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March 1, 1983

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DIVISION OF
OIL, GAS AND MINING

Mr. Ron Daniels
Deputy Director
Utah Division of Oil, Gas and Mining
State Office Building
Room 4241
Salt Lake City, Utah 84114

Re: Price River Coal Company--Pattern of Violations

Dear Ron:

This letter is written in response to your letter of February 3, 1983, to Price River Coal Company ("Company") advising that the Division has determined that a pattern of violations, as described in Rule UMC 843.13, exists for the Price River Complex Coal Mine, and further indicating that an Order to Show Cause will be issued to the Company in this regard. The alleged pattern is based on four notices of violation issued during the period between November 1, 1981 and November 1, 1982. The purpose of this letter is to advise you that no such pattern exists sufficient to warrant the issuance of an Order to Show Cause pursuant to UMC 843.13.

Under UMC 843.13(a)(1), the issuance of a Show Cause Order can only be based upon a pattern of violations that were willful or that resulted from an unwarranted failure of the permittee to comply. Subparagraph (a)(3) of that regulation provides that the Division shall determine that a pattern of violations exists, if it finds that there were violations of the same or related requirements during three or more state inspections of the permit area within any twelve month period. Even if a pattern were deemed to exist by virtue of that

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provision, the Division must further determine that the violations were caused willfully or through an unwarranted failure of the permittee to comply, in order to support an order to show cause under subparagraph (a)(1).

The Notices of Violation referred to in your letter may be summarized as follows:

1. N81-2-14-1 was issued on November 24, 1981, in connection with an inspection conducted on November 23, 1981. It cites a single violation of UMC 817.45 for alleged failure of the Company's independent contractor to maintain two temporary berms constructed at the Crandall Canyon shaft development site. Under the Company's contract with its independent shaft contractor, the contractor was obligated to install and maintain appropriate sediment control measures, such as berms. Any runoff that might have escaped these berms would have either remained on site or flowed into a drainage channel in which the operator had installed a series of straw dikes to entrap any sediment contained in any runoff flowing from the construction site. No actual damage occurred as a result of the alleged inadequacy of the berms, and only eight points were assigned to the Company for negligence. The Company promptly abated the violation within 24 hours after the inspection. Thereafter, on its own initiative, the Company installed an additional series of straw dikes in the main drainage channel leading off the Crandall Canyon Site for the purpose of preventing any damage to stream flow outside the permit area that might result from any future failures of its independent contractor to maintain berms and other sediment control devices on the construction site.

2. N82-4-4-2 was issued on March 16, 1982, in connection with an inspection conducted on March 10, 11, and 12, 1982. It cites two violations, the second of which was vacated following an assessment conference. The first was cited as a violation of UMC 817.42(a)(1) based on the alleged failure of the Company's independent contractor to maintain a section of berm at the number 2 shaft site in Crandall Canyon. The alleged violation was immediately abated at the direction of a Company representation in the presence of the inspector. Any water or runoff that might have escaped the berm would have flowed into the drainage channel in which the extensive series of straw dikes, discussed above, had previously been placed by the Company. Any sediment-laden runoff would have been entrapped by these dikes. Twenty-three points were assigned

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for negligence. It is our understanding that the total number of points assigned to this violation was substantially reduced following an assessment conference. We are still in the process of reviewing our files to confirm the reduction in points.

3. N82-4-5-1 was issued on June 23, 1982, in connection with an inspection conducted on June 18, 1982. It cites a single violation of UMC 817.41(c) and (d), 817.42(a)(2) and (c), 817.45 and 817.46(f), for alleged failure to clean a sediment pond in Crandall Canyon. Several months prior to its issuance, excessive ground water flow was unexpectedly encountered in the course of the shaft development. The Company promptly filed an emergency request with the Division in the early part of April, 1982, seeking immediate approval to enlarge its sediment pond at the Crandall Canyon site to contain the increased flow from the shaft. As indicated in the assessment conference report, the various regulatory agencies, including the Division, failed to provide timely review and approval of the operator's request, and thereby left the operator with no authority to expand the sediment pond to accommodate the increased discharge. As a result of the regulatory delay, the Company not only suffered the issuance of the Notice of Violation, but was forced, over the course of several months, to suffer the extraordinary expense and effort of trucking excess discharge off the site to prevent any drainage problems from occurring. Final approval for construction of the new pond was not received until several months after the Notice of Violation was issued. As indicated in the assessment conference report, only 7 points were assigned for negligence, and it was expressly recognized that the impact of the violation was minimal, because the operator had installed additional sediment controls in the form of numerous straw dikes to minimize any problems from excessive discharges from the existing sediment pond.

