

1993

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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930073

IN THE UTAH COURT OF APPEALS

HIDDEN VALLEY COAL COMPANY, :

Plaintiff and Appellant, :

v. :

The UTAH BOARD OF OIL, GAS & MINING and the UTAH DIVISION
OF OIL, GAS & MINING, :

Defendants and Appellants. :

Case No. 930073-CA

Priority 15

REPLY BRIEF OF THE APPELLANT

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

The Honorable Glenn Iwasaki
Third District Court Judge

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FILED

Utah Court of Appeals

MAY 10 1993


Mary T. Noonan
Clerk of the Court

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HIDDEN VALLEY COAL COMPANY,	:	
Plaintiff and Appellant,	:	
v.	:	Case No. 930073-CA
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ARGUMENT

I. HVCC'S SUBMISSION OF AN ABATEMENT PLAN DID NOT "MOOT" THIS APPEAL.

The Division argues that HVCC's compliance with their enforcement order moots this appeal. The Division's argument here depends upon a determination that the solitary act of submitting of an abatement plan constitutes "compliance" with the NOV.

The submission of an abatement plan was not "compliance" with the Division's NOV. First and most obviously, the Division knew all along that HVCC intended to pursue an appeal to this Court. The Notice of Appeal was filed on December 4, 1992, two weeks *before* the Division approved the abatement plan. After the Third District Court's ruling, the parties commenced settlement negotiations during which the Division was fully aware of HVCC's intent to perfect its appeal rights.

Second, the NOV did not simply require an abatement plan to be submitted, but required an abatement plan to be *implemented*. Various stays have been granted and the physical abatement action has not yet occurred; the physical abatement action is the subject matter of this appeal. In this case, unlike the general cases cited by the Division, HVCC has not fully complied with the Division's order to abate conditions at the Mine Site. The submission of an abatement plan was a good faith step toward settlement of the issues and was not "compliance."

Finally, the NOV itself specifies the "remedial action required." The NOV requires HVCC to:

1. submit a plan to stabilize diversions and minimize erosion;

2. coordinate with Tom Munson;
3. seed the specified disturbed areas not previously seeded;
4. reseed the road;
5. seed and reseeding to be completed as specified in the Mining & Reclamation Plan;
6. coordinate with Susan White.

See R. 64-66, attached hereto as Addendum "A."

The Division's argument is also self-contradictory because the Division argues that it "approved HVCC's abatement plan on December 19, 1992 and modified the NOV to extend dates for compliance to conform with the . . . abatement plan." *See* Brief of Appellees, pp. 12-13. The Division, therefore, approved the plan and set new dates for compliance. If the plan itself constituted compliance then no new dates would have been necessary. As such, this appeal should not be dismissed on the ground of mootness.

II. ESTOPPEL DOES NOT APPLY TO PREVENT HVCC'S APPEAL OF THESE ISSUES.

The Division argues that HVCC is estopped from "refusing to implement" its abatement plan because it submitted the abatement plan. This argument is utterly meritless. First and foremost, this Court granted a Rule 8 stay pending the outcome of this appeal. HVCC, therefore, does not have to implement its abatement plan by reason of this Court's April 14, 1993 Order.

Further, the Division's estoppel analysis fails. The Division cites the applicable "conduct of HVCC" to be counsel's reassurance that HVCC had no "tricks up its sleeve." It is not a trick to pursue appellate review. HVCC openly perfected its appeal rights under Utah Code Ann. § 40-10-30(3) (1986). The Division was never misled. The parties' unsuccessful good faith attempt to settle this matter should not be construed as conduct estopping one from pursuing an appeal.

The Division also did not rely on this conduct in the estoppel sense. The Division argues that it did not issue a Cessation Order as it could have done. As argued in Section "I" *supra*, the Division knew all along that HVCC was appealing the Third District Court decision. The notice of appeal was filed weeks before the abatement plan was ever approved by the Division. As such, reliance simply is not an element here.

The alleged detriment to the state and environment is also not compelling. The Division attached new affidavits to its brief, which are not a part of the record below, in support of their contention that the environment will be harmed if abatement action is not required now. *See* Affidavit of Susan White, dated March 16, 1993 and Affidavit of William Malencik, dated March 15, 1993, attached to the Brief of Appellees at "P" and "Q." These Affidavits state, in essence, that the Mine Site must be reseeded within a very small window of time defined by the Division's biologists. The Division also cites a danger that "undesirable weeds" may inhibit the revegetation of the Mine Site.

William Malencik's new Affidavit is *wholly inconsistent* with his prior Affidavit dated September 25, 1992. *See* Affidavit of William Malencik, dated September 25, 1992, attached hereto as Addendum "B." A comparison of these Affidavits is illustrative:

September, 1992

"The season for seeding in the Utah Desert is early to late fall. Seeding done either before or after that date is ineffectual.

If not seeded this year; the site will not be able to be effectively seeded until, at the earliest, Fall of 1993."

March, 1993

"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 . . .

(c) The outslopes will be invaded by undesirable weeds . . ."

The Division's position is internally inconsistent and it is also inconsistent with the fifty-nine (59) prior inspection reports which have found the conditions at the Mine Site to be in compliance. Therefore, the Division's claim of detrimental damage fails.

III. HVCC'S MARSHALLING OF THE EVIDENCE IN ITS OPENING BRIEF IS ADEQUATE UNDER *STATE V. LARSEN*.

The Division made a hollow argument that HVCC did not marshal the evidence in its opening brief. This assertion is simply not true. HVCC specifically refers the Court to its opening Brief at pp. 2-16; 19-20; 28-30.

The Division accusation that HVCC "distorted" the record is wholly unsupported. The policy behind the marshalling requirement is so that the appealing party does not "dump the burden of argument and research" on the Court. *State v. Larsen*, 828 P.2d 487, 491 (Utah Ct. App. 1992). An appellant is not required to make the appellees' arguments for them. HVCC

properly marshalled the evidence which supported and did not support its argument in each instance. If the Division feels that evidence is "misconstrued," it is allowed to file and did file an opposing brief under Utah R. App. P. 24(b).

IV. THE DIVISION DID NOT ESTABLISH A *PRIMA FACIE* CASE IN SUPPORT OF ITS NOV.

The NOV was issued for and the Division had the burden of establishing a *prima facie* case for four alleged violations:

- (a) failure to maintain diversions to be stable (Part 1);
- (b) failure to minimize erosion to the extent possible (Part 1);
- (c) failure to clearly mark with perimeter markers all disturbed areas (Part 2); and
- (b) failure to seed and revegetate all disturbed areas (Part 2).

See R. 64-66, attached hereto as Addendum "A."

A. The Division did not Establish a *prima facie* Case Supporting the Alleged Failure to Maintain Diversions to be Stable.

The NOV cites HVCC for a failure to maintain diversions to be stable. The Division addresses this part of its NOV only in footnote number 8 of its Brief. *See* Brief of Appellees, p. 20, n.8. The Division curiously argues that this part of the NOV was written because three gullies were eroding the outslope and not because the diversions were unstable. However, Utah Admin. R. 614-301-742.312.1 (1991) is the regulation that HVCC allegedly violated. This regulation does not say anything about the stability of "gullies." Rather, that regulation requires that "[t]he diversion and its appurtenant structures will be designed, located, constructed, maintained and used to: . . . Be stable." Utah Admin. R. 614-301-742.312.1 (1991).

This apparent concession of the diversion issue by the Division supports HVCC's argument that no *prima facie* case was made for this portion of the NOV.

Furthermore, the Division fails to establish that the road cited under Part 1 of the NOV is a diversionary structure subject to regulation under Utah Admin. R. 614-301-742.312.1 (1991). The only evidence in the record is directly to the contrary and establishes that the road is not a "diversionary structure" and that the Division failed to establish a prima facie case for violation of the cited regulation. In testifying regarding Utah Admin. R. 614-301-742.312, Karla Knoop states:

A. . . . the regulations have different requirements that need to be met for a diversion structure or for a roadway drainage structure, and the NOV cited the diversion part of the rules and I'm not sure where exactly the roadway drainage is. . .

. . .

