

**FILED**

NOV 1. 4 1997

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

SECRETARY, BOARD OF  
OIL, GAS & MINING

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| IN THE MATTER OF THE FIVE YEAR | : | SUPPLEMENTAL MEMORANDUM |
| PERMIT RENEWAL, CO-OP MINING   | : |                         |
| COMPANY, BEAR CANYON MINE,     | : | DOCKET NO. 95-025       |
| EMERY COUNTY, UTAH             | : | CAUSE NO. ACT/015/025   |
|                                | : |                         |

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Pursuant to a certain MOTION, STIPULATION AND ORDER issued October 15, 1997, the Division of Oil, Gas and Mining ("Division") offers this SUPPLEMENTAL MEMORANDUM on the need for a hearing examiner and whether collateral estoppel should apply in the Bear Canyon Mine permit renewal hearing.

**INTRODUCTION**

On October 12, 1995, the Castle Valley Special Service District, the North Emery Water Users Association and the Huntington-Cleveland Irrigation (collectively, the "Water Users") filed a Joint Objection to Renewal, Appeal, and Request for Hearing (the "Objection") with regard to the impending renewal of the coal permit held by C.W. Mining Company, dba Co-Op Mining Company ("Co-op") for its Bear Canyon Mine. The renewal was granted by the Division of Oil, Gas and Mining (the "Division") on November 2, 1995. The Water users appealed the Division's decision to the Board of Oil, Gas and Mining (the "Board"). On February 23, 1996, the Board remanded the decision to the Division for an informal conference. On October 17, 1996, November 8, 1996 and February 28, 1997, the Division held the informal conference. On

August 11, 1997, the Division held that Co-op's mining permit should be renewed. This decision was appealed by the Water Users who filed an appeal on September 10, 1997. On October 15, 1997, a stipulation was signed which mandated this filing by the Division.

## ARGUMENT

### I. THE DIVISION RECOMMENDS THAT THE BOARD NOT APPOINT A HEARING EXAMINER

In the Water Users "JOINT OBJECTION TO RENEWAL, APPEAL AND REQUEST FOR HEARING" ("Joint Objection"), they asked for the appointment of a hearing examiner. The Division does not dispute the right of the Board to appoint the examiner. R641-113-100 clearly recognizes that right by stating:

The Board may, **in its discretion**, on its own motion or motion of one of the parties, designate a hearing examiner for purposes of taking evidence and recommending findings of fact and conclusions of law to the Board. Any member of the Board, Division Staff, or any other person designated by the Board may serve as a hearing examiner.

Utah Admin. Code R641-113-100 (1997) (emphasis added).

The Division merely recommends that the Board not appoint a hearing examiner. The decision to appoint a hearing examiner is a discretionary act and the Division believes that the Board should refuse to appoint an examiner to avoid unnecessary delay in the final resolution of this matter. Director James W. Carter conducted a thorough and fair hearing of this matter as the transcripts of the Informal Conference can attest. The parties had three days to present testimony in this matter. Mr. Carter has effectively acted as a hearing examiner in this matter and the Division believes that the appointment of a hearing examiner would only prolong the litigation and increase the expense of resolving this matter. The reasons that a hearing examiner would

tend to prolong the litigation can be found by examining how a hearing examiner would function.

The first problem is how a hearing examiner would be chosen. R641-113-100 allows the Board to appoint “[a]ny member of the Board, Division Staff, or any other person” as a hearing examiner. Utah Admin. Code R641-113-100 (1997). However, the Water Users had specific criteria for the hearing examiner. They state, “Appellants/Petitioners request the Board appoint an unbiased, neutral hearing examiner that is trained in hydrology, geology, and other related disciplines.” Joint Objection at 3. The Water Users do not explicitly state that Division Staff would not be acceptable, however, given the Water Users lack of success in their attempts to convince the staff of an impact by the mine, it is reasonable to assume that they desire someone outside of the Division. This creates two problems, the first is the cost of retaining such an expert and second is how the Board or the parties would choose such an expert.

