

0005



State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

Michael O. Leavitt
Governor

Ted Stewart
Executive Director

James W. Carter
Division Director

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5340
801-359-3940 (Fax)
801-538-5319 (TDD)

November 28, 1994

Facsimile Transmittal (letter only)
(202) 208-2882

Certified Return Receipt Requested
P 074 976 425

Ed Kay, Deputy Director
Office of Surface Mining
Reclamation and Enforcement
1951 Constitution Ave., N.W.
Washington, D.C. 20240

Re: Informal Appeal, Ten-Day Notice X94-020-352-003 TV2, Gordon Creek #2, #7 and #8 Mines, Mountain Coal Company, ACT/007/016, Folder #5, Carbon County, Utah

Dear Mr. Kay:

Pursuant to 30 C.F.R. § 842.11(b)(1)(ii)(A), I am writing to request an informal review of the decision of the Albuquerque Field Office ("AFO") that the responses of the Division of Oil, Gas and Mining ("DOGM") to the above-cited Ten-Day Notice ("TDN") are arbitrary and capricious. I am including copies of the TDN, DOGM's response (September 15, 1994), a supplemental response by DOGM (October 20, 1994), and AFO's determination (November 21, 1994) for your review.

Part 1 of the TDN was issued for "Failure to provide, in the mine plan, for the elimination of all highwalls. Highwalls at the #2 Mine." I was not aware that the Office of Surface Mining ("OSM") commonly writes TDNs for alleged permit defects, a troubling development which looks like second-guessing state permitting decisions. Be that as it may, DOGM has the situation well in hand as explained in both of DOGM's responses to the TDN. AFO's determination that DOGM has acted without any rational basis is apparently driven by AFO's review of DOGM's deficiency letters to the operator.

I am also attaching DOGM's most recent correspondence to the operator in the form of a November 21, 1994 deficiency letter which analyzes the site constraints and articulates DOGM's position on highwall elimination, among other

Page 2
Ed Kay
ACT/007/016
November 28, 1994

things. As Judge Penn pointed out in his NCA vs. Uram decision, issuance of a Notice of Violation is not the only appropriate response to a TDN. DOGM respectfully submits that technical examination of the site, data gathering and analysis, review of the applicable case and administrative law, and thoughtful application of the requirements of the regulatory program to achieve the most beneficial environmental result, all of which began prior to issuance of the TDN, also constitute a rational response.

Part 2 of the TDN was issued for "Failure to reclaim the mine according to the schedule approved in the permit. Number 2, 7 and 8 Mine areas." Here again, AFO concentrates its review on Division correspondence. Mountain Coal Company ("MCC") failed to complete reclamation by October 1993 because DOGM told them not to. As is evident by DOGM's November 21 letter, MCC still does not have final approval to complete earthwork. This delay has resulted, in no small part, because of OSM's unwillingness to even discuss the technical and regulatory problems of the site. To cite MCC now for following DOGM's instructions would be the arbitrary action.

As you know, the highwall and AOC issues are evolving in the Colorado Plateau because of the technical difficulties an absolutist application of the regulations creates. I have attached the recent opinions of Judges Child and Rampton which shed light on the functional, as well as visual, attributes of AOC and on the distinction between highwalls and other cutslopes associated with underground mining.

I respectfully request that you review the record in this matter and find that the Division's actions in correcting the problems of the Gordon Creek #2, #7 and #8 mine permit are appropriate.

Very truly yours,



James W. Carter
Director

jbe
Enclosures
cc/enc: Lowell Braxton
Pam Grubaugh-Littig
Joe Helfrich
H:GC278.APP

P 074 976 425

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DOG M JBE ACT/007/016 #5

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ED KAY DEPUTY DIRECTOR
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
1951 CONSTITUTION AVE N W
WASHINGTON DC 20240

4. Article Number:
P 074 976 425

5. Signature - Address:
[Signature]

6. Signature - Agent:
[Signature]

7. Date of Delivery:
12/19/94

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PENALTY FOR PRIVATE USE, \$300

STATE OF UTAH
NATURAL RESOURCES
OIL, GAS, & MINING
TRIAD CENTER, SUITE 350
SALT LAKE CITY, UTAH 84180-1203

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of Surface Mining
Reclamation and Enforcement
TEN-DAY NOTICE

Originating Office: OFFICE OF SURFACE MINING
505 MARGUERITE AVE. NW
ALBUQUERQUE, NM 87102
Telephone Number: (505) 766-1486

Number: X - 94 - 020 - 352 - 003 TV 2

Ten-Day Notice to the State of UTAH DIVISION OF OIL, GAS AND MINING

You are notified that, as a result of A FEDERAL INSPECTION (e.g. a federal inspection, citizen information, etc.) the Secretary has reason to believe that the person described below is in violation of the Act or a permit condition required by the Act. If the State Regulatory Authority fails within ten days after receipt of this notice to take appropriate action to cause the violation(s) described herein to be corrected, or to show cause for such failure and transmit notice of your action to the Secretary through the originating office designated above, then a Federal inspection of the surface coal mining operation at which the alleged violation(s) is occurring will be conducted and appropriate enforcement action as required by Section 521(a)(1) of the Act will be taken.

Permittee: <u>MOUNTAIN COAL COMPANY</u> <small>(Or Operator if No Permit)</small>	County: <u>CARBON</u>	<input type="checkbox"/> Surface
Mailing Address: <u>P.O. Box 591 SOMERSET, CO 81434</u>		<input checked="" type="checkbox"/> Underground
Permit Number: <u>ACT/007/016</u>	Mine Name: <u>GORDON CREEK</u> <u>2, 7 AND 8</u>	<input type="checkbox"/> Other _____

NATURE OF VIOLATION AND LOCATION: FAILURE TO PROVIDE, IN THE MINE
PLAN, FOR THE ELIMINATION OF ALL HIGH WALLS.
HIGHWALLS AT THE #2 MINE.

Section of State Law, Regulation or Permit Condition believed to have been violated: R645-301-592.200
~~R645-301-355.120~~

NATURE OF VIOLATION AND LOCATION: FAILURE TO RECLAIM THE MINE
ACCORDING TO THE SCHEDULE APPROVED IN THE PERMIT.
NUMBER 2, 7 AND 8 MINE AREAS.

Section of State Law, Regulation or Permit Condition believed to have been violated: R645-300.142

NATURE OF VIOLATION AND LOCATION: _____

Section of State Law, Regulation or Permit Condition believed to have been violated: _____

Remarks or Recommendations: _____

Certified Return Receipt No. P 079 749 371

SEP - 6

Date of Notice: 8/31/94

Signature of Authorized Rep.: Russ Porter

Print Name and ID: RUSS PORTER #352



State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

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Tdo OB

Michael O. Leavitt
Governor

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Executive Director

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Division Director

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
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801-359-3940 (Fax)
801-538-5319 (TDD)

September 15, 1994

Certified Return Receipt
P 074 977 108

Thomas E. Ehmett, Acting Director
Office of Surface Mining
Reclamation and Enforcement
505 Marquette N.W., Suite 1200
Albuquerque, New Mexico 87102

Re: Response to Ten-Day Notice X94-020-352-003 TV2, Mountain Coal Company, Gordon Creek #2, #7, and #8 Mines, ACT/007/016 Folder #5, Carbon County, Utah

Dear Mr. Ehmett:

This letter responds to the above-referenced Ten-Day Notice ("TDN"), the certified copy of which was received at the Division Office on September 6, 1994.

Part 1 of 2 of the TDN reads: "Failure to provide in the mine plan, for the elimination of all highwalls. Highwalls at the #2 Mine." Regulation cited: R645-301-542.200.

The Division recognized the inadequacies of the reclamation plan at the Mountain Coal Company ("MCC") Gordon Creek #2, #7, & #8 mines in June of 1991. The Division subsequently issued a Division Order and a Notice of Violation requiring amendment of the reclamation plan to provide for complete highwall elimination, and has entered into a Settlement Agreement with the operator for the same purpose, all as set forth in the enclosed abbreviated chronology of these actions. Mountain Coal submitted the required plan amendments, which are now under review by the Division.

On two occasions, the Division invited OSM's participation in review of the reclamation plan with respect to highwall elimination. OSM declined to participate in the review or offer guidance, but stated, on December 14, 1993, that it

Page 2

Thomas E. Ehmett
TDN X94-020-352-003 TV2
September 15, 1994

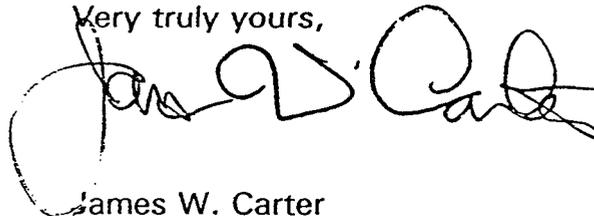
preferred to review plans when approved by the Division. Since the Division has not yet approved Mountain Coal's revised reclamation plan, and has already required MCC to revise its reclamation plan to provide for highwall elimination, OSM's allegation that the plan does not contemplate elimination of highwalls is both premature and groundless. Part 1 of the TDN should be eliminated, as it lacks a present factual basis.

Part 2 of 2 reads: "Failure to reclaim the mine according to the schedule approved in the permit. Number 2, 7, and 8 Mine areas." Regulation cited: R645-300.142.

The Division has prohibited MCC from following its originally approved reclamation schedule because the approved plan did not comport with Utah's changing regulatory requirement for elimination of highwalls. By taking enforcement and administrative action, the Division has effectively cancelled the reclamation schedule of the approved plan. When the revised reclamation plan is determined to be technically sound, a new reclamation schedule for the modified reclamation activities will be approved.

Given the record of bona fide technical problems at these mines and the plan modifications now pending, particularly in the light of both Utah's and MCC's requests for OSM technical input to plan modification, sustaining this TDN serves neither of us well. I request that AFO find this response appropriate as to both parts of TDN X94-020-352-003.

Very truly yours,

A handwritten signature in black ink, appearing to read "James W. Carter". The signature is fluid and cursive, with a large initial "J" and "C".

James W. Carter
Director

jbe

Enclosure: H:GC27CHRO.DO-

cc/enc: A. Klein, OSM

L. Braxton

P. Grubaugh-Littig

J. Helfrich

H:007016TD

GORDON CREEK #2, #7 & #8 MINES
ABBREVIATED CHRONOLOGY
RECLAMATION PLAN

- December 3, 1990 Division ("DOGM") notified of closure of Gordon Creek #2, #7 & #8 Mines.
- June 6, 1991 Division Order DO-91A ("DO") issued re: Highwall Reclamation.
- July 8, 1991 Mountain Coal Company ("MCC") requested 120-day extension citing landowner request, highwall stability issues, reclamation costs and scheduling as bases.
- July 11, 1991 Meeting with Dan Guy, Lowell Braxton and Pamela Grubaugh-Littig ("PGL"). Extension granted until 11/11/91 for submittal of DO information.
- August 6, 1991 Dianne Nielson, Lowell Braxton, Jess Kelley, and Dan Guy meet at the site to look at the highwalls and discuss possible ways of reclaiming them. At this meeting, it was decided that the Division and the operator would seek the assistance of the Western Technical Center ("WTC") in the process of "formulation and approval" of a highwall reclamation plan which would be both technically sound and programmatically acceptable to the Division and to the Office of Surface Mining ("OSM").
- September 3, 1991 Division requests WTC assistance in formulating highwall elimination plan.
- December 12, 1991 MCC submits proposal to revise Postmining Land Use information.
- January 24, 1992 Proposal denied.
- January 27, 1992 Letter sent to Lowell Braxton stating the provisions for administrative and judicial review at R645-300-200 will apply to the DO.
- February 25, 1992 Meeting with MCC and Division re: the complete elimination of highwalls.
- March 4, 1992 Clarification letter sent reiterating that complete elimination of highwalls is required.

April 29, 1992 Request received for extension to 5/7/92. Extension granted for submittal of "complete and accurate information relative to the reclamation of this mine."

May 7, 1992 MCC submits DO-91A response.

June 3, 1992 Hydrology review submitted to PGL. Permanent impoundment is proposed with critical information missing.

June 8, 1992 At I & E meeting, PGL advises Lowell Braxton of status of DO-91A. He recommends issuance of a violation.

June 15, 1992 NOV #N92-20-1-1 issued.

June 18, 1992 NOV modified to extend abatement until June 29, 1992.

July 14, 1992 Fact of Violation Hearing.

July 28, 1992 Division Order DO-92A issued regarding reclamation at Gordon Creek #2, #7 & #8.

August 13, 1992 NOV #N92-20-1-1 vacated.

August 17, 1992 "Settlement Agreement" letter from Dianne Nielson to Scot Anderson, requires submittal of required information by 12/18/92.

August 20, 1992 MCC submits highwall information.

February 1, 1993 Reclamation plan submitted.

March 17, 1993 Division completeness and technical review sent to MCC.

April 21, 1993 PGL speaks with Kathleen Welt, who says that there was a meeting with Scot Anderson, Ray Lowrie (OSM, Denver) and herself on 4/20/93. Denver could provide no assistance on highwall issue, Albuquerque Field Office ("AFO") must authorize, per Ray Lowrie.

May 4, 1993 Letter to Bob Hagen from Scot Anderson (Legal, MCC) requesting a meeting to discuss the complete reclamation of the Gordon Creek Mine in 1993.

