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STIRBA & HATHAWAY

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

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IN THE MATTER OF NOTICE OF VIOLATION N91-26-8-2, HIDDEN VALLEY MINE, EMERY COUNTY, UTAH	:	ORDER
	:	DOCKET NO. 92-005 CAUSE NO. ACT/015/007
	:	

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On June 30, 1992, the above entitled matter came before the Hearing Examiner, Chairman James W. Carter. Representing the Board of Oil, Gas and Mining's Examiner ("Examiner") was Thomas A. Mitchell, Esq., Assistant Attorney General. Representing the Division of Oil, Gas and Mining ("DOGM") was William R. Richards, Esq., Assistant Attorney General, and representing the Respondent Hidden Valley Mine was Peter Stirba, Esq. The Board considered the Examiner's recommended Findings of Fact and Order at their regularly scheduled hearing on July 22, 1992 and adopted it with the modifications contained herein.

FINDINGS OF FACT

1. NOV 91-26-8-2, parts one and two, was issued on November 20, 1991. There was an assessment conference and fact of violations hearing resulting in the final Division assessment on December 20, 1991.

2. The Petitioner timely appealed the final Division assessment and findings and paid the total assessment in the

amount of $760.00 for part one of two, and $460.00 for part two of two into the Division.

3. The Respondent, Hidden Valley Mine, is subject to the jurisdiction of the Board of Oil, Gas and Mining pursuant to Utah Statute, Utah Code Ann. § 40-10-3 (1953, as amended).

4. On September 7, 1979, Hidden Valley's predecessor, Soldier Creek Coal Company (Soldier Creek), submitted a Mining and Reclamation Plan for the land which is the subject of these enforcement proceedings. In that plan Soldier Creek stated that it intended to develop an underground coal mine by June of 1981 which was intended to produce approximately 500,000 tons per year for 40 years.

5. On April 14, 1980, the Division of Oil, Gas and Mining approved Soldier Creek's Mining and Reclamation Plan pursuant to the State Coal Program's interim regulations.

6. On April 17, 1980, surface mining operations commenced at the Hidden Valley Mine pursuant to the approved Mining and Reclamation Plan. These operations included the construction and paving of a 2.5 mile road; construction of an access road to two portal areas where pads were constructed adjacent to coal seams; construction of portal entry face ups; top soil removal from the surface; sediment pond construction and installation of drainage diversions.

7. On January 23, 1981, the Utah State Coal Program was approved by the federal government with Utah as a primacy state, and the Utah Permanent Program Regulations became effective.

8. On March 23, 1981, Soldier Creek informed the Division for the first time that the Hidden Valley mine would temporarily suspend operations.

9. By letter dated May 24, 1985, the Division notified Soldier Creek that it must elect to either permit the Hidden Valley Mine under the Permanent Program Regulations or reclaim the mine in accordance with the approved plan and Permanent Program Regulations.

10. After September 15, 1985, Hidden Valley elected to cease mining operations and reclaim the mine site. In May, 1986, the Respondent filed a Reclamation Plan incorporating the Permanent Program reclamation standards, which plan was approved by the Division.

11. Reclamation of the mine site was undertaken by Respondent, and Phase I bond release was authorized by the Division on May 24, 1988.

12. Subsequent to Phase I bond release, the Respondent has failed to comply with the Permanent Program standards and with the approved Reclamation Plan by failing to adequately construct and maintain erosion control structures on the outslope of the access haul road.

13. The Respondent has failed to comply with the Permanent Program standards and the approved Reclamation Plan by having failed to seed the disturbed area constituting the outslopes of the access road.

14. The Respondent has failed to comply with the Permanent Program standards and the approved Reclamation Plan by having failed to place disturbed area boundary markers at the toe of the slope of the disturbed area below the access road, and instead has placed them at the edge of the road above the disturbed area.

15. The violations which are the subject of this enforcement proceeding are continuing violations, and constitute a current and ongoing basis for enforcement.

16. The Respondent has not changed its position or incurred any detriment in reliance upon any act or statement of the Division or its inspection and permitting staff.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the Respondent and the Hidden Valley Mine pursuant to Utah Code Ann. § 40-10-3. This provision of the Utah Coal Statute provides that an operator comes within the jurisdiction of the Board and the Division when the operator mines or intends to mine 250 tons of coal within any 12-month period.

