

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

IN THE MATTER OF THE APPROVAL) OF THE NOTICE OF INTENT AND) RECLAMATION PLAN SUBMITTED BY) UTAH POWER AND LIGHT COMPANY,) WILBERG MINE, EMERY COUNTY,) UTAH.)	MOTION FOR RECONSIDERATION No. ACT-015-018
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COMES NOW E. S. Crawford, a surface owner over the Wilberg Mine, and pursuant to Section 40-8-8 (1), U.C.A., 1953, moves the above-entitled Board to reconsider its approval of the "Reclamation Plan" filed by Utah Power and Light Company in the above-entitled matter which was approved by the Board on or about December 28, 1977.

POINT I

THE BOARD'S APPROVAL OF UTAH POWER AND LIGHT COMPANY'S RECLAMATION PLAN SHOULD NOT HAVE BEEN GRANTED WITHOUT HEARING.

Section 40-8-13 (4), U.C.A., 1953, provides that after the Board issues a tentative decision to approve a Reclamation Plan, that

"Any person or agency aggrieved by the tentative decision may file a written protest with the Division, setting forth factual reasons for his complaint . . . if written objections of substance are received, a hearing shall be held before the board in accordance with section 40-8-8, following which the board shall issue its decision."

The Board's tentative decision dated October 7, 1977, directed that any protest to the tentative approval of Utah Power and Light's Reclamation Plan should be submitted to the Board within thirty days of October 14, 1977. On October 14, 1977, Mr. Crawford wrote the Board and asked when a hearing would be held on the matter. On October 18, 1977, Mr. Brian W. Buck, Engineering Geologist, responded with a letter stating that the Board could hear only an objection of substance and that a more detailed objection should be submitted if Mr. Crawford wished

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to appear before the Board. Mr. Crawford then wrote Mr. Buck a letter dated October 21, 1977, a copy of which is attached hereto and made a part hereof as Exhibit "A", which stated in part:

"I would like to request this approval be withdrawn until after the hearing is held. I will, at that time as you have requested, cite one piece of evidence as my objection: the final draft of the Emery EIS Impact Statement under the chapter Irreversible Damages:

Loss of approximately 4500 acres of national forest and private land above the mine, especially the head waters of Grimes Wash.

Loss of approximately 180 acre feet of surface water.

Subsidence up to ten feet.

Loss and lack of concentration of deer and elk herds in the area due to lack of water."

Mr. Ronald W. Daniels, Coordinator of Mine Land Reclamation, then responded to Mr. Crawford by letter dated October 31, 1977, in which it was stated:

". . . one of the conditions outlined by Mr. Moffat is the requirement for the operator to post a bond with the Court to secure reclamation and to indemnify the surface owner(s) for damages resultant from mining activities . . ."

"It seems to the Division that these conditions for approval adequately deal with your concerns in this matter and that your objections would not be considered to be of substance under the Mine Land Reclamation Act since your interests would be protected by said bond. (Emphasis added.)

"It is the Division's opinion that if the bond is set before the next regular meeting of the Board of Oil, Gas, and Mining (November 23), then the Mining and Reclamation Plan should be issued final approval."

There are a number of legal errors in the position and procedure taken by the Board as set forth in Mr. Daniels' letter of October 31, 1977.

A. The Board cannot delegate its responsibility to the Federal Government. The Board's obligation to insure that an adequate reclamation plan is submitted by the operator before

mining commences is mandated by state statutes and cannot be abrogated to the Federal Government. Section 40-8-3 states:

"The purpose of this Act is to provide that from the effective date of the Act, except as otherwise provided in this Act, all mining in the state shall include plans for reclamation of the land affected." (Emphasis added.)

Section 40-8-12 provides:

(1) The objectives of mine land reclamation shall be:

(a) To return the land, concurrently with mining or with a reasonable amount of time thereafter, to a stable, ecological condition compatible with the past, present and probable future local land uses.