- June 24, 1993 OSM oversight meeting at the Division. Operator request for technical assistance is discussed. OSM states that technical assistance must be requested through the Division.
- July 12, 1993 Letter from Kathleen Welt to Division requesting extension to August 6, 1993 for resubmittal.
- August 6, 1993 Resubmittal of entire plan to Division from MCC.
- December 14, 1993 Scot Anderson calls PGL to notify Division that ARCO (Mountain Coal Company) met with OSM-AFO on 12/7 (Steve Rathbun and Henry Austin) regarding the highwall issue at the #7 Mine. Mr. Anderson suggested a technical meeting with OSM-DOGM-ARCO, but Mr. Rathbun told him that would not happen. Mr. Rathbun stated that the #7 highwall must be completely eliminated, but OSM would review material submitted to them from the Division. Scot said that they will take a fresh look at the issue and decide upon the best option.
- January 18, 1994 Scot Anderson calls PGL to notify Division that ARCO will respond to Division in mid-February regarding their position on highwalls.
- March 14, 1994 Meeting with Scot Anderson, Phil Schmidt, Dan Guy, Jim Carter, Lowell Braxton, Daron Haddock, Jesse Kelley, Ken Wyatt, Henry Sauer, Tom Munson, and PGL regarding status of DOGM/OSM highwall situation. Jim tells Mountain Coal that Division will review the 8/6/93 plan according to a yet-to-be approved Approximate Original Contour ("AOC") directive. This review will entail an informal meeting with Mountain Coal and Division on 4/18.
- August 11, 1994 Meeting with Mountain Coal (Scot Anderson, Dan Guy, Paige Beville) and Division (Daron, Randy, Jesse, Susan, Henry, PGL) to discuss the June 30 deficiency letter, in particular, AOC at #7 Mine. Will request extension for submittal by 9/30.



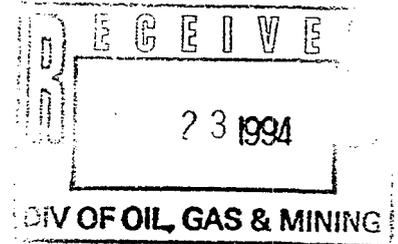
United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Suite 1200
505 Marquette Avenue N.W.
Albuquerque, New Mexico 87102

November 21, 1994

CERTIFIED RETURN RECEIPT NO. P 079 749 502

Mr. James W. Carter, Director
Department of Natural Resources
Division of Oil, Gas and Mining
355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203



Re: Division Response to Ten-Day Notice X94-020-352-003 TV2

Dear Mr. Carter:

The Albuquerque Field Office (AFO) received your response to Ten-Day Notice (TDN) X94-020-352-003 TV2 via fax on September 15, 1994. Your response was received within the 10-day period and is considered timely. The TDN was issued as a result of an oversight inspection conducted August 20-21, 1994, of the Gordon Creek 2, 7 and 8 mines. A State inspector was present throughout the inspection.

During AFO's review of your September 15 response, you submitted additional information on October 20, 1994, which was to amplify and clarify the initial response.

Part 1 of the TDN was issued for "Failure to provide in the mine plan, for the elimination of all highwalls. Highwalls at the #2 Mine." In your response, you state that the Division had recognized the inadequacies of the reclamation plan at the Gordon Creek 2, 7 and 8 mines during June of 1991. You further state that a Division Order and Notice of Violation were issued requiring the elimination of all highwalls and that a Settlement Agreement was entered into with the operator for the same purpose. You also provided an "abbreviated chronology" of these actions. Your October letter indicates that you are reviewing the August 6, 1993, response from Mountain Coal Company (MCC) and responses for subsequent deficiency letters.

AFO will agree that the elimination of highwalls at the "Old Fan Portal" and the #7 mine is discussed in the deficiency letter dated June 30, 1994, which you sent to MCC, permittee at the mines. However, the current approved mine plan states

that some highwall will be retained at the #2 mine. The revised mine plan, which was the subject of the deficiency letter, states the highwall at the #2 mine will be "reduced or eliminated based on the stability analysis for the site." This indicates that the operator has not made a firm commitment to eliminate the highwall at the #2 mine. In your response, you did not provide any documentation which clearly shows that the highwall at the #2 mine will be completely eliminated. A review of the June 30, 1994, deficiency letter does not find any reference to the elimination of the highwall at the #2 mine. You have not provided any other deficiency letters addressing the problem with the #2 mine highwall. The last open portal at the mine was sealed in 1990. Shortly after that, the Division became aware that the elimination of the highwalls at the mine would be an issue. After 4 years, there is no assurance that all the highwalls at the mines will be eliminated. Since the Division has not provided any documentation which clearly shows that the highwalls at the #2 mine will be completely eliminated or any documentation to indicate that MCC has been directed to submit a new plan that indicates this will be required, I find your response to violation 1 of 2 to be arbitrary and capricious and therefore inappropriate.

Part 2 of the TDN was issued for "Failure to reclaim the mine according to the schedule approved in the permit. Number 2, 7 and 8 Mine areas." In your response you state:

The Division has prohibited MCC from following its originally approved reclamation schedule because the approved plan did not comport with Utah's changing regulatory requirement for elimination of highwalls.

In your October response, you indicate that a reclamation schedule will be established once a new reclamation plan is approved.

The reclamation schedule at pages 3-96 and 3-102 of the approved mine plan indicates that reclamation work would be initiated within 90 days of final abandonment of the mining operation and all reclamation work would be completed 17 weeks after it had begun.

The revised mine plan, which has been reviewed and deficiencies sent to the operator, has a reclamation schedule on page 3-61 which is titled "Schedule of Reclamation for the Gordon Creek No. 2 Mine." This schedule, which must apply to the #7 and #8 mine, too, since no other schedule is included in the plan, indicates all reclamation work would be done by October 1993. The June 30, 1994, deficiency letter which resulted from a review of the plan does not list the scheduling of reclamation as a deficiency.



State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

Michael O. Leavitt
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Division Director

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3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
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801-359-3940 (Fax)
801-538-5319 (TDD)

file
TDN NB

October 20, 1994

Thomas E. Ehmett, Acting Director
Office of Surface Mining
Reclamation and Enforcement
505 Marquette N.W., Suite 1200
Albuquerque, New Mexico 87102

Re: Response to Ten-Day Notice X94-020-352-003 TV2, Mountain Coal Company, Gordon Creek #2, #7, and #8 Mines, ACT/007/016, Folder #5, Carbon County, Utah

Dear Mr. Ehmett:

I am writing to amplify and clarify the response to the above-noted TDN provided to your office under cover of my letter dated September 15, 1994.

Part 1 of 2 of the TDN, pointing out that the reclamation plan lacks a commitment to eliminate all highwalls, confirms a circumstance the Division has been aware of and working to resolve for at least the past three years. As pointed out in my September 15th letter, the Division issued a Division Order in June, 1991, requiring Mountain Coal to submit a revised reclamation plan providing for elimination of all highwalls.

Mountain Coal's reluctance to so modify its plan was based on several grounds, some of which were not programmatically sustainable. Based on a site visit in August of 1991, however, it became apparent that complete elimination by backfilling was likely to produce mass instability and uncontrolled erosion at the #7 mine. Although some time was consumed in evaluating and determining Mountain Coal's other bases for its position, the attempt to engage OSM in a shared technical evaluation of the site and formulation of a solution which would be both programmatically and technically sound, dramatically prolonged the process.

In June, 1992, DOGM issued an NOV, essentially for Mountain Coal's failure to timely resolve the permit deficiency. The NOV was vacated and a "Settlement Agreement" substituted in August, 1992. Pursuant to the agreement, Mountain Coal made submittals on August 20, 1992 and February 1, 1993 containing

Page 2
Thomas E. Ehmett
TDN X94-020-352-003 TV2
October 20, 1994

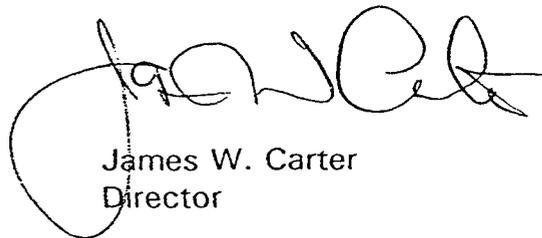
highwall elimination information and a new reclamation plan, respectively. As disclosed by the chronology, much discussion then ensued between OSM, DOGM and Mountain Coal regarding the technical problems with elimination of the highwalls by backfilling.

At this point, DOGM is reviewing Mountain Coal's August 6, 1993 submittal and subsequent responses to deficiency letters which, when approved by DOGM, will require complete elimination of highwalls at the #2 mine. DOGM anticipates completion of the review process by the end of this month.

Part 2 of 2 of the TDN relates to the reclamation schedule. At the time DOGM determined the reclamation plan to be inadequate, it directed Mountain Coal to abandon the approved reclamation schedule until a revised plan was approved. At the time DOGM approves a revised reclamation plan, a new schedule for completion of reclamation will be established. It is my understanding that Mountain Coal is eager to complete regrading and contouring of the mine site, and is only awaiting approval of a revised reclamation plan. Therefore, I anticipate a relatively short schedule.

I hope this additional information is helpful in evaluating DOGM's September 15th response. Again, I request that OSM find the remedial activities now underway to constitute an appropriate response to the TDN.

Very truly yours,



James W. Carter
Director

jbe
cc: L. Braxton
P. Grubaugh-Littig
H:EHMETTGC.LTR

Mr. James W. Carter

3

The Utah Coal Mining Rules under 645-300-142 require:

The permittee will conduct all coal mining and reclamation operations only as described in the approved application, except to the extent that the Division otherwise directs in the permit.

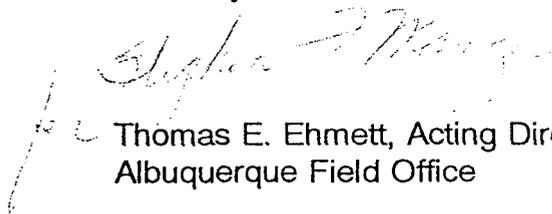
The Division has not provided any documentation which shows the approved reclamation schedule has been changed or that a new schedule is required. Rule 645-301-542.100 requires:

A detailed schedule and timetable for the completion of each major step in the reclamation plan.

The Utah rules clearly require a detailed and accurate reclamation schedule and that the schedule be followed. The last mining to occur at the site was completed prior to November 1990, at which time the #8 mine was sealed. The #2 mine was sealed in October 1985 and the #7 mine was sealed in 1989. This indicates that the approved reclamation schedule has not been followed as required by the rules. Based on the above, I find your response to violation 2 of 2 to be arbitrary and capricious and therefore inappropriate.

If you disagree with the above finding, you may request an informal review in accordance with 30 CFR 842.11(b)(1)(ii)(A). The request may be filed with this office or with the Deputy Director, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, N.W., Washington, D.C., 20240. Your request must be received within 5 days of receipt of this letter. A Federal inspection may be conducted after the 5-day appeal time has elapsed unless an informal review is requested.

Sincerely,



Thomas E. Ehmett, Acting Director
Albuquerque Field Office



State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

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3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
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801-359-3940 (Fax)
801-538-5319 (TDD)

November 21, 1994

Ms. Paige B. Beville
Manager, Environmental, Health & Safety
ARCO Coal Company
555 17th Street, Room 2170
Denver, CO 80202

940

Re: Deficiencies in Reclamation Plans, Mountain Coal Company, Gordon Creek #2, #7, & #8 Mines, INA/007/016, Folder #3, Carbon County, Utah

Dear Ms. Beville:

The Division has completed a review of the information submitted through September 30, 1994 regarding the reclamation of the Gordon Creek #2, #7, and #8 mines. Enclosed please find a copy of the technical analysis and findings. A few deficiencies have been identified that will need to be corrected in order to receive final approval of the plans. The Division met with Dan Guy on November 14, 1994 to discuss the deficiencies and what would need to be done to resolve them.

It appears that Dan has a good handle on how to proceed. Please review the Technical Analysis and provide a response to the deficiencies by December 21, 1994. Thank you for your help during the permitting process. Please call if you have any questions.

Sincerely,

Daron R. Haddock
Permit Supervisor

enclosure

cc: P. Grubaugh-Littig
J. Kelley
S. White
T. Munson
H. Sauer

taletter.278

TECHNICAL ANALYSIS AND FINDINGS

MOUNTAIN COAL COMPANY GORDON CREEK #2,#7 AND #8 ACT/007/016

November 7, 1994

SYNOPSIS

Mountain Coal Company submitted a revised reclamation plan for the Gordon Creek #2, #7, and #8 Mines area on August 6, 1993. On September 30, 1994, the permittee submitted the latest revision of the reclamation plan which addressed deficiencies identified in the Division's June 30, 1994 review. This document analyzes the submittals and discusses findings that have been made.

R645-301-233.100 **Topsoil Substitute and Supplements**

ANALYSIS

The permittee has committed to implement a soil/spoil sampling program **prior** to the commencement of backfilling and grading operations (page 3-52 thru 3-53). Soil sample site locations are depicted on Plate 3-1. The purpose of the sampling program is two fold. One purpose is the identification of potentially acid-and/or- toxic forming materials and the other is the determination of the fertility status of the stockpiled topsoil and subsoil. The laboratory results, and there interpretation will be the basis (in part) for material handling on-site. The laboratory results must be submitted to the Division for review at the earliest possible date. Discussions between the permittee and the Division with regards to the interpretation of these data and the data from the sampling of the No. 2 Mine yard must occur subsequent to each parties independent review.

