bars and construction or enlargement of substantial check dams perpendicular to the bars to serve as retention structures.

Monitoring and Maintenance. In order to insure that erosion is minimized, each structure will be inspected periodically to insure proper functioning. During the regular inspection period of April through October, structures will be examined a minimum of once per month during the regular monthly site visit. In addition, they will be inspected after weather patterns indicate that substantial runoff may have occurred at the site. Any needed maintenance or repairs to the structures will be done within one calendar month following the identification of a problem. In addition, a photographic record will be kept to track outfall condition and to identify trends toward stabilization.

### Revegetation

The revegetation techniques to answer the second violation will be limited to hand distribution methods only. The history of revegetation at Hidden Valley has shown that seedings only respond when sufficient moisture is available during the spring growing season. The use of mulching, netting and erosion blankets has not significantly altered the local environment conditions to foster plant growth. Thus, the revegetation attempts will utilize hand methods to increase moisture retention without severely damaging the surface of the steep slopes.

The areas to be seeded are: the access road which has previously been seeded three times; road fill slopes; and stream buffer zone slopes. The road upslopes will not be seeded. All seeding will be done using hand broadcast methods with the included seed mixture. On the access road - where total vegetation cover has recently been measured at 29 percent, and total perennial cover at 6 percent - the surface crust will be disturbed and seed will be broadcast in selected bare areas. Where substrate conditions allow on the remaining areas (road fill and buffer zone), pitting with a pulaski hand tool at the rate of one pit per square yard will be done prior to broadcast seeding.

The revegetation work will be accomplished when soil conditions permit. Those acceptable soil conditions are defined as less than 10 percent snow cover, frost free in the upper six inches, and sufficiently dry in the upper six inches to not clod when worked. If conditions do not permit seeding by February 1, 1993, an alternative seed mix to that listed below will be submitted for Division approval.

The following seed mixture and rates will be used:

PLS		
Common Name	Scientific Name	lbs/acre
Indian ricegrass	Oryzopsis hymenoides	3
Russian wildrye	Elymus junceus	3*
Ephraim crested wheat	Agropyron cristatum	3**
squirreltail	Sitanion hystrix	1
yellow sweetclover	Melilotus officinalis	3
fourwing saltbush	Atriplex canescens	3
shadscale	Atriplex confertifolia	2
winterfat	Ceratoides lanata	3
Palmer's penstemon	Penstemon palmeri	2
Castle Valley saltbush	Atriplex gardneri var cuneata	2
buckwheat	Eriogonum corymbosum	0.5
Total		<u>25.5</u>

\* exotic used in first mixture in 1986

\*\* exotic but an excellent soil binder and better suited for this site than other native seeds available

This mixture varies from that listed in the Interim Plan. The species selection is based on what has grown and survived at Hidden Valley in the last five years.

Monoammonium phosphate fertilizer will be spread at a rate of 242 lbs/acre on all of the areas to be reseeded.



Tab P

WILLIAM R. RICHARDS #4398  
THOMAS A. MITCHELL #3737  
Attorneys for  
Division of Oil, Gas and Mining  
355 West North Temple  
#3 Triad, Suite 350  
Salt Lake City, Utah 84180  
Telephone: (801) 538-5340

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IN THE UTAH COURT OF APPEALS

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HIDDEN VALLEY COAL COMPANY,	:	
Plaintiff and Appellant,	:	AFFIDAVIT OF WILLIAM MALENCIK
v.	:	
the UTAH BOARD OF OIL, GAS AND MINING and the UTAH DIVISION OF OIL, GAS AND MINING,	:	Case No. <u>930073-CA</u>
Defendants and Appellees.	:	

---

The undersigned, William Malencik, being duly sworn under oath, deposes and states as follows:

1. I am a Reclamation Specialist with the Utah Division of Oil, Gas and Mining.
2. I have worked in the field of resource conservation management and mine reclamation for over 40 years.
3. I graduated from Utah State University with a degree in forestry and a minor in range management.
4. Prior to college, I worked two years in a coal mine.

5. After college I worked for the United States Bureau of Land Management ("BLM"). I was a staff specialist and district manager with the BLM in the State of Colorado. My duties involved work in the forestry program, the soil and watershed program, the range improvement program, the weed control program, and the range management program.

6. In Nevada I was employed as staff specialist to the Nevada State Director of the BLM for six Nevada districts involving about 49 million acres of public land. In that capacity, I was involved in the watershed program, the range improvement program, and the weed control program.

7. I was subsequently promoted to Chief of the Planning and Environmental Coordinating staff. Thereafter, I was promoted to the Division of Technical Services. Finally, I was promoted to Associate State Director of the Nevada BLM.

8. I became employed with the Utah Division of Oil, Gas and Mining in 1987 as a reclamation specialist. I was subsequently promoted to lead inspector.

9. I was the inspector who wrote Notice of Violation 91-26-8-2 ("NOV") on November 20, 1991, which forms the basis of this legal action.

10. The NOV has two parts. In general, part one of the NOV was written because Hidden Valley failed to minimize erosion and maintain diversions as required by the Utah Coal Statute and its accompanying regulations. Specifically, part one of the violation was written because in the construction and reclamation

of the Hidden Valley Mine access road, Hidden Valley failed to adequately protect the area disturbed by the road. Hidden Valley constructed the access road by using a cut/slope construction method. By doing so, Hidden Valley changed the natural drainage, and created an unstable, uncompacted steep outslope from the natural terrain. Furthermore, the road as constructed concentrates the runoff and discharge from the road onto the inadequately protected outslope.

11. The effect of Hidden Valley's construction activities was to cause unlawful erosion at three specific areas on the outslope (referred to as gullies one, two, and three).

12. Gully one is approximately 26 inches deep, 58 inches wide, and 19 feet long.

13. Gully two is approximately 57 inches deep, 82 inches wide and about 50 feet long.

14. Gully three is approximately 54 inches deep, 79 inches long, and about 50 feet long.

15. All three gullies are continuing to erode.

16. Erosion is an ongoing process. Unless steps are taken to minimize erosion at the Hidden Valley Mine site, as required by Utah Statute, the following will happen:

(a) Uncontrolled runoff off the access road will continue.

(b) This uncontrolled runoff in turn will cause the gullies to continue to erode, which will result in the deepening and widening of the erosion channels.

(c) This uncontrolled erosion will cause the loss of soil which is essential to allow the revegetation of the outslopes.

(d) Uncontrolled erosion will further allow the deposition of sediment into Ivie Creek which is a tributary of the Colorado River Drainage System.

(e) The continued failure to control erosion at the mine site will result in the loss of site productivity and its ability to be reclaimed in accordance with the requirements of the Utah Coal Statute.

22. Part II of the NOV was written because Hidden Valley failed to seed the outslopes of the access road and several pad areas at the mine site. The Utah Statute and regulations require that areas disturbed by coal mining activities be revegetated to be consistent with the vegetation of the surrounding natural terrain.

23. Hidden Valley has not seeded the outslopes of the access road and pad areas at the mine.

25. If seeding does not take place this spring of 1993, the following will happen:

(a) The site will lose productivity and the ability to be revegetated.

(b) The outslopes will lose soil through sheet, rill and gully erosion over all the outslopes of the disturbed areas at the Hidden Valley Mine site.

(c) The outslopes will be invaded by undesirable weeds such as halogeton, which is poisonous to livestock and will further

inhibit the ability of the site to be revegetated by desirable plant species.

DATED this 15<sup>th</sup> day of March, 1993.

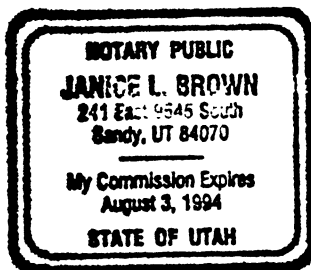
  
\_\_\_\_\_  
WILLIAM MALENCIK

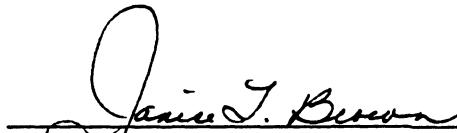
STATE OF UTAH                                 )  
  : ss.  
COUNTY OF SALT LAKE                     )

I, William Malencik, being first duly sworn, hereby state that I have read the foregoing AFFIDAVIT OF WILLIAM MALENCIK and that the same is true to the best of my knowledge, information and belief.

  
\_\_\_\_\_  
WILLIAM MALENCIK

Subscribed and sworn to before me this 16<sup>th</sup> day of  
March, 1993.



  
\_\_\_\_\_  
NOTARY PUBLIC

Tab Q



WILLIAM R. RICHARDS #4398  
THOMAS A. MITCHELL #3737  
Attorneys for  
Division of Oil, Gas and Mining  
355 West North Temple  
#3 Triad, Suite 350  
Salt Lake City, Utah 84180  
Telephone: (801) 538-5340

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IN THE UTAH COURT OF APPEALS

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HIDDEN VALLEY COAL COMPANY,	:	
Plaintiff and Appellant,	:	AFFIDAVIT OF SUSAN WHITE
v.	:	
the UTAH BOARD OF OIL, GAS AND	:	Case No. <u>930073-CA</u>
MINING and the UTAH DIVISION	:	
OF OIL, GAS AND MINING,	:	
Defendants and Appellees.	:	

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The undersigned, Susan White, being duly sworn under oath,  
deposes and states as follows:

1. I am a Reclamation Biologist with the Utah Division of Oil, Gas and Mining.
2. I graduated from Brigham Young University with a masters degree in Range & Wildlife Management.
3. I have worked as a Reclamation Biologist for approximately 13 years.

4. My duties at the Division include: Reviewing permits for adequacy of biological data and making findings of reclamation feasibility to ensure sound revegetation practices to restore the post-mining land use of land subject to Utah's coal reclamation laws. I also conduct field surveys to verify that biological information and activities meet the Utah Coal Program requirements.

5. I am the Reclamation Biologist assigned to the Hidden Valley Mine located in Emery County.

6. In that capacity, I have visited the Hidden Valley Mine approximately 15 times. My most recent visit was on March 11, 1993.

7. As a general rule, seeding to revegetate a mine site must take place in late fall or early spring. The Interagency Forage and Conservation Planting Guide for Utah, which is an authoritative source on which professional land managers rely, provides:

#### ESTABLISHING AND MANAGING SEEDING

##### TIME OF SEEDING.

On rangelands, seed only when there will be enough moisture to assure seeding establishment. This will generally be in the early spring or late fall. Seed early enough in the spring to take advantage of moisture and cool temperatures. Spring seedings are often unsuccessful because seeding is delayed by excess moisture which often means that by the time equipment can be used on the sites it is too late for optimum germination and establishment.

8. Due to the exceptional amount of water the Hidden Valley Mine site has received this winter, it is my opinion that the optimal time for seeding will occur at the mine site within the next week. As the last remaining snow melts from the

outslopes of the access roads, there may be sufficient moisture which in conjunction with other climatic conditions will significantly increase the potential for seed germination and subsequent vegetation establishment.

9. Timing, however, is critical. In other words, Hidden Valley has a very small window of opportunity with regards to seeding.

10. Due to increasing temperatures at the mine, the moisture content in the soil will be optimum for seeding for a very short time.

11. If seeding does not take place prior to the depletion of the soil moisture build-up, the chance of successful revegetation will be significantly reduced.

12. If seeding does not take place during this window of opportunity, the next beneficial time for seeding will be in the fall of 1993.

13. If seeding is not done this spring:

(a) On site soil moisture condition as seen in fall 1992, and winter of 1993, may not reoccur again for several years.

(b) The site will lose productivity and the ability to be revegetated;

(c) The outslopes of the access road will lose top soil through sleet, rill and gully erosion; and

(d) The outslopes will be invaded by undesirable weeds such as, halogeton, which is poisonous to livestock and will further inhibit the ability of the site to be revegetated by desirable plant species and return to its post-mining utility.

DATED this 16 day of March, 1993.

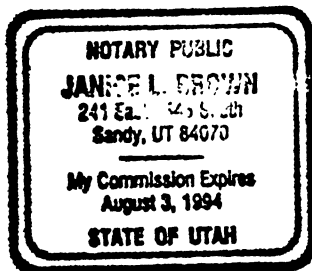
  
SUSAN WHITE

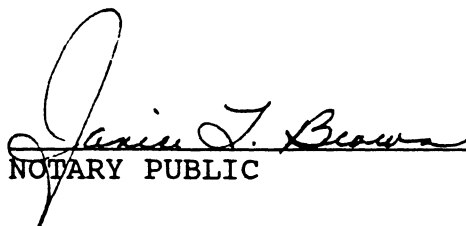
STATE OF UTAH                                 )  
  : ss.  
COUNTY OF SALT LAKE                     )

I, Susan White, being first duly sworn, hereby state that I have read the foregoing AFFIDAVIT OF SUSAN WHITE and that the same is true to the best of my knowledge, information and belief.