Q. So it is your opinion when the regulations cited 742.312 which says: "the diversion and its appurtenant structures will be designed, located, constructed, maintained and used to be stable" that is a totally inappropriate application of that rule to this situation?

A. Yes. The water bar is a diversion and the water bar is stable. It was a diversion.

R. 237-239, at 239, attached hereto as Addendum "C" (emphasis added.) *Compare* Utah Admin. R. 614-301-742.400. This testimony is unrefuted and clearly establishes that the

regulation cited was not applicable and that the NOV should be vacated. The Board ruling upholding Part 1 of the alleged violation must be overturned as clearly erroneous and not supported by the record.

B. The Division did not Establish a *prima facie* Case Supporting the Alleged Failure to Minimize Erosion to the Extent Possible.

The applicable regulation states that a permittee must control erosion to the extent possible. The regulation does not mandate that a permittee prevent erosion completely. Somewhat broadly, Utah Admin. R. 614-301-742.113 (1991) requires "[a]ppropriate sediment control measures . . . designed, constructed and maintained using the *best technology currently available* to: . . . *Minimize erosion to the extent possible.*" (emphasis added).

The standard for determining whether the operator has "minimized erosion to the extent possible" is different for regraded and reclaimed areas such as the Hidden Valley Mine and active mining operations. In the case of reclaimed areas, erosion must only be addressed where the erosion interferes with post-mining land use. In *Pittsburgh & Midway Coal Mining Company v. OSM*, 107 IBLA 246 (February 22, 1989), attached hereto as Addendum "D", the IBLA upheld vacation of a violation concerning rills and gullies. Therein, the IBLA cited the following OSM policy directive:

Observation of a rill or gully is not itself evidence that erosion is presently occurring or that the site utility is being impaired. Where an erosional channel appears stabilized, based upon an evaluation of the channel characteristics discussed above, and the channel does not interfere with post-mining land use, the

permittee should be advised to monitor the site for any change in status, but should not be required to take any corrective action.

Id. at p. 250. (emphasis added).

The only evidence in the Record regarding this standard supports the finding that erosion does not interfere with grazing activities, the post mining land use identified for Hidden Valley Mine. Testimony in this regard is provided by the Division's own expert, Bill Malencik:

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

A. That road is -- like I said, it's a wide road in a post-mining land use. There is livestock grazing, so you really don't need a road that wide for livestock grazing. . . . (emphasis added.)

R. 37-38, attached as Addendum "E". Therefore, the Division has failed to make a prima facie case upholding part 1 of the NOV regarding failure to minimize erosion to the extent possible and the NOV should be vacated.

Furthermore, the record establishes that HVCC took steps to control erosion to the extent possible. As far as testimony that erosion has not been controlled to the *extent possible*, the Division must rely solely on the testimony their hired expert, William Malencik:

- * They took some steps, but in my opinion, they didn't do enough to minimize erosion. R. 998.
- * HVCC *could have* diverted water to other areas, stabilized the channel, ripped and placed rock gabions. R. 1003-1004.

HVCC controlled erosion elsewhere on the Mine Site. In its Brief, the Division only argued evidence in the record which supports a failure to control erosion on the out slopes.¹ It is therefore reasonable to assume that the Division concedes that HVCC controlled erosion to the extent possible on other affected areas of the Mine Site. In fact, had HVCC diverted water and stabilized the channel it could have disturbed other areas on the Mine Site which were controlled. This is supported by the testimony that:

- * The existing soil type at the Mine Site increases the likelihood of erosion. R. 995. Accelerated erosion is caused by slope, lack of vegetation, amount of precipitation and high intensity runoff. R. 1022-1023.
- * HVCC placed angular riprap rock at the top of the ephemeral drainage at the Mine Site to minimize erosion. R. 1002; 1005.
- * HVCC placed a small rock check dam at the crest of the slope at the Mine Site to minimize erosion. R. 1008.
- * HVCC placed water bars and ripped the road to minimize erosion. R. 1010.
- * HVCC performed regular routine hand shovel work maintenance of small erosion areas. R. 1157.
- * HVCC performed significant repair work after a 1987 storm that exceeded the design standard of the Mine Site. R. 1157. These repair measures included new water bars, new rock to place in gullies which were created from the runoff. R. 1191. The entire road surface was ripped again to provide moisture retention capacity. R. 1191. Revegetation was done. R. 1191.
- * It would be a very difficult, if not impossible, engineering feat given the nature of the access road to structure a different condition at the Mine Site to minimize erosion on the access road. R. 1197.

¹The Reclamation Plan approved by the Division did not require reclamation of out slopes. R. 671.

- * HVCC's 1986 Reclamation Plan, approved by the Division, sought to prevent only "significant erosion." See Addendum "F" at p. 21.

Therefore, there is substantial evidence on the record that HVCC controlled erosion appropriately, to the extent possible, using the best technology currently available. Furthermore, the record establishes that erosion at the site did not interfere with the post-mining land use. Therefore, this part of the NOV should be vacated.

C. The Division did not establish a *prima facie* Case Supporting the Alleged Failure to Clearly Mark with Perimeter Markers all Disturbed Areas.

As indicated in HVCC's opening brief, the Division did not present a *prima facie* case to support its NOV for failure to clearly mark disturbed areas with perimeter markers. The Division's brief does not even address this issue. The Third District Court held that there was not substantial evidence on the record to uphold this part of the NOV. Therefore, the Division has apparently conceded this issue, also.

D. The Division did not establish a *prima facie* Case Supporting the Alleged Failure to Seed and Revegetate all Disturbed Areas.

The Division has failed to establish that the road outslopes must be reseeded and revegetated where the approved reclamation plan does not require such action and where the road has been left in place under a variance approved by the Division. The record is clear that the approved reclamation plan required reseeding and revegetation of the road surface, not the road outslopes. R. 275-276; 279-280, attached hereto as Addendum "G."

Part 2 of the NOV is not merely for a failure to seed the outslopes as the Division's Brief may indicate. Rather this part of the NOV was issued under Utah Admin. R. 614-301-354

(1991) which requires that "[d]isturbed 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."

The Division emphasizes testimony in the record that the outcrops were not seeded. However, this was pursuant to the Division's approval in 1989. At that time HVCC amended its 1986 Reclamation Plan regarding these exact reseeding and revegetation efforts. This revision was approved by the Division. *See* Brief of Appellant, pp. 6-7; *see also* pp. 18-24 (re: Estoppel).

V. A TWO YEAR STATUTE OF LIMITATIONS BARRED THE DIVISION'S NOV.

The regulation incorporating Title 40 Chapter 8 is the Board's own regulation, which it must apply. The fact that the federal SCMRA did not specifically incorporate a statute of limitations is irrelevant. In this case, the Board incorrectly substituted its judgment for the regulation and declined to apply it. The Board does not have the authority to ignore duly promulgated regulations or to declare regulations invalid. *Coastal States Energy Co. v. OSM*, 110 IBLA 179, 183 (1989); *Western Slope Carbon, Inc. v. OSM*, 98 IBLA 198, 201 (1987); *see Conoco, Inc. v. OSM (on reconsideration)*, 113 IBLA 243, 249 (1990); *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C.Cir. 1955). Similarly, a change in board policy must be reflected in a rule promulgated in accordance with the Utah Rulemaking Act. Utah Code Ann. § 63-46a-3 (1992); *see Costa v. Sunn*, 642 P.2d 530, 533 (Haw. 1982) (APA requires advance notice of an administrative agency's plan to adopt, amend or repeal its rules).

Utah Admin. R. 614-1Q-900(a) (1991) provides:

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) and are, therefore, made part of that Act pursuant to 40-10-4, U.C.A. Provisions not specifically adopted by this rule are determined to be inconsistent with this rule and shall not apply to coal mining reclamation activities

(IX) Section 40-8-9(l) and (2): Adopted.

(emphasis added). This regulation was in effect at the time the NOV was issued. It is utterly irrelevant that in 1980, eleven years before the NOV, the Board's regulations stated otherwise. The fact is that in 1991, the above-cited regulation was the one in effect. It should be applied because the Division must follow the regulations that it itself promulgates and adopts.

