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State of Utah

DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER
Executive Director

Division of Oil, Gas and Mining

JOHN R. BAZA
Division Director

April 15, 2016

CERTIFIED MAIL

7012 3460 0002 9559 6762

Denise A. Dragoo
Snell & Wilmer L.L.P.
Gateway Tower West
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1547

Subject: Findings of Fact, Conclusions, and Order for Violation #21161 Alton Coal Development, Coal Hollow Mine, C/025/0005

Dear Ms. Dragoo:

On March 16, 2016, an Informal Conference was held to review the assessment for Violation #21161. As a result of a review of all pertinent data and facts, including those presented in the Informal Conference, the attached document constitutes the findings of fact, conclusions, and order.

Within fifteen (15) days of your receipt of this letter, you or your agent may make a written appeal to the Board of Oil, Gas and Mining. To do so, you must escrow the assessed civil penalties with the Division within thirty (30) days of receipt of this letter, but in all cases prior to the Board Hearing. Failure to comply with this requirement will result in a waiver of your right of further recourse.

If no timely appeal is made, this assessed civil penalty of \$462.00 must be tendered within thirty (30) days of your receipt of this letter. Please remit payment to the Division of Oil, Gas and Mining, c/o Vickie Southwick at the address listed below.

Sincerely,



Dana Dean, P.E.
Associate Director
Assessment Conference Officer

DD/ss
Enclosures
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**BEFORE THE DIVISION OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

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**IN THE MATTER OF THE
INFORMAL HEARING AND
INFORMAL ASSESSMENT
CONFERENCE FOR NOTICE OF
VIOLATION No. #21161, ALTON
COAL DEVELOPMENT, LLC,
COAL HOLLOW MINE,
C/025/0005, KANE COUNTY,
UTAH**

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**FINDINGS of FACT,
CONCLUSIONS OF LAW
AND ORDER**

CAUSE NO. C/025/0005

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BACKGROUND

On March 16, 2016, the Utah Division of Oil, Gas and Mining (Division) held an Informal Hearing and Assessment Conference as provided for by R645-400-350 and R645-401-700 Utah Administrative Code (2015). The hearing was held in response to the written request by Alton Coal Development, LLC (Alton) for an informal hearing pursuant to R645-400-350 to review the fact of violation for Notice of Violation #21161 issued to it on December 21, 2015 for operations at the Coal Hollow Coal Mine, C/025/0005, Kane County, Utah. Alton and the Division stipulated that this informal hearing fulfilled the opportunity for an informal review of the fact of the violation as permitted and provided for under both by R645-400-350 and R645-401-700, Utah Administrative Code (2015) and that the right of Alton to seek immediate review of the Cessation Order before the Board is not restricted or infringed.

ISSUES

The Division in its Notice of Violation #21161 found that Alton, failed to complete the required mitigation work for a sage grouse mitigation project by the agreed upon deadline. The mitigation was required by the wildlife mitigation plan for the Coal Hollow Mine which required removing Pinyon and Juniper trees from 355 acres of Bureau of Land Management (BLM) land according to certain agreed upon specifications by October 31, 2015. The NOV was for violation of rules R645-300-142 and 143. Notice of a proposed penalty assessment of \$462 was sent to Alton on January 27, 2016.

Alton requested an Informal Assessment Conference on February 4, 2016 to contest the fact of violation and penalty. The conference was scheduled for March 3, 2016 at 10:00 a.m. and with the consent of the parties was continued until March 16, 2016.

PARTIES

Dana Dean, Associate Director of the Division of Oil, Gas, and Mining, served as the hearing and assessment conference officer to review the fact of the violation and penalty pursuant to R645-400-721.

Denise Dragoo, Snell & Wilmer LLP, attorneys at law, represented Alton at the hearing. Kirk Nicholes, Environmental Manager; and Larry W. Johnson, General Manager for the Coal Hollow Mine attended the hearing on behalf of Alton.

John Robinson, R., Assistant Utah Attorney General represented the Division and Joe Helfrich, environmental specialist and Daron Haddock Coal Program supervisor appeared on behalf the Division.