  
\_\_\_\_\_  
SUSAN WHITE

Subscribed and sworn to before me this 16<sup>th</sup> day of March, 1993.



  
\_\_\_\_\_  
NOTARY PUBLIC

Tab R

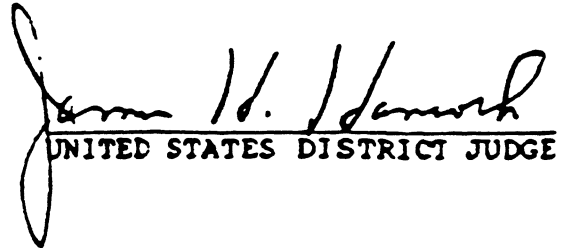
UNITED STATES OF AMERICA, )  
 )  
 PLAINTIFF, )  
 )  
 VS. ) CV-89-H-343-S  
 )  
 )  
 HARTSELLE MINING CORPORATION  
 and J. MACF BRAMLETT,  
 )  
 )  
 DEFENDANT. )

Notwithstanding the final nature of this order, the court

retains jurisdiction of this matter for the limited purpose of enforcing the injunctive relief set forth herein.

Costs are taxed against the defendants.

DONE this 24<sup>th</sup> day of September, 1990.

  
UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,                     )  
                    PLAINTIFF,                     )  
VS.   )             CV-89-H-343-S  
HARTSELLE MINING CORPORATION  
and J. MACK BRAMLETT,                     )  
                    DEFENDANTS.                     )

MEMORANDUM OF DECISION

This cause came on for hearing at a scheduled motion docket held September 14, 1990 in Birmingham, Alabama, at which time the court considered the government's motion for summary judgment filed August 13, 1990 and deemed submitted in accordance with the court's order dated August 14, 1990. Having considered the briefs of counsel for both sides and the verified material presented in support of and in opposition to the motion for summary judgment, the court is of the opinion that there is no genuine issue as to any material fact and that the government is entitled to judgment as a matter of law.

The United States instituted this action against defendants Hartselle Mining Corporation ("Hartselle") and J. Mack Bramlett ("Bramlett") pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 et seq. (hereinafter "the Act" or "SMCRA"). The government seeks an injunction requiring defendants to reclaim a surface mining site permitted to and mined by defendant Hartselle and subsequently abandoned without adequate reclamation; it also seeks to enjoin defendants

from committing further violations of the Act. In addition, the government alleges that defendant Bramlett was the "agent" of Hartselle pursuant to 30 U.S.C. § 1271(c); and that he is therefore jointly and severally liable along with the corporation for the reclamation process. Defendants raise the statute of limitations and res judicata as defenses to the government's allegations, and they contend that Bramlett is not an agent of Hartselle as that term is defined in Section 1271(c) of the Act.

The following facts are undisputed. Hartselle is wholly owned by another corporation, Continental Sales, Inc. Fifty percent of the stock of Continental Sales is owned by Donald Martin; the rest is owned in equal shares by defendant Bramlett and his wife. Defendant Bramlett was at all relevant times the president of both Continental Sales and Hartselle and served as a director of both companies.

In August of 1979 the state of Alabama, through the Alabama Surface Mining Commission, issued permit number P-2124 to Hartselle empowering it to surface mine for coal in Jefferson County, Alabama. Hartselle conducted surface mining pursuant to the permit in 1979 and 1980. Federal inspectors subsequently issued a notice of violation and cessation order to Hartselle for violation of the Act; the violations committed, as described in the orders, include failure to pass all drainage from the disturbed area through a sediment pond and failure to reclaim the area in a timely manner. The Alabama Regulatory Authority has undertaken limited reclamation activities on the mine site in question as a result of bond forfeiture; however, regulatory

standards for reclamation have not been satisfied and the violation and order remain outstanding.

Before addressing the question of agency, which the parties concede is the central disputed issue in this lawsuit, the court must first consider whether res judicata or the "applicable" statute of limitations bar this action. As a matter of law, neither defense is applicable. Although defendants failed to elaborate on either defense in their brief or at oral argument, the court assumes that the res judicata argument is based on an earlier default judgment obtained by the United States against Hartselle in an action to collect civil penalties under 30 U.S.C. § 1268. Persuaded by the rationale set forth in United States of America v. Ted Q. Wilson, C.A. No. 3-84-193 (E.D. Tenn. May 24, 1984), this court finds that a civil penalties judgment pursuant to Section 1268 does not necessarily bar a later enforcement to compel reclamation under Section 1271(c). As was the case in Wilson, the government alleges that the violations, upon which the prior suit for penalties was based and the instant suit for injunctive relief is predicated, continued unabated at the time the complaint was filed. Because the conduct allegedly has continued, the previous judgment is not a bar to the instant suit. See Lawlor v. National Screen Service, 349 U.S. 322, 328 (1955).

Defendants also allege without elaboration that the instant suit is barred by the "applicable statute of limitations." As plaintiff pointed out in its memorandum filed in response to defendants' earlier motion to dismiss, the SMCRA does not

~~prescribe any limitations period applicable to enforcement~~  
~~actions under Section 1271(c).~~ ~~It is well-settled that Congress~~  
may create a right of action without restricting the time within  
which that right may be exercised. Occidental Life Insurance Co.  
v. EEOC, 432 U.S. 355, 367 (1977). There is no evidence that  
Congress intended one of its independent, general statutes of  
limitations to apply, and the court fails to find that implied  
absorption of a state statute of limitations would be consistent  
with the underlying policies of the federal statute. Defendants'  
argument that this action is time-barred is, therefore, without  
merit.

The record indicates that the defendants herein made no  
effort to pursue or contest the notice of violation and cessation  
order through appropriate administrative channels. This failure  
to pursue administrative review precludes them from contesting  
the facts of the violation and the validity of those actions in a  
subsequent judicial proceeding to enforce the administrative  
directives. Mullins Coal Company v. Clark, 759 F.2d 1142, 1145  
(4th Cir. 1985).

The sole remaining issue is whether defendant Bramlett was  
acting as the "agent" of Hartselle and therefore can be held  
jointly and severally responsible for the company's reclamation  
obligations. Based on facts which are not in dispute, the court  
finds that Bramlett was in fact an "agent" as that term has been  
defined by relevant case law. The SMCRA provides that the  
federal government may sue for appropriate relief "whenever [a]  
permittee or his agent . . . violates or fails or refuses to

comply with any order or decision issued by the Secretary under this chapter. . . .” 30 U.S.C. § 1271(c). The ~~Act and the~~ regulations promulgated thereunder do not define the term “agent,” and courts addressing the issue have adopted the definition that appears in the Federal Mine Safety and Health Act, of 1977, 30 U.S.C. §§ 801 et seq. United States v. Peery, 862 F.2d 567, 569 (6th Cir. 1988); United States v. Dix Fork Coal Co., 692 F.2d 436, 439-40 (6th Cir. 1982). The Mine Safety and Health Act defines “agent” as “any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine.” 30 U.S.C. § 802(e).

Counsel for defendants argues that Bramlett cannot be an agent because Dix Fork requires onsite involvement which admittedly does not exist in this case. This court does not the case as incorporating such a requirement. In Dix Fork the court defined “agent” to include “...that person charged with the responsibility for protecting society and the environment from the adverse effects of the surface mining operation and particularly charged with effectuating compliance with environmental performance standards during the course of the permittee’s mining operation.” Dix Fork, 692 F.2d at 440. The court noted several factors that, when taken together, define corporate agency for the purposes of assessing individual liability pursuant to Section 1271(c): 1) whether the subject individual assumed the responsibility that the operation would be conducted in compliance with the Act’s reclamation provisions; 2)

whether the individual owned or supplied the assets that enabled the mining operation to conduct its business; and 3) whether the individual, through his actions on behalf of the corporation as SMCRA representative and as provider of the means of production, created the imminent danger that precipitated the issuance of notices of violations and cessation orders. Id.

In Peery, the court followed Dix Fork and expanded the concept of corporate agency to include consideration of the following factors: 1) whether the individual signed the permit and permit applications on behalf of the corporation; 2) whether the individual was the corporate representative as to the mining operation; 3) whether the individual discussed statutory reclamation obligations with the state or federal permitting agency; 4) whether the individual obtained the performance bond; and 5. whether the individual read and agreed to comply with permitting and reclamation obligations on which the permit was conditioned. Peery, 862 F.2d at 569.

Bramlett attempts to distinguish his situation by pointing out that he delegated authority over the mining operation to a third person hired for that purpose, that he did not involve himself in the day-to-day operations of the mine, that he seldom went to the mine site, and that although he attended the meeting at which the permit was issued and reclamation discussed, he knew little if anything about the applicable environmental regulations and requirements. Bramlett also alleges that he received no compensation from Hartselle or its parent corporation, that his financial involvement in the permittee was

"remote," and that his ability to act as president of Hartselle was conditioned upon the approval of fellow owner and director Donald Martin.

The court finds defendants' arguments to be unpersuasive given the totality of the circumstances and the purpose and policy of the Act. The fact remains that Bramlett was the president of both Hartselle and its parent corporation, he served as a director of the permittee, he signed the application for the mining permit, he personally obtained the performance bond enabling the corporation to commence mining activities, and he attended the August 23, 1979 meeting with representatives from the Alabama Surface Mining Commission, at which time environmental protection and reclamation obligations were discussed. Given Bramlett's position, his financial interest in the business, and his actual involvement in the process necessary to initiate the subject mining activities, he clearly falls within Peery's expanded definition of "agent."

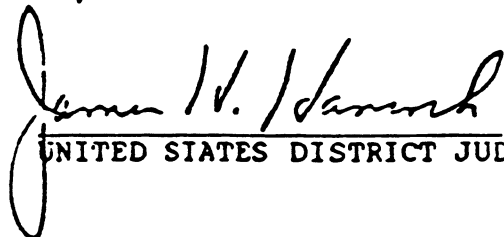
Moreover, this case is distinguishable from Dix Fork, in which the court found that the president and majority shareholder "delegated" his responsibilities under the Act to his father, thereby rendering him the "agent" for purposes of Section 1271(c). In Dix Fork the agent, Mr. Niece, owned the corporation which in turn owned the mining equipment and performed the mining operations on the site in question. Niece was the guarantor on a bank promissory note to Dix Fork and was to receive coal that was "faced up" in return for the Dix Fork's use of his equipment. He spoke with onsite inspectors regarding potential violations and

was present at all administrative proceedings as spokesman for Dix Fork and "manifested indicia of actual ownership." Dix Fork, 692 F.2d at 441.

The record fails to show that such a "quasi-symbiotic relationship" is present in this case. While Hartselle may have hired Mr. Limbaugh as superintendent of its mining operations, there is no evidence that Limbaugh had the financial involvement or exhibited the "apparent authority" of Niece. In this case Bramlett cannot use the hiring of Limbaugh as a shield, for the evidence shows that he retained sufficient control, authority and involvement to remain the agent of the corporation for the purposes of Section 1271(c). Given his position and involvement Bramlett had an obligation to educate himself about the mining operation and relevant regulations; to hold otherwise would encourage circumvention of the Act.

In sum, as a matter of law neither the statute of limitations nor res judicata bars the instant action, and both Hartselle and Bramlett are jointly and severally liable for reclamation obligations pursuant to Section 1271(c). The plaintiff's motion for summary judgment incorporating a request for injunctive relief is due to be granted; a separate order conforming to this memorandum shall be entered contemporaneously herewith.

DONE this 24<sup>th</sup> day of September, 1990.

  
UNITED STATES DISTRICT JUDGE



Tab S



# United States Department of the Interior

## OFFICE OF HEARINGS AND APPEALS

Hearings Division  
6432 Federal Building  
Salt Lake City, Utah 84138  
(Phone: 801-524-5344)

March 27, 1992

PACIFICORP, dba PACIFICORP	:	Docket No. DV 91-5-R
ELECTRIC OPERATIONS, UTAH	:	
POWER AND LIGHT COMPANY, and	:	Application for Review
ENERGY WEST MINING COMPANY,	:	
	:	Notice of Violation
Applicant	:	No. 91-02-246-1
	:	
v.	:	
	:	
OFFICE OF SURFACE MINING	:	
RECLAMATION AND ENFORCEMENT	:	
Respondent	:	
- - - -	:	
DIVISION OF OIL, GAS AND	:	
MINING, STATE OF UTAH,	:	
	:	
Intervenor	:	

### DECISION

#### Statement of the Case

On November 30, 1990, the Office of Surface Mining Reclamation and Enforcement (OSM) issued Ten-Day Notice No. X-90-02-244-06 TV1 (TDN) to the Division of Oil, Gas and Mining, State of Utah (Division) requesting that the Division take enforcement action against Utah Power and Light Company (UP&L), the permittee of a coal mine known as the "Deer Creek Mine" located in Emery County, Utah, for allegedly failing to comply with the requirements of Utah Administrative Rule (UAR) 614-303-300, which states:

No transfer, assignment, or sale of rights granted by a permit will be made without the prior written approval of the Division. (Emphasis added.)