Similarly, the Board does not have authority to repeal provisions in the Utah Code or to refuse to apply them. Utah Code Ann. § 40-10-4 (1979) states that:

. . . Title 40, Chapter 8 and the rules and regulations adopted under it, where appropriate, and not in conflict with this chapter . . shall be applicable . . .

Even if the administrative regulation discussed above does not apply, UCMRA specifically adopts Title 40 Chapter 8.

A. The Cases Cited By the Division Are Distinguishable From this Case.

The Division argues that no limitations period applies under SCMRA and therefore none applies under UCMRA. Other courts have found that limitations periods apply in this context. *United States v. Lueking*, 125 B.R. 513, 5 (E.D.Tenn. 1990) ("the statute of limitations *should run from the time when the government first had notice* of the violations and issued its CO's or

NOV's.") (emphasis added), *United States v. McCune*, No. C-2-87-1387 (S.D. Ohio, Dec. 13, 1989) and *United States v. Graham*, No. 87-1843, 1989 WL 248111 (W.D. Penn. July 20, 1989) applied a limitations period. Utah specifically incorporated a limitations period to their statutory scheme. This was the legislature's act which was approved by OSM and Congress. It is not for the Board to second guess these legislative mandates. Where a limitations period applies it should be observed.

The Division miscites several cases in support of the Board's conclusion that statutes of limitation do not apply. *PacifiCorp. v. OSM*, Slip Op. No. DV-5-R (March 27, 1992) *appeal pending* IBLA Appeal Docket No. 92-467. ("*PacifiCorp. I*") is inapposite. The applicant in that case argued for the applicability of Utah Code Ann. § 40-8-9(2) (1987) to a federal enforcement proceeding. That court held simply that the United States is not bound by state statutes of limitations in enforcing federal law. *PacifiCorp. I* at 6 (citing *United States v. Tri-No Enterprises, Inc.*, 819 F.2d 154, 158 (7th Cir. 1987); *United States v. Summerlin*, 310 U.S. 414 (1940)). HVCC's case is distinguishable in that it involves the application of a specific state statute of limitations to a state enforcement action. Furthermore, *PacifiCorp I* is currently on appeal to the Interior Board of Land Appeals. *PacifiCorp v. OSM*, No. DV 91-10-R (January 17, 1992) ("*PacifiCorp. II*"), cited by the Division, was overruled and dismissed on appeal and is not precedential here. See Order of ALJ John R. Rampton, Jr., Sept. 30, 1992 *vacating* Docket # DV-91-10-R.

Under the reasoning of *United States v. Tri-No Enterprises, Inc.*, 819 F.2d 154 (7th Cir. 1987), the statute of limitations in Utah Code Ann. § 40-8-9(1) (1987) applies. "[T]he United

States is not subject to statutes of limitations in enforcing its rights unless Congress explicitly provides otherwise." *Id.* at 158 (emphasis added). In this case, the Utah legislature provided for a two year statute of limitations, which was approved to UMCRA under Utah Code Ann. § 40-10-4 (1979) pursuant to Utah Admin. R. 614-100-400 (1991). Under SMCRA, the Secretary is delegated authority to "promulgate . . . rules and regulations" permitting states to "assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations," after obtaining approval from the Secretary. 30 U.S.C. § 1211(c)(2) (1980); 30 U.S.C. § 1253(a) (1977). The two year statute of limitations is incorporated into Utah's State Program which was approved by OSM.

Coastal States v. Hartselle Mining Corp., CV-89-H-343-S (Sept. 25, 1990) is distinguishable from the facts in this matter. The defendants in *Hartselle* generally alleged a statutory bar without citing applicable statutes of limitations. Slip Op. at p. 3. In this matter, the Board and Division are specifically bound by Title 40 Chapter 8 and Utah Admin. R. 614-1Q-900(a) (1991).

B. The Division's Arguments Concerning the Statute of Limitations are Inconsistent.

The Division argues that the violations at the Mine Site are "continuing" and that this bars the application of a statute of limitations. *See* Brief of Appellees, p. 35. This argument is internally inconsistent. If there was a violation at the Mine Site for years preceding the NOV, this supports HVCC's argument that the statute of limitations bars the NOV. "[I]t is unjust to fail to put [HVCC] on notice to defend within a specified period of time [because] 'the right to

be free from stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111 (1979) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879); *Railway Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)).

Furthermore, the Division's own witness testified that this exact statute of limitations was applied by the Division in other cases.

MR. STIRBA: Are you aware that there is a statute that has a Statute of Limitations that provides for two years under the Utah Mined Land Reclamation Act?

MR. DANIELS: Yes.

MR. STIRBA: And, I believe, that's 40-8-9; is that correct?

MR. DANIELS: Right.

MR. STIRBA: You're familiar with that particular provision that I'm referring to?

MR. DANIELS: Yes.

MR. STIRBA: Now, isn't it true that there are times when that provision has been applied by a hearing officer in the administrative appeal context and that you've just testified to concerning coal matters?

MR. DANIELS: Yes, it has.

MR. STIRBA: In essence, that hearing officer would apply that statute as a position of law that was applicable in this State to matters within the jurisdiction of the Division, correct?

MR. DANIELS: Yes.

R. 1069-1071 (emphasis added). In sum, the Board must follow its own rules. The Board applied this rule in the past. It is not HVCC's burden to explain why this rule was promulgated and applied in other circumstances and not to HVCC.

The Division further argues that "[i]t 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 . . ." *See* Brief of Appellees, p.35. This argument is unsupported by the record. The April 26, 1991 Inspection Report says only "[t]he outslope drainage areas need to be watched especially when high intensity storms hit the Mine area." R. 936, attached hereto as Addendum "H."

The May 7, 1991 Inspection Report simply states: "[o]n site conditions were substantially the same as covered in the previous inspection dated 4/20/91. The mine site was dry and showed no evidence of rain or run-off . . . Silt fences and the erosion matting all were checked and no problems noted." R. 938, attached hereto as Addendum "I." Nothing was said about a "significant increase in erosion." Therefore, the Division's characterization is completely unsupported by the record.

In summary, the Board's conclusion that the 1991 Utah Administrative Code statute of limitations contained in R. 614-1Q-900(a) did not bar the NOV was clearly erroneous. This Court need not accord the agency decision any particular deference. *Vali Convalescent & Care Inst. v. Div. of Health Care Fin.*, 797 P.2d 443 (Utah Ct. App. 1990). Therefore, the Board's decision should be vacated and the statute of limitations applied to bar the NOV.

VI. PRINCIPLES OF ESTOPPEL PREVENT THE DIVISION FROM TAKING ENFORCEMENT ACTION AGAINST HVCC ON THESE ISSUES.

The record in this case supports a finding that the doctrine of equitable estoppel applies to the Division. The Division's argument that estoppel is not supported by the facts is totally unsupported in the record. In fact, there is substantial evidence supporting estoppel and the Board's failure to so find was clearly erroneous.

A. Substantial Evidence in the Record Supports the Doctrine of Estoppel Here.

HVCC is not arguing that the Division is estopped from issuing the NOV because it did not previously inform HVCC of erosion problems. Instead, HVCC points out that the Division made Inspection Reports over a five year period which specifically found the Mine Site to be in compliance with all laws and regulations. R. 804-954. The Division also issued memoranda and letters finding compliance. The Division released 60% of the reclamation bond, another indication of compliance.

Estoppel is made out by the fact that the Division found HVCC to be in compliance continuously and consistently for five years. Suddenly, without any change whatsoever in environmental conditions at the Mine Site, HVCC received a violation.

Since nothing changed at the Mine Site, one may question why a violation issued after prior findings of compliance. On November 19, 1991, one thing had changed: the person accompanying the Division inspector. On November 19, 1991, a federal inspector from the Office of Surface Mining² accompanied Division inspector William Malencik to the Mine Site.

² The Office of Surface Mining is the federal counterpart of the Division of Oil, Gas and Mining, and regulates and enforces SCMRA.

The following is an excerpt from the testimony of Karla Knoop at the June 30, 1992 evidentiary hearing:

MR. STIRBA: With respect to the gullies, would you consider the difference between '87 and '91 to be significant?

MS. KNOOP: Not significant. There's been some change but not a substantial change.