(b) To minimize or prevent present and future on-site or off-site environmental degradation caused by mining operations to the ecologic and hydrologic regimes and to meet other pertinent state and federal regulations regarding air and water quality standards and health and safety criteria.

(c) To minimize or prevent future hazards to public safety and welfare." (Emphasis added.)

Section 40-8-5 provides, inter alia, that:

"The board and division shall have jurisdiction and authority over all persons and property, both public and private, necessary to enforce the provisions of this Act. Any delegation of authority to any other state officer, board, division, commission, or agency to administer any or all other laws of this state relating to mine land reclamation is hereby rescinded and withdrawn; and such authority is hereby unqualifiedly conferred upon the board and division as provided in this Act. . . ." (Emphasis added.)

B. Mr. Crawford's letter of objection dated October 21, 1977 was sufficient notice of objection to require a hearing on the merits thereof. Since the Board and Division have not, as yet, adopted formal Rules of Practice, pursuant to the requirements of the Utah Administrative Rule-making Act, Chapter 46 of Title 63, U.C.A., 1953, it is assumed that the practice guidelines set forth in the rules of the earlier Oil and Gas Conservation Commission are still applicable. Rule B-14 states:

"The Commission adopts as appropriate guides the rules of pleading and evidence contained in the Utah Rules of Civil Procedure insofar as the same may be applicable and not inconsistent with the rules herein set forth." (Emphasis added.)

Rule 8, U.R.C.P., provides, inter alia, the following:

"(e) (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(f) All pleadings shall be so construed as to do substantial justice."

Rule 84, U.R.C.P., states:

"The forms contained in the Appendix of Forms are sufficient under the Rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." (Emphasis added.)

As an example of the simplicity and brevity contemplated by this Rule, Form 6 of the Appendix of Forms as an example of a Complaint for Money Lent, reads:

"Defendant owes Plaintiff _____ dollars for money lent by Plaintiff to Defendant on June 1, 1948, which is now due."

Mr. Crawford's objection as a private property owner of the surface estate to the reclamation plan filed by Utah Power and Light Company that irreversible damages would result, including "loss of approximately 180 acre feet of surface water (and) subsidance of up to ten feet" certainly are specific and substantial enough to advise the Board of the nature of Mr. Crawford's complaint. To dismiss the same as a matter of law without a hearing as not being an "objection of substance" is arbitrary, capricious and without regard for the property rights of Mr. Crawford or the responsibilities imposed upon the Board by the Utah Mine Land Reclamation Act.

The cavalier manner in which Mr. Crawford's objection was treated by the Division is evident from Mr. Daniels' statements in his letter of October 31, 1977 wherein it is stated "your objections would not be considered to be of substance under the Mine Land Reclamaction Act since your interests would be protected by said bond," and "it is the Division's opinion

that if the bond is set before the next regular meeting of the Board of Oil, Gas and Mining (November 23), then the mining and reclamation plan should be issued final approval." (Emphasis added.) Whereas, as a matter of fact, the "reclamation plan" was approved by the Division and Board on or about December 28, 1977, but no bond has been set to date to protect Mr. Crawford's interests and it is obvious that the Division made no inquiry to determine if such a bond has been set, posted, or if the same was adequate to protect Mr. Crawford's interests.

POINT II

UTAH POWER AND LIGHT COMPANY HAS NOT FILED
A RECLAMATION PLAN.

Section 40-8-7 (g), U.C.A., 1953, which the Board and Division administer the provisions thereof, provides:

"(g) That with respect to all mining operations, a notice of intention, including reclamation plans prepared in accordance with this Act, be filed with and approved by the Division before any such mining operations are commenced or continued pursuant to Section 40-8-23." (Emphasis added.)

Attached hereto and made a part hereof as Exhibit "B" is the mining application filed by Utah Power and Light Company dated 9/9/77, designated as Mining Application No. ACT/015/018. It consists of three pages which are devoid of any "reclamation plan." The attachments referred to in the Application are merely description of land owners.

