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THOMAS E EHMETT (505) 766-1486

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0014



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

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801-538-5319 (TDD)

June 30, 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 X94-020-179-001 TV3, Mountain Coal Company, Gordon Creek #3 and #6, ACT/007/017, 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 June 20, 1994.

Part 1 of 3 of the TDN reads: "Failed to demonstrate in writing to the Division that there was insufficient spoil to backfill face-up at #6 Mine." Regulation cited: R645-301-553.520. Remarks: "#6 faced-up prior to Act; mined after the Act. This possibly making it a previously mined area."

Part 2 of 3 reads: "Failed to use all reasonably available spoil to backfill the face-up at Mine #6." Regulation cited: R645-301-553.521.

Part 3 of 3 reads: "Failed to eliminate all highwalls at face-up at #3 Mine." Regulation cited: R645-301-553.120. Remarks: "Mine #3 was continuously mined but proposed amendment for continuously mined areas has not been approved."

On June 26, 1987, the Division approved Phase I bond release for the Gordon Creek #3 and #6 mines. That approval was based on the requirements of the approved plan and upon the requirements of the approved Utah program. The backfilling and grading rules of the Utah Coal Regulatory Program at the time, UMC 817.101, did not require using all reasonably available spoil to backfill highwalls. In addition, a window existed in the Utah program for retention of highwalls which were geomorphologically similar to cliffs in the surrounding area.

Page 2

Thomas E. Ehmett

TDN X94-020-179-001 TV3

ACT/007/017

June 30, 1994

The Utah program has since been amended to eliminate the highwall retention window, and amendments to require the use of all reasonably available spoil to backfill highwalls in the cases of previously and continuously mined areas are pending. At the time of Phase I bond release, however, no such provisions existed in the state program. In short, Parts 1 and 2 of the TDN are without any regulatory basis. The Division found, in its technical analysis of September 10, 1986 that, since the areas were disturbed pre-law, no effort was made to salvage or protect soil materials, and that backfilling to AOC was impractical due to lack of fill materials. The Division also found that the remaining highwalls were "similar in structural composition to the pre-existing cliffs in the surrounding area, and are compatible with the geomorphic processes of the area." Final Technical Analysis, September 10, 1986, at page 20.

Late in 1991, the Division and OSM had a series of communications regarding the highwall window and other issues. The culmination of those communications was a meeting between representatives of the Division and OSM including Dianne Nielson, Lowell Braxton, Tom Mitchell, W. Hord Tipton, Robert Hagen, John Heider, Albert Kashinski, and John Retrum. At issue was the compliance status of mines for which Phase I bond release had been approved in reliance on the highwall window, among other issues. OSM stated its position by letter from Robert Hagen dated November 20, 1991, stating, "OSM agreed that the existing Utah rule can be used for bond release until such time as the State program is amended, provided that the State program is properly interpreted."

The Division relied on its understanding that no actions needed to be taken with regard to already reclaimed sites which had achieved Phase I Bond Release before November 7, 1991. That understanding is based on a series of events and communications, a chronology of which is presented here:

December 13, 1982	Utah AOC rules approved as part of the Utah Coal Regulatory Program.
September 11, 1986	Gordon Creek #3 and #6 reclamation permit approved.
May 26, 1987	OSM INE-26 Directive approved: Approximate Original Contour. Last paragraph states that: "While a subsequent different AOC opinion of an

OSMRE inspector demonstrates the subjectivity inherent in interpreting AOC, it nevertheless serves no useful purpose to substantially redisturb a stabilized and reclaimed minesite when the regulatory authority has exercised its discretion in good faith and remains satisfied that the applicable program standards, including restoration of AOC and postmining land use capability, have been met. Since environmental goals may be frustrated through the additional siltation and further degradation from a second topsoil removal and replacement, regrading, and revegetation, unless one or more of the three principles enumerated above have been clearly violated, the acceptancy of the regulatory authority should stand.

