

FILED

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

MAY 11 1992

SECRETARY, BOARD OF
OIL, GAS & MINING

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IN THE MATTER OF THE REQUEST	:	THE DIVISION OF OIL, GAS
OF HIDDEN VALLEY COAL COMPANY	:	AND MINING'S MEMORANDUM
FOR AN INFORMAL HEARING ON	:	IN OPPOSITION TO HIDDEN
THE FACT OF VIOLATION/PROPOSED	:	VALLEY COAL COMPANY'S
PENALTY FOR N91-26-8-2	:	APPLICATION FOR BOARD
	:	REVIEW OF CITATION
	:	
	:	CAUSE NO. ACT/015/007
	:	DOCKET NO. 92-005

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The Division of Oil, Gas and Mining ("the Division"), by and through its counsel, respectfully files its Memorandum in Opposition to Hidden Valley Coal Company's Application for Board Review of Citation.

INTRODUCTION

Hidden Valley Coal Company requests the Board to vacate NOV 91-26-8-2, issued by the Division on November 22, 1991 (the "NOV"). Hidden Valley does not deny that the violations set forth in the NOV exist at the Hidden Valley Mine. Rather, Hidden Valley contends that the Division was legally prevented from issuing the NOV because: (1) Hidden Valley is exempt from regulation under the Federal Surface Mining Control and Reclamation Act ("SMCRA") and the Utah Coal Mining and Reclamation Act ("UMCRA"); (2) the two year statute of limitations period set forth in the Utah Mined Land Reclamation Act had run prior to the NOV's issuance; and (3) the Division had waived its right to take enforcement action.

For the reasons set forth below, Hidden Valley's arguments are without merit and the NOV should be upheld in its entirety.

FACTS

On January 12, 1978, Soldier Creek Coal Company, now known as Hidden Valley Coal Company ("Hidden Valley"), purchased the real property and coal leases which now constitute the Hidden Valley Mine (the "Mine"). On September 7, 1979, Hidden Valley submitted a Mining and Reclamation Plan (the "Mining Plan"), which announced its intent to develop a new underground mine in Emery County, Utah. See Mining Plan, Exhibit A at p. A-1. The Mining Plan set forth in detail Hidden Valley's plans for the development and operation of the Mine:

It is the intent of [Hidden Valley] to develop a new underground mine by June, 1981. . . . The mine is scheduled to produce approximately 500,000 tons per year at maximum capacity. The estimated life of this mine is 40 years. The operations will consist of the mine, crushing and material handling system, preparation plant, and support facilities.

See Exhibit A at p. A-3.

Mining operations were to begin in June 1981 using three continuous miners. Id. Coal from the Mine was to be transported by belt to a crusher site, then fed into an onsite processing plant. Id. The processing plant was designed to process 250 tons of coal per hour. Id. Processed coal would then be stored in a 500 ton bin until it was removed by 40 tons trucks and transported to a railroad loading site near Levan, Utah. Id.

The Division approved Hidden Valley's Mining Plan on April 14, 1980. Three days later, Hidden Valley began mining

operations pursuant to the terms of its Mining Plan. See Exhibit B at p. B-5. Over the next five months, Hidden Valley cut two large pad areas, faced-up coal seams, established drainage ditches and constructed or caused to be constructed more than three miles of access roads. Hidden Valley described its mining activities as follows:

[A] paved 2.75 mile access road from Highway 10 to the proposed coal processing site was completed with state funds and dedicated to Sevier and Emery Counties. A 0.5 mile graveled Class II road was completed to gain access to the coal seams adjacent to Ivie Creek. . . . At the coal seams, two pads were constructed for the future portal operations area. Culverts were installed in the graveled access road and in the benches for drainage control. A sediment pond was constructed on the lower pad to receive surface flows from the pads. Bulk coal samples were obtained from the existing exploratory adits in the two naturally exposed coal seams. These exposed coal seams were faced up and diversions were constructed above the seams in anticipation of portal construction. Top soil was stockpiled adjacent to the upper or "B" seam pad.

See Exhibit B at p. B-5. Pictures of Hidden Valley's mining activities are attached as Exhibit C.

After it had been conducting mining activities for nearly nine months, Hidden Valley's management decided to temporarily cease development until economic conditions made the Mine more profitable:

Further development of the Hidden Valley property will be temporarily suspended and will be reassessed from time-to-time in light of the then current level of capital expenditures believed necessary to make the property operational.

Minutes of Soldier Creek Coal Company Management Committee, dated September 9, 1980, p. 4. See also Exhibit B at p. B-5.

For approximately the next five years, the Mine remained inactive while Hidden Valley determined whether the coal market justified further mining operations. See Exhibit B at p. B-7. During this time, Hidden Valley was unwilling to reclaim the Mine because it was still deciding whether to continue further mining activity. See Exhibits D and E. To this end, Hidden Valley sent the Division a letter on March 23, 1981 informing the Division that "[d]ue to the continuing slow development of a coal market in the Emery Field, permit activity on the Hidden Valley Mine has been temporarily delayed. . . Prior to any further activity on the property, the completed plan will be submitted for the Division's approval. See Exhibit D.

Four years later, Hidden Valley still had not decided whether to abandon its plan to mine the site. On May 29, 1985, the Division sent Hidden Valley a letter informing Hidden Valley that it had 30 days to decide whether to permit the property or commence immediate reclamation activities. In response to the Division's letter, Hidden Valley informed the Division on June 27, 1985 that "one of the items that has not been finalized . . . is what will happen to the Hidden Valley Mine in Emery county." See Exhibit E. Accordingly, Hidden Valley requested an extension of time to decide whether to permit the Mine pursuant to the permanent regulations or to cancel its mining plans and conduct immediate reclamation:

We were notified by certified mail on May 29, 1985, that we had 30 days to decide whether to reclaim the property. I am formally requesting that we be granted an extension until September 15, 1985, to notify the

Division of our plans. This will allow sufficient time for both parties to make a logical decision regarding the property.

See Exhibit E.

Sometime later in 1985, Hidden Valley finally abandoned its plans to continue mining:

[The Hidden Valley Mine] was proposed to be a 500,000 ton per year underground coal mining operation. Due to poor market conditions, such development was not possible. Following several years of inactive status, the company has decided that the best course of action will be to reclaim the site.

Reclamation Plan, Exhibit B at p. B-7.¹ Thereafter, Hidden Valley submitted a Reclamation Plan which the Division approved pursuant to the Permanent Regulations on January 28, 1987.

After receiving approval of its Reclamation Plan, Hidden Valley commenced backfilling and grading reclamation work at the Mine. The Division determined that Hidden Valley had satisfactorily completed its backfilling and grading obligations and granted Hidden Valley Phase I Bond release pursuant to Utah Admin. R. 645-301-880.310.

Thereafter, the Division determined that Hidden Valley was not in compliance with the regulations or its own Reclamation

¹ In a 1991 amendment to its Reclamation Plan, Hidden Valley again explained why it had abandoned its mining plans:

The Hidden Valley Coal property . . . was to be developed by Soldier Creek Coal Company . . . A mining and reclamation plan, with two amendments, were submitted and approved under the OSM Interim Program. The access road, coal seam exploration, graded pads and drainage control were the only developments realized as economic changes forced curtailment of mine development.

Plan. Accordingly, the Division issued the NOV on November 22, 1991. The NOV includes two parts. Part 1 of 2 was written for Hidden Valley's failure to maintain stable diversions and minimize erosion on the outslopes and upslopes of the access road and pads pursuant to Utah Admin. R. §§ 614-301-742.312.1 and 614-301-742.113.

Part 2 of the NOV was issued for Hidden Valley's failure to clearly mark all disturbed area boundaries with perimeter markers, and its failure to seed and revegetate all disturbed areas pursuant to Utah Admin. R. §§ 614-301-521.521 and 614-301-354.

PROCEDURAL BACKGROUND

Hidden Valley requested an informal hearing where for the first time in over 12 years it contested the Division's jurisdictional authority. Hidden Valley did not deny the existence of the violations at the hearing. The Director of the Division, Dr. Dianne R. Nielsen, in her capacity as presiding officer, upheld the fact of the violation. Ronald W. Daniels, in his capacity as assessment conference officer, upheld the penalty assessment. This appeal followed.

BURDEN OF PROOF

Hidden Valley Has The Burden Of Persuasion

In a proceeding concerning a petition for review of an NOV, "[t]he ultimate burden of persuasion as to the fact of the

violation rests with the petitioner for review." Intersouth Mineral Co. Inc. v. OSMRE, 118 IBLA 14, 17 (1991). See also Rith Energy, Inc. v. OSMRE, 119 IBLA 83, 86 (1991).² Since Hidden Valley does not contest, and has not appealed, the existence of the facts underlying the NOV, that issue is not before the Board. Therefore, the Board must treat the existence of the facts supporting the NOV as true.

The only issues before the Board are the purely legal ones raised by Hidden Valley's counsel.

² The Division does have the burden of going forward to establish a prima facie case as to the fact of the violation. Rith Energy, Inc. v. OSMRE, 119 IBLA 83, 86 (1991); Intersouth Mineral Co., Inc. v. OSMRE, 118 IBLA 14, 17 (1991); Turner Brothers, Inc. v. OSMRE, 98 IBLA 395, 398 (1987); Calvert v. Marsh Coal Co. v. OSMRE, 95 IBLA 182 191 (1987); Rhoda Coal Co., 89 IBLA 27, 29-30 (1983). A prima facie case is made when the Division presents facts from which it may be determined that a violation of pertinent requirements has occurred. Alpine Construction Co. v. OSMRE, 114 IBLA 232, 235 (1990); Coal Energy, Inc. v. OSM, 115 IBLA 385 (1989); S&M Coal Co. v. OSMRE, 79 IBLA 350, 354 (1984); Tiger Corp., 89 IBLA 622, 623 (1982); Rhoda Coal Co., 89 IBLA I. D. 460, 464 (1982). In other words, "a prima facie case is made when sufficient evidence is presented to establish the essential facts and which will justify, but not compel, a finding" of violation. S&M Coal Co. v. OSM, 79 IBLA 350, 91 I.D. 159, 161 (1984). If the Division's evidence is not overcome by a preponderance of the evidence, the NOV will be affirmed. Id. at 86; Innovative Development Energy Inc. v. OSM 110 IBLA 119, 123 (1989); Coal Energy, Inc. v. OSM, 105 IBLA 385, 387-88 (1988); Turner Brothers Inc. v. OSM, 95 IBLA 182, 191 (1987). See also 43 CFR 4.1171(b). Since Hidden Valley has not appealed the underlying factual allegations of the NOV, Hidden Valley has obviously not met this burden.

ARGUMENT

I. THE DIVISION HAS JURISDICTION TO REQUIRE HIDDEN VALLEY TO RECLAIM THE AREAS THAT IT DISTURBED BY ITS MINING ACTIVITIES.

Hidden Valley mistakenly argues that it is not subject to the reclamation requirements of SMCRA because it never actually mined coal. The fallacy of Hidden Valley's argument is its failure to focus on the "intent" language of Section 701(13).

SMCRA jurisdiction is not dependent on an operator actually mining coal. To the contrary, SMCRA jurisdiction is evoked whenever an operator "intends" to mine coal. Under both federal and state law, an "operator" is defined by law as any:

person, partnership, or corporation engaged in coal mining who removes or intends to remove more than two hundred and fifty tons of coal from the earth by coal mining within twelve consecutive calendar months in any one location.

SMCRA § 701(13), UMCRA § 40-10-3(7).³ If Hidden Valley intended to mine more than 250 tons at the time it filed its Mining Plan and commenced mining activities, it subjected itself to the jurisdiction of the Division.

The best evidence of what Hidden Valley intended to do with the Mine is the Mining Plan which it filed prior to commencing operations in 1980. That Plan demonstrates beyond doubt that

³ The reason for Congress placing the "intent" language into the statute is obvious. If an operator came within the jurisdiction of SMCRA only when it actually mined coal, it would be able to escape its reclamation obligations for its surface disturbances, so long as it did not actually extract coal from the mine. Congress obviously wanted to place the reclamation burden on the party who was responsible for the surface disturbance.

Hidden Valley intended to remove much more than "two hundred and fifty tons" of coal annually from the Mine:

It is the intent of [Hidden Valley] to develop a new underground mine by June, 1981. . . . The mine is scheduled to produce approximately 500,000 tons per year at maximum capacity. The estimated life of this mine is 40 years. The operations will consist of the mine, crushing and material handling system, preparation plant, and support facilities.

Mining Plan Exhibit A at p. A-3. See also Exhibit A at p. A-2.

Six years later, Hidden Valley again acknowledged that its had intended to mine 500,000 tons of coal per year from the Mine:

The mining plan for Hidden Valley proposed production to begin in June 1981. Maximum production was to be 500,000 tons annually with an expected mine life of 40 years. The initial development work commenced on April 17, 1980 with this goal in mind.

See Reclamation Plan. Exhibit B at pp. B-4, B-5. See also Exhibit B at pp. B-2 and B-7.

Hidden Valley did more, however, than verbally express its intent to mine large amounts of coal. Immediately upon receiving the Division's approval of its Mining Plan, Hidden Valley commenced mining activities to accomplish its production goals:

[A] paved 2.75 mile access road from Highway 10 to the proposed coal processing site was completed with state funds and dedicated to Sevier and Emery Counties.⁴ A

⁴ Specifically, the 2.75 mile access road was constructed with \$1,023,000 in State funds pursuant to Utah Resource Development Act. House Bill No. 366, Supplemental Appropriation--Emery County Coal Project, specifically provided \$1,023,000 in State funds to develop a road for the sole benefit of Hidden Valley's coal mines. House Bill 366 specifically stated:

Item 1 To the Department of
Transportation: From the General Fund--Prepaid Sales
and Use Tax Construction Account \$1,023,000

0.5 mile graveled Class II road was completed to gain access to the coal seams adjacent to Ivie Creek. . . . At the coal seams, two pads were constructed for the future portal operations area. Culverts were installed in the graveled access road and in the benches for drainage control. A sediment pond was constructed on the lower pad to receive surface flows from the pads. Bulk coal samples were obtained from the existing exploratory adits in the two naturally exposed coal seams. These exposed coal seams were faced up and diversions were constructed above the seams in anticipation of portal construction. Top soil was stockpiled adjacent to the upper or "B" seam pad.

Reclamation Plan, Exhibit B at p. B-5. These activities clearly come within the statutory definition of "surface coal mining operations" which is defined as any "[a]ctivities conducted on the surface of lands in connection with a surface coal mine." 30 C.F.R. § 700.5.

Hidden Valley did not decide to permanently abandon its mining plans until six years later when it finally determined that the coal market no longer economically justified continued mining. As Hidden Valley stated in 1986:

The Hidden Valley Mine . . . was proposed to be a 500,000 ton per year underground coal mining operation.

This appropriation is non-lapsing and is made solely for engineering and constructing or reconstructing of the following road in connection with the Soldier Creek Coal Company's Hidden Valley coal mining project:

See Exhibit F.

Obviously Hidden Valley intended to mine coal from the Hidden Valley Mine at the time it approached the Utah State legislature and acquired over 1 million dollars in tax money to build an access road to the Hidden Valley Mine. Why would Hidden Valley request, and the Utah Legislature appropriate, over one million dollars pursuant to the Resource Development Act to build an access road to an area where Hidden Valley never intended to conduct mining operations?

Due to poor market conditions, such development was not possible. Following several years of inactive status, the company has decided that the best course of action will be to reclaim the site.

See Exhibit B at p. B-7.

It is obvious from both its words and deeds that Hidden Valley intended to mine more than 250 tons of coal from the Hidden Valley Mine when it filed its Mining Plan with the Division.⁵ Hidden Valley's assertion twelve years later that it never intended to mine coal is, at best, disingenuous.

Hidden Valley's appeal is no more than a superficial attempt to escape its reclamation obligations. Hidden Valley does not deny that it caused the surface disturbances at the Mine, nor does it deny the existence of the violations listed in the NOV. Rather, Hidden Valley asks the Board to excuse it from its reclamation obligations because it erroneously analyzed the profitability of the Mine, and as such, never actually mined coal. The taxpayers of this State, however, should not bear the fiscal burden of Hidden Valley's economic miscalculations. To the contrary, both law and equity require Hidden Valley to bear those costs.

⁵ Aside from its expressed intent to mine 500,000 tons of coal per year, other facts in the Mining Plan clearly evidence the intent to mine extensive amounts of coal. Why, for instance would Hidden Valley build a processing plant on site which had a capacity to process 250 tons of coal per hour if it intended to extract less than 250 tons of coal? Would a reasonable coal company build a processing plant which would be used for less than one hour? Likewise, Hidden Valley intended to store coal in a 500 ton storage bin prior to its removal by 40 tons trucks. Would a reasonable company build a 500 ton storage bin if it intended to extract less than 250 tons of coal?

II. THE DIVISION'S ISSUANCE OF THE NOV WAS NOT BARRED BY THE STATUTE OF LIMITATIONS SET FORTH IN THE UTAH MINED LAND RECLAMATION ACT.

Hidden Valley also argues that the NOV is invalid because any enforcement action against the mine was barred by the limitations period set forth in the Utah Mined Land Reclamation Act.⁶ Although this limitation period applies to non-coal minerals regulated under an unrelated statute, Hidden Valley nonetheless contends that the limitation period is incorporated into UMCRA pursuant to Section 40-10-4:

The Utah Mined Land Reclamation Act (Chapter 8 of Title 40), and the rules and regulations adopted under it, where appropriate, and not in conflict with the provisions of this chapter or the rules and regulations adopted under it, shall be applicable to coal mining operations and reclamation operations.

Utah Code Ann. § 40-10-4. Hidden Valley's argument is without merit. Indeed, the identical argument raised by Hidden Valley has been unanimously rejected by every court to which it has been presented. See United States v. Tri-No Enterprises, Inc., 819 F.2d 154, 158 (7th Cir. 1987); United States v. Hartselle Mining Corporation, slip op. at p.4 (N.D. Alabama September 25, 1990); Pacific Corp. v. Office of Surface Mining Reclamation and Enforcement, slip. op. No. DV-5-R (March 27, 1992) ("Pacificcorp.

⁶ The two-year statute of limitation period set forth in the Utah Mined Land Reclamation Act states:

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.

Utah Code Ann. § 40-8-9(2).

I"); Pacificorp., v. Office of Surface Mining Reclamation and Enforcement, Slip. op. No. DV91-10-R at p. 4 (January 17, 1992) ("Pacificorp. II")⁷.

In Pacificorp I, a coal operator alleged that the Utah Mined Reclamation Act's limitation period applied to Utah's coal mining law. The United States Department of the Interior rejected the claim stating:

Applicant's contention cannot stand scrutiny for two reasons. First, State statutes of limitation do not apply to Federal enforcement of State programs under SMCRA. . . .

* * * * *

Second, it would be inappropriate and in conflict with the provisions of Chapter 10 of Title 40 of the Utah Code to incorporate by reference the 2-year statute of limitations where neither Congress nor the Utah State Legislature has otherwise placed a statute of limitations on enforcement actions. . . .

Id.

A similar argument was also rejected by the Federal District Court for the District of Alabama. See United States v. Hartselle Mining Corporation, slip op. at p.4 (N.D. Alabama September 25, 1990). There, a coal operator alleged that an OSM enforcement action was barred by both federal and state statute of limitations periods. The federal district court rejected the argument stating:

⁷ In Pacificorp. II, the Department of Interior rejected the identical argument stating:

It is sufficient to say in response to this ground for dismissal that the violation is a continuing one, and that no statute of limitations acts as a bar to correcting the alleged transgressing conduct.

Id.

Defendants also allege without elaboration that the instant suit is barred by the "applicable statute of limitations." As plaintiff pointed out . . . , SMCRA does not prescribe any limitations period applicable to enforcement actions under Section 1271(c). It is well settled that Congress may create a right of action without restricting the time within which that rights may be exercised. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977). There is no evidence that Congress intended one of its independent, general statutes of limitations to apply, and the court fails to find that implied absorption of a state statute of limitations would be inconsistent with the underlying policies of the federal statute. Defendant's argument that this action is time-barred is, therefore, without merit.

Id.

The reasons why courts have summarily rejected the exact argument raised by Hidden Valley are obvious. Section 40-10-4 of UMCRA incorporates provisions of the Utah Mined Land Reclamation Act only when doing so would not be "inconsistent" with its provisions. Since the Utah Legislature did not place a time limit within which the Division must bring enforcement actions under UMCRA, it would clearly be inconsistent to incorporate the two-year limitation period. As the Department of the Interior stated in Pacificorp. II:

State regulation cannot be consistent with both SMCRA and the State program, each of which lacks a statute of limitations, if a statute of limitations from another pre-existing statute is incorporated by reference.

Id.

The two year limitation period can also not be part of Utah's coal statute because the limitation period has not be approved by the Office of Surface Mining as required by SMCRA. Finally, incorporating the two year limitation period would violate federal law. Utah's right to primacy under SMCRA is contingent on the fact that its law is no less stringent than

SMCRA. See SMCRA, § 521(d), 30 U.S.C. § 1271(d).⁸ See also Annaco, Inc. v. Hodel, 675 F. Supp. 1052 (E.D. Ky. 1987). Congress, however, placed no limitation period on OSM's enforcement of SMCRA's requirements. See United States v. Hartselle Mining Corporation, slip op. at p.4 (N.D. Alabama September 25, 1990) ("SMCRA does not prescribe any limitation period applicable to enforcement actions."). Therefore, if the Board were to adopt Hidden Valley's argument, the Division would be limited by a two-year enforcement period, whereas OSM would have no such limitation. Accordingly, Utah's program would be significantly less stringent than its federal counterpart and Utah would risk losing primacy over the entire coal program.

Finally, even assuming that the two-year limitation period did apply to UMCRA, Hidden Valley's claim would still fail because the violations are continuing. The violations cited in the NOV are not distinct episodes such as a single discharge of pollution. Rather, they are violations which continue to exist today. As such, any limitation period would not bar the Divisions enforcement action. See Pacificorp II.

⁸ Section 521(d) states:

As a condition of approval of any state program submitted pursuant to section 503 [Section 1253] of the Act, the enforcement provisions there of shall, at a minimum, incorporate sanctions no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto

Section 521(d), 30 U.S.C. § 1271(d).

III. THE DIVISION HAS NOT WAIVED AND IS NOT ESTOPPED FROM TAKING ENFORCEMENT ACTION.

Without citing any legal authority, Hidden Valley alleges that the Division is estopped or has waived its right to take enforcement action against the Mine. There is no basis in either law or fact to support Hidden Valley's arguments.

As a general rule, "estoppel may not be asserted against the State." Plateau Mining Company v. Utah Division of State Lands and Forestry, 802 P.2d 720 (Utah 1990). The United States Supreme Court has explained the rationale behind this rule as follows:

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60 (1984). The only exception to the general rule that estoppel cannot be asserted against the State is when the "rule's application would result in injustice, and there would be no substantial adverse effect on public policy." Plateau Mining, 802 P.2d at 728. Obviously, estoppel cannot be asserted in the present case because it is not unjust to enforce the NOV's and failure to enforce the NOV's would severely undermine the public policies underlying SMCRA. Moreover, even if it could assert

estoppel, the facts underlying Hidden Valley's allegations do not meet the traditional elements of estoppel.⁹

Hidden Valley's argument seems to be as follows. The Reclamation Plan provides that:

The entire 6.7 acres of disturbed ground will be properly scarified, seeded, fertilized, mulched and covered to provide the best possible opportunity for plan growth. The road fill slopes and some small sites will require hand application of seed, mulch and fertilizer.

Reclamation Plan, Chapter III, section VI, p. 5 While the Reclamation Plan indicates that there are 6.7 acres of disturbed area at the Mine site, Hidden Valley actually disturbed more acres. Therefore, since the Reclamation Plan lists less disturbed acres than actually exist on site, Hidden Valley argues that the Division cannot now require it to reclaim the additional disturbed area.

Such a contention clearly doesn't meet the requisite elements of estoppel. First, the Division has taken no action which is inconsistent with its present position. The Division never informed Hidden Valley that it need only reclaim 6.7 acres. To the contrary: (1) the Division has always taken the position that all disturbed areas must be reclaimed; (2) the permit anticipates that the "entire" disturbed area will be reclaimed; (3) both the interim and permanent regulations require total

⁹ The elements of estoppel are "(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act." Plateau Mining, 802 P.2d at 728.

revegetation of the disturbed areas; and (4) the permit requires the operator to abide by the pertinent regulations.¹⁰ There is simply no conduct by the Division which would have misled Hidden Valley into thinking that it would not be required to reclaim all the areas that it had disturbed.

Second, Hidden Valley took no action in reliance on any statement by the Division. To the contrary, Hidden Valley is asking this Board to take the unprecedented position of estopping the Division on account of Hidden Valley's wrongful conduct. Hidden Valley caused the surface disturbances at the mine and was aware of the actual acreage that it had disturbed. Hidden Valley also had the statutory obligation to provide the Division with the correct information concerning the number of disturbed acres. It obviously did not. It takes a leap of logic to suggest that the Division should be estopped on the basis of erroneous information which Hidden Valley supplied, and which was within its exclusive knowledge.¹¹ Hidden Valley's failure to provide the Division with correct information in the Reclamation Plan cannot serve as the basis for estoppel.

¹⁰ A Mining and Reclamation Permit establishes the basic requirements which an operator must follow in its day-to-day operations and reclamation activities. The permit, however, can never relieve an operator of its duty to abide by the regulations.

¹¹ If at the time it submitted its Reclamation Plan Hidden Valley had actually disturbed more than 6.7 acres, Hidden Valley provided the Division with false information. If at that time Hidden Valley had only disturbed only 6.7 acres, then it must have subsequently disturbed additional acreage and was therefore conducting mining outside the boundaries of its permit. In either case, Hidden Valley is at fault.

Hidden Valley also mistakenly argues that the Division is estopped from issuing the NOV because it failed to do so prior to Phase I bond release. A bit of background will quickly reveal the fallacy of Hidden Valley's position.

There are three phases to Bond Release: Phase I, Phase II and Phase III (Final Bond Release). See Utah Admin. R. § 645-301-880.300. The Division may release up to 60 percent of the bond at the completion of Phase I if the operator completes backfilling, regrading and drainage control requirements in accordance with the approved reclamation plan. See Utah Admin. R. § 645-301-880.310. The Division granted Hidden Valley Phase I Bond release because it determined that Hidden Valley had satisfied its the backfilling and grading requirements. Accordingly, the Division released a portion of Hidden Valley's bond.

Phase II contemplates the release of an additional portion of the bond if the operator has revegetated the disturbed areas. The Division has not granted Hidden Valley Phase II Bond Release because it has not yet requested it, and because the disturbed areas at the Mine are not fully revegetated.

Final Bond Release (Phase III), is not allowed until the operator has successfully completed all reclamation operations under both the permit and the regulations. See Utah Admin. R. § 645-301-880.320. Obviously, the Division never even addressed Final Bond Release because Hidden Valley was not yet ready for

Phase II Bond Release, and had other outstanding reclamation obligations as well.

The Division's grant of Phase I Bond Release, which only applied to Hidden Valley's backfilling and grading work, could not have mislead Hidden Valley into thinking that its reclamation obligations were complete. The message given to Hidden Valley was just the opposite. The Division has yet to grant Hidden Valley Phase II Bond Release or Final Bond Release because its other reclamation obligations, including revegetation, were not yet satisfied.

Moreover, the Division, as a matter of law, cannot be prevented from requiring an operator to abide by the regulations until Final Bond Release. It is a basic principle of law that a regulatory authority retains jurisdiction over an operator until Final Bond Release and that prior to that time, the operator is required to conform to the pertinent regulations. See SMCRA, 30 U.C.C. § 1259(b); Utah Admin. R. 645-301-880.330. See also National Wildlife Federation v. Lujan, 1991 WL 257262 (D.C. Dec. 10, 1991).¹² As the United States Court of Appeals for the Fourth Circuit has stated:

¹² 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). See SMCRA, 30 U.C.C. § 1259(b); Utah Admin. R. 645-301-880.330. See also National Wildlife Federation v. Lujan, 1991 WL 257262 (D.C. Dec. 10, 1991). A bond may not be finally released "until [the] reclamation requirements of the Act and the permit are fully met." See 30 C.F.R. § 800.40(c)(3); see also Utah Admin. R. 645-301-880.330.

until bond release the operator is still liable, and an attempt to terminate jurisdiction sooner would violate the terms of the Act.

National Wildlife Federation v. Lujan, 1991 WL 257262 (D.C. Dec. 10, 1991). Indeed, an operator's request for Final Bond Release prior to satisfaction of all reclamation requirements would constitute misrepresentation because a request of Final Bond Release has the implicit assumption that all regulatory requirements have been satisfied:

[T]he filing of an application for bond release is in itself a representation that the operator has satisfied his reclamation obligations since an operator is not entitled to release from the bond unless he has met those obligations. . . . If an operator applies for release but has not fulfilled his obligations, he is guilty of misrepresentation by the very fact of making an application. This is a reasonable way of implementing the Act's condition "[t]hat no bond shall be fully released until all reclamation requirements of this chapter are fully met." 30 U.S.C. § 1269(c)(3). The condition implies that after reclamation requirements are met, the bond may be "fully released." When it turns out that the operator had in fact not fulfilled its reclamation obligations at the time of release, the Secretary's interpretation of "misrepresentation" ensures that jurisdiction will be reasserted." 30 C.F.R. § 700.11(d)(2).

National Wildlife Federation v. Lujan, 1991 WL 257262 (D.C. Dec. 10, 1991).

Any suggestion that the Division is estopped from enforcing the regulations prior to Final Bond Release is without merit.

CONCLUSION

Hidden Valley does not contest the fact that the violations cited in the NOV still exist. Hidden Valley also does not deny that it is responsible for the surface disturbances at the Mine.

Since there is no merit to the legal claims of Hidden Valley, the NOV should be upheld in its entirety.

DATED this 11th day of May, 1992.



William R. Richards
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing DOGM'S MEMORANDUM IN OPPOSITION TO HIDDEN VALLEY COAL COMPANY'S APPLICATION FOR BOARD REVIEW OF CITATION for Cause No. ACT/015/007 to be mailed by certified mail, postage prepaid, the 11 day of May, 1992 to:

Denise A. Dragoo, Esq.
Fabian and Clendenin
215 South State
Salt Lake City, Utah 84111

Peter Stirba, Esq.
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William C. Bull

This opinion is subject to revision before
publication in the Pacific Reporter.

DEC 01 1993

IN THE UTAH COURT OF APPEALS


Mary T. Noonan
Clerk of the Court

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Hidden Valley Coal Company,)
)
Plaintiff and Appellant,)
)
v.)
)
Utah Board of Oil, Gas &)
Mining and the Utah Division)
of Oil, Gas & Mining,)
)
Defendants and Appellees.)

OPINION
(For Publication)

Case No. 930073-CA

F I L E D
(December 1, 1993)

Third District, Salt Lake County
The Honorable Glenn K. Iwasaki

Attorneys: Denise A. Dragoo, Peter Stirba, Benson L. Hathaway,
Jr., and Margaret H. Olson, Salt Lake City, for
Appellant
Jan Graham, William R. Richards, and Thomas A.
Mitchell, Salt Lake City, for Appellees

Before Judges Bench, Jackson, and Orme.

BENCH, Judge:

Hidden Valley Coal Company (Hidden Valley) appeals from the decision of the district court upholding in part the decision of the Utah Board of Oil, Gas & Mining (Board), holding Hidden Valley in violation of certain reclamation standards and imposing civil penalties. We reverse.

FACTS

In 1978, Hidden Valley's affiliate, Soldier Creek Coal Company (Soldier Creek), purchased a mine site located in Emery County, Utah. In late 1978, Soldier Creek approached the Utah Division of Oil, Gas & Mining (Division) to obtain a permit to mine coal from the mine site. In September 1979, Soldier Creek submitted a mining and reclamation plan detailing its proposal for development and operation of the mine site. In April 1980,

the Division approved the mining and reclamation plan, and shortly thereafter, Soldier Creek began mining operations.

Over the next few months, Soldier Creek cut two large pad areas, exposed a coal seam, established drainage ditches, constructed culverts that altered natural runoff and stream flows, installed sediment ponds, and constructed more than three miles of access roads. However, by August 1980, Soldier Creek determined that commercial development of the mine site was not economically feasible and ceased development.

In October 1985, Hidden Valley notified the Division that it had sold its Soldier Creek affiliate and had assumed control of the mine site. Shortly after assuming control, Hidden Valley notified the Division that it planned to reclaim the mine site. In May 1986, Hidden Valley submitted a reclamation plan for Division review. Hidden Valley's reclamation plan required that the mine site be regraded, scarified, and reseeded. In December 1986, the Division approved Hidden Valley's reclamation plan.

After the Division approved the reclamation plan, Hidden Valley began reclamation activities. Between the commencement of reclamation activities and late 1991, the Division inspected the mine site at least fifty-nine times. The Division noted after each inspection that Hidden Valley was in full compliance with all its reclamation permits and standards. In June 1988, the Division approved a Phase I bond release for the mine site, indicating that as a result of its latest inspection "the backfilling, grading, topsoil placement and drainage controls were determined complete."