The permittee states that the first lift of redistributed topsoil (approximately 4-6 inches) and the underlying spoil material will be ripped simultaneously (page 3-52). The permittee also commits to ripping the spoil to twelve inches subsequent to backfilling and grading (page 3-33 & 3-46). The following questions must be clarified. Are these commitments one in the same? Will they be applied on all disturbed areas which are accessible by earth moving equipment? Will one ripping practice be applied on areas which will have topsoil applied and the other where topsoil is not applied?

R645-301-240 **Reclamation Plan**

Concrete slabs are not considered suitable growth medium and must be buried with at

least four feet of suitable cover material.

Findings of Deficiencies

The permittee must provide the following prior to approval of the proposed reclamation plan.

- 1) A commitment to submit soil/spoil laboratory results to the Division as soon as possible.
- 2) Clarification of ripping practices.
- 3) A commitment to cover all concrete slabs with four feet of suitable material.

R645-301-340 Revegetation

The revegetation portion of the plan is found on pages 3-52 thru 3-65. The revegetation seed mixture is specified on page 3-56. The mixture contains grasses, forbs, and shrubs which are known to be palatable to big game animals. Cicer milkvetch and alfalfa are the only non-native species proposed in the mixture. Cicer milkvetch is used because it is a legume and also known for its palatability to big game animals. Alfalfa is desirable for its quick establishment and nitrogen fixing capabilities. Alfalfa usually does not persist on these sites for more than a few years. Five other native forb species are included in the mixture. Besides five shrubs species to be seeded the riparian areas will also be transplanted with containerized stock of Salix, Elderberry, Serviceberry and Chokecherry (page 3-57). The riparian areas will have an augmented seeded mixture applied which includes additional grass and forb species.

All seeding will be done by broadcast methods. Either hydroseeding or hand broadcasting methods and followed by light raking (page 3-54). This method has been found to be effective for this area from past interim seeding efforts. A commitment should be made to limit the amount of time the seed is in the hydroseeder to 30 minutes.

A commitment is made in the plan to leave the site in a roughened state (page 8-32). By using a large backhoe bucket to redistribute the topsoil, depressions 2' to 3' in diameter will be left. The areas which are not backfilled and will not have topsoil redistributed will be hand roughened (page 3-53). " The hand roughening will consist of surface loosening of the soil to a depth of 4 to 6 inches, leaving numerous small pockets for retention of seed, organic mulch and water." This is inadequate to meet the performance standards. The cut above the conveyor belt does not meet vegetation performance standards and more drastic measures are required for vegetation success. A track hoe bucket should be used to reach as far as possible to provide for surface roughness in these areas. These non-topsoiled areas

should have organic matter **incorporated** into the soil surface. This cannot be done by simply hydromulching. Therefore, the operator must commit to other methods of soil preparation for non-topsoiled areas.

Revegetation: Timing.

The plan commits to seeding no sooner than September 1 (page 3-54) and to complete the seeding in the fall of the year. This is the normally accepted time of year for seeding with this particular seed mixture and for this area. The revegetation schedule is outlined on page 3-59. Preliminary work will begin in May such as seed orders and soil sampling in June. Recontouring will begin in July with final mulching occurring in October.

Revegetation: Mulching and other soil stabilizing practices.

A hydromulch will be applied to all seeded areas with slopes less than 2:1 and on nontopsoiled slopes greater than 2:1 (page 3-58). Hydromulching has been effective in controlling erosion and stabilizing the soil surface on slopes less than 2:1 during interim revegetation on site. Erosion control matting will be used on topsoiled slopes which are 2:1 or greater. However erosion control matting is not expected to be used on site. Most slopes 2:1 or steeper will not be topsoiled.

Revegetation: Standards for success.

The postmining land use in wildlife habitat. Therefore, the requirements of R645-301-356.230 must be met. Success of vegetation will be determined on the basis of shrub stocking and vegetative ground cover. The plan does not specify a shrub standard. The Division and DWR have decided that a minimum shrub stocking standard of 2000 shrubs per acre is a reasonable goal for this site to achieve (correspondence dated 10/31/94, from Bill Bates, DWR). Therefore, the plan must commit to this standard. The stated success standard for the cover and diversity requirement is to use the Oak Shrubland Reference Area (page 3-60). As measured in 1984 the vegetative cover for this area was 48%. This is a high standard for this site to meet, however given good reclamation techniques and good soil material the site should be able to meet this standard.

Findings of Deficiencies:

Several deficiencies still exist with the revegetation plan and the reclamation findings cannot be completed until these are adequately addressed. Please refer to the following summary of deficiencies regarding revegetation.

- 1) A statement must be included in the seeding methods which commits to limiting the amount of time seed is in the hydroseeder to 30 minutes or less in accordance with R645-301-341.220.
- 2) The commitment to hand roughen nontopsoiled slopes is insufficient to make a finding of revegetation success. The plan must detail the methods for vegetation establishment on nontopsoiled slopes which assure compliance with the performance standards and R645-301-341.220.
- 3) The operator must commit to a success standard of 2000 shrub or trees per acre for bond release as required by R645-301-356.231.

R645-301-500

Engineering

ANALYSIS

The first reclamation operation following the final closure of the mining operation was the sealing of the portals. The No. 2 mine was sealed permanently in October of 1985 and the No. 7 and 8 mines were sealed in December of 1990. Each portal was first sealed by placing a block seal 25 to 50 feet in by the portal. The portal structure was then removed and the area out by the seal was completely backfilled to prevent access to the seal and to minimize roofbreaking. Exposed coal seams in the portal areas were also covered.

The 2, 7 & 8 mines are considered dry mines, i.e., the mines themselves do not produce enough water to supply the needs of the mining operation. Most of the workings are downdip from the portals. The only area updip from the portal is the area northwest of the No. 2 west portals through the 70-acre lease modification. No water was encountered during the mining of this area. Because of the dryness of the mines and the locations of the portals relative to the dip of the seam, water is not expected to impound behind the seals and so no hydrologic seals were used.

Shortly after final cessation of operations and portal sealing, all surface structures were removed. Metal, wood, pipe, and other such structural material was hauled away and either resold for scrap or disposed of in a municipal landfill. All concrete, including foundations, floors, and structural supports, was broken up and buried at the toe of the portal faceups.

Reclamation of the minesite will occur in two phases. During the first Phase, the entire site will be reclaimed down to the lower end of the No. 2 mine area. The natural

drainage channels will also be reestablished and reconfigured to that point. The No. 7A Pond will be completely removed and the No. 2 pond will be enlarged to enable it to receive runoff from the entire site. All disturbed *and* undisturbed drainage will flow into the pond. The main road from the entrance gate to the pond will remain in place for pond cleaning and maintenance.

Once vegetation is reestablished and the sediment contribution to the pond is within acceptable limits, the sediment pond and the main road will be removed and reclaimed. The reclaimed main drainage channel will also be extended to intersect the undisturbed channel below the site. This will constitute the second phase of the reclamation process.

Those areas not draining to the pond, which are in the area immediately below the pond, will have alternate sediment controls such as silt fences, straw bales and containment berms.

Sweets Pond will not be reclaimed. It is located on private land and the landowner has requested that the pond be left in place for private use. The permittee will turn the pond over to the landowner when reclamation is complete. The pond is designed for long-term stability and is a utility improvement as well as a source of water for wildlife.

All cutslopes along pad and road areas will be reduced as much as possible while maintaining the required minimum stability safety factor of 1.3. This will be accomplished by recovering downslope material with a backhoe and placing it against the cutslope faces with a bulldozer. The fill material will be compacted with a sheepsfoot compactor to improve stability. Temporary erosion controls, such as straw bales and silt fences, will be placed below these backfilled areas to prevent sediment from leaving the site and entering the natural drainage. The Grand Junction consulting firm of J.F.T. Agapito & Associates, Inc. determined the limiting dimensions of the fills in the respective areas by a detailed stability analysis. This analysis is discussed and its results are shown in the discussion which follows.

Since different parts of the site were originally disturbed at different times and under different regulatory requirements, the site has been divided, for the purposes of the backfilling and grading plan, into 4 different areas: the No. 2 area, the No. 7 area, the No. 8 area, and the Old Fan Portal area.

No. 2 Area

A stability analysis of this area was done by the Grand Junction consulting firm of J.F.T. Agapito & Associates, Inc. in August of 1992. For this area, Agapito determined the

following slope geometry parameters for a stability safety factor of 1.3.

Slope Angle (degrees)	Width of Base (feet)	Maximum Height (feet)
15	933	250
20	343	125
25	197	92
30	126	73
35	90	63

The natural channels that must be reestablished through the No. 2 area limit the width of the base of the fill. Thus, the slope of 20° and base width of 343 feet were used in the design of the fill. This configuration allows a maximum slope height of approximately 125 feet.

The No. 2 area was initially disturbed prior to SMCRA. For such a site, both the R645- rules and the Federal regulations require that "all reasonably available spoil" be used in backfilling the highwall *and* that the backfill achieve a stability safety factor of at least 1.3. The designed backfills of the highwalls and cut slopes of the No. 2 area fulfill both of these requirements. Given the space constraints imposed by the reestablished natural channels, it would be impossible to completely eliminate the cut slopes and still achieve a stable configuration. The designed backfills use all the reasonably available spoil that is necessary to achieve a stable configuration *and* they eliminate as much of the cut slope as possible, even though the upper part of the cut slope will not be eliminated.

There are two seeps which daylight in the cutslope of the No. 2 area: one near the end of the No. 7 road and one above the office/shop area. The permittee plans to route the flow from these seeps over the surface of the fill in rip rap channels. However, both springs originate in fissures which span the face of the cutslope and there is some uncertainty as to whether the water from the seeps originates high in the cutslope or issues from the entire length of the fissures. If the water issues from the entire length of the fissures, it could flow out directly into the fill material, notwithstanding the precautions taken by the permittee in constructing the rip rap channels. And this means, that the stability of the fill in the seep areas could be jeopardized by saturation of the fill material and by buildup of pore pressure. This is particularly worrisome since repair of the fill will be difficult or impossible after the

completion of the earthwork.

For the sake of caution, the design of the seep areas should be revised to prevent the possible saturation of the fill by seep water. The revised design might include the opening of the fill in these areas and the establishment of actual channels for the flow of seep water. Or the design might include the installation in these areas of channels of filter gravel or some vertical extent, similar to that which is planned for the seep in the No. 8 area, which would allow water to escape from the entire length of the seep fissures.

No. 7 Area

A stability analysis of this area was done by the Grand Junction consulting firm of J.F.T. Agapito & Associates, Inc. in April of 1992. For this area, Agapito determined the following slope geometry parameters for a stability safety factor of 1.5.

Slope Angle (degrees)	Width of Base (feet)	Maximum Height (feet)
15	291	78
20	124	45
25	77	36
30	50	29
35	36	25

A safety factor of 1.5, rather than 1.3, was used for this area for a couple of reasons. First, the area contains two seeps and a small fault and has a history of natural instability. And since the planned earthwork will make it impossible to reach and repair this site in the event of failure, the slightly higher safety factor will provide a greater margin of safety. Second, the MSHA safety bench in this area is approximately 40 feet high and thus forms a good place into which to key the crest of the fill. The planned backfill will be approximately 45 feet high and will thus just cover the safety bench while leaving the upper 60 feet of the faceup as it is. The natural channel that must be reestablished through this area limits the width of the base of the fill. So again, as in the No. 2 area, the slope of 20° was used in the design of the fill. This allows a maximum base width of 124 feet and a maximum slope height of 45 feet.

Given the space constraints imposed by the reestablished natural channel, it would be

impossible to completely eliminate the portal faceup and still achieve a stable configuration. The planned configuration is thus the only one that will fulfill the requirement of R645-301-553.130 that the postmining slope be stable.

R645-301-553.140 requires that the postmining configuration minimize water pollution both on and off the site. The planned configuration will best fulfill this requirement for several reasons. First, the stable configuration achieved using the stability safety factor of 1.5 will prevent slides and minimize erosion. Second, the designed slope of approximately 2.7h:1v will best promote successful revegetation by providing a stable seed bed. Third, the lower fill height will allow for the channeling of water from a seep above the fill over the surface of the fill. This will prevent the seep from saturating and destabilizing the fill. And fourth, the planned configuration is the only possible configuration which will meet all the requirements of approximate original contour without interfering with the reestablishment of the natural drainage channel.

The planned configuration will also closely resemble the general surface configuration that existed prior to mining and will mimic the visual attributes of the surrounding area. The surrounding area is steep and contains many cliffs and ledges. The remaining 60 feet of faceup above the fill will resemble these cliffs and ledges and the fill at its base will closely resemble the talus slopes which underlie those cliffs and ledges.

The planned configuration will be entirely compatible with the postmining land use of grazing and wildlife habitat. Grazing area and wildlife habitat will merely be displaced, but not eliminated, by the remaining faceup. And the emphasis given in designing the fill to stability, good vegetation, and preservation of good water quality will enhance the value of this area as livestock land and wildlife habitat.

No. 8 Area

This area, which lies opposite the No. 7 area and on a much gentler slope, will be completely backfilled and restored to approximate original contour.

There is a seep in the road cut just below the No. 8 mine pad. This seep has been controlled by two gravel drains. The first, which is approximately 36 inches deep by 12 inches in thickness by 24 inches wide, crosses the road and discharges into a small concrete retention basin in an otherwise undisturbed area. The second is approximately 24 inches wide by 18 inches deep and parallels the road to where it discharges into the main undisturbed culvert.