This Rule is part of Utah's permanent regulatory program (State program) approved by the Secretary of the Interior, the administration of which is subject to OSM's federal oversight authority. The TDN was based upon the alleged fact that an unapproved transfer of the permit for the Deer Creek Mine occurred by virtue of a merger of Pacificorp, a Maine corporation, and UP&L, a Utah corporation to which the

permit had been issued prior to the merger. These corporations formed a surviving Oregon corporation, PacifiCorp, which now does business in the State of Utah under the assumed names: "PacifiCorp Electric Operations" (PEO) and "Utah Power and Light Company".<sup>1</sup>

After the Division determined that no violation of the State program had occurred, OSM decided that the Division's determination was arbitrary and capricious. Consequently, on January 29, 1991, OSM issued Notice of Violation No. 91-02-246-1 (NOV) to UP&L and Energy West Mining Company (Energy West), as permittee and operator, respectively, of the Deer Creek Mine, for allegedly failing to comply with UAR 614-303-300. On March 11, 1991, PacifiCorp filed the instant Application for Review<sup>2</sup> of the NOV, raising a statute of limitations defense and claiming that no transfer of any permit rights had occurred as a result of the merger.

On May 1, 1991, the Division's Petition to Intervene in this case was granted. An evidentiary hearing was then scheduled for December 9, 1991.

On December 5, 1991, the parties filed a Stipulation of Undisputed Facts (Stipulation). The next day petitioner filed a Motion to Vacate Hearing and Notice of Intent to Submit Joint (Cross) Motions for Summary Judgment and Briefing Schedule. Shortly thereafter, on December 9, 1991, an Order was entered vacating the hearing in this matter and setting a schedule for the filing of cross motions for summary judgment, briefs in support thereof, responses to the motions, and proposed findings of fact and conclusions of law. The parties have now submitted these various filings in support of their respective positions. To the extent proposed findings of fact and conclusions of law are consistent with those entered herein, they are accepted; to the extent they are not so consistent, they are rejected. Jurisdiction is not at issue.

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<sup>1</sup> Because "PacifiCorp Electric Operations" and "Utah Power and Light Company" are admittedly assumed names, PacifiCorp, PEO, and Utah Power and Light Company are one and the same entity. Also, by reason of the merger, PacifiCorp succeeded to any UP&L liability for failing to obtain prior approval of the alleged transfer of permit rights. Consequently, PacifiCorp is the only real party in interest (other than OSMRE and Energy West Mining Company).

<sup>2</sup> Applicant styled its initial pleading in this case as a "Petition for Review". The pleading should have been entitled "Application for Review" in accordance with 43 CFR 4.1160, and is so referenced herein.

The issues:

- (1) Is OSM's issuance of the NOV barred by the statute of limitations found at Utah Code Ann. § 40-8-9(2)?
- (2) Is the appropriateness of the Division's determination that no violation of the State program occurred at issue? If so, did OSM properly decide that the Division's determination was arbitrary and capricious?
- (3) Did PacifiCorp or UP&L comply with the State program?
- (4) Should the NOV be vacated with respect to Energy West?
- (5) Should the NOV be vacated with respect to PEO for the alleged failure to name PEO in the NOV or serve PEO with the NOV?

#### Statement of the Facts

Pursuant to the Stipulation of Undisputed Facts, the following facts are admitted by all of the parties and shall be taken as true for the purpose of this proceeding:

1. On February 7, 1986, the Division issued Permit No. ACT/015/018 to UP&L to operate a coal mine known as the Deer Creek Mine in Emery County, Utah. Permit No. ACT/015/018 was issued to UP&L, Mining Division, as operator.

2. On January 9, 1989, UP&L, a Utah corporation, merged with PacifiCorp, a Maine corporation, forming PC/UP&L Merging Corp., an Oregon corporation. On January 9, 1989, the name, PC/UP&L Merging Corp., was changed to PacifiCorp, an Oregon corporation (PacifiCorp). PacifiCorp does business in the State of Utah as "PacifiCorp Electric Operations" and as "Utah Power & Light Company."

3. From 1986 until October 1, 1990, Deer Creek Mine Permit No. ACT/015/018 was operated by UP&L, Mining Division.

4. By letter dated October 8, 1990, PEO, as successor to UP&L, submitted to the Division a 5-year renewal application for the Deer Creek Mine Permit No. ACT/015/108 stating that as of October 1, 1990, Energy West replaced UP&L, Mining Division, as operator of the Deer Creek Mine.

5. By letter dated October 12, 1990, PacifiCorp notified the Division that, effective October 1, 1990, the operator of the Deer Creek Mine had changed to Energy West, a Utah corporation and wholly-owned subsidiary of PacifiCorp.

6. By letter dated October 29, 1990, the Division notified PacifiCorp that the

current approved permits for the [Des-Bee-Dove Mines, the Cottonwood/Wilberg Mine, and the Deer Creek Mine] state that the applicant is Utah Power and Light Company. The five year renewal applications for the Des-Bee-Dove Mine and the Deer Creek Mine state that the permit applicant is PacifiCorp. . . . [T]he transfer requirement, according to R614-303-300, must be submitted by November 13, 1990.

7. By letter dated November 26, 1990, the Division acknowledged receipt of PacifiCorp's permit transfer application submitted November 20, 1990, and requested that further information be provided by December 7, 1990.

8. By letter dated November 28, 1990, the Division requested a change in the Deer Creek Mine Permit reclamation bond to PEO by December 14, 1990.

9. On November 30, 1990, the Division received Ten-Day Notice No. X-90-02-244-06 TV1 from OSM's Albuquerque Field Office (OSM-AFO) concerning the change in ownership of the Deer Creek Mine. The TDN requested that the Division take enforcement action against applicant for "failure to obtain prior written approval in accordance with R614-303-300 before transferring, assigning or sale of rights granted by permit."

10. By letter dated December 7, 1990, the Division informed OSM-AFO that PacifiCorp had an application for permit transfer pending. The Division requested that the TDN be withdrawn.

11. By letter dated December 20, 1990, OSM-AFO refused the Division's request to withdraw the TDN, finding that the Division's response to the TDN was arbitrary and capricious.

12. By letter dated December 27, 1990, the Division requested informal review of the TDN from OSM's Deputy Director, Operations and Technical Services (Deputy Director), and indicated it would forward additional material for review by January 7, 1991.

13. By letter dated January 7, 1991, the Division submitted the additional material and again requested that OSM withdraw the TDN.

14. By letter dated January 14, 1991, the Deputy Director responded to the Division's request for informal review by affirming the decision of OSM-AFO. The Deputy Director ordered a Federal inspection of the Deer Creek Mine.

15. On January 25, 1991, a Federal inspection of the Deer Creek Mine was conducted.

16. On January 29, 1991, pursuant to the inspection of January 25, 1991, OSM issued Notice of Violation No. 91-02-246-1 (NOV) to UP&L, as permittee, and to Energy West, as operator, of the Deer Creek Mine for failure to "obtain prior written approval in accordance with [UAR] R614-303-300 before transferring, assigning or sale of rights granted by a permit." The specific abatement action required UP&L to submit to the Division an application for transfer of rights under a permit and to receive the Division's approval by April 25, 1991.

17. By letter dated February 4, 1991, the Deputy Director informed the Division that an NOV had been issued pursuant to the Federal inspection of January 25, 1991.

18. On February 15, 1991, the Division approved the transfer of the rights granted under Permit No. ACT/015/018 from Utah Power and Light Company to PEO.

### Discussion

#### 1.

**Is OSM's issuance of the NOV barred by the statute of limitations found at Utah Code Ann. § 40-8-9(2)?**

Applicant contends that OSM's issuance of the NOV, which occurred more than two years after the merger took place, is barred by the two-year statute of limitations set forth in Utah Code Ann. § 40-8-9(2). This section is part of the Utah Mined Land Reclamation Act which pre-dates the enactment of both the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201 et seq., and the State program. Utah Code Ann. § 40-8-9(2) provides:

No suit, action or other proceeding based upon a violation of this chapter, or any rule or order issued under this chapter, may be commenced or maintained unless the suit, action or proceeding is commenced within two years of the date of the alleged violation.

Applicant's contention is premised on the claim that this statute of limitations is applicable to OSM's issuance of the NOV because (1) OSM, by enforcing UAR R614-303-300, "stepped into the shoes" of the Division, and (2) the statute has been incorporated into the State program pursuant to Utah Code Ann. § 40-10-4, which provides (emphasis added):

The Utah Mined Land Reclamation Act (Chapter 8 of Title 40), and the rules and regulations adopted under it, where appropriate, and not in conflict with the provisions of this chapter or the rules and regulations adopted under it, shall be applicable to coal mining and reclamation operations.

Applicant's contention cannot stand scrutiny for two reasons. First, State statutes of limitation do not apply to Federal enforcement of State programs under SMCRA. See United States v. Tri-No Enterprises, Inc., 819 F.2d 154, 158 (7th Cir. 1987) (citing United States v. Summerlin, 310 U.S. 414, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940) (United States is not bound by state statutes of limitations in enforcing its rights)). In the Tri-No case, the court commented as follows regarding the lack of a statute of limitations provision in SMCRA:

the United States is not subject to statutes of limitations in enforcing its rights unless Congress explicitly provides otherwise. \* \* \* Congress may create a right of action without limiting the time in which the government may exercise the right. \* \* \* If an act creating a governmental right of action contains no limitations period, \* \* \* the government may seek [to enforce its rights] under the act at any time.

819 F.2d at 158. Second, it would be inappropriate and in conflict with the provisions of Chapter 10 of Title 40 of the Utah Code to incorporate by reference the 2-year statute of limitations where neither Congress nor the Utah State Legislature has otherwise placed a statute of limitations on enforcement actions. The Cooperative Agreement between the Secretary of the Department of the Interior and the Governor of the State of Utah states:

This Agreement provides for State regulation of \* \* \* surface coal mining and reclamation operations and activities in Utah on Federal lands \* \* \* consistent with SMCRA and the Utah Code Annotated (State Act) governing such activities and the Utah State Program (Program).

30 CFR 944.30 (Article I). State regulation cannot be consistent with both SMCRA and the State program, each of which lacks a statute of limitations, if a statute of limitations from another pre-existing statute is incorporated by reference.

2.

Is the appropriateness of the Division's determination not to issue a notice of violation at issue? If so, did OSM properly decide that the Division's determination was arbitrary and capricious?

The Division has argued that its determination not to issue a notice of violation of the State program constituted "appropriate action", as that term is defined and used in 30 CFR 842.11, and thus must be upheld. OSM argues that the Order entered herein dated May 1, 1991, granting the Division permission to intervene, prohibits the Division from raising this argument because of the limits therein placed on the Division's intervention. That Order granted OSM's motion to limit the scope of the Division's intervention to the issue of the validity of the NOV and prohibited the Division from addressing OSM's issuance of the TDN.

OSM's argument cannot be sustained. Only after a ten-day notice is issued does the question of whether the Division took "appropriate action" come into play. See 30 CFR 842.11. The question bears on the validity of the process by which the NOV was issued and not on the validity of the TDN.

However, in this case, the question of whether the Division's determination not to issue a notice of violation constituted "appropriate action" amounts to a synonymous rephrasing of the question of whether applicant violated the State program. Consequently, only the latter question is addressed herein.

3.

Did PacifiCorp or UP&L comply with the State program?

In support of its position that it did not violate the State program, PacifiCorp argues that the October 1990 change in the operator of the Deer Creek Mine from UP&L to Energy West was valid under Utah Code Ann. § 40-10-9(2). This argument is not relevant to the issue in this case because it is the transfer of the rights granted under the permit from the permittee, UP&L, to the successor permittee, PacifiCorp,



which is currently at issue, not the change in the operator of the Deer Creek Mine from UP&L to Energy West.