Joe Helfrich presented the Division's reasons for issuing the NOV. Alton contested the fact of the violations and presented its objections. Daron Haddock presented the basis for the penalty calculation. At the conclusion of the informal conference at the request of counsel, the Hearing Examiner allowed each part to file post-hearing briefs. Alton filed a brief on March 23, 2016 and the Division filed a response on March 20, 2016. At the request of Alton's counsel and without objection, the Alton was allowed to file a reply brief on April 1, 2016. The statements of the witnesses and documents presented at the hearing, arguments of counsel, and the post-hearing briefs and affidavits constitute the record that is the basis for the Findings of Fact, Conclusions of Law and Order in this matter.

No recording or transcript of the conference was made.

FINDINGS OF FACT

1. The Notice of Violation was served on Kirk Nicholes on December 28, 2015.
2. A Request for an informal hearing pursuant to Rule R645-400-350 was delivered to the Division on February 4, 2016.
3. In response to the request, the Division sent Notice to Alton by certified mail to Denise Dragoo, at Snell and Wilmer on February 9, 2016 that in accordance with R645-401-700 an informal assessment conference was to be held March 3, 2016 to review the fact of the violation and the proposed penalty.
4. On March 16, 2016 the above named parties appeared and provided their statements and arguments.
5. The Mining and Reclamation Plan (MRP) approved for the Coal Hollow mine includes an obligation for Alton to provide a mitigation and protection plan for wildlife that is to be approved by the Division.

6. Alton and the Division agree that among the mitigation actions agreed upon and required for the Coal Hollow mine was a mitigation project requiring the removal of Pinyon and Juniper trees from 355 acres of BLM land located outside of the permit boundary and southwest of the mine and accessible by a public road. This work was authorized by BLM by letter on September 19, 2013.

7. On October 28, 2013 the Division approved an amendment to the MRP to include this project and the standards for doing the work that were necessary to benefit the sage grouse.

8. Mitigation work was conducted by Alton during the 2013 season, but the work did not satisfy the standards as understood by the Division.

9. The standards required for the mitigation work were clarified after a visit with the BLM at the site and the MRP was amended again on March 21, 2014 to include the revised standards.

10. The Division conducted inspections of the 355-acre tract on February 11, March 10, and April 14, 2015 and determined the project area still had not been treated as the required and thereafter issued NOV #18150 to Alton.

11. Alton abated NOV #18150 by amending the MRP once again to expressly include the standards for the mitigation work, and to add language to provide that a "final inspection of the project site by BLM or UDWR staff when the additional work has been complete would determine project completion." Proper completion of the work was required by October 31, 2015.

12. The specifications for the mitigation work are documented in a BLM letter attached to the NOV and dated as received by DOGM on October 13, 2015. The specification include among other requirements, reducing the height of stumps to less than six inches and reducing debris to less than four feet in length. The parties agree that these specifications apply to the lands and work subject to the NOV.

13. The Division conducted inspections of the BLM lands in August and September of 2015, noticed that the work had not been completed, and sent a letter to Alton on October 21, 2015 stating that the specifications for the mitigation work had still not been met and that the work was required to be completed by October 31, 2015.

14. Alton was aware on October 21, 2015 or shortly thereafter that the Division did not think the work met the standards as required, and had a reasonable opportunity to clarify any questions and/or complete the mitigation prior to the deadline.

15. As of October 31, 2015 Alton had not objected to the Division's October 21st letter, made any inquiry regarding additional requirements, or requested that BLM or DWR inspect the mitigation work.

16. On November 18, 2015 the Division's inspector without notice to Alton and without the anyone from the BLM or DWR, conducted another inspection of the BLM lands and took photographs documenting that the condition of the lands and trees on that date.

17. The Division's Inspector provided copies of these photographs to BLM and asked BLM to determine based on the photographs if specification for the project work had been met.

18. The inspector received BLM's concurrence on December 14, 2015 that it agreed that the specifications for the mitigation work had not been met by the conditions shown on the photograph, and on December 21, 2015 the Division issued NOV 21161.