MR. STIRBA: Is the general configuration of the gullies the same in '91 as it existed after the repair work in '87?

MS. KNOOP: Generally.

MR. STIRBA: Now, did you have a conversation with anyone at the inspection on the 19th of November of '91?

MS. KNOOP: Yes.

MR. STIRBA: And who did you have a conversation with?

MS. KNOOP: Well, I had conversations both with Bill Malencik and Mitch Rawlings, the OSM inspector.

MR. STIRBA: And specifically did you have conversations about the apparent concern about the gullies which are now the subject of the N.O.V.?

MS. KNOOP: Yes.

MR. STIRBA: And would you please tell the Chair who said what at that time about the gullies?

MS. KNOOP: The -- basically the OSM inspector, Mitch Rawlings, was quite concerned about the gullies. That was his second visit to the site. He was not familiar with the site in the past five years.

He was quite concerned about these gullies because they exceeded what he considered to be the standards for erosion in the area. We had discussions -- I brought up the fact that these gullies had been there since 1987 and that there had never been a problem on previous inspections with those and he said that that was basically irrelevant. The gullies were there, they were excessive, and he proceeded to make measurements on them.

MR. STIRBA: At any time prior to that day, did anyone from the state who inspected the property with you indicate to you that the condition of those gullies and those outflows after the repair work in '87 was in violation of any rule or regulation?

MS. KNOOP: There may have been some discussion after the event in 1989 where we had planned on putting some more rock in those. We certainly, I'm sure, talked about those gullies but no mention of those had been made on anything annual -- or the monthly inspections.

R. 1192-1194 (emphasis added). The state and not the federal government oversees the enforcement of UCMRA to HVCC. Utah Code Ann. § 40-10-6(9) (1989). The arrival of an OSM inspector on the scene spurred the violation, not any change in conditions.

The fact that the OSM inspector had a different opinion than the Division inspectors does not affect a conclusion that the record establishes equitable estoppel. Rather, this supports it. The Division lulled HVCC into believing they were in full compliance with all laws and regulations. In April and May of 1991, the Division told HVCC their Mine Site was in "good condition." R. 952-954. HVCC relied on these Reports in conducting their reclamation activities pursuant to the Division approved plan. The fact that one individual OSM inspector disagreed with the Division does not preclude the application of equitable estoppel to them.

B. Division "Warnings" do not Constitute Substantial Evidence that Estoppel is Inapplicable.

The Division attempts to avoid equitable estoppel by listing the various warning signs of "concerns," "monitoring" and "advice" given to HVCC. *See* Brief of Appellees at pp. 38-43. The existence of warning signs is a wholly different type of evidence than the Division's issuance of Inspection Reports concluding there was compliance and "good condition[s]." R. 804-954. "Warnings" and "comments" are not substantial evidence to support the Board's findings on the estoppel issue. Specific findings of compliance, on the other hand, are substantial evidence that HVCC was given representations upon which it relied. *See Plateau Mining v. Utah Div. of State Lands*, 802 P.2d 720, 729 (Utah 1990). As stated above, it is OSM policy that the observation of minor erosion does not require enforcement action and a permittee should be advised to monitor the site but not required to take corrective action *Pittsburgh & Midway Coal Mining Company v. OSM*, 107 IBLA 246, 250 (February 22, 1989)

HVCC does not argue that the Division should never be able to find violation following

compliance without being estopped; however, HVCC does argue that the Division should not be able to cite HVCC with a violation after there were specific findings of compliance as to these very conditions as soon as 18 days prior to the violation and as far back as five years. As stated above, the only thing that changed was that a federal inspector came along on the November 19, 1991 inspection.

The Division argues that it "noted outslope erosion on the access road at water bar locations" as early as September 3, 1987. This relates to a storm in late August, 1987 which the Division itself thought was in excess of a 100 year, 24 hour event which exceeded all design criteria. Repair methods were developed, submitted to the Division in writing and the conditions were later inspected by the Division. Karla Knoop testified that the storm events which caused some adverse conditions at the Mine Site in 1987 exceeded the design guidelines in applicable regulations.

MR. STIRBA: So the fact that there was damage done as a result of that particular event was not something that was envisioned under the reclamation plan?

MS. KNOOP: Yes. That event was in excess of what the designs were anticipated to handle.

R. 1207-1208. Therefore, those conditions had nothing to do with whether or not HVCC was in compliance and does not affect the application of equitable estoppel to the Division.

Next, the Division argues that it "warned . . . that the haul road outslopes needed to be watched for any future erosion." Watching for erosion is a standard part of the maintenance and

does not indicate a problem. The Division cites its "contact . . . regarding the Division's concerns of additional erosion and stabilization of the area." R. 874. A review of that Inspection Report makes clear that the statement is in regard to rilling on the A and B seams, which are not part of the road or the NOV. Thus, the statement is completely out of context and irrelevant here. R. 874.

The Division argues that "several months later" (August 31, 1989) the operator advised the Division of his intention to perform maintenance work. Again, this was a result of a large storm. Work was done in a timely manner, and again inspected by the Division. The Division inspection report from April 24, 1990 states that "[r]oad drainage controls that were augmented with additional work last fall were fully functional." R. 910. This indicates that the work was done, and several months later was still considered to be adequate by the Division.

The Division then cites a November, 1990 statement that "the head cut near the top of the road requires additional monitoring." However, the Division does not cite their February 8, 1991 Inspection Report which says "[a]ll diversions appeared stable without significant erosion or sediment deposition. . ." R. 931. Evidently, HVCC solved the problem to the Division's satisfaction at that time.

As further evidence of its "warnings," the Division cites an April 26, 1991 report that "outslope drainage areas need to be watched . . ." Again, being advised to watch an area does not mean there is a problem. Observation is a routine part of monitoring. The Division argues that it "warned" HVCC of "[o]utslope erosion." R. 833; R. 825. The Reclamation Plan approved by the Division did not require reclamation of outslopes. R. 671. ("The road surface

will be scarified and seeded.") Reclamation was limited to the surface of the access road constructed by Soldier Creek in 1980.

To summarize, in a harsh environmental setting such as Hidden Valley, and in this specific location where there is no choice but for run-off water to be discharged down a steep, unengineered fill, the above mentioned erosion problems are to be expected and are not significant, even in the Division's reports. The Division's Opening Brief references eight monthly inspection reports out of a possible 59 (fifty-nine). In three of the eight Division reports, the Division simply says that "watching" or "monitoring" is required. In two of these reports, the erosion mentioned was due to extreme run-off events, not due to the negligence or lack of maintenance by HVCC. In one of the reports, the area mentioned is not even relevant to the NOV. In another, erosion is mentioned as being "minor;" in another only one water bar is mentioned as needing repair. Given this summary, the Division's argument that it "continually warned" and "admonished Hidden Valley for its failure to control the erosion problem" misstates both the severity of the problem and the level of Division concern over a five-year period.³

Finally, the Division argues that the fact HVCC received a Phase I bond release does not support an argument for estoppel. In the Division's 1988 inspection memorandum, HVCC was told that "[a]s a result of this inspection, the backfilling, grading, topsoil placement and drainage controls were determined complete." R. 266. (emphasis added); *see also* R. 265; R. 264; R.

³ It is important to note that the issue here is not whether or not there was erosion; it is whether, by its statements and conduct, the Division is equitably estopped from violating HVCC based on the unchanging conditions at the Mine Site.

1174; R. 1110-1111; R. 1125-1131. "[SCMRA] cannot be read to express or assume that regulatory jurisdiction over a surface coal mining and reclamation operation must continue forever." *Nat'l Wildlife Found. v. Lujan*, 950 F.2d 765, 769 (D.C. Cir. 1991). Moreover, HVCC has never contended that the Phase I bond release was definitive evidence of estoppel. It is simply one factor to be considered along with the fifty-nine (59) Inspection Reports, verbal representations by the Division and determinations throughout 1991 that the Mine Site was in "good condition."