On November 1, 1991, Division inspector Jess W. Kelley conducted a five and one-half hour inspection of the mine site. Mr. Kelley found Hidden Valley to be in compliance with all permits and performance standards. Mr. Kelley noted that the diversions and revegetation efforts, as well as the placement of markers and signs, were in full compliance. Specifically, Mr. Kelley stated that "[t]he large rip-rap diversions between the 'A' and 'B' seam fill areas is [sic] in good condition and free from obstruction" and "[o]ther Sediment Control Measures--Silt fences at the base of the 'A' seam fill and parallel to the large main diversion are in good repair and have not captured runoff since they were last maintained." Mr. Kelley also found Hidden

1. Hidden Valley was required to provide a bond for the reclamation work at the mine site. The reclamation was divided into separate phases. At the completion of each phase, Hidden Valley, if it complied with the permit and other reclamation requirements, was allowed to reduce the bond amount.

Valley's drainage controls on the roads to be in good condition and in compliance with all permits and performance standards. Mr. Kelley also noted, "[w]ater bars and diversions on the main reclaimed road are functioning well and are in good condition."²

On November 19, eighteen days after the previous inspection, inspector Bill Malencik conducted an inspection of the mine site. Mr. Malencik found Hidden Valley to be in violation of several permit and performance standards. Shortly thereafter, the Division issued a Notice of Violation (NOV) stating that Hidden Valley had failed to: (1) "maintain diversions to be stable" and "minimize erosion to the extent possible" on the road outslope and upslope; and (2) "clearly mark with perimeter markers all disturbed areas" and "seed and revegetate all disturbed areas" on the road and stream outslopes and the road upslopes. Hidden Valley was required to abate all violations found in the NOV. In December, the Division issued a proposed penalty assessment for the NOV totaling \$1,220.

After the Division issued the NOV, Hidden Valley petitioned the Division for an informal hearing. On December 20, the Division director held an informal hearing to review Hidden Valley's contentions. In January 1992, the director issued an order upholding the NOV in its entirety. Hidden Valley appealed the decision of the director to the Board.

The chairman of the Board, acting as a hearing examiner, conducted a formal evidentiary hearing on Hidden Valley's contentions. The Board, after considering the chairman's proposed findings of fact and conclusions of law, issued an order upholding the Division's issuance of the NOV. The Board did, however, reduce the total amount of the penalty assessment to \$1,090.

Hidden Valley filed an appeal in district court seeking judicial review of the Board's order pursuant to Utah Code Ann. § 40-10-30 (1993). The district court heard oral argument and later entered an order upholding in part the Board's decision. The court upheld the Board's decision with respect to the

2. Mr. Kelley also conducted a partial inspection on October 8, 1991, finding Hidden Valley to be in compliance with all permits and performance standards. Mr. Kelley stated that the "haul road diversion, including water bars, was in good condition and contained a good cover of vegetation," and "[u]p to this time, vegetation has been very sparse because of the lack of moisture. Now, happily, due to recent rains, reseeded areas on both 'A' and 'B' seam fills are sustaining a fairly thick growth of vegetation."

allegations that Hidden Valley had failed to maintain stable diversions, minimize erosion to the extent possible, and seed and revegetate disturbed areas. However, the court overturned the Board's decision with respect to the allegation that Hidden Valley had failed to place perimeter markers on all disturbed areas.³ Hidden Valley now appeals the Board's order to this court pursuant to section 40-10-30.

ISSUE

Hidden Valley argues that the Board erroneously interpreted and applied the Utah Coal Mining and Reclamation Act (UCMRA), Utah Code Ann. § 40-10-1 to -31 (1993), in concluding that the Division established a prima facie case supported by substantial evidence for its issuance of the NOV and that Hidden Valley failed to rebut the Division's case.⁴

3. While we are required to review the actions of the Board and not the district court, see Cowling v. Board of Oil, Gas & Mining, 830 P.2d 220, 223 (Utah 1991), the issue of placement of perimeter markers was reversed by the district court and was not appealed to this court by the Division. Therefore, Hidden Valley's alleged failure to properly place perimeter markers is not before this court on appeal.

4. Hidden Valley raises two additional issues on appeal: (1) whether the Board erroneously interpreted and applied UCMRA and Utah law in concluding that the Division was not estopped from enforcing its NOV after it had repeatedly found the mine site to be in compliance with the reclamation plan and applicable law; and (2) whether the Board erred in concluding that the statute of limitations did not bar issuance of the NOV. Because of our holding on Hidden Valley's prima facie case argument, we need not reach Hidden Valley's additional issues.

The Division argues that this appeal is moot because Hidden Valley complied with the NOV by submitting an abatement plan. However, the underlying purpose of the NOV was physical abatement of the alleged violations found in the NOV, not merely the filing of an abatement plan. Hidden Valley has not undertaken any physical abatement under the NOV. This appeal is therefore not moot and the Division's argument to the contrary is without merit.

STANDARD OF REVIEW

Our review of the Division's actions under UCMRA is not governed by the Utah Administrative Procedures Act (UAPA). Utah Code Ann. § 40-10-31 (1993). The provisions of UCMRA relating to agency adjudicative proceedings before the Division or Board supersede the procedures and requirements of UAPA. *Id.* Therefore, the standard of review for this appeal is governed by Utah Code Ann. § 40-10-30 (1993) and pre-UAPA case law.

Section 40-10-30 provides, in pertinent part:

- (1) An appeal from a rule or order of the board shall be a trial on the record and is not a trial de novo. The court shall set aside the board action if it is found to be:
 - (a) unreasonable, unjust, arbitrary, capricious, or an abuse of discretion;
 - (b) contrary to constitutional right, power, privilege, or immunity;
 - (c) in excess of statutory jurisdiction, authority, or limitations;
 - (d) not in compliance with procedure required by law;
 - (e) based upon a clearly erroneous interpretation or application of the law; or
 - (f) as to an adjudicative proceeding, unsupported by substantial evidence on the record.

For cases decided outside the confines of UAPA, "[w]hen a lower court reviews an order of an administrative agency and we exercise appellate review of the lower court's judgment, we act as if we were reviewing the administrative agency decision directly." Cowling v. Board of Oil, Gas & Mining, 830 P.2d 220, 223 (Utah 1991) (citing Bennion v. Utah State Board of Oil, Gas & Mining, 675 P.2d 1135, 1139 (Utah 1983)).

Prior to the adoption of UAPA, agencies' findings of fact were "granted considerable deference and would not be disturbed on appeal if supported by substantial evidence." Morton Int'l, Inc. v. State Tax Comm'n, 814 P.2d 581, 585 (Utah 1991). Substantial evidence has been defined to be "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." Johnson v. Board of Review, 842 P.2d 910, 911 (Utah App. 1992) (quoting Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989)).

ANALYSIS

Hidden Valley argues that the Division has not established a prima facie showing of the facts supporting its NOV. The Division has the burden of establishing a prima facie case as to the fact of a violation under UCMRA.⁵

The evidence is uncontroverted that up until November 1, 1991, Hidden Valley was in full compliance with the reclamation plan. Because the Division certified that Hidden Valley was in full compliance on November 1, the Division was required to establish that some intervening event or condition occurred between the November 1 and November 19 inspections in order to establish a prima facie showing that Hidden Valley was not in full compliance. The Division could also try to establish that its prior inspections were somehow deficient such that non-compliance actually occurred prior to November 1, 1991.

Failure to Maintain Stable Diversions

The Board found that Hidden Valley "failed to comply with the Permanent Program standards and the approved Reclamation Plan by failing to adequately construct and maintain erosion control structures on the outslopes of the access haul road." Based on this finding, the Board upheld the portion of the Division's NOV that cited Hidden Valley for failing to maintain stable diversions. At the formal hearing before the Board, the Division presented no evidence to indicate that in the eighteen days prior to the inspection giving rise to the NOV, there had been any change in conditions or circumstances with regard to the stability of the diversions on the road outslopes. Neither did the Division present any evidence that it had previously notified Hidden Valley that it was close to a violation with respect to the diversions. While inspector Malencik did testify that during the inspection he conducted in April 1991 he considered several areas of the mine site, apparently including the diversions, to be close calls, he also testified that he only indicated that they should be watched because they had the potential to become problems. His report from that inspection indicated that Hidden Valley was in full compliance. Consequently, the Division has

5. UCMRA is virtually identical to its federal counterpart, the Surface Mining Control and Reclamation Act (SMCRA). See 30 U.S.C. §§ 1201 to 1328 (1977). Under SMCRA, the Office of the Secretary of the Interior carries the burden of establishing a prima facie showing of a violation. See 43 C.F.R. § 4.1171(a). Based on this model, we likewise conclude that the Division bears the initial burden of establishing a prima facie showing of a violation under UCMRA.

not supported this portion of its NOV with substantial evidence on the record. See Morton Int'l, 814 P.2d at 585; Utah Code Ann. § 40-10-30(f) (1988) (court will set aside Board's action if an adjudicative proceeding is "unsupported by substantial evidence on the record"). The Division has not established a prima facie showing that Hidden Valley had, between November 1 and November 19, failed to maintain stable diversions at the mine site. In light of the lack of record evidence supporting the Division's position, the Board's decision to uphold this portion of the NOV was arbitrary and capricious. We therefore conclude that the Board erred in upholding this portion of the NOV.

Failure to Minimize Erosion

The Board made no findings with regard to Hidden Valley's alleged failure to "minimize erosion to the extent possible." This court has reiterated that an administrative agency must make findings of fact that are sufficiently detailed so as to permit meaningful appellate review. Adams v. Board of Review of Indus. Comm'n, 821 P.2d 1, 4 (Utah App. 1991).

In order for us to meaningfully review the findings of the [Board], the findings must be "sufficiently detailed and include enough subsidiary facts to disclose the steps taken by which the ultimate conclusion on each factual issue was reached. . . . [T]he failure of an agency to make adequate findings of fact in material issues renders its findings "arbitrary and capricious" unless the evidence is "clear and uncontroverted and capable of only one conclusion."

Id. at 4-5 (quoting Nyrehn v. Industrial Comm'n, 800 P.2d 330, 335 (Utah App. 1990) (citations omitted), cert. denied, 815 P.2d 241 (Utah 1991)). We may not, however, assume that an undisclosed finding was in fact made. Id. at 5. The party defending the agency's action bears the burden of showing that the undisclosed finding was actually made. Id.

For this Court to sustain an order, the findings must be sufficiently detailed to demonstrate that the [Board] has properly arrived at the ultimate factual findings and has properly applied the governing rules of law to those findings. . . . It is not the prerogative of this Court to search the record to determine whether findings could have been made by the [Board] to support its

order, for to do so would be to usurp the function with which the [Board] is charged.

Id. (quoting Mountain States Legal Found. v. Public Serv. Comm'n, 636 P.2d 1047, 1052 (Utah 1981)).

Our review of the record reveals no evidence indicating that Hidden Valley failed to take adequate steps to minimize erosion between the November 1 and November 19 inspections. Inspector Malencik testified that, in his opinion, there were several additional steps Hidden Valley could have taken to minimize erosion, but did not identify any specific steps that Hidden Valley had apparently failed to take during that eighteen-day period. The Board made no findings with respect to Hidden Valley's alleged failure to minimize erosion, and there was no evidence presented that would have supported such a finding. In light of the absence of evidence, the Board could not have found that Hidden Valley had, between November 1 and November 19, failed to take all reasonable steps to minimize erosion. We therefore conclude that the Board erred in upholding this portion of the NOV.

Failure to Seed and Revegetate Disturbed Areas

The Board found that Hidden Valley "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." Based on this finding, the Board upheld that portion of the Division's NOV that cited Hidden Valley for failing to seed and revegetate disturbed areas.

There is some dispute in the record as to whether Hidden Valley failed to seed and revegetate the disturbed areas. However, the Division did not introduce any evidence that Hidden Valley had failed to meet seeding and revegetating requirements between November 1 and November 19. Consequently, the Division has not supported this portion of the NOV with substantial evidence on the record. The Division has not established a prima facie showing that Hidden Valley had, between November 1 and November 19, failed to seed and revegetate all disturbed areas at the mine site. In light of the lack of record evidence supporting the Division's position, the Board's decision to uphold this portion of the NOV was arbitrary and capricious. We therefore conclude that the Board erred in upholding this portion of the NOV.

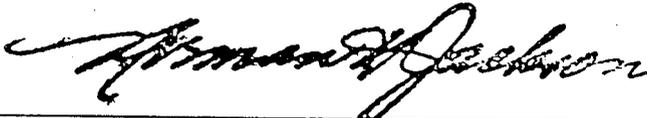
CONCLUSION

The Division failed to establish a prima facie showing of the facts underlying the violations charged in the NOV. We therefore reverse the Board's decision upholding the Division's issuance of the NOV and vacate the Division's penalty assessment against Hidden Valley.



Russell W. Bench, Judge

WE CONCUR:



Norman H. Jackson, Judge



Gregory K. Orme, Judge



UTAH
NATURAL RESOURCES
Oil, Gas & Mining

3 Triad Center • Suite 350 • Salt Lake City, UT 84180-1203 • 801-538-5340

Copy

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VACATION/TERMINATION OF NOTICE OF VIOLATION/CESSATION ORDER

To the following Permittee or Operator:

Name Hidden Valley Coal Company
Mailing Address 1801 University Drive, Phoenix, AZ 85034
State Permit No. ACT/015/007

Utah Coal Mining & Reclamation Act, Section 40-10-1 et seq., Utah Code Annotated (1953):

Notice of Violation No. N 93-35-8-1 dated October 6, 1993.

Cessation Order No. C. _____ dated _____, 19____.

Part 1 of 1 is vacated terminated because per stipulated Agreement and ruling in Utah Court of Appeals dated December 1, 1993. (see attached).

Part _____ of _____ is vacated terminated because _____

Date of service/ mailing 12/9/93 Time of service/ mailing 3:00 a.m. p.m.

Permittee/Operator representative _____ Title _____

Signature _____

PAMELA GRUBBACH-LITTLE
Division of Oil, Gas & Mining
Pamela Grubbach Little
Signature

Print Supervisor
Title

Thomas A. Mitchell (3737)
William R. Richards (4398)
3 Triad, Suite 350
355 West North Temple
Salt Lake City, UT 84180-1203
Telephone: (801) 538-5340

RECEIVED
DEC 03 1995
DIVISION OF
OIL, GAS & MINING

IN THE UTAH COURT OF APPEALS

HIDDEN VALLEY COAL COMPANY,	:	
	:	STIPULATION
Plaintiff and Appellant,	:	
v.	:	Case No. 930073-CA
The UTAH BOARD OF OIL, GAS &	:	
MINING and the UTAH DIVISION	:	Priority 15
OF OIL, GAS & MINING,	:	
Defendants and Appellants.	:	

Appellant and Appellee through counsel of record enter into this Stipulation concerning the following Notice of Violations ("NOVs").

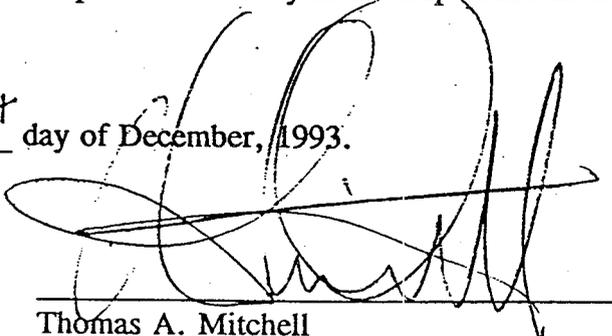
NOV N91-26-8-2 required as a condition of abatement reseeding of the road surface referenced in the NOV. The terms of the 1991 NOV's abatement and the approved abatement plan itself, specifically addressed revegetation for the road surface. NOV N93-35-08-01 was written only for failure to attain perennial vegetation on the road surface, a previously uncited regulation. This failure to meet this performance standard is nonetheless addressed within the scope of the approved abatement plan submitted by Appellant.

The parties therefore stipulate as follows:

1. NOV N93-35-08-01 is hereby vacated;
2. The Appellant's Emergency Motion to Enforce Order dated November 30, 1993, is withdrawn;
3. There shall be no further appeals as to the fact of violation concerning revegetation success on the road surface as it relates to N91-26-8-2;
4. If Plaintiff Appellants are successful in their appeal of NOV N91-26-8 the Division is not estopped from enforcing revegetation performance standards on the road surface not previously cited in NOV N91-26-8-2 or otherwise argued or raised by Appellants in this proceeding.

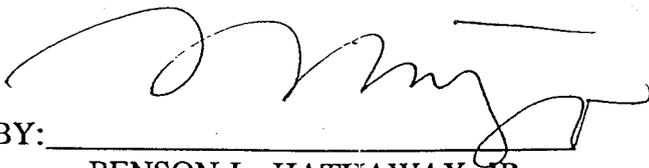
The basis for both parties entering into this Stipulation is solely in the Stipulation as set forth above.

SO STIPULATED this 15th day of December, 1993.



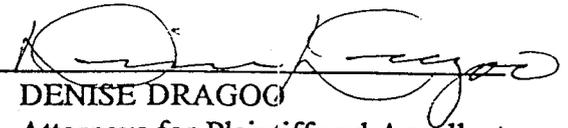
Thomas A. Mitchell
Assistant Attorney General
UTAH DIVISION OF OIL,
GAS & MINING

STIRBA & HATHAWAY



BY: _____
BENSON L. HATHAWAY, JR.
Attorneys for Plaintiff and Appellant
Hidden Valley Coal Company

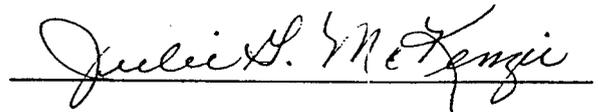
FABIAN & CLENDENIN

BY: 
DENISE DRAGOO
Attorneys for Plaintiff and Appellant
Hidden Valley Coal Company

CERTIFICATE OF DELIVERY

I hereby certify that on this 3rd day of December, 1993, a true and correct copy of the foregoing STIPULATION was hand delivered to the following:

William R. Richards
Thomas A. Mitchell
Assistants Attorney General
UTAH DIVISION OF OIL,
GAS & MINING
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, Utah 84180



k\hvcc\stipulation

DEC 01 1993

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Mary T. Noonan
Mary T. Noonan
Clerk of the Court

Hidden Valley Coal Company,)
)
Plaintiff and Appellant,)
)
v.)
)
Utah Board of Oil, Gas &)
Mining and the Utah Division)
of Oil, Gas & Mining,)
)
Defendants and Appellees.)

ORDER

Case No. 930073-CA

This matter is before the court on appellant's emergency motion to enforce this court's order of April 14, 1993 staying enforcement action on Notice of Violation, No. N91-26-8-2, by extending the effect of the stay order to Notice of Violation, No. N93-35-08-01.

IT IS HEREBY ORDERED that the motion is denied, based upon the issuance of this court's opinion filed December 1, 1993, reversing the district court's decision, and the resulting expiration of the April 14, 1993 stay order.

Dated this 1st day of December, 1993.

BY THE COURT:

Russell W. Bench
Russell W. Bench, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of December, 1993, a true and correct copy of the foregoing Order was mailed to each of the following:

Denise A. Dragoo
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William R. Richards
Thomas A. Mitchell
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Salt Lake City, UT 84180


Deputy Clerk

COVER SHEET

CASE TITLE:

Hidden Valley Coal Company,
Plaintiff and Appellant,
v.
Utah Board of Oil, Gas & Mining
and the Utah Division of Oil,
Gas & Mining,
Defendants and Appellees.

Case No. 930073-CA

December 1, 1993. OPINION (For Publication).

Opinion of the Court by RUSSELL W. BENCH, Judge; NORMAN
H. JACKSON, and GREGORY K. ORME, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 1st day of December, 1993, a
true and correct copy of the foregoing OPINION was deposited in
the United States mail to the parties listed below:

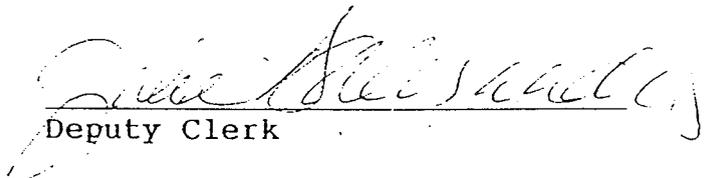
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Jan Graham
State Attorney General
William R. Richards (Argued)
Thomas A. Mitchell (Argued)
Assistant Attorneys General
Division of Oil, Gas & Mining
#3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, UT 84180

and a true and correct copy of the foregoing OPINION was deposited
in the United States mail to the district court judge listed below:

The Honorable Glenn K. Iwasaki
Third District Judge
240 East 4th South, Room 503
Salt Lake City, UT 84111


Deputy Clerk

TRIAL COURT:

FABIAN & CLENDENIN

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M. BYRON FISHER
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ANTHONY L. RAMPTON
PETER W. BILLINGS, JR.
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DOUGLAS J. PAYNE
ROBERT PALMER REES
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JOHN (JACK) D. RAY
KATHLEEN H. SWITZER
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VIA FACSIMILE

November 19, 1993

NOV 22 1993

(801) 359-3940

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

RE: Request for Informal Conference and Extension of Time for
Abatement, Hidden Valley Coal Company, Notice of Violation
No. 93-35-08-01

Dear Director Carter:

By letter dated November 12, 1993, Hidden Valley Coal Company ("HVCC"), set forth a settlement proposal regarding Notice of Violation No. 93-35-08-01 ("NOV"). HVCC has requested the Division to allow it to undertake the abatement action required under the NOV without restarting the ten-year bond liability clock. Without such an agreement, HVCC cannot proceed to abate the violation while litigation is pending before the Utah Court of Appeals in *Hidden Valley Coal Company v. Utah Board and Division of Oil, Gas & Mining*, Case No. 930073-CA. By Order dated April 14, 1993, copy enclosed, the Utah Court of Appeals granted HVCC's Motion for Stay Pending Appeal. This order requires the Board and Division to refrain from issuing, enforcing, implementing or acting upon in any way any notice of violation or cessation order requiring HVCC to effect or implement its abatement plan for NOV No. N91-26-8-2. HVCC Motion dated March 8, 1993, copy enclosed. HVCC's Motion was supported by the affidavit of HVCC's counsel concerning the parties' inability to resolve the issue of the ten-year bond clock. It is HVCC's position that the April 14, 1993 Order stays the Division from enforcing actions which would prejudice the permittee in proceedings pending before the Court of Appeals. In this case, the abatement of NOV No. N93-35-08-01 may restart the ten-year bond clock,

LAW OFFICES OF
FABIAN & CLENDENIN
A PROFESSIONAL CORPORATION
James W. Carter
November 19, 1993
Page 2

which is at the heart of HVCC's appeal. Therefore, HVCC believes that the Division has authority pursuant to R645-400-327.200 to stay abatement under the pending NOV consistent with the Court's April 14, 1993 Order, until such time as the Court of Appeals rules in Case No. 930073-CA.

During the period in which abatement is stayed, HVCC also requests an informal hearing to review the fact of the violation and the proposed penalty for NOV No. N93-35-08-01. It is HVCC's understanding that the Division will consider HVCC's settlement proposal in the context of the informal hearing.

We appreciate your assistance in this matter.

Very truly yours,



Denise A. Drago

DAD:jmc:23886

Enclosures

cc: Lee Edmonson
Peter Stirba, Esq.

cc. JWC
JFB
RST
VRR
JFB
orig
file

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KATHLEEN H. SWITZER
CRAIG T. JACOBSEN
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VIA FACSIMILE

November 19, 1993

NOV 22 1993

(801) 359-3940

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

RE: Request for Informal Conference and Extension of Time for
Abatement, Hidden Valley Coal Company, Notice of Violation
No. 93-35-08-01

Dear Director Carter:

By letter dated November 12, 1993, Hidden Valley Coal Company ("HVCC"), set forth a settlement proposal regarding Notice of Violation No. 93-35-08-01 ("NOV"). HVCC has requested the Division to allow it to undertake the abatement action required under the NOV without restarting the ten-year bond liability clock. Without such an agreement, HVCC cannot proceed to abate the violation while litigation is pending before the Utah Court of Appeals in *Hidden Valley Coal Company v. Utah Board and Division of Oil, Gas & Mining*, Case No. 930073-CA. By Order dated April 14, 1993, copy enclosed, the Utah Court of Appeals granted HVCC's Motion for Stay Pending Appeal. This order requires the Board and Division to refrain from issuing, enforcing, implementing or acting upon in any way any notice of violation or cessation order requiring HVCC to effect or implement its abatement plan for NOV No. N91-26-8-2. HVCC Motion dated March 8, 1993, copy enclosed. HVCC's Motion was supported by the affidavit of HVCC's counsel concerning the parties' inability to resolve the issue of the ten-year bond clock. It is HVCC's position that the April 14, 1993 Order stays the Division from enforcing actions which would prejudice the permittee in proceedings pending before the Court of Appeals. In this case, the abatement of NOV No. N93-35-08-01 may restart the ten-year bond clock,

James W. Carter

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which is at the heart of HVCC's appeal. Therefore, HVCC believes that the Division has authority pursuant to R645-400-327.200 to stay abatement under the pending NOV consistent with the Court's April 14, 1993 Order, until such time as the Court of Appeals rules in Case No. 930073-CA.

During the period in which abatement is stayed, HVCC also requests an informal hearing to review the fact of the violation and the proposed penalty for NOV No. N93-35-08-01. It is HVCC's understanding that the Division will consider HVCC's settlement proposal in the context of the informal hearing.

We appreciate your assistance in this matter.

Very truly yours,



Denise A. Dragoo

DAD:jmc:23886

Enclosures

cc: Lee Edmonson
Peter Stirba, Esq.

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IN THE UTAH COURT OF APPEALS

HIDDEN VALLEY COAL COMPANY,	:	APPELLANT'S
Plaintiff and Appellant,	:	MEMORANDUM IN SUPPORT
	:	OF ITS RULE 8(a) MOTION
	:	FOR A STAY PENDING
v.	:	APPEAL AND REQUEST FOR
	:	HEARING
The UTAH BOARD OF OIL, GAS &	:	
MINING and the UTAH DIVISION	:	
OF OIL, GAS & MINING,	:	Case No. 930073-CA
Appellees and Appellants.	:	

On Appeal From the Third Judicial District Court
County of Salt Lake, State of Utah

The Honorable Glenn Iwasaki
Third District Court Judge

Pursuant to Utah R. App. P. 23(a)(3), Plaintiff and Appellant Hidden Valley Coal Company ("HVCC"), by and through counsel undersigned, respectfully submits its Memorandum in Support of its Rule 8(a) Motion for a Stay Pending Appeal and Request for Hearing.

STATEMENT OF RELEVANT FACTS

1. The Division of Oil, Gas and Mining ("Division") issued Notice of Violation (Number 91-26-8-2) ("the NOV") to HVCC on November 22, 1991. *See* NOV, attached hereto as Exhibit "A." Part 1 of the NOV alleges failure to maintain the stability of diversions and failure to minimize erosion to the extent possible under Utah Admin. R. 614-301-742.312.1 and 614-301-742.113 (1991) as to the road outslope and upslope. Part 2 of the NOV was written for failure to clearly mark with perimeter markers all disturbed areas and failure to seed and revegetate all disturbed areas, under Utah Admin. R. 614-301-521.251 and 614-301-354 (1991) with respect to the road and stream disturbed outsoles and road upslopes.

2. The Appellant initiated both informal and administrative review procedures to challenge issuance of the NOV.

3. On February 14, 1992, counsel for the Division stipulated that "the stay of enforcement of the NOV will not adversely affect the health or safety of the public or cause significant imminent environmental harm to land, air or water resources. *See* Order, attached hereto as Exhibit "B."

4. After a hearing, the Board of Oil, Gas and Mining ("Board") upheld the NOV on July 30, 1992. *See* Order, attached hereto as Exhibit "C."

5. The Appellant timely appealed the Board's Order to the Third District Court pursuant to Utah Code Ann. § 40-10-30 (1986). That statute provides that:

An appeal from a rule or order of the board shall be a trial on the record and is not a trial de novo . . . The trial court shall determine the issues on both questions of law and fact and shall affirm or set aside the rule or order, enjoin

or stay the effective date of agency action, or remand the cause to the board for further proceedings . . .

6. Despite the Appellant's timely appeal, on September 3, 1992 the Division issued a Cessation Order ("CO") against HVCC's parent company requiring abatement action under the NOV. *See* Cessation Order, attached hereto as Exhibit "D."

7. On September 9, 1992, the Board stayed the CO for one day to allow the Appellant to seek appropriate judicial remedies or commence abatement action.

8. The Third District Court granted a Temporary Restraining Order on September 11, 1992, preventing the Appellees from enforcing, implementing or acting upon in any way the Cessation Order, No. C 92-26-1-2, issued by the Appellees on September 1, 1992 or the Notice of Violation issued by Appellees on November 22, 1991. The Court ordered that no civil or other penalty of any kind could accrue as a result of Hidden Valley Coal Company's non-compliance with the Cessation Order or Notice of Violation.

9. On September 25, 1992, the Division's Reclamation Specialist, William Malencik, submitted an Affidavit stating that:

(a) he wrote the NOV (p. 2, ¶ 9);

(b) the season for seeding in the Utah desert is early to late fall. Seeding done either before or after that date is ineffectual. (p. 4, ¶ 24);

(c) if the Mine Site was not seeded in fall, 1992, the site will not be able to be effectively seeded until, at the earliest, fall of 1993 (p. 5, ¶ 25(d)).

See Affidavit of William Malencik, attached hereto as Exhibit "E."

10. On September 28, 1992, the Appellant filed a Motion for a Preliminary Injunction with the district court. The Third District Court denied this Motion, but granted a stay pending appeal pursuant to Utah Code Ann. § 40-10-20(8) (1986). *See* Order, attached hereto as Exhibit "F;" *see also* Utah Code Ann. § 40-10-20(8) (1986), attached hereto as Exhibit "G."

11. On October 29, 1992, the Third District Court heard oral argument on the appeal issues which had been fully briefed by the parties. On November 5, 1992, that Court entered an Order upholding the Division with respect to the entire NOV except for the violation for failure to place perimeter markers, which the Court overturned. *See* Order, attached hereto as Exhibit "H."

12. That same day, on October 29, 1992, the Appellant filed a proposed Abatement Plan with the Division in an effort to protect itself from penalties and cessation orders. *See* Abatement Plan and Cover Letter dated October 29, 1992, attached hereto as Exhibit "I."

13. The parties thereafter engaged in serious settlement negotiations in an attempt to resolve the disputed issues between the parties. At all times, the Appellees knew of the Appellant's intention to perfect its appeal rights to the Utah Supreme Court. *See* Affidavit of Counsel, filed and served herewith.

14. The Appellant indeed pursued its appeal pursuant to the statutory authorization in Utah Code Ann. § 40-10-30(3) which reads: "Review of the adjudication of the district court is by the Supreme Court."

15. During this time of settlement negotiation, the Division granted several extensions granting HVCC additional time to comply with the Abatement Plan. *See* Letter dated January

29, 1993, attached hereto as Exhibit "J;" and Letter dated February 18, 1993, attached hereto as Exhibit "K."

16. The settlement negotiations ultimately failed due to the parties' inability to resolve the issue of whether or not the 10-year bond clock would re-start against the Appellants in the event the Appellants took the abatement action that the Division was requiring.

17. The time for the Appellant to abate the NOV was to run on February 28, 1993. Therefore, on February 5, 1993, the Appellant filed a Rule 62(d) Motion for a Stay Pending Appeal or in the Alternative for a Stay Pending a Rule 8 Adjudication by the Utah Court of Appeals. This Motion was based on Utah R. App. P. 8(a), Utah R. Civ. P. 62(d) and Utah Code Ann. § 40-10-20(8) (1986).

18. On March 4, 1993, the Third District Court heard oral argument on Appellant's Rule 62(d) Motion for a Stay Pending Appeal or in the Alternative for a Stay Pending a Rule 8 Adjudication by the Utah Court of Appeals. The Court denied the Appellant's Motion for a Stay Pending Appeal, but granted the Appellant's Motion for a Stay Pending a Rule 8 Adjudication by the Utah Court of Appeals. See Proposed Order, attached hereto as Exhibit "L."

19. On March 8, 1993, the Appellant's Brief was filed.

ARGUMENT

This Motion is made pursuant to Rule 8(a) of the Utah Rules of Appellate Procedure.

That Rule provides:

Application for a stay of the judgment or order of a trial court pending appeal . . . or for an order suspending, modifying, restoring, or granting an injunction

during the pendency of an appeal must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant

...

Since this Motion is asking for the Court to grant an order *preventing* the Division from issuing, enforcing, implementing or acting upon in any way its NOV's and CO, this motion is a request for an order granting an injunction during the pendency of an appeal. *See Jensen v. Schwendiman*, 744 P.2d 1026, 1027 (Utah Ct. App. 1987). Since the Appellant first sought relief in the district court, it has complied with the prerequisite requirements of Rule 8(a).

