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RALPH H. MILLER  
BRYCE E. ROE  
GEORGE D. MELLING, JR.  
WARREN PATTEN  
M. BYRON FISHER  
STANFORD B. OWEN  
WILLIAM H. ADAMS  
ANTHONY L. RAMPTON  
PETER W. BILLINGS, JR.  
THOMAS CHRISTENSEN, JR.  
LAWRENCE J. LEIGH  
DENISE A. DRAGOO  
JAY B. BELL  
DANIEL W. ANDERSON  
GARY E. JUBBER  
ROSEMARY J. BELESS  
W. CULLEN BATTLE  
KEVIN N. ANDERSON  
RANDY K. JOHNSON

FABIAN & CLENDENIN

A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW

TWELFTH FLOOR  
215 SOUTH STATE STREET  
P. O. BOX 510210  
SALT LAKE CITY, UTAH 84151  
TELEPHONE (801) 531-8900  
FACSIMILE (801) 596-2814

*orig mine file*  
*11/21/92*  
*Wm Maloney*  
*R Daniels*

NORMAN J. YOUNKER  
MICHELE MITCHELL  
JOHN E. S. ROBSON  
DOUGLAS B. CANNON  
DOUGLAS J. PAYNE

ROBERT PALMER REES  
DIANE H. BANKS  
P. BRUCE BADGER  
JOHN (JACK) D. RAY  
KATHLEEN H. SWITZER  
CRAIG T. JACOBSEN  
ROBERT K. HEINEMAN  
SANDRA K. ALLEN  
BRUCE D. REEMSNYDER  
LAURA L. MOSER  
GEOFFREY P. GRIFFIN

OF COUNSEL  
PETER W. BILLINGS

*Handwritten signatures*  
**RECEIVED**

HAND DELIVERED

December 31, 1991

DEC 31 1991

DIVISION OF  
OIL GAS & MINING

Dr. Dianne R. Nielson  
Utah Division of Oil, Gas & Mining  
355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-2303

RE: Hidden Valley Coal Company  
Hidden Valley Mine, Permit No. ACT/015/007  
NOV 91-26-8-2

Dear Dr. Nielson:

Enclosed pursuant to your request is Hidden Valley Coal Company's Memorandum of Points and Authorities in support of vacating the above-entitled Notice of Violation 91-26-8-2 ("NOV"). In addition, Assessment Officer Ronald Daniels requested photographic evidence regarding the extent of damage allegedly caused by rills forming over a period of three months. Hidden Valley's consultant was unable to produce photographs regarding this matter. However, the consultant testified that rills had not formed over the three-month period. This testimony is corroborated by Division inspection reports which do not indicate the damage alleged in the proposed assessment.

During the informal hearing held in this matter on Friday, December 20, 1991, the Division requested that Hidden Valley submit a written request for extension of time in which to abate the NOV. As you recall, I submitted a Petition for Temporary Relief in this matter seeking an extension in the abatement period pending review of the fact of the violation. In reviewing this Petition with the Division, the Division agreed to provide an extension in the abatement period as requested by Hidden Valley without submitting the petition for temporary relief to the Board of Oil, Gas & Mining. Hidden Valley hereby requests an extension in the abatement period for a period of 30 days from December 20, 1991. This extension is necessary to allow the Division to consider whether the required abatement may cause environmental damage and to consider the fact of the violation.

Dr. Dianne R. Nielson  
December 31, 1991  
Page Two

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Thank you for your assistance in this matter. We have forwarded the Memorandum of Points and Authorities via certified mail, return receipt requested to provide a record of service. However, the enclosed copy is provided to expedite matters.