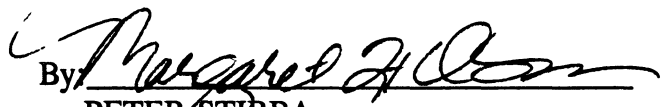
The Board's conclusion that the equitable doctrine of estoppel does not apply to HVCC is clearly erroneous. Again, this Court need not accord the agency decision any particular deference. *Vali Convalescent*, 797 P.2d at 443. The Court should find that equitable estoppel precludes the issuance of the NOV.

CONCLUSION

For the above reasons, the Court should hold that the Board's findings are unsupported by the record and its rulings of law were clearly erroneous.

DATED this 10 day of May, 1993.

STIRBA & HATHAWAY

By: 
PETER STIRBA
MARGARET H. OLSON
Attorneys for Plaintiff and Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of May, 1993, I mailed a true and correct copy, postage prepaid, of REPLY BRIEF OF THE APPELLANT to the following:

William R. Richards
Thomas A. Mitchell
UTAH DIVISION OF OIL, GAS & MINING
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, UT 84180

A handwritten signature in cursive script, appearing to read "Margaret H. Olson", written over a horizontal line.

PETER STIRBA
MARGARET H. OLSON
Attorneys for Plaintiff and Appellant

k\hvcc\brief.rpl

Tab A

Der Ca. Feb	EXHIBIT "A"	Paula Knopp
Dept. 12th Floor	Phone 472 8770	32
Fax 596 2814	Fax 472 8770	

NO. N 41-26-8-2

notice of violation

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 the 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

Charles
 Signature

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

Rec. Spec.
 Title

Wm. J. Malencik
 Signature
11/21/91.

#26
 Identification Number

SEE REVERSE SIDE

WHITE-COGM YELLOW-COGM PINK-PERMITTEE/OPERATOR GOLDEN-CCO-NOV FILE

OCOM/NOV-1

an equal opportunity employer

11/85

cc: Ms. Paula Knopp.

NOTICE OF VIOLATION NO. N 91-24-8-2

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

WHITE-DOGM YELLOW-CSM PINK-PERMITTEE/OPERATOR GOLDENROD-NOV FILE

DOGM/NOV-?

an equal opportunity employer

11/25

65

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.
- Reseed 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.

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

DOGM/NOV-2

an equal opportunity employer

11/85

Tab B

APPENDIX A

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

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

HIDDEN VALLEY COAL COMPANY,	:	
Plaintiff,	:	AFFIDAVIT OF WILLIAM
	:	MALENCIK
v.	:	
the UTAH BOARD OF OIL, GAS AND	:	Case No. <u>920904813CV</u>
MINING and the UTAH DIVISION	:	
OF OIL, GAS AND MINING,	:	Judge <u>Glenn Iwasaki</u>
Defendants.	:	

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.

24. The season for seeding in the Utah desert is early to late fall. Seeding done either before or after that date is ineffectual.

25. If seeding does not take place during the fall of 1992, 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.

(d) If not seeded this year, the site will not be able to be effectively seeded until, at the earliest, Fall of 1993.

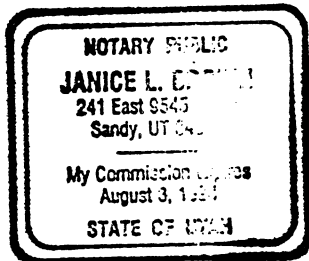
DATED this 25th day of September, 1992.

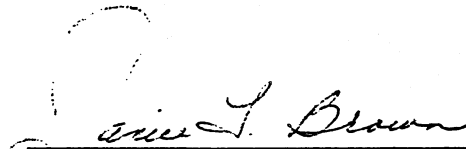
STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

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 14th day of September, 1992.




NOTARY PUBLIC

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing AFFIDAVIT OF WILLIAM MALENCIK for Case No. 920904813CV to be mailed by certified mail, postage prepaid, the 19th day of September 1992, to the following:

Peter Stirba, Esq.
Stirba & Hathaway
215 South State Street, Suite 1150
Salt Lake City, Utah 84111

Kim A. Kubota

Tab C

1 helpful but that would generally be cosmetic and would
2 certainly not present a long-term permanent solution to
3 erosion on the road fill.

4 Q. Ms. Knoop, you're familiar with the regulation
5 that has been cited by the Division in its N.O.V.?

6 A. Yes.

7 Q. And I don't have it right in front of me.
8 It's Exhibit 1, but it specifically relates and recites
9 two specific rules, correct?

10 A. Yes.

11 Q. Have you looked at those rules since the
12 N.O.V. was issued?

13 A. Yes, I have.

14 Q. And you've read those rules?

15 A. Yes.

16 Q. And the one rule -- and perhaps maybe we ought .
17 to be more specific about it. The one rule is 742 --
18 well, actually, it's Rule 614-301-742.312. Have you
19 looked at that one?

20 A. Uh-huh. Yes.

21 Q. And is that the one that identifies
22 diversions?

23 A. I believe so.

24 Q. What is a diversion?

25 A. A diversion is a hydrolic structure that is

1 used to redirect water from its natural pathway to
2 channelize that water in a manner where it's conveyed
3 either through or away from a disturbed area.

4 Q. Would a water bar be a diversion?

5 A. Not technically, no.

6 Q. Why not?

7 A. A water bar is -- especially under the
8 regulations, is a road drainage feature, not a
9 diversion. It doesn't serve to redirect water anywhere
10 other than where it's already going anyway. It's part
11 of a road drainage way system and not a diversion system
12 which is separated under the regulations.

13 Q. Can you give us an example of a diversion?

14 A. A diversion would be a structure such as
15 occurs elsewhere on this site where water is redirected
16 away from fill slope areas on the reclaimed path areas
17 that are not associated with the roadway. There are
18 several other diversions on the property.

19 Q. So, for example, would a diversion be a
20 structure that might change the flow of the stream?

21 A. Yes.

22 Q. And you mentioned the term "roadway drainage"?

23 A. Uh-huh.

24 Q. That's what a water bar is?

25 A. Yes.

1 Q. Where do you come up with that terminology?

2 A. Water bar or --

3 Q. No. Roadway drainage. Is there some other
4 provision that is referenced in the rules concerning
5 that?

6 A. Well, there's -- I don't know the specific
7 citations but the rules -- the regulations have
8 different requirements that need to be met for a
9 diversion structure or for a roadway drainage structure,
10 and the N.O.V. cited the diversion part of the rules and
11 I'm not sure where exactly the roadway drainage is. I
12 think it follows that under regulations.

13 Q. But your opinion is that the water bar
14 configuration and the water going off of the outslope is
15 a roadway drainage, correct?

16 A. Yes. Water bars are only used for a roadway
17 situation. You would never have a water bar.

18 Q. So is it also your opinion when the
19 regulations cited 742.312 which says: "The diversion in
20 its pertinent structures will be designed, located,
21 constructed, maintained and used to be stable," that is
22 a totally inapplicable or a totally inappropriate
23 application of that rule to this situation?

24 A. Yes. The water bar is a diversion and the
25 water bar is stable. It was a diversion.

Tab D



IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203



THE PITTSBURG & MIDWAY COAL MINING CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-378

Decided February 22, 1989

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer vacating Notice of Violation No. 85-02-107-10. TU 6-35-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977:
Backfilling and Grading Requirements: Generally--
Surface Mining Control and Reclamation Act of 1977:
Notices of Violation: Specificity

When a permittee has been cited for a violation of 25 CFR 216.105(i), concerning rills and gullies, the question of whether vegetation has been "established" within the meaning of that regulation is not governed by the revegetation requirements of 25 CFR 216.110. In the absence of any applicable regulation, or other agency guidance, providing a definition for "established," a dictionary definition of established may be applied.

APPEARANCES: Stuart A. Sanderson, Esq., Office of the Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; John A. Bachmann, Esq., Englewood, Colorado, for the Pittsburg & Midway Coal Mining Company.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has timely appealed from a February 26, 1987, decision of Administrative Law Judge Harvey C. Sweitzer, vacating Notice of Violation (NOV) No. 85-02-107-10, issued to the Pittsburg and Midway Coal Mining Company (P&M), pursuant to section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(3) (1982), for a violation of 25 CFR 216.105(i). Judge Sweitzer concluded that the cited regulation was inapplicable and vacated the NOV.

