

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)	OBJECTIONS TO A MOTION FOR RECONSIDERATION NO. ACT/015/018
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COMES NOW the Staff of the Division of Oil, Gas, and Mining and moves the Board not to withdraw the approval of the reclamation plan for the Wilberg Mine and to leave the question of bonding up to the District Court.

STATEMENT OF FACT

This matter is before the Board as a result of an objection by E.S. Crawford to the approval of the reclamation plan submitted by Utah Power and Light Company for the Wilberg Mine.

In essence, Mr. Crawford is contending:

1. That the Mining and Reclamation Plan, as approved, is not complete in that it does not cover surface over the underground workings which might be affected by subsidence.
2. That the surety requirements for the Wilberg Mine are inadequate to insure reclamation for areas subsided on the land surface and for hydrological regimes effected for subsidence.

ARGUMENT

POINT I The Utah Mined Land Reclamation Act requires a plan of reclamation only for the lands affected.

Section 40-8-3, Utah Code Annotated, 1953, 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".

Section 40-8-4 (4), Utah Code Annotated, 1953, defines the land affected as:

"Land affected" means the surface and subsurface of an area within the State where mining operations are being

or will be conducted, including, but not limited to: on-site private ways, roads, and railroad lines appurtenant to any such area; land excavations; exploration sites; drill sites or workings; refuse banks or spoil piles; evaporation or settling ponds; leaching dumps, placer areas; tailings ponds or dumps; work, parking, storage, or waste discharge areas; areas in which structures, facilities, equipment, machines, tools, or other material or property which result from or are used in such operations, are situated. All lands shall be excluded that would be otherwise includible as land affected, but which have been reclaimed in accordance with an approved plan or otherwise, as maybe approved by the Board, and lands in which mining operations have ceased prior to July 1, 1977". (emphasis added)

Section 40-8-14 (2), Utah Code Annotated, 1953, states:

"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 costs 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)

Specifically, the Utah Mined Land Reclamation Act did not contemplate that a reclamation plan should include those surface areas overlying the underground working unless those areas were also disturbed by surface operations such as disposal areas, surface facilities, tailing ponds, etc. The word "subsurface" in the definition of land affected applies to the underground workings of a mine where they pose a hazard or environmental liability to the public such as open portals, shafts, vent holes, mine drainage, underground mine coal fires, etc. Had the legislation intended the Board to have jurisdiction over subsidence, the definition of land affected would have included specific wording to that effect, such as, "...and includes all lands overlying any tunnels, shafts or other excavations used to extract minerals", which is stated in the definition of land affected in the Montana Strip and Underground Mine Reclamation Act.

In fact, the word "subsidence" is no where mentioned in the Utah Mined Land Reclamation Act.

The reason is obvious, it is impossible to adequately prepare a reclamation plan to cover "unknown damages" that might result from a specific mining activity which does not contemplate the actual physical use of a surface area or hydrologic regimes which might be, but not necessarily disturbed.

As a matter of interest, it should be noted that Public Law 95-87, the recent Surface Mining Control and Reclamation Act of 1977 passed by the 95th Congress of the United States, and the rules and regulations adopted thereunder, adopts this same attitude. Part 717-Underground Mining General Performance Standards of

the rules and regulations in part, reads as follows:

717.11 (a) (1)

"For the purposes of this part, underground coal mining and associated reclamation operations mean a combination of surface operations and underground operations. Surface operations include construction, use and reclamation of new and existing access and haul roads, above ground repair areas, storage areas, processing areas, shipping areas, and areas upon which are sited support facilities including hoist and ventilating ducts, and on which materials incident to underground mining operations are placed. Underground operations include underground construction, operation, and reclamation of shafts, adits, underground support facilities, underground mining, hauling, storage, and blasting".

717.11 (a) (3)

"For the purpose of this part, disturbed areas means surface work areas including, but not limited to, roads, mine entry excavation, above ground (surface) work areas, such as tipples, coal processing facilities and other operating facilities, waste work and spoil disposal areas, and mine waste impoundments or embankments".

POINT II Under patent from the United States, E.S. Crawford is owner of a surface estate from which the mineral estate is coal and has been severed.

Acts of Congress providing for the issuance of non-mineral patents with a reservation of minerals were enacted to carry out the expressed national policy of conserving the natural resources for future generations and encouraging settlement of the West;

"In his special message on "Conservation of Nation Resources", transmitted to Congress on January 14, 1910, President Taft said: "It is now proposed to dispose of agricultural lands as such, and at the same time to reserve for other disposition the treasure of coal, oil, asphaltum, natural gas, and phosphate contained therein. This may be best accomplished by separating the right to mine from the title to the surface, giving the necessary use of so much of the latter as may be required for the extraction of the deposits".