The permittee plans to leave both gravel drains in place, as well as the concrete

retention basin, and to cover both gravel drains with additional fill material. The second gravel drain will be supplemented with an additional 24-inch-square section of gravel along the road ditch. This will be covered with roofing paper before it is covered with fill material. The resulting enlarged drain will empty into the restored natural drainage channel between the No. 8 and No. 7 areas.

The plan for supplementing and retaining the gravel drains is sound. But the concrete retention basin, however small, must be removed as it would otherwise constitute a permanent structure.

Old Fan Portal Area

This area was abandoned and reclaimed in 1984, and is, therefore, subject to the reclamation requirements of both SMCRA and the R645- rules. The present plan is to leave this area in its present configuration.

The permittee claims that this area was reclaimed properly under the interim regulations, but can provide no documentation of this in the form of an approved plan or corpus of correspondence. In addition, the area contains a highwall and cutslope and very little earthwork has been done there.

The permittee also claims that there is insufficient fill material to fill and reconfigure this area. However, there is surely sufficient material for this purpose to be found in the canyon below since material was simply downcast, and not hauled elsewhere, during the construction of the area. Additional fill material will also be available in the No. 2 and No. 7 areas since the faceups and cutslopes in these areas will not be entirely eliminated.

The permittee also claims that this area constitutes a settled and revegetated fill and that it would be environmentally detrimental to redisturb it. While it is true that further modification of this area will extend its final reclamation several years into the future, it is not necessarily true that such modification would be an impossible or even inordinately difficult reclamation endeavor. This area gets ample precipitation so that revegetation should not be difficult.

This area contains an unreclaimed highwall and cut slope. The highwall and cutslope are the subject of a recent violation because they are almost entirely without vegetation and have, consequently, been eroding and contributing sediment to the drainage system of the main canyon. Therefore, in accordance with R645-301-100, the highwall must be eliminated and the area must be restored to approximate original contour.

Reclamation Costs

The total cost of reclaiming this site is anticipated to be approximately \$350,711, in 1983 dollars. The plan escalates this cost at an annual rate of 10% through 1988, for which year the total cost is approximately \$564,824. When the reclamation cost is escalated through 1999, the cost in that year's dollars totals \$692,769. The present reclamation bond is in the amount of \$641,443. As the following table shows, the present bond is adequate for the present plan only through 1995.

<u>Year</u>	<u>Escalation Factor*</u>	<u>Reclamation Cost</u>
1988	--	\$564,824
1989	1.77%	\$574,821
1990	0.77%	\$579,248
1991	1.27%	\$586,604
1992	2.21%	\$599,568
1993	2.54%	\$614,797

<u>Year</u>	<u>Escalation Factor*</u>	<u>Reclamation Cost</u>
1994	2.01%	\$627,154
1995	2.01%	\$639,760
1996	2.01%	\$652,619
1997	2.01%	\$665,737
1998	2.01%	\$679,118
1999	2.01%	\$692,769

*Escalation factors are taken from Means®

However, the reclamation cost estimate does not include the cost of reclaiming the Old Fan Portal area and the present reclamation bond does not, therefore, include that cost. The bonding section of the plan is, therefore, not adequate.

Findings of Deficiency:

The revised reclamation plan is mostly acceptable. However, the following items, which have been discussed, must be changed.

- 1) The small concrete retention basin which receives water from the No. 8 area via the across-road gravel drain must be removed during the first phase of reclamation.

- 2) The Old Fan Portal area cannot be left in its present, unreclaimed state. The permittee must modify the reclamation plan to provide for the elimination of the highwall, the restoration of the area to approximate original contour, and all other procedures required to reclaim the area.
- 3) The reclamation cost estimate must be revised to include the anticipated cost of reclaiming the Old Fan Portal area, as that cost is reflected in the revision of the reclamation plan for that area which is mandated by finding (2) above. The reclamation bond must then be adjusted, if necessary, to cover this costs.
- 4) The design of the seep areas must be revised to prevent the possible saturation of the fill by seep water.

R645-301-210 and 356.300 Impoundments

ANALYSIS

The requirements for providing for an adequate pond maintenance plan are spelled out above. The Operator has provided for maintenance of the temporary sediment pond during the reclamation phase. It will be reclaimed and the original channel restored when bond release requirements are met for sediment control and vegetation (page 7-33). Per the requirements of R645-301-880-320 and R645-301-732-210 and Phase II bond release criteria, the following structures will be affected (Sweet's Canyon Pond and the temporary sediment pond) and as such, a Division of Water Rights permit, a Division of Dam Safety permit and a maintenance agreement for these structures have been supplied. The Operator has stated how he will comply with the requirements for permanent maintenance including sediment removal if required for the reconstructed sediment pond on page 7-50 of the plan. Sediment levels are shown as being determined by direct measurement at the outlet riser, as shown on Plat 7-8, and will be cleaned-out when the sediment reaches the cleanout level of 7882,0'. The pond will be inspected quarterly and on an annual basis as required.

The Sweet's Canyon Pond will remain and be maintained by the landowner as stated in the September 28, 1994 letters found in appendix 3-5 to Beaver Creek Coal Company from Agnes K. Pierce. A Slope Stability Analysis for the Sweet's Canyon Pond is found in Appendix 3-4 demonstrating a slope stability of 2.35 for saturated conditions. Water Rights Lease and Sale Agreement allocated to the Sweet's Canyon Pond was entered into on the 7th of April, 1993 and is found in Appendix 3-9.

The following forms and applications have been approved for the following impoundments to be retained or used during reclamation.

Sweet's Pond

- 1) Form 69 filed with the Division of Water Rights is found in appendix 7-4.
- 2) A transfer of Water Rights to the Sweet's Pond from Gordon Creek is found in appendix 3-9 but a change application for the point of use needs to be filed by the owner for the water rights to be valid.
- 3) A clarification of the use and responsibility for maintenance of the pond now that Mr. E.E. Pierce is deceased is found in appendix 3-5.

Temporary Sediment Pond

- 1) Sediment clean-out levels will be marked with a sediment marker in the pond.
- 2) Clean-out of the pond will occur at the 60 % sediment storage level.
- 3) Form 69 for this structure is found in appendix 7-4.

Finding of Adequacy:

The permittee meets the requirements of the rules regarding the sediment ponds and permanent impoundments.

**R645-301-742.300 et. al.
and
R645-301-742.400 thru 743**

Diversions

ANALYSIS

The plan provides for reclamation of the Right and Left Forks of Bryner Canyon using the 100-year 6-hour storm event in accordance with R645-301-742.323. Permanent channels for the ephemeral drainages were designed using the 10-year 6-hour event in accordance with R645-301-742.333. The main channel and the Right Fork of Bryner Canyon were considered intermittent and all others considered ephemeral. The watershed boundaries used to determine precipitation runoff from undisturbed areas within Bryner Canyon are shown on Plate 7-5A. The locations of all channels showing riprap sizes and slopes are shown on Plate 3-7. All design information for the plan regarding the applicable calculations and methodologies is found in Appendix 7-1. It was noted that the operator is planning on using 4 to 6 inches of soil on top of the filter fabric as stated on page 3-45 prior to placement of the riprap. This is not standard engineering practice and as such can not be accepted. It is recommended that if the goal of the operator is to allow vegetation to become reestablished in the channel then use of a graded filter blanket would be more appropriate.

The plan provides for the restoration of the Right Fork of Bryner Canyon to restore premining characteristics of the original stream channel where it meets the old pad fill. Ponding, in what is considered a natural depression that appeared to be caused by the presence of the pad and failure to reestablish original grade for the channel, has been eliminated.

As a recommendation to the Operator, to document any failure of riprap or channels caused by greater than the design storm, the following methodologies will be deemed acceptable.

The reclamation of the channel will take place in two phases. The first phase is the reclamation of the entire mine site down to the lower end of the mine yard as shown on Plate 3-7, the natural channels will be reclaimed down to this area. During this phase the No. 7A Sediment Pond will be removed. Also during this phase the No. 2 Pond will be enlarged as shown on Plate 3-7 and 7-14. All disturbed and undisturbed drainage above this point will flow to the pond. The road from the gate to the pond will be left in place with a turnaround on the south side of the pond. This will allow access for cleaning and pond maintenance.

There are several diversions of miscellaneous spring flow which drains across reclaimed slopes (springs located at the 2, 7, and 8 mine areas). Provisions are discussed on page 3-45 regarding the use of riprap for all seep locations. This will not prevent undercutting of the riprap. Use of a graded gravel filter blanket or a semi-porous filter fabric underliner to promote vegetation reestablishment but prevent erosion is required. The spring at the 8 mine flows into a concrete basin and as such provisions should be made to remove this basin and a more natural basin installed using native rock and vegetation.

Finding of Deficiencies:

1. The Permittee must address the three perennial springs found at the 2, 7, and 8 mine sites in regards to providing stable and secure passage of this water either over or through the backfill by providing an underlining for the proposed riprap which will allow vegetation to become established.
2. The Permittee must decide whether a graded gravel filter blanket is more appropriate for the reclaimed channels to promote vegetative growth in the channel bottoms. Please remove conflicting plans for underliners and make the plan consistent. The use of 4 to 6 inches of soil over the filter cloth is not accepted engineering practice and will not be allowed. Please make the appropriate changes to page 3-45 to reflect the designs shown on Plate 3-12, using a graded filter blanket of what is referenced as -3/4 inch gravel. The filter thickness should be approximately 1/2 the thickness of the riprap but in no case less than 6-9 inches. No specifications for the graded filter are given and must be discussed.

Finding of Adequacy:

1. The Permittee has filed the necessary Stream Alteration Permit for the reclaimed stream channel with the Division of Water Rights and as such a positive finding can be made pending approval by the Division of Water Rights.

R645-301-742

Sediment Control Measures

ANALYSIS

The Permittee has provided details on mulching rates, hydromulch application rates, tackifier amounts and types, and erosion control matting. Commitments to maintain the site from an erosion standpoint have been made in the permit in Section 7.2.8.5, Maintenance Plan For Erosion. The plans for all areas not draining to the sediment pond are shown on Plates 3-7, 3-7A, and 3-7B. A summary of the BTCA areas and the runoff they contribute is contained in Table 4-2. The use of silt fences as opposed to land form structures such as berms and swales, which can be left in permanently and revegetated, is something that the Permittee may want to consider if maintenance of silt fences is an issue of concern. A more permanent control such as a berm with a gravel or coarse rock outlet would provide the same level of sediment control with less maintenance. The Division will be willing to provide suggestions for other sediment control alternatives. The Sedcad analysis found in appendix 7-3 is considered good for the areas of the fan portal which are reclaimed but does adequately incorporate the areas which are not considered reclaimed and as such can not be considered to preclude sediment control for this area.

Finding of Deficiency:

The Permittee does not meet the requirements of the rules regarding erosion control and control of sediment for the fan portal area.

R645-301-723 and 742.100,200,300

Water Quality Monitoring

ANALYSIS

The Permittee has proposed a plan which monitors 6 stations for the parameters shown in Table 7-18. The sampling program provides information on seasonal flow and water quality on intermittent and ephemeral streams that have potential to be affected by

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ACT/007/016
November 7, 1994

mine discharge and surface disturbance. Discussion of surface water monitoring locations, type, frequency and flow device may be found in Table 7-17. A map of monitoring locations is provided on Plate 7-2. Analyses will be for parameters listed in Table 7-18. The Post Mining Water Monitoring plan is described on 7-67 of the permit.

Findings of Adequacy:

The Permittee meets the requirements of the regulations regarding water monitoring.

RECLAM.278



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

June 6, 1994

CO-OP MINING COMPANY, : Docket No. DV 94-4-R
: :
Applicant : Application for Review
: and Temporary Relief
v. : :
: Notice of Violation
OFFICE OF SURFACE MINING : No. 93-020-190-03
RECLAMATION AND : :
ENFORCEMENT (OSMRE), : Trail Canyon Mine
: :
Respondent :

DECISION

Appearances: Carl Kingston, Esq., Salt Lake City, Utah, for applicant;
John S. Retrum, Esq., U.S. Department of the Interior, Denver,
Colorado, for respondent;
F. Mark Hansen, Esq., Salt Lake City, Utah, for intervenor.
Before: Administrative Law Judge Child

Co-Op Mining (Co-Op) filed an Application for Review and an Application for Temporary Relief regarding Notice of Violation (NOV) No. 93-020-190-03 issued to Co-Op by the Office of Surface Mining Reclamation and Enforcement (OSM) in October 1993. The NOV charges Co-Op, the permittee of the Trail Canyon mine, Emery County, Utah, with "[f]ailure to restore the approximate original contour on all areas disturbed by mining by using all available material" in alleged violation of R645-301-553.300 and R645-301-553.110 of the Utah Division of Administrative Rules (Utah program). As abatement action, the NOV requires Co Op to "[u]se all available materials to eliminate highwalls and cuts to the extent possible."

The Application for Review and Application for Temporary Relief were assigned a single case number. The matter came on regularly for hearing on December 20, 21, and 22, 1993, at Salt Lake City, Utah.¹ At the hearing, Co-Op's Application for Temporary Relief was granted. Thus, only the Application for Review remains at issue. The parties have filed proposed decisions, including proposed findings of fact and proposed conclusions of law, and responses in support of their respective positions. The matter is now ripe for decision. To the extent proposed findings of fact or conclusions are consistent with those entered herein, they are accepted; to the extent they are not so consistent or are irrelevant, they are rejected.

