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SECRETARY, BOARD OF
OIL, GAS & MINING

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

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IN THE MATTER OF THE FIVE YEAR PERMIT RENEWAL, CO-OP MINING COMPANY, BEAR CANYON MINE, EMERY COUNTY, UTAH	: : : : :	RESPONSE OF THE DIVISION OF OIL, GAS AND MINING TO WATER USERS' PROFFER OF EVIDENCE DOCKET NO. 95-025 CAUSE NO. ACT/015/025
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COMES NOW the Division of Oil, Gas and Mining (the "Division") and offers its response to the PROFFER OF WATER USERS PER REQUEST OF THE BOARD filed December 24, 1997 by Castle Valley Special Service District ("Castle Valley"), North Emery Water Users Association ("NEWUA") and Huntington-Cleveland Irrigation Company ("Huntington Cleveland") (collectively, "Water Users").

The Board of Oil, Gas and Mining ("Board") requested that the Water Users provide the Board with evidence that fell into two categories. First, evidence which was excluded from the Tank Seam hearing by restrictions imposed by the Board. The second category of evidence is evidence which demonstrated that the continued mining or another event at the site had the capability to invalidate the determination that no hydrological connection existed between the mine and the Water Users' springs. After looking at the proffered evidence, the Division believes a number of issues, including hydrological connection of the mine with Water Users' springs, were fully and fairly litigated at the Tank Seam hearing and no evidence has been presented to

suggest that mining or another event at the site has invalidated that determination.

To avoid needless duplication, the Division incorporates by reference all previous arguments made to the Board on this issue.

ARGUMENT

I. THE WATER USERS HAVE FAILED TO SHOW THAT THE BOARD'S INITIAL RESTRICTIONS MATERIALLY ALTERED THEIR PRESENTATION

The Water Users' proffer does not demonstrate that the Board's initial restrictions substantially altered their presentation. Any analysis of the Board's restrictions must first consider that the Board attempted to correct any limitation imposed upon the Water Users. After considering the Water Users repeated argument that the Tank Seam revision hearing had to consider the existing impact of the Blind Canyon Seam operation, Board Chairman Dave Lauriski stated, "All right. We'll go back on the record. We're going to go ahead and let you proceed, and we've noted your comments relative to what this Board should be considering, and it will consider all the evidence when we recess to consider this case. So, if you want to go ahead Mr. Smith, you may proceed." Transcript Tank Seam hearing at 335 (hereinafter T. at __). Thus, the Water Users had the chance to correct any deficiencies caused by the initial restrictions. Their failure to correct any alleged deficiencies at the hearing must cut against their argument that the Tank Seam hearing was unfair.

Another global reason for finding that the Water Users were not unfairly restricted in their presentation is that the transcript is devoid of any incident of the Water Users offering evidence

which is disallowed. Consequently, the transcript demonstrates that the Water Users both failed to offer any new evidence when presented the opportunity by Chairman Lauriski or establish for the record how they were being restricted. Moreover, the Division believes that an examination of the transcript demonstrates that the Water Users were not prevented from presenting their entire case in any meaningful way. The Water Users' proffer does not demonstrate that the hearing was unfair.

The first example of evidence restricted by the Board cited in the Water Users' proffer is an incorrect assertion. They claim that evidence of groundwater flow elevations for the Blackhawk Formation/Spring Canyon Sandstone aquifer was excluded. The Water Users state, "[t]his would have established that Co-op has been intercepting the groundwater table as mining continues northward". Proffer at 3 (EXHIBIT A). However, the Water Users' expert S. Bryce Montgomery testified, "[a]nd at the discharge point where the springs are, the potentiometric surface is very low, and the formation directly above it is not saturated. But as you get back northward into the mountain range, the Gentry Mountain Range to the north, THEN you have a thicker saturated section, and that section actually reaches up into the Blackhawk Formation which contains the coal beds. So when they mine the coal they intercept the groundwater." T. at 106. Moreover, the transcript contains numerous other examples on this subject. E.g. T. at 121, 128, 157. Contrary to their assertion, the Water Users were allowed to present evidence on this matter and, thus, the matter was fully and fairly litigated.

The Water Users' second attempt to demonstrate that evidence was restricted was to allege that geochemical, radiometric and stable isotope evidence was not submitted. Co-op

clearly offered such evidence in the hearing. E.g. T. at 247, 287-88. Interestingly, the Water Users tried to support their theory by attempting to use that evidence. See T. at 247. Logically, if the Board allowed Co-op to use such evidence, the Water Users would have been allowed to present such evidence. Thus, the Water Users' claim that they refrained from presenting such evidence by the Board's restrictions lacks credibility. Nothing in the transcript supports such an assertion.

The Water Users' third example is so vague that a proper response is difficult. They state, "[e]vidence that mining in the area has in the past dewatered a groundwater system and has caused lower spring discharge within one year following mining." Proffer at 4. It does not explain by whom, define the area, or name the spring. The evidence may be inadmissible as irrelevant or if not probative of what is occurring at Big Bear Spring and Birch Spring if the spring mentioned by the Water Users is not Big Bear Spring or Birch Spring. If the spring is Big Bear Spring or Birch Spring, then the evidence has already been considered by the Board at the hearing.

