





## United States Department of the Interior

### OFFICE OF SURFACE MINING

Reclamation and Enforcement  
Suite 1200

505 Marquette Avenue N.W.  
Albuquerque, New Mexico 87102

*cc: JWC, JPB, POF, BR.  
oig min file*

May 25, 1994

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

*Copy Joe to Bill  
FAX Malencik*

Re: Response to Ten-Day Notice (TDN) 94-020-190-01 TV1, Hidden Valley Coal  
Co. UT-015-007

Dear Mr. Carter:

The following is a written finding in accordance with 30 CFR 842.11, regarding the Utah Division of Oil, Gas and Mining's (DOG M) response to the above-referenced TDN.

Your office's response to the TDN, issued after a Federal oversight inspection at the Hidden Valley Mine, was received within the required 10 days.

According to the information provided by your office, the company has repaired the gullies by hand and intends to armor the areas subject of the TDN. This armoring was approved by DOGM as part of the plan to abate the vacated Notice of Violation N91-26-8-2 and is to be done within the next 30 days.

As the gullies covered by the TDN had been reshaped prior to the May 20, 1994, inspection conducted by Bill Malencik and Pete Hess, AFO finds that the response by DOGM to the TDN constitutes good cause for not taking further action.

Sincerely,

*Thomas O. Morgan*

Thomas O. Morgan, Jr., Acting Director  
Albuquerque Field Office

DISTURBED ENCROACHMENT ON IVIE CREEK

STREAM  
SEAM

ENCROACHMENT

TOP  
WIDTH

SLOPE  
MEASUREMENT

REMARKS

A

255'

65'

ROCK AT THE BOTTOM.  
SOME SUITABLE AREAS FOR SEEDING.

B

132'

33'

ALL ROCK.  
NO AREAS SUITABLE FOR SEEDING.

# EXHIBIT IX

## ATTACHMENT I

HIDDEN VALLEY COAL COMPANY  
ACT/015/007

### I. NOTICE OF VIOLATION

A. N91-26-8-2, 1 of 2, 11/22/91

\*\*R614-301-742.312.1 FAILURE TO MAINTAIN DIVERSIONS TO BE STABLE.  
\*\*R614-301-742.113 FAILURE TO MINIMIZE EROSION TO EXTENT POSSIBLE.  
\*\*ABATEMENT: SUBMIT PLANS TO STABILIZE DIVERSIONS AND  
MINIMIZE EROSION.

B. N92-25-1-1, 1/21/92

\*\*R645-301-731.610 DISTURBING LAND WITHIN 100 FEET OF IVIE CREEK  
WITHOUT AUTHORIZATION FROM THE DIVISION.  
\*\*ABATEMENT: COMPLY WITH R645-301-731.611 AND 731.620.  
SUBMIT AMENDED PAP TO DEMONSTRATE COMPLIANCE.

### II. EROSED GULLIES AT HIDDEN VALLEY COAL COMPANY ADDITIONAL EXPLANATORY INFORMATION

\*\*ADDITIONAL MEASUREMENTS: 3 EROSION GULLIES CITED IN THE VIOLATION DATED NOVEMBER 22, 1991 AND MEASUREMENTS OF 2 OTHER GULLIES THAT WERE ORIGINALLY OBSERVED AND NOT CITED IN THE VIOLATION.

\*\*DATE: 3/10/92

\*\*MEASUREMENTS AND PHOTOS TAKEN BY: TOM MUNSON AND BILL MALENCIK IN THE PRESENCE OF JOE JARVIS

\*\*EQUIPMENT: 100' STEEL TAPE MEASURE, 24' TAPE MEASURE AND 35MM CAMERA WITH COLOR SLIDE FILM

\*\*WHERE: GULLY EROSION ON THE ROAD OUTSLOPE, 4 BELOW GATE AND 1 ABOVE GATE AND THE DISTURBED ENCROACHMENT ON IVIE CREEK (STREAM BUFFER ZONE)

any memo file  
 cc L. P. ...  
 P. Grubbs  
 W. Malencik  
 R. Daniels  
 J. Helfrich  
 JRN

**RECEIVED**

JAN 02 1992

DIVISION OF  
 OIL GAS & MINING

RECEIVED  
 JAN - 9 1992  
 DIVISION OF OIL  
 GAS & MINING PRICE UTAH

Understanding & handwritten notes  
 were prepared by Malencik in  
 identifying allegations and proposed  
 responses are attached. WRM 1/4/92

BEFORE THE DIVISION OF OIL, GAS & MINING  
 DEPARTMENT OF NATURAL RESOURCES  
 STATE OF UTAH

Mine File -  
 Encl.

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

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

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

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

been taken from the Mine since enactment of the Surface Mining Control & Reclamation Act of ("SMCRA") on August 3, 1977. Due to this fact, the Mine is exempted from regulation under SMCRA. #1

Section 701(13) of SMCRA defines an "operator" as one who removes or [intends] to remove more than 250 tons of coal in any twelve-month period in any one location. See § 40-10-3(7), Utah Coal Mining & Reclamation Act ("UMCRA").

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

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

It is clear that 250 tons of coal were not mined by Hidden Valley after August 3, 1977. In addition, the record is clear that Hidden Valley did not "intend" to mine 250 tons during the permanent program. Hidden Valley has been cited for alleged violation of a reclamation plan approved under the permanent program of UMCRA. A reclamation plan rather than a mining permit #2

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

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

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

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

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

#5

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

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

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

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

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

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

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

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

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

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

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

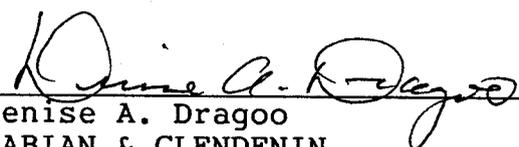
The regulation also strikes a reasonable balance between the gradual increase, due to improving technology, in what legitimately may be demanded of an operator, and an operator's need for certainty regarding closed sites. . . . It would not be appropriate . . . to require operators who had . . . met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

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

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

RESPECTFULLY submitted this 30th day of December, 1991.