The issues to be here determined are:

- I. Is the specificity of the Federal NOV at issue, and if so, should the Federal NOV be declared invalid for lack of specificity?
- II. Did Co-Op violate the Utah program as charged in the Federal NOV?
 - A. Did Co-Op violate R645-301-553.300?
 - B. Did Co-Op violate R645-301-553.110?

Statement of the Facts

The State of Utah, pursuant to sections 503(a) and 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 2353(a) and 1273(c), has assumed primary responsibility for the regulation and control of surface coal mining and reclamation operations on State and Federal lands within its borders. See 30 CFR Part 944. The State's regulatory program for these operations (the Utah program) is administered by the Utah Division of Oil, Gas and Mining (DOGM). (Tr-II. 24, 204-206)

The Trail Canyon mine is an underground mine located on the eastern slope of Trail Canyon, Emery County, Utah. The natural terrain at Trail Canyon, both in mined and unmined areas, is largely steep and rocky, with numerous intermittent natural cliffs and ledges. (Tr-I. 41, 45; Tr-II. 223, 253-254, 286; Exs. R-9, R-16, A-37, A-40)

Mining began at Trail Canyon in 1920. From 1938 to 1981, Co-Op conducted mining operations at the mine. No coal has been extracted from the mine since 1981. (Tr-I. 41-43, 45-47, 61; Exs. R-5, R-6, R-9)

People have resided at the bottom of the canyon since 1920. The number of residences grew from 4 in 1947, to 8 in 1961, to 20 in 1993 with over 100 residents. (Tr-I. 7-9, 61; Tr-II. 183-184, 295; Tr-III. 15, 42-43, 48-50; Ex. R-6)

¹ The transcript of the hearing is comprised of three volumes designated herein as "Tr-I.", "Tr-II.", and "Tr-III."

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In 1947, the mine had three portals accessible by wooden stairs attached to a coal chute. In 1951 and 1962, Co-Op constructed a nearly mile long access road from the public road at the base of the canyon, past the three portals, to a point approximately 300 feet beyond the portals. For the most part the road followed a series of natural ledges, with some levelling and cutting required. Four cuts, totalling approximately 800 feet in length and from 0 to 5 feet in width, were made into the slope of the mountain. The road is only 9 feet wide at its narrowest point. (Tr-II. 295, 298, 300-312; Tr-III. 7, 11-16, 46)

In 1970, at the insistence of the Federal Mine Safety and Health Administration (MSHA), Co Op constructed a safety berm on the outer edge of the access road. Except for a narrow portion of the road, the berm paralleled the entire length of the road. The berm, up to the portal area, was constructed from sloughage taken from the inside of the road; while the berm, from the portal area to the end of the road, was created primarily by digging the road deeper and cutting 3 feet into the mountain on the inside edge, thus leaving a band of material in place on the outer edge to serve as a berm. In most places, the berm was no more than 30 inches high. (Tr-III. 18-21, 45-48, 122-123; Ex. R-9)

In 1971 or 1972, Co-Op extended the access road further beyond the portals to a site to be used for an electrical substation to supply power to the mine. This site became known as the "transformer pad." Co-Op cut into the mountain as much as 6 feet in extending the road to the transformer pad. Co-Op also dug downward, leaving material in place on the outer edge to serve as a berm for the road extension. While the transformer pad was quite level prior to disturbance, Co-Op further leveled it by digging down 2 feet at the inner portion of the pad and moving the 2 feet of material to the outer edge of the pad. (Tr-I. 50, Tr-III. 15-18, 21)

In 1972 or 1973, the residents of Trail Canyon altered somewhat the configuration of an area later known as the "lower pad." This area, prior to the alterations, was exceptionally level and was used by the residents for recreation, including softball and basketball. To enhance access to the area, the residents installed culverts to channel a stream cutting a gully. The residents then covered the culverts with soil taken from the base of a natural cliff face at the eastern end of the lower pad. About 2 years later, Co-Op began using the lower pad as a coal stockpile and loadout area. (Tr-III. 21-24)

After construction of the access road berm, a large rock broke loose from a ledge several hundred feet up the mountainside. The rock rolled down the mountain and hit the access road, where it broke into several pieces. Most of the rock remained on the access road, but one large piece continued down to the residential area, where it hit and rolled through one of the homes, killing a girl inside the home. (Tr-III. 36-37, 61-63; Ex. R-31, A-33)

On other occasions, the access road and berm have stopped falling rocks as large as 20 tons. The berm also prevents water from running over and eroding the access road downslope. (Tr II. 259; Tr-III. 31, 229)

In 1986 Co-Op first submitted to DOGM Co-Op's reclamation plan for the Trail Canyon mine. In 1988, the residents of Trail Canyon petitioned DOGM to permit retention of the access road berm as a safety barrier against falling rocks. As part of the permitting process, DOGM required a reclamation bond from Co-Op. The bond has not been released. On May 30, 1989, DOGM approved Co-Op's reclamation plan and issued to Co-Op, under the Utah program, a permit to conduct reclamation operations at the mine. (Tr-I. 42-43, 58, 137, 140-141, 184 185; Tr-II. 242-245; Tr-III. 230; Ex. A-34)

The permit provides that the most of the access road and the "18 in. to 30 in." access road berm will be left in place as a bermed terrace, with only the lower portion of the road, including the berm, to be returned to the approximate original contour (AOC) by approximating the slope above and below the road. The permit further requires reclamation of the road by backfilling coal outcrops, scarifying the road, and reseeding. (Ex. R-7)

The permit also provides that "highwalls" will be stable and will be reduced to the extent practicable to develop a static safety factor of at least 1.3. However, the permit contemplates reducing only those "highwalls" that can be lessened by reaching with a backhoe to pull back down-cast material. Also, the permit provides that "highwalls" greater than 20 feet in height will be left in place. A May 1991 permit revision provides for the retention of "highwalls" in four areas, including the bermed terrace (reclaimed access road) and the lower pad. A map dated November 1, 1992, and prepared for Co-Op by Charles Reynolds, a mining engineer for Mangum Engineering Consultants, shows the areas where "highwalls" were retained. The term "highwalls" refers not to "highwalls," as that term is defined under the Utah program,² but to any slopes cut by man, as determined by Mr. Reynolds. (Tr-I. 75-81; Tr-II. 11, 53, 182, 184-188; Exs. R-7; R-9; R-31)

The only highwalls, as defined by the Utah program, that ever existed in the permit area were the portals. To obtain fill material for the portals during reclamation, Co-Op dug out the upper portion of the access road approximately 4 to 5 feet. In the process, the berm at this upper portion of the access road became taller, approaching 6 feet in height in some areas, due to the lowering of the inner or upslope portion of the road. (Tr-III. 122-124)

² Under R645-100-200, "[h]ighwall' means the face of exposed overburden and/or coal in an open cut of a surface coal mining and reclamation activities or for entry to underground coal mining activities." "'Overburden' means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil." Id.

Co-Op also took 2 to 3 feet of material from the transformer pad to reclaim the portals, lowering its original contour by 2 to 3 feet. After bulldozers struck rock at the transformer pad, Co-Op realized it could not meet the requirement of reclaiming the pad with 2 feet of topsoil. Thus, some soil was brought back to the transformer pad. (Tr-III. 30, 76, 97-98, 104-105, 120-122)

Co-Op's reclamation work, which was performed in 1988 and 1989, also included hauling away from the lower pad portions of the topsoil containing high concentrations of coal. Co-Op then pushed the remaining topsoil of the lower pad area into a big pile, removed underlying fill material, and used that material to reclaim the lower pad's vertical slope at the eastern end. Co-Op pushed the material up the vertical slope as steep as Co-Op's equipment would go. It also used some of the lower pad material to reclaim other parts of the mine. Co-Op then pushed back the topsoil. As a result, the lower pad is 4 to 5 feet lower than the original contour and the public road traversing the lower pad. (Tr-III. 25-29, 76, 131-133, 145, 149, 152-153)

The access road was also reclaimed. Co-Op first smoothed the road by blading the road, pushing rocks and debris against the upslope of the road. Then the road was scarified and ripped to a depth of 30 inches. The lowest portion of the road was completely obliterated. Finally, the road, pad areas, and portal area were seeded and planted with trees. (Tr-III. 126-129, 134-136)

By June of 1993, vegetation had been growing and was growing well upon the access road area, including the berm and downslope, lower pad, and transformer pad for approximately 4 years. This vegetation would have to be scraped off to access the material which OSM contends is reasonably available to reclaim the vertical cuts. Also, no fill material exists for revegetating the downslope of the reclaimed access road if the vegetation is removed. (Tr-I. 144-145; Tr-II. 62, 117-118, 256-260; Tr-III. 136-137, 160-161, 164)

On June 23, 1993, DOGM conducted an inspection at the mine to determine whether Co-Op was eligible for Phase I reclamation bond release. The inspection was attended by, among others, OSM Inspectors Thomas W. Wright and Edzel Pugh. (Tr-I. 87, 189-190)

Neither Inspector Wright nor Inspector Pugh had any knowledge of the premining contour of the land, whether from personal visits, photographs, or maps. They determined, based upon the appearance of the slopes, that man-made vertical cuts existed along the access road and at the lower pad and transformer pad. Those cuts included cuts referred to as "highwalls" in Co-Op's approved reclamation plan and permit.

They also observed two areas along the access road where the vertical face had collapsed. Mr. Wright opined that at least one of the slides originated from a cut slope.

One or both of the OSM inspectors observed dark bands of material, presumed to be coal, visible in vertical faces near the northern most portal, in another area along the access road,

and in the cliff face at the eastern end of the lower pad. Inspector Wright opined that the dark band near the portal was a "highwall," as defined under the Utah program, because material purporting to be coal was visible there. However, OSM failed to conduct any tests to determine whether these dark bands do, in fact, contain coal; the inspectors relied upon their experience in adjudging the material to be coal.

Lastly, along the access road, including the berm and the downslope, at the lower pad, and at the transformer pad, including the downslope, they observed material which they believed was available for AOC work. They did not know whether the material from the lower pad was spoil, and conceded that the rest of this material was not spoil. With regard to the berm material, Inspector Pugh believed that it could be safely pulled back to the upslope by a backhoe or excavator without dislodging rocks down the mountain. However, he is not an experienced equipment operator and did not know the track width of the necessary equipment or the width of the access road at its narrowest point. Mr. Wright testified similarly regarding the downslope material, stating that it was available without knowing the size of the equipment necessary to retrieve it or the width of the narrowest point in the road. On the lower pad, Mr. Wright observed the depth of the material in two places where DOGM had dug small holes. Based on these observations, but no actual measurements, they each determined that Co-Op failed to use all reasonably available material for AOC work on vertical cuts in violation of the Utah program. (Tr-I. 88-91, 97-99, 102-103, 109, 111-113, 115, 126-127, 133-134, 150-152, 154-161, 167-168, 170-171, 175, 178-181, 202, 209-210, 213, 218, 223-227, 229-234, 238-239, 243-246, 250-255, 276; Tr-II. 12, 28-30, 40, 106-108, 178-179, 188-189, 300-312; Tr-III. 6-15; Exs. R-9, R-10, R-11, R-16)

Subsequently, OSM issued a 10-day notice (TDN) to DOGM, citing Co-Op for, among other things, an alleged "[f]ailure to restore the approximate original contour on all areas disturbed by mining [-] [a]ll areas where highwalls and vertical cuts remain." (Ex. R-17) DOGM responded by stating its belief "that this issue[] was addressed and resolved through a previous TDN Highwall and AOC requirements were discussed at a November 7, 1991 meeting with Mr. Hord Tipton on site and the Division believed the site configuration fulfilled the spirit of the regulations." (Ex. R-20) The previous TDN was issued for "failure to make a written demonstration addressing the required criteria to eliminate highwalls to the maximum extent technically practical." (Ex. R-20; Tr-II. 35-40) In response to the previous TDN, DOGM ordered Co-Op to demonstrate that "the volume of reasonably available spoil is insufficient to completely backfill the highwalls at the Trail Canyon Mine." (Ex. R-20) Co-Op eventually complied with this order and both DOGM and OSM approved of retention of the "highwalls," given the lack of sufficient fill material. (Ex. R-20; Tr-II. 35-40)

Without any oral discussions with DOGM or Co-Op regarding the TDN, OSM found DOGM's response to be arbitrary, capricious, and an abuse of discretion. OSM Inspector Wright then reinspected the mine on October 19, 1993. (Tr-II. 22-27, 266-267, 271; Exs. R-21, R-23, R-24)

Based upon Wright's observations, OSM issued the Federal NOV, alleging that Co-Op violated R645-301-553.300 and R645-301-553.110 of the Utah program by "[f]ail[ing] to restore the approximate original contour on all areas disturbed by mining by using all available material." (Ex. R-25) The areas of concern were identified as "[a]ll areas where highwalls and vertical cut remain" and OSM ordered Co-Op to "[u]se all available material to eliminate highwalls and cuts to the extent possible." (Ex. R-25)

On December 8, 1993, Michael J. Superfesky, an OSM civil engineer, with over 15 years of experience in reclamation work, inspected the mine to determine the amount of reasonably available material for AOC work. Without taking any measurements, he determined that approximately 2,000 cubic yards, 3,700 cubic yards, and 900 cubic yards of available material existed at the lower pad, the berm of the access road, and the transformer pad, respectively. He concluded that Co-Op had not restored the land to AOC to the extent possible, although he had no knowledge of the original contour of the land. (Tr-II. 83, 91-95, 102-104, 116-117, 121, 144, 150-151, 156, 172-174)

