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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

IN THE MATTER OF THE FIVE YEAR PERMIT RENEWAL, CO-OP MINING COMPANY, BEAR CANYON MINE, EMERY COUNTY, UTAH	)	Docket No. 95-025 Cause No. ACT/015/025

FINAL BOARD ORDER ON THE COLLATERAL ESTOPPEL QUESTION

TABLE OF CONTENTS

I. Introduction 2
- A. Nature of the Case & Applicable Law 2
- B. The Parties 5
- C. The Hearing 5
- D. Appearances of Counsel 6

II. Background Information About This Case 7
- A. The DOGM Ruling on Remand 7
- B. The Water Users' Appeal 8
- C. Scope of the Mandatory Proffer 9
- D. The Water Users' Proffer 11
- E. Standard of Review 12

III. Background Information About The Prior Case 12
- A. Introduction 13
- B. Area Geologic Description 15
- C. Disputed Hydrologic Issues 16
- D. Hydrologic Effect of Mining In The Tank Seam 19
- E. Hydrologic Effect of Mining In the Blind Canyon Seam 21

IV. The Meaning of Collateral Estoppel 28
A. Claims and Issues Distinguished 28
B. The Doctrine of Collateral Estoppel (Issue Preclusion) 30
C. The Four Elements of Collateral Estoppel in this Case 33

V. The "Identical Issue" Element 34
A. The Issues in the Prior Case 34
B. The Issues in this Case 38

VI. The "Completely, Fully and Fairly Litigated" Element 47

VII. Administrative Findings and Notices 60

VIII. Conclusion & Order 62

I. Introduction

A. Nature of the Case & Applicable Law

This case arises under the Utah Coal Program, which is the regulatory program applicable to coal mining operations established by the Utah version of the federal Surface Mining Control and Reclamation Act of 1977, Public Law 95-87, 11 U.S.C. 1201 et seq. ("SMCRA"), codified at Utah Code Ann. §§ 40-10-1 et seq. (1953, as amended) ("U-SMCRA") and the implementing administrative rules, Utah Admin. Code R645 et seq.

The Utah Board of Oil, Gas & Mining (the "Board") has subject matter jurisdiction, and personal jurisdiction over the parties, to hear and decide this case under the provisions of the Utah Coal Program which allow parties in interest to raise

challenges to coal mine five-year permit renewal decisions by the Utah Division of Oil, Gas & Mining ("DOGM"). In particular, this case is governed by Utah Code Ann. § 40-10-9(4) (1953, as amended), which states:

> (4) (a) Any valid permit issued pursuant to this chapter shall carry with it the right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit. The holders of the permit may apply for renewal, and the renewal shall be issued (but on application for renewal the burden shall be upon the opponents of renewal), subsequent to fulfillment of the public notice requirements of Sections 40-10-13 and 40-10-14 unless it is established that and written findings by the division are made that:
>
> > (i) The terms and conditions of the existing permit are not being satisfactorily met;
> >
> > (ii) The present surface coal mining and reclamation operation is not in compliance with the approved plan;
> >
> > (iii) The renewal requested substantially jeopardizes the operator's continuing responsibility on existing permit areas;
> >
> > (iv) The operator has not provided evidence that the performance bond in effect for the operation will continue in full force and effect for any renewal requested in the application as well as any additional bond the division might require pursuant to Section 40-10-15; or
> >
> > (v) Any additional revised or updated information required by the division has not been provided.
>
> Prior to the approval of any renewal of any permit, the division shall provide notice to the appropriate public authorities.
>
> (b) If an application for renewal of a valid permit includes a proposal to extend the mining operation beyond the boundaries authorized in the existing permit, the portion of the application for renewal of a valid

> permit which addresses any new land areas shall be subject to the full standards applicable to new applications under this chapter; but if the surface coal mining operations authorized by a permit issued pursuant to this chapter were not subject to the standards contained in Subsections 40-10-11(2)(e)(i) and 40-10-11(2)(e)(ii) by reason of complying with the provisions of Subsection 40-10-11(2)(e), then the portion of the application for renewal of the permit which addresses any new land areas previously identified in the reclamation plan submitted pursuant to Section 40-10-10 shall not be subject to the standards contained in Subsections 40-10-11(2)(e)(i) and 40-10-11(2)(e)(ii).
>
> (c) Any permit renewal shall be for a term not to exceed the period of the original permit established by this chapter. Application for permit renewal shall be made at least 120 days prior to the expiration of the valid permit.

Id. (emphasis added). The Board's administrative rules to implement the permit renewal provisions of the above statute are published at Utah Admin. Code R645-303-100 & -200.

In general, the declared regulatory objective of the five-year permit renewal procedure under U-SMCRA is: "Effectively review and act on applications to renew existing permits in a timely manner, to ensure that coal mining and reclamation operations continue, if they comply with the State Program." Utah Admin. Code R645-303-200.230.

The Board is deciding this matter as a formal adjudication in compliance with the U-SMCRA and the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-1 et seq.

B. The Parties

The underground coal mine at issue in this case is located in Emery County, Utah and is called the Bear Canyon Mine (the "Mine"). The Mine is operated by C.W. Mining Co. dba Co-Op Mining Company (the "Operator").

The challenge to the Operator's five year permit renewal is asserted jointly by three entities: the Castle Valley Special Service District (the "Service District"), the North Emery Water Users Association (the "Water Association"), and the Huntington-Cleveland Irrigation Company (the "Irrigation Company"). The Service District, the Water Association and the Irrigation Company collectively are referred to in this Order as the "Water Users." The Water Users have certain interests in two springs located in the general vicinity of the Mine, south of the permit area, and their standing has not been questioned by any party.[1]

DOGM is also a party to this Board proceeding. No other parties have asked to be heard in this matter.

C. The Hearing

Pursuant to a Stipulation, Motion and Order for Pre-Hearing Scheduling and Discovery Order (10/15/1997) (the "Pre-Hearing Order"), the Board convened a

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[1]The Water Users either own or claim the right to use water from Birch Spring, Big Bear Spring, or both, in Emery County, Utah. These springs are located near the coal operations of the Operator (see map in the Prior R. at 488). These springs are an important source of culinary water for many residents of northern Emery County, Utah, and for irrigation purposes.

public hearing on the record in the above-captioned matter. The hearing began on December 10, 1997 at 10 a.m. in Room 1040A at the Department of Natural Resources Building in Salt Lake City, Utah, and was continued pending the issuance of this Order, as explained below.

As set forth in the stipulated Pre-Hearing Order, the hearing was held to resolve two contested threshold questions:

(1) Should, as the Water Users urge, the Board appoint a hearing examiner to hear the evidence? and

(2) Does the doctrine of collateral estoppel, as claimed by DOGM and the Operator, eliminate the need for an evidentiary hearing?

The following Board members were present and participated at the hearing: Dave D. Lauriski, Chairman; Stephanie Cartwright; Jay L. Christensen; Elise L. Erler; Thomas B. Faddies; W. Allan Mashburn; and Raymond Murray.

D. Appearances of Counsel

Attorney F. Mark Hansen, of Salt Lake City, appeared on behalf of the Operator.

Attorney Scott Ellsworth, with the Salt Lake City law firm of Nielsen & Senior, appeared at the hearing on behalf of the Water Association and the Irrigation Company.

Attorney Jeffrey W. Appel, with the Salt Lake City law firm of Appel & Warlaumont, appeared at the hearing on behalf of the Service District.

State of Utah Assistant Attorney General Daniel G. Moquin appeared at the hearing on behalf of DOGM.

No other persons entered appearances.

State of Utah Assistant Attorney General Patrick J. O'Hara served as legal counsel to the Board.

II. Background Information About This Case

A. The DOGM Ruling on Remand

DOGM originally approved the challenged five-year permit renewal November 2, 1995, but, following an appeal to the Board by the Water Users on a procedural point, the Board entered that certain "Order Granting Temporary Relief and Remanding for an Informal Conference" (2/23/1996) (the "Interim Board Order"). The Interim Board Order authorized the Operator to continue coal mining operations during the pendency of these proceedings, but it ordered DOGM to conduct an informal conference with the Operator and the Water Users.[2] On remand, the informal hearing was held by DOGM on October 17, 1996, November 8, 1996 and February 28, 1997.

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[2]The Board ordered DOGM to consider the "Objections to Permit Renewal and Request for Informal Conference" dated and filed by the Water Users October 12, 1995, which DOGM has done.

DOGM Director James W. Carter personally conducted the informal adjudicatory hearing.

The Board has reviewed the findings and conclusions as set forth in that certain decision issued on remand in this proceeding by DOGM Director Carter, entitled, the "Division's Findings, Conclusion & Order" (8/11/1997) (the "DOGM Ruling") (a copy is attached as Exhibit A to DOGM's "Supplemental Memorandum" (11/14/1997)).

Although the collateral estoppel issue was raised below by the Operator (see DOGM Ruling at pages 2-3), DOGM elected, at least for purposes of conducting the informal adjudication mandated by the Board, to reach the merits (i.e, assuming, without really deciding, that the Prior Case had not necessarily decided the issues in this case). DOGM thereby, for all practical purposes on remand, effectively denied the Operator's collateral estoppel contentions. DOGM, in any event, plainly considered the merits of all of the conflicting evidence, then ruled on the merits against the Water Users. After reviewing the evidence, DOGM Director Carter ultimately concluded:

> "Co-Op's coal mining operations are in compliance with their permit and with the environmental protection standards of the state program."

DOGM Ruling at 8.

B. <u>The Water Users' Appeal</u>

Objecting to the DOGM Ruling of August 11, 1997, the Water Users' appealed. The Board has reviewed the pre-hearing papers filed to date by the parties in

this case, including the Water Users' "Joint Objection to Renewal, Appeal, and Request for Hearing" (9/10/1997) (the "Appeal"), and the various supplemental briefs filed by the parties bearing on the two threshold questions explained above.

The collateral estoppel question has, in a timely manner, been renewed by the Operator in opposition to this Appeal. Even though DOGM Director Carter elected to not decide the case on remand on the collateral estoppel point, DOGM now, for purposes of the Appeal, also concurs with the Operator on the collateral estoppel question.

C. Scope of the Mandatory Proffer

The Board has heard and considered the parties' respective oral arguments at the December 10, 1997 public hearing. After hearing the arguments of counsel, the Board first deliberated on December 10, 1997, after which deliberations the Board stated on the record to the parties, who were present through their counsel:

(i) That the Board was taking the collateral estoppel question under advisement;

(ii) That the Board was ordering the Water Users to make a specific and timely post-hearing proffer of evidence, described more particularly below, to assist the Board in deciding the contested collateral estoppel question; and

(iii) That the Board had decided to deny the Water Users' request for a hearing examiner. Although the Board does have the discretion to appoint

a hearing examiner in the right case (see Utah Admin Code R641-112), the Board finds that it has the appropriate technical expertise to hear the technical issues of geology and hydrology in this case. The Board also finds that it is in the public interest for the full Board to hear and decide this particular matter.

In a permit renewal case such as this, U-SMCRA gives the Operator a presumptive right of renewal, and the burden of proof to block a renewal falls on the objector. Utah Code Ann. § 40-10-9(4) (1953, as amended). That means the Water Users have the burden to prove that this particular five-year permit renewal was wrongful. In that context, to assist the Board in deciding the contested collateral estoppel question, the Board ordered the Water Users to make a written proffer to the Board by December 24, 1997, as follows:

(1) Make a proffer of specific "old" evidence, if any, which was in fact excluded by the Board during the Prior Case, and which the Board needs to consider in this case; and

(2) Make a proffer of specific "new" evidence, if any, which shows a change, as a result of continued coal mining in the Blind Canyon Seam ("BCS") since the Prior Order of the Board was issued June 13, 1995 in the Prior Case, which the Board needs to consider in this case.

D. The Water Users' Proffer

Since making its interim ruling on December 10, 1997, the Board has received and reviewed post-hearing papers filed by the parties, including the following:

(1) "Proffer of Water Users Per Request of the Board" (12/24/1997), (the "Proffer");

(2) "Response of the Division of Oil, Gas & Mining to Water Users' Proffer of Evidence" (1/8/1998) ("DOGM's Proffer Response");

(3) "Co-Op's Response to Proffer of Water Users, Objection to and Motion to Strike Proffer of Water Users" (1/12/1998) (the "Operator's Proffer Response" or "Motion to Strike"); and

(4) "Water Users' Reply to Objection to and Motion to Strike Proffer of Water Users" (1/26/1998) (the "Memo Opp. Motion to Strike").