It is submitted that a reclamation plan would, at the least, outline the known damages that would result from the contemplated mining activity and then set forth a plan describing how said damages would be repaired, mitigated or compensated. Utah Power and Light Company's notice of intention to commence mining operations does neither.

The FINAL ENVIRONMENTAL STATEMENT, EMERY, prepared for the contemplated mining operation by the Department of the Interior, Bureau of Land Management, details several "adverse impacts which cannot be avoided should be the proposal be

implemented." (Chapter 5). The unavoidable adverse impacts which would directly affect Mr. Crawford as a private property owner of a portion of the surface estate over the contemplated mining area are as follows:

"(a) Subsidence could occur on 4,658 acres where the Hiawatha and the Bear Canyon coal seams would be mined. It is not possible to determine exactly how deep the land would subside, however, the depth could be as much as ten feet (Brauner, 1973). A relatively narrow peripheral zone around the leased area would also experience some subsidence, but this would be hardly discernable. There are presently insufficient data to estimate the extent of occurring surface fractures, bulges and sink holes." (page 5-5).

"(b) Subsidence following mining operations could intercept ground water aquifers above the mined areas. Springs, including nine that have been measured, could be affected with the possible loss of over 180 acre-feet per year of surface discharge." (page 5-7).

"(c) Mine accidents cannot be totally eliminated, however, nor can subsidence hazards." (page 5-20).

Also, in Chapter 6 which deals with the relationship between short-term uses and long-term effects, the following statement is made:

"The subsidence effects above the Wilberg Mine must be considered as long-term. Complete restoration of the area to its original condition would be considered unreasonable and impractical. Use of the surface for cabin sites, sewer and water lines, recreational pursuits such as camping, hiking, ORV, and hunting, and use by livestock and wildlife could be foreclosed in part or entirely." (page 6-23).

It is obvious from the foregoing findings of the EIS that if Utah Power and Light Company's proposed mining operation is approved, the Crawford property will be subjected to substantial damage, most of which cannot be repaired, that will prevent its development to its highest and best use from an economic standpoint. Attached hereto and made a part hereof as Exhibit "C" is a Preliminary Evaluation of the Crawford property by Marcellus Palmer and Associates of Salt Lake City, dated November 18, 1977, which, in part, states:

"First of all, the demand and current use in the area leads me to the conclusion

that the highest and best use at this time is for mountain home site and recreational development. You have adequate water already owned and used to further expand these developable uses."

Article I., Section 22, Constitution of Utah, provides:

"Private property shall not be taken or damaged for public use without just compensation."

The Utah Supreme Court has long held that any substantial interference with one's property cannot be permitted for a public use short of invoking the public's right of eminent domain through condemnation proceedings. In Stockdale v. Rio Grande Western Railroad Co., 28 Utah 201, 77 Pac. 849 (1904), the Utah Court stated:

"Under the provisions of the Constitution of this state hereinbefore referred to, a party whose property is about to be specially damaged in any substantial degree for public use has the same rights and is given the same remedies for the protection of his property from the threatened injury as would be accorded him if his property was actually taken and appropriated for such use. That such is the spirit and intent of the foregoing provisions of the Constitution is evident from the tone and character of the extended discussions on this question in the constitutional convention at the time the provision was adopted and became part of the organic law of the state." (pp. 326-344, 623-654, Proceedings Constitution Convention, 1895).

It should be noted that the responsibility and jurisdiction of the Board is to accomplish the objectives of the Utah Mine Land Reclamation Act as set forth in Section 40-8-12 thereof, which reads as follows:

"The objectives of mine land reclamation shall be:

- (a) To return the land, concurrently with the mining or within a reasonable amount of time thereafter, to a stable, ecological condition compatible with past, present and probable future local land uses.
- (b) To minimize or prevent present and future on-site or off-site environmental degradation caused by mining operations to the ecologic and hydrologic regimes. . . .
- (c) To minimize or prevent future hazards to public safety and welfare. (Emphasis added.)