Mr. Superfesky based his conclusion, in part, upon his opinion that moving the access road berm material up against the vertical cuts on the upslope would improve the safety and stability of the area. He stated that one of the purposes of the AOC requirement is to restabilize disturbed areas and prevent the collapse of artificially created cut-slopes. He also stated that the berm's location along the outer edge of the road reduced the safety or stability of the downslope because the berm placed a surcharge load on the natural underlying material. He opined that the berm material should be placed against the vertical cuts to eliminate these instability factors and improve the stability of the upslope. The berm material would provide some support for the vertical cut faces and protect them against weathering. He worried that if the material exposed by the cuts was softer than the overlying material, the forces of nature would wear away the softer material, resulting in the overlying material falling down to fill the void. However, he did not know whether such softer material exists. (Tr-II. 99-101, 111-113, 142-143)

He believed the remains of the road could be made passable and the purportedly available material retrieved using a backhoe with a 1/2- or 3/4-quarter yard bucket and a track of 8 to 10 feet wide. He did not know the exact width of the road, however, and acknowledged the danger of operating heavy equipment near the outer edge of the road. (Tr-II. 163-166, 169-170)

Nor did Mr. Superfesky know that the access road berm served as a drainage control structure. No doubt his lack of awareness of many facts was attributable to the fact that he visited the mine only once. At no time, either during the visit or otherwise, did he familiarize himself with the Utah program. (Tr-II. 120, 171, 173)

Through numerous witnesses with greater familiarity with the mine area, including the only witness, Bill Stoddard, with knowledge of the original contour of the mine area, Co-Op refuted much of the evidence presented by OSM. Co-Op showed that the dark bands of material in

the mine area were either or both naturally exposed features prevalent in the area or carbonaceous shale (rather than coal exposed by Co-Op). (Tr-II. 194, 226-228, 254-255, 260; Tr-III. 158-160, 168-170, 189, 199-202)

Co-Op proved that the cliff face at the eastern end of the lower pad is a natural feature slightly enlarged by the Trail Canyon residents, and not by Co-Op. Also, the lower pad elevation is already several feet below original contour because of the removal of material to reclaim other areas. If additional material were taken from the culvert area of the lower pad for reclamation of vertical cuts, as suggested by Mr. Superfesky, the stability of the public road traversing the area would be adversely affected. The removal of the material might cause sloughage of the ground supporting the road. Moving material in the lower pad area would also cause siltation problems in Trail Creek. Finally, moving the material up against the eastern cliff face is not even possible due to the steepness of the slope. (Tr-III. 29, 183-184, 211, 214-215, 221)

Similarly, there are good reasons for not moving the access road berm. DOGM had several reasons for leaving it in place: (1) it is stable, with no sloughing, (2) it protects the residents from the regular occurrence of falling rocks caused by, among other things, frequent seismic activity in the area, (3) it serves as a drainage control, (4) movement of the berm would likely result in some dislodged rocks rolling downhill toward the residents, and (5) movement of the berm material up against the vertical cuts would accomplish only a minimal amount of reclamation. Moreover, Alan Jenkins, an experienced equipment operator, made clear that the narrowness and steepness of the access road prevented access by the equipment necessary to move the berm. (Tr-II. 251, 253, 356, 259, 272-274; Tr-III. 43-44, 70-73, 117-118, 124, 139, 140-142)

Kimly Mangum, a licensed engineer, also testified for Co-Op. His company, Mangum Engineering Consultants, continuously consulted with Co-Op since 1987 regarding reclamation of the Trail Canyon mine. (Tr-III. 65-68, 72)

Mr. Mangum presented convincing testimony, based upon measurements, that Mr. Superfesky had overestimated the amount of material available for reclaiming vertical cuts at the transformer pad, access road berm, and lower pad. In fact, the transformer pad contained no available material, as evidenced by striking rock with bulldozers and having to return some material from the portal area to the transformer pad to meet the 2-foot minimum topsoil requirements. (Tr-III. 79-92, 95-99)

Mr. Mangum referenced an analysis performed by Dames & Moore. That analysis shows that the safety factor on the vertical cuts of the upslope is 2.73 when dry, and 2.5 when wet. The berm material, which is mostly undisturbed or consolidated material, has a safety factor of 2.72. If the berm material is moved to the inside of the road, the safety factor of that material would be 1.32, less than half of the safety factor of the upslope. (Tr-III. 93-94)

Mr. Mangum also established that the weight of the berm material is immaterial and insignificant in determining the stability of the access road downslope, given that the road was

built mostly on rock ledges. If the material were moved against the upslope, it would have little or no effect on upslope stability because there is no underlying soft material requiring protection from weathering. Slides and sloughing off would occur just as predictably in the disturbed areas as in the undisturbed areas. Given these facts as well as the dangers to the residents and equipment operators from attempting to move and removing the berm, it is safer to leave the berm at the outer edge of the road rather than moving it against the upslope. (Tr-III. 94, 96-97, 99-101)

Finally, Co-Op showed that the transformer pad, bermed terrace (reclaimed access road), and lower pad all blend in with and complement the surrounding area. For instance, as previously noted, the bermed terrace largely follows preexisting natural benches with steep upslopes. In fact, at least two OSM witnesses had trouble distinguishing between the vertical cuts and the naturally steep cliff faces on the upslope. Moreover, the bermed terrace compliments the surrounding area by protecting the residents against falling rocks and providing a necessary water barrier to prevent runoff over the downslope. (Tr-I. 160-161; Tr-II. 103-104, 107-108, 221-227, 229, 254; Tr-III. 300-312)

Discussion

I.

Is the specificity of the Federal NOV at issue, and if so, should the Federal NOV be declared invalid for lack of specificity?

Co-Op contends that the Federal NOV fails to sufficiently describe the nature of the alleged violation, the remedial action required, and the portion of the mine to which it applies. Intervenors raise a similar contention. OSM correctly points out that neither Co-Op nor intervenors raised this specificity issue in their pleadings, and therefore argues that they are barred from now raising the issue. However, the issue was raised at trial, without objection, both through testimony and an oral motion to dismiss made by Co-Op. (Tr-I. 130-131; Tr-II. 195-196) Under these circumstances, the specificity of the Federal NOV is at issue in this proceeding.

In order to sustain a claim that an NOV is invalid for lack of specificity, the applicant for review must show that it was prejudiced by the lack of specificity. Renfro Construction Co., Inc., 87 I.D. 584, 587 (1980). Neither Co-Op nor intervenors have shown any prejudice to Co-Op and therefore the Federal NOV is not invalid for lack of specificity.

II.

Did Co-Op violate the Utah program as charged in the Federal NOV?

While OSM has the initial burden of going forward to establish a prima facie case as to the validity of the Federal NOV, the ultimate burden of persuasion rests with Co-Op. 43 CFR 4.1171. Assuming, without deciding, that OSM established a prima facie case, Co-Op met its burden of persuasion on the determinative issue of whether it violated the Utah program, as more fully discussed below.

A.

Did Co-Op violate R645-301-553.300?

Co-Op is charged with violating R645-301-553.300 of the Utah program, which provides:

Exposed coal seams, acid- and toxic-forming materials, and combustible materials exposed, used or produced during mining will be adequately covered with nontoxic and noncombustible materials, or treated, to control the impact on surface and ground water in accordance with R645-301-731.100 through R645-301-731.522 and R645-301-731.800, to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use.

The basis of OSM's charge that Co-Op violated R645-301-553.300 are the OSM inspectors' observations of dark bands of material, presumed to be coal, exposed in vertical faces near the northern most portal, in another area along the access road, and in the cliff face at the eastern end of the lower pad. However, OSM failed to conduct any tests to determine whether these dark bands do, in fact, contain coal. At least two witnesses, including an OSM witness, Inspector Pugh, testified that the coal seams were completely covered at the portal areas. Another OSM witness, Inspector Wright, admitted that almost all of the areas depicted as "retained highwalls" on Co-Op's map are not, in fact, "highwalls," as no coal exposed by mining exists in those areas.³ Also, Co-Op presented two witnesses, Mr. Reynolds and DOGM Inspector Kelley, who testified that exposed dark bands of carbonaceous material or coal were characteristic of the area in locations undisturbed by mining. Mr. Reynolds sampled one of the bands and concluded that none of the bands identified by Inspectors Wright and Pugh as containing coal actually contained coal. And, OSM presented little or no evidence to show that the exposed coal, if any, was exposed by the mining operation as opposed to

³ As previously noted, "highwall" is defined under the Utah program as "the face of exposed overburden and/or coal in an open cut . . . for entry to underground coal mining activities." R645-100-200. "'Overburden' means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil." *Id.*

being a naturally exposed band of material. In sum, the preponderance of the evidence shows that Co-Op did not expose a coal seam or other combustible matter and then fail to cover it, and thus that Co-Op did not violate R645-301-553.300.

B.

Did Co-Op violate R645-301-553.110 of the Utah program?

Co-Op is also charged with violating R645-301-553.110 of the Utah program. R645-301-553.110 requires Co-Op to backfill and grade disturbed areas to "[a]chieve the approximate original contour, except as provided in R645-301-553.600 through R64-301-553.642." R645-100-200 defines "approximate original contour" as follows:

that surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls, spoil piles, and coal refuse piles having a design approved under the R645 Rules and prepared for abandonment. . . .

Exceptions to the AOC requirements are found at R645-301-600 through R645-301-553.642. None of those exceptions apply in this case. R645-301-553.610 does not apply because there is no evidence that Co-Op obtained from DOGM the necessary approval for a variance from AOC. (Tr-II. 46-49) R645-301-55.620 does not apply because no highwalls exist at the mine, as discussed below. R645-301-55.630 has no application because DOGM has not approved a variance for mountaintop removal and the mining operation did not constitute mountaintop removal. (Tr-II. 51-52) R645-301-55.640 to R645-301-55.642 are not applicable because they pertain only to surface, and not underground, coal mining. (Tr-II. 52-53)

Much discussion has focused upon the "highwalls" at the mine and the Utah program requirement to eliminate highwalls. See R645-553.120. However, Co-Op has not been charged with a violation of the requirement that highwalls be eliminated. The concern in this case is whether Co-Op met the AOC requirement, which includes a mandate that all highwalls have a design approved under the Utah program.

Confusion has arisen in this case because the map prepared by Mr. Reynolds refers to all purported vertical cuts as "retained highwalls." The preponderance of the evidence shows that there are no highwalls, as that term is defined in the Utah program, *i.e.*, there is no "face of exposed overburden and/or coal in an open cut . . . for entry to underground coal mining activities." R645-100-200.

Using the term "highwall" loosely to refer to any vertical cuts, DOGM ordered Co-Op to demonstrate in writing that the volume of reasonably available spoil was insufficient to

completely backfill the highwalls at the mine. To both DOGM's and OSM's satisfaction, Co-Op complied with this order. Thus, there is no dispute that Co-Op is not required to completely eliminate the remaining vertical cuts.

However, several OSM witnesses testified that Co-Op failed to achieve AOC because reasonably available material allegedly exists at the transformer pad, access road berm, access road downslope, and lower pad to partially backfill vertical cuts remaining on the access road upslope, transformer pad upslope, and eastern upslope of the lower pad. However, OSM took no measurements of the purported available material and Co-Op presented preponderating evidence that much, if not all, of this material was not reasonably available.

Co-Op showed that no available material exists at the transformer pad, as Co-Op had to return some material from the portals to the pad to meet the requirement of a minimum of 2 feet of topsoil coverage. Indeed, as more fully discussed below, Co-Op repeatedly detailed facts or factors which OSM did not adequately take into account in concluding that AOC had not been achieved.

Co-Op's witness, Alan Jenkins, established that the access road berm material was not reasonably available because the narrowness and steepness of the road precluded access by equipment necessary to move the large rocks in the berm. OSM witnesses opined that the material could be accessed, but Mr. Jenkins' testimony is more persuasive.

His testimony is more persuasive because he was able to support his opinion with much greater factual detail and more cogent reasoning. No doubt he was able to do so because he has far greater experience in operating all forms of equipment.

Even if the berm material were reasonably available, Co-Op presented convincing reasons for retention of the berm. Those reasons are based upon components of the AOC requirement as well as the Utah program backfilling and grading requirements, including provisions in addition to, and sometimes in competition with, the AOC requirement.

First, Co-Op established that the berm serves the important function of diverting water that is otherwise likely to spill over the outer edge of the road and cause erosion of the downslope. The definition of AOC at R645-100-200 as well as R645-301-553, R645-301-553.140, and R645-301-553.410 support consideration of this factor in determining whether the berm should be retained or used for backfill. The definition of AOC contemplates a surface configuration that "complements the drainage pattern of the surrounding terrain." (Emphasis added) R645-301-553 provides:

... nothing in R645-301-553[, including the AOC requirement,] will prohibit the placement of material in road and portal pad embankments located on the downslope, so long as the material used and the embankment design comply with the applicable requirements of R645-301-500 and R645-301-700 and the material is moved and placed in a controlled manner.

"'Embankment' means an artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or for other similar purposes." R645-100-200 (emphasis added). R645-301-553.140 provides that "[d]isturbed areas will be backfilled and graded to . . . [m]inimize erosion and water pollution both on and off the site" (Emphasis added) R645-301-553.410 provides that cut and fill terraces may be allowed by DOGM where "[n]eeded to conserve soil moisture, ensure stability, and control erosion on final-graded slopes" OSM's well-qualified expert, Michael Superfesky, did not consider the berm's drainage control utility and these regulatory provisions in recommending transfer of the berm against the access road upslope.