With the matter still under advisement, and having reviewed the above documents pertaining to the Proffer, the Board resumed the hearing on January 28, 1998, at the same location as noted above, so as further to deliberate in executive session. The Board then decided to keep the deliberative portion of the hearing open pending the issuance of this written Order. This Order re-states the Board's already-

announced denial of the motion to appoint a hearing examiner, and announces for the first time the final decision of the Board on the collateral estoppel question.[3]

E. Standard of Review

The threshold question of collateral estoppel is a question of law which the Board reviews de novo for correctness. The Board is not obligated to defer to Director Carter's resolution of the question on remand.

III. Background Information About The Prior Case

As a point of departure to resolve the collateral estoppel question, the Board is cognizant of the Board's two-volume, 891 page Record in the prior Board proceeding between these identical parties. The earlier case which gives rise to the collateral estoppel question is that certain case styled as, In the Matter of the Request for Agency Action by Petitioners North Emery Water Users Association, Huntington-Cleveland Irrigation Company, and Castle Valley Special Service District, Board Docket No. 94-027, Cause No. ACT/015/025-93B, aff'd, Castle Valley Special Service

[3]The Board also hereby (a) denies the Operator's Motion to Strike the Proffer and (b) denies the Water Users' open-ended request that the Board give the Water Users yet another opportunity to file a more detailed proffer at some unspecified date in the future. See Memo Opp. Motion to Strike at 5-6. The Board expressly ordered the Water Users to make their Proffer by no later than December 24, 1997, which they did, so the Board hereby decides this case based on that Proffer as made.

District v. Utah Board of Oil, Gas & Mining, 938 P.2d 248 (Utah 1996), rehearing denied, (Utah 1997) (the "Prior Case").[4]

On June 13, 1995, following two days of evidence, the Board made many specific findings in the Prior Case about the lack of hydrological connection between the Operator's coal mining in the Mine, on the one hand, and the Water Users' two springs, on the other. DOGM and the Water Users claim in this case that the Prior Case fully resolves the issues in this case, but the Water Users claim otherwise. Since the precise findings in the Prior Case are squarely brought into issue in this case, the Board hereby re-states, verbatim, the text of the Board's "Order" in the Prior Case (6/13/1995) (the "Prior Order"), as follows:

A. Introduction.

1. The Water Users in this proceeding are appealing the determination of the Division of Oil, Gas & Mining (the "Division") to grant Co-Op Mining Company ("Co-Op") a significant revision to its mining permit under the Utah Coal Mining and Reclamation Act, Utah Code Ann. § 40-10-1 et seq.

2. The significant revision to Co-Op's mining permit would allow Co-Op to mine a coal seam known as the Tank Seam within Co-Op's existing Bear Canyon Mine in Emery County, Utah. The Tank Seam is located approximately two hundred vertical feet above Co-Op's existing coal mining operations, which are currently being conducted in the Blind Canyon coal seam in the Bear Canyon mine.

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[4]The Prior Case Record, abbreviated for citation purposes in this Order as "Prior R.", is hereby incorporated by this reference into the official administrative Record in this case.

3. Water Users North Emery Water Users Association, Huntington-Cleveland Irrigation Company and Castle Valley Special Services District (collectively the "Water Users") are engaged in the collection and distribution of culinary and irrigation water to users in the general vicinity of the Bear Canyon mine.

4. The Water Users generally contend that Co-Op's existing and proposed mining operations have negatively affected the quantity and quality of water flow from two springs, Birch Springs and Big Bear Springs. Birch Spring is managed by and provides water for the water systems of Water Users Huntington-Cleveland Irrigation Company and North Emery Water Users. **Hearing Transcript (hereinafter cited as "T. __.") at 40.**[5] Big Bear Spring is managed by and provides water for the water system of petitioner Castle Valley Special Service District. **T. 74-76.**

5. The Division approved Co-Op's Application for a Significant Revision to permit mining in the Tank Seam by a decision and accompanying Technical Analysis dated July 21, 1994.

6. The Water Users timely appealed the Division decision on August 22, 1994, and requested that the Board of Oil, Gas & Mining (the "Board") either reverse the Division's approval or, in the alternative, require Co-Op to provide replacement water supplies to the Water Users at Co-Op's sole expense.

7. The Board conducted an extensive formal evidentiary hearing in this matter on October 25, 1994 and November 17, 1994, and additionally considered post-hearing memoranda filed by the parties.

8. At the evidentiary hearing, the Water Users presented testimony by certain of its employees and officers concerning the history and development of Birch and Big Bear Springs, and historic flow rates of the springs. The Water Users also presented expert testimony by Mr. Bryce Montgomery, a consulting geologist, about the alleged impacts of Co-

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[5]The Transcript for the two-day Board hearing in the Prior Case, Prior R. at 86-354 and 534-706, is itself paginated from 1-442. The "T." cites in the Prior Order are to that original pagination supplied by the Court Reporter.

Op's mining activities on the quantity and quality of flows from the springs, and the geologic mechanisms by which such impacts might occur.

9. Co-Op presented evidence in rebuttal by its expert consultants that all water encountered within the Bear Canyon mine was for a variety of reasons hydrologically separate from Big Bear and Birch Springs. Co-Op's experts also testified that the Tank Seam, the area which it sought to mine pursuant to its application for a Significant Permit Revision, was essentially dry and not in any way linked to the disputed aquifer(s).

10. The Division also presented testimony by Division hydrologist Tom Munson and Division permit supervisor Darron Haddock concerning Co-Op's application and associated hydrologic studies.

B. Area Geologic Description.

11. The Bear Canyon Mine is located near the eastern margin of the Wasatch Plateau Coal Field in Bear Creek Canyon, a tributary to Huntington Canyon, in Emery County, Utah. **Exhibit D, p. 1-2.** In the Bear Canyon mine, coal is currently removed from two generally horizontal seams within the Blackhawk Formation, the Blind Canyon Seam and the Hiawatha Seam. **Id. at p. 2-4.** Co-Op began operations at the mine in 1981. **T. 168.**

12. The Tank Seam, which Co-Op seeks to mine pursuant to the disputed application for Significant Permit Revision, is also located within the Blackhawk formation, 220 to 250 vertical feet above the Blind Canyon Seam. **Id. at p. 2-6.**

13. In the vicinity of the Bear Canyon mine, the stratigraphic sequence from the surface downward includes the North Horn Formation, the Price River Formation, the Castlegate Sandstone, the Blackhawk Formation, the Star Point Sandstone, and the Mancos Shale. **Exhibit C, Table 2-4.**[6]

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[6]A copy of the referenced Figure 2-4, entitled, "Generalized Block Diagram Showing Occurrence of Groundwater," is found in the Prior R. at 486.

14. In the vicinity of the mine, groundwater is contained within the Star Point sandstone. The Star Point sandstone is composed of three separate members: the upper member is the Spring Canyon member, the middle member is the Storrs member; and the lower member is the Panther member. **T. 105-106.**

15. Birch Springs is located on the east side of Highway 31 in Huntington Canyon between Bear Canyon and Trail Canyon. **Exhibit 1 ; T. 39**. Big Bear Spring is located on the north side of Bear Canyon approximately one half mile from Co-Op's mine portal into the Blind Canyon seam. **T. 77-78.** Neither spring is located within the permit area. **Exhibit C, p. 2-9.**

16. The two springs both issue from the Panther member of the Star Point sandstone where it contacts the Mancos shale. The Mancos shale is impervious to water and acts as a floor to hold the groundwater above it in overlying formations. **T. 105.**

C. Disputed Hydrologic Issues.

17. Water Users called as an expert witness Mr. S. Bryce Montgomery, a consulting professional geologist, with experience in groundwater hydrology. **T. 99-100.**

18. Mr. Montgomery's basic theory of the hydrology of the area was based upon the concept of a regional aquifer. The base of this aquifer is the level at which the Panther member of the Star Point sandstone contacts the impermeable Mancos shale. It is at this level that Birch and Big Bear Springs issue forth. **T. 106.** Mr. Montgomery testified that the aquifer has a potentiometric surface (the level below which the aquifer is fully saturated) that slopes upward to the north toward Gentry Mountain. **T. 106.** As the potentiometric surface slopes upward to the north, Mr. Montgomery posited that it reached up into the Blackhawk formation which contains the coal beds, and where it is intercepted by coal mining. **T. 106.**

19. Mr. Montgomery testified that groundwater in this aquifer flows not only laterally through the pervious sandstone beds, but also vertically downward through the strata by means of extensive faulting in the area.

T. 106-107. Birch and Big Bear Springs, along with the Co-Op mine, are located between two large faults known as the Pleasant Valley Fault and the Bear Canyon fault. **T. 107; Exhibit 8.**

20. Mr. Montgomery's conclusion about the effects of Co-Op's mining was that the north portion of Co-Op's mining in the Blind Canyon seam had intercepted the potentiometric surface of the regional aquifer. He testified that water that would normally flow in its natural course down through the bedding and the fracture system to discharge naturally from the subject springs was instead being intercepted by coal mining and conveyed out of the groundwater system. **T. 122, 141.** This would in turn reduce the amount of water in storage for the springs, and negatively affect their flow for many years. **T. 122.**

21. Mr. Montgomery also testified about what he considered to be anomalous flows from the subject springs caused by Co-Op's alleged dumping of surplus water in the south end of the mine, demonstrating a linkage between the mine workings and the springs. **T. 147-148.** Mr. Montgomery testified that this water carried or picked up calcium sulfate, resulting in the anomalous levels of calcium and sulfates shown for 1991 by Exhibit 18. **T. 148.**

22. Co-Op called as expert witnesses Mr. John D. Garr and Mr. Richard B. White, respectively a consulting geologist and a consulting hydrologist with Earthfax Engineering ("Earthfax"). Earthfax was hired by Co-Op to revise the hydrologic characterization of the Bear Canyon mine and the Statement of Probable Hydrologic Consequences ("PHC") for the mine. **T. 200.**

23. Earthfax's activities included the drilling of four in-mine monitoring wells downward from the Blind Canyon seam to the Mancos shale, with hydrologic testing of each of the three members of the Star Point sandstone. **T. 201.**

24. Mr. Garr disputed Mr. Montgomery's testimony concerning the existence of a regional aquifer, testifying that more site-specific data led him to reach a different conclusion. **T. 202.**

25. Mr. Garr testified that there are three separate aquifers below the mine, each with a separate piezometric surface and each separated and confined by shale interbedding within the Star Point sandstone. **T. 208-209.** He concluded that the confinement of the aquifers, particularly in the northernmost drill hole, suggested that the recharge for the aquifers supplying the springs is miles to the north at a higher elevation, rather than in the Co-Op area. **T. 209, 211, 261, 288-289.**

26. Mr. White testified that the recharge area was far to the north of the mine in a "shatter zone" of fractured strata where water there would percolate easily downward into the Star Point sandstone. **T. 312.** The significance of this zone was that the recharge area for Big Bear and Birch springs in the Star Point sandstone would be lower than the mine, and not subject to being affected by it. **T. 312-313, 322-326, 339-340.**

27. Both Mr. Garr and Mr. White concluded that any water being intercepted by mining in the Blind Canyon seam is a confined aquifer within the uppermost Spring Canyon member of the Star Point sandstone, which due to the confinement of the aquifers is separate from the source of the springs. **Exhibit C, p. 2-33; T. 251, 255-256, 284, 288-289.** They testified that because the Panther member, which is the source of water to both Birch and Big Bear springs, is hydrologically disconnected from the Spring Canyon member, any aquifer in that member encountered while mining would not affect spring flow. **T. 358-359, 362.**

28. Both Mr. Garr and Mr. White testified that water being encountered in the Blind Canyon seam generally represented perched aquifers, rather than the interception of the regional aquifer posited by Mr. Montgomery. **T. 223, 285.** Relying on a United States Geologic Survey report concerning mine dewatering in the area, Mr. Garr testified that the rate of natural downward flow into the regional aquifer is unlikely to be affected by the interception of perched aquifers. **T. 223.**

29. Mr. Garr and Mr.White testified that the location of the Blind Canyon fault was highly significant to the issue of whether Co-Op's mining in the Blind Canyon seam is affecting the flow of Birch Springs. Birch Springs is actually 800 feet to the west of the Blind Canyon fault, so the fault lies between the mine and the springs. **T. 118, 212, 293-294.** Mr. Garr testified that if groundwater were moving from the mine into the

fault (which lies between the mine and Birch Springs) the water would either be stopped by the fault or the fault would act as a conduit for the water to emerge at the surface. **T. 213, 266.** Because no spring exists where the Blind Canyon fault intersects the surface, Mr. Garr concluded that there was no connection between groundwater encountered in the mine and Birch Springs. **T. 213. 266-267.**

D. Hydrologic Effect of Mining In The Tank Seam.

30. There was substantial legal dispute between Co-Op and the Water Users concerning the scope of the Board's review of the probable hydrologic consequences of mining. Co-Op argued that the only factual issue that the Board should consider was whether mining in the Tank Seam would cause material damage to the hydrologic balance. The Water Users argued that the Significant Permit Revision would allow the Bear Canyon mine to remain in operation, and would allow mine dewatering to continue. They contended the Board is therefore required to consider the possible hydrologic impact of all mining in the Bear Canyon mine at this time, rather than the impact only of mining the Tank Seam.

