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March 14, 2005

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**Re: Distribution of Mohrland Portal Water**

Dear Ward:

We are responding on behalf of ANR Co., Inc. ("ANR") to the letter dated February 16, 2005 to you from Craig Smith, attorney for Huntington-Cleveland Irrigation Company ("HCIC"). HCIC's letter attempts to persuade the State Engineer to impose an annual diversion limit of 101.42 acre feet of water from the King #2 Mohrland Portal that ANR may distribute through its pipeline for use in Hiawatha.

ANR disagrees with HCIC's position for a number of reasons but primarily because HCIC is estopped from challenging at this late date ANR's diversion, distribution and use of the Mohrland Portal water developed from the Blackhawk Mine. The parties extensively litigated this issue after ANR's predecessor United States Fuel Company ("USF") filed its complaint against HCIC in 1992. After extensive discovery, the parties conducted an eight day bench trial in 1997. From the evidence received, Judge Bryce K. Bryner was convinced that HCIC was estopped from challenging USF's upstream water diversion, distribution and water use.

HCIC had numerous opportunities to protest USF's conflicting upstream water use in proceedings before the State Engineer and to appeal decisions approving USF's upstream water use projects in 1907, 1930, 1948, 1953, 1957, 1958, 1963, 1968, 1972, 1978 and 1984.

In 1972, USF constructed its pipeline from the Mohrland Portal to Hiawatha to convey water diverted from the Mohrland Portal. USF invested \$83,000 to construct its new pipeline from Mohrland to Hiawatha. In developing its water pipeline, USF relied on seven decades of silence by HCIC, and numerous approvals by the State Engineer authorizing USF's water use investment, including five certificates of appropriation issued in 1912, 1935, 1957, 1961 and 1962.

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In connection with its pipeline, in 1972 USF filed four Change Applications, two of which were a6961 (91-251) and a6963 (91-316). These two rights had been recognized and included in the Proposed Determination for the Price River general adjudication that included the Miller Creek drainage. HCIC never protested this Proposed Determination. The Proposed Determination authorizes a diversion of 0.942 cfs and 0.58 cfs, respectively, for these water rights.

For the first time in nine decades and after nine separate upstream water development projects by USF, in 1972 HCIC filed protests against three of USF's four change applications. In 1973, the State Engineer conducted a hearing on USF's pipeline change applications. During this hearing, HCIC asserted that the Blackhawk Mine water was tributary to Cedar Creek, that it had a senior right to that water, and that its rights would be adversely affected. The State Engineer held a second hearing in 1983 and another in 1984, but HCIC failed to appear for either hearing. HCIC failed to exhaust its administrative remedies and failed to appeal to district court not only the State Engineer's approvals of USF's pipeline change applications but also the state engineer's certificates of change.

During the trial, HCIC attempted to offer evidence that the Blackhawk Mine water diverted from the Mohrland Portal was tributary to Cedar Creek. Judge Bryner refused to receive this evidence because the State Engineer had included the rights in the Price River Proposed Determination, and HCIC failed to file a protest. Further, HCIC failed to exhaust its administrative remedies and appeal to district court the State Engineer's approval of the pipeline change applications that allowed USF to divert 0.942 cfs and 0.58 cfs of the Blackhawk Mine water from the Mohrland Portal and convey the same through its pipeline for use in Hiawatha in the Price River drainage.

We have sent to you under separate cover copies of the parties' post-trial briefs, Judge Bryner's Findings of Fact and Conclusions of Law, and the parties' briefs to the Utah Supreme Court which more thoroughly analyze the estoppel of HCIC.

HCIC's letter attempts to rely on a statement made by USF's counsel contained in the State Engineer's October 12, 1984 Memorandum Decision approving the Blackhawk change applications. The statement that "water was in fact being pumped upslope out of the Blackhawk Mine" does not confirm that the water was tributary to Cedar Creek and not Miller Creek. At most the statement confirms that the water was developed mine water. Moreover, the statement made in the hearing and again set forth in the State Engineer's Memorandum Decision placed the onus squarely on HCIC to appeal the decision to district court if it was asserting that the water was tributary to Cedar Creek and would impair its alleged senior rights if conveyed to the Miller Creek drainage. The State Engineer noted that there was no evidence that USF's diversion under the pipeline change applications had diminished HCIC's rights located several miles downstream. He concluded that approval of the change applications would not adversely affect

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HCIC's water right. HCIC never challenged either of these conclusions. Attempting to challenge them 20 years later is simply too late.

Finally, HCIC's letter does not mention the flow portion of ANR's water rights. The State Engineer's Memorandum Decision approved the diversion of a total flow of 1.522 second feet of water for the Blackhawk water rights. ANR is entitled to all of this flow year round under its water rights. The volume limitation of 101.42 acre feet per year applies only to domestic use of water in Hiawatha and not industrial use which presently has no volume limitation. The return water must be released back to Miller Creek just as your January 12, 2005 letter instructed.

We would appreciate your consideration of ANR's position in this matter.

Very truly yours,



Denise A. Dragoo

DAD:dma

cc: Carl Kingston, Esq.  
Mark Dykes, Esq.  
J. Craig Smith, Esq.