INDEX CODE:

25 CFR 216.105(i)
25 CFR 216.110(f)
30 CFR 715.14(i)
30 CFR 715.20
30 CFR 816.95

107 IBLA 246

GFS(MIN) 32(1989)

On November 18, 1985, following an inspection of P&M's McKinley Mine in McKinley County, New Mexico, OSMRE inspector Rade H. Orell issued the NOV in question for "[f]ailure to fill, grade or otherwise stabilize rills and gullies deeper than 9 inches" (Exh. R-1 at 2). The NOV cited 25 CFR 216.105(i) as the regulation which had been violated and Pit 2 Ramp F (Ramp 2F) as the location of the violation. ^{1/} The inspector required P&M to either comply with 25 CFR 216.105(i) "such that the rill and gully problem at Pit 2 Ramp F is filled, graded, or otherwise stabilized" or "[s]ubmit a plan for approval, describing alternate methods for stabilizing the area and complete the required activities after approval" (NOV at 2).

P&M filed an application for review of the NOV on December 17, 1985, and an application for temporary relief from the NOV on January 9, 1986. On March 13 and 14, and April 9 through 11, 1986, Judge Sweitzer held a hearing in Lakewood, Colorado. In a ruling from the bench on April 11, 1986, Judge Sweitzer granted P&M's application for temporary relief (Tr. 688). OSMRE did not seek review of that determination. However, it filed the present appeal from Judge Sweitzer's February 26, 1987, decision.

The regulation cited in the NOV, 25 CFR 216.105(i), provides:

Regrading or stabilizing rills and gullies. When rills or gullies deeper than 9 inches form in areas that have been regraded and the topsoil replaced but vegetation has not yet been established, the permittee shall fill, grade, or otherwise stabilize the rills and gullies and reseed or replant the areas according to § 216.110. The regulatory authority shall specify that rills or gullies of lesser size be stabilized if the rills or gullies will be disruptive to the approved postmining land use or may result in additional erosion and sedimentation.

Ramp 2F, which is 1,600 feet long and approximately 67 feet wide, is located at the lowest level in a 44-acre watershed (Tr. 100, 134, 431, 448; Exh. P&M 1). Prior to mining, an arroyo 15- to 20-feet deep existed at the site of Ramp 2F (Tr. 520). During mining activities in the area, P&M used Ramp 2F as a haul road. In mid to late October 1984, following regrading and topsoiling, P&M reseeded the ramp. Between the time of reseeding and issuance of the NOV in November 1985, runoff from the watershed created a drainage feature along the length of the ramp (Tr. 420, 586). The depth of the drainway ranges from a few inches to as much as 2 feet (Tr. 521). The OSMRE inspector testified that he issued the NOV because gullies in excess of 9 inches existed on Ramp 2F (Tr. 26, 60).

At the hearing and in its posthearing brief, OSMRE concentrated on establishing that drainage had created rills and gullies that were deeper

^{1/} Since Ramp 2F is located on Indian lands within the meaning of section 701(9) of the Act, 30 U.S.C. § 1291(9) (1982), the applicable regulations are found at 25 CFR Part 216. The initial program regulatory requirements for backfilling and grading of disturbed areas on Indian lands and non-Indian lands are identical. See 25 CFR 216.105(i); 30 CFR 715.14(i).

than 9 inches; vegetation had not been established; and the rills and gullies had not been stabilized. In arguing that vegetation had not been established, OSMRE sought to invoke the standards for measuring the success of revegetation set forth at 25 CFR 216.110(f), specifically the requirement that the necessary vegetation be in existence for two growing seasons. Although admitting the depth of the drainage feature, P&M insisted that no rills and gullies within the meaning of 25 CFR 216.105(i) had been created, but, instead, the ramp was a reclaimed drainway. It further contended that the drainway was stabilized. It also asserted that 25 CFR 216.110(f) did not provide the standard for judging whether vegetation had been established and that vegetation had been established within the meaning of 25 CFR 216.105(i).

In his February 26, 1987, decision, Judge Sweitzer found that OSMRE's reliance on 25 CFR 216.110(f) was misplaced because that regulation could not apply unless there was a failure to establish vegetation. He stated that success of revegetation and establishment of vegetation were not interchangeable concepts, and he invoked the plain meaning of establish, "to introduce and cause to grow and multiply," as set forth in Webster's Ninth New Collegiate Dictionary 425 (1985), to find

[t]hat vegetation was established on Ramp 2F. Because of this finding, P&M is not required to perform remedial measures in the Ramp 2F area. Indeed, hearing evidence reveals the disputed drainage feature is stable. Rocks in the drainage feature's bottom protect against further erosion * * *. Furthermore, the drainage feature does not jeopardize the area's postmining land use (Tr. 461-63).

(Decision at 5).

Judge Sweitzer concluded that: "The disputed drainage feature occurs along a premining drainage way where vegetation was established. Because vegetation was established, 25 CFR 216.105(i), the NOV's cited regulation, is inapplicable. NOV No. 85-02-107-10 is hereby vacated" (Decision at 5-6).

OSMRE asserts on appeal that Ramp 2F is not a reclaimed drainage way, such that an exception allowing the formation of rills and gullies would apply, 2/ because, although the ramp was the site of a premining drainway, P&M "never attempted to reestablish or reclaim the drainage channel which existed prior to mining," rather P&M allowed the water to wend its way down

2/ The exception is found in the language of the preamble to the final rulemaking for the non-Indian lands initial program regulations, specifically 30 CFR 715.14(i). At 42 FR 62645 (Dec. 13, 1977), the preamble provides, "Rills and gullies formed along disturbed and reclaimed drainage ways will be permitted if vegetation has first been established." Because 30 CFR 715.14(i) is identical to 25 CFR 216.105(i) (see note 1, supra), the preamble language is equally applicable to each provision.

the ramp area and create its own channel (OSMRE Brief at 11). OSMRE also contends that in order for vegetation to be "established" in accordance with 25 CFR 216.105(i), either the standard of 25 CFR 216.110(f) must be met or the vegetation must be capable of controlling erosion. Thus, maintains OSMRE, Judge Sweitzer incorrectly applied a dictionary definition of "establish." Finally, OSMRE argues that its prima facie burden regarding a violation of 25 CFR 216.105(i) is satisfied by showing that rills and gullies deeper than 9 inches are present, and that it has no obligation to show instability because the existence of rills and gullies of such a depth is a strong indication that the soil surface is not stable with respect to erosion. The operator must show that vegetation has been established, OSMRE asserts.

P&M supports Judge Sweitzer's decision and asserts that OSMRE's burden of proof argument is inconsistent with the position taken by OSMRE in its response, published in the Federal Register, to a petition for rulemaking related to 25 CFR 216.105(i) and OSMRE's official policy set forth in a document approved by the Acting Director, OSMRE, on July 7, 1987, entitled "Interpretation of Initial Program and Indian Lands Regulations Concerning Rills and Gullies."

On April 30, 1987, Peabody Coal Company filed the petition for rulemaking referred to by P&M. In a notice published in the Federal Register on September 11, 1987, OSMRE denied that petition. 52 FR 34394 (Sept. 11, 1987). Peabody had proposed that OSMRE amend its regulations at 30 CFR 750.16 to authorize all surface coal mining operations on Indian lands to comply with the surface stabilization requirements of 30 CFR 816.95, ^{3/} rather than requiring existing operations which had not been issued a permanent program permit pursuant to 30 CFR Part 750 to adhere to the 25 CFR Part 216 requirements, including the regulation at 25 CFR 216.105(i).

The basis for denial was OSMRE's determination that the principal difference between the regulations at 30 CFR 816.95 and 25 CFR 216.105(i) was that "the latter prescribes a specific numerical depth at which the presence of unstabilized rills and gullies constitute a definite violation on areas where vegetation has not been reestablished," and that proper application of the provisions of 25 CFR 216.105(i) in accordance with the July 9, 1987, policy directive would render any differences between the regulations insignificant. Id. at 34395.

^{3/} That regulation provides as follows:

"(a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

"(b) Rills and gullies, which form in areas that have been regraded and topsoiled and which either (1) disrupt the approved postmining land use or the reestablishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving streams shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted."