2. The intent of an operator to mine is to be determined by an objective standard based upon the acts and representations of the operator during relevant time periods. The Board concludes that Hidden Valley possessed the requisite intent to conduct mining activities, subjecting itself to the jurisdiction of the Utah Coal Statute.

3. The Board concludes that the Permanent Program standards apply to the Respondent because the operator neither permanently ceased operations nor abandoned the intent to mine prior to the Permanent Program becoming effective, and because Hidden Valley specifically agreed to application of the Permanent Program rules in its 1986 Reclamation Plan.

4. The Board concludes the Division has made a prima facie case to support the issuance of the NOV's which are the subject of this enforcement action. The Board further concludes that Hidden Valley has not carried its burden of proof to rebut the Division's prima facie case.

5. The Board concludes that the statute of limitations provision contained in the Utah Mined Land Reclamation Act is not incorporated by reference under Utah Code Ann. § 40-10-1 et seq. because it is inconsistent with the approved federal program as well as less stringent. Further, the Board concludes that even if there were an applicable statute of limitations, the statute has not begun to run because the violations are continuing.

6. The Board concludes that the Respondent has not proven the elements of estoppel necessary to avail itself of that affirmative defense.

ORDER

1. The Division's action in issuing the NOV subject to this enforcement action should be upheld.

2. The Division's penalty assessments are upheld as to all parts of the NOV, with the exception of that part relating to the placement of the disturbed area boundary markers, where the negligence points should be reduced to zero. Final assessment for part two of two of the violation is reduced from $460.00 to $330.00.

ISSUED AND SIGNED this 30th day of July, 1992.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING

James W. Carter, Chairman

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing ORDER in Docket No. 92-005, Cause No. ACT/015/007 to be mailed by certified mail, postage prepaid, on the 30th day of July, 1992, to the following:

Peter Stirba
Stirba & Hathaway
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Hand Delivered to:

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Assistant Attorney General
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Lynda Jensen

Copied at DOGM
9/8/92
HPA

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

HIDDEN VALLEY COAL COMPANY,	:	**COMPLAINT**
Plaintiff,	:	
v.	:	
the UTAH BOARD OF OIL, GAS & MINING and the UTAH DIVISION OF OIL, GAS & MINING,	:	Case No. 920904813CV
	:	Judge Leslie A. Lewis
Defendants.	:	

Plaintiff, Hidden Valley Coal Company, complains of Defendants Utah Board of Oil, Gas & Mining and Utah Division of Oil, Gas & Mining, and alleges as follows:

1. Plaintiff, Hidden Valley Coal Company ("HVCC"), is a Utah corporation which owns a coal property in Emery County, Utah, hereinafter referred to as the "Mine Site".

2. HVCC brings this action pursuant to Utah Code Ann. § 40-10-30 (1986) which provision, among other things, authorizes suit in District Court against the Board of Oil, Gas & Mining (the "Board") for the purpose of obtaining judicial review and appealing an order of

the Board which arises from the application of the Utah Coal Mining and Reclamation Act ("UCMRA"), Utah Code Ann. § 40-10-1 *et. seq.* and the rules promulgated thereunder.

3. Jurisdiction of this Court is also predicated upon the provisions of Utah Code Ann. § 40-10-22(3)(f) (1981) which provide for judicial review in the "appropriate district court" of actions by the Board taken under that section or any other provision of the State Coal Program.

4. On November 20, 1991, the Division of Oil, Gas & Mining (the "Division") issued Notice of Violation ("NOV") 91-26-8-2, Parts 1 and 2, to HVCC regarding Hidden Valley Mine Permit No. ACT/015/007 regarding reclamation activities at the Mine Site.

5. Parts 1 and 2 were issued pursuant to Utah Administrative Code 614-301-742.312.1 (1990) for failure to maintain diversions and minimize erosion of the road outslopes and upslopes to the extent possible. Part 2 of the NOV was issued pursuant to Utah Administrative Code 614-301-521.251 (1990) and 614-301-354 (1990) for failure to clearly mark with perimeter markers and failure to seed and revegetate all disturbed areas of the road and stream outslopes and road upslopes.