BY:

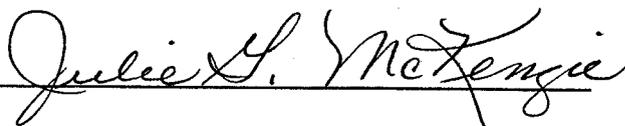
  
Denise A. Dragoo  
FABIAN & CLENDENIN,  
a Professional Corporation  
215 South State Street  
Twelfth Floor  
P.O. Box 510210  
Salt Lake City, Utah 84151  
Telephone: (801) 531-8900  
Attorneys for Hidden Valley Coal  
Company

CERTIFICATE OF SERVICE

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

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

DAD:123091a



*W. C. [unclear]*  
*1/21/92*  
*P. E. [unclear]*  
*Wm. Malvern [unclear]*  
*R. Daniels*

**FABIAN & CLENDENIN**

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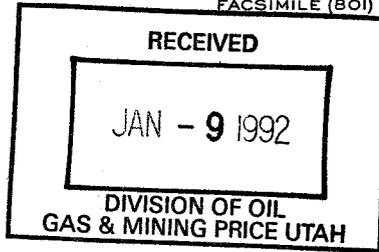
NORMAN J. YOUNKER  
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SANDRA K. ALLEN  
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LAURA L. MOSER  
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OF COUNSEL  
PETER W. BILLINGS

*J. Helrich*  
*DR. [unclear]*  
**RECEIVED**

RALPH H. MILLER  
BRYCE E. ROE  
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RANDY K. JOHNSON



December 31, 1991

*Mine File-Enf.*

HAND DELIVERED

DEC 31 1991

DIVISION OF  
OIL GAS & MINING

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

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

Dear Dr. Nielson:

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

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

LAW OFFICES OF  
FABIAN & CLENDENIN  
A PROFESSIONAL CORPORATION

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

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

Very truly yours,



Denise A. Dragoo

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

*File 12/11/1991 #5  
Copy Fran, Bill M.*

**FABIAN & CLENDENIN**

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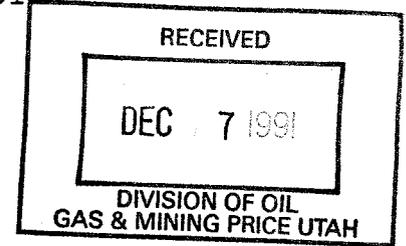
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PETER W. BILLINGS

HAND DELIVERED

December 11, 1991

Ms. Vickie Bailey  
Utah Division of Oil, Gas & Mining  
355 West North Temple, Suite 350  
Salt Lake City, Utah 84180-2303



RE: Notice of Violation No. N91-26-8-2,  
Hidden Valley Mine, Permit No. ACT/015/007 *min file - Enj.*

Dear Vickie:

On behalf of CalMat Company of Arizona ("Calmat"), we respectfully request the Division of Oil, Gas & Mining ("Division") to review the fact of violation of the above-entitled notice of violation ("NOV"). CalMat requests that this NOV be vacated and that the Division withdraw the required abatement action. CalMat is concerned that the abatement action requested by the Division will cause environmental harm to the permit area and will increase the period of time for which the operator is responsible for reclamation and revegetation success.

The current abatement time set by the NOV is December 20, 1991. We are requesting the Board of Oil, Gas & Mining to extend the period for abatement pending the Division's hearing on this matter.

Thank you for your assistance in this matter.

Very truly yours,

Denise A. Drago

DAD:jmc

- cc: Lee Edmonson
- Karla Knopp
- Dr. Dianne R. Nielson
- ✓ Pamela Grubaugh-Littig
- Lowell Braxton
- Susan White
- Tom Munson
- Thomas A. Mitchell, Esq.



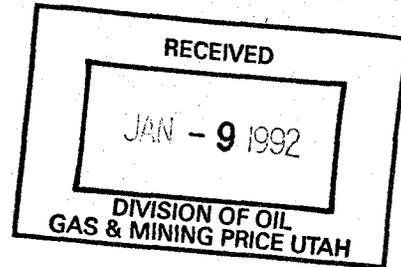
DEC 11 1991

DIVISION OF  
OIL GAS & MINING

**The CalMat Companies**

December 30, 1991

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



Dear Denise,

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

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

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

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

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

Denise Drago, Esq.  
December 30, 1991  
Page 2

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

Sincerely,

Hidden Valley Coal Company



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

LE/des















*big mining file  
cc: L. Burt Foell  
P. G. M. Burt Foell  
L. M. M. Burt Foell  
R. Daniels*

**FABIAN & CLENDENIN**

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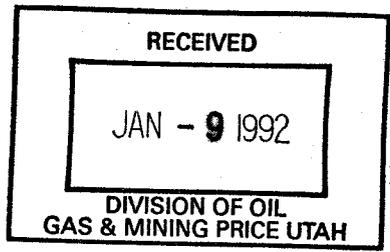
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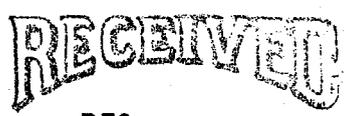
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Mitchell*

HAND DELIVERED



December 31, 1991

*mine file - Enf.*



DEC 31 1991

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

DIVISION OF  
OIL GAS & MINING

RE: Hidden Valley Coal Company *ACT/015/007*  
Memorandum of Points and Authorities Concerning  
Notice of Violation N91-26-8-2

Dear Dianne:

Enclosed for your reference is a copy of the March 12, 1979 Federal Register cited in our Memorandum of Points and Authorities in the above-entitled matter. As you will note at page 14916, OSM applies the requirement from removal of 250 tons of coal as a general exemption from regulation of surface coal mining and reclamation operations.

Please give me a call if you have further questions concerning this matter.

Very truly yours,

Denise A. Dragoo

DAD:jmc

cc: Lee Edmonson (with enclosure)

## RULES AND REGULATIONS

14915

areas without persuasive justification should not be adopted. (See also the discussion of the definition of "adjacent area" in the preamble to Section 701.5 below.)