Very truly yours,

  
Denise A. Dragoo

DAD:jmc  
cc: Lee Edmonson (with enclosures)  
Joe Jarvis (with enclosures)  
Karla Knoop (with enclosures)  
Ronald Daniels (with enclosures)

BEFORE THE DIVISION OF OIL, GAS & MINING

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

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IN THE MATTER OF THE REQUEST OF	:	HIDDEN VALLEY COAL COMPANY
HIDDEN VALLEY COAL COMPANY FOR	:	MEMORANDUM OF POINTS AND
AN INFORMAL HEARING ON THE FACT	:	AUTHORITIES IN SUPPORT OF
OF VIOLATION/PROPOSED PENALTY	:	VACATING N91-26-8-2
FOR N91-26-8-2	:	
	:	CAUSE NO. ACT/015/007

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During the informal hearing held in the above-entitled matter on Friday, December 20, 1991, Hearing Officer, Dianne R. Nielson, Director of the Division of Oil, Gas & Mining ("Division"), requested Hidden Valley Coal Company ("Hidden Valley") to brief jurisdictional defenses raised by the operator. Hidden Valley, by and through its counsel of record, requests that Notice of Violation N91-26-8-2 ("NOV") be vacated in its entirety for the following reasons:

- I. HIDDEN VALLEY IS EXEMPT FROM REGULATION UNDER THE FEDERAL SURFACE MINING CONTROL & RECLAMATION ACT AND THE UTAH COAL MINING & RECLAMATION ACT

During the informal hearing on December 20, 1991, Hidden Valley presented testimony concerning the history of the Hidden Valley Mine (the "Mine"). This Mine has never been operated as a commercial venture. Exploratory operations at the Mine were conducted prior to 1977; however, not a single ton of coal has

been taken from the Mine since enactment of the Surface Mining Control & Reclamation Act of ("SMCRA") on August 3, 1977. Due to this fact, the Mine is exempted from regulation under SMCRA. Section 701(13) of SMCRA defines an "operator" as one who removes or intends to remove more than 250 tons of coal in any twelve-month period in any one location. See § 40-10-3(7), Utah Coal Mining & Reclamation Act ("UMCRA").

The regulations implementing SMCRA have applied this definition as a 250-ton limitation on SMCRA's coverage. See 44 Fed. Reg. 14915-14916 (1979); D. Hunt, Vol. 2 Coal Law & Regulation § 42.01(2). The Office of Surface Mining ("OSM") regulations at 30 C.F.R. § 700.11(a)(2) (1991) applies SMCRA to all coal exploration and surface coal mining and reclamation operations except:

The extraction of 250 tons of coal or less by a person conducting a surface coal mining and reclamation operation. The person who intends to remove more than 250 tons is not exempted.

It is clear that 250 tons of coal were not mined by Hidden Valley after August 3, 1977. In addition, the record is clear that Hidden Valley did not "intend" to mine 250 tons during the permanent program. Hidden Valley has been cited for alleged violation of a reclamation plan approved under the permanent program of UMCRA. A reclamation plan rather than a mining permit

was obtained when Hidden Valley concluded after exploration analysis that poor quality of coal, coupled with excessive preparation and transportation costs, made the project unworkable. Letter dated December 30, 1991 attached hereto. In addition, the fact that Hidden Valley submitted a reclamation plan to the Division does not vest jurisdiction under SMCRA or UMCRA where none exists. Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Comm'n, 838 F.2d 536, 542 n.3 (D.C. Cir. 1988); see also, A/S Ivarins Rederi v. United States, 891 F.2d 1441, 1445 (D.C. Cir. 1990).

Exemption of the Mine from regulation under SMCRA is consistent with the Interior Board of Land Appeals' rationale in Citizens for the Preservation of Knox County, 81 IBLA 209 (1984). In that case, the IBLA determined that an operation extracting coal during the interim program was not required to obtain a mining permit under the permanent program and was only subject to reclamation under the permanent program. The IBLA stated:

Both coal mining and the responsibility for reclamation must exist within a discreet jurisdictional time period for the requirements of that time period to be imposed. Because of the jurisdictional "break" between the interim program and the permanent program, OSM believes that those operations which had extracted coal only during the interim period and which now engage only in reclamation activities are not subject to permitting requirements of the permanent program. . . . If the two activities (coal

mining and its concomitant reclamation requirement) that triggered the present obligation in one regime are not present in the other, the permit obligation is not triggered.