Mr. Superfesky recommended the transfer because the berm material would protect against erosion of the upslope. While Superfesky's impressive credentials cannot be ignored, his testimony regarding erosion and the added safety of moving the berm was, to a great extent, theoretical and not adequately tied to the particular conditions of the mine site.

For instance, he expressed concern for the possible erosion of softer materials exposed by the vertical cuts, causing harder material from above to fall toward the void, but he had only visited the mine site once and did not know whether such soft materials exist. Mr. Mangum, who visited the mine site regularly from 1987 onward, testified that no such soft materials are present. In light of the particular conditions of the mine, Mr. Mangum reasonably concluded that, without moving the berm, slides and sloughing would occur just as predictably in the disturbed areas as in the undisturbed areas.

Similarly, in assessing the instability likely to be caused by the weight of the berm on the outer edge of the road, Mr. Superfesky did not consider certain factors. One such factor, as detailed by Mr. Grubaugh-Littig and Mr. Mangum, is that the underlying material appears stable and is largely solid rock. Considering the relevant factors, Mr. Mangum reasonably concluded that the minimal weight of the berm was immaterial and insignificant in determining the stability of the access road downslope.

Nor did Mr. Superfesky adequately consider the danger to the residents of dislodging rocks if the berm were moved. His bare assertion that the move could be done safely evidenced no thoughtful consideration of the danger. Convincing evidence was presented in contradiction of his assertion.

The foundation of Mr. Superfesky's recommendation to move the berm suffers from additional defects. He overestimated the amount of material in the berm, which did not average 4 feet in height as he asserted but did not measure. Also, there is no indication he was aware that much of the berm consists of original contour material left in place. These facts are relevant to the assessment of the berm material's effect on the stability of the downslope if the material is left on the outer edge of the road, and to the assessment of the berm material's effect on the stability of the upslope if the material is moved.

In sum, Mr. Superfesky's knowledge of the particular conditions of the mine and the Utah regulations was simply far less comprehensive than that of Co-Op's witnesses. Co-Op's witnesses presented convincing practical reasons for retaining the berm in accordance with, and after consideration of, the full range of regulatory provisions bearing upon the determination of whether to retain the berm.

Co-Op also presented preponderating evidence that the lower pad area met the AOC requirement in light of all relevant facts and factors. In recommending movement of material from over the culvert to the eastern cliff face, neither Mr. Superfesky nor the OSM inspectors were aware of the original contour of the land. They either did not know or seemed to ignore the fact that the eastern cliff face of the lower pad is a natural feature. They did not know that the residents of Trail Canyon, and not Co-Op, enlarged the cliff face. Nor did they know that the lower pad was already several feet lower than its original contour.

The factual ignorance of the OSM witnesses is exemplified by OSM Inspector Pugh's suggestion that Co-Op should have hauled off coal material on the lower pad and used the lower pad topsoil to cover the cliff face, rather than using the topsoil to cover the coal material. (Tr-II. 218-220) In fact, Co-Op did haul off much coal material and used lower pad soils or materials to reclaim various other areas, including the cliff face. This effort resulted in the lowering of the pad's original contour.

While Mr. Mangum concurred with OSM's witnesses that some material is available over the culvert, it is questionable whether this material is reasonably available in light of several facts. First, due to the steepness of the eastern slope of the lower pad, Co-Op would not be able to push any more material up against the eastern cliff face. Second, removal of material in the culvert area would jeopardize the stability of the public road. Third, removal of such material would cause siltation of the stream.

Even if there is lower pad material reasonably available, movement of this material is not mandated by the AOC requirement. To the contrary, moving the material would render the lower pad less like the original contour of the land.

The pad already closely resembles the original contour of the land, being relatively flat to the west, and steeper with a cliff face to the east. Moving material from west to east would lower an area already several feet lower than the original contour. Movement would not complement the drainage pattern, but would cause drainage problems and possibly destabilize the public road. Finally, movement is not necessary to reduce a highwall because the eastern cliff face is not a highwall.

The last area that purportedly contains reasonably available material is the downslope of the access road and transformer pad. OSM Inspectors Wright and Pugh concluded that available material existed there, but gave no indication as to the amount of material available. Mr. Superfesky, whose task was to determine the amount of available material, did not

mention the downslope as an area with available material. Also, Mr. Mangum testified that the downslope contained no available material.

Without any indication as to the amount of material available, if any, and with little or no demonstrated benefit to placing small amounts of material against the vertical cuts, there is little, if any benefit, to be gained by moving this material. The evidence does not illuminate whether moving this undetermined amount of material will move the mine closer to its original contour in any material way. Moreover, moving the material is nearly certain to cause harm in that both downslope and road vegetation will be destroyed, likely causing erosion. Also, the testimony regarding movement of the berm raises questions as to whether the downslope material can be retrieved and retrieved safely. These factors must be taken into account in assessing whether AOC has been achieved.

In sum, the evidence preponderates in favor of a finding that the AOC requirement has been met for all areas of the mine, taking into account all relevant facts and factors. The photographs and video received as evidence demonstrate that the lower pad, transformer pad, and access road blend into and complement the drainage pattern of the surrounding terrain and closely resemble the general surface configuration of the land prior to mining, as recounted by Mr. Stoddard. No highwalls exist on the mine and the Utah program, considered as a whole, dictates that no further reclamation of the vertical cuts is warranted.

Now, having observed the demeanor of the witnesses and having weighed the credibility thereof, there are here entered the following:

Findings of Fact

1. Factual findings set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.
2. The issue of the specificity of the Federal NOV was raised at trial, without objection, both through testimony and an oral motion to dismiss made by Co-Op. (Tr-I. 130-131; Tr-II. 196-196)
3. Co-Op was not prejudiced by any lack of specificity in the Federal NOV.
4. The natural and premining terrain at Trail Canyon is largely steep and rocky, with numerous intermittent natural cliffs and ledges and exposed bands of coal and carbonaceous shale. (Tr-II. 223, 226-228, 253-255, 260, 286; Tr-III. 158-160, 168-170, 199-202)

5. In 1988 and 1989, Co-Op, having been issued a reclamation permit by DOGM, reclaimed the mine, including completely backfilling and covering the portals and revegetating the disturbed areas. As a result, there are no coal seams, acid- and toxic-forming materials, combustible materials, or overburden exposed by Co-Op in any vertical cuts or entries to underground coal mining activities not adequately covered with nontoxic and noncombustible materials. (Tr-I. 41-43, 144-145; Tr-II. 62, 117-118, 194, 228, 256-259; Tr-III. 125-126, 136-137, 160-161, 164, 189)

6. The only witness produced with knowledge of the original contour of permit area is Bill Stoddard. (Tr-I. 127, 175, 238-239, 243; Tr-II. 121, 150-151, 156, 293-312)

7. There is no reasonably available material at the transformer pad for further reclamation of vertical cuts because the pad contains only 2 feet of topsoil upon solid rock, the minimum amount of topsoil required. (Tr-III. 30, 76, 97-98, 104-105, 120-122)

8. There is no reasonably available material at the access road berm for further reclamation of vertical cuts because: (1) the narrowness and steepness of the road precluded and still precludes access by equipment necessary to move the large rocks in the berm, and (2) movement of the berm will likely dislodge rocks, sending the down the mountain and endangering the Trail Canyon residents. (Tr-II. 272-273; Tr-III. 72, 117-118, 124, 139, 140-142)

9. In recommending transfer of the berm material against the access road upslope, Mr. Superfesky did not adequately consider or assess: (a) the berm's drainage control utility, (b) the provisions of the Utah program pertaining to erosion and drainage control, (c) the lack of soft material exposed by the vertical cuts, (d) the stability and solid rock composition of the material underlying the berm, (e) the danger to the Trail Canyon residents of dislodging rocks if the berm were moved, (f) the substantial amount of original contour material in the berm, (g) the amount of material purportedly available in the berm, and (h) the inability to access the berm with equipment necessary to move the berm. In addition thereto, the berm completes a catch basin to prevent rock falling from upslope into the residential area. (Tr-II. 120, 142-143, 163-166, 169-173, 251-253, 256, 259, 272-273; Tr-III. 19-21, 45-46, 70-73, 96-97, 100, 117-118, 122-124, 139, 140-142)

10. Even if the berm remains on the outer edge of the access road terrace, slides and sloughing are likely to occur on the upslope just as predictably in the disturbed areas as in the undisturbed areas. (Tr-III. 99-101)

11. The weight of the berm is immaterial and insignificant in determining the stability of the access road downslope. (Tr-III. 96-97)

12. There is no reasonably available material at the lower pad for further reclamation of vertical cuts because: (a) Co-op would not be able to push any more material up against the eastern cliff face of the lower pad due to the steepness of the eastern slope of the pad,

(b) removal of the material in the culvert area would jeopardize the stability of the public road, and (c) removal of such material would cause siltation of the stream. (Tr-III. 29, 211, 214-215)

13. In recommending movement of lower pad material from over the culvert to the eastern cliff face, OSM's witnesses failed to adequately consider: (a) that the eastern cliff face is a natural feature, (b) that the lower pad is several feet lower than the original contour of the land, (c) that the enlargement of the eastern cliff face was accomplished by the residents of Trail Canyon and not Co-op, (d) that Co-op hauled off much coal material from the lower pad and used lower pad soils or materials to reclaim various other areas, including the cliff face to the extent feasible by pushing the material up the face with a bulldozer, (e) that removal of the material in the culvert area would jeopardize the stability of the public road, and (f) that removal of such material would cause siltation of the stream. (Tr-III. 21-29, 76, 131-133, 145, 149, 152-153, 211, 214-215)

14. There is no reasonably available material at the downslope of the transformer pad and reclaimed access road for further reclamation of vertical cuts because: (1) there is insufficient evidence of the amount of material purportedly available, (2) movement of this material, if any, will destroy vegetation and likely cause erosion of the downslope, and (3) it is questionable whether this material can be retrieved or retrieved safely. (Tr-II. 117-118; Tr-III. 98-99, 160-161; see also Finding 8)

15. The transformer pad, including the downslope, the reclaimed access road (bermed terrace), including the upslope and downslope, and the lower pad closely resemble the general surface configuration of the land prior to mining and blend into and complement the drainage pattern of the surrounding terrain. (Tr-II. 221-227, 229, 254)

16. DOGM's response to the TDN was not arbitrary, capricious, or an abuse of discretion.

Conclusions of Law

1. The Hearings Division of the Department of the Interior has jurisdiction of the parties and of the subject matter of this proceeding.

2. Conclusions of law set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.

3. The specificity of the Federal NOV is at issue in this proceeding because the issue was raised at trial without objection from OSM.

4. The Federal NOV is not invalid for lack of specificity because Co-Op was not prejudiced by the lack of specificity, if any.

5.Co-Op did not violate R645-301-553.300 of the Utah program because the preponderance of the evidence shows that Co-Op did not expose a coal seam or other combustible matter and then fail to cover it.

6.Co-Op did not violate R645-301-553.110 because the preponderance of the evidence shows that the AOC requirement was met for all areas of the mine, taking into account all relevant facts and factors.

7.Because Co-Op did not violate the Utah program as charged in the Federal NOV, the Federal NOV is invalid.

Order

It is hereby ordered that the Federal NOV is invalid.



Ramon M. Child
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).

Distribution

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

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September 26, 1994

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BHP PETROLEUM (AMERICAS) INC.,	:	Docket No. DV 93-11-R
	:	
Applicant	:	Application for Review and Temporary Relief
	:	
v.	:	Notice of Violation
	:	No. 93-02-352-004
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (OSMRE),	:	Knight Coal Mine
	:	
Respondent	:	

DECISION

Appearances: Robert G. Holt, Esq., and Clay W. Stucki, Esq., Salt Lake City, Utah, for applicant;

Jon Johnson, Esq., Office of the Field Solicitor, Denver, Colorado, for respondent.

Before: District Chief Administrative Law Judge Rampton

BHP Petroleum (Americas) Inc. (BHP) filed an Application for Review and an Application for Temporary Relief regarding Notice of Violation (NOV) No. 93-02-352-004. Inspector Russell Porter of the Office of Surface Mining Reclamation and Enforcement (OSMRE) issued the NOV following an October 1992, Phase I Bond Release inspection for the Knight Mine, Sevier County, Utah. The NOV charges that the operator, BHP, failed to fulfill reclamation backfilling and grading requirements set out under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C §§ 1201-1291.

The NOV originally cited BHP for violations of the Utah State program (Ex. R-4). However, OSMRE later modified the NOV to cite BHP for violations of the Federal interim regulations because mining activities at the Knight Mine ceased in 1980. All mining activities at the Knight Mine ended before the adoption of the Utah State program making the Utah State program inapplicable to the Knight mine. The NOV listed three separate alleged violations, only two of which are presently at issue. Violation 1 is stated as a "failure to return all

disturbed areas to their approximate original contour [(AOC)]." (Ex. R-4, p.2). Violation 2 is for a "failure to eliminate all highwalls." (Ex. R-4, p.3). Violation 3 was resolved by a negotiated settlement between the parties.

BHP believes that Violation 1 should be dismissed because they have achieved AOC and the area conforms to the postmining land use. Additionally, BHP argues that Violation 2 should be dismissed since the feature in question is not a highwall as defined by the Federal regulations. BHP's Application for Temporary Relief was granted at a hearing on July 9, 1993, at Salt Lake City, Utah. As for the Application for Review, Violations 1 and 2 were addressed at a hearing held on November 30 through December 2, 1993, at Salt Lake City, Utah. After review of the record, the parties' briefs and reply briefs, and for the reasons set forth below, both alleged violations must be dismissed.