The decision to grant an injunction pending appeal is within the discretion of this court as the reviewing court. *Id.* In ruling on a request for an injunction pending appeal, the analysis is the same as if the party is requesting a preliminary injunction. *Id.*; *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982). These factors include: (1) whether there is a likelihood of success on the merits of the appeal; (2) whether the movant has made a showing of irreparable injury if a stay is not granted; (3) whether granting of stay would substantially harm other parties; (4) and whether granting of stay would preserve the public interest. *United States v. Baylor University Medical Center*, 711 F.2d 38, 39 (5th Cir. 1983) *cert. denied* 469 U.S. 1189 (1984).

A preliminary injunction should issue in this case because Appellant HVCC has made the necessary showing and failure to issue an injunction will effectively deprive Appellant of any judicial review of the Board's action, as abatement of the NOV will render the case moot. In

this case, an injunction pending appeal is an appropriate order given the all the facts and circumstances.

I. An Injunction Pending Appeal Should Issue Under Utah Rules of Appellate Procedure 8(a).

A. The Appellant Hidden Valley Coal Company Will Suffer Substantial and Irreparable Harm if Division Action is Not Stayed.

The Appellant will be assessed \$750.00 per day for 30 days as a civil penalty for each day that the CO is not stayed. *See* Utah Admin. Code 645-401-420, 430. The State may also seek criminal fines and imprisonment against Appellant pursuant to Utah Code Ann. § 40-10-20(5) and (6) (1986) if the NOV is not abated within 30 days. In addition, the State may request the attorney general to institute a civil action against Appellant pursuant to Utah Code Ann. § 40-10-22(2) (1981). These imminent, tangible, harsh penalties will constitute irreparable harm within the meaning of the Rule. *See* Affidavit of Lee Edmonson dated September 11, 1992, attached hereto as Exhibit "M;" *see also, Great Salt Lake Minerals and Chemicals v. Marsh*, 596 F.Supp. 548, 557 (D.Utah 1984) (risk of being put out of business and threats to economic viability is irreparable harm); *TLX Acquisition Corp. v. Telex Corp.*, 679 F.Supp. 1022, 1032 (W.D.Okl. 1987) (irreparable harm is found in the invocation, application or enforcement of the Oklahoma Control Shares Act when plaintiffs would sustain a monetary loss as a result); and *Mesa Petroleum Co. v. Cities Service Co.*, 715 F.2d 1425, 1432 (10th Cir. 1983) (irreparable injury where corporation faced potential prosecution for failure to comply with state take-over statutes).

Furthermore, Appellant should not have to take the abatement action which is the subject of its pending appeal before the appeal is resolved. Otherwise the entire appeal is rendered moot because the abatement action would be required *now* instead of *after* Appellant has exercised its right to judicial review under Utah Code Ann. § 40-10-30 (1986). Essentially, Appellant faces incurring sanctions as a price for exercising its appeal rights. If an injunction is not issued, Appellant will be penalized for failing to take abatement action while it pursues this appeal of that order.¹

The Appellees have argued that this appeal is already moot because the Appellant submitted an Abatement Plan. The action that the Division is requiring under its NOV is obviously to *take the abatement action* and not to merely submit a plan to abate. This fact is supported by a letter from the Division's Acting Director, which states that "[y]ou will be required to begin and complete that work within the time set forth within the approved plan." See Letter dated January 29, 1993, attached hereto as Exhibit "J."

Appellees should not be permitted to undermine the integrity of Appellant's appeal by enforcing their CO and NOV. If Appellees are allowed to take this action, the Appellant will suffer irreparable harm because it will be forever divested of its statutory right to judicial review.

¹It should be noted that Appellant's Brief was filed on March 8, 1993 and the Appellees' Brief is due April 7, 1993. Utah R. App. P. 26. This matter will shortly thereafter be calendared for oral argument. The Division is attempting to undercut this appeal by demanding that abatement action be taken immediately.

In past hearings, The Appellees have argued that Appellant will not be irreparably harmed because if it prevails on this appeal, it can either: (1) recover the \$ 750.00 per day penalty from the State; or (2) not pay the assessing penalties until the resolution of the appeal. This argument is unpersuasive and hollow for several reasons. First of all, the practical impact of the CO substantively moots this appeal. No litigant with financial interests would or could take such a risk. The Appellant will effectively be forced into going ahead and taking the abatement action.

Secondly, such a situation would have a chilling effect on the proceedings. Rather than seek its statutorily guaranteed right to judicial review as an equal adversary party, this situation would put Appellant "behind the eight ball." Thus, if an injunction is not granted, Appellant will incur an additional financial exposure of \$750.00 per day for each day it awaits the Court of Appeals' decision in this matter. This consequence will attach only because Appellant has chosen to appeal. While it is true perhaps that if Appellant prevails, then it won't have to pay the penalties, but that argument is merely stating the obvious fact that any party who wins an appeal usually has a reversal of a previous unfavorable decision. The chilling effect, however, lies in the fact that Appellant, as a condition of judicial review, must expose itself to the prospects of additional penalties which would not be imposed but for the fact that it has chosen

to appeal.² It would undermine and deteriorate Appellant's ability to effectively litigate the issues presently pending before this Court.

Third, Appellees' argument fails to take into account the fact that the irreparable harm in this case is not simply financial. The officers of Appellant face criminal fines and imprisonment personal to them, which reach beyond the corporate veil. Utah Code Ann. § 40-10-20(5) and (6) (1986). In light of the fact that the officers and agents of Appellant are simply pursuing the best interests of the corporate entity pursuant to Utah Code Ann. § 40-10-30 (1986), the Appellees' argument that Appellant should simply endure the risk is unpersuasive.

In summary, if Division action is not stayed the Appellant will suffer substantial and irreparable harm from: (1) civil penalties of \$ 750.00 per day until this Court's decision; (2) civil action by the State; (3) additional criminal fines; (4) imprisonment; (5) personal liability of corporate officers, agents and directors; and (6) a deprivation of statutorily guaranteed appeal rights.

² Put in this context, the Division's CO and its contesting of this injunction evidences the obvious fact that the Division wants Appellant to be "behind the eight ball" and to impede the ability of the Appellant to present the issues for judicial review. The Division obviously wants to moot the appeal because it has already argued mootness as a result of the Appellant's submission of an Abatement Plan.

B. The Substantial Economic Injury, Threatened Criminal Fines and Imprisonment of Appellant Hidden Valley Coal Company Outweighs Any Negligible Injury to the State.

The serious threatened injury to Appellant far outweighs any insignificant intangible damage to the Appellees. The Appellees will not be damaged at all. The NOV has already been stayed since January 21, 1992. The Appellees' counsel *stipulated* that no public health or safety issues are implicated and no environmental harm to land, air or water will occur. *See* Order, attached hereto as Exhibit "B." The condition that the Appellees want abated has existed for years. *See* Affidavit of Lee Edmonson, dated September 11, 1992, attached hereto as Exhibit "M."

In contrast, Appellant faces a civil penalty of \$750.00 per day until the appeal is decided, criminal fines not exceeding \$10,000.00 per violation and one year in prison as a result of the CO. Utah Code Ann. § 40-10-20(5), (6) and (8) (1986); Utah Admin. Code. 645-401-430 (1991). As discussed above, the Appellant will also be divested of its statutory right to judicial review. In light of the immediate, substantial and irreparable damage which Appellant will incur, the harm to the Appellees is negligible.

The only way that harm to Appellant can be prevented is if the Court issues an injunction pending appeal preventing the Appellees from enforcing, implementing or acting upon in any way the NOV and CO until the resolution of this appeal.

C. The Public Interest is Unaffected by an Injunction Pending Appeal in This Case.

The public interest in this case is not particularly compelling or urgent, especially when contrasted with the consequences to Appellant in this case. No emergency, clear danger or critical policies are implicated whatsoever. "[C]ounsel for [Appellees] stipulated . . . that the stay of enforcement of the NOV will not adversely affect the health or safety of the public or cause significant imminent environmental harm to land, air or water resources." See Order, attached hereto as Exhibit "B;" see also Affidavit of Lee Edmonson, dated September 11, 1992, attached hereto as Exhibit "M." This is also demonstrated in testimony from Division witnesses at the June 30, 1992 hearing:

MR. STIRBA: And in April of 1991 when you saw this site these three matters, these three gullies, did not concern you [enough to ticket them] is that correct?

MR. MALENCIK: No.

. . . .

MR. MALENCIK: I didn't write a violation. I didn't think a violation existed.

. . . .

MR. STIRBA: You indicate . . . compliance with permits and performance standards. You see where it says signs and markers?

MR. MALENCIK: Yes.

MR. STIRBA: You indicated yes, correct?

MR. MALENCIK: Yes.

MR. STIRBA: Meaning compliance with the permit and the plan, true?

MR. MALENCIK: That's correct.

MR. STIRBA: And any applicable rules and regulations, correct?

MR. MALENCIK: That's correct.

MR. STIRBA: And also with respect to vegetation you noted on paragraph 13 there on the front page a yes with respect to compliance with the permit and performance standards; isn't that true?

MR. MALENCIK: Yes.

See June 30, 1992 Transcript, testimony of William Malencik, pp. 67 - 71, 75 attached hereto as Exhibit "N."

MR. STIRBA: And then after that, do you see where it says -- does it state this: "overall, the reclaimed site looked good on this inspection. This inspection also served as the phase one bond release inspection." Does it say that?

MS. LITTIG: Yes, it does.

MR. STIRBA: And that was the opinion of the site that you held at that time based upon your inspection; isn't that true?

MS. LITTIG: Yes.

MR. STIRBA: And as a result of your determination that the site looked good and your analysis of the -- some of the information you received on that inspection, you approved then a release of the phase one bond; isn't that correct?

MS. LITTIG: Yes.

MR. STIRBA: And the reason or the basis for your determination when you went to the inspection or went on that inspection, rather, was you were attempting to see whether the reclamation work which had been proposed had been completed in a satisfactory fashion, correct?

MS. LITTIG: Yes.

MR. STIRBA: And you made such a determination that, in fact, it had, correct?

MS. LITTIG: Yes.

See June 30, 1992 Transcript, testimony of Pam Grubaugh-Littig, p. 169 - 170, attached hereto as Exhibit "O."

The Mine Site has existed in its present state at least 1987. *See* June 30, 1992 Transcript, testimony of Karla Knoop, p. 231, attached hereto as Exhibit "P;" testimony of Joseph Jarvis, pp. 271 - 272, attached hereto as Exhibit "Q." A preliminary injunction will not cause or worsen any condition that has not been present for years. Furthermore, the Appellees' witnesses testified that there are no harmful or dangerous conditions existing at the Mine Site.

D. Appellant Makes a Clear Showing That It Will Prevail On The Merits and That The Appeal Should Be the Subject of Further Litigation.

Utah R. Civ. P. 65A(e)(4) states that, in order for an injunction to be proper, there must be a showing that there is "a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or [that] the case presents serious issues on the merits which should be the subject of further litigation." (Emphasis added). Although Appellant need only satisfy one requirement for purposes of this Motion, both requirements are satisfied here. Therefore, a preliminary injunction is proper.

a. There is a Substantial Likelihood that Appellant will Prevail on the Merits of This Appeal.

No mining activities have been conducted at the Mine Site since at least September of 1980. *See* June 30, 1992 Transcript, testimony of Lee Edmonson, p. 191, attached hereto as Exhibit "R." Appellant has conformed to all Division requests to reclaim the property in the manner that was specified and has responded to all suggestions for maintenance. *See* June 30, 1992 Transcript, testimony of Lee Edmonson, p. 196, attached hereto as Exhibit "R."

Due to its compliance with the reclamation plan and applicable law, Appellant received a Phase I bond release³ from the Division on May 24, 1988. *See* June 30, 1992 Transcript, testimony of Lee Edmonson, p. 213, attached hereto as Exhibit "R;" testimony of Dianne Nielson, pp. 149 - 150, attached hereto as Exhibit "S;" testimony of Pam Grubaugh-Littig, pp. 164 - 170, attached hereto as Exhibit "O."

MR. STIRBA: In other words, if there was not compliance with the plan and the applicable rules and regulations on that portion of the reclamation work, you would not have approved release of the bond, true?

MS. LITTIG: This is true.

³ A Phase I bond release means that the operator has satisfied the reclamation plan for "backfilling and regrading (which may include the replacement of topsoil) and drainage control of a bonded area." (Emphasis added). Utah Admin. Code 645-301-880.310 (1991). Thus, the Appellant had already satisfied the Division with its drainage controls and regrading the Division would not have allowed 60% of the reclamation bond released. For the Division to complain almost 4 years later about the condition of the drainage control is totally inconsistent with its prior approval.

MR. STIRBA: And also you checked, I believe, the complete box, meaning that this was a complete inspection by you, true?

MS. LITTIG: Yes.

MR. STIRBA: And as a result of your determination that the site looked good and your analysis of the -- some of the information you received on that inspection, you approved then a release of the phase one bond; isn't that correct?

MS. LITTIG: Yes.

See June 30, 1992 Transcript, testimony of Pam Grubaugh-Littig, pp. 164 - 169, attached hereto as Exhibit "O." The bond release is evidence that Appellant had completed reclamation with respect to that phase of the reclamation work. *See* June 30, 1992 Transcript, testimony of Pam Grubaugh-Littig, p. 166, attached hereto as Exhibit "O." Appellant should have been able to rely upon that release.

The Division has inspected the Mine Site at least fifty-nine different times since 1987. The Division's inspection reports always indicate that the Mine Site was in full compliance. Prior to November 19, 1991, the Division made no indication whatsoever that any violation existed with respect to the Mine Site or the reclamation plan. *See* June 30, 1992 Transcript, testimony of Lee Edmonson, p. 197, attached hereto as Exhibit "R;" testimony of Joseph Jarvis, pp. 271 - 272, attached hereto as Exhibit "Q." Even as late as 1991, the Mine Site was in full compliance with all Division requirements. In April and in May, 1991, William J. Malencik, a Reclamation Specialist for the Division, inspected the Mine Site. At both times the conditions

at the Mine Site did not constitute a violation of any kind. *See* June 30, 1992 Transcript, testimony of William J. Malencik, pp. 68 - 76, attached hereto as Exhibit "N."

No new conditions have come into existence at the Mine Site. From the years 1987 - 1991 there has been insignificant, insubstantial change in the erosion conditions and no change whatsoever in the placement of perimeter markers at the Mine Site. *See* June 30, 1992 Transcript, testimony of Karla Knoop, p. 231, attached hereto as Exhibit "P;" testimony of Joseph Jarvis, pp. 271 - 272, attached hereto as Exhibit "Q." In fact, up to and until at least November 1, 1991, the Division's reports record the Mine Site as in "good condition."⁴ *See* Inspection Report, dated November 1, 1992, attached hereto as Exhibit "T."

However, on or about November 19, 1991, the Division conducted another inspection of the Mine Site. On November 20, 1991, the Division issued the NOV pertaining to reclamation activities at the Mine Site. The NOV states that Appellant failed to maintain diversions and minimize erosion of the road outslopes and upslopes to the extent possible, failed to clearly mark with perimeter markers and failed to seed and revegetate all disturbed areas of the road and stream outslopes and road upslopes. The NOV was issued notwithstanding the fact that the conditions at the Mine Site have remained unchanged since 1986 when reclamation began, since the bond release, and since at least fifty-nine (59) prior inspections.

⁴ The Appellant should not have to reclaim forever. Weather and other natural conditions affect the Mine Site's habitat. Once the reclamation plan was complete, the Division should have stopped attempting to hold the Appellant legally responsible for the conditions which were released under the bond (i.e. erosion).

Appellant challenged this action within the administrative system and a final order was issued on July 30, 1992. As per statutory right, the Appellant appealed that order for the purpose of obtaining judicial review of that action. This is the matter presently pending before the Court. As argued above, the NOV and CO must be stayed so that meaningful judicial review can take place.

Many substantial issues of law and fact are now pending before this Court which should be reversed. These are somewhat complicated issues of law pursuant to the Utah Coal Mining and Reclamation Act. The following argument is not an attempt to argue the substantive issues of this appeal now, but to provide the Court with an appreciation of the legal issues which are presented and of the likelihood that Appellant will prevail on the merits of this action.⁵

The Board rejected Appellant's argument that a two year statute of limitations applied to the NOV. Utah Code Ann. § 40-8-9-(2) (1987) ("no . . . proceeding . . . rule or order . . . may be commenced [more than] two years from the date of the alleged violation.") This ruling was clearly erroneous. As stated above, the disputed conditions at the Mine Site have existed since at least 1987. Nothing has changed. Appellant should not be subjected to perpetual liability and exposure under the statutes which clearly contemplate a limitation of actions. Absolutely no evidence was introduced upon which the Board could base an opinion that an event within the last two years tolled the running of the statute of limitations. In fact, the Appellees' own witness testified that this statute of limitations was applied by the Division in other cases.

⁵ See Appellant's Brief, dated March 8, 1993.

MR. STIRBA: Are you aware that there is a statute that has a Statute of Limitations that provides for two years under the Utah Mined Land Reclamation Act?

MR. DANIELS: Yes.

MR. STIRBA: And, I believe, that's 40-8-9; is that correct?

MR. DANIELS: Right.

MR. STIRBA: You're familiar with that particular provision that I'm referring to?

MR. DANIELS: Yes.

MR. STIRBA: Now, isn't it true that there are times when that provision has been applied by a hearing officer in the administrative appeal context and that you've just testified to concerning coal matters?

MR. DANIELS: Yes, it has.

MR. STIRBA: In essence, that hearing officer would apply that statute as a position of law that was applicable in this State to matters within the jurisdiction of the Division, correct?

MR. DANIELS: Yes.

See June 30, 1992 Transcript, testimony of Ronald Daniels, pp. 108 - 110, attached hereto as Exhibit "U." There was absolutely no evidence to support the Board's ruling, much less substantial evidence. The application of this statute of limitations is established by the Division

itself. The Division coordinator of Minerals Research admitted that fact. Since the condition at the Mine Site has existed at least since 1987 the NOV was time barred.

Appellant proved that the Division was estopped from taking its enforcement action but the Board ruled otherwise. The Appellees failed to require reclamation of road outslopes and upslopes in either the approved Reclamation Plan or prior to approval of the Phase I bond release. By its NOV, the Appellees attempted to impose stricter standards than those required under the Appellant's 1986 reclamation plan. The Appellees had almost six years to review this plan and determine its adequacy. Instead, during those six years, the Appellees approved the reclamation operations and released the bond. During those six years the Appellees made fifty-nine (59) inspections and found the Mine Site to be in full compliance with all permit and performance standards. Appellant was entitled to rely on the approved reclamation plan and bond release to assure it regulatory certainty. The imposition of the NOV at that late date was barred by waiver and estoppel.

Furthermore, and importantly, the issues in this appeal are matters of first impression and as such the interests weigh heavily in maintaining the *status quo* until the appellate court has had an opportunity to exercise judicial review. *Territorial Court of Virgin Islands v. Richards*, 674 F.Supp. 180, 181 (D. Virgin Islands 1987) (granting a stay pending appeal due to the unique circumstances and lack of direction from the appellate court).

[B]ecause the question is one where the [appellate court's] review is plenary, and there is an inherent public interest in the application of the proper law . . . we believe that the interests weigh heavily in maintaining the *status quo* until the [appellate court] addresses this case of first impression. Other courts have thought likewise.

id. at 183 [citation omitted] (emphasis added). In this case, no Utah appellate court has substantively ruled on the issues presented. These issues are novel under the Utah Coal Mining and Reclamation Act.

The action taken by the Board and its factual finding upholding the Division's position are not supported by substantial evidence when viewed in light of the whole record and were unreasonable, unjust, arbitrary, capricious or an abuse of discretion. Appellant owned coal property, complied with all Division requests and has maintained its Mine Site in the same condition since 1987. Out of the blue sky, the Division violated them for erosion conditions and placement of perimeter markers. These conditions have existed this way for years.

In addition to all of this bizarre, somewhat irregular procedure, the Appellees then ordered the Appellant to either take the abatement action or face penalties in the middle of their proceeding for judicial review of that order. Given the utter absence of evidence to support the Board findings, the Board's clearly erroneous application of the laws and the showing made in this Memorandum that Appellant has a substantial probability of success on the merits, the Court should grant this Motion for a Stay Pending Appeal.⁶

⁶ The July 30, 1992 Order contains absolutely no analysis of the facts presented at the hearing. See Order, attached hereto as Exhibit "C". Any fair reading of that Order is clear evidence of a lack of attention to and analysis of the issues in this case. Judicial review in this Court is essential to a fair resolution of the issues raised by the Appellant HVCC during the course of this matter.

b. This Appeal Presents Serious Issues on the Merits Which Should be the Subject of Further Litigation.

Utah Code Ann. § 40-10-30 (1987) states that "[a]n appeal from an . . . order of the Board shall be a trial on the record and is not a trial de novo." In other words, this Court's review of the proceedings below will be of the recorded transcript and pleadings only.⁷ In this appeal, the Appellant challenges the Board's findings of both law and fact.

Findings of law are reviewed for clearly erroneous application. Utah Code Ann. § 40-10-30(1)(e) (1986). The issues presented in this case are matters of statutory interpretation. The Court should, in the course of this appeal, read the statutes and apply them to the facts evidenced in the record. The Court can make a determination in the context of an appeal and not an injunction pending appeal hearing, whether or not the application was erroneous. The Act clearly gives Appellant this option. The Court should not allow the Appellees to undermine this appeal by allowing the CO to force the abatement action and moot judicial review.

To a large extent, this review by the Court is a matter of first impression in this jurisdiction. There is little or no case law interpreting many of the statutory provisions under the Utah Coal Mining and Reclamation Act. Both sides should be given a full opportunity to brief the issues for the Court so the Court can determine whether or not the Board applied the law correctly.

⁷ *Cowling v. Bd. of Oil, Gas and Mining*, 830 P.2d 220 (Utah 1991) recently held that "[w]hen a lower court reviews an order of an administrative agency and we exercise appellate review of the lower court's judgment, we act as if we were reviewing the administrative agency decision directly." *Id.* at 223.

Findings of fact must be supported by substantial evidence. Utah Code Ann. § 40-10-30(1)(f) (1986). This is a standard greater than a preponderance of the evidence. A mere forty-nine -- fifty one discrepancy in the evidence is not enough. In this case substantial evidence is not met because there is no evidence to support the Board's factual findings either in the record, the Appellees' briefs or in the state reports. See Appellant's Brief, section "I." In fact, the Appellees never had a problem with respect to the disputed condition at the Mine Site until the NOV was issued, even though the conditions have not changed. The testimony of Appellees' officers, agents, employees and representatives do not substantiate the Board's findings. See June 30, 1992 Transcript, contained in the record at R.962-1331. The Court should have time to make a full and thorough evaluation of the record in this case to determine whether the test of substantial evidence has been met.

The issues in this appeal rise to the level of seriously questioning whether there was substantial evidence to support the factual findings and make a good faith argument that the Board's application of the law was clearly erroneous. Accordingly, this appeal deserves full attention and adjudication. The integrity and validity of the appeal can only be preserved by the entry of an injunction pending appeal in this case.

II. An Injunction in Pending Appeal in This Case Would Merely Preserve the *status quo* Until the Resolution of the Appeal Pending Before this Court.

By this Motion, the Appellant is simply requesting that the Court preserve the *status quo* of the parties until the propriety and legality of the Appellees' actions can be resolved.⁸ This

⁸ As noted *supra*, the Appellant's Brief has already been filed. The entire appeal has the potential to be resolved in the next several months.

not an extreme or drastic measure. The Board itself stayed the *status quo* for seven months. The Third District Court stayed the *status quo* during the pendency of its judicial review. An injunction pending appeal will simply protect the integrity and viability of the appeal pending before this Court. Rather than permitting the CO to dispose of the subject matter of this appeal, a preliminary injunction will allow *the Court* to make a final ruling on the merits and order a final disposition of the issues itself.

III. Utah Code Ann. § 40-10-20(8) (1986) Authorizes This Court To Suspend Abatement Requirements.

Notwithstanding Utah R. App. P. 8(a), this Court has independent authority to stay the Division's NOV and CO. Utah Code Ann. § 40-10-20(8) (1986) provides that:

Any operator who fails to correct a violation for which a notice or cessation order has been issued under Subsection 40-10-22(1) within the period permitted for its correction

(which period shall not end until the entry of a final order by the board, in the case of any review proceedings initiated by the operator in which the board orders, after an expedited hearing, the suspension of the abatement requirements of the citation after determining that the operator will suffer irreparable loss or damage from the application of those requirements, or until the entry of an order of the court, in the case of any review proceedings initiated by the operator wherein the court orders the suspension of the abatement requirements of the citation),

shall be assessed a civil penalty of not less than \$ 750 for each day during which the failure or violation continues.

On October 9, 1992, the Third District Court granted a stay of enforcement of the Division's CO under this statute. See Order, attached hereto as Exhibit "H."

The Utah Coal Mining and Reclamation Act clearly contemplates the entry of a court order suspending the abatement requirements of an NOV until such time as a reviewing court rules on the merits of the violation. A valid appeal has been filed and is pending before this Court. The statute allowing this appeal expressly authorizes the Court to enjoin agency orders. This power is in addition to the Court's power to issue an injunction pending appeal under Rule 8(a).

The Appellees themselves suspended the abatement period on at least two occasions from February 14, 1992 through September 10, 1992 to allow administrative review. Given the circumstances and the applicable standard of review, the Court should stay the abatement period pending judicial review.

CONCLUSION

The Appellant has made a sufficient showing that an injunction pending appeal should issue in this case. The Appellant will suffer irreparable harm if it is forced to take the Abatement action required by the Division. No public harm will result. Also, these issues are matters of first impression under the Utah Coal Mining Reclamation Act and should be the subject of further litigation. Therefore, the Appellant's Motion for a Stay should be granted.

REQUEST FOR HEARING

Due to the intensely factual and urgent nature of the issues in this case, the Appellant respectfully requests that the Court hear oral argument in this matter on its regular calendar schedule.

DATED this 8th day of March, 1993.

STIRBA & HATHAWAY

BY: 

PETER STIRBA

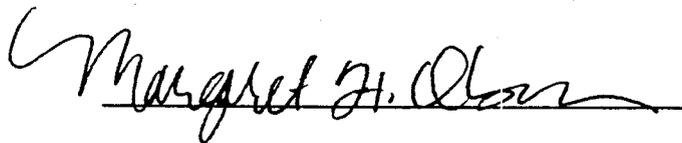
MARGARET H. OLSON

Attorneys for Plaintiff and Appellant
Hidden Valley Coal Company

CERTIFICATE OF DELIVERY

I hereby certify that on this 8th day of March, 1993, a true and correct copy of the foregoing APPELLANT'S MEMORANDUM IN SUPPORT OF ITS RULE 8(a) MOTION FOR A STAY PENDING APPEAL AND REQUEST FOR HEARING was hand delivered to the following:

William R. Richards
Thomas A. Mitchell
Assistants Attorney General
UTAH DIVISION OF OIL,
GAS & MINING
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, Utah 84180



klhvcc\rul8.mem

PETER STIRBA (Bar No. 3118)
STIRBA & HATHAWAY
Attorneys for Plaintiff
Hidden Valley Coal Company
215 South State Street, Suite 1150
Salt Lake City, UT 84111
Telephone: (801) 364-8300

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

HIDDEN VALLEY COAL COMPANY	:	
Plaintiff,	:	ORDER
v.	:	
the UTAH BOARD OF OIL, GAS & MINING and the UTAH DIVISION OF OIL, GAS & MINING,	:	Case No. 920904813CV
Defendants.	:	Judge Glenn K. Iwasaki

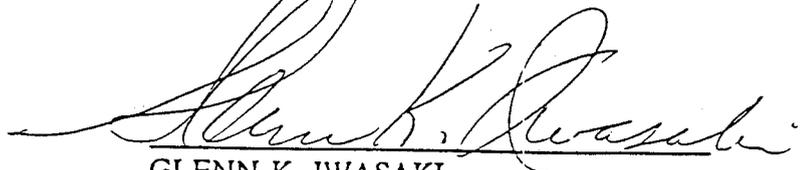
This matter came on for hearing September 29, 1992, before the Court pursuant to Plaintiff's Motion for a Preliminary Injunction. Plaintiff was represented by Peter Stirba, Esq. and the Defendants were represented by William R. Richards and Thomas A. Mitchell, Assistant Utah Attorney Generals. The Court having read the parties' memoranda and the affidavits submitted in support and in opposition to Plaintiff's Motion, and being fully advised in the premises, hereby ORDERS as follows:

1. That Plaintiff's Motion for a Preliminary Injunction is hereby denied.

2. That pursuant to Utah Code Ann. § 40-10-20(8) (1986) and Utah Admin. Code 645-401-422, the enforcement of Cessation Order No. C92-26-1-2 issued to CalMat Company is hereby stayed and the time for abatement under the Cessation Order is suspended until the entry of a final order in this matter or until a further order of the Court.

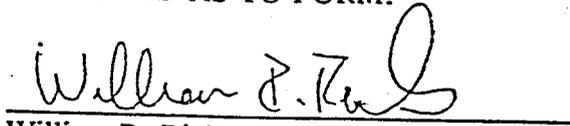
Dated this 9th day of October, 1992.

BY THE COURT:



GLENN K. IWASAKI
Third District Court Judge

APPROVED AS TO FORM:



William R. Richards
Thomas A. Mitchell
Assistant Attorney Generals

CERTIFICATE OF MAILING

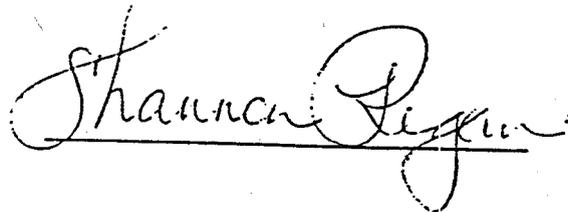
I hereby certify that on this 6 day of October, 1992, a true and correct copy of the foregoing ORDER was mailed, postage pre-paid, to the following:

William R. Richards
Thomas A. Mitchell
Assistant Attorney Generals
UTAH DIVISION OF OIL, GAS & MINING
3 Triad Center, Suite 350
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Utah Board of Oil, Gas & Mining
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, Utah 84180

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

Denise Dragoo
FABIAN & CLENDENIN
P.O. Box 510210
Salt Lake City, Utah 84151



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GARY E. JUBBER
ROSEMARY J. BELESS
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W. CULLEN BATTLE
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JOHN (JACK) D. RAY
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FACSIMILE (702) 252-5014

VIA FACSIMILE

November 19, 1993

NOV 22 1993

(801) 359-3940

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

RE: Request for Informal Conference and Extension of Time for
Abatement, Hidden Valley Coal Company, Notice of Violation
No. 93-35-08-01

Dear Director Carter:

By letter dated November 12, 1993, Hidden Valley Coal Company ("HVCC"), set forth a settlement proposal regarding Notice of Violation No. 93-35-08-01 ("NOV"). HVCC has requested the Division to allow it to undertake the abatement action required under the NOV without restarting the ten-year bond liability clock. Without such an agreement, HVCC cannot proceed to abate the violation while litigation is pending before the Utah Court of Appeals in *Hidden Valley Coal Company v. Utah Board and Division of Oil, Gas & Mining*, Case No. 930073-CA. By Order dated April 14, 1993, copy enclosed, the Utah Court of Appeals granted HVCC's Motion for Stay Pending Appeal. This order requires the Board and Division to refrain from issuing, enforcing, implementing or acting upon in any way any notice of violation or cessation order requiring HVCC to effect or implement its abatement plan for NOV No. N91-26-8-2. HVCC Motion dated March 8, 1993, copy enclosed. HVCC's Motion was supported by the affidavit of HVCC's counsel concerning the parties' inability to resolve the issue of the ten-year bond clock. It is HVCC's position that the April 14, 1993 Order stays the Division from enforcing actions which would prejudice the permittee in proceedings pending before the Court of Appeals. In this case, the abatement of NOV No. N93-35-08-01 may restart the ten-year bond clock,

LAW OFFICES OF
FABIAN & CLENDENIN
A PROFESSIONAL CORPORATION
James W. Carter
November 19, 1993
Page 2

which is at the heart of HVCC's appeal. Therefore, HVCC believes that the Division has authority pursuant to R645-400-327.200 to stay abatement under the pending NOV consistent with the Court's April 14, 1993 Order, until such time as the Court of Appeals rules in Case No. 930073-CA.

During the period in which abatement is stayed, HVCC also requests an informal hearing to review the fact of the violation and the proposed penalty for NOV No. N93-35-08-01. It is HVCC's understanding that the Division will consider HVCC's settlement proposal in the context of the informal hearing.

We appreciate your assistance in this matter.

Very truly yours,



Denise A. Dragoo

DAD:jmc:23886

Enclosures

cc: Lee Edmonson
Peter Stirba, Esq.



The CalMat Companies

cc: JPB
WRP
JCH
RZ
Jwe
orig minifile

Copy Susan

F A C S I M I L E C O V E R S H E E T

FROM: CALMAT CO. OF ARIZONA
1801 E. UNIVERSITY DRIVE
PHOENIX, ARIZONA 85034

Phone Number : (602) 254-8465
Fax Number : (602) 253-1026

TO WHOM : Mr. James W. Carter

DATE SENT : 11/12/93

LOCATION : Utah Div. of Oil Gas & Mining

FAX NO. : (801) 359-3940

SENDER : MARK F. REARDON/LEE EDMONSON/ANDY SIERSMA

LOCATION : Hidden Valley Coal Co.