The second problem with the hearing examiner approach is that the hearing examiner’s opinion is just a recommendation and not binding on the parties until and if the Board accepts the proposal. Under R641-113-500:

**No later than the 10th day of the month following filing of the proposed rulings, findings, and conclusions by the hearing examiner, any party may file with the Board such briefs or statements as they may desire regarding the proposals made by the hearing examiner, but no party will offer additional evidence without good cause shown and an accompanying request for de novo hearing before the Board. The Board will then consider the hearing examiner’s proposed rulings, findings, and conclusions and such additional materials as filed by the parties and may accept, reject, or modify such proposed rulings, findings, and conclusions in whole or in part or may remand the case to the hearing examiner for further proceedings, or the Board may set aside the proposed ruling, findings, and conclusions of the hearing examiner and grant a de novo hearing before the Board. If a Board member acted as the hearing examiner, then said Board member will not participate in the Board’s determination.**

Utah Admin. Code R641-113-500 (1997).

Thus, after the hearing examiner makes his **proposed** ruling the parties will have until the tenth of the next month to file additional briefs that the Board will then have to read in addition to the findings of the hearing examiner. Moreover, if the Board finds deficiencies in the opinion of the hearing examiner, they may be forced to remand or hear the case in its entirety de novo. This would further delay a resolution to an objection which is already two years old. Ironically, under R645-300-153 a permit has to be renewed every five years unless special circumstances apply which do not exist here. Utah Admin. Code R645-300-153 (1997). Thus, by the time the April hearing takes place over half the permit period will have elapsed. Any further delay means that the hearing will be held only a short time before an objection can be made to another renewal of the permit. A speedy resolution of the objection is in everybody's interest.

In sum, the Division believes that the appointment of a hearing examiner is unnecessary, costly and time-consuming. The Division Director has essentially performed the function of a hearing examiner in his well-thought-out opinion.

**II. THE DIVISION BELIEVES THAT THE BOARD SHOULD NOT INVOKE THE DOCTRINE OF COLLATERAL ESTOPPEL PRIOR TO THE HEARING**

The case at bar presents unique problems in the application of the doctrine of collateral estoppel. The Division believes that it may be necessary for the Board to examine the evidence of the Water Users before it can rule on whether collateral estoppel can apply.

Preclusion generally is appropriate if both the first and second action involve application of the same principles of law to an historic fact setting that was complete by the time of the first adjudication. Substantial uncertainty is encountered, however, in dealing with preclusion on issues of applying law to facts that seem indistinguishable but that were not closed at the time of the first preclusion. Such facts are often called "separable", and preclusion may be denied simply because of factual separability.

FEDERAL PRACTICE AND PROCEDURE, CHARLES ALAN WRIGHT § 4425 at 243 (1981).

The reality is that the continued mining at the Bear Canyon Mine means that the Division is not dealing with a closed factual setting when it attempts to determine whether collateral estoppel should apply. Additionally, under R645-301-729, the Division is required to prepare a Cumulative Hydrologic Impact Assessment (“CHIA”) for each mine which assesses the impact that a mine will have in the cumulative impact area. The Division as stated in the informal conference believes that the CHIA is a “dynamic document that accommodates new information and changes as our understanding increases.” (EXHIBIT A at 8). The CHIA that is challenged one year may not exist the following year.<sup>1</sup>

Thus, the application of collateral estoppel is quite problematic. A number of cases relying on the authority of the United States Supreme Court in Lawlor v. National Screen Service, 349 U.S. 322 (1955) have refused to apply res judicata or collateral estoppel to continuing conduct which occurred after a judgment was rendered. E.g., Bronson v. Board of Education, Etc., 510 F.Supp. 1251 ( S.D. Ohio 1980). In Bronson, the federal district court refused to hold that plaintiffs were barred from litigating conduct which occurred subsequent to the original judgment stating, “collateral estoppel would simply be inapplicable to these issues.”

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<sup>1</sup>The coal mining rules explain the process of the CHIA. The pertinent rule states:  
729. Cumulative Hydrologic Impact Assessment (CHIA).  
729.100. The Division will provide an assessment of the probable cumulative hydrologic impacts of the proposed coal mining and reclamation operation and all anticipated coal mining and reclamation operations upon surface- and ground-water systems in the cumulative impact area. The CHIA will be sufficient to determine, for purposes of permit approval whether the proposed coal mining and reclamation operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The Division may allow the applicant to submit data and analyses relevant to the CHIA with the permit application.  
729.200. An application for a permit revision will be reviewed by the Division to determine whether a new or updated CHIA will be required.  
Utah Admin. Code R645-301-729 (1997).