The fourth example of evidence cited by the Water Users was clearly discussed at the hearing. For example, the amount of water intercepted by Co-op was discussed in the transcript in detail from pages 183-86. T. at 183-86. The Water Users were conducting the cross-examination. Nowhere in the transcript were the Water Users denied the right to call rebuttal witnesses. Thus, the Water Users should not claim they were denied the right to present evidence on the matter.

The Water Users' fifth example of evidence restricted by the Board is clearly incorrect. The Water Users rely heavily on a May 17, 1991 letter to claim the Board restricted their evidence. However, the Water Users are inconsistent in their pleading. The Water Users treat the letter as new evidence on page 15 of their pleading stating, "[t]hough not disclosed to the Board nor the Water Users at the Tank Seam hearing, Mr. Tom Munson, senior reclamation hydrologist for the Division, had previously recognized that Co-op's actions had a potential effect on Big Bear Spring." Munson Memorandum to Pamela Grubaugh-Litig, dated May 17, 1991." Water Users' Proffer at 15. The Water Users are clearly implying that the Division successfully hid evidence from the Water Users. The Division will deal with the falsity of that accusation when it addresses the use of the letter as new evidence. However, it is quite clear that the Board's restrictions did not prevent evidence from being admitted that the Water Users claim they did not know about. The fact that the Water Users attempt to submit the letter as new evidence should preclude it from being used as evidence that was excluded by the Board's restrictions.

The fifth example is evidence concerning McCadden Hollow, Tie Fork Canyon, Gentry Hollow and Wild Cattle Hollow. The Water Users' expert testified about the Tie Fork Canyon. Interestingly, he stated that another mine had impacted the Water Users' spring in the Tie Fork Canyon and the spring had to be closed. T. at 75-76. Subsequently, the other mine helped the Water Users develop a new spring in the area. Thus, it does not seem very pertinent to the issue of a hydrological connection between the mine and Big Bear and Blind Canyon. Moreover, nothing in the transcript seems to indicate that either the Division or Co-op tried to limit testimony about Tie Fork. Thus, the Water Users appear to have been free to expand their

testimony on the subject. Similarly, to the degree that surface flow measurements about McCadden Hollow, Gentry Hollow, and Wild Cattle Hollow demonstrate that Gentry "Ridge is the source of the water encountered by the mine", the Water Users appear to have had an opportunity to use such evidence in rebuttal if they had chosen to do so. At the hearing, Co-op presented evidence that the three aquifers for the mine area are recharged in an area other than Gentry Ridge. The logical time for the Water Users to present evidence on the issue would be in rebuttal. The Division would agree that if the Board, after hearing evidence from Co-op about the point of recharge, had prevented the Water Users from presenting such evidence, the hearing would have been unfair. However, nothing in the transcript suggests this occurred.

Similarly, compared to the third example the seventh example is very vague and thus difficult to analyze. However, the transcript of the first Board hearing is replete with testimony about fractures that in the Water Users' opinion would allow a connection between the mine and the springs. For example, the Water Users' expert, S. Bryce Montgomery, testified as follows:

Now, there are conditions here that make this groundwater not only able to flow laterally through the previous sandstone beds, but it can also be transmitted vertically down through the strata, and it's due to extensive faulting that's occurred in this area. These are tensional faults, formed by tensional forces pulling apart the rock formation and allowing cracks or joints to be formed, and where there's actually been movement or displacement along the joints, that's a fault. You have openings that are developed vertically. These are near vertical faults that trend north and south. The Big Bear Spring and the Birch Spring, along with the Co-op mine, are located directly between two very prominent faults, as I show here on this sketch.

T. at 107.

Thus, the Water Users did raise this issue at the previous hearing. The transcript record is devoid of any attempt to limit the testimony on this issue. Thus, the matter was fully and fairly litigated.

II. THE WATER USERS HAVE NOT PRESENTED ANY NEW EVIDENCE THAT WOULD JUSTIFY A REFUSAL TO APPLY COLLATERAL ESTOPPEL

The Doctrine of Collateral Evidence protects even incorrect decisions. “[I]t is true that all preclusion doctrines rest on a determination that it is better to run the risk of perpetuating a wrong decision than to incur the multiple costs of repeated litigation.” 18 CHARLES A. WRIGHT Et. al. § 4424 at 239. Thus, to defeat the application of collateral estoppel the Water Users must proffer evidence that demonstrates that the controlling facts have changed. Evidence that just tends to show the initial decision was incorrect ordinarily cannot defeat collateral estoppel. Thus, the Water Users needed to proffer evidence that showed that either the continued mining of the site or some external event had changed the hydro geology of the permit area. This the Water Users have failed to do.