31. As more fully set forth in the succeeding paragraphs, the Board finds that, based upon the evidence, Co-Op's proposed mining in the Tank Seam will not cause material damage to the hydrologic balance.

32. The Water User's expert Mr. Montgomery admitted that no appreciable groundwater exists in the Tank Seam, and that the potentiometric surface of the principal aquifer was below the Tank Seam. **T. 112, 123-125, 162.** This testimony was corroborated by Co-Op's witness Mr. Garr, who testified that any aquifer was well below the Tank Seam. **T. 265.**

33. Mr. Montgomery incorrectly assumed that there would be an internal ramping system within the mine between the Tank Seam and the area of the Blind Canyon seam presently being mined. **T. 113, 162.** This assumption led Mr. Montgomery to conclude that the interval between the Tank Seam and the Blind Canyon Seam would be affected. **T. 113.** Mr. Montgomery also posited that contaminants deposited within the mine workings in the Tank Seam, and outside from road salt, would be conveyed downward to the base of the hydrologic system over time.

34. In fact, Co-Op will transport coal from the Tank Seam by means of a separate portal, and then into a vertical shaft back into the Blind Canyon seam to Co-Op's existing conveyor system. **T. 174-176.** This shaft intersects the south area of Co-Op's mine workings, in an area that is entirely dry. **T. 175.** The area underlying the access road is also dry. **T. 175.** This shaft encounters no water seepage anywhere in the hole between the Tank Seam and the Blind Canyon seam. **T. 274.**

35. Mr. Montgomery also testified that the removal of coal from the Tank Seam would eventually cause the collapse of overlying beds, increasing jointing and fracturing and furthering the conveyance of water and potential contaminants downward. **T. 113.**

36. Mr. Montgomery additionally testified that, although the Tank Seam was above the regional aquifer, it might encounter small perched aquifers, and interrupt the flow downward of water contained in those aquifers through fractures, thereby reducing supply to the regional aquifer. **T. 124-130, 162-163.**

37. The Board notes the inconsistency between Mr. Montgomery's testimony that mining would eventually cause additional fracturing, thus increasing downward flows, with his testimony that mining would limit downward flows.

38. Co-Op's witnesses presented evidence rebutting Mr. Montgomery's testimony that mining within the Tank Seam could have negative hydrologic effects. In order to test whether water existed within the Tank Seam, Co-Op conducted a testing program involving the drilling of eight holes upward from the Blind Canyon seam into the Tank Seam at various locations. **T. 171, 179.** All but one of these drill holes was essentially dry, although one hole encountered flows of approximately a half gallon per minute. **T. 172, 283.** Similarly, the eight foot diameter bore hole between the two levels was also dry. **T. 283.**

39. Because there is little water in the Tank Seam, there is little possibility that any contaminants could be carried downward from the Tank Seam into the aquifers supplying the Water Users' springs. **T. 285-287, 344.** There is no significant recharge to the aquifers coming from

the ridge above the mine because it is very narrow and has little flat surface to catch runoff. **T. 211, 220-222.**

40. In summary, the evidence establishes that:

(a) the Tank Seam is essentially dry;

(b) the Tank Seam is well above the "regional aquifer" theorized by the Water Users;

(c) no direct connection between any water that might in the future be located in the Tank Seam and the ostensible regional aquifer has been established;

(d) the surface above the seam has limited recharge potential, further reducing the risk of contaminants being conducted downward.

41. Based upon this evidence, the Board finds that mining in the Tank Seam will not cause material damage to the hydrologic balance, either through reduction in supply or contamination. Co-Op has satisfied its burden of proof on this issue.

E. Hydrologic Effect of Mining In the Blind Canyon Seam.

42. Because the parties devoted a substantial portion of their evidence to the hydrologic effects of mining in the Blind Canyon seam, the Board feels obligated to make findings of fact concerning this issue.

43. The Board is faced with two differing expert models of the effect of mining in the Blind Canyon seam on aquifer(s). The Water Users' expert, Mr. Montgomery, testified to the existence of a regional aquifer with a potentiometric surface sloping from north to south, with Big Bear and Birch Springs exiting from the aquifer at the contact of the Star Point Sandstone. Mr. Montgomery theorized that the northern portions of Co-Op's mine workings had intersected the potentiometric surface, and that the removal of substantial quantities of this water through mine dewatering had reduced current and future supplies to the Water Users' springs.

44. Co-Op's experts Messrs. Garr and White instead theorized separate aquifers in the Star Point sandstone rather than a single regional aquifer. They relied upon drilling in the mine that had established the existence of shale tongues interlineated between the three members of the Star Point sandstone. They testified that these shale tongues were generally impervious, and created essentially separate aquifers with separate potentiometric surfaces in each of the three sandstone members. Because the two disputed springs were supplied only from the lowest member, the Panther, any intersection between mining and the potentiometric surface of the separate aquifer in the upper Spring Canyon member would not affect spring flow.

45. While the Board recognizes that the evidence before it on this issue is not as clear as that concerning mining in the Tank Seam, it is ultimately convinced that Co-Op's hydrologic model is more convincing. As more fully set forth below, the Board believes that Co-Op's model is linked more closely to local conditions, and is supported by radiologic and chemical analyses establishing dissimilarities between mine waters and waters emanating from the two springs.

46. In preparing the PHC, Earthfax conducted tritium testing of waters encountered in the mine and flows from the two springs. Tritium is an isotope of hydrogen that was released into the earth's atmosphere during open-air nuclear testing in the 1950s and 1960s. Tritium testing can be used to determine the "age" of water, because water that has been underground since before the nuclear era will have only small amounts of tritium, while new water exposed to fallout will have higher levels. **T. 287-288.**

47. Tritium testing of water encountered in the mine showed that it was "old" water with low concentrations of tritium, while water from Big Bear Spring had tritium concentrations approximately ten times greater. **T. 247, T. 288.** This data indicates that Big Bear spring has a source different from the water encountered by Co-Op in the Blind Canyon seam. **T. 288.** While Mr. Montgomery speculated that higher tritium levels in Big Bear Spring could be caused by water seeping across surface formations prior to being tested, the Board does not find this testimony convincing.

48. Tritium testing did not rule out similarity between the mine water and waters tested from Birch Spring, as both waters were found to be "old" water. **T. 247-248.** However, chemical analysis of the mine water and water from the Birch Springs showed chemical dissimilarities between the two waters, particularly in the area of sulfate content. **T. 290, 299-300, 304-306; Exhibit C, p. 2-19.** The Water Users countered that higher levels of sulfates could be the result of spring water being affected by surface mineralization.

49. The Board also concludes that the evidence linking declines in flows at the two springs to activities in the mine rather than the extensive drought Utah has suffered in recent years was unconvincing. For example, the Board notes that the Water Users' witness Darrell Leamaster, a civil engineer and District Manager of petitioner Castle Valley, acknowledged that high flows of up to 230-240 gallons per minute from Big Bear Spring in the 1983-1984 time period were linked to wet weather at the time. **T.79, 97.** Similarly, Exhibit 15, relied upon by the Water Users, appears to show a response in flow from Big Bear spring to high precipitation in the early 1980s. For Birch Springs, actual flow data was limited to several years. See **Exhibit 16; T. 338.** Testimony about higher flows when the spring was reworked may lack relevance, since the testimony concerned the high water years of 1983-84. **T. 58.**

50. Testimony by the Water Users' witnesses also focused on anomalous flows in Big Bear Spring in 1991, coupled with spikes in sulfates and calcium concentrations. **Exhibit 18; T. 147-148.** Co-Op's witness Mr. White disputed any causal connection between activities in the mine and these flows. **T. 327.** The Board does not believe that either side's evidence on this issue is dispositive.

51. The Water Users attempted, over objection by Co-Op, to present Little Bear Springs as a "control". Little Bear Springs is located across Huntington Canyon from the two subject springs and the Bear Canyon Mine, and so could not be affected by mining activity. The Water Users argued that, although part of the same regional aquifer, it did not show the same decline in flow as Big Bear and Birch Springs, and so was probative of whether flows from the latter two springs had been affected by mining. The Board is convinced by Co-Op's expert testimony that the regional aquifer system in the mine area is complex, and that the

hydrology of springs is in the area is sufficiently different that they are generally not analogous. **T. 208, 215-216.** The Board also notes that even the U.S.G.S. report relied upon by Mr. Montgomery cautions against comparisons between springs in the area due to differing geology. **T. 216.** Accordingly, the Board finds that Little Bear Spring is not useful as a control in this matter.

52. In summary, the evidence establishes that:

(a) Tritium analysis establishes that Big Bear spring and water encountered by Co-Op during mining are not of the same age, and thus hydrologically distinct;

(b) chemical analysis supports, although it alone does not conclusively establish, the conclusion that Birch spring and the mine water are hydrologically distinct;

(c) the existence of the Blind Canyon fault between the mine and Birch spring would preclude waters encountered in the mine from reaching Birch spring;

(d) Co-Op's more-localized hydrologic model supports the conclusion waters encountered in the Bear Canyon mine from perched aquifers and/or the Spring Canyon member of the Star Point sandstone are hydrologically distinct from the springs, which issue from the Panther member of the Star Point sandstone.

53. The Board therefore finds that based upon the evidence before it, Co-Op's mining of the Blind Canyon seam is not likely to cause material damage to the hydrologic balance in the mine area, and is not linked to declines, if any, in spring flows from Big Bear and Birch Springs.

CONCLUSIONS OF LAW

1. Pursuant to Utah Code Ann. § 40-10-11(2), Co-Op has the burden of affirmatively demonstrating the following:

(a) that the permit application is accurate and complete, and that all statutory and regulatory requirements have been complied with;

(b) that reclamation can be completed as required by law and the proposed reclamation plan; and

(c) that the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made by the Division, and the proposed operation of the same has been designed to prevent material damage to the hydrologic balance outside the permit area.

2. The feasibility of reclamation and the adequacy of Co-Op's reclamation plan, a required showing under Utah Code Ann. § 40-10-11(2)(b), has not been challenged in this proceeding, and is not an issue here.

3. The Board concludes that the permit application was in fact complete, and that the requirements of the Utah Coal Mining and Reclamation Act and associated regulations have been complied with. The Water Users argue that the permit application is incomplete, and not in compliance with law, because the document incorporating the Division's determination of Probable Hydrologic Consequences allegedly does not include baseline data. Utah Code Ann. § 40-1010(2)(c) requires a Division determination of the probable hydrologic consequences of mining operations. Such a determination was in fact made and approved by the Division. See Exhibit C. The Water Users contend that Co-Op's permit application does not comply with Division Rule R645-301-724, which requires baseline information concerning groundwater hydrology, because Table 2-5 of the PHC indicates that flow rates for the subject springs were not measured at the inception of mining. The Board is convinced that this omission is harmless. The Cumulative Hydrologic Impact Assessment (Exhibit D) for the proposed Significant Permit Revision contains the exact baseline information for the flow from these springs that the Water Users claim is absent. **Exhibit D, p. 2-17, Appendix D.** The absence of this information from one table in the PHC

when it is present in another portion of the permit application package is not significant. Utah Code Ann. § 40-10-11(2)(a) has been satisfied.

4. At the hearing in this matter, the parties disputed whether the possible effects of mining in the Blind Canyon seam should have been considered by the Division in ruling upon the Significant Permit Revision application. Co-Op's application for Significant Permit Revision involved only a proposal to mine the Tank Seam. Co-Op's current operations in the Blind Canyon seam are authorized under the terms of Co-Op's existing permit, which has not been challenged in this proceeding. The principal issue of law before the Board is whether possible negative hydrologic impacts of operations in the Blind Canyon seam should be considered here, or whether only impacts from mining in the Tank Seam may be considered.

5. If only the subject matter of the Significant Permit Revision application is to be considered, it is clear that Co-Op has met its burden of demonstrating that material damage to the hydrologic balance will not occur from mining in the Tank Seam. The great weight of the evidence showed that the Tank Seam was well above the regional aquifer theorized by the Water Users, that it was essentially dry, and that any effect that such mining would have by either limiting the downward flow of water or allowing contaminants into the hydrologic system was purely speculative.