PHONE NO. : (602) 254-8465

COVER PAGE + 3



The CalMat Companies

November 12, 1993
Via Facsimile (801) 359-3940

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

Re: Hidden Valley Coal Company, NOV No. 93-35-08-01

Dear Director Carter:

I have scheduled a conference call with you and Denise Dragoo to review settlement of the above-referenced NOV for 3:00 p.m. on Monday, November 15, 1993. In connection with that conference call, we would like to provide you with some background information and a proposal for settlement. NOV 93-35-08-01 was issued on October 22, 1993 and received by Hidden Valley Coal Company (HVCC) on November 1, 1993. The violation is issued for the alleged "failure to revegetate land which was disturbed by coal mining operations" in violation of R645-301-352. The NOV relates to the road surface (excluding outcrops) and "other areas." Reseeding to abate the NOV is required no later than December 1, 1993.

It is our intent to comply with the Utah Coal Program and the Division's regulations. We are willing to revegetate the portions of the reclaimed Hidden Valley Mine cited by the NOV. However, representations have been made by your staff that revegetation of these areas may restart the ten-year bond clock under R645-301-357.220. Pursuant to R645-301-357.100, this ten-year period commences:

After the last year of augmented seeding, fertilization, irrigation or other work, excluding husbandry practices that are approved by the division in accordance with R645-301-357.300. [Emphasis added]

The "husbandry practices" exception may be available if the abatement activities do not constitute "augmented seeding." We are aware of pending rule changes to R645-301-357.300 under study

by the Division and the Utah Coal Operators Subcommittee which would allow "husbandry practices" to be performed on reclaimed areas without restarting the bond liability period. The reseeded of the Hidden Valley Mine presents an excellent opportunity to apply these husbandry practices on an experimental basis. In this case, the Division may approve revegetation activities on the previously reclaimed site as an "experimental practice" to allow reseeded without restarting the ten-year bond clock. HVCC has reviewed this matter with the Utah Coal Operators and they would welcome this opportunity to apply the proposed "husbandry practices" now under study.

In considering the settlement proposal/experimental practice, it should be noted that in the Fall of 1992, a vegetation survey at the Hidden Valley Mine showed excellent revegetation results. The Mine as a whole is well on its way to meeting the Division's revegetation standards. If revegetation is considered over the entire area of the Mine as opposed to isolating the road and certain "other areas", revegetation standard should be met during the initial ten-year period. Because revegetation at the Mine has progressed to this point, the additional seeding activities in the small areas requested by the Division may be viewed as husbandry practices. In addition, if seeding is not undertaken for the purpose of revegetation, but for erosion control, the Division may have discretion not to restart the bond clock. If revegetation is viewed as an erosion control measure, we may have already met the standard for minimizing erosion to the extent possible. In reclaimed areas, revegetation may be necessary only to address erosion which interferes with a post-mining land use. See *Pittsburg Midway Coal Company v. OSM*, 107 IBLA 246 (Feb. 22, 1989).

It should be noted that our reseeded of the road surface goes beyond the revegetation requirements of R645-301-353. Under this regulation, a permittee is not required to establish a vegetative cover on surface areas of roads that are approved as part of the post-mining land use. The Division has approved the road in question as a post-mining land use under our 1986 reclamation plan.

In sum, we would agree to undertaking the abatement action required under the NOV if the Division will agree that its activities do not restart the 10-year bond clock. Without such a guarantee, we cannot proceed to abate the violation while litigation relating to this issue is pending before the Utah Court of Appeals in *Hidden Valley Coal Company v. Utah Board and Division of Oil, Gas & Mining*, Case No. 930073-CA. If the Division will not agree to this settlement proposal, HVCC respectfully requests the

James W. Carter
November 12, 1993
Page 3 of 3

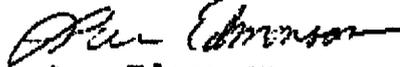
Division to stay the abatement time pending the final ruling. As you are aware, this matter was argued before the Utah Court of Appeals on Wednesday, August 18, 1993 and a decision should be issued shortly.

Finally, on November 10, 1993, I received a proposed assessment for the NOV. This proposed assessment was issued precipitously prior to the 15 days allowed under R645-401-600 for submission of information to the Division regarding facts surrounding the violation and the amount of penalty. If this matter is not settled, HVCC requests that the Division reconsider its untimely assessment. The Division should reconsider its assessment in light of the study performed in the Fall of 1992 which showed excellent revegetation success at this site. I believe a copy of this revegetation study is on file with the Division. However, we would be glad to provide the Division with an additional copy upon request.

Thank you for your consideration on this matter.

Sincerely,

Hidden Valley Coal Company



Lee Edmonson
Manager, Planning & Regulatory Affairs

LEE/msr
93-097

cc: Denise A. Dragoo, Esq.

From: Jim Carter (JCARTER)
To: PGRUBAUGH-LITTIG
Date: Tuesday, November 16, 1993 2:20 pm
Subject: Hidden Valley NOV -Reply

I'm copying you with a letter from Edmondson basically asking us to "not start the bond clock" I suggested that they should submit a request for additional time to abate the NOV and request an informal review of the fact of violation. Meanwhile, we should evaluate their request. Of particular interest is the circled paragraph on page 2 of 3 regarding whether we can require revegetation of a road. When we get their requests, we can gather to strategize.

CC: LBRAXTON, JHELFRICH



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 17, 1993

TO: Pamela Grubaugh-Littig, Permit Supervisor
FROM: Susan M. White, Senior Reclamation Biologist *SMW*
RE: N93-35-8-1, Hidden Valley Coal Company, Hidden Valley Mine, ACT/015/007, Folder #2, Emery County, Utah

SYNOPSIS

By letter dated November 12, 1993 from Lee Edmonson, Cal Mat, the permittee, proposed a settlement to Notice of Violation N93-35-8-1. The letter contained several misleading concepts that I will address in this memo. Perhaps, a settlement agreement could be proposed such that the ten-year bond clock issue would not be addressed until the time of bond release application.

ANALYSIS

One settlement proposal offered by the permittee was for the Division to allow revegetation activities classified as husbandry practices as an "experimental practice". This proposal could be acceptable, however experimental practices as defined by R645-302-210 require an application detailing the practice, the environmental benefits, monitoring, etc., etc., and the Division and the Office (OSM) must concur. I envision this as a long process and one which will not correct the immediate problem at hand, N93-35-8-1. However, the operator may pursue this avenue.

The permittee alleges that the "site as a whole is well on its way to meeting the Division's revegetation standards". In October of this year I took some cursory vegetation data and my data on the reference area cover value is far different than that claimed by the operator. This difference will be investigated further this coming summer.

The permittee's settlement proposal argues that surface areas of roads are exempt from any revegetation standards. While this statement is true, no roads as defined by UMC 700.5 Definitions, exist within the disturbed area. The declared postmining land use for the mine site is wildlife habitat and livestock grazing (page 7 of the PAP). The permit defines the road to be used "for livestock trailing" (page 24-c) and "to aid in achievement of the postmining land uses" (page 7-b). The



permit also states that the terraces of the roadway will enhance forage production (page 24) and "the roughened condition of the road and barriers across the road prevent vehicular access" (page 24-a). These statements and details as to how the road is to be revegetated demonstrate that the operator had no intention of leaving the road as defined in UMC 700.5 which is exempt from revegetation.

I believe that the one concession that the Division could make in a settlement agreement would be to not assess the 10-year bond clock issue until a bond release application has been received. This means that if and when OSM approves the Division's proposed Husbandry Practices, even though the seeding is done now (prior to approval) the Division will evaluate the practice under the current Husbandry Guidelines at the time of bond release application. But all the conditions of the approved Husbandry Practices must be met such as acreage reseeded and time periods in which work is allowed.

Finally, I strongly recommend that an extension not be granted if requested by the Permittee. Now is the ideal time to seed at the Hidden Valley Mine. Further delays into the season may bring frozen ground or snow making seeding difficult or impossible and eventually delaying the seeding another year.

RECOMMENDATION

The Division should offer to evaluate the 10-year bond clock issue at the time of bond release application. Since the Division cannot guarantee how the proposed Husbandry rule will be in its final form (i.e. approved by OSM) this is a risk to the Operator. The Division has compromised since technically any seeding done now should restart the bond clock..

cc: Joe Helfrich



State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

INSPECTION REPORT

ggf

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)

Partial: X Complete: Exploration:
Inspection Date & Time: 11/18/93 8am to 10am
Date of Last Inspection: 10/27/93

Mine Name: Wildcat Loadout County: Carbon PermitNumber: ACT/007/033
Permittee and/or Operator's Name: Andalex Resources, Inc.
Business Address: P.O. Box 902, Price, Utah 84501
Type of Mining Activity: Underground Surface Prep. Plant X Other
State Official(s): Susan White
Company Official(s): Mike Glasson
Federal Official(s): None

Weather Conditions: Cool and clear
Existing Acreage: Permitted- 100 Disturbed- 60 Regraded- Seeded- Bonded- 100
Increased/Decreased: Permitted- Disturbed- Regraded- Seeded- Bonded-
Status: Exploration/ Active/ X Inactive/ Temporary Cessation/ Bond Forfeiture
Reclamation (Phase I/ Phase II/ Final Bond Release/ Liability Year)

REVIEW OF PERMIT, PERFORMANCE STANDARDS & PERMIT CONDITION REQUIREMENTS

Instructions

1. Substantiate the elements on this inspection by checking the appropriate performance standard.
 - a. For complete inspections provide narrative justification for any elements not fully inspected unless element is not appropriate to the site, in which case check N/A.
 - b. For partial inspections check only the elements evaluated.
2. Document any noncompliance situation by referencing the NOV issued at the appropriate performance standard listed below.
3. Reference any narratives written in conjunction with this inspection at the appropriate performance standard listed below.
4. Provide a brief status report for all pending enforcement actions, permit conditions, Division Orders, and amendments.

	<u>EVALUATED</u>	<u>N/A</u>	<u>COMMENTS</u>	<u>NOV/ENF</u>
1. PERMITS, CHANGE, TRANSFER, RENEWAL, SALE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. SIGNS AND MARKERS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. TOPSOIL	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4. HYDROLOGIC BALANCE:				
a. DIVERSIONS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
b. SEDIMENT PONDS AND IMPOUNDMENTS	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. OTHER SEDIMENT CONTROL MEASURES	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. WATER MONITORING	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. EFFLUENT LIMITATIONS	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. EXPLOSIVES	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. DISPOSAL OF EXCESS SPOIL/FILLS/BENCHES	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. COAL MINE WASTE/REFUSE PILES/IMPOUNDMENTS	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. NONCOAL WASTE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. PROTECTION OF FISH, WILDLIFE AND RELATED ENVIRONMENTAL VALUES	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. SLIDES AND OTHER DAMAGE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. CONTEMPORANEOUS RECLAMATION	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. BACKFILLING AND GRADING	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13. REVEGETATION	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
14. SUBSIDENCE CONTROL	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15. CESSATION OF OPERATIONS	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
16. ROADS:				
a. CONSTRUCTION/MAINTENANCE/SURFACING	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. DRAINAGE CONTROLS	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
17. OTHER TRANSPORTATION FACILITIES	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18. SUPPORT FACILITIES/UTILITY INSTALLATIONS	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19. AVS CHECK (4th Quarter-April, May, June) _____ (date)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20. AIR QUALITY PERMIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21. BONDING & INSURANCE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>



INSPECTION REPORT

(Continuation sheet)

Page 2 of 2

PERMIT NUMBER: ACT/007/033

DATE OF INSPECTION: 11/18/93

(Comments are Numbered to Correspond with Topics Listed Above)

3. TOPSOIL

The topsoil piles had what appeared to be considerably more wind blown coal than seen a year ago by this inspector. The operator was asked about a vacuuming program to remove the coal from the topsoil piles and the undisturbed area down wind from the coal piles. The operator and the Division were to look into this possibility further.

Since the Loadout also spot loads coal from other locations the operator was informed that acid and toxic forming properties of those coals needs to be investigated since a fines problem is occurring on and off site.

4. HYDROLOGIC BALANCE:

A. DIVERSIONS- The ditch into Pond E requires maintenance, sediment build-up and piping around the half round was noted. A large piping hole was also noted on the test plot adjacent to the substation. The operator stated that the electrical cable was buried there and that proper compaction could not be achieved in order to stop the piping. The operator was to maintain the area.

13. REVEGETATION

The 1993 test plots were being prepared. Alfalfa hay had been incorporated into the plots. A suggestion was made to the operator to roughen the plots prior to seeding.

Copy of this Report:

Mailed to: Bernie Freeman (OSM), Mike Glasson (WCL)

Given to: Joe Helfrich (DOGM)

Inspector's Signature: *Susan M. White* #35 Date: 11/23/93

cc: Henry Sauer

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VIA FACSIMILE

November 19, 1993

NOV 22 1993

(801) 359-3940

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

RE: Request for Informal Conference and Extension of Time for
Abatement, Hidden Valley Coal Company, Notice of Violation
No. 93-35-08-01

Dear Director Carter:

By letter dated November 12, 1993, Hidden Valley Coal Company ("HVCC"), set forth a settlement proposal regarding Notice of Violation No. 93-35-08-01 ("NOV"). HVCC has requested the Division to allow it to undertake the abatement action required under the NOV without restarting the ten-year bond liability clock. Without such an agreement, HVCC cannot proceed to abate the violation while litigation is pending before the Utah Court of Appeals in *Hidden Valley Coal Company v. Utah Board and Division of Oil, Gas & Mining*, Case No. 930073-CA. By Order dated April 14, 1993, copy enclosed, the Utah Court of Appeals granted HVCC's Motion for Stay Pending Appeal. This order requires the Board and Division to refrain from issuing, enforcing, implementing or acting upon in any way any notice of violation or cessation order requiring HVCC to effect or implement its abatement plan for NOV No. N91-26-8-2. HVCC Motion dated March 8, 1993, copy enclosed. HVCC's Motion was supported by the affidavit of HVCC's counsel concerning the parties' inability to resolve the issue of the ten-year bond clock. It is HVCC's position that the April 14, 1993 Order stays the Division from enforcing actions which would prejudice the permittee in proceedings pending before the Court of Appeals. In this case, the abatement of NOV No. N93-35-08-01 may restart the ten-year bond clock,

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FABIAN & CLENDENIN
A PROFESSIONAL CORPORATION

James W. Carter

November 19, 1993

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which is at the heart of HVCC's appeal. Therefore, HVCC believes that the Division has authority pursuant to R645-400-327.200 to stay abatement under the pending NOV consistent with the Court's April 14, 1993 Order, until such time as the Court of Appeals rules in Case No. 930073-CA.

During the period in which abatement is stayed, HVCC also requests an informal hearing to review the fact of the violation and the proposed penalty for NOV No. N93-35-08-01. It is HVCC's understanding that the Division will consider HVCC's settlement proposal in the context of the informal hearing.

We appreciate your assistance in this matter.

Very truly yours,



Denise A. Dragoo

DAD:jmc:23886

Enclosures

cc: Lee Edmonson
Peter Stirba, Esq.

PETER STIRBA (Bar No. 3118)
MARGARET H. OLSON (Bar No. 6296)
STIRBA & HATHAWAY
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215 South State Street, Suite 1150
Salt Lake City, UT 84111
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IN THE UTAH COURT OF APPEALS

HIDDEN VALLEY COAL COMPANY,	:	APPELLANT'S
Plaintiff and Appellant,	:	MEMORANDUM IN SUPPORT
v.	:	OF ITS RULE 8(a) MOTION
The UTAH BOARD OF OIL, GAS &	:	FOR A STAY PENDING
MINING and the UTAH DIVISION	:	APPEAL AND REQUEST FOR
OF OIL, GAS & MINING,	:	HEARING
Appellees and Appellants.	:	Case No. 930073-CA

On Appeal From the Third Judicial District Court
County of Salt Lake, State of Utah

The Honorable Glenn Iwasaki
Third District Court Judge

Pursuant to Utah R. App. P. 23(a)(3), Plaintiff and Appellant Hidden Valley Coal Company ("HVCC"), by and through counsel undersigned, respectfully submits its Memorandum in Support of its Rule 8(a) Motion for a Stay Pending Appeal and Request for Hearing.

STATEMENT OF RELEVANT FACTS

1. The Division of Oil, Gas and Mining ("Division") issued Notice of Violation (Number 91-26-8-2) ("the NOV") to HVCC on November 22, 1991. *See* NOV, attached hereto as Exhibit "A." Part 1 of the NOV alleges failure to maintain the stability of diversions and failure to minimize erosion to the extent possible under Utah Admin. R. 614-301-742.312.1 and 614-301-742.113 (1991) as to the road outslope and upslope. Part 2 of the NOV was written for failure to clearly mark with perimeter markers all disturbed areas and failure to seed and revegetate all disturbed areas, under Utah Admin. R. 614-301-521.251 and 614-301-354 (1991) with respect to the road and stream disturbed out slopes and road upslopes.

2. The Appellant initiated both informal and administrative review procedures to challenge issuance of the NOV.

3. On February 14, 1992, counsel for the Division stipulated that "the stay of enforcement of the NOV will not adversely affect the health or safety of the public or cause significant imminent environmental harm to land, air or water resources. *See* Order, attached hereto as Exhibit "B."

4. After a hearing, the Board of Oil, Gas and Mining ("Board") upheld the NOV on July 30, 1992. *See* Order, attached hereto as Exhibit "C."

5. The Appellant timely appealed the Board's Order to the Third District Court pursuant to Utah Code Ann. § 40-10-30 (1986). That statute provides that:

An appeal from a rule or order of the board shall be a trial on the record and is not a trial de novo . . . The trial court shall determine the issues on both questions of law and fact and shall affirm or set aside the rule or order, enjoin

or stay the effective date of agency action, or remand the cause to the board for further proceedings . . .

6. Despite the Appellant's timely appeal, on September 3, 1992 the Division issued a Cessation Order ("CO") against HVCC's parent company requiring abatement action under the NOV. *See* Cessation Order, attached hereto as Exhibit "D."

7. On September 9, 1992, the Board stayed the CO for one day to allow the Appellant to seek appropriate judicial remedies or commence abatement action.

8. The Third District Court granted a Temporary Restraining Order on September 11, 1992, preventing the Appellees from enforcing, implementing or acting upon in any way the Cessation Order, No. C 92-26-1-2, issued by the Appellees on September 1, 1992 or the Notice of Violation issued by Appellees on November 22, 1991. The Court ordered that no civil or other penalty of any kind could accrue as a result of Hidden Valley Coal Company's non-compliance with the Cessation Order or Notice of Violation.

9. On September 25, 1992, the Division's Reclamation Specialist, William Malencik, submitted an Affidavit stating that:

(a) he wrote the NOV (p. 2, ¶ 9);

(b) the season for seeding in the Utah desert is early to late fall. Seeding done either before or after that date is ineffectual. (p. 4, ¶ 24);

(c) if the Mine Site was not seeded in fall, 1992, the site will not be able to be effectively seeded until, at the earliest, fall of 1993 (p. 5, ¶ 25(d)).

See Affidavit of William Malencik, attached hereto as Exhibit "E."

10. On September 28, 1992, the Appellant filed a Motion for a Preliminary Injunction with the district court. The Third District Court denied this Motion, but granted a stay pending appeal pursuant to Utah Code Ann. § 40-10-20(8) (1986). *See* Order, attached hereto as Exhibit "F;" *see also* Utah Code Ann. § 40-10-20(8) (1986), attached hereto as Exhibit "G."

11. On October 29, 1992, the Third District Court heard oral argument on the appeal issues which had been fully briefed by the parties. On November 5, 1992, that Court entered an Order upholding the Division with respect to the entire NOV except for the violation for failure to place perimeter markers, which the Court overturned. *See* Order, attached hereto as Exhibit "H."

12. That same day, on October 29, 1992, the Appellant filed a proposed Abatement Plan with the Division in an effort to protect itself from penalties and cessation orders. *See* Abatement Plan and Cover Letter dated October 29, 1992, attached hereto as Exhibit "I."

13. The parties thereafter engaged in serious settlement negotiations in an attempt to resolve the disputed issues between the parties. At all times, the Appellees knew of the Appellant's intention to perfect its appeal rights to the Utah Supreme Court. *See* Affidavit of Counsel, filed and served herewith.

14. The Appellant indeed pursued its appeal pursuant to the statutory authorization in Utah Code Ann. § 40-10-30(3) which reads: "Review of the adjudication of the district court is by the Supreme Court."

15. During this time of settlement negotiation, the Division granted several extensions granting HVCC additional time to comply with the Abatement Plan. *See* Letter dated January

29, 1993, attached hereto as Exhibit "J;" and Letter dated February 18, 1993, attached hereto as Exhibit "K."

16. The settlement negotiations ultimately failed due to the parties' inability to resolve the issue of whether or not the 10-year bond clock would re-start against the Appellants in the event the Appellants took the abatement action that the Division was requiring.

17. The time for the Appellant to abate the NOV was to run on February 28, 1993. Therefore, on February 5, 1993, the Appellant filed a Rule 62(d) Motion for a Stay Pending Appeal or in the Alternative for a Stay Pending a Rule 8 Adjudication by the Utah Court of Appeals. This Motion was based on Utah R. App. P. 8(a), Utah R. Civ. P. 62(d) and Utah Code Ann. § 40-10-20(8) (1986).

18. On March 4, 1993, the Third District Court heard oral argument on Appellant's Rule 62(d) Motion for a Stay Pending Appeal or in the Alternative for a Stay Pending a Rule 8 Adjudication by the Utah Court of Appeals. The Court denied the Appellant's Motion for a Stay Pending Appeal, but granted the Appellant's Motion for a Stay Pending a Rule 8 Adjudication by the Utah Court of Appeals. See Proposed Order, attached hereto as Exhibit "L."

19. On March 8, 1993, the Appellant's Brief was filed.

ARGUMENT

This Motion is made pursuant to Rule 8(a) of the Utah Rules of Appellate Procedure.

That Rule provides:

Application for a stay of the judgment or order of a trial court pending appeal . . . or for an order suspending, modifying, restoring, or granting an injunction

during the pendency of an appeal must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant

...

Since this Motion is asking for the Court to grant an order *preventing* the Division from issuing, enforcing, implementing or acting upon in any way its NOV's and CO, this motion is a request for an order granting an injunction during the pendency of an appeal. See *Jensen v. Schwendiman*, 744 P.2d 1026, 1027 (Utah Ct. App. 1987). Since the Appellant first sought relief in the district court, it has complied with the prerequisite requirements of Rule 8(a).

The decision to grant an injunction pending appeal is within the discretion of this court as the reviewing court. *Id.* In ruling on a request for an injunction pending appeal, the analysis is the same as if the party is requesting a preliminary injunction. *Id.*; *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982). These factors include: (1) whether there is a likelihood of success on the merits of the appeal; (2) whether the movant has made a showing of irreparable injury if a stay is not granted; (3) whether granting of stay would substantially harm other parties; (4) and whether granting of stay would preserve the public interest. *United States v. Baylor University Medical Center*, 711 F.2d 38, 39 (5th Cir. 1983) *cert. denied* 469 U.S. 1189 (1984).

A preliminary injunction should issue in this case because Appellant HVCC has made the necessary showing and failure to issue an injunction will effectively deprive Appellant of any judicial review of the Board's action, as abatement of the NOV will render the case moot. In

this case, an injunction pending appeal is an appropriate order given the all the facts and circumstances.

I. An Injunction Pending Appeal Should Issue Under Utah Rules of Appellate Procedure 8(a).

A. The Appellant Hidden Valley Coal Company Will Suffer Substantial and Irreparable Harm if Division Action is Not Stayed.

The Appellant will be assessed \$750.00 per day for 30 days as a civil penalty for each day that the CO is not stayed. *See* Utah Admin. Code 645-401-420, 430. The State may also seek criminal fines and imprisonment against Appellant pursuant to Utah Code Ann. § 40-10-20(5) and (6) (1986) if the NOV is not abated within 30 days. In addition, the State may request the attorney general to institute a civil action against Appellant pursuant to Utah Code Ann. § 40-10-22(2) (1981). These imminent, tangible, harsh penalties will constitute irreparable harm within the meaning of the Rule. *See* Affidavit of Lee Edmonson dated September 11, 1992, attached hereto as Exhibit "M;" *see also, Great Salt Lake Minerals and Chemicals v. Marsh*, 596 F.Supp. 548, 557 (D.Utah 1984) (risk of being put out of business and threats to economic viability is irreparable harm); *TLX Acquisition Corp. v. Telex Corp.*, 679 F.Supp. 1022, 1032 (W.D.Okl. 1987) (irreparable harm is found in the invocation, application or enforcement of the Oklahoma Control Shares Act when plaintiffs would sustain a monetary loss as a result); and *Mesa Petroleum Co. v. Cities Service Co.*, 715 F.2d 1425, 1432 (10th Cir. 1983) (irreparable injury where corporation faced potential prosecution for failure to comply with state take-over statutes).

Furthermore, Appellant should not have to take the abatement action which is the subject of its pending appeal before the appeal is resolved. Otherwise the entire appeal is rendered moot because the abatement action would be required *now* instead of *after* Appellant has exercised its right to judicial review under Utah Code Ann. § 40-10-30 (1986). Essentially, Appellant faces incurring sanctions as a price for exercising its appeal rights. If an injunction is not issued, Appellant will be penalized for failing to take abatement action while it pursues this appeal of that order.¹

The Appellees have argued that this appeal is already moot because the Appellant submitted an Abatement Plan. The action that the Division is requiring under its NOV is obviously to *take the abatement action* and not to merely submit a plan to abate. This fact is supported by a letter from the Division's Acting Director, which states that "[y]ou will be required to begin and complete that work within the time set forth within the approved plan." See Letter dated January 29, 1993, attached hereto as Exhibit "J."

Appellees should not be permitted to undermine the integrity of Appellant's appeal by enforcing their CO and NOV. If Appellees are allowed to take this action, the Appellant will suffer irreparable harm because it will be forever divested of its statutory right to judicial review.

¹It should be noted that Appellant's Brief was filed on March 8, 1993 and the Appellees' Brief is due April 7, 1993. Utah R. App. P. 26. This matter will shortly thereafter be calendared for oral argument. The Division is attempting to undercut this appeal by demanding that abatement action be taken immediately.

In past hearings, The Appellees have argued that Appellant will not be irreparably harmed because if it prevails on this appeal, it can either: (1) recover the \$ 750.00 per day penalty from the State; or (2) not pay the assessing penalties until the resolution of the appeal. This argument is unpersuasive and hollow for several reasons. First of all, the practical impact of the CO substantively moots this appeal. No litigant with financial interests would or could take such a risk. The Appellant will effectively be forced into going ahead and taking the abatement action.

Secondly, such a situation would have a chilling effect on the proceedings. Rather than seek its statutorily guaranteed right to judicial review as an equal adversary party, this situation would put Appellant "behind the eight ball." Thus, if an injunction is not granted, Appellant will incur an additional financial exposure of \$750.00 per day for each day it awaits the Court of Appeals' decision in this matter. This consequence will attach only because Appellant has chosen to appeal. While it is true perhaps that if Appellant prevails, then it won't have to pay the penalties, but that argument is merely stating the obvious fact that any party who wins an appeal usually has a reversal of a previous unfavorable decision. The chilling effect, however, lies in the fact that Appellant, as a condition of judicial review, must expose itself to the prospects of additional penalties which would not be imposed but for the fact that it has chosen

to appeal.² It would undermine and deteriorate Appellant's ability to effectively litigate the issues presently pending before this Court.

Third, Appellees' argument fails to take into account the fact that the irreparable harm in this case is not simply financial. The officers of Appellant face criminal fines and imprisonment personal to them, which reach beyond the corporate veil. Utah Code Ann. § 40-10-20(5) and (6) (1986). In light of the fact that the officers and agents of Appellant are simply pursuing the best interests of the corporate entity pursuant to Utah Code Ann. § 40-10-30 (1986), the Appellees' argument that Appellant should simply endure the risk is unpersuasive.

In summary, if Division action is not stayed the Appellant will suffer substantial and irreparable harm from: (1) civil penalties of \$ 750.00 per day until this Court's decision; (2) civil action by the State; (3) additional criminal fines; (4) imprisonment; (5) personal liability of corporate officers, agents and directors; and (6) a deprivation of statutorily guaranteed appeal rights.

² Put in this context, the Division's CO and its contesting of this injunction evidences the obvious fact that the Division wants Appellant to be "behind the eight ball" and to impede the ability of the Appellant to present the issues for judicial review. The Division obviously wants to moot the appeal because it has already argued mootness as a result of the Appellant's submission of an Abatement Plan.

B. The Substantial Economic Injury, Threatened Criminal Fines and Imprisonment of Appellant Hidden Valley Coal Company Outweighs Any Negligible Injury to the State.

The serious threatened injury to Appellant far outweighs any insignificant intangible damage to the Appellees. The Appellees will not be damaged at all. The NOV has already been stayed since January 21, 1992. The Appellees' counsel *stipulated* that no public health or safety issues are implicated and no environmental harm to land, air or water will occur. *See* Order, attached hereto as Exhibit "B." The condition that the Appellees want abated has existed for years. *See* Affidavit of Lee Edmonson, dated September 11, 1992, attached hereto as Exhibit "M."

In contrast, Appellant faces a civil penalty of \$750.00 per day until the appeal is decided, criminal fines not exceeding \$10,000.00 per violation and one year in prison as a result of the CO. Utah Code Ann. § 40-10-20(5), (6) and (8) (1986); Utah Admin. Code. 645-401-430 (1991). As discussed above, the Appellant will also be divested of its statutory right to judicial review. In light of the immediate, substantial and irreparable damage which Appellant will incur, the harm to the Appellees is negligible.

The only way that harm to Appellant can be prevented is if the Court issues an injunction pending appeal preventing the Appellees from enforcing, implementing or acting upon in any way the NOV and CO until the resolution of this appeal.

C. The Public Interest is Unaffected by an Injunction Pending Appeal in This Case.

The public interest in this case is not particularly compelling or urgent, especially when contrasted with the consequences to Appellant in this case. No emergency, clear danger or critical policies are implicated whatsoever. "[C]ounsel for [Appellees] stipulated . . . that the stay of enforcement of the NOV will not adversely affect the health or safety of the public or cause significant imminent environmental harm to land, air or water resources." See Order, attached hereto as Exhibit "B;" see also Affidavit of Lee Edmonson, dated September 11, 1992, attached hereto as Exhibit "M." This is also demonstrated in testimony from Division witnesses at the June 30, 1992 hearing:

MR. STIRBA: And in April of 1991 when you saw this site these three matters, these three gullies, did not concern you [enough to ticket them] is that correct?

MR. MALENCIK: No.

MR. MALENCIK: I didn't write a violation. I didn't think a violation existed.

MR. STIRBA: You indicate . . . compliance with permits and performance standards. You see where it says signs and markers?

MR. MALENCIK: Yes.

MR. STIRBA: You indicated yes, correct?

MR. MALENCIK: Yes.

MR. STIRBA: Meaning compliance with the permit and the plan, true?

MR. MALENCIK: That's correct.

MR. STIRBA: And any applicable rules and regulations, correct?

MR. MALENCIK: That's correct.

MR. STIRBA: And also with respect to vegetation you noted on paragraph 13 there on the front page a yes with respect to compliance with the permit and performance standards; isn't that true?

MR. MALENCIK: Yes.

See June 30, 1992 Transcript, testimony of William Malencik, pp. 67 - 71, 75 attached hereto as Exhibit "N."

MR. STIRBA: And then after that, do you see where it says -- does it state this: "overall, the reclaimed site looked good on this inspection. This inspection also served as the phase one bond release inspection." Does it say that?

MS. LITTIG: Yes, it does.

MR. STIRBA: And that was the opinion of the site that you held at that time based upon your inspection; isn't that true?

MS. LITTIG: Yes.

MR. STIRBA: And as a result of your determination that the site looked good and your analysis of the -- some of the information you received on that inspection, you approved then a release of the phase one bond; isn't that correct?

MS. LITTIG: Yes.

MR. STIRBA: And the reason or the basis for your determination when you went to the inspection or went on that inspection, rather, was you were attempting to see whether the reclamation work which had been proposed had been completed in a satisfactory fashion, correct?

MS. LITTIG: Yes.

MR. STIRBA: And you made such a determination that, in fact, it had, correct?

MS. LITTIG: Yes.

See June 30, 1992 Transcript, testimony of Pam Grubaugh-Littig, p. 169 - 170, attached hereto as Exhibit "O."

The Mine Site has existed in its present state at least 1987. *See* June 30, 1992 Transcript, testimony of Karla Knoop, p. 231, attached hereto as Exhibit "P;" testimony of Joseph Jarvis, pp. 271 - 272, attached hereto as Exhibit "Q." A preliminary injunction will not cause or worsen any condition that has not been present for years. Furthermore, the Appellees' witnesses testified that there are no harmful or dangerous conditions existing at the Mine Site.

D. Appellant Makes a Clear Showing That It Will Prevail On The Merits and That The Appeal Should Be the Subject of Further Litigation.