8. Changes have been made in the permit and performance standard provisions of the rules to reflect the Office's interpretation that the phrase "at or near the mine site," used in the statutory definition of "surface coal mining operations," modifies only "loading of coal." The Office interprets the Act as setting no territorial limitation on its jurisdiction over other facilities identified in the statutory definition preceding "loading of coal."

*Resulting from or incident to.* The Office received comments which recommended changing the proposed definition of "resulting from or incident to."

1. A suggestion that the term be defined as "the reaction or outcome which would naturally or logically follow an action" appears to make no major change in the proposed definition.

2. Another commenter recommended the term be defined as "any documented cause and effect relationship."

OSM has decided not to define this term believing that a meaningful definition which would cover all situations is not possible. The causal relationship between the activities included in the definition of surface coal mining operations and the enumerated structures and facilities referred to as "resulting from or incident to such activities" cannot be accurately stated in a definition. Instead, the concept will have to be developed by application to case-by-case situations.

*Other minerals.* (proposed definition). OSM received two comments recommending the addition of a definition of "other minerals" in order to prevent operators, who are in fact mining coal, from using the loophole of "other minerals" when coal does not exceed 15% percent of the other mineral. The commenters cited an enforcement action arising under initial program regulations in which an operator alleged he was exempt from the Act because he was removing overburden as fill for a commercial construction project and that the coal being removed as an incidental matter was less than 15% percent of the tonnage of the overburden.

OSM believes that situations such as this can be taken care of by case-by-case inspection and enforcement actions. The Act defines "other minerals" in Section 701(14). Application of this definition to the phrase as it appears in the definition of surface coal mining operations should prevent abuse. For dirt or earth to be included within the definition, an operator

would have to show that the dirt or earth had commercial value and that coal was only an incidental byproduct of the extraction operation that amounted to less than 15% percent of the tonnage of the earth. Moreover, ambiguous cases would be governed by enforcement consistent with the remedial purposes of the Act.

#### § 700.11 Applicability.

Authority for this Section is Sections 523, 701 and 710 of the Act.

This Section repeats the exemption for those surface coal mining and reclamation operations which are exempted from regulation by the statute. Paragraphs (a) and (b) of this Section repeat the language of the statutory exemptions in Section 523 of the Act. Language is added to Paragraph (a) to limit the concept of noncommercial use based upon applicable legislative history. (S. Rep. 95-128, No. 95th Cong., 1st Sess. 97-98 (1977)).

1. Several commenters suggested revisions in the exemptions of Section 700.11. It was argued that the specific exemption of "landowner" in subsection (a) implies that "nonlandowners" do not share the exemption. Subsection (a) follows the language of Section 523(1) of the Act in this respect. Lacking clear congressional direction in the language of Section 523(1) of the Act or its legislative history, OSM is not prepared at this time to depart from the statutory language as suggested by the commenter.

2. A number of comments were received on Section 701.11(b). That section as proposed added language to that which appears in Section 523(3) of the Act for the purpose of eliminating interpretations of the statutory exemption which OSM felt would be contrary to congressional intent (see 43 FR 41668, September 18, 1978). Some commenters approved of the proposed language saying that without it, the 2-acre exemption "constitutes a tremendous loophole which would be continuously abused." Without some limitation commenters were concerned about unpermitted operators circumventing the law by skipping from one less than 2-acre site to another without reclamation. Other commenters felt the language was too restrictive. Specifically, commenters suggested (1) deleting the words "or intends to affect," (2) adding the phrase "at a single site or combination of sites," (3) adding a time limitation on the phrase "or intends to affect" and (4) substituting 250 tons as the basis for the exemption rather than 2 acres. OSM has rejected the suggested deletion of the words "or intends to affect." The language in the regulation to clarify that the first 2 acres of a larger operation or a series of less than 2-acre operations that are actual-

ly one mine are not excluded. This is felt to be the proper interpretation of congressional intent.

OSM has responded to other comments by changing the proposed language in Paragraph (b) to clarify that the Act and the regulations do not exempt operations conducted by the same operator at several sites that together exceed 2 acres regardless of whether they are situated so as to be considered one mine. However, OSM agrees in part with commenters who suggested that a time period should apply to operators intending to affect less than 2 acres. OSM believes that the time period should apply only to operations at physically unrelated sites such that an operator would be exempt from the Act and regulations if he or she affected a total of less than 2 acres at physically unrelated sites within 1 year. If the operator affected a total of more than 2 acres at physically unrelated sites within 1 year, he or she would not be exempt from the Act or regulations.

If a time period were not adopted, an operator would only be exempt from the Act and regulations for one 2-acre surface coal mining operation during his or her lifetime. Lacking a clear indication that this is what Congress intended, OSM does not believe such a limitation would be fair or is necessary to fulfill the intent of this section of the Act. Adding the 1-year time limitation is also responsive to the comment that the phrase "or intends to affect" might cover operations planned years in the future and miles away.

The time limitation should not apply to physically related sites, however, or else the mining of what is in reality a larger nonexempt mine may fall within the exemption. Should the 1-year period apply to physically related sites, an operator could phase the operation so as to affect less than 2 acres per year and qualify for the exemption.

OSM has rejected a suggestion to substitute 250 tons as the standard for exemption instead of 2 acres, as 250 tons is a limitation on the Act's coverage in the definition of "operator" in Section 701(13) of the Act. It is in addition to, not a substitute for, Section 523 of the Act and OSM cannot change an explicit standard in the Act such as the 2-acre standard.

3. Commenters suggested that proposed Paragraph (c), which has been redesignated as Paragraph (d), should be stricken or changed. That paragraph refers to the exemption based on Section 523(2) of the Act and is explained in Part 707 of the regulations. It governs coal extraction which is an incidental part of Federal, State, or local government-financed highway or other construction. The thrust of the

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## RULES AND REGULATIONS

comment was considered and rejected in Part 707 and therefore cannot lead to a change in Section 700.11. For further discussion see the preamble to Part 707.