A change in the operator of a mine requires the permittee to submit to the Division an "Application for Permit Change." See UAR R614-303-200. A transfer of the rights granted under a permit from the permittee to a successor permittee requires the permittee or successor permittee to submit an "application for transfer, assignment, or sale of permit rights" prior to the transfer of those rights. See UAR R614-303-300. The NOV was issued not because PacifiCorp failed to submit an Application for Permit Change to the Division regarding the change of the operator of the Deer Creek Mine, but because PacifiCorp did not submit an application for the transfer of permit rights (and have it approved) before the transfer of permit rights resulting from the corporate merger. (See Exhibit M to Stipulation)

In support of PacifiCorp's assertion that it is in compliance with the State program, PacifiCorp also argues that it is the State's approval of a transfer of permit rights that gives the transfer legal effect and, therefore, that UP&L was legally incapable of effecting a transfer of any permit rights until such transfer was approved by the Division. According to PacifiCorp, the merger could not have resulted in the assignment of permit rights until the State's approval of the transfer on February 15, 1991, at which time the NOV already had been issued.

Applicant relies on three cases to support its position: Clark Coal Company v. Office of Surface Mining Reclamation and Enforcement, 102 IBLA 93 (1988); Dan Slimp/Murphy Mountain Mining v. Office of Surface Mining, No. NX 7-43-R (ALJ Hearing, September 29, 1988); and Wilson Farms Coal Co., 2 IBSMA 118 (1980). These cases do not support applicant's conclusion that a transfer of permit rights can only be effected by the regulatory authority. To the contrary, these three cases stand for the following limited proposition:

an agreement between a permittee and a third party regarding assignment of mining rights under [a] permit will not relieve a permittee of its obligations under the Act.

Clark Coal, 102 IBLA at 97.

Applicant fails to distinguish the relationship between a permittee and a third party from the relationship between the permittee and the regulatory authority. UAR 614-300-303 obligates the permittee to obtain the written approval of the Division prior to transferring to a third party any

rights granted by a permit. To fail to obtain that "prior written approval" is a violation of the State program and that is why the permittee remains liable for violations of the Act occurring on the permit area until such time as the transfer is approved. These cases do not, however, hold that the permittee has no legal capacity to transfer the rights granted under the permit to a third party. The capacity to do so is distinct from the obligation the permittee owes to the regulatory authority and is matter of State contractual law.

In Roy E. Mehaffey v. Office of Surface Mining Reclamation and Enforcement, 117 IBLA 350 at 355 (1991), the Interior Board of Land Appeals stated:

It matters not that Mehaffey sold his interest in RM Coal to Diamond. Unless and until the assignment of the permit issued to RM Coal is approved by the issuing agency, RM Coal is responsible for compliance with the permit terms. This approval must be granted for a party to be relieved of responsibility under the permit. A purported or actual transfer of the permit or the assets of the entity holding the permit to a third party will not suffice to relieve the permittee of record of liability for violations of the Act.

(Emphasis added.) In the above quoted passage, the Board does not find that the selling of the permittee's rights under the permit was legally without effect until approved by the regulatory authority. To the contrary, the Board's reference to an "actual transfer" implies that permittees possess the legal capacity to transfer their permit rights.

The correctness of this implication is manifest upon an examination of 30 CFR 774.17, paragraph (a) of which is substantively identical to UAR 614-303-300. Paragraph (e) of 30 CFR 774.17 provides:

Notification. (1) The regulatory authority shall notify the permittee, the successor, commenters, and OSM, if OSM is not the regulatory authority, of its findings [regarding whether the successor is eligible to receive a permit and otherwise satisfies the criteria for approval of the transfer of permit rights to the successor.]

(2) The successor shall immediately provide notice to the regulatory authority of the consummation of the transfer, assignment, or sale of permit rights.

(Emphasis added). This regulation clearly contemplates that approval of a transfer of permit rights by the regulatory authority is not the act which effects the transfer of those rights, but rather that the transfer of those rights is consummated by some act of the permittee.

Applying the above law to the facts in this case, it is clear that when UP&L merged with PacifiCorp on January 9, 1989, the rights granted under Permit No. ACT/015/018 were transferred to the corporation that survived the merger, namely, PacifiCorp. The Plan of Merger provides that

[u]pon consummation of the Merger, PacifiCorp and UP&L each shall be merged with and into [PC/UP&L] Merging Corp. in the manner and with the effect provided by the Maine Business Corporation Act (MBCA), Utah Business Corporation Act (UBCA), and the Oregon Business Corporation Act, the separate existence of PacifiCorp and UP&L shall cease and thereupon UP&L, PacifiCorp and Merging Corp. shall be a single corporation.

(See Exhibit A to Stipulation) The portions of the MBCA and UBCA which establish the legal effect of a corporate merger are nearly identical.<sup>3</sup> Consequently, only Utah law is set forth below. Utah Code Ann. § 16-10-71(2) provides, in pertinent part:

(a) [Upon merger] [t]he several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be the corporation designated in the plan of merger as the surviving corporation. . . .

(b) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.

\* \* \*

---

<sup>3</sup> Compare Me. Rev. Stat. Ann. tit. 13A, §§ 905(2) and 906(5) and Utah Code Ann. §§ 16-10-71(2) and 16-10-72(2). Both of these states appear to have modeled their statutes after the Model Business Corporation Act. See 19 Am. Jur. 2d Corporations § 2629, which discusses the Act.

(d) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporation. All property . . . and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated [shall be] vested in such single corporation without further act or deed . . . .

(e) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated . . . .

(Emphasis added.)

Where the surviving corporation of a merger of a domestic corporation and a foreign corporation is to be foreign corporation, as in this case, both the MBCA and the UBCA provide that the effect of such a merger shall be the same as in the case of the merger of domestic corporations, except insofar as the laws of such other jurisdiction provide otherwise. Utah Code Ann. § 16-10-72 (2); Maine Rev. Stat. Ann. tit. 13A, § 906 (5). The surviving corporation, PacifiCorp, is an Oregon corporation governed by the Oregon Business Corporation Act, which provides in pertinent part:

When a merger takes effect:

(a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(b) The title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment;

(c) The surviving corporation has all liabilities of each corporation party to the merger; . . .

Oregon Rev. Stat. § 60.497 (1) (emphasis added).

Applying Maine, Utah, and Oregon law, as directed by the Plan of Merger, it is clear that the merger effected a transfer of the permit rights. The Maine and Utah merger statutes both contemplate the transfer of such "rights" so

long as the laws of the foreign jurisdiction, Oregon, do not provide otherwise. Oregon law provides more simply and generally for the transfer of "all property" to the surviving corporation. In the absence of any intent to the contrary, the most reasonable interpretation of the Oregon law is that "all property" is intended to be an all-inclusive phrase encompassing the permit rights in question. See 19 Am. Jur. 2d Corporations § 2629.

4.

**Should the NOV be vacated with respect to Energy West?**

Energy West argues that the NOV should be vacated with respect to it because of the alleged failure of OSM to assert against Energy West any factual basis or legal argument in support of its Cross Motion for Summary Decision. As an initial matter, the December 9, 1991 Order entered herein specifically states that "Stipulated Facts which govern this proceeding have been filed." Consequently, any alleged failure of a party to reference in its motion for summary judgment a fact contained within the Stipulation is not grounds for denying its motion.

Nor is the alleged failure of a party to raise a legal argument necessarily grounds for denying summary judgment in favor of that party where good cause appears for granting summary judgment.

In this case there is good cause, independent of any alleged OSM failures, for denying OSM's motion for summary judgment against Energy West and granting Energy West's motion for summary judgment vacating the NOV with respect to Energy West. Specifically, Energy West, which is the operator and not the permittee of the mine, should not be held responsible for the failings of the original permittee, UP&L, and the successor permittee, Pacificorp, regarding the transfer of the permit.

This is not a case for application of the rule that a permittee and an operator of a mine should be held jointly and severally liable for compliance with any applicable performance standards. See, e.g., S & M Coal Co. and Jewel Smokeless Coal Co. v. Office of Surface Mining, 79 IBLA 350 (1984). No performance standard is involved in this case.

Nor is this a case where the operator of the mine might be held liable for a violation of SMCRA as the agent of the permittee. See, e.g., Bernos Coal Company and Excello Land and Mineral Corp. v. Office of Surface Mining, Surface Law Mining Summary, 338 ALJ, p. 2271 (July 1985). To the contrary, the Stipulation shows absolutely no basis for

extending the scope of any agency relationship between Energy West and UP&L or PacifiCorp to the execution of the merger by which the permit rights were transferred. Nothing in the State program, federal regulations, or the undisputed facts suggests that Energy West was, is, or should be held responsible for the transfer of the permit rights by merger and any failings in that regard.

5.

Should the NOV be vacated with respect to PEO for the alleged failure to name PEO in the NOV or serve PEO with the NOV?

At the time of issuance of the NOV, Utah Power and Light Company, the name under which the NOV was issued, did not exist separately from PacifiCorp. Utah Power and Light Company was the name of the Utah corporation which was originally the permittee of the mine. However, upon completion of the merger, Utah Power and Light Company ceased to exist and PacifiCorp remained as the surviving and successor corporation, continuing to operate in the State of Utah under the assumed name of Utah Power and Light Company. (See Exhibit A to Stipulation) Thus, naming and serving Utah Power and Light Company amounted to naming and serving PacifiCorp.

Although PEO is represented to be the successor to UP&L under the undisputed facts, the foregoing facts show that the true name of the successor to UP&L is PacifiCorp. PEO, like "Utah Power and Light Company," is merely one of the assumed names under which PacifiCorp does business in the State of Utah and does not exist separate from PacifiCorp. Consequently, any failure to name PEO in the NOV or serve PEO with the NOV is meaningless and any order to vacate the NOV with respect to PEO would be nonsensical and might be falsely interpreted as absolving PacifiCorp of responsibility for the violation.

---

Now, having observed the demeanor of the witnesses and having weighed the credibility thereof, there are here entered the following:

Findings of Fact and Conclusions of Law

1. The Hearings Division of the Department of the Interior has jurisdiction of the parties and of the subject matter of this proceeding.

2. Factual findings and conclusions of law set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.

3. OSM's issuance of the NOV is not barred by the statute of limitations found at Utah Code Ann. § 40-8-9(2).

4. The appropriateness of the Division's determination that no violation of the State program occurred is at issue and OSM properly decided that the Division's determination was arbitrary and capricious.

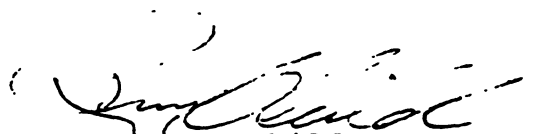
5. PacifiCorp and UP&L violated UAR 614-303-300 of the State program by failing to obtain prior written approval of the transfer of the permit rights from UP&L to PacifiCorp.

6. Energy West should not be held responsible for the failings of UP&L and PacifiCorp regarding the transfer of the permit.

7. PEO is merely one of the assumed names under which PacifiCorp does business in the State of Utah and does not exist separate from PacifiCorp.

#### Order

The NOV is hereby vacated with respect to Energy West. In all other respects, the NOV is hereby affirmed.

  
Ramon M. Child  
Administrative Law Judge

#### Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).

Tab T





# United States Department of the Interior

## OFFICE OF HEARINGS AND APPEALS

Hearings Division  
6432 Federal Building  
Salt Lake City, Utah 84138  
(Phone: 801-524-5344)

January 17, 1992

PACIFICORP, d/b/a PACIFICORP	)	Docket No. DV 91-10-R
ELECTRIC OPERATIONS, and	)	
ENERGY WEST MINING CO.,	)	Application for Review
	)	
Petitioners	)	Notice of Violation
	)	No. 91-02-244-002
v.	)	
	)	Cottonwood/Wilberg Mine
OFFICE OF SURFACE MINING	)	
RECLAMATION AND ENFORCEMENT	)	
(OSMRE),	)	
	)	
Respondent	)	
- - -	)	
UTAH DIVISION OF OIL, GAS AND	)	
MINING, A DIVISION OF UTAH	)	
DEPARTMENT OF NATURAL	)	
RESOURCES, STATE OF UTAH,	)	
	)	
Intervenor	)	
- - -	)	
DEPARTMENT OF TRANSPORTATION,	)	
STATE OF UTAH,	)	
	)	
Intervenor	)	

### Order Denying Summary Judgment

Petitioners have filed Motion for Summary Judgment to vacate Notice of Violation No. 91-02-244-002 (NOV), to which respondent has filed Brief in Opposition.

Petitioners argue that there is no dispute as to material facts and that the NOV should be vacated as a matter of law on the following grounds:

1. The NOV is invalid because it is based on criteria which have not been promulgated as required by the Administrative Procedure Act (APA), 5 U.S.C. § 553.

The respondent correctly points out that whereas such defense was not raised by petitioners in their Application for Review, it was nonetheless raised by the State of Utah Division of Oil, Gas and Mining (UDOGM) in its Petition to Intervene.