Utah R. Civ. P. 65A(e)(4) states that, in order for an injunction to be proper, there must be a showing that there is "a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or [that] the case presents serious issues on the merits which should be the subject of further litigation." (Emphasis added). Although Appellant need only satisfy one requirement for purposes of this Motion, both requirements are satisfied here. Therefore, a preliminary injunction is proper.

a. **There is a Substantial Likelihood that Appellant will Prevail on the Merits of This Appeal.**

No mining activities have been conducted at the Mine Site since at least September of 1980. *See* June 30, 1992 Transcript, testimony of Lee Edmonson, p. 191, attached hereto as Exhibit "R." Appellant has conformed to all Division requests to reclaim the property in the manner that was specified and has responded to all suggestions for maintenance. *See* June 30, 1992 Transcript, testimony of Lee Edmonson, p. 196, attached hereto as Exhibit "R."

Due to its compliance with the reclamation plan and applicable law, Appellant received a Phase I bond release³ from the Division on May 24, 1988. *See* June 30, 1992 Transcript, testimony of Lee Edmonson, p. 213, attached hereto as Exhibit "R;" testimony of Dianne Nielson, pp. 149 - 150, attached hereto as Exhibit "S;" testimony of Pam Grubaugh-Littig, pp. 164 - 170, attached hereto as Exhibit "O."

MR. STIRBA: In other words, if there was not compliance with the plan and the applicable rules and regulations on that portion of the reclamation work, you would not have approved release of the bond, true?

MS. LITTIG: This is true.

³ A Phase I bond release means that the operator has satisfied the reclamation plan for "backfilling and regrading (which may include the replacement of topsoil) and drainage control of a bonded area." (Emphasis added). Utah Admin. Code 645-301-880.310 (1991). Thus, the Appellant had already satisfied the Division with its drainage controls and regrading the Division would not have allowed 60% of the reclamation bond released. For the Division to complain almost 4 years later about the condition of the drainage control is totally inconsistent with its prior approval.

MR. STIRBA: And also you checked, I believe, the complete box, meaning that this was a complete inspection by you, true?

MS. LITTIG: Yes.

MR. STIRBA: And as a result of your determination that the site looked good and your analysis of the -- some of the information you received on that inspection, you approved then a release of the phase one bond; isn't that correct?

MS. LITTIG: Yes.

See June 30, 1992 Transcript, testimony of Pam Grubaugh-Littig, pp. 164 - 169, attached hereto as Exhibit "O." The bond release is evidence that Appellant had completed reclamation with respect to that phase of the reclamation work. *See* June 30, 1992 Transcript, testimony of Pam Grubaugh-Littig, p. 166, attached hereto as Exhibit "O." Appellant should have been able to rely upon that release.

The Division has inspected the Mine Site at least fifty-nine different times since 1987. The Division's inspection reports always indicate that the Mine Site was in full compliance. Prior to November 19, 1991, the Division made no indication whatsoever that any violation existed with respect to the Mine Site or the reclamation plan. *See* June 30, 1992 Transcript, testimony of Lee Edmonson, p. 197, attached hereto as Exhibit "R;" testimony of Joseph Jarvis, pp. 271 - 272, attached hereto as Exhibit "Q." Even as late as 1991, the Mine Site was in full compliance with all Division requirements. In April and in May, 1991, William J. Malencik, a Reclamation Specialist for the Division, inspected the Mine Site. At both times the conditions

at the Mine Site did not constitute a violation of any kind. See June 30, 1992 Transcript, testimony of William J. Malencik, pp. 68 - 76, attached hereto as Exhibit "N."

No new conditions have come into existence at the Mine Site. From the years 1987 - 1991 there has been insignificant, insubstantial change in the erosion conditions and no change whatsoever in the placement of perimeter markers at the Mine Site. See June 30, 1992 Transcript, testimony of Karla Knoop, p. 231, attached hereto as Exhibit "P;" testimony of Joseph Jarvis, pp. 271 - 272, attached hereto as Exhibit "Q." In fact, up to and until at least November 1, 1991, the Division's reports record the Mine Site as in "good condition."⁴ See Inspection Report, dated November 1, 1992, attached hereto as Exhibit "T."

However, on or about November 19, 1991, the Division conducted another inspection of the Mine Site. On November 20, 1991, the Division issued the NOV pertaining to reclamation activities at the Mine Site. The NOV states that Appellant failed to maintain diversions and minimize erosion of the road out slopes and upslopes to the extent possible, failed to clearly mark with perimeter markers and failed to seed and revegetate all disturbed areas of the road and stream out slopes and road upslopes. The NOV was issued notwithstanding the fact that the conditions at the Mine Site have remained unchanged since 1986 when reclamation began, since the bond release, and since at least fifty-nine (59) prior inspections.

⁴ The Appellant should not have to reclaim forever. Weather and other natural conditions affect the Mine Site's habitat. Once the reclamation plan was complete, the Division should have stopped attempting to hold the Appellant legally responsible for the conditions which were released under the bond (i.e. erosion).

Appellant challenged this action within the administrative system and a final order was issued on July 30, 1992. As per statutory right, the Appellant appealed that order for the purpose of obtaining judicial review of that action. This is the matter presently pending before the Court. As argued above, the NOV and CO must be stayed so that meaningful judicial review can take place.

Many substantial issues of law and fact are now pending before this Court which should be reversed. These are somewhat complicated issues of law pursuant to the Utah Coal Mining and Reclamation Act. The following argument is not an attempt to argue the substantive issues of this appeal now, but to provide the Court with an appreciation of the legal issues which are presented and of the likelihood that Appellant will prevail on the merits of this action.⁵

The Board rejected Appellant's argument that a two year statute of limitations applied to the NOV. Utah Code Ann. § 40-8-9-(2) (1987) ("no . . . proceeding . . . rule or order . . . may be commenced [more than] two years from the date of the alleged violation.") This ruling was clearly erroneous. As stated above, the disputed conditions at the Mine Site have existed since at least 1987. Nothing has changed. Appellant should not be subjected to perpetual liability and exposure under the statutes which clearly contemplate a limitation of actions. Absolutely no evidence was introduced upon which the Board could base an opinion that an event within the last two years tolled the running of the statute of limitations. In fact, the Appellees' own witness testified that this statute of limitations was applied by the Division in other cases.

⁵ See Appellant's Brief, dated March 8, 1993.

MR. STIRBA: Are you aware that there is a statute that has a Statute of Limitations that provides for two years under the Utah Mined Land Reclamation Act?

MR. DANIELS: Yes.

MR. STIRBA: And, I believe, that's 40-8-9; is that correct?

MR. DANIELS: Right.

MR. STIRBA: You're familiar with that particular provision that I'm referring to?

MR. DANIELS: Yes.

MR. STIRBA: Now, isn't it true that there are times when that provision has been applied by a hearing officer in the administrative appeal context and that you've just testified to concerning coal matters?

MR. DANIELS: Yes, it has.

MR. STIRBA: In essence, that hearing officer would apply that statute as a position of law that was applicable in this State to matters within the jurisdiction of the Division, correct?

MR. DANIELS: Yes.

See June 30, 1992 Transcript, testimony of Ronald Daniels, pp. 108 - 110, attached hereto as Exhibit "U." There was absolutely no evidence to support the Board's ruling, much less substantial evidence. The application of this statute of limitations is established by the Division

itself. The Division coordinator of Minerals Research admitted that fact. Since the condition at the Mine Site has existed at least since 1987 the NOV was time barred.

Appellant proved that the Division was estopped from taking its enforcement action but the Board ruled otherwise. The Appellees failed to require reclamation of road out slopes and upslopes in either the approved Reclamation Plan or prior to approval of the Phase I bond release. By its NOV, the Appellees attempted to impose stricter standards than those required under the Appellant's 1986 reclamation plan. The Appellees had almost six years to review this plan and determine its adequacy. Instead, during those six years, the Appellees approved the reclamation operations and released the bond. During those six years the Appellees made fifty-nine (59) inspections and found the Mine Site to be in full compliance with all permit and performance standards. Appellant was entitled to rely on the approved reclamation plan and bond release to assure it regulatory certainty. The imposition of the NOV at that late date was barred by waiver and estoppel.

Furthermore, and importantly, the issues in this appeal are matters of first impression and as such the interests weigh heavily in maintaining the *status quo* until the appellate court has had an opportunity to exercise judicial review. *Territorial Court of Virgin Islands v. Richards*, 674 F.Supp. 180, 181 (D. Virgin Islands 1987) (granting a stay pending appeal due to the unique circumstances and lack of direction from the appellate court).

[B]ecause the question is one where the [appellate court's] review is plenary, and there is an inherent public interest in the application of the proper law . . . we believe that the interests weigh heavily in maintaining the *status quo* until the [appellate court] addresses this case of first impression. Other courts have thought likewise.

Id. at 183 [citation omitted] (emphasis added). In this case, no Utah appellate court has substantively ruled on the issues presented. These issues are novel under the Utah Coal Mining and Reclamation Act.

The action taken by the Board and its factual finding upholding the Division's position are not supported by substantial evidence when viewed in light of the whole record and were unreasonable, unjust, arbitrary, capricious or an abuse of discretion. Appellant owned coal property, complied with all Division requests and has maintained its Mine Site in the same condition since 1987. Out of the blue sky, the Division violated them for erosion conditions and placement of perimeter markers. These conditions have existed this way for years.

In addition to all of this bizarre, somewhat irregular procedure, the Appellees then ordered the Appellant to either take the abatement action or face penalties in the middle of their proceeding for judicial review of that order. Given the utter absence of evidence to support the Board findings, the Board's clearly erroneous application of the laws and the showing made in this Memorandum that Appellant has a substantial probability of success on the merits, the Court should grant this Motion for a Stay Pending Appeal.⁶

⁶ The July 30, 1992 Order contains absolutely no analysis of the facts presented at the hearing. *See* Order, attached hereto as Exhibit "C". Any fair reading of that Order is clear evidence of a lack of attention to and analysis of the issues in this case. Judicial review in this Court is essential to a fair resolution of the issues raised by the Appellant HVCC during the course of this matter.

b. This Appeal Presents Serious Issues on the Merits Which Should be the Subject of Further Litigation.

Utah Code Ann. § 40-10-30 (1987) states that "[a]n appeal from an . . . order of the Board shall be a trial on the record and is not a trial de novo." In other words, this Court's review of the proceedings below will be of the recorded transcript and pleadings only.⁷ In this appeal, the Appellant challenges the Board's findings of both law and fact.

Findings of law are reviewed for clearly erroneous application. Utah Code Ann. § 40-10-30(1)(e) (1986). The issues presented in this case are matters of statutory interpretation. The Court should, in the course of this appeal, read the statutes and apply them to the facts evidenced in the record. The Court can make a determination in the context of an appeal and not an injunction pending appeal hearing, whether or not the application was erroneous. The Act clearly gives Appellant this option. The Court should not allow the Appellees to undermine this appeal by allowing the CO to force the abatement action and moot judicial review.

To a large extent, this review by the Court is a matter of first impression in this jurisdiction. There is little or no case law interpreting many of the statutory provisions under the Utah Coal Mining and Reclamation Act. Both sides should be given a full opportunity to brief the issues for the Court so the Court can determine whether or not the Board applied the law correctly.

⁷ *Cowling v. Bd. of Oil, Gas and Mining*, 830 P.2d 220 (Utah 1991) recently held that "[w]hen a lower court reviews an order of an administrative agency and we exercise appellate review of the lower court's judgment, we act as if we were reviewing the administrative agency decision directly." *Id.* at 223.

Findings of fact must be supported by substantial evidence. Utah Code Ann. § 40-10-30(1)(f) (1986). This is a standard greater than a preponderance of the evidence. A mere forty-nine -- fifty one discrepancy in the evidence is not enough. In this case substantial evidence is not met because there is no evidence to support the Board's factual findings either in the record, the Appellees' briefs or in the state reports. See Appellant's Brief, section "I." In fact, the Appellees never had a problem with respect to the disputed condition at the Mine Site until the NOV was issued, even though the conditions have not changed. The testimony of Appellees' officers, agents, employees and representatives do not substantiate the Board's findings. See June 30, 1992 Transcript, contained in the record at R.962-1331. The Court should have time to make a full and thorough evaluation of the record in this case to determine whether the test of substantial evidence has been met.

The issues in this appeal rise to the level of seriously questioning whether there was substantial evidence to support the factual findings and make a good faith argument that the Board's application of the law was clearly erroneous. Accordingly, this appeal deserves full attention and adjudication. The integrity and validity of the appeal can only be preserved by the entry of an injunction pending appeal in this case.

II. An Injunction in Pending Appeal in This Case Would Merely Preserve the *status quo* Until the Resolution of the Appeal Pending Before this Court.

By this Motion, the Appellant is simply requesting that the Court preserve the *status quo* of the parties until the propriety and legality of the Appellees' actions can be resolved.⁸ This

⁸ As noted *supra*, the Appellant's Brief has already been filed. The entire appeal has the potential to be resolved in the next several months.

not an extreme or drastic measure. The Board itself stayed the *status quo* for seven months. The Third District Court stayed the *status quo* during the pendency of its judicial review. An injunction pending appeal will simply protect the integrity and viability of the appeal pending before this Court. Rather than permitting the CO to dispose of the subject matter of this appeal, a preliminary injunction will allow *the Court* to make a final ruling on the merits and order a final disposition of the issues itself.

III. Utah Code Ann. § 40-10-20(8) (1986) Authorizes This Court To Suspend Abatement Requirements.

Notwithstanding Utah R. App. P. 8(a), this Court has independent authority to stay the Division's NOV and CO. Utah Code Ann. § 40-10-20(8) (1986) provides that:

Any operator who fails to correct a violation for which a notice or cessation order has been issued under Subsection 40-10-22(1) within the period permitted for its correction

(which period shall not end until the entry of a final order by the board, in the case of any review proceedings initiated by the operator in which the board orders, after an expedited hearing, the suspension of the abatement requirements of the citation after determining that the operator will suffer irreparable loss or damage from the application of those requirements, or until the entry of an order of the court, in the case of any review proceedings initiated by the operator wherein the court orders the suspension of the abatement requirements of the citation),

shall be assessed a civil penalty of not less than \$ 750 for each day during which the failure or violation continues.

On October 9, 1992, the Third District Court granted a stay of enforcement of the Division's CO under this statute. *See Order, attached hereto as Exhibit "H."*

The Utah Coal Mining and Reclamation Act clearly contemplates the entry of a court order suspending the abatement requirements of an NOV until such time as a reviewing court rules on the merits of the violation. A valid appeal has been filed and is pending before this Court. The statute allowing this appeal expressly authorizes the Court to enjoin agency orders. This power is in addition to the Court's power to issue an injunction pending appeal under Rule 8(a).

The Appellees themselves suspended the abatement period on at least two occasions from February 14, 1992 through September 10, 1992 to allow administrative review. Given the circumstances and the applicable standard of review, the Court should stay the abatement period pending judicial review.

CONCLUSION

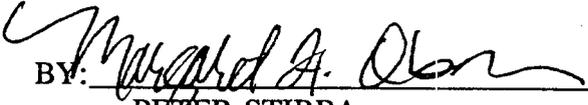
The Appellant has made a sufficient showing that an injunction pending appeal should issue in this case. The Appellant will suffer irreparable harm if it is forced to take the Abatement action required by the Division. No public harm will result. Also, these issues are matters of first impression under the Utah Coal Mining Reclamation Act and should be the subject of further litigation. Therefore, the Appellant's Motion for a Stay should be granted.

REQUEST FOR HEARING

Due to the intensely factual and urgent nature of the issues in this case, the Appellant respectfully requests that the Court hear oral argument in this matter on its regular calendar schedule.

DATED this 8th day of March, 1993.

STIRBA & HATHAWAY

BY: 

PETER STIRBA

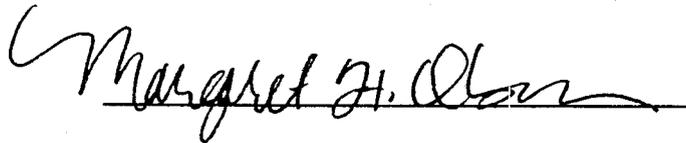
MARGARET H. OLSON

Attorneys for Plaintiff and Appellant
Hidden Valley Coal Company

CERTIFICATE OF DELIVERY

I hereby certify that on this 8th day of March, 1993, a true and correct copy of the foregoing APPELLANT'S MEMORANDUM IN SUPPORT OF ITS RULE 8(a) MOTION FOR A STAY PENDING APPEAL AND REQUEST FOR HEARING was hand delivered to the following:

William R. Richards
Thomas A. Mitchell
Assistants Attorney General
UTAH DIVISION OF OIL,
GAS & MINING
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, Utah 84180



k\hvcc\ru18.mcm

PETER STIRBA (Bar No. 3118)
STIRBA & HATHAWAY
Attorneys for Plaintiff
Hidden Valley Coal Company
215 South State Street, Suite 1150
Salt Lake City, UT 84111
Telephone: (801) 364-8300

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

HIDDEN VALLEY COAL COMPANY	:	
Plaintiff,	:	ORDER
v.	:	
the UTAH BOARD OF OIL, GAS & MINING and the UTAH DIVISION OF OIL, GAS & MINING,	:	Case No. 920904813CV
Defendants.	:	Judge Glenn K. Iwasaki

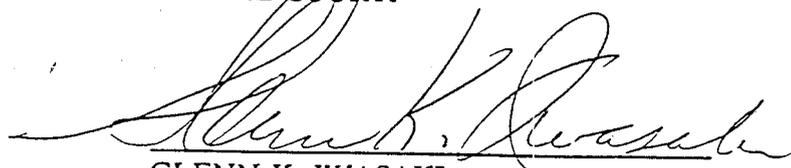
This matter came on for hearing September 29, 1992, before the Court pursuant to Plaintiff's Motion for a Preliminary Injunction. Plaintiff was represented by Peter Stirba, Esq. and the Defendants were represented by William R. Richards and Thomas A. Mitchell, Assistant Utah Attorney Generals. The Court having read the parties' memoranda and the affidavits submitted in support and in opposition to Plaintiff's Motion, and being fully advised in the premises, hereby ORDERS as follows:

1. That Plaintiff's Motion for a Preliminary Injunction is hereby denied.

2. That pursuant to Utah Code Ann. § 40-10-20(8) (1986) and Utah Admin. Code 645-401-422, the enforcement of Cessation Order No. C92-26-1-2 issued to CalMat Company is hereby stayed and the time for abatement under the Cessation Order is suspended until the entry of a final order in this matter or until a further order of the Court.

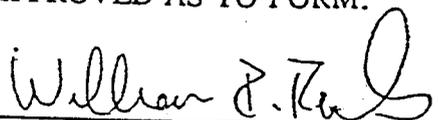
Dated this 9th day of October, 1992.

BY THE COURT:



GLENN K. IWASAKI
Third District Court Judge

APPROVED AS TO FORM:



William R. Richards
Thomas A. Mitchell
Assistant Attorney Generals

CERTIFICATE OF MAILING

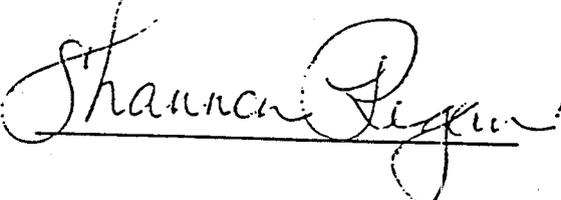
I hereby certify that on this 6 day of October, 1992, a true and correct copy of the foregoing ORDER was mailed, postage pre-paid, to the following:

William R. Richards
Thomas A. Mitchell
Assistant Attorney Generals
UTAH DIVISION OF OIL, GAS & MINING
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, Utah 84180

Jan Brown, Docket Secretary
Utah Board of Oil, Gas & Mining
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, Utah 84180

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

Denise Dragoo
FABIAN & CLENDENIN
P.O. Box 510210
Salt Lake City, Utah 84151



From: Jim Carter (JCARTER)
To: PGRUBAUGH-LITTIG
Date: Tuesday, November 16, 1993 2:20 pm
Subject: Hidden Valley NOV -Reply

I'm copying you with a letter from Edmondson basically asking us to "not start the bond clock" I suggested that they should submit a request for additional time to abate the NOV and request an informal review of the fact of violation. Meanwhile, we should evaluate their request. Of particular interest is the circled paragraph on page 2 of 3 regarding whether we can require revegetation of a road. When we get their requests, we can gather to strategize.

CC: LBRAXTON, JHELFRICH



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 17, 1993

TO: Pamela Grubaugh-Littig, Permit Supervisor

FROM: Susan M. White, Senior Reclamation Biologist *SMW*

RE: N93-35-8-1, Hidden Valley Coal Company, Hidden Valley Mine, ACT/015/007, Folder #2, Emery County, Utah

SYNOPSIS

By letter dated November 12, 1993 from Lee Edmonson, Cal Mat, the permittee, proposed a settlement to Notice of Violation N93-35-8-1. The letter contained several misleading concepts that I will address in this memo. Perhaps, a settlement agreement could be proposed such that the ten-year bond clock issue would not be addressed until the time of bond release application.

ANALYSIS

One settlement proposal offered by the permittee was for the Division to allow revegetation activities classified as husbandry practices as an "experimental practice". This proposal could be acceptable, however experimental practices as defined by R645-302-210 require an application detailing the practice, the environmental benefits, monitoring, etc., etc., and the Division and the Office (OSM) must concur. I envision this as a long process and one which will not correct the immediate problem at hand, N93-35-8-1. However, the operator may pursue this avenue.

The permittee alleges that the "site as a whole is well on its way to meeting the Division's revegetation standards". In October of this year I took some cursory vegetation data and my data on the reference area cover value is far different than that claimed by the operator. This difference will be investigated further this coming summer.

The permittee's settlement proposal argues that surface areas of roads are exempt from any revegetation standards. While this statement is true, no roads as defined by UMC 700.5 Definitions, exist within the disturbed area. The declared postmining land use for the mine site is wildlife habitat and livestock grazing (page 7 of the PAP). The permit defines the road to be used "for livestock trailing" (page 24-c) and "to aid in achievement of the postmining land uses" (page 7-b). The



permit also states that the terraces of the roadway will enhance forage production (page 24) and "the roughened condition of the road and barriers across the road prevent vehicular access" (page 24-a). These statements and details as to how the road is to be revegetated demonstrate that the operator had no intention of leaving the road as defined in UMC 700.5 which is exempt from revegetation.

I believe that the one concession that the Division could make in a settlement agreement would be to not assess the 10-year bond clock issue until a bond release application has been received. This means that if and when OSM approves the Division's proposed Husbandry Practices, even though the seeding is done now (prior to approval) the Division will evaluate the practice under the current Husbandry Guidelines at the time of bond release application. But all the conditions of the approved Husbandry Practices must be met such as acreage reseeded and time periods in which work is allowed.

Finally, I strongly recommend that an extension not be granted if requested by the Permittee. Now is the ideal time to seed at the Hidden Valley Mine. Further delays into the season may bring frozen ground or snow making seeding difficult or impossible and eventually delaying the seeding another year.

RECOMMENDATION

The Division should offer to evaluate the 10-year bond clock issue at the time of bond release application. Since the Division cannot guarantee how the proposed Husbandry rule will be in its final form (i.e. approved by OSM) this is a risk to the Operator. The Division has compromised since technically any seeding done now should restart the bond clock..

cc: Joe Helfrich



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

11/19

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801-538-5319 (TDD)

Bill Richards

[Handwritten initials]

November 17, 1993

TO: Pamela Grubaugh-Littig, Permit Supervisor
FROM: Susan M. White, Senior Reclamation Biologist *SMW*
RE: N93-35-8-1, Hidden Valley Coal Company, Hidden Valley Mine, ACT/015/007, Folder #2, Emery County, Utah

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cc: Joe Helfrich

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WILLIAM R. RICHARDS #4398
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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

HIDDEN VALLEY COAL COMPANY,	:	
Plaintiff,	:	MEMORANDUM IN OPPOSITION TO MOTION FOR STAY
v.	:	
the UTAH BOARD OF OIL, GAS AND MINING and the UTAH DIVISION OF OIL, GAS AND MINING,	:	Case No. <u>920904813CV</u>
Defendants.	:	Judge <u>Glenn K. Iwasaki</u>

The Board of Oil, Gas and Mining (the "Board"), and the Division of Oil, Gas and Mining ("the Division"), respectfully file their joint Memorandum in Opposition to the Motion for Stay filed by Hidden Valley Coal Company ("Hidden Valley").

INTRODUCTION

The Utah Legislature adopted the Utah Coal Reclamation Act ("UMCRA") to "[a]ssure that surface coal mining operations are conducted so as to protect the environment" and that "reclamation operations occur as contemporaneously as possible." Utah Code Ann. § 40-10-2(3). To this end, UMCRA requires coal operators to

meet strict environmental performance standards during its mining operations and for a period of 10 years after reclamation is complete. Whenever there is a violation of an environmental performance standard which is not abated within 90 days, UMCRA requires the Division to issue a cessation order. See Utah Code Ann. § 40-10-22(1)(c); Utah Admin. R. 645-400-314. As a punitive remedy, a cessation order carries with it a mandatory \$750 per day fine until the violation is abated, for a maximum period of 30 days. Utah Admin R. 645-401-420.

This Court, as well as the Director of the Division of Oil, Gas and Mining, and the Board of Oil, Gas and Mining, have determined that Hidden Valley is presently in violation of several of UMCRA's performance standards at the Hidden Valley mine. Yet, although Hidden Valley's arguments have been rejected in three separate hearings, and Hidden Valley has agreed to abate the violations, Hidden Valley nonetheless requests the Court to allow it to remain in violation of the law while it raises the same issues on yet another appeal.

For the reasons set forth below, the Court should deny Hidden Valley's motion.

BACKGROUND

A. The NOV is Issued.

The Division inspected the Hidden Valley Mine on November 20, 1991 and determined that Hidden Valley was in violation of two environmental performance standards. As such, the Division issued Notice of Violation 91-26-8-2 on November 22, 1991 (the

"NOV"). The NOV includes two parts. Part 1 was written for Hidden Valley's failure to minimize erosion on the outcrops of the access road and pads as required by Utah Code Ann. § 40-10-17(2)(d)¹ and Utah Admin. R. §§ 645-301-742.312.1 and 645-301-742.113.²

Part 2 of the NOV was issued for Hidden Valley's failure to seed and revegetate all disturbed areas as required by Utah Code Ann. § 40-10-17(2)(s)³ and Utah Admin. R. §§ 645-301-353 and 645-301-354.

B. Informal Appeal.

After the NOV was issued, Hidden Valley petitioned the Division for an informal hearing. On December 20, 1991, the Director of the Division, Dr. Dianne R. Nielson, held an informal hearing to review Hidden Valley's contentions. Hidden Valley was represented by counsel and introduced evidence to support its claims. On January 17, 1992, Dr. Nielson issued an order

¹ Utah Code Ann. § 40-10-17(2)(d) requires a mining operator to "stabilize and protect all surface areas . . . affected by surface coal mining and reclamation operations to effectively control erosion." Id.

² Utah Admin. R. 645-301-742.113 requires a mining operator to "[m]inimize erosion to the extent possible."

³ Utah Code Ann. § 40-10-17(2)(s) requires a mining operator to:

Establish on the regraded areas and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area.

Id.

upholding the NOV in its entirety. On February 10, 1992, Hidden Valley appealed the Director's decision to the Board.

C. Formal Adjudication Before The Board.

The Chairman of the Board, who was acting in the capacity of a hearing examiner, held a full day evidentiary hearing on June 30, 1992. On July 30, 1992, the Board considered the Chairman's proposed findings of fact and conclusions of law and issued an order upholding the NOV in its entirety. The Board upheld Part one of the NOV finding that Hidden Valley "failed to comply with the Permanent Program standards and the approved Reclamation Plan by failing to adequately construct and maintain erosion control structures on the outslope of the access haul road." R. at 438, 436.⁴

The Board upheld Part two of the NOV finding that Hidden Valley 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." R. at 436.⁵

⁴ The Board's decision was based on the uncontroverted testimony of the Division's inspector that uncontrolled erosion was occurring at three areas at the mine. See R. at 987-992, 995-996, 997-998, 999-1013; R. 606-613. Hidden Valley's own witness supported the Board's finding that erosion is continuing to occur at the mine. See R. at 1192, 1203, and 1204.

⁵ The Board's finding was based on the uncontroverted testimony that Hidden Valley failed to seed the outslopes of the access road and pad areas. R. at 1014-1017. Hidden Valley's own witness, Joe Jarvis, admitted that the outslopes were never seeded. See R. at 1237, 1240.

D. Appeal Before the Third District Court.

On August 27, 1992, Hidden Valley appealed the Board's Order to the Third District Court. On October 28, 1992, this Court heard argument on Hidden Valley's appeal. On November 5, 1992, this Court issued a final order rejecting Hidden Valley's legal arguments and upholding the NOV. Specifically, the Court upheld "the Board's ruling as to part one of the NOV concerning failure to address the erosion on the outslopes of the reclaimed access road." Order, dated November 5, 1992 at 3. The Court also found "that there is substantial evidence on the record and that indeed it is undisputed that the Appellant failed to re-seed the areas addressed in the Notice of Violation." Id. at 3.

E. Hidden Valley Submits an Abatement Plan.

The same day that this Court announced its order from the bench upholding the NOVs, Hidden Valley wrote the Division two letters indicating its intention to abate the violations and to come into compliance with Utah's coal statute. The first letter, dated October 29, 1992 stated:

Also, I presume that Hidden Valley will take appropriate action pursuant to the NOV and therefore I would appreciate it if the Division would not take any emergency action adverse to my client without us first at least talking on the phone. I can assure you that neither myself nor my client have any tricks up our sleeves for which the Division should have any concerns.

Attached as Exhibit "A."

That same day Hidden Valley also submitted a proposed Plan of Abatement to satisfy the NOV. The cover letter to the

Abatement Plan stated: "Enclosed is the Plan of Abatement for the above Cessation Order and Notice of Violation No. N91-26-8-2. . . ." Attached as Exhibit "B." The proposed Abatement Plan provided that, "[t]he proposed plan is intended to satisfy the violations under NOV N91-26-8-2 recorded at the Hidden Valley reclamation site owned and operated by Hidden Valley Coal Company."

Based on Hidden Valley's representations and its submission of an Abatement Plan, the Division did not issue a cessation order as it was empowered to do pursuant to Utah Admin R. 645-400-314. Rather, the Division extended the time for compliance to allow Hidden Valley time to finalize the Plan. See Exhibit "C." Following several discussions with the Division, Hidden Valley submitted an amended Abatement Plan on December 14, 1992 "to satisfy two violations that were issued for the reclaimed Hidden Valley Mine under NOV N-91-26-8-2 on November 20, 1991." Attached as Exhibit "D."⁶

The Abatement Plan set forth in detail what procedures Hidden Valley intended to implement at the mine to control

⁶ Hidden Valley's cover letter to the Abatement Plan stated as follows:

Attached are the Hidden Valley Mine abatement Plan for NOV N91-26-8-2 and the Hidden valley Mine Reclamation Amendment pages. These documents have been revised to include Division comments discussed in our meeting on December 3, 1992; thank you for taking the time to discuss the draft revised abatement plan at that meeting.

erosion and seed the outslopes of the access road. The Abatement Plan also set forth the time periods within which Hidden Valley would start implementation on the ground. As to controlling erosion on the outslope, Hidden Valley committed that:

The proposed work will begin no later than April 1, 1993, and as soon as practical after approval has been obtained, materials have been received, and environmental conditions are acceptable.

Exhibit "D" at page 2.

As to seeding the outslopes of the access road, Hidden Valley committed that:

The Revegetation work will be accomplished when soil conditions permit. Those acceptable soil conditions are defined as less than 10 percent snow cover, frost free in the upper six inches, and sufficiently dry in the upper six inches to not clod when worked. If conditions do not permit seeding by February 1, 1993, an alternative seed mix to that listed below will be submitted for Division approval.

Exhibit "D" at 7.

The Division approved Hidden Valley's Abatement Plan on December 19, 1992, and modified the NOV to extend the dates for compliance to conform with the dates agreed to in the Abatement Plan.

Hidden Valley now requests an injunction preventing the Division from issuing a cessation order if Hidden Valley fails to timely implement the procedures it agreed to implement in the Abatement Plan. For the reasons set forth below, this Court should deny Hidden Valley's motion.

THIS COURT SHOULD NOT STAY THE ISSUANCE
OF THE CESSATION ORDER IF HIDDEN VALLEY REFUSES
TO IMPLEMENT ITS ABATEMENT PLAN

I. HIDDEN VALLEY'S MOTION FOR AN INJUNCTION IS
MOOT BECAUSE IT AGREED TO ABATE THE NOV

Hidden Valley is not entitled to an injunction because its appeal is moot. It is a basic principle that compliance with an enforcement order moots an appeal of any underlying issues. See, e.g., Keyes v. School District No. 1, 895 F.2d 659, 663-664 (10th Cir.), cert denied, 111 S. Ct. 951 (1990) (An appeal from an order requiring the defendant to submit "plans" was rendered moot because the defendant had fully complied with the order.); Olson v. U.S., 872 F.2d 820, 823 (8th Cir. 1989) ("[A] taxpayer's submission of materials in compliance with an IRS summons renders moot any constitutional objections to compelled submissions."); Butcher v. Bailey, 753 F.2d 465, 471 (6th Cir. 1985) (Compliance with an order requiring the debtor to turn over records mooted an appeal claiming privilege against self-incrimination.); U.S. v. Kis, 658 F.2d 526, 532-535 (7th Cir.), cert denied, 455 U.S. 1018 (1981) (Compliance with an IRS summons by providing certain documents mooted taxpayer's appeal from the enforcement order.); Van Schaack Holdings Ltd. v. Fulenwider, 798 P.2d 424, 426-427 (Colo. 1990) (An appeal from an order directing dissolution of a corporation was mooted by dissolution of the corporation pending appeal).