19. Although BLM was required to make an inspection prior to the determination that the mitigation work was satisfactorily completed, an inspection by BLM was not required for the inspector to determine that the work was not completed and BLM's concurrence was adequate support for issuing the NOV.

20. On January 13, 2016 the Division Inspector and representatives of the BLM, DWR, and Alton visited the mitigation area. Those present agreed that the work still did not meet the specification standards as required.

21. Alton caused additional mitigation work to be done in order to meet the specifications and at a follow-up inspection on January 25, 2016 the BLM agreed that the mitigation work was completed as required. This was confirmed by letter sent by BLM on January 26, 2016.

22. Alton was not prejudiced by the lack of notice by the Division inspector of his November visit to the BLM lands to determine if the conditions for offsite mitigation had been satisfied.

22. Alton's lack of notice and presence during the inspection did not alter the conditions that were observed, did not surprise or take unfair advantage of Alton, and did not prevent Alton from having full opportunity to do the work and the prior reminder letter offset any claim of surprise or prejudice due to the lack of notice.

CONCLUSIONS OF LAW

1. Notice of the informal hearing was given as required for both an informal hearing and an informal assessment as required by the appropriate rules and the hearing was conducted at a time and place as agreed by the parties and consistent with the requirements of the Coal Mining and Reclamation Act (Act).

2. The informal conference fulfilled the requirement for an informal hearing before the Division of the cessation order including the facts of the violation and the hearing officer was properly authorized to conduct the hearing.

3. The standards and the conditions for the satisfactory completion of the mitigation work on the BLM lands were reviewed and agreed upon by Alton prior to being incorporated into the MRP.

4. The mitigation standards as set forth in the MRP required that BLM or DWR to approve the completion of the sage grouse mitigation project on the BLM lands by October 31, 2015.

5. As of October 31, 2015 the mitigation work had not been completed as required by the specifications; rather additional work was required. The additional work was not performed and the project was not completed by Alton until January 2016.

6. Alton's failure to complying with the MRP by the deadline is not excuse by the lack of a prior BLM or DWR inspection and approval.

7. Alton was aware that BLM or DWR was required to approve the work, had been advised of the Division's concerns that the work was not done prior to October 31, 2015 and made no effort to obtain approval until after the NOV was issued.

8. The Division, is required to assure that Alton complies with the MRP and the Division's inspections and the prior inspections, visits to the mitigation area, and notices to Alton to complete the work were done in compliance with those obligations and are within the scope of the inspector's authority to enforce the terms of the mitigation obligations as incorporated in the MRP.

9. The Division inspector was well known to Alton's mine personnel as an inspector with proper credentials as an inspector and he was not required to present his appropriate credentials before each inspection, and Alton was not prejudiced by the failure of the inspector to present his credential as an inspector.

10. The Division inspector was not required to give notice to Alton prior to a visit to the BLM mitigation lands to verify if the mitigation work was completed since the lands are located off of the permit area and are accessible by a public road.

11. Any failure of the Division to provide notice of the inspection visit to the BLM lands to determine if the conditions for offsite mitigation had been satisfied did not prejudice Alton's rights or its abilities to do the mitigation work and do not excuse the failure to comply with the terms and conditions of the MRP.

12. The record of the meetings and revisions to the MRP indicate that the Division made sufficient efforts to work cooperatively with the agencies and with Alton and the failure to include Alton on the November 18th visit after the deadline had passed to do the work and after providing notice of the need to do the work in October was not a breach of that obligation.

13. The record supports the basis for the penalty calculations as determined by the Division.

ORDER

NOW THEREFORE, it is hereby Ordered that the Notice of Violation and amount of the Penalty are upheld.

Alton is advised that they have the right pursuant to Utah Code §40-10-22(3) and R645-400-360 Utah Administrative Code to file an appeal of this the issuance of the cessation order by filing a request for agency action in accordance with the Rules of the Board within 30 days of the notice of this decision upholding the issuance of the Cessation Order.

SO DETERMINED AND ORDERED this 15th day of April, 2016



Dana Dean, Associate Director
Division of Oil, Gas and Mining