It is clear from the foregoing statute that the jurisdiction of the Oil, Gas and Mining Board is limited to requiring and approving reclamation plans which will accomplish the foregoing objectives of the Utah Mine Land Reclamation Act. If the proposed mining operations in question will cause damages to the property rights of Mr. Crawford which cannot be reasonably repaired and restored through reclamation processes, then this Board has no jurisdiction to entertain the mining proposal and the property rights of Mr. Crawford must be acquired, if permitted by law, through condemnation proceedings in the appropriate state Court. This Board has no authority or jurisdiction to approve a mining plan which would have the effect of "taking" the private property of another through inverse condemnation.

POINT III

SURETY REQUIREMENTS ARE TO INSURE RECLAMATION.

As noted by Mr. Daniels' letter of January 16, 1978 to Mr. Heward of Utah Power and Light Company, a copy of which is attached hereto and made a part hereof as Exhibit "D", the Federal Government, by virtue of the Surface Mining Control and Reclamation Act of 1977, Public Law 95-87, requires a permittee of a federal coal lease to replace any surface water which is interrupted as a result of the mining operation. Mr. Daniels points out to Mr. Heward that he understands that the requirement of replacing interrupted surface water will be required by the Office of Surface Mining, and recommends that Utah Power and Light Company increase their bond to cover water replacement requirements. As a matter of fact and law, the Division is required to insure the replacement of surface water interrupted by mining operations pursuant to Section 40-8-12 (b), cited above, independent of any Federal requirements.

Mr. Daniels' letter of January 16 seems to infer that Utah Power and Light Company can make a unilateral decision of the amount of bonding necessary to meet the water replacement requirement. Such is not the case. Section 40-8-14, U.C.A. 1953,

provides:

"(1) After receiving notification that a notice of intention has been approved, but prior to commencement of such operations, the operator shall provide surety to the division, in a form and amount determined by the board.

"(2) In determining the amount of surety to be provided, the board shall consider factual information and recommendations provided by the division as to the magnitude, type and cost of approved reclamation activities planned for the land affected and the nature, extent and duration of operations under the approved notice. The board shall approve a fixed amount estimated as required at any point in time covered by the notice of intent to complete reclamation to an acceptable standard.

* * *

(Emphasis added.)

To meet its responsibilities under this section, the Board must receive evidence from the interested parties and recommendations from the Division as to what reclamation will be necessary to accomplish the reclamation objectives as set forth in Section 40-8-12, U.C.A., 1953, if, in fact, reclamation is deemed to be possible, and if so, set the amount of bond necessary to cover the anticipated costs thereof. Such a determination has not been made to date by the Board.

If and when such a determination is made, it should be remembered that the surety is only applicable when under the circumstances reclamation is possible to insure that reclamation will, in fact, be carried out whether or not the operator is financially able to do so at the completion of mining activities. As discussed under the preceding point, the surety provision is not intended to compensate the surface property owner for the value of "taking" his property since the Board does not have authority or jurisdiction to supervise a condemnation action or to determine the amount of just compensation for the property if such can be acquired through condemnation proceedings.

PRAYER FOR RELIEF

Based on the foregoing premises, Mr. E. S. Crawford

respectfully prays that the Board reconsider its approval of Utah Power and Light Company's Notice of Intention to Commence Mining Operations given on or about December 28, 1977, and set the same for an evidentiary hearing to determine if the proposed mining operation can encompass a reclamation plan which meets the criteria and requirements of the Utah Mine Land Reclamation Act; and, if such is possible, to then determine the amount of surety which must be posted to secure the necessary reclamation activities and procedures.

DATED this 24th day of January, 1978.


E. S. CRAWFORD

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, a copy of the foregoing Motion to Reconsider to Mr. Merrill Heward, Manager, Utah Power and Light Company, P. O. Box 899, Salt Lake City, Utah 84110, this 24th day of January, 1978.


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