Respondent argues that the NOV, which cites petitioners for failure to permit approximately 5 miles of Utah Highway 57 from the mine south to the intersection with Utah State Highway Route 29 pursuant to 30 CFR 773.11(a) and Utah Administrative Code 614-300-112-400, is based principally on (1) the statutory definition of "surface coal mining operations" set forth at section 701(28) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. § 1291(28), and (2) its regulatory counterpart in the approved Utah State Program, 30 CFR Part 944 et. seq. at U.C.A. § 40-10-4(18), together with, (3) the administrative record of respondent's rule-making concerning the regulation of roads following In re Permanent Surface Mining Regulation Litigation (PSMRL), 620 F. Supp. 1519 (D.D.C. 1985).

As respondent points out in its Brief, the NOV in question, based as it was on the extent of petitioners' mining related use of the road in question, did not effect a material change to existing law and policy which would necessitate adherence to APA notice and comment procedures.

**2. The State of Utah's refusal to take enforcement action was an appropriate response to the Ten Day Notice (TDN) issued by respondent, thus presenting a bar to the issuance of the NOV.**

It would appear that UDOGM would be attempting by proposed amendment to exempt all "public roads" from regulation under SMCRA. Unless and until such efforts may be successful, both the respondent and UDOGM are charged by the Act with enforcement thereof according to its terms.

Appropriate response to a Ten Day Notice by UDOGM would present a bar to issuance by respondent of the NOV. In the instant case, however, refusal to enforce the Act in the manner requested in the TDN was inappropriate response by UDOGM to the Ten Day Notice. Issuance of the TDN and subsequently the NOV was a proper exercise of respondent's oversight responsibility to enforce SMCRA.

**3. Neither UDOGM nor the respondent has jurisdiction over State Highway 57.**

It is true that the State of Utah Department of Transportation has jurisdiction conferred by State law over

State Highway 57. Be that as it may, it is also true that SMCRA confers upon respondent and Utah enactments thereunder confer upon UDOGM the authority to regulate surface coal mining operations utilizing public roads and to require issuance of permit and impose restrictions where appropriate for the use thereof by the mining operator.

**4. The NOV is barred by the State and Federal Statutes of Limitation.**

It is sufficient to say in response to this ground for dismissal that the violation is a continuing one, and that no statute of limitations acts as a bar to correcting the alleged transgressing conduct.

Now, having considered petitioners' Motion for Summary Judgement and the briefs of petitioners in support of said motion and respondent in opposition thereto, and being fully advised in the premises, it is ORDERED.

1. Petitioners' Motion for Summary Judgement is DENIED, except as to that portion of the NOV which requires reclamation within 80 days, which portion is stayed.

2. Hearing will proceed principally on the question of the extent of coal mining operation use of State Highway 57, and that use vis-a-vis use thereof by the public. From such inquiry, it may be determined whether petitioners were in violation of the requirement, if any, to permit the use of said highway.

Dated: January 17, 1992



Ramon M. Child  
Judge, OHA

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Tab U

R614-1Q        SUBCHAPTER Q - APPLICABILITY OF 40-8-1 ET SEQ. AND RULES M-1  
THROUGH M-10

R614-1Q-900    PART UMC 900

(a) The following provisions of 40-8 U.C.A. (1953, as amended, (the Utah Mined Land Reclamation Act of 1975)) and its implementing regulations are deemed consistent with Chapter 10 of Title 40, U.C.A. (1953, as amended). Provisions not specifically adopted by this rule are determined to be inconsistent with Chapter 10 and shall not apply to coal mining and reclamation activities.

- (i)            Section 40-8-1  
Superseded
- (ii)           Section 40-8-2  
Adopted
- (iii)           Section 40-8-3  
Adopted
- (iv)           Section 40-8-4(2)  
Adopted
- (v)            Section 40-8-5(1), (2) and (3)  
Adopted
- (vi)           Section 40-8-6(1)(a), (b) and (d)  
Adopted  
(1)(c) Superseded
- (vii)           Section 40-8-7(1)  
Adopted, however, with respect to (1)(e), offsite  
impacts may be considered where required by Chapter  
10, Title 40, U.C.A. (1953, as amended) and  
implementing regulations.  
  
(2) Superseded
- (viii)           Section 40-8-8(1), (2) and (3)  
Adopted  
(4), (5) and (6) Superseded
- (ix)           Section 40-8-9(1) and (2)  
Adopted  
(3) and (4) Superseded
- (x)            Section 40-8-10  
Adopted, provided, however, that publication  
requirements of Chapter 10, Title 40 shall supersede  
those provision.

- (i) Rule M-1  
Superseded
- (ii) Rule M-2  
Superseded
- (iii) Rule M-3  
Superseded
- (iv) Rule M-4  
Superseded
- (v) Rule M-5  
Superseded
- (vi) Rule M-6  
Superseded
- (vii) Rule M-7  
Superseded
- (viii) Rule M-8  
Superseded
- (ix) Rule M-9  
Adopted, provided, however, that the definition of  
"interested parties" at Rule B-1 and B-7 is superseded  
by the definition specified at Chapter 10, Title 40,  
U.C.A.
- (x) Rule M-10  
Superseded

Tab V



## MARCH 1980

### Utah Code Ann. § 40-8-9

(1) Any person or operator adversely affected by any rule, regulation, or order issued under this chapter, may bring a civil suit or action against the board in any state court...

(2) An action or appeal involving any provision of this chapter or a rule or order shall be determined as expeditiously as feasible...

(3) Any person, owner, or operator who willfully or knowingly evades this chapter...is subject to a fine of not more than \$10,000 for each violation.

(4) No suit, action or other proceeding based upon a violation of this chapter, or any rule, regulation, or order issued under this chapter, may be commenced or maintained unless the suit, action, or proceeding is commenced within two years from date of the alleged violation.

### Rule UMC 900(a)(ix)

(a) The following provisions of the Utah Mined Land Reclamation Act of 1975 and its implementing regulations are deemed consistent with Chapter 10 of Title 40, U.C.A., 1953. Provisions not specifically adopted by this rule are determined to be inconsistent with Chapter 10 and shall not apply to coal mining and reclamation activities.

(ix) Section 40-8-9

(1) and (2) Adopted

(3) and (4) Superseded

Tab W

Mined Land Reclamation Act  
Utah Code Ann. § 40-8-9 (Amended)

Rule R614-1Q  
UMC 900(a)(ix)

~~(1) Any person or operator adversely affected by any rule, regulation, or order issued under this chapter, may bring a civil suit or action against the board in any state court...~~

~~(2) An action or appeal involving any provision of this chapter or a rule or order shall be determined as expeditiously as feasible...~~

~~[(3)](1)(a)~~ Any person, owner, or operator who willfully or knowingly evades this chapter...is subject to a fine of not more than \$10,000 for each violation.

~~[(4)](2)~~ No suit, action or other proceeding based upon a violation of this chapter, or any rule, regulation, or order issued under this chapter, may be commenced or maintained unless the suit, action, or proceeding is commenced within two years from date of the alleged violation.

(a) The following provisions of the Utah Mined Land Reclamation Act of 1975 and its implementing regulations are deemed consistent with Chapter 10 of Title 40, U.C.A., 1953. Provisions not specifically adopted by this rule are determined to be inconsistent with Chapter 10 and shall not apply to coal mining and reclamation activities.

(ix) Section 40-8-9

(1) and (2) Adopted

(3) and (4) Superseded

Tab X



UTAH  
NATURAL RESOURCES  
Oil, Gas & Mining

3 Triad Center, Suite 350 • Salt Lake City, UT 84190-1203 • (801) 538-5340

**FILED**

*File*

JUN 29 1992

Permit: INA/015/005  
Inspection Date September 3, 1987

inspection report

SECRETARY, BOARD OF

OIL, GAS & MINING

California Portland Cement

Business Address 695 South Rancho Avenue

City Colton State CA

92324-054

Mine Hidden Valley Surface ☐ Underground ☒

County Emery State UT

Company Official(s) None

State Official(s) Harold G. Sandbeck and Tom Munson

Time of inspection 12 00 ☐ a.m. ☒ p.m. to 6 00 ☐ a.m. ☒ p.m. ☐ Partial ☐ Complete

Date of last inspection August 14, 1987 Weather conditions Cloudy/Warm

Acreage 960 ☒ Permitted 7 ☒ Disturbed 7 ☒ Degraded 7 ☒ Seeded 7 ☒ Buried

Enforcement Action None

#### COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

	YES	NO	NOT	COMPLIES		YES	NO	NOT	COMPLIES
1. Permits	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	9. Protection of fish, wildlife and related environmental values	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Signs and markers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	10. Slides and other damage	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
3. Topsoil	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	11. Contemporaneous reclamation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Hydrologic balance					12. Backfilling and grading	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a. Stream channel diversions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	13. Revegetation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Diversions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	14. Subsidence control	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c. Sediment ponds and impoundments	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	15. Cessation of operations	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d. Other sediment control measures	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	16. Roads				
e. Surface and groundwater monitoring	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	a. Construction	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Effluent limitations	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	b. Drainage controls	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
5. Explosives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	c. Surfacing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Development waste and spoil disposal	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	d. Maintenance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Coal processing waste	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	17. Other transportation facilities	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
8. Noncoal waste	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	18. Support facilities and utility installations	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

WHITE - DOGM YELLOW - OSM PINK - PERMITEE OPERATOR GOLD/RED - NO FILE

DOGM IR-1

an equal opportunity employer

831

**EXHIBIT**  
*R-26*  
CAUSE# *ACT-10-100*

# INSPECTION REPORT COMMENTS

Permit No. INA/05/007  
Inspection Date September 3, 1987

Please number comments to correspond with topics on previous page

General Comments: A high intensity, short duration thunderstorm occurred at the mine site. Tom Munson (Staff hydrologist) determined by visual observation, actual main channel flow depth measurements and other means that the storm event was well in excess of the 100 year return interval. In the mine plan, the reclaimed main channel flow depth design was 0.55 feet for a 100 year - 24 hour storm. The actual reclaimed main channel flow depth was 2 feet or greater in certain areas of the channel which was well in excess of 0.55 feet. The mine plan peak flow design for the reclaimed channel was 41 cfs. This channel saw flows well in excess of 41 cfs.

## Areas of Storm Damage

- 1.) Ourslope erosion on the access road at water bar locations.
- 2.) Erosion of hillside, namely gullying, on both sides of the reclaimed channel.
- 3.) Erosion of the main channel.
- 4.) Silt fence sediment buildup and/or damage.

Since the storm event was determined to be in excess of the 10 year return interval, a violation is not warranted, however, the operator is responsible for timely repairs to all damage areas mentioned above.

Copy of report mailed to Brian Smith, OSM and John Rains, CPC

Copy of report given to Joe Helfrich, DORM

Inspector's signature Harold J. Sanabala 14 September 1987 No. 27

WHITE - DOGM YELLOW - OSM PINK - PERMITTEE/OPERATOR GOLDENROD - NOV FILE



STATE OF UTAH  
NATURAL RESOURCES  
Oil, Gas & Mining

FILED

355 W. North Temple • Salt Lake City, Utah 84119 • 313-2500 • 313-2501 • 313-2502

JUN 29 1992

# INSPECTION REPORT

## SECRETARY, BOARD OF OIL, GAS & MINING

INSPECTION DATE & TIME: October 6, 1987  
2:00 p.m. to 5:00 p.m.