6. One significant fact is that even if the Board were to deny Co-Op's application for a Significant Permit Revision, mining could continue in the Blind Canyon seam under Co-Op's existing permit. The Board therefore does not believe that it is relevant to consider the hydrologic impacts of existing mining in the permit area.[7] Nonetheless, because the bulk of the

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[7]The sentence in Finding 6 of the Prior Order about relevancy was dicta or harmless error, because the Board ultimately held that it had a legal duty under U-SMCRA to make the CHIA findings related to the BCS. In the Prior Case, the Utah Supreme Court expressly held that the Board was within its jurisdictional mandate to make the findings. See Castle Valley Special Service District v. Utah Board of Oil, Gas & Mining, 938 P.2d 248 (Utah 1996), rehearing denied, (Utah 1997), where the Supreme Court observed: "Far from being caught by surprise by the Board's consideration of Blind Canyon seam issues and evidence in deciding whether to approve Tank seam operations, Water Users actively supported the use of such evidence during the hearing and in their post-hearing memoranda." Id.

evidence presented by the parties focused on cumulative impacts of all mining, the Board has made factual findings on this issue. The Board has found that the factual evidence does not support the conclusion that the continuation of Co-Op's previously authorized operations in the Bear Canyon mine will cause material damage to the hydrologic balance.

7. Co-Op presented a hydrologic model that appears to the Board to better describe local conditions than the model presented by the Water Users. Radiologic and chemical analysis appears to differentiate water found in the mine from water at Big Bear and Birch Springs. The Board simply has not heard convincing evidence that declines in flows at the two springs have resulted from mine dewatering instead of the drought conditions of recent years. The Board therefore concludes that the requirements of Utah Code Ann. § 40-10-11(2)(c) concerning material damage to the hydrologic balance have been satisfied.

8. At the hearing, the Board took under advisement Co-Op's motion to exclude evidence of damage to the Water Users' springs that took place prior to 1991, the date when Co-Op's mining permit for the Bear Canyon mine was last approved. Co-Op argued that the Water Users were collaterally estopped from raising issues that had been raised and readjudicated before the Board and Division in the 1991 proceeding. The Board has chosen to consider all evidence before it concerning alleged damage to the Water Users' springs, and accordingly denies Co-Op's motion.

9. The water replacement requirements of 30 U.S.C. § 1309a are not applicable under the circumstances. That statute, which was enacted as part of the Federal Energy Policy Act of 1992, requires the operators of underground mines to replace promptly any water supplies adversely impacted by underground mining operations. The Water Users have failed to prove to the Board as a factual matter that either the quantity or quality of their water has been adversely impacted by mining at the Bear Canyon mine, so the statute may not be applied to Co-Op here.

10. In addition, the Board does not believe that a permit revision appeal such as this one is the proper forum for raising the federal

statutory water replacement requirement. The Utah legislature has yet to incorporate the water replacement requirement for underground mines into the Utah Coal Mining and Reclamation Act. See Utah Code Ann. § 40-10-1 et seq. The Board questions whether it has jurisdiction under the Utah act to require water replacement pursuant to 30 U.S.C. § 1309a. This proceeding for review of a Division permit decision simply is not the proper forum for the Water Users' water replacement claims.

11. The Board finds that, under the circumstances set forth above, no attorneys fees, costs, or expenses should be awarded in this proceeding pursuant to Utah Code Ann. § 40-10-22(3)(e).

ORDER

IT IS THEREFORE ORDERED that Petitioners' appeal is denied, and the Division's action approving Co-Op's Application for a Significant Permit Revision is upheld. No costs, expenses or attorney's fees are awarded.

IV. The Meaning of Collateral Estoppel

A. Claims and Issues Distinguished

For purposes of collateral estoppel analysis, it is important to distinguish between legal "claims" and factual "issues". To illustrate the distinctive meaning of those terms in a neutral hypothetical context, a material factual *issue* (e.g., the light was red when the driver of the school bus entered the intersection) can have legal significance to different legal *claims* arising out of an auto-bus accident (e.g., criminal liability of the driver for breaking a traffic law and civil liability of the driver for third party injury claims).

The Water Users unsuccessfully *claimed* in the Prior Case that DOGM should not have approved a certain "significant permit revision"[8] to allow the Operator to extend its underground coal mining operation into the then "new" seam of coal called the Tank Seam ("TS"). The then-existing, or "old", seam of coal, which figured prominently in certain geological and hydrological factual *issues* raised by the Water Users to support their *claim* in the Prior Case about the alleged impropriety of the significant permit revision on the TS, was the BCS. Together, the BCS and the TS, along with all associated surface and subsurface facilities, comprise the Mine which is the subject of the Water Users' fundamental *claim* in this case that the Board should deny the Operator's request for a five-year permit renewal. In general, the Water Users allege that the Board should shut down the Mine because, in violation of U-SMCRA, the Operator's underground coal mining operation is causing material damage to the quantity and quality of the water in the two springs.

DOGM and the Operator now generally assert that the doctrine of collateral estoppel (defined fully below) bars the Water Users' from re-litigating the geological and hydrological issues about the BCS and the TS which they already litigated in the Prior Case. In contrast, the Water Users generally contend that collateral estoppel is not a bar to any of the issues in this case because the Board in the Prior

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[8]As required by U-SMCRA, a "significant permit revision" is subject to all of the Utah Coal Program requirements for a permit for a new coal mine, including all environmental and public notice requirements. Utah Admin. Code R645-300-200.226.

Case allegedly prevented them from introducing "old" evidence about the geo-hydrology issues concerning the BCS and/or they now have "new" evidence which shows that the relevant geo-hydrological conditions have changed. So as to not have to decide the collateral estoppel question in a vacuum, the Board asked the Water Users to make a specific Proffer.[9]

B. The Doctrine of Collateral Estoppel (Issue Preclusion)

Since this case raises a threshold question of "collateral estoppel," it is essential to define the meaning of "collateral estoppel"--sometimes called "issue preclusion"--and to distinguish it from the related doctrine of "res judicata"--sometimes called "claim preclusion."

Simply put, res judicata and collateral estoppel are closely-related doctrines of law intended to prevent the wasteful re-litigation of, respectively "claims" and "issues." In State v. Ruscetta, 742 P.2d 114, 116 (Ct. App. 1987), the Utah Court of Appeals concisely explained the meaning, and jurisprudential purpose, of res judicata and collateral estoppel. The Court of Appeals also stated the four elements of collateral estoppel, as follows:

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[9]In an effort to find out from the Water Users themselves what evidence they have which they contend would be introduced by them if a new Board hearing were to be held, the Board ordered the Proffer. The Board does not agree with the suggestion that it is "impossible" to find out what evidence the Water Users contend was improperly excluded by the Board at the earlier hearing. The Proffer has answered that very question.

> The doctrine of res judicata serves to promote finality and stability of judgment and to foster judicial economy by preventing redundant litigation. Copper State Thrift & Loan v. Bruno, 735 P.2d 387 (Utah App.1987); Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948). Two branches of res judicata have been recognized. The first branch, claim preclusion, operates to bar a second claim between the same parties or their privies concerning the same claim or cause of action previously rendered final by judgment on the merits. Claim preclusion bars claims which should have been litigated as well as those actually litigated in the prior action. Copper State Thrift & Loan, 735 P.2d at 389; Penrod v. Nu Creation Creme, Inc., 669 P.2d 873, 874-75 (Utah 1983); Krofcheck v. Downey State Bank, 580 P.2d 243, 244 (Utah 1978). The second branch, collateral estoppel, involves two different causes of action and only bars those issues in the second litigation necessarily decided in the first. Copper State Thrift & Loan, 735 P.2d at 389. The Utah Supreme Court has required four tests for the application of collateral estoppel: 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question? 2. Was there a final judgment on the merits? 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? 4. Was the issue in the first case competently, fully, and fairly litigated? Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978).

Id. at 116.

The Supreme Court of Utah expressly has held that collateral estoppel is applicable to administrative adjudicative proceedings, as follows:

> Res judicata, which "subsumes the doctrine of collateral estoppel," Stevensen v. Goodson, 924 P.2d 339, 353 (Utah 1996), applies to administrative adjudications in Utah. [FN2] We noted recently in Salt Lake Citizens v. Mountain States, 846 P.2d 1245 (Utah 1992), that "the doctrine of res judicata has been applied to administrative agency decisions in Utah since at least 1950." Id. at 1251 (citing North Salt Lake v. St. Joseph Water & Irr. Co., 118 Utah 600, 223 P.2d 577, 582-83 (1950)). In Mountain States, we reiterated the rule that "'the principles of res judicata apply to enforce repose when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a

> controversy over legal rights and to apply a remedy.' " Id. (quoting Utah Dep't of Admin. Servs. v. Public Serv. Comm'n, 658 P.2d 601, 621 (Utah 1983)); see also United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966), quoted in Mountain States, 846 P.2d at 1251 n. 4.
>
> FN2. Although the term "res judicata" is often used to describe the overall doctrine of preclusion, a distinction should properly be made between that branch of the doctrine which precludes the relitigation of previously decided claims, called either res judicata or claim preclusion, and that branch which precludes the relitigation of previously decided issues, known as either collateral estoppel or issue preclusion. See Noble v. Noble, 761 P.2d 1369, 1374 n. 5 (Utah 1988).

Career Service Review Board v. Department of Corrections, 942 P.2d 933, 938 (Utah 1997).

The Board hereby holds that Water Users may not re-litigate issues decided in the Prior Case, assuming the four elements of collateral estoppel can be shown. The Board, like any other tribunal, cannot in fairness impose vexatious and repetitive litigation on parties subject to its jurisdiction. Moreover, the Board cannot in good faith re-try issues it has already fairly heard and fully decided.

Applicable case law makes clear that the burden of showing the four elements falls on the person who seeks a finding of collateral estoppel. That burden falls on DOGM and the Operator in this case. Even though the Water Users were, as explained above, ordered by the Board to make an evidentiary Proffer to assist the Board is deciding this matter, the Board understands that the collateral estoppel burden remains with DOGM and the Operator.

The Water Users' "claim" against DOGM and the Operator in this case (i.e., that the Operator's requested five year permit renewal on the Mine should be denied) is different from that of the Water User's "claim" in the Prior Case (i.e., that the Operator's then-requested significant permit revision on the Tank Seam should have been denied). Neither DOGM nor the Operator contend that the Water Users' "claim" in this case was ripe for adjudication as part of the Prior Case, so this case does not raise a question of res judicata, or claim preclusion. Instead, the Board is concerned in this case only with the question of whether DOGM and the Operator have met their burden to show that the doctrine of collateral estoppel, or issue preclusion, bars the Water Users from re-litigating certain factual "issues" about geology and hydrology which are common to both the Prior Case and this case.

C. The Four Elements of Collateral Estoppel in this Case

Two of the four elements for collateral estoppel undeniably exist in this case in relation to the Prior Case, as follows:

Element 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question? DOGM and the Operator say yes, while the Water Users say no.

Element 2. Was there a final judgment on the merits? Yes, in Castle Valley Special Service District v. Utah Board of Oil, Gas & Mining, 938 P.2d 248 (Utah 1996), rehearing denied, (Utah 1997), the Utah Supreme Court affirmed the

Board's Prior Order in the Prior Case, thereby resulting in a final judgment on the merits.

Element 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? Yes, the parties in the Prior Case and in this case are identical.

Element 4. Was the issue in the first case competently, fully, and fairly litigated? DOGM and the Operator say yes, the Water Users say no.

With the above considerations in mind, we now discuss the two contested elements.

V. The "Identical Issue" Element

This section compares the issues in the Prior Case to the issues in this case to determine whether they are identical.

A. The Issues in the Prior Case

To determine whether the issues raised by the Water Users in this case are "identical" with the issues already litigated in the Prior Case, it is essential first to state the issues from the Prior Case, of which there were two. As the Prior Order makes clear, the parties in the Prior Case *then* had a dispute about whether there were one or two issues, as follows:

> 30. There was substantial legal dispute between Co-Op and the Water Users concerning the scope of the Board's review of the probable hydrologic consequences of mining. Co-Op argued that the only factual

> issue that the Board should consider was whether mining in the Tank Seam would cause material damage to the hydrologic balance. The Water Users argued that the Significant Permit Revision would allow the Bear Canyon mine to remain in operation, and would allow mine dewatering to continue. They contended the Board is therefore required to consider the possible hydrologic impact of all mining in the Bear Canyon mine at this time, rather than the impact only of mining the Tank Seam.

Prior Order at ¶ 30 (Prior R. at 798) (emphasis added).

The Board resolved the above-stated conflict about the scope of the issues in the Prior Case in favor of the Water Users, and the Supreme Court later held that it was proper for the Board so to do. Therefore, the two ultimate factual issues litigated in the Prior Case were:

(1) Whether coal mining by the Operator in the TS causes material damage to the quantity and/or quality of the Water User's water supplies in the two springs (i.e., based on the Water Users' contention that there is a geo-hydrological connection between the TS and the springs); and

(2) Whether coal mining by the Operator in the BCS causes material damage to the quantity and/or quality of the Water Users' water supplies in the two springs (i.e., based on the Water Users' claim that there is a geo-hydrological connection between the BCS and the springs).