Id. p. 7. Based on this reasoning, Hidden Valley is exempt from regulation. No coal mining activity occurred at the Mine after 1977 during the interim program; therefore, reclamation cannot be required under the permanent program.

Hidden Valley is exempt from regulation under SMCRA and UMCRA. Therefore, the NOV in this matter must be vacated.

## II. THE NOV IS BARRED BY THE APPLICABLE STATUTE OF LIMITATION

In the alternative, in the event that the Hearing Officer rules that Hidden Valley is not exempt from SMCRA or UMCRA, the NOV is barred under the statute of limitation applicable to State enforcement actions. Pursuant to § 40-8-9(2) of UMCRA:

No suit, action or other proceeding based upon a violation of this chapter, or any rule or order issued under this chapter, may be commenced or maintained unless the suit, action or proceeding is commenced within two years of the date of the alleged violation.

This two-year statute of limitation is incorporated into UMCRA pursuant to Utah Code Ann. § 40-10-4.

The NOV was sent via certified mail, return receipt requested, on November 22, 1991. Violation 1 of 2 relates to

road outslopes and upslopes and Violation 2 of 2 relates to road and stream disturbed outslopes and road upslopes. These areas were not included in the reclamation plan approved by the Division in 1986. At the Hearing Officer's request, Hidden Valley has measured by planimeter the disturbed areas which the Division required to be reclaimed under the approved plan as 4.2 acres for the pad and 1.9 acres for the road. The new areas cited by the NOV involve an additional 5-6 acres not included in the approved plan or reclamation bond.

Hidden Valley posted a bond in the amount of \$171,716.00 based upon the approved reclamation plan. Effective June 1, 1988, the Division approved Hidden Valley's Phase I bond release reducing the amount of reclamation liability to reflect backfilling, grading and revegetating activities undertaken by the operator. Failure of the Division to take enforcement action or otherwise require the operator to include road upslopes and downslopes under the reclamation plan within two years of the plan approval, or certainly within two years of Phase I bond release, now bars the Division from enforcing the NOV.

**III. THE DIVISION HAS WAIVED OR IS ESTOPPED FROM TAKING ENFORCEMENT ACTION**

As set forth above, the Division failed to require reclamation of road outslopes and upslopes in either the approved

reclamation plan or prior to approval of Phase I bond release. The effect of a bond release was recently discussed by the United States Court of Appeals for the District of Columbia Circuit in National Wildlife Federation v. Lujan, 1991 W.L. 257262 (D.C. Cir. Dec. 10, 1991). In that case, the D. C. Circuit upheld OSM's rules terminating regulatory jurisdiction upon final bond release. Although the bond released in this matter was a Phase I release and not a final bond release, the rationale of the Court is applicable here. The Court found that:

The regulation also strikes a reasonable balance between the gradual increase, due to improving technology, in what legitimately may be demanded of an operator, and an operator's need for certainty regarding closed sites. . . . It would not be appropriate . . . to require operators who had . . . met the standards of their permits and the applicable regulatory program to . . . reclaim [in accordance with new technology]. 53 Fed. Reg. 44361 (1988).

Id. p. 5. In this case, the Division is attempting to impose stricter standards than those required under the reclamation plan approved in 1986. The Division has had more than five years in which to review the plan and determine its adequacy. During that period of time, the Division has approved Hidden Valley's reclamation operations, approved Phase I of those operations and has approved a commensurate reduction in the reclamation bond. As set forth by the D.C. Circuit in National Wildlife Foundation,

the operator is entitled to rely on an approved reclamation plan and bond release to assure some regulatory certainty. Imposition of the NOV is now estopped or waived by the Division's approval of the reclamation plan and/or the Phase I bond release. For these reasons, the NOV in this matter must be vacated.

