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TO: Ken Wyatt

FROM: Carter Reed ACT/015/009 #2

SUBJECT: water

TOTAL PAGES INCLUDING COVER PAGE: 5

DATE: 11/3/98

TIME: 4:25 pm

COMMENTS:
As discussed.

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

RECEIVED
OCT 29 1998
WATER RIGHTS
PRICE

IN THE MATTER OF APPLICATION)
) MEMORANDUM DECISION
NUMBER 93-3713 (A68607))

Application Number 93-3713 (A68607), in the name of Cottonwood Creek Consolidated Irrigation Company, was filed on February 21, 1995, to appropriate 5.0 cfs of water from Cottonwood Creek at the Blue Cut Canal diversion located at a point North 230 feet and West 680 feet from the SE Corner of Section 19, T18S, R8E, SLB&M. The water is to be used supplementally for the irrigation of 3210.90 acres from March 1 to November 30. It should be noted that the water being filed on is discharged from the Cottonwood-Wilberg Mine into Grimes Wash, and according to the application is considered to be "new" water that has been introduced into the Cottonwood drainage.

The application was advertised in The Emery County Progress on March 14 and 21, 1995, and was protested by PacifiCorp, the State of Utah Division of Wildlife Resources, and the U.S. Department of the Interior, Bureau of Reclamation.

A hearing was held on July 1, 1996, in Castle Dale, Utah. The applicants were represented by Mr. Eugene Johansen, President of the Cottonwood Creek Consolidated Irrigation Company, Mr. Craig Johansen, one of its Board of Directors, and Mr. Ross Huntington, the Company Secretary. PacifiCorp was represented by their legal counsel, Ms. Jody Williams, Mr. Chuck Semborski, and Mr. Carly Burton. The Bureau of Reclamation was represented by Mr. Jonathan Jones, and the Utah Division of Wildlife Resources was represented by Mr. Lorin Sperry.

Speaking in behalf of the application, Mr. Eugene Johansen indicated that the Company is concerned about the effect that mining is having on the watershed, and the various tributaries that provide water for their stockholders. Likewise they are concerned that water being intercepted in the mines is being discharged into drainages other than the one where it was intercepted.

Mr. Craig Johansen indicated that water rights have existed for many years in Little Cottonwood Creek and Grimes Wash, however at the present time Little Cottonwood Creek is dry, and the only water in Grimes Wash is that which is being discharged by Energy West Mining Company from the Cottonwood-Wilberg Mine. Records have been kept by the Emery Water Conservancy District on the discharge from the mine into Grimes Wash. A flow of 5.0 second feet of water has been documented. The applicants feels that if the water being discharged by the mine is "new water" and is subject to appropriation, this application will replace the water that has been intercepted by the mining process, which is no longer available to the Cottonwood Creek system. Therefore, they are requesting that this application be approved.

Jody Williams, spoke in behalf of PacifiCorp, indicating that Chuck Semborski, the manager for Geology and Hydrology for Energy West Mining Company for the East Mountain complex would provide some background information upon which they are basing their protest. Mr. Semborski indicated that the water that infiltrates East Mountain does so very slowly, and represents approximately 30% of the precipitation that falls on the watershed. The other 70% of the water is carried overland through the surface drainages. The water that does infiltrate the mountain travels downward into the North Horn Formation, at which point the

downward migration basically ceases because of the bentonitic clays that are characteristic of this formation. As a result, approximately 70% of the springs in the East Mountain area surface at the contact with this formation. As a result, very little water enters the underlying coal bearing Blackhawk Formation, or the Star Point Sandstone Formation. Water movement in the total stratigraphic sequence is also controlled by the various geologic features in the area.

Mr. Semborski indicated that 70% of Energy West's mining permits are located within the Huntington Drainage, and 30% within the Cottonwood Drainage. A concerted effort is made to determine which drainage is contributing water in the mine, and that volume of water is discharged to the appropriate drainage. There are times when it is not physically possible to immediately discharge water into the appropriate drainage, however records are kept by the mine and the appropriate amount is eventually discharged to the contributing drainage.