Id. at 1274. Similarly, the Water Users are seeking relief for future damages to their water supply and not past damages. Of course, whether collateral estoppel should apply in any particular case is factually driven and requires factual findings. Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366 (1996). These factual findings are particularly difficult to make in the instant case due to the existence of "continuing conduct" and the fact that both the Division and Co-op took the position in the earlier hearing that the issue of the Blind Canyon Seam impact on the Water Users springs should be decided in another hearing.

The Utah Supreme Court in Jones stated:

In Sevy v. Security Title Co., 902 P.2d 629 (Utah 1995), we explained that collateral estoppel, or issue preclusion, prevents the parties from relitigating issues resolved in a prior related action. The party seeking collateral estoppel must satisfy four requirements. First, the issue challenged must be identical in the previous action and in the case at hand. Second, the issue must have been decided in a final judgment on the merits in the previous action. Third, the issue must have been competently, fully, and fairly litigated in the previous action. Fourth, the party against whom collateral estoppel is invoked in the current action must have been either a party or privy to a party in the previous action. 902 P.2d at 632-33 (citing Timm v. Dewsnap, 851 P.2d 1178, 1184 (Utah 1993)). 'Issue preclusion arises in a second action on the basis of a prior decision when the same 'issue' is involved in both actions; the issue was 'actually litigated' in the first action, after a full and fair opportunity for litigation,' and the issue was actually decided by a sufficiently final and valid disposition on the merits. 18 Charles A. Wright et al., Federal Practice and Procedure § 4416 (1981).

Jones, Waldo, Holbrook, Etc. v. Dawson, 923 P.2d at 1370 (Utah 1996).

In the Informal Hearing, the Division did not believe that the third prong of Jones could be satisfied until the Water Users were allowed to demonstrate what evidence was excluded by the Board's action and what evidence concerned events which have occurred subsequent to the Board's decision. The Division's records which include the earlier Tank Seam Board hearing transcript clearly demonstrate that the Division and Co-op attempted to limit testimony at the

Tank Seam Hearing to the Tank Seam and had at least initial success with the Board.<sup>2</sup>

The transcript of the Tank Seam hearing raise legitimate doubt about whether the third prong of Jones (the issue has been competently, fully and fairly litigated) has been satisfied. Jones, 923 P.2d at 1370. The Utah Supreme Court recognized that the Board did not resolve the renewal issue, “[w]hatever the effect of the contested findings and conclusions may be on Co-op’s pending permit renewal application, the Board did not purport to resolve the renewal issue in its order.” Castle Valley Special Service District v. Utah Board of Oil, Gas and Mining, 938 P.2d 248, 254 n.5 (1996). This was particularly true since the burden of proving the applicability of collateral estoppel is on the party asserting it. Id. at 1370. When it held the informal hearing, the

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<sup>2</sup> An examination of the transcript of the Tank Seam Hearing demonstrates that the Water Users were initially limited in their presentation of evidence. While the transcript does reveal that the evidence which was presented was later admitted despite objections by Co-op and the Division, it is impossible to know from the record what evidence was never presented because of the initial limitations placed by the Board. For illustration the following statements are quoted: Tom Mitchell, Division attorney, stated, “[i]f they have a complaint with regard to mining as it’s going on today, they have a remedy, but that remedy is not an objection to a permit, to a significant revision to the permit.” 1994 Hearing Transcript (herein after cited as “T. \_\_.”) at 13. Mr Hansen stated the proper time to raise objections to present mining was when the renewal was heard. “That would be the proper time for the petitioners to raise those issues. Here and now is not the time.” T at 20-21. Tom Mitchell, “[i]t seems to me that’s the only relevant issue, is if you stop mining in one level and start mining in another level, what is the effect of mining in the new level, not what was the effect of mining in the old mine.” T. at 24 The Board Chairman Dave Lauriski stated, “I want to point out that in the Board’s deliberations, that the issue before us today relates to the significant revision of the mining permit issued to Co-op in July of this year, and the Board in its deliberations determined that we would only consider evidence as it relates to the impact of mining of the Tank Seam. However, if petitioners need to lay foundation by raising issues that relate to current mining activities and as it impacts, as it might impact the Tank Seam mining, then we will consider those issues as relevant to this case.” T at 29. The Board Chairman Dave Lauriski stated, “[t]he Petitioners in this case haven’t asked us to look at the permit that was granted in 1991, toward the Blind Canyon Seam.” T. at 333.