On the first question, the Board found in the Prior Case that the TS was "dry," and thus not a contributing factor in any of the problems alleged by the Water

Users at their springs located outside the Operator's permit area. Prior Order at ¶ 31-41 (Prior R. 798-801). The Board summarized its findings on the TS issue as follows:

> 40. In summary, the evidence establishes that:
>
> (a) the Tank Seam is essentially dry;
>
> (b) the Tank Seam is well above the "regional aquifer" theorized by the Water Users;
>
> (c) no direct connection between any water that might in the future be located in the Tank Seam and the ostensible regional aquifer has been established;
>
> (d) the surface above the seam has limited recharge potential, further reducing the risk of contaminants being conducted downward.
>
> 41. Based upon this evidence, the Board finds that mining in the Tank Seam will not cause material damage to the hydrologic balance, either through reduction in supply or contamination. Co-Op has satisfied its burden of proof on this issue.

Prior Order at ¶ 40-41 (Prior R. at 800-801). Thus, the Board held in the Prior Case that there was not, as alleged by the Water Users, a geo-hydrological connection between the TS and the springs.

On the second issue, the Board also found that there was not, as alleged by the Water Users, a geo-hydrological connection between the BCS and the two springs. The Board concluded that coal mining in the BCS was not causing material damage to the springs located outside the Operator's permit area. Prior Order at ¶ 42-53 (Prior R. 801-806). The Board also expressly held from the conflicting technical

geo-hydrological expert evidence that a regional drought, not mining in the BCS, better-explained the decreased flows observed by the Water Users at their springs. Prior Order at ¶ 49 (Prior R. at 803-804). The Board summarized its findings on the lack of connection between the BCS and the two springs this way:

> "52. In summary, the evidence establishes that:
>
> (a) Tritium analysis establishes that Big Bear spring and water encountered by Co-Op during mining are not of the same age, and thus hydrologically distinct;
>
> (b) chemical analysis supports, although it alone does not conclusively establish, the conclusion that Birch spring and the mine water are hydrologically distinct;
>
> (c) the existence of the Blind Canyon fault between the mine and Birch spring would preclude waters encountered in the mine from reaching Birch spring;
>
> (d) Co-Op's more-localized hydrologic model supports the conclusion waters encountered in the Bear Canyon mine from perched aquifers and/or the Spring Canyon member of the Star Point sandstone are hydrologically distinct from the springs, which issue from the Panther member of the Star Point sandstone.
>
> "53. The Board therefore finds that based upon the evidence before it, Co-Op's mining of the Blind Canyon seam is not likely to cause material damage to the hydrologic balance in the mine area, and is not linked to declines, if any, in spring flows from Big Bear and Birch Springs."

Prior Order at ¶ 52-53 (Prior R. at 805-806).

B. <u>The Issues in this Case</u>

The Board has reviewed the Proffer, and the comments about it as filed by DOGM and the Water Users. The Board finds that the Water Users have not shown any specific "old" evidence, if any, which was in fact excluded by the Board during the Prior Case, and which the Board needs to consider in this case. The Board likewise finds that the Water Users have failed to show that any specific "new" evidence exists which shows a change, as a result of continued coal mining in the BCS since the Prior Order of the Board was issued June 13, 1995 in the Prior Case, which the Board needs to consider in this case. The Board agrees, therefore, with DOGM and the Operator that the Proffer demonstrates that the Water Users are seeking to re-litigate the same ultimate factual issues already resolved in the Prior Case. It further appears to the Board that the Water Users want to re-litigate the host of related "sub-issues" concerning regional topography, regional geography, geological faults, geological fractures, geological formations, precipitation data, spring flow data, mine water data, subsurface water flows, hydrological theories about aquifer recharge locations, hydrological theories about subsurface water transit mechanisms, data based on tests of water at various locations for tritium levels, data based on tests of water at various locations for levels of certain chemical contaminants, etc., all of which were decided in the Prior Case.

In so holding, the Board relies on the entire Record in the Prior Case. The following table helps explain why the Board finds that the issues in this case are identical to the issues in the Prior Case:

Water User's Proffer No.	Water Users' Proffer	Board's Analysis of Proffer
"Old" No. 1	"Evidence of groundwater flow elevation for the Lower Blackhawk Formation/Spring Canyon Sandstone aquifer and the project intercept with the floor of the Blind Canyon Seam. . . ." Proffer at 3-4.[10]	The Board heard testimony on this general subject in the Prior Case. See, e.g., Prior R. at 191, 206, 213, and 242. See, e.g., Prior Order at ¶¶ 17-29
"Old" No. 2	"The geochemical, radiometric and stable isotope data indicate that several flow systems exist in the area. . . ." Proffer at 4.	The Board heard testimony on this general subject in the Prior Case. See, e.g., Prior R. at 332 and 551-552. See, e.g., Prior Order at ¶¶ 46-48.
"Old" No. 3	"Evidence 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.	The Board heard testimony throughout the hearing in the Prior Case on this general subject matter. See, e.g., Prior Order at ¶ 17-53, passim.
"Old" No. 4.	"Information on the dates Co-Op intercepted water flow in the mine and the quantity of the flow. . . ." Proffer at 4.	The Board heard testimony throughout the hearing in the Prior Case on this subject matter. See the Prior Order, passim. See Prior R. at 268-271.

[10]In this table, the Board does not always reprint the full text of every Proffer, but the Board's Analysis of each Proffer item is, of course, based on the full text, which is incorporated by this reference.

Water User's Proffer No.	Water Users' Proffer	Board's Analysis of Proffer
"Old" No. 5	"Letter from DOGM concerning Co-op's unauthorized and illegal discharge of water into the abandoned mine working in the Blind Canyon Seam. In the Tank Seam hearings a great deal of time was spent discussing the icicle formation above Big Bear Spring and the water quality impact in Big Bear Spring. We now know these problems were caused by Co-Op's discharge of water into the abandoned mine workings on the south end of the mine. This has been verified by an inter office memo from DOGM dated May 17, 1991. It is important to note the date on DOGM's letter. It knew about this throughout the Tank Seam Hearing and failed to come forward with the information. This water impacted the water quality of Big Bear Spring and caused the icicle formation." Proffer at 5.	As the Proffer states, this issue about the discharge of water underground was the subject of much testimony at the hearing in the Prior Case. See, e.g., Prior R. at 232-233 and Prior Order ¶ 21. The Board resolved the admittedly conflicting expert testimony by finding that water, if any, stored by the Operator in the southern workings of the BCS did not, in fact, reach the springs (i.e., due to the essentially impenetrable barrier between the BCS and the springs created by the existence of the Blind Canyon Fault and/or the presence of certain intervening "tongues" of impervious shale in the Star Point Sandstone--see, e.g., Prior Order at ¶¶ 29 & 44). The Board finds, therefore, that this item was decided by the findings in the Prior Order. As for the allegedly withheld memorandum, even if the Proffer is construed in a light most favorable to the Water Users, the Board finds that the Proffer fails to show material facts which suggest that DOGM in fact improperly concealed evidence. The Board presumes, without more, that a routine, non-confidential file document like the one described was in fact freely available for inspection and copying by the Water Users in the weeks and months leading up to the prior hearing. The Board further presumes that the Water Users in the exercise of reasonable diligence could have produced the document at the hearing in the Prior Case. The Board concludes that err, if any, in DOGM not unilaterally volunteering the document was harmless because the Board nonetheless heard substantially similar evidence from the Water Users' expert. The Water Users had the opportunity to cross-examine the author of the document in question because DOGM called that person to the stand. On these facts, the Board finds that the document, if it had been introduced, would not have added anything significant to the substantial evidence already heard by the Board.
"Old" No. 6	"[E]vidence of additional surface flow measurements in McCadden Hollow, Tie Fork Canyon, Gentry Hollow, and Wild Cattle Hollow would indicate areas of stream loss and ground water recharge to the strata underlying Gentry Ridge. . . ." Proffer at 5.	The Board heard detailed expert testimony in the hearing in the Prior Case on the general subject matter of where the aquifers near the mine were recharged, and found that the two springs were fed by different aquifers than the 3 aquifers near the Mine. See, e.g., Prior Order at ¶ 25-26.
"Old" No. 7	"Fracture and joint density and orientation data would have been presented during the hearing to indicate the intensely fracture[d] nature of the rock formations in Co-op['s] mine permit area which allow movement of water to the springs. . . . " Proffer at 5-6	The Board heard detailed expert testimony in the hearing in the Prior Case on the general subject matter of fractures which allegedly allow water to flow underground between the BCS and the springs. See, e.g., Prior R. at 192.
"New" No. 1	"Evidence that the Gentry Mountain groundwater system is interconnected from top to bottom. . . ." Proffer at 6	After hearing substantial expert testimony, the Board expressly rejected the "regional aquifer" theory in the Prior Case. See, e.g., Prior Order at ¶ 43-45.

Water User's Proffer No.	Water Users' Proffer	Board's Analysis of Proffer
"New" No. 2	"At the informal conference, for the first time and in direct contravention of its statements made at the time of renewal in 1990-91, Co-op admitted it pumped vast quantities of water intercepted at the working face of the mine into a worked-out portion of the mineral elsewhere during [the] period from 1989-1992. . . ." Proffer at 7	This issue was the subject of testimony at the hearing in the Prior Case. See, e.g., Prior R. at 272. The Board found on the Prior Case that water intercepted by the Operator in the Mine was not connected to the water in either of the two springs, so this alleged new item adds nothing. See also the Board's Analysis of Proffer Item "Old" No. 5.
"New" No. 3	"Water Users will present evidence that Co-op's dumping of water into the old workings contaminated Big Bear Spring demonstrating the interconnection. . . ." Proffer at 7-8.	See Board's Analysis of "old" Item 5 and "New" Item 2.
"New" No. 4(a)	To show "the communication with and interconnection between the mining operations and the Springs . . .New and additional Geochemical and Radiometric Sampling was conducted at [the] springs and [the] mine inflow locations in accordance with the Division Order. . . ." Proffer at 8.	New sampling data, per se, does not necessarily create a "new" issue, as the Board presumes routine hydrological sampling will continue. The Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.
"New" No. 4(b)	To show "the communication with and interconnection between the mining operations and the Springs . . .Mine inflow samples were collected by the Water Users and by Co-Op for major cations, anions, trace metals, and radiometric and stable isotopes. . . .' Proffer at 8-9.	The Board heard testimony on this general subject in the Prior Case. See, e.g., Prior R. at 332 and 551-552. The Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.
"New" No. 4(c)	To show "the communication with and interconnection between the mining operations and the Springs . . .A groundwater flow model was presented by the water Users showing that the water intercepted by Co-Op in the Blind Canyon Seam is the result of the interception of the water table tributary to the lower Blackhawk/Star Point Sandstone aquifer. . . ." Proffer at 9	The Board heard substantial evidence at the hearing in the Prior Case bearing on the question of the relationship, if any, between the aquifers in the vicinity of the mine and the springs. The Board found the Operator's evidence on the aquifers more persuasive. Prior Order at ¶ 43-45. The Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.
"New" No. 4(d)	To show "the communication with and interconnection between the mining operations and the Springs . . .Precipitation data collected from eight meteorological stations in the are[a] indicates that cyclic changes in precipitation are common and the long-term precipitation trend in neither increasing nor decreasing, but remains nearly constant. . . ." Proffer at 9-10	The Board heard substantial evidence at the hearing in the Prior Case bearing on the question whether the springs had experienced declines in flows from drought, or from coal mining, and found the drought explanation the more persuasive. See Prior Order at ¶ 49. The Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.