Minerals are not conserved for the use of future generations if the owner of the surface estate may prevent any mining that interferes with the subjacent support of the surface estate. However, in general, in every grant of mineral resources there is an implied reservation of subjacent support of the surface estate. The owner of the surface estate is entitled to this subjacent support as a proprietary right at common law. This subjacent support is support that the underlying land gives to the vertically overlying land. The right to subjacent support exists without grant or voluntary act and is entirely independent of the question of negligence of the part of the mine owner. The mineral right allows the mine owner to remove the mineral in a manner that will result in the maximum recovery of same. The skillful modern methods of pillar removal and longwall mining result in maximum recovery, even though it might cause the mine roof to cave; it is immaterial whether the mineral has been removed carefully and by accepted modern methods. When the surface estate is owned by another

party, without waiver of support, the surface overlying the mine workings must be supported in its natural state. Where this is not possible, the surface estate owner has three (3) remedies:

1. Have the mine owner post adequate surety prior to mining, in order to cover anticipated damages, or
2. Sell his surface estate to the mine owner, or
3. Wait until subsidence related damages are realized and seek compensation for these damages via the courts.

Congress has provided, in each act where the surface estate and mineral estate were separated for the purpose of allowing the private ownership of the surface estate, a statutory procedure whereby the owner of the surface estate may receive payment of damages from the holder of the mineral estate by reason of mining operations accompanying or damaging the surface estate.

30 USC Section 81, states in part:

"Any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, any upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefore, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as maybe determined by a court of competent jurisdiction. The owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit. Nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector, or entryman who has made or shall made final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal". (emphasis added)

The common law liability for subjacent support has been interpreted differently by various courts depending upon the situation. This has led to some unsatisfactory settlements and caused some states to pass subsidence related statutes. Without such statutory protection, the surface owner may attempt to seek injunctive protection if the mineral owner is engaging in pursuits that may damage the surface. It might be expected that an injunction would be granted

as a matter of course to prevent violation of what is often called natural right and absolute duty, but such is not the case. It has been held that such an injunction would actually harm the miner much more than it would benefit the surface owner; and while it has been said in a specific case involving support, the equities will not be balanced, most of the cases do so in fact.

To obtain this injunctive remedy, the surface owner must show that irreparable damage will result if mining pursuit is not stopped. In most cases, without nearby examples of similiar circumstances, it is not possible to forecast the extent of surface damage due to subsidence. In Utah, Rule 65 A (c) of the Utah Rules of Civil Procedure would have the party instituting such an injunction post security if the injunction would result in an operator being ordered to close his mining operations.

Sometimes, before mining, the mine operator will seek to purchase the estate. If this is not possible, he will seek a contract to pay a previously agreed upon acreage rate for damages to the surface estate. Historically, the courts have assessed the damages on one of the following criteria.

1. The diminution in value of the land.
2. The cost of restoration of the damaged land.
3. The decrease in market value of the land.
4. The loss by permanent depreciation of a structure affected by subsidence.

In the case of the Wilberg Mine, the Division and the USGS have supported the Utah Power and Light petition to the Seventh Judicial District Court in Emery County to set a bond for the present market value of the land. The acreage amount set by the court would be the maximum amount of damages Utah Power and Light would be responsible for.

CONCLUSION

Presently, the technology of predicting possible damages to the surface and/or hydrological regimes affected by the subsidence from mining is very limited.

The Staff contacted West Virginia, Kentucky, Wyoming, Montana, Pennsylvania, Arizona, Colorado, and New Mexico and found that even in those States where substantial amount of underground coal production is realized, with the exception of Pennsylvania and Montana, all such questions in regard to subsidence damage and liability have been resolved solely by the jurisdiction of the courts.

Under the Utah Mined Land Reclamation Act of 1975, the Board and Division does not have the authority to require a reclamation plan for the land overlying underground mine workings which may possibly be affected by subsidence.

The Board and Division does not have enough factual information to show that irreparable damage to the surface of the Wilberg Mine will result from the mining plan submitted by Utah Power and Light Company. The Board and Division cannot therefore seek injunctive action against Utah Power and Light to stop mining.

Utah Power and Light has diligently attempted to purchase the land overlying the Wilberg Mine and has been unsuccessful.

Utah Power and Light has now petitioned the Seventh Judicial District Court in Emery County to set adequate surety. The parties involved should work through that court to achieve an equitable settlement. The Division does not specifically endorse the amount of \$250 per acre which has been proposed by Utah Power and Light to the Court. The Division does, however, support the effort that Utah Power and Light is making, via that court, to provide an equitable amount of surety.

We respectfully submit that the Board and Division does not have authority over this matter and further, that the Board was not remiss in granting approval for the Utah Power and Light Mining and Reclamation Plan which adequately covers the actual surface disturbances involved.