Included in the Water Users new evidence list is evidence that Co-op pumped water into its old workings. The Water Users allege that the Division withheld this information from the Water Users. This charge is patently false. This letter has been a public document available for inspection since its creation. The fact that the Water Users failed to inspect the Division’s files before the last hearing does not make this letter new evidence for collateral estoppel purposes. “Failure to adduce evidence available equally at the first trial as at the second is not likely to create a new issue.” Wright, *supra* § 4417 at 164.

Moreover, it is clear from an examination of the hearing transcript that the Water Users were well aware of the pumping of water into the old workings. Testimony by Water Users’ witness Darrel Leamaster clearly shows that Water Users were made aware of the pumping and in

fact had been informed by the Division of that fact. Mr Leamaster stated, “[a]nd what we eventually found out was that Co-op mine was discharging mine water back into the old workings of the old mine.” T. at 89. Additionally, the transcript contains this following exchange between Tom Mitchell, the Division’s Attorney and Mr Leamaster about the pumping of water into the old works and the subsequent build-up of ice. Question from Tom Mitchell: “But you don’t have anything you can point to of our own personal knowledge of that time other than what you may have learned from your expert; is that a fair statement?” Answer from Mr. Leamaster: “Yes. Although we have been also given some information from DOGM, not directly from the mining company, but from DOGM that also--” Question from Tom Mitchell: From the records filed with DOGM as a requirement of their permit? Answer from Mr. Leamaster: “ That also indicated there was a problem.” T. at 95. Clearly, the Division did not attempt to hide evidence from the Water Users.

The Division refuses to rebut the remaining proffer of evidence paragraph by paragraph because, the Division’s response is the same for each item. Nothing in the proffer even suggests that the hydro geology of the permit area has changed since the last hearing. The evidence is only offered to demonstrate that the Board made an incorrect decision the first time. Even if this were true, which the Division determined in the informal hearing is not the case, it would be legally irrelevant. If the doctrine of collateral estoppel did not protect incorrect decisions, it would be useless. Courts would always have to listen to the merits of the case before making a decision on collateral estoppel, thereby depriving the proponent of collateral estoppel the benefits of the doctrine. Once a court has listened to the merits of a case, it can make a decision without

invoking collateral estoppel. This is precisely what occurred at the Division level, where after hearing the merits of the case, the Division believed it was pointless to rule on collateral estoppel when Co-op was entitled to a favorable decision based on the merits.

III. DIVISION'S RECOMMENDATION ON THE APPLICATION OF COLLATERAL ESTOPPEL

CO-OP'S SUPPLEMENTAL MEMORANDUM ON ISSUES OF HEARING EXAMINER AND COLLATERAL ESTOPPEL (hereinafter "CO-OP'S MEMO") filed November 14, 1997 asked for collateral estoppel to apply to the following issues:

- [1] Big Bear Spring is not hydrologically connected to Co-op's permit area.
- [2] Birch Spring is not hydrologically connected to Co-op's permit area.
- [3] As of the date of the Tank seam Order, neither the quantity nor the quality of water at either spring was ever adversely impacted by mining at the Bear Canyon mine.
- [4] As of the date of the Tank seam Order, Co-op's mining operation was designed to prevent material damage to the hydrologic balance outside the permit area.
- [5] As of the date of the Tank seam Order, Co-op's permit application is complete and accurate, and in full compliance with all statutory and regulatory requirements.

CO-OP'S MEMO at 5.

The Division finds that issues 1,2, 4, and 5 are fully supported by the Board's Order ("ORDER") dated the 13 of June 1995. (EXHIBIT B) Paragraph one of the CONCLUSIONS OF LAW section of the ORDER supports application of collateral estoppel to issue five. Paragraph 52 of the FINDINGS OF FACT of the ORDER supports application of collateral estoppel to issues one and two. Paragraph 53 of the FINDINGS OF FACT of the ORDER supports application of collateral estoppel to issue four. The Division believes that issue three identified in Co-op's pleading needs to be modified. While the findings in Paragraph 52 preclude

a finding of an adverse impact due to an underground connection between the springs and the mine, it is possible that Co-op's pumping water into the old works could have caused surface contamination. Since the practice had stopped by the time of the Tank Seam hearing and thus was not relevant to whether the revision should be approved, the Board never ruled on that possibility. Consequently, collateral estoppel would not be appropriate applied to that allegation. If Co-op restricts the use of collateral estoppel to underground contamination, the Division would support that use.

CONCLUSION

The proffer by the Water Users has not demonstrated that the Board restrictions prevented a full and fair litigation of issues that Co-op claims should be precluded from further litigation by the doctrine of collateral estoppel. Moreover, the Water Users have not proffered any evidence why the earlier Board determinations would now be invalid.

Thus, the Division supports Co-op's attempt to apply collateral estoppel to the five issues with the above discussed modification of issue four.

DATED this 6th day of January, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing RESPONSE OF THE DIVISION OF OIL, GAS AND MINING TO WATER USERS' PROFFER OF EVIDENCE or Docket No. 95-025, Cause No. ACT/015/025 to be mailed, postage prepaid, this 8th day of January, 1998, to the following:

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