Division did not believe that Co-op had met the burden of proving the third prong of the analysis (the need to fully and fairly litigate) and proceeded to hear the evidence that the Water Users asserted was new or had been excluded because of the limitations placed on them in the prior hearing. Due to the manner the case was presented, it was often impossible to determine which was new evidence and which was old evidence perhaps subject to collateral estoppel, until a careful and time-consuming examination of the old record was made. The Division found it impossible to apply collateral estoppel in a contemporaneous manner.

Once it heard the evidence, the Division was able to make a factual determination on the merits of the Water Users argument which made a decision about collateral estoppel unnecessary. A decision about collateral estoppel is only important if the Division had ruled against Co-op. Then, Co-op could have used the argument that if evidence was correctly precluded the decision would have been different. Since Co-op did not lose the hearing, the issue of whether the Division should have found that collateral estoppel applied to some issues is not important. Remanding the Division's decision for a determination will only delay the final resolution of the case. The Water Users have already appealed the Division's decision to renew the permit. Thus, the Board will have to make an independent decision on the issue of collateral estoppel regardless of the Division's position.

However, if the Division would presently rule on the collateral estoppel issue, it is doubtful that the Division would find collateral estoppel. In Jones, the Utah Supreme Court clearly put the burden of proving the applicability of collateral estoppel on the party asserting it. Id. at 1370. To date, Co-op has not proven the third prong of collateral estoppel. The Division does not take a position on whether Co-op could prove that the issue has been "competently,

fully, and fairly litigated in the previous action” if it marshaled the record.

The Division’s recommendation to the Board is that they request a proffer of the evidence that the Water Users believe was either not presented at the Tank Seam Hearing because of the limitations placed by the Board (at the urging of Co-op and the Division) or evidence that has arisen subsequent to the Board Hearing. This will help the Board decide if prong three of Jones is satisfied. Additionally, the evidence which exists subsequent to the Hearing will help the Board to decide whether prong one of the Jones test is satisfied: Whether “the issue challenged [is]... identical in the previous action and in the case at hand.” Id. at 1370.

The Division acknowledges that the Utah Supreme Court found that sufficient evidence existed to support the Board’s findings on the Blind Canyon Seam. Castle Valley, 938 P.2d at 254. However, the Division does not believe that this is dispositive on whether the Water Users received a hearing on the Blind Canyon Seam which would justify collateral estoppel. The two issues are analytically distinct. Arguably, the bar for deciding that sufficient evidence exists to support a finding is lower than determining that an issue has been “competently, fully, and fairly litigated”.

Thus, any determination of the collateral estoppel issue shall occur subsequent to the proffer of evidence by the Water Users.

## CONCLUSION

The Board should not take any action which prolongs the resolution of the permit renewal issue. The appointment of a hearing examiner would only result in additional delay. The Division performed the function of a hearing examiner when it conducted a comprehensive and extensive

informal hearing. A hearing examiner would not only delay resolution of the matter it would greatly inflate the cost of resolving the matter. The hiring of an outside expert satisfactory to Co-op could be quite expensive.

Similarly, the Board should deny the request of Co-op to remand the case to the Division for a determination of the issue of collateral estoppel. The Board will have to make an independent determination of the applicability of collateral estoppel regardless of the Division's decision. Remanding the case will only result in needless delay. Additionally, the Division believes that the Board should not rule on the issue of collateral estoppel until the Water Users have a chance to proffer evidence.

DATED this 14<sup>th</sup> day of November, 1997.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing SUPPLEMENTAL MEMORANDUM for Docket No. 95-025, Cause No. ACT/015/025 to be mailed by first-class mail, postage prepaid, this 14<sup>th</sup> day of November, 1997, to the following:

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EXHIBIT A