When the Division issued the NOV on November 20, 1991, it required Hidden Valley to submit an abatement plan demonstrating how it would control erosion and seed the outcrops of the access

road. On October 29, 1992, Hidden Valley submitted an Abatement Plan "to satisfy the violations under NOV N91-26-8-2 recorded at the Hidden Valley reclamation site owned and operated by Hidden Valley Coal Company." See Exhibit D. In that Plan, Hidden Valley specifically agreed to abate the environmental violations at the mine and set forth in detail what activities it would undertake to abate the violations. Hidden Valley also consented to commence the remediation work on specific dates. The Division approved Hidden Valley's Abatement Plan on December 19, 1992 and modified the NOV accordingly.

Since Hidden Valley has complied with the terms of the NOV by submitting an Abatement Plan and has agreed to commence remedial work, Hidden Valley's appeal is now moot. Accordingly, this Court must dismiss Hidden Valley's motion for stay.

II. HIDDEN VALLEY IS ESTOPPED FROM OBTAINING AN INJUNCTION BECAUSE IT AGREED TO ABATE THE VIOLATION.

Hidden Valley is also estopped from seeking to enjoin the Division from requiring Hidden Valley to do what it agreed to do. The Utah Supreme Court has set forth the elements of estoppel as follows:

Conduct by one party which leads another, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct.

Blackhurst v. Transamerica Ins. Co., 699 P.2d 688 (Utah 1985).

See also Pecking v. Great West Life Assurance Co., 814 P.2d 1125 (Utah App. 1991). Each element is obviously met in this instance.

A. The Conduct of Hidden Valley.

On October 29, 1992, Hidden Valley submitted an Abatement Plan to "to satisfy the violations under NOV N91-26-8-2 recorded at the Hidden Valley reclamation site owned and operated by Hidden Valley Coal Company." See Exhibit "D." At that time, Hidden Valley announced its intent to resolve the NOV. Indeed, Hidden Valley's attorney expressly stated to the Division that "I can assure you that neither myself nor my client have any tricks up our sleeves for which the Division should have any concerns." See Exhibit "A." In the final version of the Abatement Plan, Hidden Valley agreed to implement erosion control measures by "not later than April 1, 1993," and agreed to seed the outslopes of the access roads when soil conditions permit." See Exhibit "D."

B. The Division's Reliance on Hidden Valley's Conduct.

When this Court upheld the Board's Order on November 5, 1992, the Division was statutorily empowered to issue Hidden Valley a cessation order because environmental violations remained unabated at the mine site. However, based on the representation of Hidden Valley's counsel, and Hidden Valley's submission of an Abatement Plan, the Division did not issue the cessation order, but instead granted Hidden Valley an extended period of time within which to finalize its Abatement Plan. See Exhibit "C." When Hidden Valley submitted its amended Abatement Plan, and agreed to implement erosion control measures by "not later than April 1, 1993," and agreed to seed the outslopes of

the access roads when soil conditions permit," the Division approved the Plan and modified the NOV to extend the dates for compliance to conform with the dates for abatement set forth in Hidden Valley's Abatement Plan.

C. Detriment to the State and Environment.

Based on Hidden Valley's commitment to abate the violations at the mine site, the Division did not issue Hidden Valley a cessation order. The Division believed that since Hidden Valley agreed to abate the violations, allowing Hidden Valley additional time to finalize its Abatement Plan would expedite and facilitate implementation of the remedial procedures at the mine. Of greater concern was getting Hidden Valley to seed the outslopes of the access road to take advantage of the excellent water year the southern Utah desert had been experiencing.

Now, Hidden Valley has entirely changed its position and informed the Division that it does not intend to do what it promised to do in its Abatement Plan. Over three months have now passed since Hidden Valley informed the Division of its intention to comply with the NOV and three months have passed during which Hidden Valley could have implemented its Plan to remediate the environmental violations at the mine. If Hidden Valley is allowed to change its position, erosion will continue at the site, another planting season will be missed, and the environment will continue to suffer.⁷

⁷ The Record is clear, that if left unabated, the environment will suffer. See Transcript at 37-38, 39-41, 45, 46-47. See also Affidavit of William Malencik, at p. 3-4. If left

Hidden Valley should be held to its word, and required to implement abatement procedures at the mine.

III. HIDDEN VALLEY IS NOT ENTITLED TO AN INJUNCTION PURSUANT TO RULE 65A OF THE UTAH RULES OF CIVIL PROCEDURE.

To be entitled to an injunction, Rule 65A of the Utah Rules of Civil Procedure require Hidden Valley to establish the following four elements:

- (1) The applicant will suffer irreparable harm unless the order or injunction issues;
- (2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party or enjoined;
- (3) The order or injunction, if issued, would not be adverse to the public interest; and
- (4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

unabated, uncontrolled runoff will continue from the road onto the outslope. Id. This in turn will allow continued gully erosion, and the consequent deepening and widening of the erosion channels. Further deposition of sediment into Ivie Creek, a tributary of the Colorado River drainage system will also continue. Id. Moreover, the erosion will result in additional soil loss which will significantly reduce the potential for the effective revegetation of the mine site. Id.

Lack of seed on the disturbed areas is allowing further loss of soil through sheet, rill and gully erosion. Affidavit of William Malencik, at p. 3-5. This in turn will allow continued removal of soil from the outslopes which is required for successful revegetation. Id. Additionally, if Hidden Valley does seed the disturbed areas this fall, it will not be able to do so for at least another full year. Affidavit of William Malencik, at p. 3-5. During that time, the site will continue to erode, soil will be removed from the outslopes, and the potential for successful revegetation will be significantly diminished. Id.

Utah R. Civ. P. 65A. Since this court has already refused to grant Hidden Valley an injunction under Rule 65A of the Utah Rules of Civil Procedure, and has subsequently ruled against Hidden Valley on the merits of its appeal, Hidden Valley obviously cannot establish that its is entitled to an injunction under Rule 65 now. The Division will not go into the merits of each of the four elements necessary to the granting of an injunction under Rule 65 but would refer the Court to the Division's Brief in Opposition to Hidden Valley's Motion for Injunction filed earlier in this case.

IV. RULE 62d OF THE UTAH RULES OF CIVIL PROCEDURE
IS INAPPLICABLE IN THIS CASE.

Rule 62d of the Utah Rules of Civil Procedure does not allow for the automatic stay of the Division's enforcement action. Although Rule 62d does provide for the stay of a monetary judgment upon the posting of a supersedeas bond, the stay is not automatic for the stay of an enforcement action. See Jensen v. Schwendiman, 744 P.2d 1026 (Utah App. 1987). Rather, the "decision to stay enforcement of a judgment is within the discretion of the reviewing court" and must be based on an analysis of four factors which are identical to the four factors set forth in Rule 65 of the Utah Rules of Civil Procedure. Jensen v. Schwendiman, 744 P.2d 1026, 1027 (Utah App. 1987). See, e.g., Donovan v. Fall River Foundary Co., Inc., 696 F.2d 524

(7th Cir. 1982). The Utah Court has set forth the elements necessary to obtain a stay of an enforcement action as follows:⁸

[I]t is generally required that (a) the applicant make a strong showing that he is likely to succeed on the merits of the appeal; (b) the applicant establish that unless a stay is granted he will suffer irreparable injury; (c) no substantial harm will come to other interested parties, and (d) a stay would do no harm to the public interest.

Jensen v. Schwendiman, 744 P.2d at 1027.

Since this Court has already ruled against Hidden Valley on the merits, it is obvious that Hidden Valley cannot meet this standard now. Indeed, the only argument that Hidden Valley raises in support of the stay is that if it implements the abatement measures it will effectively moot its appeal.⁹ The Utah Court of Appeals has specifically rejected this argument and has held that the possibility of mootness is insufficient by itself to justify the issuance of a stay under Rule 62(d). See Jensen v. Schwendiman, 744 P.2d at 1027.

In Jensen, the Utah Court of Appeals dealt with a motion to stay where the parties set forth "as grounds only that the stay is necessary to avoid having the appeal mooted." 744 P.2d at 1028. The court specifically held that "[t]he possibility of

⁸ The Jensen case was specifically dealing with a motion under Rule 8 of the Rules of Appellate Procedure. The court specifically held, however, that the standard under Rule 8 and Rule 62(d) of the Rules of Civil Procedure were identical. Id. at 1027.

⁹ It is difficult to distinguish why implementation of the procedures would moot its appeal any more than the filing of its Abatement Plan and its agreement to implement abatement procedures.

mootness alone, however, will not suffice to support granting a stay." Id. at 1028. To the contrary, the court held that the moving party must demonstrate each of the four elements set forth above, and must marshal the evidence explaining why it is entitled to a stay. The court denied the parties motion for the stay on the grounds that there was insufficient showing that the moving party would prevail on the merits.

It is an equally clear principle that the stay provision of Rule 62(d) may not be used as a means for delay of a governmental regulatory function. See Donovan v. Fall River Foundary Co., Inc., 696 F.2d 524 (7th Cir. 1982). There, a company sought to stay a governmental order requiring it to submit to a health inspection. The company's procedural maneuvering had prevented the government from exercising its enforcement powers for an extended period of time. After the district court rejected its arguments, the company requested the district court to issue a stay pursuant to Rule 62d pending its appeal of the district court's decision.

The court held that in an enforcement context a supersedeas bond was insufficient to compensate the appellee for delay in the entry of the final judgment. The court continued that when the judgment being appealed from is an enforcement order, "[i]t is difficult to imagine how one would go about calculating the size of the bond necessary to compensate the appellee for the delay." Id. at 526-527. Therefore, the court concluded that giving the appellant an automatic stay upon posting a supersedeas bond would

offend the spirit of Rule 62(d) because the appellee would not be compensated for the delay in the enforcement of the final judgment. Id. at 527.

The court went on to admonish the moving party for the exact conduct being exhibited here by Hidden Valley:

A company should not be rewarded for resisting enforcement of what the district court has determined to be a valid warrant, reasonable in scope, by being allowed to argue for a stay on the basis of its having strung out the proceedings as long as it could. The fault for the delay is the company's; the grant of a stay would reward and compound that fault.

Id. at 527.

V. UTAH CODE ANN. § 40-10-20(8) DOES NOT PROVIDE THIS COURT WITH AN INDEPENDENT BASIS TO STAY ENFORCEMENT OF THE NOV.

Hidden Valley also contends that Utah code ann. § 40-10-20(8) gives this Court an independent basis for staying the Division's issuance of the cessation order. Hidden Valley's argument is without merit. Section 40-10-20(8) establishes two situations where the Division is prevented from issuing a cessation order: (1) when the Board has made a determination that the operator will suffer irreparable loss or damage and (2) when a court has entered an order staying the cessation order. Section 40-10-20(8) is not a grant of unfettered discretion to the district court.¹⁰

¹⁰ Indeed, why would Utah's coal statute require the Board to make a determination that the operator would suffer irreparable harm before staying the cessation order, but allow a district judge to stay the order without any findings at all.

The factors which a district judge must examine before staying a cessation order are those set forth in Rule 65 of the Utah Rules of Civil Procedure. Indeed, the Surface Mining Coal Reclamation Act, the governing act for UMCRA, specifically provides that "Temporary restraining orders shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended." 30 U.S.C. 1271. Since UMCRA may not be any less stringent than SMCRA, this court must make a finding pursuant to Rule 65 of the Utah Rules of Civil Procedure before it may stay the issuance of a cessation order.

VI. HIDDEN VALLEY'S MOTION IS NOT RIPE FOR REVIEW.

Finally, Hidden Valley's motion for an injunction is not ripe for review. First, as Hidden Valley knows, weather conditions at the mine do not presently allow for the implementation of Hidden Valley's seeding plan. Therefore, there is no threatened enforcement by the Division which this court can stay. Moreover, the Division has told Hidden Valley that at any point site conditions are appropriate for seeding, the Division would give Hidden Valley 20 days to implement its Plan, thus providing Hidden Valley ample opportunity to seek protection in this court.

CONCLUSION

There is no dispute that environmental violations exist at the Hidden Valley mine. There is also no dispute that Hidden Valley has agreed to abate the violations at the mine. Yet Hidden Valley asks this Court to relieve it from the obligations

of its agreement and to remove the mechanism created by
Legislature to force a coal operator to remedy environmental
violations. To grant Hidden Valley's motion would be contrary to
both law and equity. Hidden Valley should be required to do what
it agreed to do and what it is statutorily required to do.

DATED this 17th day of February, 1993.

JAN GRAHAM, ESQ.
UTAH ATTORNEY GENERAL

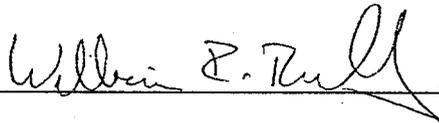
BY: William R. Richards
WILLIAM R. RICHARDS
THOMAS A. MITCHELL
Assistant Attorneys General
355 West North Temple
#3 Triad, Suite 350
Salt Lake City, Utah 84180

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO MOTION FOR STAY for Case No. 920904813CV to be mailed by certified mail, postage prepaid, the 17th day of February 1993, to the following:

Peter Stirba, Esq.
Stirba & Hathaway
215 South State Street, Suite 1150
Salt Lake City, Utah 84111

Denise Dragoo
Fabian & Clendenin
215 South State, Suite 1150
Salt Lake City, Utah 84111



cc Mine file
Pum, Tom Mitchell
Ben Richards
RECEIVED
LWJ

IN THE UTAH COURT OF APPEALS

MAR 11 1993

DIVISION OF
OIL GAS & MINING

-----coOoo-----

Hidden Valley Coal Company,)
)
Plaintiff and Appellant,)
)
v.)
)
Utah Board of Oil, Gas & Mining)
and the Utah Division of Oil,)
Gas & Mining,)
)
Defendants and Appellees.)

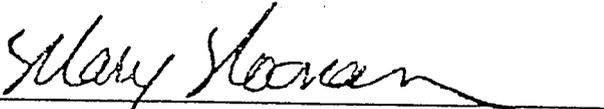
NOTICE OF HEARING

Case No. 930073-CA

TO: ALL PARTIES OR THEIR COUNSEL OF RECORD

You are hereby notified that appellant's motion for stay has been set for hearing at 9:00 a.m. on Wednesday, April 7, 1993.

Dated this 11th day of March, 1993.



Mary T. Noonan
Court Clerk

Pam

FILED DISTRICT COURT
Third Judicial District

PETER STIRBA (Bar No. 3118)
MARGARET H. OLSON (Bar No. 6296)
STIRBA & HATHAWAY
Attorneys for Plaintiff and Appellant
Hidden Valley Coal Company
215 South State Street, Suite 1150
Salt Lake City, UT 84111
Telephone: (801) 364-8300

MAR 19 1993

SALT LAKE COUNTY
By K. Wells
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

HIDDEN VALLEY COAL COMPANY	:	
	:	
Plaintiff,	:	ORDER
	:	
v.	:	
	:	
the UTAH BOARD OF OIL, GAS & MINING and the UTAH DIVISION OF OIL, GAS & MINING,	:	Case No. 920904813CV
	:	
Defendants.	:	Judge Glenn Iwasaki

Based upon the Motion of the Plaintiff Hidden Valley Coal Company, the arguments of counsel, and good cause appearing before,

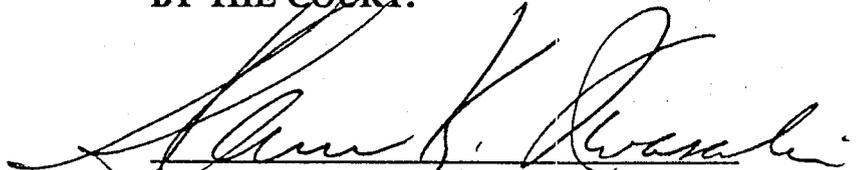
IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiff's Motion for a Rule 62(d) Motion for a Stay Pending Appeal is denied.
2. The Plaintiff's Motion for a Stay Pending a Rule 8 Adjudication by the Utah Court of Appeals is granted.

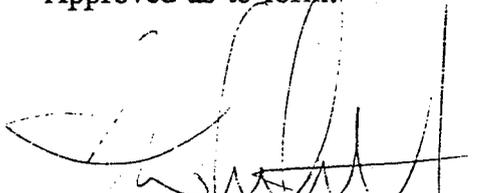
3. The Plaintiff shall file its Rule 8 Motion to the Utah Court of Appeals forthwith.

DATED this 19th day of March, 1993.

BY THE COURT:


JUDGE GLENN IWASAKI

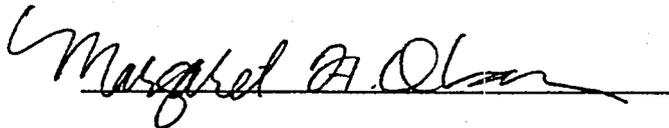
Approved as to form:


THOMAS A. MITCHELL

CERTIFICATE OF DELIVERY

I hereby certify that on this 8 day of March, 1993, a true and correct copy of the foregoing ORDER was hand delivered to the following:

William R. Richards
Thomas A. Mitchell
Assistants Attorney General
UTAH DIVISION OF OIL, GAS & MINING
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, Utah 84180



RECEIVED

FEB 18 1993

DIVISION OF
OIL GAS & MINING

SH STIRBA AND
HATHAWAY

A PROFESSIONAL LAW CORPORATION

215 SOUTH STATE STREET • SUITE 1150
SALT LAKE CITY • UTAH 84111
TELEPHONE: 801 364-8300
FACSIMILE: 801 364-8355

MARGARET H. OLSON

February 17, 1993

Thomas A. Mitchell
Assistant Attorney General
Division of Oil, Gas & Mining
Three Triad Center
355 West North Temple, #350
Salt Lake City, Utah 84180-1203

Re: *Hidden Valley Coal Motion for a Stay Pending Appeal*

Dear Tom:

This letter is to confirm our conversation this afternoon whereby we set a hearing date on the above motion for March 4, 1993 at 3:00 p.m. before Judge Iwasaki. Enclosed is a Notice of Hearing for your file.

Since the deadline presently in place for abatement is February 28, 1993, you indicated that a letter from Hidden Valley Coal's geologist asking for another extension would relieve Hidden Valley Coal of this deadline until Judge Iwasaki will be able to hear the Motion. Karla Knoop of JBR Consultants Group will be sending you such a letter shortly. You indicated that upon receipt of this letter, there would be no problem with another Division extension.

Thank you for your consideration and accommodation in this matter. Short of any complications between now and then, I will see you on March 4.

Very truly yours,



MARGARET H. OLSON

MHO/kg
Enclosure
cc: Lee Edmonson



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

Norman H. Bangarter
 Governor
 Dee C. Hansen
 Executive Director
 Dianne R. Nielson, Ph.D.
 Division Director

355 West North Temple
 3 Triad Center, Suite 350
 Salt Lake City, Utah 84180-1203
 801-538-5340

February 18, 1993

CERTIFIED RETURN RECEIPT REQUESTED
 No. P 540 713 927

Karla Knoop, Hydrologist
 JBR Consultants Group
 Suite A-4
 8160 South Highland Drive
 Sandy, Utah 84093

Karla

Dear Ms. Knoop:

Re: Notice of Violation N91-26-8-2, Hidden Valley Coal Company, Hidden Valley Mine, ACT/015/007, Emery County, Utah

On February 17, 1993, JBR Consultants Group, as Hidden Valley Coal Company's representative, requested an extension to implement the approved abatement plan for NOV N91-26-8-2. The existing implementation date established by the Division is February 28, 1993, as stated in January 29, 1993, correspondence to Lee Edmonson. The extension to March 15, 1993, is requested because the specific environmental conditions in the plan under which implementation would occur, have still not been met.

Division biologists determined that on January 28, 1993, field abatement of the NOV was possible. Subsequent to that time, low temperatures have prevailed over the region, and three separate, significant snow storms have occurred. An insufficient window of time has elapsed to allow for snow melt, drying of the soil, and mobilization of crews. JBR therefore, requested in its February 17, 1993, letter that an extension be granted until March 15th, at which time site conditions would be reassessed.

By this letter, I am granting an extension in the abatement time for NOV N91-26-8-2 to 5:00 p.m. on March 15, 1993. Authority for this extension is found at R645-400-327-400.

Sincerely,

Lowell

Lowell P. Braxton
 Acting Director

vb

cc: Lee Edmonson
 T. Mitchell
 P. Grubaugh Littig



State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

Norman H. Bangarter
Governor
Dee C. Hansen
Executive Director
Dianne R. Nielson, Ph.D.
Division Director

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5340

January 29, 1993

CERTIFIED MAIL
P 074 975 243

Lee Edmonson
CALMAT Company
Properties Division
1801 East University Drive
Phoenix, Arizona 85034

Dear Mr. ^{Lee} Edmonson:

Re: NOV N26-8-2, Implementation of Abatement Plan, Hidden Valley Mine, Hidden Valley Coal Company, ACT/015/007, Folder #2, Emery County, Utah

This is to confirm the verbal extension granted Hidden Valley on January 14, 1993 to comply with the terms of its abatement plan previously submitted and approved by the Division.

Susan White, staff biologist, visited the site on January 26, 1993, and determined the site suitable for seeding as of that date. Your abatement plan stated that if seeding is not done by February 1, 1993, an alternative seed mixture to that approved would be submitted, which would allow for a change to warm season species for a summer seeding. The February 1, 1993, deadline for seeding with the planned seed mixture is extended to February 28, 1993. The importance of seeding now during what appears to be a wet cycle, outweighs the requirements of a few of the species in the seed mixture for a cold stratification period.

As requested in your letter, and agreed by us on the 14th, this is official notification that seeding must be completed within the time set forth in this letter. Should site conditions change in this time period, the Division must receive written notification. Concerning the erosion control measures to be instituted, you will receive written notification by the Division at such time as dirt work can be commenced. You will be required to begin and complete that work within the time set forth within the approved plan. As always, I encourage you and your technical

Page 2
Lee Edmonson
January 28, 1993

staff to remain in contact with the Division concerning changing conditions at the site.

Please notify the Division of the date on which you will begin seeding, so that a representative from the Division can be on the site. Additionally, please notify the Division by letter when the seeding has been completed.

Sincerely,


Lowell P. Braxton
Acting Director

lsj
cc: Pamela Grubaugh-Littig
Tom Munson
Susan White
Bill Malencik PFO

LPB93006.LTR



The CalMat Companies

January 20, 1993

RECEIVED

JAN 25 1993

DIVISION OF OIL GAS & MINING

orig: Mine file
Pam Grubbs
Tam Mitchell
L.P.B.
JP
1-26-93

Lowell Braxton, Acting Director
DIVISION OF OIL, GAS & MINING
Three Triad Center
355 West North Temple, #350
Salt Lake City, Utah 84180-1203

Re: NOV 91-26-8-2

Dear Lowell:

This is to confirm our telephone conversation of January 14, 1993 wherein you granted an extension of time to Hidden Valley Coal Company to comply with its abatement plan previously submitted and approved by the Division. It is my understanding that considering the practical difficulties of seeding the site at this time, and for other reasons, the extension of time is for a reasonable time when it becomes practical to implement the plan. I think both you and I would agree that this would probably be some time in the late spring.

Would you please inform me more specifically when the Division would like the work performed so that Hidden Valley can have some lead time in order to do the work that is anticipated. Our consultant, Karla Knoop of JBR Consulting, will also be visiting the site from time to time to assess conditions and will be discussing the situation with Division staff on an ad hoc basis.

As you know, Hidden Valley has appealed the decision from the Third District Court which upheld various aspects of the initial NOV. As you also know, Hidden Valley intends to prosecute that appeal to its conclusion and this extension request should not be considered as limiting Hidden Valley's option to pursue its appeal or to seek appropriate judicial relief pending a resolution of the issues by the Utah Supreme Court. While I have appreciated your candor and assistance throughout these recent negotiations, I do not want you or the Division to misunderstand that Hidden Valley believes it has no choice in light of the bond clock issue to pursue its appellate rights.

Pam please draft a response -
L.P.B. 1-26

Mr. Lowell Braxton
January 20, 1993
Page 2

In any event, I will expect written confirmation from you concerning a new time frame for implementation of the abatement plan which more specifically delineates what the Division believes is reasonable under the circumstances.

Thank you for your cooperation and assistance.

Very truly yours,



Lee Edmonson, Manager
Planning and Regulatory Affairs

LE/cn

93-004

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March 4, 1993

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Re: Hidden Valley Coal Company vs. The Utah Board of Oil, Gas
and Mining and the Utah Division of Oil, Gas & Mining
Case No. 920904813 CV

Reporter's transcript of hearing in the above-entitled case which
was heard on October 28, 1992 before the Honorable Glenn K.
Iwasaki.

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

HIDDEN VALLEY COAL COMPANY,)
Plaintiff and Appellant,)
vs.)
the UTAH BOARD OF OIL, GAS &)
MINING and the UTAH DIVISION)
OF OIL, GAS & MINING,)
Defendants and Appellees,)

CASE NO. 920904813 CV

CERTIFIED COPY

* * * * *

BEFORE THE HONORABLE GLENN K. IWASAKI

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SALT LAKE CITY, UTAH

OCTOBER 28, 1992

A P P E A R A N C E S

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FOR THE PLAINTIFF:

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1 THE COURT: Good morning. The matter before the
2 court is Hidden Valley Coal Company versus Utah Board and
3 Utah Division of Oil, Gas & Mining, case number 920904813.

4 Appearances for the record, please.

5 MR. STIRBA: Peter Stirba, your Honor, appearing
6 on behalf of Hidden Valley Coal Company and seated with me
7 is Lee Edmonson, who is with Hidden Valley.

8 MR. MITCHELL: Tom Mitchell for the Utah Board
9 and--

10 MR. RICHARDS: William Richards on the behalf of
11 Division of Oil, Gas & Mining.

12 THE COURT: Mr. Stirba, this is your motion; is
13 it not?

14 MR. STIRBA: I believe so. I will be happy to
15 proceed.

16 THE COURT: Thank you.

17 MR. STIRBA: I realize that the court, needless
18 to say, has been inundated with fairly voluminous briefs,
19 and what have you, and hopefully I can pare this down in
20 some meaningful fashion so that the court has some basis to
21 see that the position of Hidden Valley Coal Company makes
22 some sense.

23 I think the first thing I'd like to say is that
24 generally the concerns here, your Honor, relate to the
25 appropriate use and exercise of mistrust by the Division

1 insofar as it regulates Hidden Valley Coal Company.

2 There is no question that reclamation is
3 appropriate. There is no question that Hidden Valley Coal
4 Company has been involved in the reclamation process for
5 quite sometime. There is no question they submitted a plan
6 to that end, which was approved by the Division. There is
7 no question that they have been asked on many instances to
8 do precisely what the Division requested them to do and
9 they have done that. And there is also no question that
10 with respect to the reclamation process, there are certain
11 rules, certain legal statutes and laws which Hidden Valley
12 is bound by, but by the same token, so is the Division.

13 And the problem in this case is the fact that the
14 Division, in essence, we feel, has inappropriately
15 exercised its police power in regulating my client. And
16 certainly the police power and the regulation is not
17 designed so that at a whim the Division can jerk Hidden
18 Valley's chain and basically act inconsistent and uncertain
19 with respect to that regulation, and that is a fundamental
20 problem in this case. And that's a fundamental problem in
21 Hidden Valley's litigating the issue of NOV.

22 And the standard of review, of course, is consist
23 at the present time with that, under 40-10-30, which
24 provides for the court to overturn the Board's ruling on a
25 number of different grounds, and certainly one of them is

1 under subsection (a), if the court finds that the decision
2 of the Board was, "unreasonable, unjust, arbitrary and
3 capricious or an abuse of discretion." That's precisely
4 one of the things we are here about. We have other things,
5 but certainly we have that.

6 Now, I think that it is helpful if I can explain
7 perhaps one phenomenon of the reclamation process. I don't
8 have a nice photograph. I don't have a fancy diagram, but
9 I think I can explain it so that the court will understand
10 the issue.

11 When Hidden Valley decided to suspend any further
12 operations in terms of trying to put this property into an
13 operational mine. It had put a road from a certain level
14 down to the mine site and that's sort of--it is a downhill
15 slope going down there. The road, I believe, is about a
16 half a mile long, your Honor. And that road--this is in a
17 very arid desert climate. And you basically have butts on
18 one side, butts on the other, and you have a canyon, a
19 relatively steep canyon that the road tracks as it goes
20 down to the coal mine properties.

21 That road has--just inherent in it, it has
22 outslopes. In other words as you cut the road, it is like
23 a switchback on a hiking trail, your Honor. You basically
24 have the road and then, of course, you have fill material
25 supporting the road on the side, and that drops down

1 anywheres from 100 to 200 feet as this road goes down the
2 gully.

3 There is no question, and it is admitted in the
4 transcript testimony at the hearing, you are going to have
5 erosion. There is no way you can't have erosion off of
6 that road. Because by definition, you have this road going
7 down like this, then you have fill on the side. And to the
8 extent you are ever going to have rain, to the extent you
9 are ever going to have weather, to the extent you are ever
10 going to have the natural forces of gravity, you are going
11 to have reclamation; that's a given.

12 Now, the concerns of the Division were back in
13 '86--not '91, but back in '86, when they approved the plan,
14 which my client relied on. They said, you can keep that
15 road. They could have told them to take that road out but
16 they said, no, you can keep that road.

17 All right. So they keep the road. Next thing
18 they have concern with is, well, you got that road and we
19 are afraid that water, just by raining--what they do is
20 they have here density intensity--storms, generally thunder
21 storms, in that area. Basically, what you have, you have
22 water that would just sheet down the road. And considering
23 the fact they have very little vegetation, considering the
24 fact you have soil standards, water will not absorb very
25 well. You are in a desert climate.

1 I am sure the court can appreciate massive
2 rainfall, at any time, has a very devastating effect on the
3 ground. In any event, what the Division said was, we don't
4 want that water to come cascading down the flat surface and
5 down this grade, so what we want you to do is we want you
6 to put in water bars.

7 Now, water bars are merely mounds of dirt. There
8 is nothing, you know, really creative about them other than
9 they are mounds of dirt, which are put at various points
10 along this half-mile road and they are at a 45--a certain
11 angle, so that basically when you have water that would hit
12 a bar, it would go to the outslopes. So in other words it
13 was directing the water right to where the fill is, where
14 the erosion is, where the outslopes are in the road. And
15 if you have them periodically down the road, this, of
16 course, tends to divert the water and will eliminate some
17 massive cascading of the water or sheeting of water down
18 the road where you might have real impairment. And that
19 was, once again, approved by the Division as part of the
20 plans submitted by Hidden Valley.

21 And in fact, your Honor, there were problems that
22 occurred, as is in the record, when there were major storms
23 which exceeded hundred-year storm standards. And there was
24 some damage done to some of these water bars, which was not
25 anticipated, which Hidden Valley repaired at the request of

1 the Division.

2 In one way, they were saying there was some
3 problem with the bars, but then at the Division, at certain
4 points after '86, when they appeared to believe--which is
5 Hidden Valley recollection--they said, would you put in
6 another water bar, would you put in two more water bars,
7 because they were evaluating the efficacy of the bars.

8 Hidden Valley did that. No problem. But the
9 design of having a road and having the water bars is the
10 Division's approved design. And by definition, you are
11 going to have anything but erosion coming off that
12 outslope, and the water is directed right to the outslope.
13 That's a given.

14 And that water, by going through the outslope to
15 the extent you are going to have some effect on the soil,
16 you are going to have erosion. That is a given and I have
17 some testimony I'd like to point out to this court that is
18 consistent with that, that I think points out the flaws and
19 some of the unreasonableness about the Division's position.
20 But in any event, that's the circumstances you had in '86.

21 You had this road cut through the canyon. You
22 had these water bars, and you had erosion--by definition
23 you are going to have erosion on the outslopes. And that
24 was the plan approved by the Division in '86 and that's the
25 reclamation work that was done in '86.

1 So in any event, in '91, mysteriously out of the
2 blue after four or five or six years of history here, where
3 ever single time the Division is going down and looking at
4 this phenomenon, signing off on it, every single time as
5 being in full compliance with all applicable rules and
6 regulations.

7 We could--incidentally, an Office of Surface
8 Mining inspector is present with Mr. Malencik, the state
9 inspector, on November 19th of 1991. They write an NOV,
10 and they say all of a sudden there are four big problems
11 with what we have here. Before that, there was absolutely
12 no evidence whatsoever. Not that there was a failure to
13 comply with any applicable rule, with any applicable
14 regulation, and notwithstanding some of the comments in the
15 reports, which I can see were in there.