4. The Office has added a new Paragraph (c) and relettered the Paragraphs that follow. Paragraph (c) sets forth the exemption provided by Section 701(13) of the Act in the definition of the word "operator" for persons who remove 250 tons of coal or less. The word "operator" is not used in the Act in all places at which responsibilities are imposed on those who mine coal. However, there appears to be no rational scheme for the use of the word "operator" and the use of words such as "persons" or "permittee." This unsystematic usage not only tends to support a broad exemption from Federal regulations for removing 250 tons or less of coal during a surface coal mining operation but also ensures that, if the exemption were limited to those sections of the Act where the word "operator" is used, the results would be an irrational and confusing regulatory scheme. Thus, the Office has adopted 250 tons of coal or less as a general exemption from regulation of surface coal mining and reclamation operations.

This exemption does not apply to coal exploration. Section 512 of the Act regulates coal exploration without regard to how much coal is removed in the process, although Section 512(d) hinges a requirement of prior approval on removal of more than 250 tons. The exemption of mining 250 tons or less, and the regulation of exploration that removes 250 tons or less, is consistent and rational. Explorations can have substantial adverse impacts over a relatively large area with the removal of only insignificant amounts of coal. Moreover, the regulatory burden on coal exploration is considerably lighter than that on a surface coal mining and reclamation operations.

5. Proposed Paragraph (d), which has been redesignated as Paragraph (e), provides the exemption for coal extracted incidental to the extraction of other minerals, an exemption which appears in the definition of surface coal mining operations in Section 701(28) of the Act.

6. One commenter suggested that mining on Indian lands should not be exempted from Paragraph (e) of the proposed Section, which has been redesignated as Paragraph (f). Regulations implementing Section 710 of the Act for the mining of coal on Indian lands are located in 25 CFR Part 177. Therefore, it is appropriate to exclude that category of mining from regulations in 30 CFR Chapter VII.

7. It was suggested that proposed Paragraph (f), which has been redesignated as Paragraph (g), be deleted in

order that coal exploration on Federal lands outside the permit area be included under the coverage of the Chapter. This proposal was rejected. Section 512(e) of the Act provides that exploration on Federal lands is to be regulated under Section 4 of the Federal Coal Leasing Amendments Act of 1975, and not under SMCRA. However, Section 4 applies only to coal exploration on unleased lands. Because of this, OSM believes the Act does not prevent OSM from regulating coal exploration within permit areas on Federal lands. See the preamble to Part 740 for more discussion.

8. Finally, it was suggested that the exemptions be expanded to exclude all small operators from coverage by the Act until the law and regulations can be changed. OSM has declined to follow this suggestion. OSM cannot create new exemptions not authorized in the Act where it is clear that Congress considered the Act's application to small operators and specified certain exemptions in Sections 502(c) and 507(c), and the definition of operator in Section 701.

#### § 700.12 Petitions to initiate rulemaking.

Authority for this Section is found in Section 301(g) of the Act which provides a petitioning process for initiation of a proceeding to issue, amend, or repeal rules issued under the Act. This process is set forth in Section 700.12 of the regulations and is basically the same as that of the initial regulatory program.

A change from the initial program regulation on petitions places a burden upon the petitioner to present facts, technical justification, and legal arguments which support the petition. If the petition concerns an existing rule, it must present justifications and arguments not considered in the previous rulemaking. The Director has authority to reject a petition which does not provide this information and create a reasonable basis for further consideration of the need to issue, amend or repeal a rule. This is also intended to eliminate the need for further consideration of petitions which are frivolous and do not provide a minimum threshold of information meriting the initiation of the administrative process.

The Director's decision on a petition is a final decision for the Department. This has the effect of opening the opportunity for judicial review of the decision without further appeals within the Department.

1. In response to a comment on Section 700.12, OSM has eliminated "State or local government" from Paragraph (a). The reference is not required because State and local governments are included in the definition of

"person," thereby entitling them to petition.

2. OSM has rejected comments which suggested that Paragraph (c) be changed to provide for direct notification to the petitioner rather than publication in the FEDERAL REGISTER. OSM feels notification in the FEDERAL REGISTER is the better course because it notifies the broadest possible group who may be interested in the petition.

3. It was also suggested that Paragraph (c) be changed to require a public hearing. OSM believes that a public hearing may not be necessary in all cases. It is sufficient, therefore, to provide for discretionary hearings. If hearings on the petition would be helpful, OSM anticipates holding them. Hearings will be conducted as part of the rulemaking process if one is initiated.

4. Some commenters recommended revising the Section to provide for judicial review pursuant to Section 526 of the Act if a petition is denied. By making the Director's decision final for the Department, the decision will be subject to judicial review. Specifying that judicial review is pursuant to Section 526 of the Act is unnecessary. Section 526 is applicable according to its terms. Adding language to the regulation could not serve to confer jurisdiction under Section 526 if Section 526 did not confer jurisdiction by its own terms.

5. A commenter suggested adding "practical reasons for the change, . . . if any" to 700.12(b) saying this is one of the most important things to consider when deciding whether to amend a rule. OSM agrees that practical reasons are important factors to consider but believes these will be reflected through "facts" which merit issuing or amending a rule. Therefore, because "facts" are included in 700.12(b), OSM found no reason to add the suggested language.

6. Commenters recommended deleting from 700.12(c) the sentence "facts, technical justification, or law previously considered in a petition on rulemaking on the same issue shall not be found to provide a reasonable basis." The commenters felt that situations, ideas and experience with a rule over time may change and make previously rejected facts, technical justification or law relevant. OSM agrees with this rationale but once again feels that the commenters' concern is addressed by the final language. In essence, the commenters are saying that over time facts concerning the implementation or experience with a regulation may change. Therefore, new facts would be relevant to a decision whether to issue or amend a rule and would be considered. For this reason, OSM has not adopted the commenters' suggestion.



program permit, such operations need not comply with the public participation and substantive reclamation requirements of the permanent program.

#### 4. Constitutional Law: Due Process

Due process requirements are met so long as notice is given and an opportunity to be heard is granted before deprivation of property becomes final.

