

**FILED**

NOV 21 1997

SECRETARY, BOARD OF  
OIL, GAS & MININGBEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH

---oo0oo---

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

---oo0oo---

Pursuant to a certain MOTION, STIPULATION AND ORDER issued October 15, 1997, the Division of Oil, Gas and Mining ("Division") offers this REPLY TO SUPPLEMENTAL MEMORANDUMS to answer memorandums filed by Castle Valley Special Service District, the North Emery Water Users Association and the Huntington-Cleveland Irrigation (collectively "the Water Users") and C.W. Mining Company, d.b.a. Co-op Mining Company ("Co-op") on the need for a hearing examiner and whether collateral estoppel should apply in the Bear Canyon Mine permit renewal hearing.

**INTRODUCTION**

Having read the supplemental memorandums filed by the Water Users and Co-op, the Division finds no reason to materially alter its initial positions. Thus, this reply will be a brief expansion of the SUPPLEMENTAL MEMORANDUM. The Division still believes that the appointment of a hearing examiner is both unnecessary and will waste time and money. The Division will not expand on its initial analysis of the issue. However, the Division will briefly discuss the collateral estoppel issue. The Division presents this material to the Board of Oil, Gas and Mining ("the Board") in order to provide additional guidance to the Board on the issue of

collateral estoppel. The Division continues to believe that a final determination of whether collateral estoppel should apply cannot be made until the Water Users are allowed to show evidence that falls into one of two categories. First, evidence of mine impacts which have occurred subsequent to the Tank Seam Hearing, and second, evidence that was excluded by the Board's limitations in the Tank Seam Hearing.

## ARGUMENT

### **I. Issue Preclusion Is Not Applicable If a Court Directs That An Issue Be Litigated in A Future Action**

In addition to the arguments adopted in the Division's SUPPLEMENTAL MEMORANDUM filed November 14, 1997 and incorporated by reference, the Division wishes to bring to the Board's attention one other potential reason why collateral estoppel may not apply. Persuasive authority states, "[m]ore importantly, a judgment is not res judicata as to any matters which a court expressly refused to determine, and which it reserved for future consideration, or which it directed to be litigated in another forum or in another action." Jackson Trak Group, Inc., v. Mid States Port Authority, 751 P.2d 122, 128 (Kan. 1988) (cites omitted).

Whether this situation exists in the instant case is questionable. Evidence in the record exist to both support a claim that the Board reserved the issue and that the Board determined the issue. 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." 1994 Hearing Transcript at 29. This language suggests that the issue of whether the Blind Canyon Seam was

impacting the Water Users' springs was being reserved. On the other hand, the Board did make findings on the impact of the Blind Canyon Seam, and the Utah Supreme Court in Castle Valley Special Service District v. Utah Board of Oil, Gas and Mining did uphold the Board's findings. 938 P.2d 248, 255 (Utah 1996). This is very persuasive that the issue was not reserved.

In sum, the Division believes that the determination of whether the Board reserved the issue of the Blind Canyon Seam needs to be examined by the Board. The record is contradictory on whether the issue of the Blind Canyon Seam's impact on the Water Users' springs was reserved.

### CONCLUSION

The Division continues to believe that the issue of whether collateral estoppel should apply is a complex problem given the record of the previous proceeding and the fact that the Board is not dealing with a closed set of facts due to continued mining at the site. Consequently, the Division still reserves judgment on whether collateral estoppel should apply until it sees a proffer of evidence by the Water Users on what evidence was excluded in the first hearing and what evidence has arisen since the previous hearing. Moreover, the Division believes that the Board should adopt a similar approach.

DATED this 21st day of November, 1997.

By Daniel G. Moquin  
Daniel G. Moquin  
Assistant Attorney General  
1594 West North Temple, Suite 300  
P.O. Box 140855  
Salt Lake City, UT 84114-0855

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing REPLY TO SUPPLEMENTAL MEMORANDUMS for Docket No. 95-025, Cause No. ACT/015/025 to be mailed by first-class mail, postage prepaid, this 21<sup>st</sup> day of November, 1997, to the following:

Jeffrey W. Appel  
W. Herbert McHarg  
APPEL & WARLAUMONT, L.C.  
1100 Boston Building  
9 Exchange Place  
Salt Lake City, Utah 84111

J. Craig Smith  
David B. Hartvigsen  
NIELSEN & SENIOR, P.C.  
1100 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, Utah 84111

Attorneys for Castle Valley  
Special Service District

Attorneys for North Emery Water  
Users Association and Huntington-  
Cleveland Irrigation Company

F. Mark Hansen, Esq.  
404 East 4500 South, Suite B-34  
Salt Lake City, Utah 84107

Attorney for Co-op Mining Company

Sent by First-Class Mail To:

Wendell Owen  
Co-Op Mining Company  
P.O. Box 1245  
Huntington, Utah 84528

Carl E. Kingston, Esq.  
3212 South State Street  
Salt Lake City, Utah 84115

Sent by Hand Delivery To:

Patrick J. O'Hara  
Assistant Attorney General  
1594 West North Temple, Suite 300  
P.O. Box 140855  
Salt Lake City, UT 84114-0855

Daniel G. Moquin  
Assistant Attorney General  
1594 West North Temple, Suite 300  
P.O. Box 140855  
Salt Lake City, UT 84114-0855

  
\_\_\_\_\_