Permittee and/or Operators Name: California Portland Cement  
Business Address: 635 South Rancho Avenue Colton, CA 92324-0514  
Mine Name: Hidden Valley Permit Number: INA/015/007  
Type of Mining Activity: Underground ☒ Surface ☐ Other ☐  
County: Emery  
Company Official (s): none  
State Official(s): Harold G. Sandbeck and Bill Malencik, DOGM  
Partial: ☒ Complete: ☐ Date of Last Inspection: Sept. 3, 1987  
Weather Conditions: Clear and warm  
Acreage: Permitted 960 Disturbed 7 Regraded 7 Seeded 7 Bonded 7  
Enforcement Action: None

### COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

	YES	NO	N/A	COMMENTS
1. PERMITS	( )	( )	( )	( )
2. SIGNS AND MARKERS	( X )	( )	( )	( )
3. TOPSOIL	( )	( )	( )	( )
4. HYDROLOGIC BALANCE:				
a. STREAM CHANNEL DIVERSIONS	( X )	( )	( )	( )
b. DIVERSIONS	( X )	( )	( )	( )
c. SEDIMENT PONDS AND IMPOUNDMENTS	( )	( )	( )	( )
d. OTHER SEDIMENT CONTROL MEASURES	( X )	( )	( )	( )
e. SURFACE AND GROUNDWATER MONITORING	( )	( )	( )	( )
f. EFFLUENT LIMITATIONS	( )	( )	( )	( )
5. EXPLOSIVES	( )	( )	( )	( )
6. DISPOSAL OF DEVELOPMENT WASTE AND SPOIL	( )	( )	( )	( )
7. COAL PROCESSING WASTE	( )	( )	( )	( )
8. NONCOAL WASTE	( )	( )	( )	( )
9. PROTECTION OF FISH, WILDLIFE AND RELATED ENVIRONMENTAL VALUES	( )	( )	( )	( )
10. SLIDES AND OTHER DAMAGE	( )	( )	( )	( )
11. CONTEMPORANEOUS RECLAMATION	( )	( )	( )	( )
12. BACKFILLING AND GRADING	( )	( )	( )	( )
13. REVEGETATION	( )	( )	( )	( )
14. SUBSIDENCE CONTROL	( )	( )	( )	( )
15. CESSATION OF OPERATIONS	( )	( )	( )	( )
16. ROADS				
a. CONSTRUCTION	( )	( )	( )	( )
b. DRAINAGE CONTROLS	( )	( )	( )	( )
c. SURFACING	( )	( )	( )	( )
d. MAINTENANCE	( )	( )	( )	( )
17. OTHER TRANSPORTATION FACILITIES	( )	( )	( )	( )
18. SUPPORT FACILITIES				
UTILITY INSTALLATIONS	( )	( )	( )	( )

EXHIBIT

F-27

Case # ACT 115-27

INSPECTION REPORT  
(continuation sheet)

Page 2 of 2

PERMIT NUMBER: INA/015/007

DATE OF INSPECTION Oct. 6, 1987

(Comments are Numbered to Correspond with Topics Listed Above)

GENERAL COMMENTS:

As of October 6, 1987, the storm damage, as discussed in the September 3, 1987, partial inspection, has not been repaired. On September 14, 1987, DOGM informed the operator that the storm damages should be repaired by October 31, 1987. The operator has informed the undersigned inspector that repair work should commence by October 20, 1987. The repair work will address the storm damage areas as stated in the September 3, 1987, inspection report.

Copy of this Report:

Mailed to: John Rains, CPC and Brian Smith, OSM

Given to: Joe Helfrich, DOGM

Inspectors Signature and Number: Harold G. Sandbeck #27 Date: Oct. 13, 1987

*Harold G. Sandbeck*





STATE OF UTAH  
NATURAL RESOURCES  
Oil, Gas & Mining

355 W. North Temple - 18th Floor - Suite 150 - Salt Lake City, UT 84103 - 203 - 801-538-5340

**FILED**

JUN 29 1992

INSPECTION REPORT

SECRETARY, BOARD OF  
OIL, GAS & MINING

INSPECTION DATE & TIME: Oct. 21, 1987  
9:00 a.m. to 5:00 p.m.

Permittee and/or Operators Name: California Portland Cement  
Business Address: 695 South Rancho Avenue Colton, CA 92324-0514  
Mine Name: Hidden Valley Permit Number: INA/015/CG7  
Type of Mining Activity: underground ☒ Surface ☐ Other ☐  
County: Emery  
Company Official(s): John Pains  
State Official(s): Harold G. Sandbeck and Bill Malencik  
Partial: ☐ Complete: ☒ Date of Last Inspection: Oct. 6, 1987  
Weather Conditions: Clear and warm  
Acreage: Permitted 960 Disturbed 7 Regraded 7 Seeded 7 Bonded 7  
Enforcement Action: 3 TDN's, TDNX-87-02-006-013-TV-3

COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>COMMENTS</u>
1. PERMITS	( X )	( )	( )	( )
2. SIGNS AND MARKERS	( X )	( )	( )	( )
3. TOPSOIL	( X )	( )	( )	( )
4. HYDROLOGIC BALANCE:				
a. STREAM CHANNEL DIVERSIONS	( X )	( )	( )	( X )
b. DIVERSIONS	( X )	( )	( )	( )
c. SEDIMENT PONDS AND IMPOUNDMENTS	( )	( )	( X )	( )
d. OTHER SEDIMENT CONTROL MEASURES	( X )	( )	( )	( )
e. SURFACE AND GROUNDWATER MONITORING	( X )	( )	( )	( )
f. EFFLUENT LIMITATIONS	( )	( )	( X )	( )
5. EXPLOSIVES	( )	( )	( X )	( )
6. DISPOSAL OF DEVELOPMENT WASTE AND SPOIL	( )	( )	( X )	( )
7. COAL PROCESSING WASTE	( )	( )	( X )	( )
8. NONCOAL WASTE	( )	( )	( X )	( )
9. PROTECTION OF FISH, WILDLIFE AND RELATED ENVIRONMENTAL VALUES	( X )	( )	( )	( )
10. SLIDES AND OTHER DAMAGE	( )	( )	( X )	( )
11. CONTEMPORANEOUS RECLAMATION	( X )	( )	( )	( )
12. BACKFILLING AND GRADING	( X )	( )	( )	( )
13. REVEGETATION	( X )	( )	( )	( )
14. SUBSIDENCE CONTROL	( )	( )	( X )	( )
15. CESSATION OF OPERATIONS	( )	( )	( X )	( )
16. ROADS				
a. CONSTRUCTION	( X )	( )	( )	( )
b. DRAINAGE CONTROLS	( X )	( )	( )	( )
c. SURFACING	( X )	( )	( )	( )
d. MAINTENANCE	( X )	( )	( )	( )
17. OTHER TRANSPORTATION FACILITIES	( )	( )	( X )	( )
18. SUPPORT FACILITIES				
UTILITY INSTALLATIONS	( )	( )	( X )	( )

INSPECTION REPORT  
(continuation sheet)

Page 2 of 3

PERMIT NUMBER: INA/015/007

DATE OF INSPECTION Oct. 11, 1987

(Comments are Numbered to Correspond with Topics Listed Above)

GENERAL COMMENTS:

On this complete inspection, DCGM was accompanied by John Rains (operator) and Joe Funk (OSM oversight inspector). Ground conditions were dry. Following are the TDN's received by undersigned inspector on October 21, 1987:

T87-02-006-013, 1 of 3 was issued for failure to design, construct and maintain diversions in a manner which prevents additional contribution of suspended solids to streamflow and to runoff outside the permit area. The undersigned inspector field checked and terminated the repair work before the TDN deadline. However, DCGM maintains that this TDN was unwarranted since the storm event was documented in the September 3, 1987, inspection report to exceed site designs. Therefore, the operator was exempt from violations and given until October 31, 1987, to repair the site.

T87-02-006-013, 2 of 3 was issued for failure to designate and mark a stream buffer zone. The Division does not contest the fact that stream buffer zone signs may not have been in place at the time of inspection. The Division feels that issuing an NOV for the reasons cited above after Phase 1 reclamation has been completed may be technically proper, but since no mechanized operations are, or will be, ongoing on this site, issuance will not likely cause correction of the violation, nor serve any other useful purpose. No NOV will be issued for this portion of this TDN.

T87-02-006-013, 3 of 3 was issued for failure to provide drains for outsloped dips discharging onto road embankments. The undersigned inspector field checked and terminated the repair work before the TDN deadline. As with TDN 1 of 3, DCGM maintains that this TDN was unwarranted since the storm event was documented to exceed site designs. Therefore, the operator was exempt from violations and given until October 31, 1987, to repair the site.

Copy of this Report:

Mailed to: John Rains, CPC; Brian Smith, CSM

Given to: Joe Helfrich, DCGM

Inspectors Signature and Number: Harold G. Sandbeck #27 Date: Oct. 29, 1987

INSPECTION REPORT  
(continuation sheet)

Page 3 of 3

PERMIT NUMBER: INA/C15/CC7

DATE OF INSPECTION Oct. 21, 1987

(Comments are Numbered to Correspond with Topics Listed Above)

Joe Funk expressed concern that two months was too long to have not repaired the site. September 3, 1987, is the recognized date whereby DOGM realized a problem existed at the mine site. DOGM believes that two to three months is a reasonable length of time to have an out-of-state operator repair a site. An operator requires time to assess the damage, to draw up any designs, and to contract out the repair work.

The California Portland Cement operator estimated the repair work at \$25,000. He also stated it was company policy to take the following steps before initiating work.

- A. Define scope of work after a field survey.
- B. Prepare design specifications and drawings.
- C. Inform DOGM regarding the intentions to repair site.
- D. Incorporate B above and any other information into a formal contract bid proposal.
- E. Print bid proposal and mail to prospective contractors.
- F. Field tour of site with all prospective contractors.
- G. Analyze all bids and award contract.
- H. Issue notice to contractor to proceed.

Inspectors Signature and Number: Harold G. Sandbeck #27 Date: Oct. 29, 1987



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NATURAL RESOURCES  
Oil, Gas & Mining

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JUN 29 1992

INSPECTION REPORT

SECRETARY, BOARD OF  
OIL, GAS & MINING

INSPECTION DATE & TIME: Aug. 3, 1988  
2:00-3:00 p.m.

Permittee and/or Operators Name: California Portland Cement  
Business Address: 635 South Rancho Avenue Colton, CA 92324-0514  
Mine Name: Hidden Valley Permit Number: ACT/015/007 7085  
Type of Mining Activity: Underground XX Surface Other  
County: Emery State: Utah  
Company Official(s): None  
State Official(s): Bill Warmack and John Whitehead  
Partial: Complete: XX Date of Last Inspection: July 6, 1988  
Weather Conditions: Clear and hot  
Acreage: Permitted 960 Disturbed 7 Regraded 7 Seeded 7 Eroded 7  
Enforcement Action: None

COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

	YES	NO	N/A	COMMENTS
1. PERMITS	(X)	( )	( )	( )
2. SIGNS AND MARKERS	(X)	( )	( )	(X)
3. TOPSOIL	(X)	( )	( )	( )
4. HYDROLOGIC BALANCE:				
a. STREAM CHANNEL DIVERSIONS	(X)	( )	( )	( )
b. DIVERSIONS	(X)	( )	( )	(X)
c. SEDIMENT PONDS AND IMPOUNDMENTS	( )	( )	(X)	( )
d. OTHER SEDIMENT CONTROL MEASURES	(X)	( )	( )	(X)
e. SURFACE AND GROUNDWATER MONITORING	(X)	( )	( )	(X)
f. EFFLUENT LIMITATIONS	( )	( )	(X)	( )
5. EXPLOSIVES	( )	( )	(X)	( )
6. DISPOSAL OF DEVELOPMENT WASTE AND SPOIL	( )	( )	(X)	( )
7. COAL PROCESSING WASTE	( )	( )	(X)	( )
8. NONCOAL WASTE	( )	( )	(X)	( )
9. PROTECTION OF FISH, WILDLIFE AND RELATED ENVIRONMENTAL VALUES	(X)	( )	( )	( )
10. SLIDES AND OTHER DAMAGE	( )	( )	(X)	( )
11. CONTEMPORANEOUS RECLAMATION	(X)	( )	( )	( )
12. BACKFILLING AND GRADING	(X)	( )	( )	( )
13. REVEGETATION	(X)	( )	( )	( )
14. SUBSIDENCE CONTROL	( )	( )	(X)	( )
15. CESSATION OF OPERATIONS	( )	( )	(X)	( )
16. ROADS				
a. CONSTRUCTION	(X)	( )	( )	( )
b. DRAINAGE CONTROLS	(X)	( )	( )	( )
c. SURFACING	(X)	( )	( )	( )
d. MAINTENANCE	(X)	( )	( )	( )
17. OTHER TRANSPORTATION FACILITIES	( )	( )	(X)	( )
18. SUPPORT FACILITIES				
UTILITY INSTALLATIONS	( )	( )	(X)	( )

EXHIBIT

P-37

Case # ACT 10 51m

TAB 123

INSPECTION REPORT  
(continuation sheet)

Page 2 of 3

PERMIT NUMBER: ACT/015/007

DATE OF INSPECTION Aug. 9, 1988

(Comments are Numbered to Correspond with Topics Listed Above)

GENERAL COMMENTS:

The mine site conditions were moist; some evidence was present indicating a previous localized storm had occurred with little or no effects to the site. In maintenance areas noted, some minor hand work is required to reduce future storm impacts. Ivie Creek was flowing during this inspection.

2. SIGNS AND MARKERS:

A new mine I.D. sign was installed and erected on the property. Although the metal post and sign appear to be stable at this time, future installations should be directed towards reducing post height; the current height tends to be very susceptible to the varying winds associated with this area.

4b. DIVERSIONS:

1. Second waterbar diversion upwards from lower road switchback is developing some minor erosion on outslope bank.
2. Road drainage ditch by lower switchback has developed some cutting.