APPEARANCES: Mark Squillace, Esq., Susan A. Shands, Esq., Washington, D.C., for appellant; Milo Mason, Esq., Walton D. Morris, Jr., Esq., Office of the Solicitor, for the Office of Surface Mining; Robert A. Creamer, Esq., Chicago, Illinois, for intervenor Midland Coal Company.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

Appellant appeals the decision of the Director, Office of Surface Mining (OSM), dated December 16, 1982, denying appellant's request for a Federal inspection and Federal enforcement action at the Midland Coal Company's (Midland) Mecco Mine in Knox County, Illinois.

Midland began a surface coal mining operation at the Mecco Mine in 1956. After the enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. s 1201 (1982), Midland obtained various interim permits from the Illinois Department of Mines and Minerals, including permit Nos. 567-79, 823-82, 824-82, 835-82, Gob 30, Gob 69, and Slurry 87. [FN1] By letter dated May 21, 1982, Phil L. Christy, Reclamation Director for Midland, notified Douglas Downing of the Illinois Department of Mines and Minerals, Land Reclamation Division, that Midland had declared a permanent cessation of operations at the Mecco Mine. [FN2] Christy advised Downing that reclamation activities consisting of topsoil replacement in parcel 2 of permit No. 823-82 [FN3] and haulage road reclamation work on permit No. 824-82 [FN4] were planned for 1982. He further advised that Midland was planning an additional 2 years to complete the reclamation on the haulage roads, support facility, and refuse areas; and requested an extension of time to December 1, 1984, 'to complete the reclamation grading on all above areas' (Christy letter of May 21, 1982).

On June 1, 1982, the Secretary of the Interior approved the Illinois permanent program. 30 CFR 913.10. That program provides, in part, that:

Not later than two months following the approval of the Illinois permanent program \* \* \*, all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of the Illinois permanent program \* \* \* shall file an application for a permit with the Department. Such application shall cover those lands to be mined after the expiration of eight months from the approval of the Illinois program \* \* \*. [Emphasis added.]

I. R. 1700.11(f).









We find that the foregoing material lends itself to the interpretation advocated by OSM before this Board. [FN13] Although the regulations refer to surface coal mining and reclamation operations, OSM argues that the use of the conjunctive 'and' rather than the disjunctive 'or' indicates that the regulations apply only when surface coal mining and the responsibility for reclamation occur together under the permanent program. Use of the disjunctive 'or' would have made it clear that reclamation activities, apart from mining activities, would require a permit. OSM states:

Both coal mining and the responsibility for reclamation must exist within a discrete jurisdictional time period for the requirements of that jurisdictional time period to be imposed. Because of the jurisdictional 'break' between the interim program and the permanent program, OSM believes that those operations which had extracted coal only during the interim program and which now engage only in reclamation activities are not subject to the permitting requirements of the permanent program. In other words, when surface coal mining occurs, it triggers the requirement of reclamation; and both activities are subject to the permitting requirements only during the jurisdictional period in which both activities occur. The regulations require permanent program permits only when surface coal mining and the responsibility for reclamation occur together during the permanent program. [FN6] When coal extraction occurs only in the interim program period and only reclamation activities occur after state program approval, the language of the regulations does not require a permanent program permit for the reclamation activities.

6 Of course, reclamation activities which follow coal extraction which occurs during the permanent program must be permitted until they are completed and the bond release occurs.

Of course, following this logic, what was a surface mining and reclamation operation for purposes of the interim program on May 31, 1982, was not a surface coal mining and reclamation operation for purposes of the permanent program on June 1, 1982, the date of Illinois' assumed primacy. It is OSM's position that this is both logical and practical. The interim program and the permanent program are separate regulatory regimes. If the two activities (coal mining and its concomitant reclamation requirement) that triggered the permit obligation in one regime are not present in the other, the permit obligation is not triggered.

Reply in Opposition to Appellant's Statement of Reasons at 7-8. We believe that the language and legislative history of SMCRA and the Federal and Illinois regulations, support OSM's position.

OSM further argues, as a matter of policy, that it is impractical to require mine owners to get a permanent permit when they have only reclamation activities left to complete under an interim permit 8 months after a permanent program has been approved. Although SMCRA clearly requires mining operations to be permitted, it also requires reclamation to be conducted once mining is undertaken. See sections 502 and 506 of SMCRA. Reclamation regulation is an important part of SMCRA. However, OSM argues that '[a]n operator who already

sold or contracted its coal at a price calculated without the extensive capital costs of obtaining a permanent program permit for \* \* \* reclamation activities after the interim program could face financial ruin' (OSM Answer at 8). OSM hypothesizes that the \$25,000 to \$75,000 estimated cost of a permanent permit could divert capital expenditures from reclamation activities. That result, of course, runs counter to the Congressional Intent to see to it that lands which are mined are reclaimed. Along these lines, OSM also suggests that out of economic self-interest, operators may abandon reclamation and forfeit bond rather than pay the expense of a permanent permit. Although these reasons alone, without support from SMCRA and the regulations, would not be sufficient to persuade us, they offer practical support to a conclusion derived from evaluating the material before us.

Thus, we conclude that where, as in Midland's situation, there was a permanent cessation of operations at the Mecco Mine prior to the approval of the State permanent program permit, the remaining reclamation operations may be completed under the interim regulations.

Consequently, appellant's request for a Federal inspection and enforcement action was properly denied by OSM because there was no violation under the Department's interpretation of SMCRA and the regulations. The State of Illinois interpretation of the regulations is consistent with the Federal interpretation.

[3] Appellant also urged that Midland should be required to submit an application for a permanent permit for its Mecco Mine reclamation operations in order to assure that the public participation and substantive reclamation requirements of the approved Illinois program will be met. The question is, under the circumstances of this case, whether Midland's reclamation operations are intended and required by SMCRA to be covered by the permanent program. We have decided that they are not. Consequently, if such reclamation operations do not require a permanent permit, then they need not be in compliance with the public participation and substantive reclamation requirements of the permanent program. Since Midland need not comply with the permanent program, its reclamation operations will continue to be subject to the interim permit requirements, with OSM and Illinois invested with the authority to continue enforcement of the interim permit until the work has been completed. Midland pointed out in its Answer that appellant 'participated in two full days of hearings conducted by the Illinois Department with respect to the interim program reclamation plans for Permits 823-82 and 824-82' (Midland's Answer at 6).