4. N82-4-12-2 was issued on October 15, 1982, in connection with an inspection conducted on October 7, 8, and 13, 1982. It cited two violations. The first was based on an alleged violation of UMC 817.41, 817.42(a)(1), 817.43(c) and 817.45 relating to maintenance of berms and diversions in Hardscrabble Canyon. Following an assessment conference, the civil penalty was totally vacated, because the damage to the berms had been caused by torrential rainfall and the Company had engaged in continuous and diligent maintenance throughout and following the period of adverse weather. Thus, there was

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no finding of fault on the part of the operator. The alleged violation should have been vacated. The second violation was based on an alleged violation of UMC 817.43(c) and (f), 817.45 and 771.19, for failure of the independent contractor to maintain diversions at the number one shaft site in Crandall Canyon. No actual environmental damage occurred as a result of the alleged failure to maintain berms and only 10 points were assigned for negligence. Furthermore, it was expressly recognized that the Company had installed temporary sediment control measures to mitigate any possible damage that could result from any failure by its independent contractor to fulfill its contractual responsibility to maintain berms and other sediment control devices.

Based on the foregoing, it appears that six violations were cited in the four notices. Of these, one was vacated and one was assessed no penalty. Thereby leaving four violations for which a penalty was assessed. The violation cited in N82-4-5-1 relating to cleaning a sediment pond resulted from the inability of the operator to secure regulatory approvals and had no relationship whatsoever to the other violations.

From the foregoing summary, it should be clear that the cited violations were neither willful nor caused by any unwarranted failure of the permittee to comply with applicable requirements. Indeed, it appears obvious that the Company took extraordinary measures to prevent any violations and to mitigate any damage that could occur from violations.

In further support of the Company's position, we offer the following explanation of the proper interpretations of the terms "willful" and "unwarranted failure to comply" as used in UMC 843.13:

1. Willful. As defined in UMCA 43.13, the term willful means "an act or omission . . . committed by a person who intends the result which actually occurs." Thus, a willful violation implies an intentional act or omission by the person who causes the violation. Under the point system in UMC 845, the maximum number of points assignable for negligence is 15, and between 16 and 30 points are assignable for reckless, knowing or intentional conduct. With the possible exception of one of the violations in question, all were assigned less than 15 points for degree of fault, thereby clearly indicating that such violations were not willful but involved a degree of fault less than pure negligence.

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2. Unwarranted Failure to Comply. Under UMC 843.13 and §40-10-13 (19) U.C.A. (1953), the term "unwarranted failure to comply" is defined to mean the failure of the permittee to prevent the occurrence of any violation due to indifference, lack of diligence, or lack of reasonable care or the failure to abate any violation due to indifference, lack of diligence, or lack of reasonable care. It is important to note that the term "willful" is expressly defined in terms of the conduct of the person who actually commits the violative act or omission, the term "unwarranted failure to comply" is expressly defined in terms of the conduct of the permittee. Thus, where a permittee has exercised diligence and reasonable care to prevent the occurrence of a violation or to abate violations, there can be no finding of any unwarranted failure to comply on the part of the permittee, simply because a violation was caused willfully or negligently by an errant employee or independent contractor.

If an unwarranted failure to comply were interpreted to mean any violation caused by the negligence of any person, virtually every violation would be subject to the provisions of 843.13. Obviously, this could not have been the intention of the legislature, or the Board in adopting the regulation. There would have been no need for an express reference in the act or regulation to "willful violations," if all negligently caused violations could give rise to a determination of a pattern testifying issuance of a show cause order.

It has been held that the permittee's unwarranted failure to comply implies a greater degree of fault than the ordinary negligence referred to under the civil penalty system. OSM v. RWR Development Co. & Debcon Coal Co., No. Cho 2-a (ALJ Allen, March 17, 1981). Accordingly, there should never be a determination of an unwarranted failure to comply where the points assigned to a particular violation do not even reach the maximum amount assignable for ordinary negligence. With the possible exception of one violation, all of the violations in question received no more than 10 points for degree of fault.

In making any preliminary determination as to the existence of a pattern of violations, the Division should first examine the notices and the accompanying reports of the inspectors and the assessment officer. Where, as here, it is apparent on the face of the notices and accompanying reports that the violations were not willful, that all, but possibly one, were assigned less than 15 points for negligence, that the

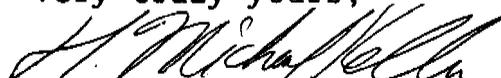
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permittee exercised diligence to prevent the occurrence of violations and promptly abated all violations, the Division has no basis for determining that a pattern of violation exists sufficient to support the issuance of a show cause order. It is also important to note that no damage to the environment or public health or safety ever resulted from any of the violations in question and that all such violations were abated in a timely manner and pose no continuing problems which in any way warrant the suspension or revocation of the Company's permit. We request, therefore, that no such determination be made by the Division.

If the Division should, nevertheless, determine that such a pattern of violations does exist, we request that we be notified of same and that the Company be granted a hearing before the Board prior to issuance of any order to show cause.

We hope you will give serious consideration to the foregoing, and reach the conclusion that there is no pattern of violations to support the issuance of the show cause order under UMC 43.13. Price River is concerned about the seriousness of the allegations in your letter and is prepared to take all necessary legal action to prevent any suspension or revocation of its mine permit. However, the Company remains eager and willing to cooperate with the Division in fulfilling its responsibilities under the law. If we can respond to any questions that you may have regarding the foregoing, please do not hesitate to contact me.

Very truly yours,


H. Michael Keller

HMK:kmr
cc: Barbara Roberts
Gordon Cook
Joseph Reynolds, Esq.