16 The issue--and the salient issue is were the
17 boxes checked as being in compliance on the routine
18 inspection reports. And they clearly were, each and every
19 single time. And we had testimony at the hearing that the
20 purpose of those boxes was so that there would be a
21 truthful representation made by the inspector of the
22 conditions of the mine site and the reclamation site in
23 whether or not there was compliance. And I think we need
24 to take those checks and those determinations by the
25 Division employees at face value.

1 But in any event, the NOV surfaces in November of
2 '91. And there's four basic components of the NOV. And
3 the first one is in two parts. And really, I think this
4 will address a number of issues that the court might be
5 concerned about. The first part is they say there is
6 failure to maintain diversion to be stable--diversion to be
7 stable. And they presumably cite--and I am reading from
8 the NOV, which I'm sure the court has attached
9 somewhere--they cite a regulation and it is
10 614-301-742.312. And all that regulation says, your Honor,
11 is "diversion and its appurtenant structures will be
12 designed, located, constructed maintained and used to be
13 stable." That's all it says.

14 Now, they are complaining about the stability of
15 resuming water bars. The only problem you have--the only
16 problem you have, Judge, is if you take the entire
17 transcript, which is one day's evidentiary hearing, right
18 here, and you go through this transcript, and the only
19 person who testifies against Hidden Valley on behalf of
20 division substantially on the NOV and the problems with the
21 NOV is Mr. Malencik. There's not one scintilla shred of
22 evidence where anybody from the Division says that the
23 water bars were unstable or that there was a stability
24 problem with any structural component of the reclamation
25 plan. So counsel has raised an issue in their brief about

1 marshalling the problem. There isn't any evidence--there's
2 not one person that testified by the Division on this
3 particular point.

4 Since the standard is--at least one of the
5 standards is--that the evidence has to be substantial in
6 light of the whole record. It seems to me fairly clear if
7 there is no evidence, none whatsoever, then clearly there
8 has not been a prima facie case made with respect to that
9 absent the NOV, and clearly we should prevail on that fact
10 alone.

11 I will tell you the only testimony on diversion,
12 your Honor, can be found at pages 271 and 272 of the
13 transcript. I have--early I gave that incorrectly. The
14 only testimony is Ms. Knoop's testimony on 237 to 242.

15 What she is saying--she is our witness. She is
16 not saying her water bar, designed by her, is unstable.
17 What she is saying, water bars aren't even diversions in
18 the first place. They are roadway drainage controls.
19 There's a distinction under the rules, therefore, the
20 regulations don't apply. That's the only testimony in
21 that.

22 The second thing on the NOV on Part 1, they
23 reference failure to minimize erosion to the extent
24 possible. And they cite a regulation 614-301-742.113. And
25 if you flip to that and you read what that says, it is very

1 simple. It says in terms of sediment control measures, you
2 have the obligation to minimize erosion to the extent
3 possible.

4 The only problem with this is, if you look at Mr.
5 Malencik, and he did testify about erosion, there is no
6 question about that. If you look at what he really
7 testified to on direct and cross, you have a fundamental
8 problem.

9 First problem is, it is to the extent possible.
10 It isn't a question. It is not a question of whether or
11 not you are going to have erosion. In other words, that's
12 not what that regulation says. If you have erosion, does
13 it mean you have liability under the rules? It has to be.
14 You have to have erosion, otherwise to the extent possible,
15 you can't control.

16 And even forgetting the testimony of Ms. Knoop,
17 we refuted and rebutted the testimony of Mr. Malencik about
18 Mr. Malencik saying there are four or five other things
19 that Hidden Valley could do. Meanwhile none of those
20 things were brought up until we got to the hearing.

21 In other words, there's nothing in any of these
22 70 or what have you, or 50 reports that indicate there are
23 some other things they need to do. And it isn't a question
24 that Hidden Valley didn't do certain things, because in
25 fact they did when requested by the Division.

1 So everything Mr. Malencik testified to about
2 they could have put rock gravel in, they could have put rip
3 rap rock in, they could have increased the channels, all
4 those kind of things are never requested of Hidden Valley.
5 We never heard about them until we get to the hearing.

6 But aside from all that, Mr. Malencik on
7 cross-examination, says that he--basically on direct, he
8 talks about it being a chronic condition. So I asked him,
9 and I am talking about page 61 and 62 of the transcript. I
10 asked him what he meant by a chronic condition. Once
11 again, he had testified the chronic condition is this
12 erosion. It is continuing. And I have looked at it, I
13 have measured it in these three gullies. We have a
14 problem.

15 So he says, you know, chronic condition is not my
16 word. It is a word listed in the mining reclamation plan,
17 and so my word on that is accelerated erosion; situation
18 caused by the construction of that road. The road the
19 Division already approved in '86, which they could have
20 told Hidden Valley to yank out, but didn't, and accelerated
21 by the fact that water bars concentrated the water. And
22 there was no protection placed on the outslope. Once
23 again, the water bars approved, authorized, signed off by
24 the Division in 1986, knowing full well what the water was
25 going to do. This is not complicated.

1 You have basically dirt mounds and the angle the
2 water goes down, and it goes down the outslope as indicated
3 by the plan into, basically, what is an ephemeral drain. I
4 won't even get into that. It is basically a paying oil
5 gully were water ought to go.

6 I can go on. After he explains that I say all
7 right. This is my question: "So by chronic, you mean it
8 is accelerated erosion and do you mean by that, that's
9 because there are man made structures put on the road; is
10 that correct?"

11 "And coupled with other facts in terms of slope,
12 we have no control over, it is a gully, lack of vegetation.
13 We have no control over. That happens to be a desert. An
14 amount of presip. I don't think Hidden Valley can control
15 the water high intensity runoff, which they couldn't
16 control, yes."

17 "QUESTION: But the primary--the reason is
18 because of water bars on the road, true?

19 "ANSWER: The road construction in the water
20 bars.

21 "QUESTION: All right. And the road construction
22 was approved by the Division, correct?

23 "ANSWER: That's correct. And the water bars
24 were approved by the Division, correct?

25 "ANSWER: That's correct."

1 Now. I don't think that you can get a much more
2 conclusive response. This is the fellow who's complaining
3 about that point. And he just testified that his concerns
4 about accelerated erosion are caused by the road and the
5 water bars. Both of which were approved by the Division.
6 Those are by the Division, and there, but for the Division
7 and their approval of the reclamation plan in '86.

8 So given the testimony, again the substantial
9 evidence test, and we cite a case, I think it is Brown
10 versus Tax Commission or something like that. It is a tax
11 commission case, where the court says, you must look at the
12 entire record and you must look at the evidence and in
13 support of a motion and the evidence that detracts from a
14 position.

15 I don't think there's any way that there's
16 substantial evidence that Hidden Valley didn't control the
17 erosion to the extent possible. That's the second part of
18 Part 1.

19 Now, let's look at the other parts of the NOV,
20 which we have in November 1991. We have violation Part 2
21 of 2 and there are two parts to this, your Honor. The
22 first part is failure to clearly mark the perimeter markers
23 in all disturbed areas. And they cite a regulation
24 614-301-521.251.

25 And basically what they're saying is, hey, we

1 don't like where your markers are put. Ticket them.
2 Problem. The markers had been there since 1987. That's
3 unrefuted. The testimony in the hearing of Mr. Joe Jarvis
4 on page 271 and 272 of the transcript is the only
5 testimony--is the only testimony in the entire record that
6 says anything about perimeter markers.

7 And what does Mr. Jarvis say? He is our witness.
8 This is our expert, consultant engineer. He has asked Mr.
9 Jarvis, "When were the markers put in?"

10 He said, "1987.

11 "Has anybody ever complained to you about the
12 position of the those markers?

13 "No, nobody said a peep until November 19 of
14 1991." So, given that fact, and given the standard of
15 review, if you have no evidence, none, to support the
16 position of the Division, you clearly can't have
17 substantial evidence, given the whole record as it exists,
18 to support their position, even forgetting estoppel issues
19 and inconsistent issues and unreasonable issues with
20 tagging them for markers which they knew had been there
21 since 1987. Never said a thing.

22 And the only thing that Malencik said about
23 markers, he never said the markers were in the wrong place.
24 He never said the markers should have been here. He never
25 said the markers were here. All he said was, there's a

1 rule you have to have markers. We concede that.

2 Now, the only other aspect of this, then, is
3 finally we have Part 2 of the final page, and that one is
4 with respect to, they claim that Hidden Valley failed to
5 seed and revegetate all disturbed areas. They cite a
6 regulation. I will concede it is correct. 614-301-354,
7 which does say that there is a seeding requirement with
8 respect to all disturbed areas.

9 The problem is, once again, you have no evidence
10 other than the reference by Malencik that we will--no, I
11 take that back. Here's what Malencik said.

12 Malencik said, "They didn't seed the disturbed
13 areas.

14 "Why?

15 "Because I went out there, I looked at the
16 disturbed areas. I didn't see seed." He said that.

17 The second thing he says, "I talked to Karla
18 Knoop. Ms. Knoop is a consultant for Hidden Valley. I
19 mean--I mean, she's a reclamation specialist. He's a
20 hydrologist. She has extensive training and education.
21 She is a reclamation specialist. He's a hydrologist. She
22 has extensive training and educational background, went to
23 Utah State. Has been involved in these issues for many
24 years, as she testified at the hearing. And Malencik
25 said--he admitted they didn't seed those disturbed areas.

1 Okay. But the problem is, the problem is once
2 again the Division has acted inconsistent, unreasonable,
3 and unfair with Hidden Valley. Because what happened, your
4 Honor, is in 1989, Hidden Valley submits an amendment to
5 its reclamation plan. And Joe Jarvis, in his testimony,
6 testified to this, and I--it is right after page 272. It
7 is about 4 pages. He testifies on that issue. Here's what
8 he said.

9 He said, yes, we did not seed all the disturbed
10 areas. What he is talking about, the out slopes off of the
11 this road. And the reason why Joe Jarvis said they didn't
12 seed those was for two reasons: One, they felt that it
13 would be counterproductive, if you have to go out and walk
14 on this out slope, you tend to deteriorate the quality of
15 that out slope. And you have to spread this manually, so he
16 said that wouldn't make much sense, because we are
17 concerned about erosion, we are concerned about the quality
18 of this out slope. You don't want a bunch of people
19 trampling on that after seeding it, so we decided that
20 wouldn't make much sense.

21 The second thing he said, we didn't manually seed
22 it. We had already put, consistent with the plan, a
23 vegetation requirement--we had already put in a bunch of
24 seedings and plants, and noticeably, the seeds of those
25 plants were now seeding that area and so we thought through

1 the natural processes of the development of these plans,
2 that's how it would be seeded.

3 And the problem is, the Division knows all about
4 this. Because in 1989 they amend the plan. And they
5 provided that amendment to the Division, and the Division
6 doesn't say, no, you can't do this. You can't do this.
7 You can't do this. The Division accepts it as part of the
8 plan. And they basically say they are not going to do any
9 further vegetation work, period. They can't.

10 Why are they not going to do that? By the way,
11 it is attached as an amendment to the plan. Is is dated
12 December 29, 1981. That is exactly what Mr. Jarvis
13 testified to. He says we decided--and once again, this is
14 not where the Division doesn't know what's going on. They
15 are all there at the time. They are consulting with these
16 people. They explain to them not only orally but pursuant
17 to that plan. There are certain portions of this project
18 we are not going to reseed. Does the Division say
19 anything? No. November of 1991, all of a sudden it
20 becomes a problem.

21 I think, once again, you have a situation where
22 there's absolutely no substantial evidence to support that
23 finding, and once again, you have the Division acting
24 inconsistently and unreasonably, arbitrarily and unfairly
25 with respect to Hidden Valley.

1 But, now, there's something else, too, that is of
2 some concern here. We have raised the issue of estoppel
3 and you know we cite a couple of cases, and I think the law
4 is fairly clear now in Utah that estoppel certainly is an
5 appropriate legal principle to be applied to governmental
6 agencies where otherwise they may have not conducted
7 themselves fairly with respect to the citizenry and put the
8 citizenry in a difficult position. And we cite to the
9 court the Celebrity Club case where the judge states it
10 very succinctly that the conduct of the government must
11 scrupulously just in dealing with its citizens. In other
12 words, the government is held to a very high standard in
13 the Celebrity Club case.

14 Of course you have the situation with the Liquor
15 Control Commission is basically saying to somebody, you can
16 go ahead and put your liquor club here because you are 600
17 feet from a school, and they write that into effect. They
18 go ahead and put 200 grand into the liquor club. And then
19 all of a sudden about two or three weeks later they change
20 their position, and the Supreme Court says you can't do
21 that because the Celebrity Club was entitled to rely upon
22 the representation of government.

23 Just as in this case, Hidden Valley is entitled
24 to rely on what the Division is telling it. Because once
25 again, it is important. There has to be certainty, there

1 should be consistency, and that Hidden Valley, as a good
2 corporate citizen--there's absolutely no evidence it is
3 not--is entitled to have that kind of relationship with the
4 Division. And to show you how--what I think is sort of a
5 conclusive on the anomalies and inconsistencies of the
6 position, because once again, I don't think the Division
7 can just jerk Hidden Valley's chain any time it wants to.
8 It is bound by the same rules, same regulations, and same
9 requirements as anybody else, and what--when they are
10 telling Hidden Valley, your plan is okay. You can make
11 these modification. You can do these things. You are in
12 compliance, Hidden Valley is entitled to rely on that.

13 But look at how bad it is, Judge, in terms of
14 whether or not this is a reasonably appropriate response on
15 behalf of the Division. Exhibit 78 is the inspection
16 report and Mr. Malencik, the chief witness, of course, has
17 his own inspection reports, but they only go through May of
18 '91. The effect it had on them in November '91, the
19 evidence is absolutely clear, nothing happened, nothing
20 magical happened between May of '91 and November of '91 on
21 that property. Wasn't like we had an earthquake or
22 anything like that down there.

23 On his April and May reports, right here,
24 compliance with permits and performance standard, every one
25 of the issues in the NOV, he checks off yes. Complies,

1 full compliance. There is no equivocation. But it even
2 gets worse. Because another inspector goes down there.
3 This is 18 days. 18 days before Mr. Malencik, with his
4 OSM inspector, tickets my clients, saying now we have got
5 these four major problems. And we're entitled to, just as
6 Hidden Valley is--I think you are entitled to reliance
7 again on what the division is doing, as a corporate
8 citizen, trying to do a reclamation job and trying to do it
9 as well as they can. And concededly in many respects, they
10 have been exemplary in their conduct. They are entitled to
11 rely on this kind of information.

12 But there's a fellow who goes down there--this is
13 Exhibit 78--only 18 days before. And his name is Jess
14 Kelley. And Jess Kelley conducts a complete a
15 thorough--there's a partial and complete inspection. Makes
16 a complete inspection of this property that now supposedly
17 18 days later is problematic. And he says--he is down
18 there from 10:00 until 3:30 in the afternoon, five and a
19 half hours he is down there looking at this project.

20 And, Judge, you know, I asked Mr. Malencik at one
21 point about, could he see the water bars or something like
22 that. He said they are plainly visible. Once again, I
23 apologize for not having the photographs, but this is not a
24 difficult project to see everything. You know, you are out
25 in an area that is isolated. It is like hiking in the

1 canyons or--hiking in the canyons, or hiking in the desert.
2 You know, you walk through something and you see it. You
3 can see everything about it.

4 We have a video which I might even want you to
5 look at if you are really pressed for something
6 interesting. There's a video which shows those areas and
7 you can see that there's nothing hidden about any of this.
8 It is all up there, easily to be seen by anybody. If you
9 are there five and a half hours, you're really looking at
10 it real close because it is not that big. I mean, walking
11 all of this half-mile road, you can kind of eyeball
12 everything. Five and a half hours is a long period of
13 time.

14 Anyway, he is there five and a half hours. Right
15 here he has compliance with permits and performance
16 standards. This is one of their reports. Remember the
17 testimony was, we are supposed to make this accurate. We
18 are supposed to be correct. It means there is money in
19 this. I think Mr. Liddick testified that what this means
20 is there's full compliance with all applicable rules and
21 regulations. I think Mr. Malencik testified to that.

22 And as far as signs and markers, yes. Total
23 compliance. No question. 18 days before there's not a
24 problem. And this is consistent with every other
25 inspection report that has been done since 1987. That was

1 Jay Jarvis' point.

2 You look at revegetation. That is the other
3 issue. What does he check? Yes. Same thing. Total
4 compliance with all applicable rules and regulations.

5 You look at roads. And they have four
6 categories. They have construction, drainage controls,
7 surfaces and maintenance of it. Every one of those things
8 is checked yes, once again. There is not a problem. This
9 inspector says that full compliance with the permits and
10 performance standards and applicable rules and regulations,
11 but it even gets worse.

12 As far as the inconsistency of the Division,
13 there are comments. And what they do is they have a place
14 where they can check comments, then they have, you know, a
15 couple of sheets and they have inspection report comments.
16 Well, what he does, he says about the pertinent issues that
17 evidently Mr. Malencik was concerned about--signs and
18 markers, this is 18 days before. He says the sign
19 identification, sign was in good repair and clearly visible
20 at the entrance to the site. Nothing said about there's a
21 problem with any signs and markers.

22 What does he say about the diversions, which
23 supposedly are problems? No. The roads. Drainage
24 control--this is what he says right here. Drainage
25 controls, water bars, and diversion on the main reclaimed

1 road, the one I told you about, are functioning well and in
2 good condition. And yet here we have a situation where 18
3 days later all of a sudden we have this major league
4 problem.

5 I'd submit that given that factual history, of
6 the Division repeatedly--repeatedly saying to my client,
7 you are doing a good job, you are in full compliance, there
8 is no problem, that the Division should be estopped from
9 now taking a position inconsistent with that of November
10 19th. And I don't think the fact record is at all anything
11 but absolutely clear that that's precisely what occurred as
12 indicated by what I just showed you in terms of the report
13 by Mr. Kelley just 18 days before.

14 Now, the final issue I want to address, I know
15 there are four legal issues but I'm not going to address
16 the issue of jurisdiction because I think it's been
17 adequately briefed on both sides. I am not going to
18 address the issue of the interim standard versus the
19 permanent program standards. Once again, I do think that's
20 a fairly clear legal issue. I think it has been adequately
21 briefed by both sides.

22 I want to say something about the statute of
23 limitations issue, which also I think is a pertinent issue
24 that I think the court can clearly decide this case based
25 upon that question. It is esoteric, but bear with me

1 because I think--I think I can make it somewhat clear.

2 In the Mined Land Reclamation Act which was
3 passed in 1975, which was the 40-8 act, that has two years
4 statute of limitations in it--I think it is 40-8-9 and at
5 that point in 1975, had four subsections, 1, 2, 3, and 4.
6 And the statute of limitations, two years, was subsection
7 4. In 1980 the Division passed--no, I'm sorry, the Board
8 passed a rule, a reclamation, and it basically said that
9 under the Coal Mine and Reclamation Act, that particular
10 statute of limitations, subsection 4, was determined
11 inconsistent with the Coal Mining Reclamation Act, which
12 actually was passed, I believe, in '79. So it came later,
13 so therefore, it sort of ran out, if you will, of the Coal
14 Mining Reclamation Act, the two-years statute, and that was
15 the law up until 1987. And that's where we have a change.
16 And that's our point.

17 In 1987, Judge, two things happened: One, the
18 Mined Land Reclamation Act was amended. The 1975 act was
19 amended. And the section I have read, 40-8-9 which had
20 four subsections in it, they deleted subsection 1 and 2 and
21 instead took 3 and 4 and made them 1 and 2. So now your
22 two years statute of limitations was now subsection 2 as
23 opposed to subsection 4.

24 The other thing that happened in 1987 is the
25 Board once again went over its ruling and made some changes

1 in its rules--and made some changes in its rules and
2 adopted a rule that we cite in our brief, which now said in
3 some repetitive form, that subsection 1 and 2 were deemed
4 consistent--I am paraphrasing--were deemed consistent with
5 the Mined Land Reclamation Act, and so therefore what you
6 have now is a rule in 1987 which is different in impact
7 than 1980.

8 Specifically in 1983, read out the two-year
9 statute of limitations, and specifically in--and expressly
10 in 1987 they read it back in. That was the condition of
11 the law in 1991 when we were cited in NOV. There was a
12 two-year statute of limitations because that particular
13 provision was not changed until 1991. In fact it was
14 repealed December 31, 1991. It was in effect November 19,
15 1991.

16 The point of all this is that the Board can't--it
17 is not empowered either by our Utah rule making act or a
18 general agency and administrative law principles. It is
19 bound by its own rules. And the Board can't say when it
20 has a two-years statute of limitations in 1987. It can't
21 say that that is not an applicable rule. And the only
22 thing the Division responded--of course we are talking
23 about a 1980 rule--there was a change in 1987 that changed
24 the whole dynamic. And the interesting thing is, this is
25 absolutely consistent--absolutely consistent with the

1 testimony in the evidentiary hearing, because Ron Daniels
2 testified in the hearing and Ron Daniels is a division
3 employee and probably the most senior division employee I
4 know. Ron has been there forever and is very knowledgeable
5 about these things.

6 I asked him specifically about this point,
7 because we were trying to establish the correctness of the
8 two-years statute of limitations and whether there was
9 agency practice which will once again support our claim
10 that the two-years statute in 1987 was applicable. And Ron
11 Daniels testified that yes, the agency had applied a
12 statute, two-years statute of limitations previous to his
13 testimony. They had done it in context where they were
14 acting as hearing officer.

15 For example, Barbara Roberts, former assistance
16 Attorney General is somebody he mentioned would apply
17 two-years statute of limitations in certain kind of
18 context. I asked him specifically whether or not that
19 would have occurred in 1987 because that was the salient
20 date when there were these changes both in the Mined Land
21 Reclamation Act and also the rule. He did not say
22 definitively, yes, but he did say, "I think so." And
23 that's consistent with our argument that there is, in fact,
24 a two-year statute of limitations not only by law, but
25 there's a two-year statute of limitations by agency

1 practice. And if that applies--if that applies, then
2 clearly these things are barred--time barred by the
3 two-year statute.

4 So, in summary, your Honor, I think those are the
5 most important points, I think for purposes of today, I'd
6 like to argue. But I do think it is important we once
7 again remember that under the standard review here, if you
8 feel because the statute does say unreasonable or
9 unjust--if you feel there's a problem with respect to the
10 way the Division has functioned vis-a-vis my client and in
11 such a way that it is inconsistent and not appropriately
12 exists in the past hour, that in and of itself would be
13 supported and by the standard of view that's pertinent
14 here. Thank you.

15 THE COURT: Thank you.

16 Mr. Stirba, if I may ask you a few questions. I
17 appreciate the fact that you are not arguing every point
18 you brought up on your appeal. However, if I grant--if I
19 decide in your favor regarding the jurisdiction question in
20 this matter, who if any agency, or if anyone at all, would
21 have jurisdiction over the site.

22 MR. STIRBA: Well, I think in terms of a
23 reclamation, I'm not sure that anybody would. Other than
24 perhaps the Office of Secure Phase Mining, because there is
25 a vehicle--obviously where there is a statute issue,

1 there's some state law that is pertinent to the resolution
2 of that, where the state folks don't do what the Feds think
3 should be done, the Feds can step in and take some action.
4 So certainly I think for purpose of any protection, if
5 there was a real public interest here, that was going
6 unproductive, which I don't there is, and I don't think the
7 record supports--I think the Fed could exercise
8 jurisdiction over Hidden Valley and I think they would.
9 That's consistent with what we already know. The OSM goes
10 with the state guys all the time.

11 THE COURT: Secondly, is there any difference
12 between the application of interim standard and permanent
13 standard? In your brief you have said it should be
14 controlled by the interim standards but there is no mention
15 as to what--as to how that differs from those of permit
16 standards.

17 MR. STIRBA: Well, the interim standards are
18 different because interim standards are very general and
19 much less specific than the--than the particular rules and
20 regulations which are mentioned in the NOV.

21 THE COURT: But wouldn't it have the same force
22 and effect, though, regardless of which--if I rule as to
23 the interim or permanent, isn't the same force and effect
24 on your client the same?

25 MR. STIRBA: Generally speaking I would say

1 probably from a--from an agency view point, yes.

2 THE COURT: And also as to the doctrine of
3 estoppel, and I am aware of the Celebrity Club case that
4 you have cited in your brief, I see a factual difference
5 and will allow you time to explain. That Celebrity Club,
6 to their detriment, relied upon the opinion of the Liquor
7 Commission in allowing them to maintain their location, and
8 in fact, paid \$200,000 or so to bring it up to standards.
9 And then was told later by the Commission that no, our
10 previous statement to you is wrong, you are not allowed to
11 maintain the club at that location.

12 As contrasted, I see in my mind, I don't see what
13 HVCC has relied upon to their detriment and to do something
14 positive, similar to Celebrity Club, in investing
15 additional \$200,000 for their powers, whereas in your--HVCC
16 are good corporate citizens who would be required to do
17 these things anyway. Do I make my point clear?

18 MR. STIRBA: Absolutely. I am glad you brought
19 that up. That was my point of testimony of Malencik. What
20 they did is, if the Division didn't like the road, the
21 Division could have said, change the road. They relied on
22 the Division accepting road in the condition that it was
23 in, inherently causing some erosion. If the Division
24 didn't like the water bars, didn't like the way the water
25 was going to run down the water bars, run off the outslopes

1 into that ephemeral drain, the Division could have said, we
2 don't like that change. We are not going to approve it.
3 They didn't do that. They put in the water bars.

4 Then we have five years later, five years later,
5 Malencik testifies that was the point of that. He
6 testifies the real problem is the water bars and the road.
7 Well, they relied on the Division signing off on their
8 plan, and they put them in reliance on that. And you can't
9 now change the facts. That's the essence of the estoppel
10 issue.

11 And everything Judge--because remember in '87,
12 and in '89, there were major league storms that hit that
13 area, and there were repairs done on those water bars. As
14 I told you, there were additional water bars as Ms. Knoop
15 testified, put in at the behest of the Division. One
16 against this was the concept for reclaiming that road.

17 If the Division didn't like that, they should
18 have told them. And remember, Hidden Valley is not sitting
19 here idly when it does these things in terms of what it
20 means to them. They hire consultants because they are--you
21 have to hire people with--experts in the field of
22 reclamation. The consultants cost money. The engineers
23 cost money. The configuration costs money. All of this
24 costs money. And is not really all that distinction from
25 Celebrity Club investing their 200 grand, because Hidden

1 Valley has invested in that concept and that program and
2 that plan. And if there was a problem with that plan, the
3 Division has a duty, and it was incumbent upon them in '86
4 to say, out of here, and they didn't do that.

5 THE COURT: Thank you, Mr. Stirba.

6 MR. STIRBA: Thank you, Judge.

7 THE COURT: Mr. Mitchell, Mr. Richards?

8 MR. MITCHELL: Thank you, your Honor. I think
9 Mr. Stirba dramatically illustrates the importance of the
10 appellate rules which were required that on appeal you
11 don't get to retry the case. You don't get to introduce
12 new facts. You don't get to basically try your case again
13 and change the standard of review. So, I think, what Mr.
14 Stirba has would put it as is. He is like a defendant in a
15 criminal case. He is in front of a jury and as many
16 rabbits as you can set loose in the room to work to his
17 benefit, to cry and create some reasonable doubt.

18 I want to address only one factual matter. I
19 think it is so crucial, it goes to your question--if I can
20 approach the bench.

21 THE COURT: Thanks. It is in the record.

22 MR. MITCHELL: These are from the record, the
23 exhibits of the pictures--the first group of pictures which
24 are in the record show the actual mining activity on the
25 site. The second group--

1 THE COURT: Hold on a minute, Mr. Mitchell.

2 Mr. Stirba, are you acquainted with these photos?
3 I imagine they are part of the record.

4 MR. STIRBA: They are, judge. I am aware of them
5 and the only thing I want--to give fair and equal time, we
6 have a great video.

7 THE COURT: As you said, if I am going to look at
8 it--

9 MR. STIRBA: That's right.

10 THE COURT: Go ahead.

11 MR. MITCHELL: The other deals with the gullies
12 themselves that are cutting in as slope. The only thing I
13 want to address, since he brings it out, and it is not
14 something that was raised, or discussed, or argued, or made
15 anything of at the time of the hearing, is what happened
16 when they put their plan in front of the Division? What
17 they did was, they made a cost benefit analysis. The
18 Division doesn't make their plan for them. The Division
19 says, yes, if you want to do it this way, you can do it
20 this way, if you think you can meet performance standards.

21 They don't require you to remove a road when you
22 come in and say, your Honor, we want the road here for
23 post-mining purposes, because we want to be able to
24 continue to move cattle up there. The bottom line is we
25 don't want to remove that dirt. It would be expensive to

1 move that road. What we want to do is leave it there and
2 we'll take care of maintenance, recognizing that is going
3 to be a really high maintenance structure. We think we can
4 do it money ahead, maintaining it as opposed to removing
5 it.

6 That's something--the Division isn't God. The
7 Division says, you are big boys. You have got your
8 experts. You get to make up your own mind how you want to
9 do it, but if you do it that way, you have still got to
10 make your reclamation plan, which you designed, which you
11 paid for. You have got to do what you said in there. And
12 evidence from Joe Jarvis is, no, we didn't think--we have
13 good reason for not doing it, but we didn't do it.

14 With regard to the revegetation putting the
15 perimeter markers in, nobody denies--and those pictures
16 show you that there's erosion going on there. Now, this
17 thing can really be solved quite simply. The reason it can
18 be solved quite simply is because we do have rules of
19 appellate procedure, which allows us to look at something
20 on appeal, and not have to retry the case again, and not
21 require you to go back and look at videos, and hundreds and
22 hundreds of pages. It is called a marshalling requirement.
23 And the marshalling requirement requires Hidden Valley--Mr.
24 Stirba to say, this is the evidence in the record on which
25 they rely. And we don't think that that's substantial

1 evidence.

2 In State vs. Larsen the Court of Appeals said
3 this, "is not a case of exalting hypertechnical adherence
4 to form over substance. A reviewing court is entitled to
5 have the issues clearly defined with pertinent authority
6 cited and is not simply depository in which the appealing
7 party may dump the burden of argument and research. The
8 marshalling requirement provides the appellate court the
9 basis from which to conduct a meaningful review of facts
10 challenged on appeal."

11 Challenging the findings of the Board based upon
12 the evidence in front of the Board that they relied upon
13 and said, okay, this is what's there. That's all you can
14 find in his brief, period. I defy you in either the
15 opening brief or the reply brief to find anywhere where he
16 cites a single fact in support. And yet if you look at our
17 brief, you can see a substantial amount of that. You
18 should at least see some of the argument in our brief from
19 the record in his brief.

20 The court went on to say, "The appellant argued
21 only selected evidence favorable to his position." If
22 that's not what happened here, I don't know what is.
23 That's all they did. They presented no evidence supporting
24 the trial court's findings. Appellant's approach does not
25 begin to meet the marshalling burden that must be carried

1 because appellant failed to marshall evidence in support of
2 the trial court's findings and show how those findings are
3 clearly erroneous, not some other evidence, we affirm the
4 factual findings of the trial court.

5 Now, Mr. Stirba has argued to this court and he
6 is correct, this is not an APA case. This is in front of
7 this court. If this was in front of the Court of Appeals,
8 and the statute had been made to conform with the APA, that
9 would be true. But what this case is, this is a case of
10 review of the evidence that was relied on by the trial
11 court, not evidence of the complete record.

12 Now, the two cases that are particularly helpful
13 in that respect--let me also point out to you Heinecke
14 versus Department of Commerce which is 810 P.2d 459 Court
15 of Appeals case, which is in footnote 7.

16 Says, "While it is true, as recognized in Grace
17 Drilling, there is a distinction between the 'substantial
18 evidence if viewed in light of the whole record' test,"
19 which is what Peter is arguing you should look at, "and
20 other less exacting standards of appellate review, this
21 distinction does not obviate the need to marshal the
22 evidence. Although the marshalling requirement has been
23 most ardently adhered to in cases applying a 'clearly
24 erroneous' standard. The marshalling requirement is
25 equally applicable under the substantial evidence test."

1 Now, when you look at Grace Drilling, and
2 particular when you look at Vali Convalescent case, cited
3 by Mr. Stirba, and if you look at Vali Convalescent, which
4 is 797 P.2d, if you look at page 443, and you look at their
5 footnote 6, talking about the difference between pre APA
6 cases, which this is an APA cases, it says, "The Utah
7 Administrative Procedures Act is not applicable to this
8 case," which is also true here, "has modified somewhat our
9 standard for reviewing the factual determinations of an
10 administrative agency. Somewhat less difference"--in
11 the--they said Grace Drilling--"somewhat less difference is
12 accorded in connection with the review of an agency's
13 factual determinations when the Administrative Procedure
14 Act is applicable, given the act's reference to
15 'substantial evidence when viewed in light of the whole
16 record before the court.'"

17 So Mr. Stirba, I am afraid, misleads you when he
18 tells you you are supposed to look at what other evidence
19 you might consider if you were considering this de novo.
20 You, only in this case, look to see that there's support
21 for that.

22 Your Honor, in this--on this review, there are
23 only a couple of questions of pure law. And as to those
24 questions of pure law, you are in as good a position as the
25 agency to make those determinations.

