

0034

*File Copy Price River Coal Co*

*Copy to: Joe Cardy Board*

LAW OFFICES OF  
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July 1, 1981

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OF COUNSEL  
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HAND DELIVERED

*ACT/007/004*

Board and Division of Oil,  
 Gas and Mining  
 1588 West North Temple  
 Salt Lake City, Utah 84116

Attention: Cleon Feight

Re: Notice of Violation No. 81-3-2-6--Amended Application for Review

Gentlemen:

Please find enclosed herewith an Amended Application for Review on behalf of Price River Coal Company in connection with the above-captioned Notice of Violation. The enclosed Amended Application amends the application previously filed on behalf of Price River Coal Company on March 4, 1981.

Very truly yours,

*H. Michael Keller*  
 H. Michael Keller

HMK/nw

Enclosures

**RECEIVED**  
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DIVISION OF  
 OIL, GAS & MINING

RECEIVED

JUL 01

BEFORE THE BOARD OF OIL, GAS & MINING DIVISION OF OIL, GAS & MINING

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

IN THE MATTER OF THE )  
APPLICATION FOR REVIEW ) AMENDED APPLICATION  
AND REQUEST FOR HEARING )  
BY PRICE RIVER COAL COMPANY ) Cause No. \_\_\_\_\_  
OF NOTICE OF VIOLATION NO. )  
81-3-2-6 )  
\_\_\_\_\_ )

Pursuant to Sections 40-10-22(3) (a) and 40-6-8(f), Utah Code Ann. (1953), as amended, Price River Coal Company ("Applicant") by and through its undersigned attorney, hereby files this Amended Application for review and request for hearing before the Board of Oil, Gas & Mining ("Board"), amending the Application previously filed by Applicant on March 4, 1981, for review and hearing on Notice of Violation No. 81-3-2-6 ("Notice") issued to Applicant by the Division of Oil, Gas & Mining ("Division") pursuant to the Coal Mining & Reclamation Act of 1979 and the regulations promulgated thereunder. A copy of the Notice is attached hereto as Exhibit "A". By this Amended Application, Applicant requests review and hearing solely on the fact of Violations Nos. 2 and 5 (the "subject violations") set forth in the Notice and on the amount of the civil penalty points and civil monetary penalties

assigned and assessed in connection with the subject violations. In support of this Amended Application, Applicant respectfully alleges and shows:

I. FACTS

1. Applicant operates an underground coal mining operation (Act/007/004) situated in Townships 12 and 13 South and Ranges 8, 9 and 10 East, Salt Lake Base and Meridian, Carbon County, Utah.

2. Applicant has an approved mining and reclamation plan on file with the Division.

3. In the fall of 1980, Applicant sought approval from the Division and the Federal Office of Surface Mining, Reclamation and Enforcement ("OSM") to modify its prior approved mining and reclamation plan to allow construction of two shafts and surface support facilities in Crandall Canyon for the purpose of improving ventilation and handling of personnel and equipment in the mine. At a preconstruction review meeting held between various representatives of Applicant, the Division and OSM on September 17, 1980, it was agreed that Applicant would be allowed to commence certain activities in furtherance of its proposed Crandall Canyon Project.

4. By letter dated November 13, 1980, James W. Smith, Coordinator of Mine Land Development for the Division, formally

granted Applicant approval to do the following work in Crandall Canyon:

1. Grade access road to Class III specs.
2. Remove and stockpile topsoil from the shaft construction site.
3. Prepare site for shaft contractor's equipment.
4. Initiate shaft construction.

The approval was made subject to certain express stipulations relating specifically to review of catchment basins by the Division of Water Rights and the Division of Health and the preservation of certain potential archeological sites. The final paragraph of the letter stated that the Division had no further comments or stipulations concerning the approval of the construction as outlined above.

5. By letter dated December 23, 1980 from Donald A. Crane of OSM's Region V Office in Denver, OSM authorized Applicant to proceed with the work in Crandall Canyon as approved by the Division. The approval of OSM was expressly made subject to various stipulations. The only stipulation relating specifically to the sequence of construction activities at the Crandall Canyon Project required that temporary sediment control basins and associated diversion be constructed prior to initiation of the shaft construction.

6. Pursuant to the specific approvals granted by the Division and OSM for the Crandall Canyon operation, Applicant proceeded to commence removal and stockpiling of topsoil from the shaft construction site, installation of sediment control facilities, and preparation of the site for the shaft contractor's equipment.