The cited policy directive provides:

Observation of a rill or gully is not itself evidence that erosion is presently occurring or that site utility is being impaired. Where an erosional channel appears stabilized, based upon an evaluation of the channel characteristics discussed above, and the channel does not interfere with postmining land use, the permittee should be advised to monitor the site for any change in status, but should not be required to take any corrective action.

(July 9, 1987, directive at 3).

Thus, despite OSMRE's claim in this appeal that its prima facie case is limited to showing that rills and gullies of more than 9 inches in depth exist on the site, OSMRE's policy directive and the response to the petition for rulemaking indicate that only unstable rills and gullies constitute a violation, unless they interfere with the post mining land use. ^{4/} OSMRE's policy pronouncement is consistent with the Board's interpretation of 30 CFR 715.14(i) in Palmer Coking Coal Co. v. OSMRE, 96 IBLA 266, 268 (1987),^a in which we stated:

OSMRE argues that the presence of such channels by itself establishes that Palmer failed to comply with the regulations. We disagree. In reclaiming an area disturbed by mining, there is a period of time before revegetation stabilizes the newly replaced topsoil to the point that little or no erosion takes place. Cf. 30 CFR 715.20. During that time period, some erosion will inevitably occur, but it must be minimized. We conclude that that is the aim of 30 CFR 715.14(i). Indeed, the regulation provides that as an alternative to filling and grading, a permittee may "otherwise stabilize" rills or gullies. 30 CFR 715.14(i). That is, rills or gullies, which have already formed, may be left in place as long as they are "stabilize[d]."

Moreover, it is absolutely clear that the regulation is applicable only when vegetation has "not yet been established." Thus, to present a prima facie case of a violation of 25 CFR 216.105(i), OSMRE must show the existence of rills or gullies at least 9 inches in depth; that they exist in an area where vegetation has not yet been established; and that they are not stable. At the hearing OSMRE submitted evidence in support of each of these. However, P&M clearly established by a preponderance of the evidence that the cited regulation was inapplicable.

[1] Judge Sweitzer properly rejected OSMRE's claim that 25 CFR 216.110(f) controls the question of whether or not vegetation has been established. Careful reading of the language of 25 CFR 216.105(i), the cited regulation, reveals that the reference to section 216.110 applies

^{4/} The evidence does not show, nor does OSMRE argue, that the drainage way in question would interfere with the postmining use of the land.

a) GFS(MIN) 32(1987)

only upon a showing that "vegetation has not yet been established." As stated by Judge Sweitzer, "For 216.110 to apply, a threshold determination that vegetation was not established must be made" (Decision at 4). To impose the requirements of section 216.110 on that determination is, we find, insupportable. To show the fallacy of applying that regulation in this particular case, one need only turn to Judge Sweitzer's statement in his decision that

25 CFR 216.110(f) requires approved reference areas by which to assess revegetative success. However, there is no approved reference area by which to determine Ramp 2F's revegetative success (Tr. 71). It is unreasonable for OSM to rigidly apply 216.110(f)(2)'s two growing season requirement where no approved reference area exists.

(Decision at 5).

The NOV issued to P&M does not mention 25 CFR 216.110, and neither the corrective actions specified in the NOV nor the description of the violation imply that the revegetation standards of section 216.110 were of concern to OSMRE. Cf. Old Ben Coal Co., 2 IBSMA 38, 87 I.D. 119 (1980) (notice of violation failed to set forth with reasonable specificity the nature of the alleged violation). Consequently, we hold that OSMRE's attempt to incorporate the requirements of 25 CFR 216.110 in 25 CFR 216.105(i), as the standard by which to judge whether vegetation had been established, was improper.

In the absence of any applicable regulation, or other agency guidance, providing a definition for "established," we find that Judge Sweitzer's use of the dictionary definition of "establish" was appropriate. 5/ P&M seeded Ramp 2F in October 1984 with a mixture of nine perennial species and mulched the area with 2-1/2 tons of mulch per acre (Tr. 503-04, 513). Germination took place and vegetation grew in 1984 and 1985 (Tr. 83, 427-28). Testimony and exhibits presented at the hearing reveal the presence of healthy vegetation on Ramp 2F (Tr. 58, 75, 77-83, 129-31, 435, 440, 452, 456, 514-15; Exhs. R-5 through R-9; Exhs. P&M S-6 through P&M S-12). The evidence shows that at the time OSMRE issued the NOV in question, vegetation had been established on Ramp 2F. 6/ Therefore, we must agree with Judge Sweitzer's conclusion that 25 CFR 216.105(i) is inapplicable.

5/ We note that in In Re Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (1983)^b, the Board had occasion to refer to a Bureau of Land Management (BLM) definition of "established" in the context of reforestation. Therein we stated: "A stand of timber is said to be 'established' if it consists of suitable growing trees, having survived at least one growing season, and 'which are past the time when considerable juvenile mortality occurs.' BLM Manual 5705.05H (Oregon State Office Supplement)." Id. at 285, 90 I.D. at 203 (footnote omitted). We are not aware of any OSMRE definition of "established" applicable to the backfilling and grading regulations in 25 CFR 216.105.

6/ Having determined that vegetation had been established, we also find that the evidence supports P&M's claim of an exception for premining

b) GFS(MISC) 46(1983)

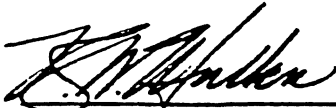
Moreover, even if vegetation had not been established, the evidence in this case does not support the issuance of the NOV because, although OSMRE required P&M to fill, grade, or otherwise stabilize the rills and gullies, the drainage feature had been stabilized at the time the NOV was issued. OSMRE stipulated to P&M's calculations regarding the stability of the drainage channel, and those calculations showed the channel to be self-armored and stabilized (Tr. 626, 633-35, 649, 658). In addition, as noted by Judge Sweitzer, rocks in the bottom of the channel protected against further erosion (Decision at 5, citing various pages of the hearing transcript and exhibits). Therefore, we also agree with Judge Sweitzer's finding that the channel was stabilized.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.



Bruce R. Harris
Administrative Judge

I concur:



R. W. Mullen
Administrative Judge

fn. 6 (continued)

drainage ways (see note 2, supra). OSMRE's contention on appeal that P&M was required to design and seek approval for a drainage channel, rather than merely to recontour the ramp area and allow the runoff to seek its own channel, is without merit. OSMRE cites no legal basis for that position. In fact, the OSMRE inspector testified that he knew of no requirement in the applicable regulations requiring the design of drainways (Tr. 92-93, 97-98). Furthermore, Wayne Robert Erickson, P&M's General Environmental Supervisor at the McKinley Mine, stated that the drainway methodology employed at Ramp 2F had been utilized by P&M at the McKinley Mine for at least 6 or 7 years, and, in fact, had been approved for use by OSMRE in P&M's permanent program permit at the McKinley Mine (Tr. 470-71).

Tab E

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

Tab F

HIDDEN VALLEY COAL MINE

RECLAMATION PLAN

CHAPTER III

Soldier Creek Coal Company

Submitted by

JBR Consultants Group

May, 1986

portion to be restored, it is expected that the channel bottom will rest on bedrock. The gradient of the channel will be the same as it was on the culvert (0.071 ft/ft) (Figure V). The channel will be riprapped to stabilize the disturbed section.

The other two 18" diameter culverts are road drainage culverts which were spaced to convey runoff under the road to prevent significant erosion. With the removal of these culverts waterbars will be installed according to spacing in Table 3b and Plate III at a 45° angle to the direction of the roadbed. These waterbars will serve a similar purpose as the culverts, to control and collect surface runoff from the road and the hillsides above the road. The 11 waterbars will be approximately 18" high by 72" wide with a rounded crest extending across the road (Figure VI). The area just up hill from the bar will be excavated to a depth of 12" by a width of 48". The small flows diverted at each waterbar will be discharged to the west into the natural rockfill above the ephemeral drainage.

The roadbed will then be ripped to increase percolation and water-holding capacity. The entire road surface will be seeded. A gate with a lock will be installed near the top of the road to discourage trespass and prevent livestock drift onto the revegetated areas (Plate III).