[4] In conclusion, we will briefly address Midland's argument that granting appellant's appeal would deny Midland due process. Midland, as an intervenor, had an opportunity to raise any relevant arguments to persuade this Board to reject appellant's position. Midland asserted, however, that if this Board were to find that the statute and regulations required Midland to obtain a permanent permit, the resulting retroactive revocation of Midland's existing interim program permit would result in a taking of Midland's property without due process. We do not so find and, contrary to Midland's argument, there is no





gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, clam banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities; \* \* \*.'

FN10 's 771.11 General requirements for permits--Operators.

'Except as provided for in s 771.13(b), on and after 8 months from the date on which a regulatory program is approved by the Secretary, no person shall engage in or carry out surface coal mining and reclamation operations on non-Federal or non-Indian lands within a State, unless that person has first obtained a valid permit issued by the regulatory authority under an approved regulatory program.'

FN11 's 771.21 Permit application filing deadlines.

'(a) Initial implementation of permanent regulatory programs. (1) Not later than 2 months following the initial approval by the Secretary of a regulatory program under Subchapter C of this chapter, regardless of litigation contesting that approval, each person who conducts or expects to conduct surface coal mining and reclamation operations after the expiration of 8 months from that approval shall file an application for a permit for those operations.'

FN12 See 43 FR 41687 (Sept. 18, 1978) and 43 FR 41688 (Sept. 18, 1978).

FN13 I. R. 1770.11(f) follows the language of section 502(d) of SMCRA, while I. R. 1771.21(a)(1) follows the language of 30 CFR 771.21(a) which is authorized by the more general language of 506(a) of SMCRA.

FNa GFS(MIN) 157 (1983)

FNb GFS(MISC) 37 (1983)

GFS(MIN) 96 (1984)

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COPR. (C) 1991 ROCKY MOUNTAIN MINERAL LAW FOUNDATION

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



*Mine File-Enf.*

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IN THE MATTER OF THE APPEAL : FINDINGS, CONCLUSIONS  
OF FACT OF VIOLATION : AND ORDER  
#N91-26-8-2, HIDDEN VALLEY :  
COAL COMPANY, **HIDDEN VALLEY** : INFORMAL HEARING  
**MINE**, EMERY COUNTY, UTAH : CAUSE NO. **ACT/015/007**

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On December 20, 1991, the Division of Oil, Gas and Mining ("Division") held an informal hearing concerning the fact of violation for the above-referenced Notice of Violation ("NOV"). The following individuals attended:

Presiding: Dianne R. Nielson, Director  
Division of Oil, Gas and Mining

Petitioner: Lee Edmonson  
Hidden Valley Coal Company  
("Hidden Valley")

Denise Dragoo  
Fabian and Clendenin  
Counsel for Hidden Valley Coal Company

Joe Jarvis  
JBR Consultants  
Consultant to Hidden Valley Coal Company

Karla Knoop  
JBR Consultants  
Consultant to Hidden Valley Coal Company

Division: Lowell Braxton  
Associate Director for Mining

Pamela Grubaugh-Littig  
Permit Supervisor

Susan White  
Reclamation Specialist

William Malencik  
Reclamation Specialist  
Issuing Inspector

Board: Ron Daniels  
Assessment Conference Officer  
Penalty Assessment

Joe Helfrich  
Assessment Officer  
Penalty Assessment

The Findings, Conclusions, and Order in this matter are based on information provided by the Petitioner in connection with this informal hearing, and information in the files of the Division. During the informal hearing, counsel for Hidden Valley presented arguments as to why the NOV should be vacated. Counsel offered to further brief the legal arguments and the presiding officer provided that additional briefs could be submitted by December 30, 1991. The Division agreed to planimeter the road, pads, and related outslope areas. This information was considered as part of the review of fact of violation.

In the brief filed by counsel for Hidden Valley, vacation of the NOV was requested, based on the following reasons.

1. Hidden Valley is exempt from regulation under the federal Surface Mining and Reclamation Act and the Utah Coal Mining and Reclamation Act because 250 tons of coal were not mined at the Mine and no coal mining activity occurred at the Mine during the interim program after January 3, 1977.

2. The NOV is barred by the applicable statute of limitation of two years.

3. The Division has waived or is estopped from taking enforcement action because the Division failed to require reclamation of road upslopes and outslopes (cut and fill slopes) in either the approved reclamation plan or prior to approval of Phase I bond release.

The Consultant for the Operator also stated during the informal hearing that the reclamation requested in the NOV would create additional damage to fine-particle-covered portions of the outslopes.

#### FINDINGS OF FACT

1. Notice of this hearing was properly given.

2. The Assessment Conference, to review the proposed penalties for NOV N91-26-8-2, was held immediately following this informal hearing regarding fact of violation. Requirement to pay the assessed penalty is stayed pending the decision in the informal review of fact of violation.

3. NOV N91-26-8-2 was issued on November 22, 1991. It includes two parts. Part 1 of 2 was written for failure to maintain diversions to be stable and failure to minimize erosion to the extent possible, in accordance with Utah Admin. R. 614-301-742.312.1 and 614-301-742.113, with respect to the road outslope and upslope. Part 2 of 2 was written for failure to clearly mark with perimeter markers all disturbed areas and failure to seed and revegetate all disturbed areas, in accordance with Utah Admin.

R. 614-301-521.251 and 614-301-354, with respect to the road and stream disturbed out slopes and road upslopes.

4. As enacted in 1977 and 1979 respectively, the Surface Coal Mining and Reclamation Act (SMCRA) and the Utah Coal Mining and Reclamation Act (UCMRA) both include the definition:

"operator" means 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. (emphasis added)

SMCRA § 701(13); Utah Code Ann. § 40-10-3(7).