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| June 26, 1987 | Phase I Bond Release approved by Lowell Braxton. |
| August 5, 1987 | OSM Oversight inspection at Gordon Creek #3 and #6. |
| November 15, 1988 | OSM Oversight inspection at Gordon Creek #3 and #6. |
| April 12, 1990 | Major revisions to the Utah permanent regulatory program rules submitted to OSM on August 11, 1989 approved and effective this date, including R614-301-500, Engineering. (See 30 CFR 944.15 (n)). |
| November 6-7, 1991 | OSM and Division held a meeting in Salt Lake City to discuss issues including public roads, highwalls, AVS, and permit transfers. In attendance were: Dianne Nielson, Lowell Braxton, Tom Mitchell, W. Hord Tipton, Robert Hagen John Heider, Albert Kashinski, and John Retrum. |

- November 20, 1991 OSM Oversight inspection at Gordon Creek #3 and #6.
- November 20, 1991 Letter from Robert Hagen to Dianne Nielson with an OSM summary of the November 6 and 7, 1991 meeting. Item #4 summary notes state: "OSM agreed that the existing Utah rule can be used for bond release until such time as the State program is amended, provided that the State program is properly interpreted. Upon approval of the amendment, all permits for mines that are not in the process of reclamation will be reviewed for compliance with the amended rule."
- December 5, 1991 Division response to Draft Summary of OSM/DOGM meeting of November 6 and 7, 1991.
- December 5, 1991 Division receives OSM Mine Site Evaluation Inspection Report. The report states: "The portal and stockpile areas had some highwall showing, but I told the DOGM inspectors that I would not address this issue until the Hidden Valley highwall issue was resolved."
- December 11, 1991 Letter to Dianne Nielson from Robert Hagen re: TDL 91-02-370-002, Hidden Valley Mine. Paragraph 2 states: ". . . the November 7, 1991 meeting between OSM and DOGM, Mr. Tipton modified OSM's position relative to retroactive application of the proposed changes." Paragraph 3 states: "At the November 7, 1991 meeting Mr. Tipton also outlined terms for the acceptance of highwalls already released under the existing State program. In accordance therewith, this highwall will not require additional reclamation."
- December 17, 1991 Letter to Dianne Nielson from Robert Hagen re: TDL 91-02-370-001 and TDN 89-02-370-003,

Trail Canyon Mine. Paragraph 4 states: "The WSC report identifies reclamation issues that should be addressed by DOGM prior to final reclamation of the site. However, consistent with the agreement reached at the November 7, 1991 meeting between OSM and DOGM regarding acceptance of highwalls where Phase I release has occurred"

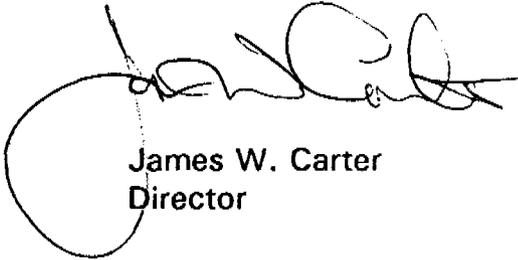
- | | |
|--------------------|--|
| September 17, 1993 | <u>Federal Register</u> Notice re: Utah Program Amendment on Highwalls. |
| November 12, 1993 | Division response to OSM with requested revised and clarified language set out in the September 17, 1993 <u>Federal Register</u> . |
| March 31, 1994 | OSM response to Division's November 12, 1993 submittal. |
| May 9, 1994 | OSM grants Division an extension to May 31, 1994 to respond to March 31, 1994 issue letter. |
| May 18, 1994 | Phase II Bond Release Inspection at Gordon Creek #3 and #6, with Division and OSM in attendance. |
| May 27, 1994 | OSM grants Division an extension to June 30, 1994 to respond to March 31, 1994 issue letter. |
| June 6, 1994 | Decision by Administrative Law Judge Child that Federal NOV No. 93-020-190-03, issued for failure to use all reasonably available spoil to backfill highwalls, is invalid. |

In sum, the Division's position is that the mine sites at Gordon Creek #3 and #6 were properly reclaimed in accordance with the Utah regulatory program in effect at the time of performance of the reclamation work and Phase I bond release. In 1991, OSM and the Division jointly agreed to not pursue retroactive application of program amendments approved subsequently, in accordance with

Page 6
Thomas E. Ehmett
TDN X94-020-179-001 TV3
ACT/007/017
June 30, 1994

Directive INE-26. There have occurred no events since those decisions were made which would justify re-evaluating the circumstances. The Division believes it would be particularly difficult and manifestly unreasonable to attempt retroactive application of program amendments which have not yet been finally approved. I therefore request that OSM find this response to TDN X94-020-179-001 TV3 to be appropriate.

Very truly yours,

A handwritten signature in black ink, appearing to read "James W. Carter". The signature is written in a cursive style with a large, prominent loop at the beginning.

James W. Carter
Director

jbe
cc: Lowell P. Braxton
Pamela Grubaugh-Littig
Joe Helfrich
007017TD

* * * * *

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

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