7. On February 4, 1981, an inspection of Applicant's Crandall Canyon operation was conducted by Inspector Tom Portle and other representatives of the Division. At the time of the inspection, Applicant was still in the process of installing sediment control facilities and preparing the site for the shaft contractor's equipment, including the pouring of concrete pads on which to store equipment to be used later in connection with shaft construction. Applicant had not initiated shaft construction.

8. In connection with the inspection, Inspector Tom Portle issued the Notice to Applicant and alleged therein six violations of which Nos. 2 and 5 relate specifically to Applicant's operations at the shaft site in Crandall Canyon. Violation No. 2 of 6 was based on an alleged failure by Applicant to comply with the terms and conditions of its approved permit, in violation of UMC 771.19. Violation No. 5 of 6 was based on an alleged failure by Applicant to construct sediment control methods to prevent to the extent possible additional contribu-

tions of sediment to streamflow or to runoff outside the permit area, in violation of UMC 817.45.

9. By letter dated February 27, 1981 and received by the Division on March 4, 1981, Applicant requested that an informal conference be held with the Division's assessment conference officer, Ron Daniels, pursuant to §40-10-22(c), Utah Code Ann. (1953) and UMC §843.12(a)(2). In connection with its request, Applicant filed with the Board on March 4, 1981, an Application for Review and Request for Hearing on the Notice. The Application requested, inter alia, that the matter be set for hearing at an appropriate time following completion of the informal conference.

10. By a Notice of Proposed Assessment dated April 6, 1981, the Division announced to Applicant proposed assignments of civil penalty points and assessments of civil monetary penalties for the violations set forth in the Notice.

11. On April 22, 1981 in the offices of the Division, an assessment conference, as requested by Applicant, was held between representatives of Applicant and representatives of the Division. Ron Daniels, the assessment conference officer for the Division, presided over the conference.

12. By letter dated May 28, 1981 and received by Applicant on June 3, 1981, the Division's assessment officer, Ron Daniels, issued an assessment conference report concerning

the Notice. His report announced various revisions to the originally proposed assessment. With respect to the subject violations, he upheld both violations, but reduced the assessment for Violation No. 2.

## II. STATEMENT OF REASONS

### A. Fact of the Subject Violations.

1. Violation No. 2. Applicant denies the violation and requests that it be vacated for the following reasons:

- a. Applicant was in compliance with the terms of its approvals from the Division and OSM.

As set forth in the Notice, the violation was based on Applicant's alleged failure to follow the terms of its approved permit. As indicated in the Inspection Report prepared by Inspector Tom Portle and dated February 26, 1981, it appears that the apparent basis for the violation was the inspector's perception that Applicant had failed to follow the specific stipulation imposed by OSM in its approval letter requiring Applicant to construct sediment control facilities prior to initiation of shaft construction.

At the time of the inspection, Applicant was in the process of installing sediment control facilities and preparing the site for the shaft contractor's equipment in accordance with the approvals granted to it by the Division and OSM. Appli-

cant had not initiated the shaft construction. The pouring of concrete pads for storage of equipment to be used later during shaft construction constituted site preparation, not initiation of shaft construction. Therefore, there is no basis for the alleged violation and it should be vacated.

- b. The violation is a duplication of Violation No. 5.

The violation was apparently based on the allegation that Applicant initiated shaft construction prior to completion of sediment control structures. As discussed more fully below, Violation No. 5 was also based on Applicant's alleged failure to construct sediment control structures prior to initiation of shaft construction. Moreover, the inspector's report clearly indicates that both of the subject violations were issued on the basis of an alleged failure by Applicant to complete construction of sediment control facilities prior to initiation of shaft construction. Therefore, Violation No. 2 is duplicative of Violation No. 5 and should be vacated. See, e.g., Delight Coal Co. v. OSM, No. CH9-4-P ALJ (Allen) (June 29, 1979), holding, inter alia, that where one federal coal mining violation is duplicative of another it should be vacated.

2. Violation No. 5. Applicant denies the violation and requests that it be vacated for the following reason:

Applicant was in the process of constructing sediment control facilities in compliance with its approvals at the time of the inspection.

As set forth in the Notice, the violation was based on Applicant's alleged failure to construct sediment control methods. In fact, at the time of Inspector Portle's inspection, Applicant was in the process of installing sediment control facilities. Moreover, Applicant was under no regulatory deadline by which to complete construction of such facilities. Thus, there was no failure by Applicant to construct such facilities.