Water User's Proffer No.	Water Users' Proffer	Board's Analysis of Proffer
"New" No. 4(e)	To show "the communication with and interconnection between the mining operations and the Springs . . .A connection between precipitation (spring runoff) and spring discharge is observed if you sequentially compare the data. If average monthly precipitation is compared to the average monthly flows at Big Bear Spring and Little Bear Spring (a reasonable control due to its location on the other side of the canyon), the discharge of both Springs generally follows changes in precipitation prior to 1985. . . ." Proffer at 10.	After having heard the conflicting evidence and arguments about the issue whether Little Bear Spring is a useful "control" in relation to the Big Bear Spring, the Board in the Prior Case expressly held, in Paragraph 51 of the Prior Order that Little Bear Spring is not a useful "control" in relation to Big Bear Spring. (See Prior R. 218-221, 298-301, 804-805). The Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.
"New" No. 4(f)	To show "the communication with and interconnection between the mining operations and the Springs. . .Birch Spring showed nearly constant spring flow during the period of record and only a very modest decline following the decline in precipitation in 1985. The flow spike and subsequent decline in flow occurred after groundwater was intercepted in the Blind Canyon Seam and after Co-Op discharged mine water into Dry Canyon. Birch Spring discharge has declined significantly since 1989, as compared to flows prior to 1989, while precipitation has increased 6% The only known material variable is mining by Co-Op." Proffer at 10-11.	The Board heard substantial evidence at the hearing in the Prior Case bearing on the question whether the springs had experienced declines in flows from drought, or from coal mining, and found the drought explanation the more persuasive. See Prior Order at ¶ 49. The Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.
"New" No. 4(g)	To show "the communication with and interconnection between the mining operations and the Springs. . .Prior to May 1989, spring discharge of Little Bear Spring and Big Bear Spring peaked between April and July. . . ." Proffer at 11.	See Board's Analysis of "New"Item 4(e).
"New" No. 4(h)	To show "the communication with and interconnection between the mining operations and the Springs . . .Co-Op has suggested that flows at Big Bear Spring derive from Bear Creek. The Water Users have since measured flow at four locations . . . .The data presented from these measurements shows a stream loss of 8 gpm or less. Stream loss would have to be maintained on the order of a constant 100 to 150 gpm to sustain the flows of Big Bear Spring." Proffer at 11	The Board heard substantial geo-hydrological evidence in the prior case concerning the proposition urged by the Water Users that the springs were losing recharge water because the water was being intercepted and diverted by coal mining in the BCS and the TS. The Board also heard substantial evidence on the alternative explanation urged by DOGM and the Operator that a local aquifer (i.e., an aquifer geo-hydrologically distinct and independent from the subsurface water sources near the Mine) was the source of the recharge for the springs, and that a drought, which impacted that local aquifer, better-explained the observed decrease in spring flows. See, e.g., Prior Order at ¶¶ 17-53 (Prior R. at 794-806). The Board resolved those conflicting facts in favor of the Operator. The Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.

Water User's Proffer No.	Water Users' Proffer	Board's Analysis of Proffer
"New" No. 4(i)	To show "the communication with and interconnection between the mining operations and the Springs . . .Since April of 1991 Co-Op has discharged water under their discharge permit into Bear Creek. . . .The reported discharges from the mine are very close to the same flows that we have lost from our spring." Proffer at 12.	See Board's Analysis of "New" Item 4(h).
"New" No. 5	"The Division overlooked the logical reasoning that a CHIA must be inadequate if it is based on a Probable Hydrological Consequence ("PHC") containing inaccurate and insufficient data. Furthermore the Division made no attempt to resolve the several co-existent and opposing theories, and included no conditions on its approval of the permit renewal to secure information designed to resolve once and for [sic] the divergent theories of water transit in the geologic area in question. Such a resolution is required by law and has yet to occur". . ." Proffer at 12.	This introductory section is legal argument, not an evidentiary proffer. There is no dispute by DOGM or the Operator that the Operator has a duty to submit all hydrological data required by law. In the Prior Case, with the PHC and CHIA in mind, the Board finds that it did consider "the divergent theories of water transit in the geologic area in question," and that the Board did decide that contested factual issues as explained herein. The Board understands that the Water Users still do not agree with the merits of that Board decision, or with the Supreme Court's later decision to affirm it, but there is no question that those decisions were in fact made by the Board and the Supreme Court. The Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.

Water User's Proffer No.	Water Users' Proffer	Board's Analysis of Proffer
"New" No. 5(a)	"The evidence would address the following: At the informal conference, Co-Op totally changed its prior position with respect to hydrologic data in the PHC and relied on an entirely new theory postulated by their new expert. The abandoned theory was that the mine was continuing to intercept many small perched aquifers, rather than a major source of groundwater. This theory forms the basis for the current PHC. The new theory rejected the perched aquifer concept and is premised instead upon the notion that the mine intercepts and has intercepted a single broad-based sandstone channel that produces and produced the water in the mine . . ." Proffer at 13.	The papers filed by DOGM and the Operator in this case make clear that they still contend that the aquifer near the Mine (whether characterized as a "perched aquifer" or as "single broad-based sandstone channel") is not connected geologically to the Water Users' springs. In that sense, the Board finds that there is no significant change in DOGM's or the Operator's prior position. The Board thinks it is immaterial for purposes of resolving the present dispute that the Operator's expert allegedly has refined and updated his thinking on the precise nature of the localized aquifer intercepted by the Mine. The Board would, of course, think it a significant, new and relevant change if DOGM and/or the Operator were to find that there is, in fact, a geo-hydrological connection between the Mine and the springs, and that the coal mining is causing material damage to the quantity and/or quality of the water supplies in the springs. The Proffer offers no evidence of such a material change. The Board expects the PHC and CHIA documents to be updated from time to time as new data is obtained in the ordinary course, but the Proffer fails to show facts that the refinement described in the Proffer is significant in relation to the ultimate issue in dispute in this matter (and in the Prior Case). Moreover, in the Prior Case, the Board expressly found that groundwater near the Mine was in the sandstone, so this so-called "new" sub-issue is really an old sub-issue. The Board found as follows: "14. <u>In the vicinity of the mine, groundwater is contained within the Star Point sandstone</u>. The Star Point sandstone is composed of three separate members: the upper member is the Spring Canyon member, the middle member is the Storrs member; and the lower member is the Panther member. T. 105-106 [Prior R. at 190-191]." Prior Order at ¶ 14 (Prior R. at 793) (emphasis added). The Board also found: "27. <u>Both Mr. Garr and Mr. White concluded that any water being intercepted by mining in the Blind Canyon seam is a confined aquifer within the uppermost Spring Canyon member of the Star Point sandstone, which due to the confinement of the aquifers is separate from the source of the springs</u>. Exhibit C, p. 2-33; T. 251, 255-256, 284, 288-289. <u>They testified that because the Panther member, which is the source of water to both Birch and Big Bear springs, is hydrologically disconnected from the Spring Canyon member, any aquifer in that member encountered while mining would not affect spring flow</u>. T. 358-359, 362. (emphasis added) Prior Order at ¶ 27 (Prior R. at 796-797). The Board finds that the Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.

Water User's Proffer No.	Water Users' Proffer	Board's Analysis of Proffer
"New No. 5(b)	"The evidence would address the following: The current PHC describes the stratigraphic sequence in the mining area as a 'great thickness of discontinuous sandstone, coal, and mud/siltstone units.' PHC at 2-6. The PHC also states that '[d]rainage of water from faults and fractures produces the largest volume of water flowing into the mine.' PHC at 2-33. While that has long been the theory of the Water Users, at the informal conference, Richard White, another expert called by Co-Op, testified that this statement in the PHC was incorrect, citing the new theory that "the largest volume of water flowing into the mine is from the sandstone channel.' HT III. at 260. In order to determine the viability of these inconsistent, new and scientifically unsubstantiated theories, data must be collected. It is not in the record from the DOGM. Evidence will be presented to establish the boundaries of the recharge area for the Springs; where the water intercepted by Co-Op's mining operations was destined before it was intercepted; whether the sandstone channel is connected to other sources in the Water User's recharge area or otherwise connected to the Springs; and among other conceivable hypothesis [sic], whether the 'sandstone channel' interrupts or dips below the Blind Canyon Seam, or as the Division presumed, without adequate evidence, spills out in a 'flood plain' lip over the top of the seam only. These facts and the scientific basis therefore represent new issues for the Board and must be properly resolved in the de novo hearing requested by the Water Users." Proffer at 14.	See Board's Analysis of "New" Item 5(a). It is clear that the Board found that the aquifer intercepted by the Mine was either a perched aquifer or in the sandstone, but was, in any event, geo-hydrologically separated from the springs. See Prior Order at ¶ 52(d), where it states: "(d) Co-Op's more-localized hydrologic model supports the conclusion waters encountered in the Bear Canyon mine from <u>perched aquifers and/or the Spring Canyon member of the Star Point sandstone</u> are hydrologically distinct from the springs, which issue from the Panther member of the Star Point sandstone." (emphasis added). The Board heard substantial evidence at the hearing in the Prior Case concerning (a) the recharge area for the springs, (b) where, if anywhere, the water intercepted by the Operator's mining operations was destined before it was intercepted, (c) and whether the local aquifer in the sandstone near the Mine is, or is not, connected to other sources n the Water User's recharge area, or otherwise connected to the Water User's two springs. The Board's made detailed findings of fact on these very issues in the Prior Case. See Prior Order, <u>passim</u>, at ¶¶ 17-53 (Prior R. at 794-806). The Water Users have failed to proffer any specific "new" evidence exists which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.
"New" No. 6	"Mining activities which re-direct or contaminate water are in violation of the Environmental Protection Standards set forth at R645-303-233.120. They also damage the hydrologic balance outside the permit area in violation of R645-301-750. . . Water Users' will present evidence to show Co-Op's mining operations have not been, and are not now being conducted to minimize effects to Water Users' states appropriated water rights. The water encountered and intercepted by the Co-Op mining efforts is hydrologically connected with Big Bear and Birch Springs, and Water Users will present more evidence to establish a violation of the Environmental Protection Standards and interference with vest rights." Proffer at 14-16.	See Board's Analysis of "New" Items 5(a) and 5(b). As noted above, the Board made detailed factual findings in the Prior Case that the water encountered and intercepted by the Operator's mining efforts is not hydrologically connected with Big Bear and Birch Springs, so that mining in the BCS and/or the TS does not cause material damage to the water supplies in the Water Users' two springs. See Prior Order at ¶¶ 17-53 (Prior R. 794-806). Therefore, the item does not raise a new issue. The Water Users have failed to proffer any specific "new" evidence exists which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.

Water User's Proffer No.	Water Users' Proffer	Board's Analysis of Proffer
"New" No. 7	"There are numerous false and inaccurate statements in the PHC; therefore the CHIA as a matter of fact and law fails to properly address the cumulative hydrologic impact of mining. At this point in time, these issues must be resolved by the Board in a de novo proceeding. Water Users have addressed these issues in detail in pages 8 through 21 of Objector's Joint Post Informal Conference Memorandum and Closing Argument (attached). These issues are not susceptible to bar by the doctrine of Collateral Estoppel." Proffer at 16	The Board has reviewed pages 8 through 21 of "Objector's Joint Post Informal Conference Memorandum and Closing Argument" (the "Joint Memo"). Viewing those pages of the Joint Memo as a proffer on this Item in a light most favorable to the Water Users, the Board finds that all of the sub-issues raised in the Joint Memo are not new, but rather, direct or indirect duplicative and redundant re-statements of the various collateral evidentiary attacks discussed in detail above. The Board finds that pages 8 to 21 the Joint Memo ra-hash the myriad evidentiary sub-issues extensively litigated in the Prior Case, including evidence about the extent of groundwater flows measured in the Mine; evidence about the Operator's pumping of water into the old workings; evidence about annual precipitation data; evidence that the Probable Hydrologic Consequences ("PHC") document for the Mine concluded that the Mine will not impact the springs; and evidence that the Cumulative Hydrologic Impact Assessment ("CHIA") document for this Mine concluded that the Mine will not impact the springs. The Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.
"New" No. 8	"In paragraph 15 of the Order, the Division states that "Big Bear Spring's flow rate has also recovered, from a low of 76 g.p.m. in mid-1995 to 148 g.p.m. in late 1996.' Division Order at 7 ¶ 15. The Division ignored uncontroverted testimony that prior to Co-Op's interception of water by its mining efforts, the Water User's had close to 300 gpm emanating from Big Bear Spring. HT I. at 30. Further evidence would be presented to show that since mining efforts to Co-Op began to intercept and divert water, Water Users['] water sources have been impacted and have never fully recovered. The only legitimately available cause for this impact is the mining efforts of Co-Op." Proffer at 16	The Board heard substantial geo-hydrological evidence in the prior case concerning the proposition urged by the Water Users that the springs were losing recharge water because the water was being intercepted and diverted by coal mining in the BCS and the TS. The Board also heard substantial evidence on the alternative explanation urged by DOGM and the Operator that a local aquifer (i.e., an aquifer geo-hydrologically distinct and independent from the subsurface water sources near the Mine) was the source of the recharge for the springs, and that a drought, which negatively impacted the recharge of that local aquifer, better-explained the observed decrease in spring flows. See, e.g., Prior Order at ¶¶ 17-53 (Prior R. at 794-806). The Board resolved those conflicting facts in favor of DOGM and the Operator. The Water Users have failed to proffer any specific "new" evidence which shows a change, as a result of continued coal mining in the BCS, since the Prior Order of the Board was issued June 13, 1995 in the Prior Case.