RESPECTFULLY submitted this 30th day of December, 1991.

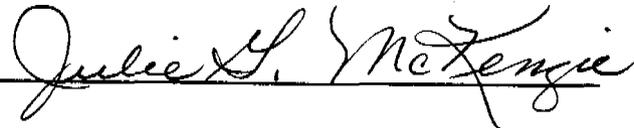
BY:   
Denise A. Dragoo  
FABIAN & CLENDENIN,  
a Professional Corporation  
215 South State Street  
Twelfth Floor  
P.O. Box 510210  
Salt Lake City, Utah 84151  
Telephone: (801) 531-8900  
Attorneys for Hidden Valley Coal  
Company

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 1991, the foregoing Memorandum of Points & Authorities was mailed via certified mail, return receipt requested, to:

Dr. Dianne R. Nielson, Director  
Utah Division of Oil, Gas & Mining  
3 Triad Center, Suite 350  
355 West North Temple  
Salt Lake City, Utah 84180

DAD:123091a





**The CalMat Companies**

December 30, 1991

Denise Drago, Esq.  
Fabian & Clendenin  
P.O. Box 510210  
Salt Lake City, Utah 84151

Dear Denise,

I have given some thought to the position we took recently on the issue of whether or not the Hidden Valley Mine was ever an "operator" and subject to reclamation regulations.

We know that 250 tons of coal was not mined after August 3, 1977. To shed some light upon whether or not we "intended" to be a mine we are searching the minutes of Board meetings for the Company and its parent organization.

A mine is not put into production without exploration and feasibility analysis. The intent is always to conduct sufficient tests and studies to determine if a prospect may be economically developed. In the case of the Hidden Valley Mine site the conclusion of the exploration analysis was that poor coal quality, coupled with excessive preparation and transportation costs, made the project unworkable. The Company elected to not develop a mine because it could not project a profitable return on the estimated investment required.

At that point it was clearly the intent of the Company not to mine the property. Further exploratory work was halted, the subsidiary Hidden Valley Coal Company's valuable assets were sold (there was an operating mine in Soldier Creek Canyon), and the Hidden Valley site was basically mothballed. The property has periodically been on the market for sale with no takers.

This is a brief synopsis of what has transpired at the site based upon my search of our files and conversations with some

Denise Dragoo, Esq.  
December 30, 1991  
Page 2

of the people within CalMat who were involved in the progression of events which led to the final decision to halt pre-development activities at the site.

Sincerely,

Hidden Valley Coal Company



Lee Edmonson, Assistant Secretary and  
Manager, Planning & Regulatory Affairs

LE/des



(Cite as: 1991 WL 257262, \*1 (D.C.Cir.))

regulations establishing regulatory procedures and performance standards "conforming to the provisions of" the Act (30 U.S.C. s 1251(b)). Section 515 contains detailed "environmental protection performance standards" applicable to "all surface coal mining and reclamation operations." 30 U.S.C. s 1265. Through the Office of Surface Mining Reclamation and Enforcement ("OSMRE"), the Secretary is to take steps "necessary to insure compliance with" the Act. 30 U.S.C. s 1211(a), (c)(1). The states too have a significant role to play. After an interim period of federal regulation, states had the option of proposing plans for implementing the Act consistent with federal standards on non-federal lands. When the Secretary approved the programs submitted by the states, those states became primarily responsible for regulating surface coal mining and reclamation in the non-federal areas within their borders. 30 U.S.C. s 1253. In states not having an approved program, the Secretary implemented a federal program. 30 U.S.C. s 1254(a), (b). The "permanent program" regulations issued under section 501(b) set standards for federally-approved state programs and for the federal program that takes effect when a State fails to "implement, enforce, or maintain" its program. 30 U.S.C. s 1254(a). Enforcement is carried out by the "regulatory authority," that is, the state agency administering the federally-approved program, the Secretary administering a federal program, or OSMRE conducting oversight of state programs. See 30 C.F.R. s 700.5.