6. On December 17, 1991, the Division issued a proposed assessment for the NOV of $760 for Part 1 and $460 for Part 2. The NOV and subsequent assessment were informally reviewed by the Division on December 20, 1991, and an informal order upholding the NOV and assessment were issued on January 17, 1992.

7. On February 10, 1992, HVCC petitioned the Board for review of the Division's informal order regarding the NOV and subsequent penalty assessment. HVCC concurrently filed a petition for temporary relief with the Board, which the Board granted on February 14, 1992.

8. On June 30, 1992, an evidentiary hearing was held on HVCC's petition whereby HVCC challenged the factual basis for the issuance of the NOV and penalty assessment as well as the jurisdiction and legal authority of the Division in issuing the NOV and penalty assessment. Evidence and testimony was presented by the Division and HVCC to the Chairman of the Board who was acting in the capacity of a hearing examiner. After considering the evidence and testimony, the examiner had the responsibility to make a recommendation to the Board with the responsibility to make recommended findings of fact and conclusions of law and an order to the Board for its consideration and adoption.

9. On July 30, 1992, the Board, after considering the proposed findings of fact and conclusions of law of the hearing examiner, issued an order upholding the Division with respect to the issuance of the NOV and the assessment pursuant to Part 1 of the NOV. However, the Board reduced the Part 2 assessment from $460 to $330 after finding that the negligence points regarding disturbed area boundary markings should be reduced to zero. A copy of the Board's order is attached hereto as Exhibit "A".

10. HVCC now appeals and requests a review of the Board's order attached hereto for the following reasons:

(a) The Board has erroneously interpreted and applied the applicable provisions of the UCMRA and the rules promulgated thereunder in its determination that HVCC intended to mine more than 250 tons of coal in any 12-month period, thus subjecting itself to the jurisdiction of the Board subject to regulation under the UCMRA and the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C.A. § 1201 *et seq.*

(b) The Board has erroneously interpreted and applied the applicable statutory provisions and its own rules in applying the Permanent Program Rules to HVCC's 1986 Reclamation Plan as opposed to applying the standards of the Interim Program.

(c) The Board has erroneously interpreted and misapplied Utah Code Ann. § 40-8-9(2) (1987) and Utah Code Ann. § 40-10-4 (1979) and the rules promulgated thereunder in its determination that a two-year statute of limitations did not apply to the issues raised by the NOV.

(d) The Board erroneously interpreted and applied existing law in its finding that the Division established a prima facie case supporting its issuance of the NOV, that HVCC failed to rebut the Division's case and that HVCC failed to prove that the Division was estopped from taking its enforcement action.

(e) The Board erroneously interpreted and applied existing law in its finding that the Division was not estopped in the enforcement of its NOV after it had already approved HVCC's reclamation activities for a Phase I bond release.

(f) The action taken by the Board and its factual findings upholding the Division's position are not supported by substantial evidence when viewed in light of the whole record, were unreasonable, unjust, arbitrary, capricious or an abuse of discretion.

WHEREFORE, Plaintiff HVCC prays for judgment as follows:

1. That the Court order Defendants Utah Board of Oil, Gas & Mining and the Utah Division of Oil, Gas & Mining to dismiss any pending proceedings in Cause No. ACT/015/007, vacate its July 30, 1992 order and vacate the NOV and penalty assessment.

2. That the Court order Defendants Utah Board of Oil, Gas & Mining and Utah Division of Oil, Gas & Mining to modify and amend its July 30, 1992 order as follows:

(a) The order be amended to dismiss and vacate the Division's NOV and penalty assessment on the legal grounds as set forth hereinabove; and/or

(b) The order be amended to find that HVCC did not commit any of the alleged violations in the NOV, or there is not substantial evidence to justify the Board's factual findings, or that the Board's factual findings are deficient as a matter of law such that the Division's NOV, penalty assessment and proceedings thereunder are dismissed and vacated.

3. That the Court order Defendant Utah Division of Oil, Gas & Mining to repay to HVCC all amounts paid by HVCC for the penalty assessment.

4. That the Court award Plaintiff costs herein and such other and further relief as the Court deems just and equitable in the premises.

DATED this 27th day of August, 1992.

STIRBA & HATHAWAY

BY:_____
PETER STIRBA
Attorneys for Plaintiff
Hidden Valley Coal Company

Plaintiff's address:
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EXHIBIT "A"