Statement of the Facts

BHP operates the Knight Mine, an underground coal mine in Sevier County, Utah. When BHP began operations, they constructed the portal entry to the mine creating a highwall in the hillside (Tr-II. 201-202). Above the highwall and the portal entry, BHP also constructed a bench in the hillside to catch debris from sliding down the hill into the portal entry (Tr-II. 203). This area also served as a drainage way above the portal entry area (Tr-II. 203). Additionally, BHP constructed a shop building, a water tank and pump house, power utility lines, and roads to assist the mining operation. Mining at the mine ceased in June 1980 and the mine has remained inactive ever since.

On April 11, 1986, BHP submitted a reclamation plan for the Knight Mine to the Utah Division of Oil, Gas & Mining (UDOGM) (Ex. A-10). The plan called for the retention of the roads, buildings, water tank, and utility lines for the benefit of postmining land use as a cattle management and recreational area (Tr-I. 63-64, 67, 153; Tr-III. 38-41; Ex. A-10). The permit also called for BHP to backfill and grade the highwall with the bench above the highwall (Ex. A-10). BHP's permit was granted on September 8, 1987 (Ex. A-9). UDOGM approved the final configuration of the land in late 1987 and BHP immediately began the redistribution of the topsoil and reseeded (Tr-III. 45-46). This reclamation work continued through 1992 with monthly inspections by UDOGM and two inspections by OSMRE during this time. On May 22, 1992, BHP applied for a Phase I Bond Release. OSMRE's inspector, Porter, inspected the mine site on October 29, 1992, along with UDOGM and the U. S. Forest Service (Tr-I. 33). UDOGM recommended bond release but OSMRE eventually issued the NOV to BHP on June 8, 1993 (Ex. R-4).

Discussion

In notice of violation proceedings, OSMRE has the initial burden of establishing a prima facie case as to the fact of the violation. OSMRE has met this initial burden. The ultimate burden of persuasion regarding the fact of the violation rests with BHP as the applicant for review. 43 CFR 4.1171.

In this decision, it is assumed, without deciding, that OSMRE established a prima facie case. The discussion focuses on whether BHP met its burden of persuasion.

I.

Violation 1 is dismissed because BHP achieved AOC

Violation 1 states that BHP "fail[ed] to return all disturbed areas to their approximate original contour." (Ex. R-4, p.2). Under the Federal interim regulations, "surface work areas which are involved in the excavation, disposal of materials, or otherwise affected, shall be regraded to approximate original contour." 30 CFR 717.14(a). AOC is achieved when the mined area, "including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated; water impoundments may be permitted where the regulatory authority determines that they are in compliance with § 715.17." 30 CFR 710.5. OSMRE would specifically require BHP to remove the shop building, water tank, pad area, power utility poles and roads and blend in these areas with the surrounding terrain to achieve AOC (Tr-I. 69-72).

BHP may retain the water tank and the underground water storage area (water storage facilities) as water impoundments. AOC is attainable, even though water impoundments remain at the mine site, so long as the water impoundments comply with section 715.17. 30 CFR 710.5. Section 715.17 simply requires that the hydrologic system is protected to the extent that "[c]hanges in water quality and quantity, in the depth to ground water, and in the location of surface water drainage channels shall be minimized such that the postmining land use of the disturbed land is not adversely affected and applicable Federal and State statutes and regulations are not violated." In other words so long as the water storage facilities do not adversely affect either the postmining land use of cattle management and recreation or violate other Federal and State statutes and regulations, BHP may retain these facilities and still achieve AOC at the Knight Mine.

Not only are the anticipated cattle management and recreational uses not adversely affected by the water storage facilities, the facilities will benefit these postmining land uses. Porter agreed that the water storage facilities could be used to water livestock and fight grass fires in the future (Tr-I. 73). In addition, the water facilities do not violate any Federal laws. OSMRE only argued that the water facilities violated the AOC requirements. However, under the definition of AOC in the Federal program, water impoundments may be retained. Similarly, the water facilities do not violate any State or local laws. UDOGM did not find that the reclamation work done at the Knight Mine violated any State or local laws. J. Randall Harden, Senior Reclamation Engineer at UDOGM, testified that continuous UDOGM inspections confirmed that BHP had met the AOC requirements of backfilling and grading (Tr-II. 132-137, 152-159). Since the water storage facilities do not adversely affect the postmining land use or violate any Federal or State laws, BHP is not required to remove the water storage facilities to achieve AOC.

With respect to the roads, the interim regulations require removal of haul and access roads and regrading of the land affected consistent with the requirements of 30 CFR 717.14 and 717.20, unless retention of the roads is approved. 30 CFR 717.17(j). If roads could not be retained under the more general AOC requirement, then 30 CFR 717.17(j) would be rendered superfluous.

The question is under what circumstances may roads be retained consistent with the AOC requirement. A related question is under what circumstances, if any, may flat areas, such as the pad area and the land underneath the support facilities, as well as the support facilities themselves, be retained under the AOC requirement.

It is clear that the AOC requirement does not require restoration to the exact original contours. Rather, as noted in OSMRE's own directive,

the general terrain should be comparable to the premined terrain; that is, if the area was basically level or gently rolling before mining, it should retain these general features after mining. Rolls and dips need not be restored in their original locations and level areas may be increased * * * through formation of shorter, steeper slopes, provided that those slopes are capable of supporting the postmining land use and blend with the surrounding terrain.

(Ex. A-6, p.2). While this directive is not binding, it is an accurate statement of the law.

The regulations pertaining to surface coal mining require that the final graded slopes shall not exceed the approximate premining slopes. 30 CFR 715.14(b). OSMRE regulatory commentary indicates that this requirement does not preclude reclamation, such as BHP has undertaken, where previously uninterrupted slopes include differences in topography such as roads and level areas.

The "final graded slope", that measured after mining and grading, is not necessarily a uniform slope but is often an overall average slope. Therefore, terraces, roads and diversion ditches may be included within the slope measurement path * * *.

42 Fed. Reg. 62639, 62644 (Dec. 13, 1977).

While slope measurements are not required for underground mining, they still provide an objective measure of AOC, which is defined identically for both surface and underground mining. 30 CFR 710.5. The evidence shows that the average overall slopes for the postmining topography at the Knight Mine are not steeper than the premining slopes (Exs. A-47, A-48, A-49; Tr-II. 55-62).

Moreover, a diagram of AOC from the SMCRA legislative history permits a postmining terrain of a relatively flat area graded into a slope where an uninterrupted slope formerly

existed (Ex. A-37). Cross sections of the disturbed areas at the Knight Mine and testimony by Kent Wheeler, a former UDOGM employee and current environmental consultant to BHP, show that the postmining topography is very similar to the premining topography, matching up much like the diagram of AOC from the SMCRA legislative history (Tr-III. 63-66; Exs. A-50, A-51, A-52, A-53).

From an examination of the regulations, it is clear that achieving slope stability and minimizing adverse hydrologic impacts are principal motivating concerns behind the AOC requirement. *See, e.g.*, 30 CFR 717.14 and 717.17(j). Harden, the UDOGM Senior Reclamation Engineer, confirmed that these are the primary concerns (Tr-II. 145). Harden testified that BHP's reclamation work satisfied these concerns (Tr-II. 146). OSMRE Inspector Porter agreed with Harden that the current drainage, which contains some diversions of the premining drainage, allows water to flow through the area in an unobstructed and controlled manner (Tr-I. 78-79, Tr-II. 142-143). In general, Porter had no problem with the current drainage (Tr-I. 96). He also acknowledged that BHP had stabilized the soil and that the alleged violations did not effect or harm the environment (Tr-I. 82, 127). In sum, the evidence does not show that the present reclaimed configuration of the Knight Mine is unstable or likely to adversely effect the hydrology or environment.

In fact, there is evidence indicating that the reclaimed configuration is more beneficial than the premining configuration. Witnesses for both BHP and OSMRE agree that the pad area and the roads will benefit the postmining land use, providing a corral area and access to the water tank (Tr-I. 73-76, Tr-II. 147-149, Tr-III. 47-52). The pad area provides a level area to corral and pen livestock from which erosion and siltation of the streams is less likely to occur. If corralling and penning livestock were to take place on the less level premined slopes, erosion and siltation would be more likely (Tr-III. 47).

The foregoing leads to the conclusion that the postmining configuration of the land, including the pad area, roads, and flat areas underlying the support facilities, meets the AOC requirement, as it closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain. This necessarily subjective determination is supported by the fact that rebackfilling and regrading of these areas would probably be more detrimental to the environment than leaving the existing reclamation work. BHP revegetated the area 6 years ago (Tr-III. 43-46). Porter agreed that the vegetation had been in place for some time and had stabilized the soil (Tr-I. 81-82). As both Porter and Wheeler testified, destroying the revegetation to regrade the area could cause erosion and reestablishing the vegetation could be very difficult (Tr-I. 91, 103; Tr-III. 67-69).

As for the shop building, pump house, and power utility poles, the Federal regulations are unclear as to whether AOC can be achieved if buildings and other support facilities remain. If the land underneath the facilities complies with the AOC requirement, as in this case, it appears that the only possible objection to the facilities would be that visually they do not blend with, or closely resemble, the surrounding terrain. This objection does not implicate the

principal concerns for achieving slope stability and minimizing adverse hydrologic impacts. The AOC requirement should not be read to preclude the retention of support facilities, based upon visual aesthetics, especially where retention of the facilities is dictated by the tantamount requirement to restore the land to support the postmining land use.

For underground mining, SMCRA requires, with respect to surface impacts such as the construction of roads, structures, and facilities, that the operator operate in accordance with the environmental protection performance standards for surface coal mining set out under section 1265 of Title 30. 30 U.S.C. § 1266(10). Those standards include the requirement to "restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses * * *. 30 U.S.C. § 1265(b)(2). Congress noted that "surface mining also presents possible land planning benefits as such mining involves the opportunity to reshape the land surface to a form and condition more suitable to man's uses." H.R. Rep. No. 95-218 at 93-94; 1977 U.S.C.C.A.N. at 630. There is no dispute that the support facilities benefit the postmining land use, rendering the land more capable of supporting this use.

Wheeler and Harden testified that the buildings BHP left behind, such as the shop building, benefit the postmining land use of livestock management and that the pump house and the power utility poles were an integral part of the water storage system at the mine (Tr-II. 147-149, Tr-III. 50-52). Porter agreed that the remaining road and facilities could be used in the postmining land use of livestock management and recreation (Tr-I. 73-76).

In conclusion, BHP has presented sufficient evidence to rebut any prima facie case that the roads, pad area and other flat areas underlying the support facilities, and the support facilities themselves do not comply with the AOC requirement. Consequently, Violation 1 should be dismissed.

II.

Violation 2 must be dismissed because the area outlined by OSMRE is not a highwall under the Federal regulations.

Violation 2 charges BHP with "failure to eliminate all highwalls." A highwall is defined as "the face of exposed overburden and coal in an open cut of a surface coal mining activity or for entry to underground mining activity." 30 CFR 701.5. Under the Federal regulations, the law clearly states that BHP must "[b]ackfill and grade to the most moderate slope possible to eliminate any highwall * * *." 30 CFR 717.14(a)(2). However, the area that OSMRE describes as a highwall was not used for entry to underground mining activity. BHP correctly argues that the area cited by OSMRE as a highwall in the NOV is not a highwall according to the definition cited above.

In a similar case where mining company witnesses testified that rock failures above the highwall were natural slope failures, the Interior Board of Land Appeals (IBLA) stated that the

slope failure may "have been triggered by the company's mining activities and, if so, that the company is responsible for returning these disturbed areas to their approximate original contours. It does not necessarily follow, however, that the rock facades would have to be completely eliminated to meet this performance standard." *River Processing, Inc. v. Office of Surface Mining Reclamation and Enforcement*, 76 IBLA 129, 138-139 (Sept. 26, 1993) (citations omitted), *aff'd*, *River Processing, Inc. v. Clark*, Civ. No. 8-316 (D. Ky. May 2, 1985). In fact, Porter agreed that retention of a disturbed slope after elimination of the highwall below it constituted AOC in a diagram of AOC from the SMCRA legislative history (Tr-I. 111-112, Ex. A-37).

To illustrate that the above situation applied to the Knight Mine, M. Gregory Cloward, the engineer who designed and constructed the highwall, testified that the area identified by OSMRE as a highwall was a cutslope located above the actual highwall to stabilize the area above the portal entry (Tr-II. 211-215). Cloward's testimony, along with construction plans for the mine and photographs of the area, showed that the actual highwall had been completely eliminated (Tr-II. 215-216). Porter agreed that the vertical face, which was constructed as part of the portal entry to the mine, had been eliminated (Tr-I. 110). Additionally, Wheeler testified that the area OSMRE labeled as the highwall is about 100 feet away from the actual highwall made by BHP to gain access to the mine (Tr-III. 74-76). Since the cutslope was not part of the entry to the underground mine, it cannot be part of the highwall.

BHP has presented sufficient evidence to rebut any prima facie case that a highwall still exists at the Knight Mine. BHP proved that the actual highwall has been sufficiently backfilled and reclaimed to comply with the interim regulations. Therefore, Violation 2 should be dismissed.

Conclusion

Based on the foregoing, Violation 1 and Violation 2 in Notice of Violation No. 93-02-352-004 are hereby declared invalid and dismissed.


John R. Rampton, Jr.
District Chief
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).