4d. OTHER SEDIMENT CONTROL MEASURES:

1. The silt fences were observed and with the following exceptions, were noted to be in good repair.
  - A. Lower silt fence on the old pond site had some water run around the outer edge of fencing.
  - B. A small piping hole has developed on the southern end of the eastern silt fence along main channel.
  - C. Some water run around has occurred on the southern end of the western silt fence along main channel.
2. The backfill area adjacent to the old pond site, specifically by the rock check dams, is developing some rills especially where the water cascades down from upper dams. Some additional placement of rock may be required to dissipate the water energy in these particular areas.

INSPECTION REPORT  
(continuation sheet)

Page 3 of 3

PERMIT NUMBER: ACT/015/007

DATE OF INSPECTION Aug. 9, 1988

(Comments are Numbered to Correspond with Topics Listed Above)

4e. SURFACE AND GROUND WATER MONITORING:

The results of the May 1988 stream monitoring work of Ivie Creek were received by the Division on July 18, 1988. Samples were taken on May 23, 1988.

Copy of this Report:

Mailed to: John Rains, California Portland Cement  
Mailed to SLC for: Brian Smith, OSM; Joe Helfrich, DOGM  
Filed to: PFO

Inspectors Signature and Number: William A. Warmack #30 Date: Aug. 12, 1988

*William A. Warmack*



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JUN 29 1992

INSPECTION REPORT

SECRETARY, BOARD OF  
OIL, GAS & MINING

INSPECTION DATE & TIME: March 7, 1989  
9:30 a.m. - 11:30 a.m.

Permittee and/or Operators Name: California Portland Cement  
Business Address: 695 South Rancho Avenue Colton, CA 92324-0514  
Mine Name: Hidden Valley Permit Number: INA/015/007  
Type of Mining Activity: Underground XX Surface Other  
County: Emery State: Utah  
Company Official(s): None  
State Official(s): Bill Warmack  
Partial: XX Complete:        Date of Last Inspection: February 1, 1989  
Weather Conditions: Overcast and cool  
Acreage: Permitted 960 Disturbed 7 Regraded 7 Seeded 7 Bonded 7  
Enforcement Action: None

COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

	YES	NO	N/A	COMMENTS
1. PERMITS	( )	( )	( )	( )
2. SIGNS AND MARKERS	( X )	( )	( )	( X )
3. TOPSOIL	( )	( )	( )	( )
4. HYDROLOGIC BALANCE:				
a. STREAM CHANNEL DIVERSIONS	( )	( )	( )	( )
b. DIVERSIONS	( )	( )	( )	( )
c. SEDIMENT PONDS AND IMPOUNDMENTS	( )	( )	( )	( )
d. OTHER SEDIMENT CONTROL MEASURES	( X )	( )	( )	( X )
e. SURFACE AND GROUNDWATER MONITORING	( )	( )	( )	( )
f. EFFLUENT LIMITATIONS	( )	( )	( )	( )
5. EXPLOSIVES	( )	( )	( )	( )
6. DISPOSAL OF DEVELOPMENT WASTE AND SPOIL	( )	( )	( )	( )
7. COAL PROCESSING WASTE	( )	( )	( )	( )
8. NONCOAL WASTE	( )	( )	( )	( )
9. PROTECTION OF FISH, WILDLIFE AND RELATED ENVIRONMENTAL VALUES	( )	( )	( )	( )
10. SLIDES AND OTHER DAMAGE	( )	( )	( )	( )
11. CONTEMPORANEOUS RECLAMATION	( )	( )	( )	( )
12. BACKFILLING AND GRADING	( )	( )	( )	( )
13. REVEGETATION	( )	( )	( )	( )
14. SUBSIDENCE CONTROL	( )	( )	( )	( )
15. CESSATION OF OPERATIONS	( )	( )	( )	( )
16. ROADS				
a. CONSTRUCTION	( )	( )	( )	( )
b. DRAINAGE CONTROLS	( )	( )	( )	( )
c. SURFACING	( )	( )	( )	( )
d. MAINTENANCE	( )	( )	( )	( )
17. OTHER TRANSPORTATION FACILITIES	( )	( )	( )	( )
18. SUPPORT FACILITIES				
UTILITY INSTALLATIONS	( X )	( )	( )	( X )

INSPECTION REPORT  
(continuation sheet)

Page 2 of 2

PERMIT NUMBER: ACT/015/007

DATE OF INSPECTION March 7, 1989

(Comments are Numbered to Correspond with Topics Listed Above)

GENERAL COMMENTS:

The mine site was free of snow, ground conditions were moist. Cattle were observed grazing on the adjacent areas. Ivie Creek was flowing and the majority of the ice was gone.

2. SIGNS AND MARKERS:

The mine I.D. sign has been reposted at a lower elevation. Stream buffer zone signs were observed and in good repair.

4d. OTHER SEDIMENT CONTROL MEASURES:

1. Repairs have been made to silt fences and berms that did not fair well with winter.
2. Rills have developed on the northern portion of the A seam and western portion of the B seam fill slopes. Measurements indicated that the areas were still in compliance with UMC 817.106 since the rills have not developed beyond 9 inches in depth (A seam: 6-8 inches, B seam: 4-6 inches). However, based upon the season and the likelihood of precipitation events, the operator should undertake preventive maintenance to ensure that these rills do not further develop. Mr. Rains (CPC) was contacted on 3/8/89 regarding the Division's concerns of additional erosion and stabilization of the area.

18. SUPPORT FACILITIES:

The fence at the main gate has been tightened and appears to be in good repair. Also, the drift fences above and below the site were observed and found to be functioning properly.

Copy of this Report:

Mailed to: John Rains, California Portland Cement; Karla Knoop (JBR)  
Mailed to SLC for: Brian Smith, OSM; Joe Helfrich, DOGM  
Filed to: PFO

Inspectors Signature and Number: William A. Warmack #30 Date: March 8, 1989

*William A. Warmack* 3/8/89





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JUN 29 1992

inspection report

SECRETARY, BOARD OF

OIL, GAS & MINING

Permittee Operator Name California Portland Cement

Business Address 695 South Rancho Avenue

City Colton

State Calif

County 92324-0514

Mine Hidden Valley

☐ Surface

☒ Underground

County Emery

State Ut

Company Official(s) JaFone

State Official(s) Bruce Chalencik

Time of inspection 8:30 ☐ a.m. ☐ p.m. to 11:30 ☒ a.m. ☐ p.m. ☒ Period ☐ Complete

Date of last inspection 7/11/89 Weather conditions Clear/Warm

Acres 960 ☐ Permitted 7 ☐ Disturbed 7 ☐ Regraded 7 ☐ Seeded 7 ☐ Bored

Enforcement Action None

### COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

	YES	NO	N/A	COMMENTS		YES	NO	N/A	COMMENTS
1 Permits	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	9 Protection of fish, wildlife and related environmental values	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2 Signs and markers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	10 Slides and other damage	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3 Topsoil	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	11 Contemporaneous reclamation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4 Hydrologic balance					12 Backfilling and grading	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- Stream channel diversions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	13 Revegetation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
- Diversions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	14 Subsidence control	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- Sediment ponds and impoundments	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	15 Cessation of operations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- Other sediment control measures	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	16 Roads				
- Surface and groundwater monitoring	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	- Construction	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- Effluent limitations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	- Drainage controls	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5 Explosives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	- Surfacing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6 Development waste and spoil disposal	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	- Maintenance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7 Coal processing waste	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	17 Other transportation facilities	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8 Noncoal waste	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	18 Support facilities and utility installations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

WHITE - DOGM    YELLOW - OSM    PINK - PERMITTEE OPERATOR    GOLDENROD - NOV FILE

DOGM IR 1

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EXHIBIT

P-52

Case # NT 16107

TAB 623

INSPECTION REPORT COMMENTS

Permit No. INA/015/007

Inspection Date 8/31/89

Please number comments to correspond with topics on previous page

General Comments: The mine site and surrounding areas have received several high intensity storms since the last inspection. While some concern exists over the storm intensity, nevertheless, the operator advised the Division of his intention to perform maintenance work in order to avoid possible future failure of environmental control measures that may result in adverse action by the Division. Also, he is looking to directing more of the runoff from the two Inghurwe Slopes. I request Mr. Row to consult with the Division Hydrologist on his water diversion plans.

Other Sediment Control: Recent storms had tested the silt fences. Its fortunate the silt fences had been constructed to a high standard because the recent storms refilled some sections, however, no end running was observed. The operator is currently in the process of negotiating maintenance work with prospective contractors.

Copy of report mailed to \_\_\_\_\_

Copy of report given to \_\_\_\_\_

Inspector's signature \_\_\_\_\_ No. \_\_\_\_\_

WHITE - DOGM YELLOW - OSM PINK - PERMITTEE OPERATOR GOLDENROD - NOV FILE

INSPECTION REPORT COMMENTS

Permit No. TNA/015/007

Inspection Date August 31, 1989

Please number comments to correspond with topics on previous page

Revegetation Both the road and the B Seam slope were seeded last fall. It doesn't appear that many seedlings survived the summer drought. The flood in Dry Creek destroyed the water gap drift fence. Since no livestock are in the area and the operator has committed to repair the drift fence before cattle graze lands adjoining the mine site, no action is recommended.

Copy of report mailed to { CRC/John Rains; SBR Karla Knoop;  
OSM/Bruce Smith; DOGM/Joe Helfrich

Copy of report given to Field Office

Inspector's signature Jim J. Chalovich

No. 26

WHITE - DOGM YELLOW - OSM PINK - PERMITTEE OPERATOR GOLDENROD - NOV RLE  
9/1/89

DOGM/R-2

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JUN 29 1992

Permit: INA/015/007

Inspection Date 10/15/90

inspection report

SECRETARY, BOARD OF  
OIL, GAS & MINING

Business Address Cal Mat Co  
1801 E University Drive

City Phoenix State AZ Zip 85034

Mine Hidden Valley ☐ Surface ☒ Underground ☐ Other

County Emery State UT

Company Official(s) Karla Knapp (JBR)

State Official(s) Susan M White

Time of inspection 11:00 ☒ am ☐ pm to 1:00 ☐ am ☒ pm ☐ Partial ☒ Complete

Date of last inspection on 9/27/90 Weather conditions Fair & Warm

Acreage 950 ☐ Permitted 7 ☐ Disturbed 7 ☐ Regraded 7 ☐ Seeded 7 ☐ Barbed

Enforcement Action None

#### COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

	MS	A1	A2	CONCRETE		MS	A1	A2	CONCRETE
1 Permits	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	9 Protection of fish, wildlife and related environmental values	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2 Signs and markers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	10 Slides and other damage	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3 Topsoil	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	11 Contemporaneous reclamation	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4 Hydrologic balance					12 Backfilling and grading	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a Stream channel diversions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	13 Revegetation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
b Diversions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	14 Subsidence control	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c Sediment ponds and impoundments	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	15 Cessation of operations	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d Other sediment control measures	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	16 Roads				
e Surface and groundwater monitoring	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	- Construction	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
f Effluent limitations	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	- Drainage controls	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
5 Explosives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	- Surfacing	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
6 Development waste and spoil disposal	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	- Maintenance	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7 Coal processing waste	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	17 Other transportation facilities	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
8 Noncoal waste	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	18 Support facilities and utility installations	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

WHITE - DOGM YELLOW - OSM PINK - PERMITTEE OPERATOR GOLDENROD - NOV FILE

DOGM 11-1

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921

EXHIBIT

R-105

11/14/90 # 15,000.01

# INSPECTION REPORT COMMENTS

Permit No. INA/015/007

Inspection Date 10/15/00

Please number comments to correspond with topics on previous page

1. Records were reviewed at the Division Office  
Reclamation Bond is for \$68,000 with Ot. Paul Fire &  
Marine Ins. Co.

Pam Gumbough-Littig advised the company 2 weeks ago  
that <sup>Liability Insurance</sup> ~~no policy~~ had been submitted to the Division.  
Lynn Edmanson stated that ~~no policy~~ is in effect; ~~the company~~ <sup>the company</sup> ~~is not~~ <sup>is not</sup> ~~submitting~~ <sup>submitting</sup> ~~it~~ <sup>it</sup> ~~to the Division~~ <sup>to the Division</sup> ~~yet~~ <sup>yet</sup>

2a. A large flow of water had passed through the  
rip-rapped stream channel. The channel held  
up very well.

4d. The silt fences all looked good with very little  
sediment build-up after rains

4e. Water monitoring data for May had been submitted

13. Although the site is in <sup>poor</sup> ~~poor~~ <sup>vegetative</sup> condition the vegetation  
is improving. Three *Atriplex* spp., 2 grasses <sup>spp.</sup> and  
2 other shrub spp. were observed on site. The  
~~the~~ water spreading berms had been breached. These  
should be repaired to encourage vegetative growth

Copy of report mailed to \_\_\_\_\_

Copy of report given to \_\_\_\_\_

Inspector's signature \_\_\_\_\_ No \_\_\_\_\_

WHITE - DOGM YELLOW - OSM PINK - PERMITTEE OPERATOR GOLDENROD - NOV FILE

INSPECTION REPORT COMMENTS

Permit No. 1NA/015/007  
Inspection Date 10/15/96

Please number comments to correspond with topics on previous page

10. The second water bar down from top of road continues to head cut, this requires repair.

Approximately 5 to 6 water bars up from the bottom of the road, the berm along the road needs to be reestablished to prevent rilling along the slope.

