

0005

cc: JWB
JWB
JWB
11-23-93 JWB
JWB ACT/15/007

FABIAN & CLENDENIN

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

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

GEORGE D. MELING, JR.
WARREN PATTEN
M. BYRON FISHER
STANFORD B. OWEN
WILLIAM H. ADAMS
ANTHONY L. BARNETT
PETER W. BRUNING, JR.
THOMAS CHRISTENSEN, JR.
DENISE A. DRAGOO
JAY S. BELL
DANIEL W. ANDERSON
GARY E. JUBBER
BOBBIAN J. BELESS
ANNA W. BRACE
W. CLAREN BATTLE
KEVIN N. ANDERSON

RANDY K. JOHNSON
NORMAN J. YOUNKER
MICHELE MITCHELL
JOHN E. S. ROBSON
DOUGLAS B. CANNON
DOUGLAS J. PAYNE
ROBERT PALMER REES
DIANE H. BARKS
P. BRUCE BADGER
JOHN (JACK) D. BAY
KATHLEEN H. SWITZER
CRAIG T. JACOBSEN
BRUCE D. SEEMANBYDER
BROCK L. SEEMANBYDER
DOUGLAS E. BREWER
CRAIG E. HUGHES

OF COUNSEL
PETER W. BRUNING, SR.
RALPH H. MILLER

NEVADA OFFICE
KEVIN N. ANDERSON
2835 SOUTH JONES BLVD., SUITE 5
LAS VEGAS, NEVADA 89102
TELEPHONE (702) 367-4648
FACSIMILE (702) 288-8814

VIA FACSIMILE

November 19, 1993

RECEIVED

NOV 22 1993

DIVISION OF
OIL, GAS & MINING

(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.

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

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 outslopes 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 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

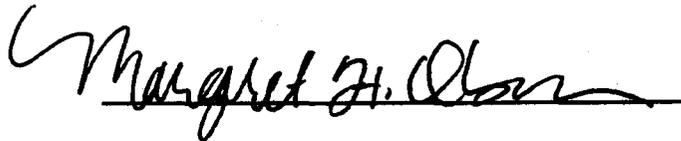
MARGARET H. OLSON

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



klhvcc1ru18.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

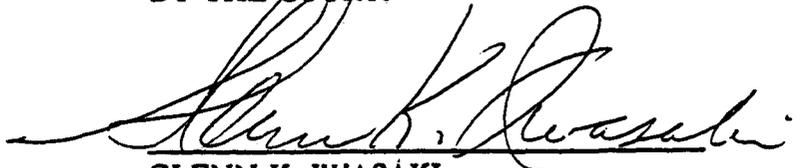
This matter came on for hearing September 29, 1992, before the Court pursuant to Plaintiff's Motion for a Preliminary Injunction. Plaintiff was represented by Peter Stirba, Esq. and the Defendants were represented by William R. Richards and Thomas A. Mitchell, Assistant Utah Attorney Generals. The Court 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.

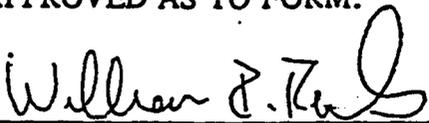
Dated this 9th day of October, 1992.

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