In the Inspection Report of Inspector Portle of February 26, 1981, Violation No. 5 indicates that the actual basis for Violation No. 5 was the inspector's perception that Applicant was not constructing the sediment control facilities in accordance with the stipulation that such construction be completed prior to initiation of the shaft construction. Inasmuch as Applicant was, at the time of the inspection, in the process of constructing its sediment facilities prior to any initiation of the shaft construction, the violation had no basis and should, therefore, be vacated.

#### B. Civil Monetary Penalties.

1. Violation No. 2. The civil monetary penalty should be vacated or reduced for the following reasons:

- a. Applicant did not commit the alleged violation, and, therefore, no civil penalty should be assessed in connection therewith.
- b. Even if the violation is upheld, the civil monetary penalty should be substantially reduced.

Under the assessment conference report, Applicant was assessed a civil monetary penalty of \$380.00, based on an assignment of 29 penalty points, of which 1 point was assigned for a prior violation, 19 points were assigned for seriousness, 8 points were assigned for negligence, and 1 point was assigned for acreage.

Of the 19 points assigned for seriousness, 7 were assigned for the probability of the event which the violated standard was designed to prevent, and 12 were assigned for the extent of the actual or potential damage that occurred or would occur. The event which the violated standard was apparently intended to prevent was the contribution of additional sediments to streamflow or runoff outside the permit area. No actual damage has been shown by the inspector to have occurred. Thus, the 12 points assigned for extent of damage must be based on speculation as to potential damage.

It is the apparent position of the inspector that Applicant's site preparation activities, such as the pouring of cement pads for storage of equipment, constituted initiation of shaft construction. Such activity would have neither

increased the probability of the occurrence of environmental damage to streamflow or runoff outside the permit area pending completion of construction and installation of sediment control facilities, nor created potential for environmental damage.

Prior to installation of sediment control facilities, Applicant was required to remove topsoil from the area. Thus, the area was already disturbed and cleared of vegetation prior to completion of construction of the sediment control facilities. Pouring of the concrete pads would have served to minimize the amount of exposed surface disturbed area which might have provided a source of additional contributions of sediment. Therefore, there was no probability of occurrence or extent of potential damage, and no points should have been assigned for seriousness.

No points should have been assigned for negligence, because Applicant was acting in good faith reliance on the approvals granted to it by the Division and OSM in preparing the site for the shaft contractor's equipment and installing sediment control facilities. Thus, the Applicant acted without negligence, and any violation that may have occurred was no more than an inadvertent violation for which no points for degree of fault should have been assigned.

Based on the foregoing, the civil penalty points assigned in connection with the violation should be vacated, or reduced to no more than 2 points, and the civil monetary penalty should be vacated or reduced accordingly.

2. Violation No. 5. The civil penalty assessed in connection with the violation should be vacated or reduced for the following reasons:

- a. Applicant did not commit the alleged violation, and, therefore, no civil monetary penalty should be assessed in connection therewith.
- b. Even if the violation is upheld, the civil penalty should be substantially reduced.

A civil monetary penalty of \$640.00 was assessed for the violation based on a total of 41 assigned penalty points, of which 1 point was assigned for past violations, 24 points were assigned for seriousness, 16 points were assigned for negligence, and 1 point was assigned for acreage.

Of the 24 points assigned for seriousness, 12 points were assigned for the probability that the event which the violated standard was designed to prevent would occur and 12 points were assigned for the extent of actual or potential damage that occurred or would occur. Like Violation No. 2, this violation is based upon the inspector's perception that the Applicant initiated the shaft construction prior to completion of construction of sediment control facilities. Thus,

the same reasons discussed above for reducing the civil penalty assessed for Violation No. 2 are also applicable to Violation No. 5. Accordingly, no points should have been assigned for seriousness or negligence.

Based on the foregoing, the civil penalty points assigned in connection with the violation should be vacated or reduced to no more than 2 points, and the civil monetary penalty should be vacated or reduced accordingly.

### III. REQUEST FOR RELIEF

Based on the foregoing, Applicant respectfully requests that this Amended Application be set for hearing before the Board at the next regularly scheduled meeting of the Board; that notice of the time, place and purpose of such hearing be given in accordance with the laws of the State of Utah and the rules and regulations of the Board and Division; that upon the conclusion of such hearing the Board enter an order vacating the subject violations and the abatement actions required thereunder and vacating or reducing the penalty points and monetary penalties that have been assigned and assessed in connection therewith.

DATED this 15th day of July, 1981.

Respectfully submitted,

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By: H. Michael Keller

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