5. UCMRA defines "coal mining" in the context of the term "surface coal mining" in part as:

activities conducted on the surface of lands...including excavation for the purpose of obtaining coal....

Utah Code Ann. §40-10-3(18).

6. Chapter III of the Reclamation Plan submitted and approved for the Hidden Valley Mine, includes the following description:

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. However by August, 1980 it became evident that economic conditions had changed and it was decided by the company to cease development.

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. Bulk coal samples were obtained from the existing exploratory audits 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.

Hidden Valley Coal Mine Reclamation Plan, Chapter III, pp. 1 and 4, May 1986.

7. In the minutes of a September 9, 1980 meeting of the Soldier Creek Coal Company Management Committee, provided by counsel for Hidden Valley, the status of operations of the Hidden Valley Mine are discussed:

After further discussion, and upon motion duly made, seconded, and unanimously carried, it was decided that:

(1) 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 as a mine and the costs of mining and hauling coal therefrom vis-a-vis the market for coal; (emphasis added)

Minutes of Soldier Creek Coal Company Management Committee, September 9, 1980, p.4.

8. As stated in Utah Code Ann. §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. (emphasis added)

9. Section III of Chapter III of the Hidden Valley Reclamation Plan (page 27) requires, in accordance with UMC 817.106, that:

The rills or gullies that may appear during post-reclamation monitoring will be stabilized by filling with soil and rock. Chronic sites will be stabilized with small gabions or rock check dams.

10. There is no map or other documentation in the Reclamation Plan which specifically identifies the areas included in the Disturbed Area, stated to be approximately 6.7 acres. The text of the report refers to the disturbed area, stating:

The disturbed area is approximately 6.7 acres consisting of an access road, pads and drainage control structures.

Chapter III, page 6.

Planimetry conducted by Division staff following the informal conference indicates that the area consisting of the road surface, pad areas with matting and graded/seeded, and sediment control structures (Plate III) total 6.1 acres. This acreage is consistent with calculations provided by Hidden Valley in response to the informal conference. Planimetry of that area plus the outslopes and upslopes of the road and the southern outslopes of the pads totals 9.1 acres.

11. Disturbed Area markers have been placed at both sides of the road. The markers were not placed at the foot of the outslopes or the top of the upslopes of the road.

12. There is no map in the plan which delineates the disturbed area boundary.

13. The Reclamation Plan states:

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

Chapter III, Section VI, page 56.

14. The Reclamation Plan is silent on the subject of revegetation of cut slopes of the road.

15. Both the Division staff and the consultant for Hidden Valley agreed that, because of saline soil conditions and concerns for fine soil profiles and rocky areas, seeding procedures may vary and may be largely accomplished through broadcasting.

16. The existing Phase I surety amount is sufficient to cover the seeding of the subject fill slopes.

#### CONCLUSIONS OF LAW

1. While Hidden Valley may not have "mined 250 tons of coal within a consecutive 12 month period," the documentation in the Reclamation Plan and the September 9, 1980 minutes of the Management Committee clearly indicate that they "intended to remove more than 250 tons of coal." Furthermore, the Management Committee "temporarily suspended" further development in September, 1980. It did not terminate development.

2. The Division did require and the reclamation plan requires stabilization of rills and gullies, including those which "may appear during post-reclamation monitoring."

3. The Division did require and the reclamation plan requires revegetation of the fill slopes associated with the road.

4. The reclamation plan is silent on requirements for revegetation of the cut slope of the road.

5. The Division did require and the reclamation plan requires revegetation of the fill slopes of the pads.

6. It is not possible to determine whether the fill slopes associated with the road were included in the disturbed area acreage, and hence considered in the determination of reclamation surety. The plan provides for reclamation of those fill areas. Planimetry data is not consistent with the stated acreage of the

disturbed area. There is no map in the plan which delineates the disturbed area boundary. However, failure by Hidden Valley to properly designate the fill slopes as disturbed area or failure to include the area in the reclamation calculation does not obviate the responsibility of Hidden Valley to reclaim the fill slopes, as described in the plan.

7. The Division has not waived and hence is not estopped from taking enforcement action.

8. The statute of limitation does not apply.

9. Hidden Valley's consultant has indicated that they did not seed the fill slopes of the road or the subject fill slopes associated with the pads. There is no information to indicate that the Division was aware of those facts at the time of phase I bond release. The success of erosion mitigation measures, including prevention of rills and gullies and reestablishment of vegetation is ongoing during the reclamation period. The reclamation plan and the performance standards require mitigation when problems are noted by the operator or the Division. Because that monitoring and preventative action is an ongoing responsibility, it cannot be stayed by any statute of limitations.

#### ORDER

NOW THEREFORE, it is ordered that:

1. NOV N91-26-8-2 parts 1 of 2 and 2 of 2 are upheld, except with respect to revegetation of the cut slopes of the road

as discussed in Part 2 below.

2. Hidden Valley is directed to submit the plans and move the disturbed area markers, as required in the NOV. The Division will work with Hidden Valley or its consultant to approve seeding plans, including exemptions from ground disturbance in areas where appropriate to minimize erosion of existing soils. Although the Reclamation Plan omitted vegetation of the cut slope of the road, Hidden Valley is encouraged to do such vegetation if it will enhance slope stability and protect against erosion on the road, which is subject to the reclamation plan and ongoing monitoring.

3. The revegetation of the fill slopes will be included under the existing surety. The present Phase I surety is adequate. Hidden Valley is not required to revise the amount of its Phase I surety.

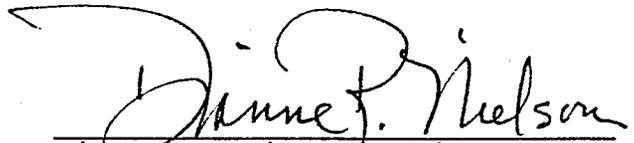
4. The required plan will be submitted to the Division within 30 days of the issuance of this order. The Division will extend the abatement period for the completion of seeding as needed to provide for seeding at the earliest favorable time.