Copy of report mailed to Lee Edmonson/lmc; Karla Knoop/TBR; Brian Smith/DSM

Copy of report given to Joe Helfrich

Inspector's signature Steven M. White

No. 35

WHITE - DCGM YELLOW - OSM PINK - PERMITTEE OPERATOR GOLDENROD - NOV FILE



UTAH  
NATURAL RESOURCES  
Oil Gas & Mining

3 Trade Center, Suite 350 • Salt Lake City, UT 84103 • (801) 538-5340

**FILED**

JUN 29 1992

Permit No. ACT/015/007  
Inspection Date 11/8/90

inspection report

SECRETARY, BOARD OF  
OIL GAS MINING

Operator Cal Mat Co.  
Business Address 1801 E Univ. Dr.  
City Phoenix State AZ Zip 85034  
Mine Hidden Valley ☐ Surface ☒ Underground ☐ Other  
County Emery State UT  
Company Official(s) Lee Edmonson, Karla Knoop (IBR)  
State Official(s) Susan White  
Time of inspection 9 00 ☒ a.m. ☐ p.m. to 11 00 ☒ a.m. ☐ p.m. ☒ Partial ☒ Complete  
Date of last inspection 10/15/90 Weather conditions Partly Cloudy, Cool  
Acreage 950 ☐ Permitted ☒ Disturbed ☒ Regraded ☒ Seeded ☒ Bonded  
Enforcement Action None

#### COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

	YES	NO	N/A	COMMENTS		YES	NO	N/A	COMMENTS
1 Permits	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	9 Protection of fish, wildlife and related environmental values	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2 Signs and markers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	10 Slides and other damage	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3 Topsoil	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	11 Contemporaneous reclamation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4 Hydrologic balance					12 Backfilling and grading	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a-Stream channel diversions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	13 Revegetation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b-Diversions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	14 Subsidence control	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c-Sediment ponds and impoundments	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	15 Cessation of operations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d-Other sediment control measures	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	16 Roads				
e-Surface and groundwater monitoring	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	- Construction	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f-Effluent limitations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	- Drainage controls	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5 Explosives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	- Surfacing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6 Development waste and spoil disposal	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	- Maintenance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7 Coal processing waste	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	17 Other transportation facilities	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8 Noncoal waste	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	18 Support facilities and utility installations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

WHITE - OGM YELLOW - OSM PINK - PERMITTEE OPERATOR GOLDENROD - NCV FILE

OGM 21

an equal opportunity employer

**EXHIBIT**

F-161

CAUSE # ACT/015 7

## INSPECTION REPORT COMMENTS

Permit No. ACT/015/007Inspection Date 11/8/90

Please number comments to correspond with topics on previous page

2. The mine identification sign will be changed soon to reflect the owners new address.
4. - The head cut near the top of road requires ~~more~~ additional armoring. Some work had been done.
- The loose silt fence post was fixed.
  - The silt fence by the old sediment pond requires work. Some rocks were placed at the bottom however shovel work is required to prevent water cutting beneath the fence.
  - the water spreaders are functioning, new grass shoots were observed, however where they have been breached should be repaired.
13. The vegetation reference area was located. The area was marked with rebar stakes. The vegetation, although sparse, is improving.
16. Temporary berm was established along lower portion of the road until the ground is softened by moisture in the spring when the berm will be reestablished.

Copy of report mailed to Lee Edmonson/KMC; Brian Smith/OSMCopy of report given to Joe Helfrich/DOGMInspector's signature Susan M WhiteNo 35

WHITE - DOGM YELLOW - OSM PINK - PERMITTEE OPERATOR GOLDENROD - NOV FILE





*gk gji*

JUN 29 1992

SECRETARY, BOARD OF  
OIL, GAS & MINING

Perm. No. ACT/015/007

Inspection Date 4/26/91

Permittee Operator Name Cal Mat Co.

Business Address 1801 University Drive

City Phoenix

State Arizona

Zip 85034

Mine Hidden Valley

☐ Surface

☒ Underground

☐ Other

County Emery

State Ut.

Company Official(s) None

State Official(s) Bruce Malenich

Time of inspection 1:00 ☐ a.m. ☒ p.m. to 4:00 ☐ a.m. ☒ p.m. ☐ Partial ☒ Complete

Date of last inspection 3/21/91 Weather conditions Clear / Windy

Acreage 950 ☐ Permitted 7 ☐ Disturbed 7 ☐ Regraded 7 ☐ Seeded 7 ☐ Bonded

Enforcement Action None

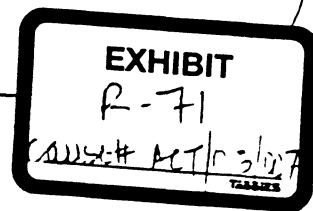
COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

	YES	NO	N/A	COMMENTS		YES	NO	N/A	COMMENTS
1 Permits	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	9 Protection of fish, wildlife and related environmental values	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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4 Hydrologic balance					12 Backfilling and grading	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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- Diversions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	14 Subsidence control	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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- Surface and groundwater monitoring	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	- Construction	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
- Effluent limitations	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	- Drainage controls	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
5 Explosives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	- Surfacing	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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8 Noncoal waste	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	18 Support facilities and utility installations	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

WHITE - DOGM    YELLOW - OSM    PINK - PERMITTEE OPERATOR    GOLDENROD - NOV FILE

DOGM IR 1

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inspection report

## INSPECTION REPORT COMMENTS

Permit No ACT/015/007

Inspection Date 4/26/91

Please number comments to correspond with topics on previous page

Stream Channel Diversion. The stream channel diversion was checked from the top to the bottom. No problems were noted.

Other Sediment Control. The silt fences below the A & B coal seams remain functional.

Non Coal Waste. The mine site was clean and no mine associated waste nor trash was observed.

Wildlife & Environmental Values. Water was running in the main creek. Only a few deer tracks were observed next to the creek.

Backfilling & Grading. The Diversion position on highwalls over the Hidden Valley was sustained by OSM.

Revegetation. The mine site was dry, with minimal moisture in the top two inches of soil. It is premature to make any substantial judgement on the vegetation, especially in those areas where erosion matting was installed.

Roads. The road berms have held up with no short-circuiting of runoff. The outlope drainage areas need to be watched especially where high intensity storms hit the mine area.

Copy of report mailed to Cal Nat/hee Edmonson; OSM/Brian Smith; DOGM/ Joe Helbreich

Copy of report <sup>PFD</sup> given to \_\_\_\_\_

Inspector's signature \_\_\_\_\_

*Tom J. Helbreich*

No. 26

WHITE - DOGM YELLOW - OSM PINK - PERMITTEE OPERATOR GOLDENROD - NOV FILE

5/2/91

Tab Y

1           MR. STIRBA: Thank you, Ms. Knoop. That's all I  
2 have at this time.

3           THE HEARING OFFICER: Mr. Richards?

4                           CROSS-EXAMINATION

5 BY MR. RICHARDS:

6           Q. You stated that there was a major event in  
7 1987?

8           A. Yes.

9           Q. Is that a rainfall event?

10          A. Yes, it was a rainfall thunderstorm.

11          Q. And at that time you stated that that did  
12 cause some erosion on the site?

13          A. Yes.

14          Q. Mr. Stirba has referred to three areas as the  
15 N.O.V. erosion sites. Did erosion occur in 1987 based  
16 on that event at those sites?

17          A. Yes.

18          Q. You testified that you undertook some  
19 activities to control the erosion at the three N.O.V.  
20 sites during 1987?

21          A. We did work at those sites to control and  
22 protect the integrity of the roadway above those.

23          Q. But you never -- did you do anything to the  
24 gullies themselves?

25          A. Yes.

1 Q. The erosion gullies themselves?

2 A. Yes.

3 Q. And what type of activities did you conduct?

4 A. At that time we placed rock, riprap rock that  
5 both was salvaged from on-site adjacent areas and  
6 brought into the site. That rock was placed in the  
7 bottom of the gullies.

8 Q. Were you working with the Division personnel  
9 at this time --

10 A. Yes.

11 Q. -- as to how to do that?

12 A. Yes.

13 Q. And did the Division and Hidden Valley work  
14 together to try and design a program that could minimize  
15 the erosion?

16 A. Yes.

17 Q. So it would be fair to say that you and the  
18 Division were well aware that these three sites  
19 constituted an erosion problem in 1987?

20 A. Yes.

21 Q. You testified that there was an event in 1989;  
22 is that true?

23 A. Uh-huh.

24 Q. And you testified that that actually increased  
25 the erosion at these three sites?

1           A.    No.  That event removed the particles that we  
2 placed in 1987, some of those were removed out of the  
3 gullies in 1989.

4           Q.    That was the riprap?

5           A.    Right.

6           Q.    And so would it be your testimony that the  
7 riprap you placed in 1987 was ineffective?

8           A.    No.  Some of it stayed in place, some of it  
9 did not.

10          Q.    Was there incremental erosion between '87 and  
11 '89?

12          A.    Yes.

13          Q.    So these gullies were continuing to erode?

14          A.    Probably.

15          Q.    You testified that you did some other work  
16 during 1989, and I can't honestly remember what you  
17 stated.  Did you do other work during 1989?

18          A.    Yes.

19          Q.    And what work was that?

20          A.    We did work all throughout the entire site.  
21 We, again, reconstructed the water bars and we placed  
22 additional large rock in the outfall areas.

23          Q.    Were you working with the Division at this  
24 time?

25          A.    Yes.

1 Q. Were they -- were you and the Division aware  
2 that this was a continuing problem in 1989?

3 A. Well, we were aware that the erosion had  
4 continued and that it -- the integrity of the road would  
5 be at stake if something was not done.

6 Q. So in 1987 -- 1987, the Division -- did the  
7 Division ever inform you that this was not an erosional  
8 problem?

9 A. They never informed us that it was or it  
10 wasn't.

11 Q. Okay. You were working with them to control  
12 the erosion; is that true?

13 A. They knew what we were doing, yes.

14 Q. And you knew the erosion was increasing?

15 A. We knew that it had the potential to increase,  
16 yeah.

17 Q. And then in 1989 you testified that the  
18 erosion did, in fact, increase?

19 A. Uh-huh.

20 Q. Then, again, in placing -- you were  
21 undertaking other activities to try and reduce the  
22 amount of erosion, correct?

23 A. Not necessarily. We were taking activities to  
24 protect the road so that there would not be further  
25 future erosion of the road surface.

1 Q. Of the road surface?

2 A. Yeah, the top road surface, not the gully  
3 itself.

4 Q. Did you undertake any activities on the  
5 outslope in 1989?

6 A. We placed rock in the outslope but that was  
7 for the protection of the road surface.

8 Q. I see. Once again, those activities that took  
9 place in 1989, you were working in conjunction with the  
10 Division?

11 A. The Division approved the plans to put those  
12 rock in.

13 Q. What date did you have that conversation with  
14 Mr. Munson that you referred to after the N.O.V.  
15 discussion of the site?

16 A. I believe it's the 20th, the date of --

17 Q. November 20th?

18 A. No. January 20th, I'm sorry.

19 Q. Of 1991?

20 A. '92, the --

21 Q. 1992. So this conversation was after the  
22 N.O.V. was written?

23 A. Yes.

24 Q. And you testified that Mr. Munson stated that  
25 this was a difficult engineering problem to overcome



1 erosion here?

2 A. (Whereupon the witness nodded her head up and  
3 down.)

4 Q. Did he ever tell you that you did not have to  
5 comply with the regulations?

6 A. No.

7 Q. Did he ever tell you that the erosion was not  
8 a problem?

9 A. I don't know specifically if he said that or  
10 not.

11 MR. RICHARDS: Okay. That's all the questions I  
12 have.

13 THE HEARING OFFICER: Mr. Stirba?

14 MR. STIRBA: Yes. May I approach the witness,  
15 please?

16 THE HEARING OFFICER: Certainly.

17 REDIRECT EXAMINATION

18 BY MR. STIRBA:

19 Q. Ms. Knoop, let me show you what has already  
20 been received as Exhibit R-26. Do you see that?

21 A. Uh-huh.

22 Q. And this is a inspection report prepared by  
23 some State inspectors when they inspected the mine site  
24 on September 3, 1987. Do you see that?

25 A. Yes.