Mr. Semborski also pointed out that there is an extensive monitoring program in place that requires the monitoring of many of the springs and streams in and adjacent to the permit area. All of the data is available in the quarterly report provided to the Division of Oil, Gas and Mining, and in an Annual Report.

Mr. Semborski stated that it is his opinion that the water being intercepted in the mines would be tributary to the surface drainages of Cottonwood and Huntington Creeks even though the water movement through the formations is extremely slow. As a result, the water that is intercepted should not be considered developed; or a new source of water.

Mr. Carly Burton, a Hydrologist for PacifiCorp, indicated that he was initially involved in establishing the hydrologic monitoring plan for the mine permits on East Mountain. He too, believes that the water being discharged from the mines is not a new source of water, but water that is moving through the geologic formations and would be tributary to the drainages at some point in time. He also believes that the Cottonwood and Huntington Creek drainages are fully appropriated, and that there is no additional water to be considered for appropriation under this application.

Representing the Bureau of Reclamation, Mr. Jonathan Jones said that they did not formally protest the application. However, if such an application were granted, he feels that subsequent requests, if approved, may interfere with the Emery County Project water rights.

Lorin Sperry, representing the Utah Division of Wildlife Resources, was also concerned about the filing of this new application and its potential impact on their existing water rights.

Clyde Magnuson, the State appointed River Commissioner was concerned with the erratic nature of the discharge of water from the mine, and the difficulty it causes in keeping the system properly regulated.

Kay Jensen, President of the Huntington-Cleveland Irrigation Company, which is not a party to the proceeding, expressed a concern about how PacifiCorp determines the division of the water that is intercepted underground, and is subsequently discharged to the Huntington and Cottonwood Drainages. He believes

that a Memorandum of Understanding, or an Agreement should be worked out between Energy West Mining and the water users on the two drainages.

In conclusion, Craig Johansen stated his opinion that there are two issues to be decided by the State Engineer as a result of the filing of this application. One is whether the State Engineer believes there is "new water" that can be appropriated as a result of the mine discharge, and if so, this application should be granted. However, if the State Engineer feels that the system is fully appropriated and this application is denied, then the State Engineer must recognize that there has been interference with existing water rights in Little Cottonwood Creek and Grimes Wash, and he has a responsibility to get involved in the resolution of those issues as well.

In acting on the application to appropriate, the authority of the State Engineer is limited to determining whether the application should be approved or rejected. In an appropriation application proceeding, the State Engineer has no authority to determine whether mining operations interfere with existing water rights. Furthermore, the State Engineer has no jurisdiction or statutory authority under any context to determine or adjudicate claims of water right interference due to mining operations. Rather, in making the decision on this application, the State Engineer is only determining whether there is reason to believe from the evidence that there is unappropriated water available which can be appropriated to a beneficial use without impairing existing rights.

With regards to the appropriation application, the State Engineer has reviewed the application, the information provided at the hearing, and the water rights of record. In paragraph 12 of the application the applicant states that it considers the water sought to be appropriated is "new" water introduced into the Cottonwood drainage. The State Engineer, however, is of the opinion, based on the information presented at the hearing, that the water applied for is water which is part of and which contributes to the Cottonwood drainage. Furthermore, the surface waters of Cottonwood Creek have been fully appropriated; the rights to the use of water on Cottonwood Creek are vested in the prior appropriators which include the applicant and the protestants. The State Engineer is of the opinion that there is no unappropriated water available under this application. Consequently, there is no reason to believe the proposed appropriation can be approved without impairing existing rights.

It is, therefore, ORDERED and Application Number 93-3713 (A68607) is hereby REJECTED.

This Decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 28th day of October, 1998

Robert L. Morgan, P.E., State Engineer

RLM:MPP:lz

Mailed a copy of the foregoing Memorandum Decision this 28th day of October, 1998, to:

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BY: Laurel Zunde
Laurel Zunde, Secretary