This reclamation process on the road will restore the natural

Tab G

1 Q. Then why didn't you place the disturbed areas
2 at the bottom of the disturbance?

3 A. Well, let me repeat that the initial
4 inspections along with DOGM personnel --

5 Q. My question is --

6 MR. STIRBA: Wait. Wait a second. You asked him
7 to explain. He's going to explain it. You asked him
8 why. He's trying to answer. I think he's entitled to
9 answer.

10 THE HEARING OFFICER: Let's let him respond to that
11 last question, as he understood it, and then you can
12 follow-up if you need to.

13 THE WITNESS: Okay. Prior to formulating the
14 reclamation plan and devising which areas to do and how
15 to do them, we had several ground inspection discussions
16 of this area and along with the CalMat people,
17 ourselves, JBR people, and DOGM people, and there was
18 two things that were considered at the time and that was
19 the fact that there was going to be a variance on the
20 road and that we would have to stabilize the road bed to
21 prevent the erosion that was occurring at that time in
22 the road bed.

23 There was no inspection of the outslopes as far as
24 erosion or as an erosion problem there. And also that
25 same consideration applies to this area down here in the

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 MR. RICHARDS: That's the only questions I have of
2 this witness.

3 THE HEARING OFFICER: Mr. Stirba?

4 REDIRECT EXAMINATION

5 BY MR. STIRBA:

6 Q. Mr. Jarvis, insofar as the outslopes are
7 concerned, as they exist today or existed back in
8 November of '91, do you have an opinion as to the
9 efficacy of seeding those areas?

10 A. If I just take a second to explain those
11 areas.

12 Q. Please.

13 A. As I say, the area was initially reclaimed and
14 reseeded in the fall of 1986 and reseeded again in 1989,
15 following some repair, extensive repair works due to
16 flood events. And we have experienced that while it's
17 good to reseed areas that it's -- because it's such a
18 marginal site that it takes an exceptional precipitation
19 year to really get anything to grow, and it's only in
20 the last few years we've been able to get anything to
21 grow.

22 And so sites like those very steep slopes would be
23 very difficult to seed at the proper time to predict
24 that you would get growth out of them. And we have
25 experienced fairly good growth now from our previous

1 seeding efforts, but we've also realized that there's
2 been a lot of colonization by the natural vegetation
3 that we didn't see there to occupy sites and to invade
4 sites that were unvegetated.

5 And the outslopes of the road do not show any
6 indication of colonization either by natural plants or
7 natural seeding from our seeded community because our
8 plant seeding community now is to the stage this year
9 and last year is producing seed and has produced seed
10 from the plants that have established themselves over
11 the years, and we have yet to experience any
12 colonization of those slopes to any extent at all.

13 So I would say that our efforts would have to be
14 very timely to be effective and probably, in most cases,
15 would not be effective since we do have a natural
16 colonization and a natural seeding effort going on there
17 now.

18 Q. Irrespective of the effectiveness, do you have
19 any other concerns about seeding those outslopes as it
20 may relate to altering their condition or movement?

21 A. Well, yes. Realize that those slopes are so
22 steep that if we got anybody on them, there will be
23 quite a bit of disturbance and movement of materials and
24 so we will -- I would suspect that we will loosen a lot
25 of materials and cause a lot of unraveling and, you

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

1 stabilize the road bed and that's -- that's the efforts
2 that were put forth in the reclamation plan and approved
3 as the only efforts needed on the road.

4 MR. RICHARDS: No further questions.

5 MR. STIRBA: Done.

6 THE HEARING OFFICER: Anything further? All right,
7 we're through with this witness. Mr. Stirba, any
8 further testimony?

9 MR. STIRBA: No. Mr. Chairman, we would just offer
10 the exhibits that -- I think it's 81, 82 and 83 and then
11 we would rest.

12 THE HEARING OFFICER: Any objection?

13 MR. RICHARDS: No. I'd like to talk to one
14 witness, if I could, about rebuttal. Could we have a
15 five minute recess?

16 THE HEARING OFFICER: All right. We'll hang
17 another five minutes but don't go far. And we'll admit
18 81, two and three.

19 (Recess.)

20 MR. RICHARDS: I have one rebuttal witness.

21 THE HEARING OFFICER: Let's swear this witness in.

22 AL MUNSON,
23 having been duly sworn was examined and testified
24 as follows:

25 THE HEARING OFFICER: Mr. Richards?

Tab H

4/26/91

JUN 29 1992

SECRETARY, BOARD OF
OIL, GAS & MINING

Permit No ACT/015/007
Inspection Date 4/26/91

Inspection report

Permittee Operator Name Cal Chat 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 ☐ Banded
Enforcement Action None

COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

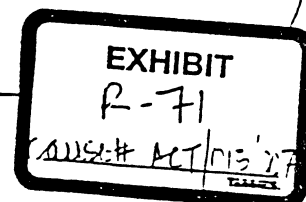
	YES	NO	N/A	COMMENTS		YES	NO	N/A	COMMENTS
1 Permits	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	9 Protection of fish, wildlife and related environmental values	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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 checked="" type="checkbox"/>
- 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"/>
- 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"/>
- 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"/>
- 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 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"/>
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 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

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INSPECTION REPORT COMMENTS

Permit No. ACT/05/007

Inspection Date 4/26/91

Please number comments to correspond with topics on previous page.

Stream Channel Division. The stream channel division was checked from the top to the bottom. No problems were noted.

Other Sediment Control. The silt fence below the A & B coal seams remains functional.

Open 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 Division's position on highwalls and the Hidden Valley was sustained by OSM.

Revegetation. The mine site was dry, with minimal moisture in the top six inches of soil. It is premature to make any substantial judgments 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 when 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 given to PFA

Inspector's signature

Tom J. Helbreich

No. 26

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JUN 29 1992

SECRETARY, BOARD OF
OIL, GAS & MINING

Permit No Act/015/007
Inspection Date 5/7/91

Inspection report

Permittee Operator Name Cal Mat Co.
Business Address 1801 University Drive
City Phoenix State Ariz Zip 85024
Mine Hidden Valley ☐ Surface ☒ Underground ☐ Other
County Emery State Ut
Company Official(s) None
State Official(s) Bill Malencik, Hugh Klein
Time of inspection 1:00 ☐ a.m. ☒ p.m. to 4:00 ☐ a.m. ☒ p.m. ☒ Partial ☐ Complete
Date of last inspection 4/26/91 Weather conditions Clear/Windy
Acreage 950 ☐ Permitted 7 ☐ Disturbed 7 ☐ Regraded 7 ☐ Seeded 7 ☐ Bonded
Enforcement Action None

COMPLIANCE WITH PERMITS AND PERFORMANCE STANDARDS

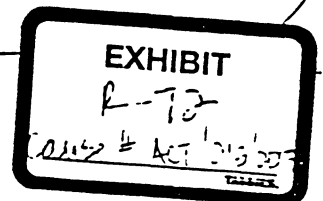
	YES	NO	N/A	COMMENTS		YES	NO	N/A	COMMENTS
1. Permits	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	9. Protection of fish, wildlife, and related environmental values	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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 checked="" 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 checked="" 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 checked="" 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 checked="" 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 checked="" 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 checked="" 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 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 type="checkbox"/>	<input type="checkbox"/>

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INSPECTION REPORT COMMENTS

Permit No. ACT/015/007

Inspection Date 5/7/91

Please number comments to correspond with topics on previous page

General Comments On site conditions were substantially the same as covered in the previous inspection dated 4/26/91. The mine site was dry and showed no evidence of rain run-off.

Followup On Previous Inspections Division on May 6, 1991 received W. Harold Tipton's letter on TOL 91-02-370-002 TV1 relative to the elimination of highwalls. The letter indicates and orders a federal inspection.

Other Sediment Control Silt fences and the erosion matting all were checked and no problems noted.

Vegetation The seeding project showed minimal response to vegetation establishment. Saltbush plants were observed along the reclaimed road. Grass plants are hard to find except in moisture depressions.

Copy of report mailed to Cal Mat/ Lee Edmonson; OSM/Bruce Smith; DOGM/ Joe Helfrich

Copy of report given to filed RFO

Inspector's signature

[Signature]

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