1 As Morton Salt, which I think is the case Mr.
2 Stirba was trying to think of, which was 814 P.2d 581,
3 which is an APA case, and probably the best Supreme Court
4 case on the APA and standard of review, talks about and
5 whether--and as they point out, this is true, whether APA
6 or not an APA review--you must determine whether or not the
7 agent--to determine when the agency is entitled some
8 difference on a question of law, you must determine whether
9 or not the agency has been entrusted with some
10 particularized discretion. But by the legislature, and as
11 far as the elements of the estoppel, that's clearly not
12 true. The elements of estoppel are most recently set forth
13 by important Plateau.

14 In terms of statute of limitations, while the
15 principle is persuasive, the statute either applies or it
16 doesn't apply. The rest of it is facts to which this court
17 must, unless they find the facts they relied on are not
18 substantial, are very nonbasis to them, must uphold and mix
19 questions of law in fact where the court must find no more
20 than that the application of law and fact had some
21 reasonable and rational basis, you need only--you need only
22 as a question of law look at those two points.

23 Now, other elements of estoppel, Plateau sets
24 them out clearly and I think, your Honor, has it exactly
25 right. The point in time--we look at the time the NOV was

1 written. That's all that was in front of the Board, the
2 reclamation plan, how it should have been approved,
3 shouldn't have been approved, whether they made a bad
4 decision at deciding to keep the road and the high
5 maintenance problems associated with it. That's not in
6 front of the Board at that time.

7 What is in front of the Board is when the
8 inspection occurred, was there a violation on the grounds?
9 Did those gullies exist? Did they, in any way, receive
10 anything directed to them that said you are not required to
11 meet the performance standards on those outsoles in terms
12 of those gullies? No, they didn't receive it. They didn't
13 it. In fact what they received is warnings.

14 As far as the outsoles are concerned, the best
15 example would be, you have somebody come into your
16 courtroom. They say, you know, I have been driving the
17 same street for a long time. And I often exceed the speed
18 limit by five, sometimes ten miles an hour. And
19 periodically the cop, who is on that stretch of road, would
20 pull me over, give me a warning, which is what we had here.
21 A warning on these erosion problems. And then one day I
22 went by at 70 miles an hour and there was another cop there
23 as well, and this time the guy gave me a ticket.

24 Well, your Honor, I have been lulled into
25 thinking that I could speed down this section of road until

1 this guy, and never receive anything more than a warning.
2 And I don't think this court would have any problem
3 understanding estoppel doesn't apply.

4 As far as perimeter markers, either the perimeter
5 markers were there and the vegetation, the seeding effort
6 had taken place as required by the plan, prepared and
7 submitted by Hidden Valley or it didn't.

8 Now, when they say--when they come into the
9 Division and they say, we are entitled--and this is their
10 argument: Assume for a moment that bond release was at
11 all--one bond release was at all relevant to vegetation
12 standards on the disturbed areas. If that was true, then
13 what it would mean is they could come in and they'd say, we
14 want a whole chunk of our bond back. And we are entitled
15 to it because we are representing, as a factual matter to
16 you, that we have done the things that we said we'd do in
17 the plan.

18 And National Wildlife says, the case out of
19 Washington, construing the federal statute which our
20 statute is based on, looks exactly like--says when an
21 operator makes a representation to the agency about a state
22 of affairs, the stated facts are true, the agency is
23 entitled to rely on that. But if it is determined at a
24 later date that that state of affairs is not true, i.e.
25 inspectors went out there and over time, they noticed

1 finally toward the end, particularly--somebody came out and
2 looked at it with fresh eyes, that you have got grass
3 growing where it was seeded and you don't have grass
4 growing where it wasn't seeded. And you go, hey, that's a
5 disturbed area, and it become visually apparent to the
6 inspector now, because you have vegetation success in some
7 places or you don't have vegetation success in the other
8 places. You will pull out the map and you go, "I'll be
9 darned. These guys not only didn't put these perimeter
10 markers where they belong, they didn't seed it and they
11 denied it."

12 Nowhere do they have a single document that says,
13 you know, it is okay. You don't have to follow your plan.
14 You can move your perimeter markers and they have them up
15 here, and ignore that down there. Nowhere in the record is
16 there a single statement like that. Nowhere in the record
17 is there a single statement that says, no, you don't have
18 to revegetate those areas, which in your plan you said
19 you'd revegetate. Doesn't exist.

20 The only other area that is an area of mixed law
21 in fact is the intent to mine. The statute says, intent to
22 mine. Intent to mine, and says no more. Either I mine or
23 intended to mine.

24 You have in front of you pictures that show the
25 activity done under applying permit. The record is clear

1 that they had a nonconditional permit. They had a permit
2 that allowed them to mine. The only conflicting evidence
3 is the opinion of somebody who was never even employed by
4 the company at any relevant period of time. And in his
5 opinion, subjectively at this point in time, it is like
6 bringing in the defendant's girl friend in the robbery and
7 she says, "You know, I didn't know him then but I know him
8 well, and it doesn't make sense to me that he really would
9 have intended to take that money." And say that's not even
10 reasonable doubt, probably. It certainly isn't sufficient
11 to undermine document, after document, after document of
12 contemporaneous statements, the photographs that show the
13 tons and tons of earth moved in preparation. What other
14 evidence would they have?

15 They brought in somebody who said, well, I guess
16 the most you can say about this project is they made a lot
17 of money in reliance upon a certain price of coal, and they
18 disturbed a lot of ground in reliance of a certain amount
19 of coal, and they got approval to do all this in reliance
20 upon a certain price of coal. Then the coal market
21 dropped, so what did they do? Did they come in and say, we
22 are shutting it down? No. They said, we'd like to go into
23 temporary suspension. We'd like to be in a position where
24 we aren't required to come back and start reclaiming
25 immediately. We want to have our cake and eat it too. We

1 want to still have our permit, still have the right to
2 continue to go forward with the operation at any time, not
3 have to come in and reclaim.

4 So, what is it the Board has to determine? The
5 Board has to determine objectively, from the objective
6 facts stated at the time the activity occurred, what their
7 objective state of mind was when they disturbed this soil.

8 You know, if the court were to find as a matter
9 of law, and it was to be upheld and so forth, there was no
10 intent to mine, then no one would have jurisdiction. If we
11 don't have jurisdiction, the federal government doesn't
12 have jurisdiction, it would then be what's called an
13 abandoned mine program, an abandoned program, and the
14 Division would then go out with public funds and have to
15 maintain and reclaim it with public dollars. We would have
16 jurisdiction, not overhead. But we would have jurisdiction
17 to spend public money to do what Hidden Valley had managed
18 to get out of that. That would be the impact of that.

19 Finally, and it is esoteric, we have the statute
20 of limitations. Now, I think--and it is--let me, if I may
21 approach the bench, give you for demonstrative purposes,
22 the first page which shows in March 1980 what the law was.
23 And it is fairly clear under the coal rules adopted in
24 1980. In fact it is not fairly clear, it is as clear as
25 you can ever get, that the Utah Mine Act was superceded,

1 deemed to be inconsistent.

2 In 1987 the legislature changed the statute.
3 What's also true in 1987 is, Mr. Stirba is right, the
4 Division, working with the operators, with their counsel,
5 with their environmental subcommittee, drafted a completely
6 new set of rules which completely superseded the UMC rules.
7 614-1(Q) was dropped and the office of Surface Phase Mining
8 found to be the effective rules in the new rules, 614-1 et
9 seq.

10 Unfortunately, it is true, nobody ever told the
11 Division of Administrative Records that these 614-1(Q)
12 rules weren't being used. Nobody noticed that until 1991.
13 Unfortunately, whoever was advising the Division in 1987
14 didn't follow through to make sure they didn't have two
15 sets of rules on the racks; however, there's two points to
16 that. One is to maintain privacy as a matter of federal
17 law, as a matter of common law, which supercedes statute
18 law; no rule can have effect of law unless it is approved
19 by the Office of Surface Mining and the Office of Surface
20 Mining, in 1987 only approved the new rules.

21 Secondly, the bottom line is this court can only
22 go--can only do that which the statute supports. And the
23 statute is clear that--and Peter cites the language in his
24 reply brief--it could only apply to Mined Land Reclamation
25 Act, to the Coal Act, where they aren't inconsistent, and

1 Peter's brief essentially concedes that. That there is no
2 authority anywhere for the Coal Act to have a two-year
3 statute of limitations, so it is inconsistent. It is a
4 matter of statutory interpretation and this court is
5 capable of making that, whether or not the statute of
6 limitations in 40-8.

7 It is clear what the Board thought. The evidence
8 is clear on that, that it was inconsistent, whether by
9 implication, it can be made applicable. These rules don't
10 make it applicable. The statute makes it applicable, or
11 not applicable, depending on whether or not it is
12 consistent. The rules simply tell you back in 1980 that it
13 clearly wasn't, and the Board never did anything. You were
14 different. It was the legislature who changed the
15 numbering but it doesn't make it more consistent or less
16 consistent. Doesn't speak to that issue at all. The case
17 law tells you whether it is consistent or inconsistent.

18 Now, I guess I'd just like to know if you have
19 any questions.

20 THE COURT: I do. So there is a two-year statute
21 of limitations, but your argument is, it doesn't apply in
22 this particular instance, based upon the interpretation of
23 case law, correct?

24 MR. MITCHELL: There is--in another act there was
25 a two-year statute of limitations. In our act if something

1 in the Mine Act is not inconsistent, it may be used in this
2 act. So to determine whether 40 dash anything--in 40-8 may
3 be used in the Coal Act, you must determine whether it is
4 consistent.

5 THE COURT: So if it is inconsistent there is no
6 statute of limitations?

7 MR. MITCHELL: No statute of limitations.

8 THE COURT: Isn't that against public policy as
9 well as--well, doesn't that go against the grain of the
10 whole idea of having closure at one time or another or to
11 have someone protected from limit and perpetuity.

12 MR. MITCHELL: No, I don't think so. I think
13 National Wildlife states it pretty well in that case. That
14 was the nub of the issue: At what point is the mine
15 operator free from liability? The mine operator is free at
16 the end of the statutory period of liability unless you
17 determine that he has misrepresented to you a certain state
18 of affairs. In other words, the public interest is not
19 served by somebody knowingly failing to do something they
20 have a legal obligation to do.

21 An inspector not catching it for some reason,
22 within the ten-year period and saying, "got you," because
23 all you have done now is shifted it. These people bought
24 liability for ten years based upon their plan. Either they
25 are following their plan or they weren't following the

1 plan. Either they are meeting performance standard or they
2 are not. If they followed their plan, they don't make
3 misrepresentation at the end of ten years, their liability
4 ends. That's what they signed off for.

5 THE COURT: When would that ten-year term run?

6 MR. MITCHELL: It begins to run when the first
7 stages of reclamation are complete.

8 THE COURT: And that was the Phase 1 return of
9 the bond, part of the bond on the Phase 1 part of the
10 reclamation; is that what you are saying?

11 MR. MITCHELL: Let me verify that.

12 MR. RICHARDS: I believe it starts to run the
13 date the first stage of regulation is complete. The bond
14 release is irrelevant to that. It would start to start
15 ticking when reclamation was done, then there's that period
16 to make sure that reclamation complies with the performance
17 standard.

18 THE COURT: Complete reclamation or partial
19 reclamation?

20 MR. MITCHELL: Complete reclamation. There's
21 reclamation success and then there's, you have done
22 everything on the ground you need to do, now we need to see
23 if you have got success.

24 THE COURT: I understand that, Mr. Mitchell. So
25 what your position is, not until a complete reclamation,

1 either a submission of complete reclamation by HVCC or
2 termination by the Board of the Division, there's complete
3 reclamation in the first place, only after that time does
4 the ten-year period start to run; is that you are telling
5 me?

6 MR. MITCHELL: I don't want to represent--because
7 I'm not that clear on it myself, on exactly the exact date.

8 THE COURT: Mr. Richards, can you help out on
9 that?

10 MR. RICHARDS: I think what you are getting at is
11 reclamation is complete. They have done what they said
12 they would do, then it is a question of, do they meet
13 performance standards during this ten-year period? The
14 ten-year period has started to run here. It is
15 significantly into it.

16 I think what you are getting at is, do they have
17 to complete all the performance standards for a significant
18 period of time, then does ten years start?

19 No, the ten years start when they have put the
20 things on the ground they said they would do, then it
21 starts.

22 THE COURT: In this case, specifically, then,
23 when did it begin, the ten years? When did it begin?

24 MR. RICHARDS: Around 1987.

25 THE COURT: 1987? Was that contemporaneous with

1 the commission of the reclamation?

2 MR. RICHARDS: If the reclamation plan gives the
3 start--to start reclamation, they put it on the--when the
4 work is completed, the bond clock starts.

5 THE COURT: All right. All right. The other
6 question that I have, other questions on this, you
7 indicated that the HVCC had previously in the past received
8 warnings, and where is the factual support for those
9 warnings, and can you give me some reference to that?

10 MR. MITCHELL: Yes. If you look in our reply
11 brief--oh, excuse me--in the main brief, I believe you will
12 actually find those documents in the Appendix as well as
13 under section 4 where the Division is not estopped, on page
14 21--beginning on page 25 of our brief.

15 "In addition to its direct communications with
16 Hidden Valley, the Division continually warned of the
17 erosion problem in its monthly inspection reports 831, 833,
18 835, 854, 74, 889, 921, 924, 925," and it states to
19 Addendum X, which is full of inspection reports.

20 THE COURT: Okay. And included in Addendum X was
21 that inspection report prior to the issuance of the NOV,
22 which gave in fact warnings to HVCC of placement of
23 perimeter markers and/or reseeding of the outslopes?

24 MR. MITCHELL: No, those warnings only were
25 addressed to the continual erosion. It is undisputed that

1 the Division--as I say, until really fresh eyes
2 noticed--that certain disturbed areas were experiencing
3 vegetation success and others weren't; that there was a,
4 you know, let's get out the map, something is wrong
5 here--and it was discovered by the Division that indeed
6 they had not placed the perimeter markers as they had
7 represented at the boundaries of the disturbed areas. They
8 had not complied with their plan and revegetated, seeded at
9 all. Never put seed in. There's a difference between
10 seeding something and saying we are not all that pleased
11 with how that seeding is done; how it is doing.

12 In terms of what more we can do, you know, we
13 might suggest that we say what is not done. We are
14 concerned with the effects of walking on it. That's
15 relevant, if you seed it in the first place. In this case
16 what they acknowledged, no, we never seeded, we didn't put
17 in the perimeter boundaries where it says there in the
18 plan.

19 THE COURT: Which leads into my final question,
20 Mr. Mitchell. Are you asserting that 18 days after the
21 original inspection, 18 days prior to the issuance of the
22 NOV, there was an inspection where it was determined to be
23 full compliance; your factual basis for the issuance of the
24 NOV, 18 days later is the revisional observations of the
25 inspectors to indicate that something was amiss and then

1 they brought out the maps and was indicated by the maps
2 that the parameters were not as stated in their plan; is
3 that what your point is?

4 MR. MITCHELL: Yes, I think it is fair to say
5 what the inspection reports reflect with regard to the
6 perimeter markers, is that there was an assumption on the
7 part of the inspectors going out there for a substantial
8 period of time, that those perimeter markers were in the
9 right place.

10 THE COURT: Okay.

11 MR. MITCHELL: And of course, you know I--you
12 can't find a single document that says, Hidden Valley,
13 before you place those perimeter markers, let us go out
14 with you, we want you to put them right here, forget what
15 the map says, forget what the plan says, we want you to put
16 them right here, and you can rely upon this. Telling us,
17 put them right here.

18 We never told them where to put it. They said
19 where they put it. They didn't put it where they said they
20 put it, and it is undisputed the Division visually did not
21 catch that until particularly fresh eyes saw the situation.

22 THE COURT: That would account for the issuance
23 18 days after compliance inspection that the NOV were
24 issued?

25 MR. MITCHELL: Right. Remember the compliance

1 things are--these are not representations to the operator
2 that you never have to meet performance standards, that you
3 can modify your plan, that if erosion gets out of
4 control--it is like when you pull the person over for
5 speeding you say, I am giving you a warning ticket and then
6 you come by the next day, you go past--and in this case you
7 can see from looking at the pictures, we are getting
8 increased erosion.

9 You say, I am not giving you a warning ticket
10 this time. I am giving you the ticket.

11 THE COURT: Thank you, Mr. Mitchell.

12 MR. MITCHELL: Thank you.

13 THE COURT: Since this is new to me as to
14 appeals, do we have rebuttal and do I give both the
15 opportunity for rebuttals? I will do it any way that
16 counsel feels--

17 MR. STIRBA: I really do feel this is summation.
18 Since we are, in essence, the plaintiff, I think we have
19 the opportunity to provide rebuttal argument briefly.

20 MR. MITCHELL: I think it is not at all like a
21 trial. It is like an appeal, and on appeal the appellant
22 does get rebuttal, so I have no problem with that. Just
23 let's not buy into this in any way that this is something
24 other than appeal.

25 THE COURT: Thank you.

1 Thank you, Mr. Stirba. Sorry for the
2 interruption. I have got another matter that I am behind
3 on about an hour, and I apologize to counsel who is sitting
4 out there.

5 You may continue.

6 MR. STIRBA: I will try to be brief.

7 The reason why I appealed the trial, 40-10-30,
8 which says there will be a trial on the record, that's
9 where I get it from. I am not making this stuff up. Now,
10 I want to just address that question about the 18
11 days difference as, supposedly, what happened to the
12 perimeter markers. Not to belabor the point, the problem
13 is there is no evidence in the record to support the
14 representations that were made in court. There is
15 absolutely no testimony in the record about the perimeter
16 markers at all. There is no testimony about whether or not
17 they were in the wrong place or not. There is absolutely
18 no testimony that there was some confusion on the part of
19 the Division. There is absolutely nothing in the record,
20 so based upon the record before the court, there is nothing
21 to support it and therefore it can't possibly be
22 sustainable.

23 I want to address the statute of limitations and,
24 the question that came up about the consistency. I think
25 that the diagram in the chart is helpful because I think it

1 finally will flesh out what we were saying and the
2 Division's position. The problem is, and what I think is
3 pertinent is, if you look at the 1987 sheet, which is the
4 60-page, you find an answer to the consistency question
5 right in--contained in the rule.

6 This is the Board's own rule adopted in 1987.
7 And it specifically says, "The following provision of the
8 Utah Mined Land Reclamation Act, and its impending
9 regulations are determined consistent with the provision,
10 not specifically adopted, are determined to be
11 inconsistent."

12 What did they specifically adopt which the Board
13 was saying was consistent? And if you go right across to
14 the left there, you see they adopted 1 and 2. Two is the
15 2-year statute of limitations, and I'd submit, Judge, once
16 again, on the record, not something we are hypothesizing
17 Ron Daniels wouldn't have testified to existence and
18 application of a statute of limitations which the Board--if
19 the Board's agency practice wasn't to apply 1, and that's
20 exactly what he testified below. It is clearly unrefuted,
21 there is no question about it and the reason why he said
22 that.

23 Once again, the reason why I asked him. Was it
24 post '87? He said, I think so. Is because right here is
25 what you have in '87. You have the Board, by it is own

1 rule, adopting 1 and 2 and 2 is the 2-year statute of
2 limitations. And the Board can't ignore this, disregard
3 its own rule.

4 Finally, I just want to say one thing about this
5 issue of compliance. You know, you don't know how much
6 clearer it can be if you look at those inspection records.
7 I don't know how many times a division, a state agency has
8 to tell somebody they're in full compliance without it
9 being clear, in fact they are in full compliance, and there
10 isn't any question about it.

11 It isn't a situation where somebody is speeding
12 down the road and a police officer doesn't ticket them,
13 then all of a sudden one day he does. It is the situation
14 where somebody is going down the road, he is always doing
15 the speed limit and the police officer never tickets him.
16 All of a sudden, he tickets him. He says, wait a minute, I
17 was doing 55. The officer says, I just changed the signs.
18 It is now 50.

19 That's the problem. That is exactly what
20 happened to Hidden Valley. Every single report they talk
21 about warnings. Judge, this is a fact sensitive issue.
22 You have to--if you look at those inspection reports, they
23 are not warnings. What you have is you have them
24 indicating full compliance on their inspection report in
25 almost every single one, on almost every single inspection.

1 And that Mr. Malencik issues NOV, then what you have is
2 sometimes it says, you have got to watch this, sometimes
3 you have got to watch this. You might want to do this.
4 These are like suggestions. But the important fact is,
5 once again, as both Mr. Malencik testified and Mr. Liddick
6 testified, when I asked them, I said, "Now, you do those
7 reports and those reports are going to be accurate, true?

8 "True.

9 "And those reports are to show whether somebody
10 is in full compliance with all rules and applicable
11 regulations, true?

12 "True."

13 And then I asked him, "And they are supposed to
14 be accurate; isn't that right?

15 They both said, "Yes, that's right."

16 Well, that's the important point. They are not
17 going down there to have a picnic. They are not going down
18 there to just to be outdoors. They are going down there to
19 look at that mine site and, you know, those perimeter
20 markers, Judge.

21 It is almost preposterous. They are not hidden
22 under the ground. They are not somehow camouflaged. You
23 are talking about sticks that are about four feet high.
24 You can't not see them. It is like everything else down
25 there. There is nothing hidden. And you know, this is the

1 desert. This is in Emery County. This is the middle of
2 November, where--and I am telling you, short of an
3 earthquake, life doesn't change that much from year to year
4 to year.

5 That's what you have got the Division acting like
6 all of a sudden, you know, between November 1 when Jess
7 Kelley was there for five and a half hours, five and a half
8 hours, giving a complete inspection, saying this is passing
9 inspection. Then all of a sudden 18 days later something
10 magical happens to change it. It didn't happen.

11 What you have, what you have, is exactly what I
12 referenced before. You have Mr. Malencik going down there.
13 Now the only significant change, he is going down there
14 with a federal OSM inspector. And Ms. Knoop testified that
15 was the first or second time he had been at the site. And
16 he looks at this thing. Who knows whether he is right or
17 he is wrong. He freaks.

18 And so Mr. Malencik feels some pressure now to
19 ticket Hidden Valley Coal Company, whereas up until this
20 time, for five and a half years nobody ever dreamed of
21 doing that. And that's the only reason why it happened.
22 And that ain't right, and that ain't fair, and that ain't
23 the way to treat a good corporate citizen who si trying the
24 best they can to reclaim a site, which everybody concedes,
25 and it is right there in the record, is extremely

1 difficult, extremely harsh site to cure.

2 I mean, under the best of circumstances, and
3 nobody is saying--nobody is saying there is not one shred
4 of evidence in the record that Hidden Valley isn't trying
5 to do a good job. They are not trying to shirk their
6 responsibility. That's not what this case is all about.

7 What it is, the Division can't jerk that
8 corporate chain anytime just because all of a sudden some
9 federal guy puts some pressure on. The other thing is the
10 bond clock is very real. Lujan is a good case. It kind of
11 has language that supports the Division's position and
12 supports our position. It a good case, at least for one
13 proposition. It is clear we all agree on it. It is
14 consistent with the question you asked.

15 The purpose of reclamation isn't to have
16 impepetuity for liability. That isn't the deal. Lujan
17 says if there are new technologies that come out, you can't
18 sit there and say, well, now, you have got to do the new
19 technologies. That isn't fair. This all of a sudden
20 changes. What if there was a earthquake. That isn't fair.
21 That's not Hidden Valley's fault. It just wrecks
22 everything. At the time those big storms come in, they
23 were one in one hundred year storms. Hidden Valley isn't
24 responsible for that.

25 You can only reclaim something where reasonably

1 anticipated and to be expected. That's exactly what they
2 did, what Lujan said. You can't have imperpetuity
3 liability. The reality here, and the real problem here,
4 other than the fact there has been some real changes, is
5 that by upholding this NOV, upholding this NOV, then you
6 restart--not you, but in essence, the concept is that bond
7 clock starts all over again. So they have got another ten
8 years in the soup where you can have the same problem that
9 they have had before.

10 All of a sudden--the Division goes along and says
11 you are fine, you are fine, you are fine, you are fine, and
12 then all of a sudden for some reason some inspector says,
13 oh, no you are not, and tickets them. Again, they are back
14 in another ten years. That isn't fair. That isn't what
15 the reclamation program is designed for. You have to tell
16 them everything, give them a 60 percent release. This baby
17 is done. There isn't that much more to do, if anything.

18 And here we are going to put Hidden Valley in a
19 position of having to worry about this for another ten
20 years. That's the problem and that's why Hidden Valley is
21 in the position it is in today, and that, I think, given
22 the total factual record, which is I think, what you have
23 to look at, is the total record. That's certainly conduct
24 that is unreasonable, unjust and arbitrary on the part of
25 the Division.

1 And respectfully, I know it is difficult when you
2 argue, you kind of want to say certain things certain ways
3 but, respectfully there is absolutely no evidence in the
4 record about some of that. All of a sudden they
5 misrepresent--they made--or all of a sudden these
6 changes--that's why all of a sudden we had magical changes.
7 There is nothing--it is clear the magical changes, because
8 what's with the OSM guy. Judge, you know as well as I do
9 that agency governmental guys, they try their best, and
10 many times they do a very responsible job. But there are
11 times--there are times, certainly, when for whatever reason
12 like in the Celebrity Club, or like what I think in this
13 case, things happen which are just not fair to somebody who
14 is trying to deal with the government. You have that here
15 and that's why the NOV is not sustainable.

16 THE COURT: My last question to you: Are you
17 concluded?

18 MR. STIRBA: Sorry. I have, Judge.

19 THE COURT: My last question, supposing I do
20 dismiss all of the matters pending against HVCC and we go
21 back to square one, the status quo before the NOV; is that
22 correct

23 MR. STIRBA: Yes.

24 THE COURT: And then HVCC then would only be
25 bound by the reclamation plan that they had previously

1 filed.

2 MR. STIRBA: And the amendments thereto which
3 once again, they weren't going to seed certain areas. The
4 Division didn't say anything about that. Remember, that's
5 something wrong of NOV. That is what has been going on
6 repeatedly. Knoop testified to this. It is clear in the
7 inspection reports they were contacted when the storms
8 would come in there would be a problem. Hidden Valley
9 would be asked to replace this water bar. Could you put in
10 new water bars. They always did.

11 See their concern is not curing the problem.
12 They want to basically--what the Division asked, and there
13 is no evidence they have never not done that, their problem
14 is, if you jacket up to the level of NOV, which is the
15 first time it ever got to that point, and then you so find,
16 they got renewed liability all over again. That's the
17 problem. It isn't that they want to resist the Division or
18 they don't want to assist the Division in doing what is
19 reasonable and responsible. And they have done that in the
20 past and I'm sure they will continue to do it in the
21 future. But they sure as heck don't want the liability
22 that is attached, which we think inappropriately given the
23 success and overall conduct in this reclamation plan.

24 THE COURT: Wasn't there an opportunity for HVCC
25 to comply and be purged of the NOVs, prior to today's date?

1 MR. STIRBA: No. They got ticketed. As soon as
2 the 19th hit, they got the NOV. And if there is a finding
3 of the NOV that bond clock starts. In other words Malencik
4 didn't say, oh, wait a minute. Wait a minute, why don't
5 you fix and repair this or do something else. There was
6 nothing like that.

7 THE COURT: That was your argument to me. As I
8 recall it is as to the issuance of the TRO and as to the
9 inspection pending their hearing. And correct me if I am
10 wrong, that you said that there was no reason to comply
11 with the NOV due to the fact that then it would make the
12 appeal moot.

13 MR. STIRBA: Uh-huh.

14 THE COURT: Today you are saying--I don't want to
15 misrepresent you today--you are saying they complied with
16 it anyway. We just don't want to have an NOV over our head
17 to start the bond clock ticking again. Am I wrong or
18 am--on my analysis there?

19 MR. STIRBA: No, I think you're right. I am
20 saying this once again, I am saying this is--I am not
21 saying this is in the record. What I am saying is, if the
22 court's concerned that somehow the reclamation project
23 would be totally undermined if it set aside this NOV, I
24 respectfully submit that isn't the case. There is nothing
25 in the record that would suggest that Hidden Valley

1 wouldn't continue to do what it has done, which is in the
2 record in the past, that is, if they is a request made by
3 the division, they will find those requests.

4 The resistance here has been in essence twofold:
5 They are trying to get out from under the reclamation
6 project. They are not in the business of reclaiming
7 compliance. They are a sand and gravel company. They just
8 want to get this thing done. Well, you can't get it done
9 if the NOV is found against them because you have the added
10 exposure. And the second thing is, which is more of a
11 policy issue, they thought they were doing everything they
12 were expected to do, which is consistent with the record,
13 and now all of a sudden there is uncertainty here. So you
14 have those two problems.

15 THE COURT: Thank you, Mr. Stirba

16 MR. STIRBA: Thank you

17 MR. MITCHELL: Your Honor, your recollection is
18 absolutely correct and the issue is exactly as Peter said
19 couple of week ago to you, the NOV is irrelevant to the
20 bond clock. The NOV is irrelevant to any extension of
21 anything. The issue is, if they go back and reseed, will
22 that start the bond clock? Maybe yes, maybe no, but
23 whether the NOV is upheld or not upheld is irrelevant to
24 that issue. It is the issue of, if you were supposed to
25 start it, then your seeding at the time of the bond clock

1 started and you walked through time without seeding it,
2 finally do seed it, and it is ten years for everything,
3 including revegetation, and you wait until 1992 to finally
4 seed, will that starts the ten years? That's nothing the
5 Division did. That's them failing to put the seed on the
6 ground, which they said they would do in their plan. There
7 is the plan which they agreed to do, which is approved.
8 Some plans are better than some others sometimes.

9 You know, it is like taking care of a car in a
10 garage. That's a cheap way, but if it dies on you out on
11 the highway, it will be real expensive. There is the more
12 expensive way but its a lot better maintenance solution
13 down the road. They took the high maintenance solution and
14 they are paying for it. The Division cannot protect adults
15 from their own behavior.

16 This is not an APA case under Grace Drilling,
17 under the other cases I cited to you. It is substantial
18 evidence in terms sufficient to support the Board's
19 determination, not sufficient evidence on the whole record.

20 Finally, aside from the fact that you have got a
21 plan and you have got a performance standard in the record,
22 and you have got those at Exhibit 3, R-614, Exhibit 4,
23 R-614 and R-615 dealing with hills and gullies and
24 revegetation. You have got Hidden Valley itself through
25 their consultant, Joe Jarvis, telling you why he didn't

1 think he ought to comply with the plan. Through their own
2 witnesses you have evidence they didn't comply with the
3 plan.

4 Bottom line is, you don't get to make up the
5 rules as you go along. The fact that somebody gives you
6 warnings and works with you and works with you and works
7 with you, doesn't give you a license when finally they can
8 go no further in working with you because those gullies
9 have gotten so deep and you haven't done what you were
10 asked to do, which is to control that head cutting there at
11 those road bars. And you haven't done what you said you'd
12 do because they believed you. The Division is not estopped
13 by believing something that turns out to be an incorrect
14 statement.

15 This is a case where after being told what the
16 plan was, the building of the building for the liquor club,
17 and being told this is what you have got to do, they go
18 ahead and do something different and when they do something
19 different, they suffer consequences for it. The liquor
20 club case isn't the same at all. You are absolutely right.

21 THE COURT: I have no questions for you, Mr.
22 Mitchell. Thank you very much.

23 Both sides submit it?

24 MR. STIRBA: I do, your Honor. Thank you

25 MR. MITCHELL: Submit it, your Honor.

1 THE COURT: I appreciate all those voluminous--I
2 appreciate the very good briefs prepared for me with the
3 courtesy copies. Obviously a lot of work and time has gone
4 in this. I'm not prepared to rule from the bench on an
5 issue of this complexity. I will invite you to reconvene
6 at 1:30 tomorrow if that does not conflict with your
7 schedules for my decision in this matter. Is that
8 acceptable to you, Mr. Stirba?

9 MR. STIRBA: Tomorrow is Thursday?

10 THE COURT: It is.

11 MR. STIRBA: Yes, that would be fine, yes,
12 thanks.

13 THE COURT: Mr. Mitchell or Mr. Richards?

14 MR. MITCHELL: Yes, I think that would be fine.

15 THE COURT: I don't anticipate it being very
16 long. I'm not going to open it up to any questions. I
17 will take the bench and render my decision. I am advising
18 the you to be here. If you are not here, I will still do
19 it.

20 Thank you very much, gentlemen.

21 We will be in recess.

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REPORTER'S CERTIFICATE

STATE OF UTAH)
 : SS.
SALT LAKE COUNTY)

I, NORA S. WORTHEN, an official court reporter for the Third Judicial District Court in and for Salt Lake County, State of Utah, do hereby certify that I reported stenographically the proceedings in the matter of HIDDEN VALLEY COAL COMPANY VS. the UTAH BOARD OF OIL, GAS & MINING and the UTAH DIVISION OF OIL, GAS & MINING, Case No. 920904813 CV, and that the above and foregoing is a true and correct transcript of said proceedings.

Dated this 3rd day of March 1993.



Nora S. Worthen, CSR, RPR
Utah License No. 205