\*2 The primary means of ensuring compliance is the permit system established in sections 506 through 514 and section 515(a). 30 U.S.C. ss 1256-1264, 1265(a). A permit is required for "any surface coal mining operations." [FN3] 30 U.S.C. s 1256. Summaries of applications for permits must be published, and objections may be submitted by local agencies or by "any person having an interest which ... may be adversely affected" by a proposed operation. 30 U.S.C. s 1263. Each application must include a reclamation plan. Section 507(d), 30 U.S.C. s 1257(d). A reclamation plan describes the present use of the land, proposed and possible post-mining uses of the land, and what steps the operator will take to ensure the viability of the latter. Among other things, the plan must show how the operator will achieve soil reconstruction and revegetation of the mined area. Section 508, 30 U.S.C. s 1258. [FN4] A permit application can only be approved if it demonstrates that "all requirements" of the Act have been satisfied and that "reclamation as required by [the Act] ... can be accomplished." 30 U.S.C. s 1260.

Section 509 requires the operator to post a performance bond in an amount sufficient to secure completion of reclamation. The operator and the surety remain liable under the bond for the duration of the surface mining and reclamation operation and until the end of the "revegetation period" (5 or 10 years) prescribed by section 515(20). 30 U.S.C. s 1259(b). At that time, the operator may petition the regulatory authority for **release** of the bond. The petition must be published, and is subject to the same opportunities for comment and hearing as the permit application. 30 C.F.R. s 800.40(a)(2), (b)(2). Further, "[n]o bond shall be fully released ... until reclamation requirements of the Act and the permit are fully met." *Id.* s 800.40(c)(3).

Prior to this rulemaking, the relationship between **bond release** and continuing regulatory jurisdiction was unclear. 53 Fed. Reg. 44,356 (1988). State authorities would decline to act on violations reported after **bond release**,





























FN5 Murray stated, 'Section 2.01 of the Act requires a permit for mining operations. Section 1771.21 of the Illinois Rules and Regulations states that a permit will be necessary for persons who expect to conduct 'surface coal mining and reclamation activities.' The words 'reclamation activities' cannot be read alone; they must be read in conjunction with 'surface coal mining and.'" (Emphasis in original.)

FN6 Jones advised appellant that DSM's position was based, in part, on section 506(a) of SMCRA which provides, inter alia, that 'no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program.'

FN7 Appellant asserted that under section 502(d) of SMCRA, 30 CFR 77.21(a)(1) and sections 1700.11(f) and 1771.21(a)(1) of the Illinois permanent program regulations, a permanent program application is clearly required in the subject case. Further, appellant asserted that the detailed reclamation provisions of section 508 of SMCRA and 30 CFR Part 780 are to be applied during a state's permanent program to all surface coal mining and reclamation operations.

FN8 The Illinois regulation at section 1770.11(f) provides in pertinent part: 'Not later than two months following the approval of the Illinois permanent program pursuant to section 503 of the Federal Act \* \* \* all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of the Illinois permanent program \* \* \* shall file an application for a permit with the Department. Such application shall cover the approval of the Illinois program.'

Similar language is found at I. R. 1771.21(a)(1) which provides:

'Not later than two months following the initial approval by the Secretary of a regulatory program for Illinois, \* \* \* each person who conducts or expects to conduct surface coal mining and reclamation operations after the expiration of eight months from that approval shall file an application for a permit for those operations.'

FN9 SMCRA, section 701(28), states in part:

'(28) 'surface coal mining operations' means--

'(A) activities conducted on the surface of lands in connection with a surface coal mine \* \* \* the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal \* \* \*, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: \* \* \* and

'(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to

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