5. The finalized assessment, resulting from the Assessment Conference of December 20, 1991, is due and payable to the Division 30 days from the date of this Order.

6. The Petitioner may appeal to the Board of Oil, Gas and Mining the informal determination of fact of violation and/or finalized assessment by filling said appeal within 30 days of the

date of this Order, in accordance with statutory and regulatory requirements, including placing the assessed civil penalty in escrow.

SO DETERMINED AND ORDERED this 17th day of January, 1992.

A handwritten signature in cursive script, reading "Dianne R. Nielson". The signature is written in black ink and is positioned above a horizontal line.

Dianne R. Nielson, Director  
Division of Oil, Gas and Mining  
State of Utah

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing FINDINGS, CONCLUSIONS AND ORDER for Cause No. ACT/015/007 to be mailed by certified mail, postage prepaid, the 22nd day of January, 1992 to:

Lee Edmonson  
Hidden Valley Coal Company  
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NOV 91-26-8-2      HIDDEN VALLEY COAL CO.

I HEREBY CERTIFY THE FOLLOWING VERBATIM EXCERPTS WERE TAKEN FROM THE CURRENT APPROVED HIDDEN VALLEY COAL MINE RECLAMATION PLAN.

PERTAINING TO VIOLATION NO. 1 OF 2 (EROSION)

- PAGE 7      "THIS REVEGETATION WILL NOT PROVIDE EITHER WILDLIFE OR LIVESTOCK FORAGE OF ANY SIGNIFICANCE BUT WILL STABILIZE THE SITE. "
- PAGE 21      "THE 11 WATERBARS WILL BE APPROXIMATELY 18 INCHES HIGH BY 72 INCHES WIDE WITH A ROUNDED CREST EXTENDING ACROSS THE ROAD (FIGURE VI). THE AREA JUST UP HILL FROM THE BAR WILL BE EXCAVATED TO A DEPTH OF 12 INCHES BY A WIDTH OF 48 INCHES. THE SMALL FLOWS DIVERTED AT EACH WATERBAR WILL BE DISCHARGED TO THE WEST INTO THE NATURAL ROCKFILL ABOVE THE EPHEMERAL DRAINAGE. "
- PAGE 21a      "TWO ADDITIONAL WATERBARS HAVE BEEN ADDED NEAR THE END OF THE ROAD TO PREVENT EROSION OF THE TOE OF THE SMALL ROADSIDE COAL SEAM BACKFILL. THEY WERE INSTALLED ACCORDING TO THE SPECIFICATIONS IN THE ORIGINAL PLAN. WHERE NEEDED TO

CONTROL GULLYING, ONSITE ROCK HAS BEEN PLACED IN THE WATERBAR OUTFALLS TO SUPPLEMENT EXISTING ROCK FILL. SMALL LOOSE-ROCK CHECK DAMS WERE INSTALLED AT THE DOWNSTREAM END OF THE WATERBARS TO CHECK THE WATER BEFORE IT SPILLS OVER THE CREST OF THE OUTFALL. "

PAGE 24 (CONTINUED FROM PAGE 21) "THIS RECLAMATION PROCESS ON THE ROAD WILL RESTORE THE NATURAL DRAINAGE PATTERNS AND CONTROL EROSION. BECAUSE THE CUTS AND FILLS REMAIN THE INTEGRITY OF THE ROAD ALIGNMENT IS RETAINED. THUS, THE ROAD COULD BE RESTORED FOR USE IN FUTURE COAL RESOURCE DEVELOPMENT WITH MINIMAL CONSTRUCTION ACTIVITY AND ENVIRONMENTAL DAMAGE. "

PAGE 27 "UMC 817.106 REGRADING OR STABILIZING RILLS AND GULLIES "THE EXISTING RILLS IN THE ROAD SURFACE WILL BE ELIMINATED WITH WATER-BARRING AND RIPPING OF THE ROAD SURFACE. THE RILLS OR GULLIES THAT MAY APPEAR DURING POST-RECLAMATION MONITORING WILL BE STABILIZED BY FILLING WITH SOIL AND ROCKS. CHRONIC SITES WILL BE STABILIZED WITH SMALL GABIONS OR ROCK CHECK DAMS. "\*\*\*

PERTAINING TO VIOLATION NO. 2 OF 2 (DISTURBED AREA AND SEEDING)

PAGE 8 "THE APPROXIMATELY 6.7 ACRES OF DISTURBED LAND WILL BE FULLY RECLAIMED. THE WORK SCHEDULE CALLS FOR RECLAMATION WORK TO BEGIN IN THE FALL OF 1986 WITH COMPLETION BY DECEMBER 31, 1986. "\*\*\*

PAGE 51a "AFTER THE INITIAL REVEGETATION ATTEMPT ON THE ROAD, TWO ADDITIONAL ATTEMPTS WERE MADE TO ESTABLISH VEGETATION ON THE ROAD. IN THE FALL OF 1987, AND AGAIN IN THE FALL OF 1988, THE ROAD SURFACE WAS RIPPED, SEEDED, FERTILIZED AND MULCHED ACCORDING TO THE ORIGINAL REVEGETATION PLAN."

PAGE 56 "UMC 817.111 REVEGETATION: GENERAL REQUIREMENTS  
"THE ENTIRE 6.7 ACRES OF DISTURBED GROUND WILL BE PROPERLY SCARIFIED, SEEDED, FERTILIZED, MULCHED AND COVERED TO PROVIDE THE BEST POSSIBLE OPPORTUNITY FOR PLANT GROWTH. THE ROAD FILL SLOPES AND SOME SMALL SITES WILL REQUIRE HAND APPLICATION OF SEED, MULCH AND FERTILIZER. THE RECLAMATION WORK IS SCHEDULED FOR LATE FALL, 1986."\*\*



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Wm. J. Malencik, #26  
DOGM Reclamation Specialist  
12-18-91

\*\* Underscoring added for emphasis.

WJM/wlg