VI. The "Completely, Fully and Fairly Litigated" Element

The Board finds that the issues described in the Proffer made in this case were completely, fully and fairly litigated in the Prior Case, for the following reasons:

The Water Users claimed in their appeal to the Supreme Court in the Prior Case that it was improper for the Board in that case to make findings about the lack of a geo-hydrological connection between the BCS and the springs. The Board notes that the Supreme Court has already held in the Prior Case that it was entirely proper for the Board to adjudicate the BCS issue in that case.

The Board stated in the Prior Order: "42. Because the parties devoted a substantial portion of their evidence to the hydrologic effects of mining in the Blind Canyon seam, the Board feels obligated to make findings of fact concerning this issue." Prior R. at 801 (emphasis added). In the Prior Case, the Board expressly made detailed findings of fact and conclusion of law concerning the complex and technical issue under U-SMCRA called the "cumulative hydrologic impact assessment" ("CHIA," usually pronounced as CHEE-a).

At all times prior to the entry of the Board's Prior Order in the Prior Case, the Water Users argued again and again that the Board had broad jurisdiction, and even an affirmative duty, to consider evidence of cumulative hydrologic impacts from the mine operation in the BCS when combined with the then-proposed new mining in the TS.

The Water Users made a strong record in the Prior Case for the proposition that the U-SMCRA required DOGM and the Board to consider the cumulative hydrologic impact of the Operator's then-pending request to mine the TS while continuing mining in the already permitted BCS. U-SMCRA, at Utah Code Ann. § 40-10-10(2)(c) makes clear that the Board correctly studied the cumulative hydrologic impacts from "all anticipated mining in the area," including, but not limited to the mining in the TS and in the BCS:

> (2) The permit application, and the reclamation plan submitted as part of a permit application shall be submitted in the manner, form, and content specified by the division in the rules and shall include the following:
>
> (c) A determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site with respect to the hydrologic regime, quantity and quality of water in surface and groundwater systems, including the dissolved and suspended solids under seasonal flow conditions, and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the division of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and, particularly, upon water availability; but this determination shall not be required until such time as hydrologic information on the general area prior to mining is made available from an appropriate federal or state agency. The permit shall not be approved until this information is available and is incorporated into the application.

Utah Code Ann. § 40-10-10(2)(c) (Supp. 1997). The Board ultimately agreed with the Water Users that CHIA evidence about the BCS should be received so the Board could

determine whether DOGM had done a proper CHIA on the significant permit revision requested for the TS.

As requested by the Water Users, the Board made detailed subsidiary factual findings in the Prior Order about whether mining in the BCS contributed to adverse cumulative hydrological impacts at the springs. While the ultimate factual findings were not the one desired by the Water Users, the Prior Record makes clear that it was they who asked the Board to make those findings in the Prior Case.

Section 40-10-11(c)(2) of U-SMCRA expressly requires DOGM and the Board to consider cumulative hydrologic impacts in significant permit revision cases like the Prior Case, as follows:

> (2) No permit or revision application shall be approved unless the application affirmatively demonstrates and the division finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval and made available to the applicant, that:
>
> > (c) The assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in subsection 40-10-10(2)(c) has been made by the division and the proposed operation of same has been designed to prevent material damage to hydrologic balance outside the permit area.

Utah Code Ann. § 40-10-11(2)(c) (Supp. 1997).

It is true that DOGM and the Operator attempted in the Prior Case to limit the Water Users' evidence at the prior hearing, but those objections were overruled by the Board. In response to each objection by DOGM and the Operator, the

Water Users would restate their legal basis under U-SMCRA for providing testimony and evidence concerning the BCS; and in each instance, the Board allowed the evidence and the testimony to be admitted.

In the Prior Case, the Board quite sensibly asked that the Water Users tie their evidence concerning the regional geo-hydrology and the cumulative hydrological impact of mining in the entire permit area to the Water Users' challenge to the TS permit revision. Chairman Lauriski, speaking for the Board, stated:

> . . . However, 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. <u>However, if petitioners need to lay foundation by raising issues that relate to current mining activities and as it impacts, they can show that relationship as it impacts, as it might impact the Tank Seam mining, then we will consider those issues as relevant to this case. Okay</u>?
>
> Just for the record, I want to read in how this was noticed, so that everybody understands the frame work with which we'll conduct this hearing. <u>The purpose of this proceeding will be for the Board to consider the objection of the petitioner to the Division for determination of approving Co-Op Mining Company's significant revision to extend its mining operations into the Tank Seam. That also is what appears in the petitioner's motion for this hearing</u>. And so that's how we're going to conduct the hearing, by narrowing that focus as it relates to the Tank Seam and impact of mining on that Tank Seam. Okay.
>
> With that, we'll move into the merits of this case and I would ask counsel if they have any opening arguments they wish to present.

Prior R. at 114-115. (emphasis added).

The Board does not agree with the Water Users' assertion that the Board in the Prior Case restricted the Water Users in their evidentiary presentation about the geo-hydrological relationship between their springs and the BCS. The Water Users insisted at the hearing in the Prior Case (correctly) that such a restriction would have been err. In the Prior Case, after the Board heard argument from counsel for Water Association and the Irrigation Company to the effect that the Board had a duty in a significant permit revision case under U-SMCRA to look not only at "those aspects of the revision that are new", but also "how the mine will operate under that significant revision", Chairman Lauriski gave the Water users a green light, not a red light, as follows: "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." Prior R. at 597-599 (emphasis added).

The findings made by the Board about the lack of a hydrological connection between the BCS and the two springs were not tangential or optional in the context of the Prior Case. In the Prior Case, the Water Users persuaded the Board that U-SMCRA, and its implementing regulations, require DOGM to make CHIA findings

before approving a significant permit revision. Before the evidentiary hearing in the Prior Case, the Water Users stated[11]:

> The PHC [Probable Hydrologic Consequence] and the Cumulative Hydrologic Impact Assessment ("CHIA") both fail to recognize the adverse impact of Co-Op's mining and specifically mine dewatering activity on regional aquifers that feed the Big Bear and Birch Springs, <u>and thus the CHIA fails to meet the minimum requirements of R645-301-729.100 in not recognizing or mitigating the material damage to hydrologic balance outside the permit area</u>.

<u>Id.</u> (emphasis added). The regulation cited in the preceding paragraph by the Water Users states:

> 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.

R645-301-729-100 (1996). Likewise, in their post-hearing briefs to the Board in the Prior Case, the Water Users insisted that the Board make comprehensive CHIA findings, as follows:

"POINT I
"THIS BOARD HAS JURISDICTION AND AUTHORITY

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[11]See, e.g., "Appeal of Division Determination to Approve Significant Revision to Permit to Allow Mining of Tank Seam by Co-Op Mining Company," filed by the Water Association and the Irrigation Company, Prior R. at page 7, paragraph 14.

TO REVIEW THE PERMIT AND APPLICATION OF CO-OP

"The jurisdiction of this Board to administratively review Co-op's Permit as urged by Petitioners, and the scope of its review in conducting such administrative review is set forth in Utah Ann. § 40-10-14(3) and R645-300-200 of the Administrative Rules "Administrative and Judicial Review of Decision on Permits." Specifically R645-300-211 of this chapter of the rules states:

"211. General. Within 30 days after an applicant or permittee is notified of the decision of the Division concerning a determination made under R645-106, an application for approval of exploration required under R645-200, a permit for coal mining and reclamation operations, a permit change, a permit renewal, or a transfer, assignment, or sale of permit rights, the transfer, assignment, or sale of permit rights, the applicant, permittee, or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the decision, in accordance with R645-300-200.

"Petitioners NEWUA and Huntington-Cleveland, as owners and purveyors of drinking water from Birch Spring, are clearly persons with an interest which is or may be adversely affected. <u>This regulation by establishing current or potential adverse affect caused by the Division determination on a permit" purposefully gives this Board a wide scope of both jurisdiction and authority in reviewing permit matters appealed to it. Nowhere in the Regulations is the Board's review limited to any specific aspect of a permit or revision to a permit. The dynamic nature of coal mining and its affects on the environment clearly require this wide review authority</u>. [Footnote 1 starts at this point, and reads]: "For example, during the last Permit approval of Co-op's Bear Canyon Mine, the mine was relatively dry and not discharging any water. Since that time, the mine has encountered significant water, and currently discharges between 300 - 500 gpm. Never before has the Bear Canyon Mine permit been reviewed while the mine was encountering and discharging such significant amounts of water. [End Footnote 1]. <u>One obvious example of adverse affect on NEWUA and Huntington-Cleveland is the prolonged life of the Bear Canyon Mine and its material damage to the hydrologic</u>

balance outside the permit area which will occur if the substantial revision to the Permit is upheld.

"Thus, under the regulations governing this Board's review, if the Appellants are being adversely affected by Co-op's permitted mining activity or will be adversely affected by the substantial revision sought by Co-op, this Board has jurisdiction and authority to act on the determination of the Division to grant a substantial revision to Co-op's Permit."

"Post-Hearing Memorandum of North Emery Water Users Association and Huntington Cleveland Irrigation Company," Prior R. at 732, 736-37 (emphasis added). An identical expansive argument regarding CHIA jurisdiction was advanced by the Service District, as follows:

"I. JURISDICTION AND RELATED ISSUES

"CVSSD hereby incorporates the arguments set forth in Co-Petitioners NEWA and Huntington-Cleveland's Memorandum concerning the ability of the Board to jurisdictionally review all aspects of the Co-op operation. CVSSD is an affected entity pursuant to the Administrative Rules and the Tank Seam is but one portion of the total operation of Co-op. The failure to review the cumulative impacts of revisions to permits or extensions to permits creates risks of a segmented view of the overall actual impacts and a piecemeal review process. Since some of the major water sources of this region are at stake, this cannot be allowed.

. . . .

"Not only has Co-op failed to demonstrate its ability to locate alternate water sources or to replace the water sources of Petitioners, it has failed to demonstrate a finding of no material damage to the existing hydrological balance outside the permitted area. The Board must force Co-op to accomplish the legislative and administrative tasks required of it and has the jurisdiction to do so.

II. Prior Proceedings . . . .

> "The probable hydrologic consequences ("PHC") and the cumulative hydrologic impact assessment ("CHIA") are designed to function as evolving processes, in which the cumulative effects of mining on hydrologic resources are detailed, explored and explained on an updated and ongoing basis. By purposefully segmenting the Tank Seam from the remainder of their operation, this burden has not been met by Co-op. Thus, further data collection is required before any approval may be made.
>
> . . . .

"Post-Hearing Memorandum of Castle Valley Special Service District," Prior R. at 774, 775-78 (emphasis added).

When the Board ruled, the Water Users succeeded in convincing the Board that it did have a duty to decide the CHIA issues about the BCS raised by the Water Users. The Water Users were correct when they argued that the cumulative hydrologic impacts in that area included the effect of mining not only in the TS, but also mining in the BCS (located about 250 feet below the TS). Having won that legal point, the Water Users nonetheless lost on the Board's CHIA factual finding that mining in the BCS did not have any impact on the two springs operated by the Water Users. Prior Order ¶¶ 42-53 and Conclusions of Law 1, 3-10 (reprinted above).

In the Prior Case, the Board notes that the Water Users did not claim in their appeal to the Utah Supreme Court that the Prior Record lacked substantial evidence to support the Board's Prior Order.

U-SMCRA, at Utah Code Ann. § 40-10-2, entitled "Purpose," states:

> It is the purpose of this chapter to:
>
> (1) Grant to the board and division of oil, gas, and mining the necessary authority to assure exclusive jurisdiction over non-federal lands and cooperative jurisdiction over federal lands in regard to regulation of coal mining and reclamation operations as authorized pursuant to Public Law 95-87.

Id. The CHIA findings made by the Board in the Prior Case fell squarely within that express grant of jurisdiction to the Board to make CHIA findings regarding all anticipated coal mining in the cumulative impact area under study in a given permit action.

Disappointed by the Board's ruling in the Prior Case, the Water Users filed an appeal to the Utah Supreme Court, where they claimed, inter alia, (1) that the Board had exceeded its subject matter jurisdiction by making the BCS findings in a case about the TS significant permit revision; (2) that the Board had acted arbitrarily and capriciously by making the BCS findings, and (3) that the Board had violated the Water Users due process rights by making the BCS findings. The Supreme Court expressly rejected all three points, and affirmed the propriety of the Board's decision to make the BCS findings in the Prior Case. The Court explained why, as follows:

> The second issue we review concerns the propriety of the Board's making findings of fact and conclusions of law related to the Blind Canyon seam when the issue before the Board was whether to permit mining in the Tank seam. At the beginning of the hearing on Water Users' petition, the Board considered what evidence it would allow. The

Board ruled that any evidence presented must be relevant to the proposed Tank seam operation, although evidence with regard to Co-Op's existing mining activities--e.g., those in the Blind Canyon seam--could be offered as background or foundation. During the hearing Water Users introduced a broad range of evidence about the geology and hydrology of the permit and spring area, including evidence relating to the Blind Canyon seam. Water Users argued that this evidence was relevant to the effect of mining the Tank seam for several reasons, all of which in some way relied on the theory that the Blind Canyon seam and the springs were part of a single connected water system. Despite multiple objections by Co-Op and the Division, none of Water Users' offered evidence was excluded as irrelevant. After Water Users concluded their evidentiary case, Co-Op and the Division responded with evidence showing that the springs and the coal seams were in fact in separate water systems and that as a result neither the past nor the proposed future mining activities could affect the springs.

Against this background, Water Users challenge the Blind Canyon findings on the ground that they exceed the Board's jurisdiction, violated their right to due process, and are arbitrary and capricious. We first discuss the jurisdictional argument: Water Users assert that the Board exceeded its jurisdiction when it made the Blind Canyon findings and conclusions, reasoning that because administrative agencies have only the jurisdiction conferred by statute, and because the statutes indicate that the scope of a Board hearing is set by the hearing notice, any issue not included in the notice is beyond the Board's jurisdiction. They urge that because the hearing notice referred only to the Tank seam and because the Board ruled that the scope of the hearing would be limited to the Tank seam, the Board lacked power to make the contested Blind Canyon findings and conclusions.

The jurisdictional argument is without merit. The requirement of notice under the argument Water Users assert goes to jurisdiction over the parties, not over the subject matter. 2 Am. Jur. 2d Administrative Law § 288 (1994) (because notice goes to personal rather than subject matter jurisdiction, it may be waived). Subject matter jurisdiction, on the other hand, goes to the competence of a body to resolve a certain dispute. See Salt Lake City v. Ohms, 881 P.2d 844, 852 (Utah 1994) ("Subject matter jurisdiction is the authority and competency of the court to decide

the case." (internal quotation marks omitted)). It is clear that in ruling on the ultimate issue of the permit revision for the Tank seam, the Board had subject matter jurisdiction. See Utah Code Ann. § 40-10-2 (1993 replacement) (Board intended to have jurisdiction over coal mining regulation under Surface Mining Act); id. § 40-10-6(4) (granting Board authority over coal mining permit approval). If the contested findings were in any way relevant to the issues before the Board, they were within the Board's authority to make. As the discussion below illustrates, the findings and conclusions were relevant to the Board's rulings on the ultimate issues.

Water Users' claim that the challenged findings harm them is more accurately expressed by their due process challenge. At root, this complaint is that because they did not expect the Board to make findings and conclusions about the Blind Canyon seam (the scope of the hearing having been limited to the Tank seam by notice and ruling), they effectively will be foreclosed from opposing the renewal of the Blind Canyon permit without ever having an adequate opportunity to litigate those issues. In other words, they were not given adequate notice of or an adequate hearing on Blind Canyon seam issues and therefore were deprived of due process by the issuance of findings on those issues.

The record does not support this claim. The arguments presented by Water Users at the hearing demonstrate that Water Users considered evidence relating to the Blind Canyon seam to be relevant to the ultimate issue of mining in the Tank seam. For example, Water Users urged the Board not to limit its consideration to "those aspects of the revision that are new." Although Water Users later argued to the Board that the Blind Canyon evidence was presented only to provide context and background for the Tank seam evidence, a review of some of the arguments they presented at the original hearing shows otherwise. In the course of the hearing, Water Users adduced evidence in support of the arguments that (1) water traveling through faults and cracks would come from above the Tank seam, pick up contaminants in the Tank seam, and proceed down through the Blind Canyon seam and into the springs; (2) water pumped up from the Blind Canyon seam for use in Tank seam mining would either be taken out of the mine with coal or carry contaminants with it back down to the Blind Canyon seam; (3) the permit revision application and the Division's evaluation of the application failed to satisfy statutory and

regulatory requirements because they did not recognize and address damage already caused to the springs by mining; and (4) applicable federal law requires the provision of replacement water to ameliorate the damage done to the springs.

These arguments are directly relevant to the ultimate issue: The first two arguments claim that mining operations in the Tank seam will cause direct harm to the springs, while the second two offer indirect reasons why the Tank seam permit revision should not be approved or should be modified before approval. In turn, the validity of these objections to the permit revision depends on conclusions about the nature of the Blind Canyon seam--what relationship there is between the Tank and the Blind Canyon seams and whether a hydrologic link exists between the Blind Canyon seam and the springs. Far from being caught by surprise by the Board's consideration of Blind Canyon seam issues and evidence in deciding whether to approve Tank seam operations, Water Users actively supported the use of such evidence during the hearing and in their post-hearing memoranda. Furthermore, Water Users have adopted an argument before this Court which makes Blind Canyon seam conditions relevant: In support of their request for replacement water, Water Users renew to this Court the claim that pumping water from the Blind Canyon seam to the Tank seam for mining purposes will adversely affect the springs. Since that result follows only if water in the Blind Canyon seam eventually makes its way to the springs, that assertion alone would make the hydrology of the Blind Canyon seam and its relationship to the springs relevant.

In sum, Water Users presented arguments and evidence in the Tank permit revision proceedings that related to Blind Canyon seam conditions. The Board considered all the evidence presented and ruled on two ultimate issues: whether to allow Tank seam mining at all and whether to require Co-Op either to provide replacement water to remedy the claimed harm to the springs or to identify replacement water sources. That the Board might have disposed of these ultimate issues on a narrower set of facts does not make it improper or unfair to include additional or alternative findings that respond to the bulk of the parties' argument and evidence and that give additional support for its decision. Water Users' right to notice and a fair hearing was not violated.

> Water Users' claim that the Board acted arbitrarily and capriciously in using evidence relating to the Blind Canyon seam in making its findings and conclusions depends upon the irrelevance of the evidence to the issue to be decided. Because we have concluded that the evidence was relevant, that claim also fails.

Castle Valley Spec. Serv. Dist. v. Utah Board of Oil, Gas & Mining, 938 P.2d 248 (Utah 1996, rehearing denied, (Utah 1997) (footnotes omitted) (emphasis added).[12]

VII. Administrative Findings and Notices

The Board finds as a matter of law that due and regular notice of the time, place and purpose of the hearing was properly given to all interested parties and in the form and manner as required by law and regulations of the Board.

This Order is based exclusively on evidence of record in the adjudicative proceeding or on facts officially noted, and constitutes the signed written order stating the Board's decision and the reasons for the decision, all as required by the Administrative Procedures Act, Utah Code Ann. § 63-46b-10 and Utah Administrative Code R641-109.

Notice re Right to Seek Judicial Review by the Utah Supreme Court or to Request Board Reconsideration: As required by Utah Code Ann. § 63-46b-10(e) to -10(g) (1953, as amended), the Board hereby notifies all parties in interest that they have

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[12]In Footnote 5 of the opinion issued in the Prior Case by the Utah Supreme Court, the Court observed: "Whatever 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." The Board now answers that question.

the right to seek judicial review of this final Board Order in this formal adjudication by filing a timely appeal with the Utah Supreme Court within 30 days after the date that this Order issued. Utah Code Ann. § 63-46b-14(3)(a) and -16 (1953, as amended). As an alternative to seeking immediate judicial review, but not as a prerequisite to seeking judicial review, the Board also hereby notifies parties that they may elect to request that the Board reconsider this Order, which constitutes a final agency action of the Board. Utah Code Ann. § 63-46b-13, entitled, "Agency review - Reconsideration," states:

> "(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.
> (b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.
> (2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.
> (3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.
> (b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied."

Id. The Board also hereby notifies the parties that Utah Administrative Code R641-110-100, which is part of a group of Board rules entitled, "Rehearing and Modification of Existing Orders," states:

> "Any person affected by a final order or decision of the Board may file a petition for rehearing. Unless otherwise provided, a petition for rehearing must be filed no later than the 10th day of the month following the date of signing of the final order or decision for which the rehearing is sought. A copy of such petition will be served on each other party to the proceeding no later than the 15th day of that month."

Id. See Utah Administrative Code R641-110-200 for the required contents of a Petition for Rehearing. If there is any conflict between the deadline in Utah Code Ann. § 63-46b-13 (1953, as amended) and the deadline in Utah Administrative Code R641-110-100 for moving to rehear this matter, the Board hereby rules that the later of the two deadlines shall be available to any party moving to rehear this matter. If the Board later denies a timely petition for rehearing, the party may still seek judicial review of the Order by perfecting a timely appeal with the Utah Supreme Court within 30 days thereafter.

VIII. Conclusion & Order

The Board carefully has reviewed the Water Users' Proffer, and does not find any "old" evidence was excluded in the Prior Case, nor does the Board find any "new" evidence that tends to show that, since the Board entered its Prior Order in June 1995, the geo-hydrological regime at the Mine vis-a-vis the springs has changed from what it was determined by the Board to be back then. The Board finds that the Water Users' Proffer, even when construed in a manner most favorable to the Water Users,

merely shows that the Water Users desire to re-litigate the same issue about the alleged geological water transit mechanism between the Mine and the springs.

The ultimate factual issue asserted by the Water Users--that there is a geo-hydrological connection between the BCS and the TS, on the one hand, and the springs, on the other, with the effect that coal mining in the Mine causes material damage to the valuable water supplies in the springs--is the same in this case as it was in the Prior Case. The Board finds nothing material which suggests otherwise in the Proffer. A new hearing would not serve any useful purpose in this matter because the myriad of geo-hydrological sub-issues outlined in the Proffer are all subsumed under the ultimate geo-hydrological issues about the BCS and the TS decided in the Prior Case.

Under all the circumstances, the Board is persuaded that DOGM and the Operator have met their burden in this case to show that the Water Users are collaterally estopped from having a new hearing on the issues outlined in the Proffer. The Board finds that all four elements of collateral estoppel, as discussed above, have been met in this case. In the Prior Case involving exactly the same parties, the Water Users did enjoy a full, fair and complete hearing on the identical issues which they want to re-litigate in this case, and that case ultimately resulted in the entry of a final judgment adjudicating those issues.

The Board finds, therefore, that the Operator has satisfied all of the requirements for permit renewal established by Utah Code Ann. § 40-10-9(4) (1953, as

amended), and the corresponding implementing administrative rules. The Water Users' Appeal is denied. The Board unanimously finds that DOGM properly granted the Operator's requested five-year permit renewal on the Mine, so it is hereby ordered that said permit renewal is affirmed. The Board makes no award of attorneys fees or costs to any party. This Order closes this case.

A signed, fax copy of this Order shall be deemed equivalent to the original for all purposes.

ISSUED AND SIGNED this 6th day of March, 1998.

STATE OF UTAH, BOARD OF OIL, GAS AND MINING

By _____
Dave D. Lauriski
Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing "FINAL BOARD ORDER ON THE COLLATERAL ESTOPPEL QUESTION" in Docket No. 95-025, Cause No. ACT/015/025 to be mailed, certified mail, on the 9 day of March, 1998, to the following:

J. Craig Smith, Esq. Scott Ellsworth, Esq. David B. Hartvigsen, Esq. Nielsen & Senior Attorneys for North Emery Water Users Association and Huntington-Cleveland Irrigation Co. 1100 Eagle Gate Tower 60 East South Temple Salt Lake City, Utah 84111	Jeffrey W. Appel, Esq. Appel & Warlaumont Attorneys for Castle Valley Special Service District 1100 Boston Building 9 Exchange Place Salt Lake City, Utah 84111
F. Mark Hansen, Esq. Attorney for Co-Op Mining Co. 404 East 4500 South, Suite B-34 Salt Lake City, Utah 84107	Carl E. Kingston, Esq. Attorney for Co-Op Mining Co. 3212 South State Street Salt Lake City, Utah 84115

and hand-delivered the same date noted above to:

Daniel G. Moquin, Esq. Assistant Attorney General Attorney for Division of Oil, Gas and Mining Utah Attorney General's Office 1594 West North Temple, Suite 300 P.O. Box 140855 Salt Lake City, Utah 84114-0855	Mr. Lowell P. Braxton Acting Director Utah Division of Oil, Gas & Mining 1594 West North Temple, Suite 1210 P.O. Box 145801 Salt Lake City, UT 84114-5801
Ms. Mary Ann Wright Associate Director of Mining Utah Division of Oil, Gas & Mining 1594 West North Temple, Suite 1210 P.O. Box 145801 Salt Lake City, UT 84114-5801	Mr. James W. Carter Director Utah Division of Oil, Gas & Mining 1594 West North Temple, Suite 1210 P.O. Box 145801 Salt Lake City, UT 84114-5801
Patrick J. O'Hara, Esq. Assistant Attorney General Attorney to the Board of Oil, Gas & Mining 160 East 300 South, 5th Floor P.O. Box 140857 Salt Lake City, UT 84114-0857	

Christine Allred

Christine Allred, Secretary to the Board