

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION)

NUMBER 93-3657 (a15965))

MEMORANDUM DECISION

Change Application Number 93-3657 (a15965) was filed January 11, 1991, by Co-Op Mining Company c/o Joseph O. Kingston. Heretofore, 15.0 acre-feet of water has been diverted from Huntington Creek at the Cleveland Canal located at a point North 1740 feet and East 160 feet from the S1/4 Corner of Section 9, T17S, R8E, SLB&M. The water has been used for irrigation and livestock purposes. The water under this change application is represented by Stock Certificate Number 2690, in the amount of 48 shares of Class A stock in the Huntington-Cleveland Irrigation Company. Hereafter, the applicant proposes to divert the same quantity of water from a spring located at a point South 1725 feet and West 1280 feet from the NE Corner of Section 22, T16S, R7E, SLB&M, and from the Bear Canyon Mine portal located at a point North 79 feet and East 75 feet from the SW Corner of Section 24, T16S, R7E, SLB&M. The water is to be used for the domestic supply of 19 families, the supplemental irrigation of 1.39 acre, and for uses associated with coal mining at the Bear Canyon Mine, which includes bathhouse facilities, dust suppression, fire protection and other related uses.

Public notice of the change application was given in The Emery County Progress beginning February 5, 1991, and ending February 19, 1991. Subsequent to the public notice, protests were filed by the North Emery Water Users' Association, Castle Valley Special Service District, and Huntington City.

A hearing was held on Thursday, May 2, 1991, in Castle Dale, Utah to review the application and receive comments from the protestants. The applicant was represented by Attorney Carl E. Kingston. The protestants were represented by their legal counsel, Mr. Jeffrey W. Appel.

In defense of the application, Mr. Kingston indicated that Co-Op Mining Company has been mining coal in Trail and Bear Canyons since 1940. During this time, it has been their understanding that the water used at the mine and for the residences in Trail Canyon has been validated by shares of stock owned in the Huntington-Cleveland Irrigation Company, and by an individual water right referenced as 93-1067. He indicated that all of the mining prior to 1980 took place in Trail Canyon. At that time, because of geologic problems, the mining effort was moved to Bear Canyon where it is still taking place.

The present use of water is reflective of the historic use made at the mine and the residences. The spring referenced in this change application is located in Trail Canyon and is used to provide water for the 19 residences, as well as a portion of the irrigated acreage. The water diverted at the mine portal provides for the mining and support facilities, which includes an office and bathhouse, as well as irrigation of top soil stock piles. The in-mine use involves dust control at the mine face. The individual water right owned by the applicant is also diverted from the Bear Canyon Mine portal and used for domestic, irrigation and mining uses in Bear Canyon. This right is junior in priority to the rights of the Huntington-Cleveland Irrigation Company.

By way of background concerning this change application, Mr. Kingston indicated that in 1990, Co-Op transferred 60 shares of their Irrigation Company stock to a neighboring mine. At that time, his client was contacted by the Irrigation Company requesting that shares of stock be transferred to the mine because Co-Op's private water right is junior to the rights of the Irrigation Company. As a result, the applicant had Stock Certificate #2690 divided from a prior Certificate in the amount of 48 shares. It should be noted that the applicant holds an additional 188.77 shares of stock in the Company.

Mr. Kingston believes that the concerns of the protestants, which deal with claimed interference of the water quality and quantity of their culinary springs in the area has not resulted from the applicant's diversion of water for mining purposes.

Mr. Richard White, a Hydrologist with Earthfax Engineering, was present at the hearing and indicated that he was retained by the applicant to perform a hydrologic study of the area. In his review of Huntington Creek flow data, spring flow data from Big Bear, Little Bear, Tie Fork and Birch Springs, and recent precipitation data from five stations in the area, it appeared to him that the concerns of the protestants rest in the fact that for the past several years, less than normal precipitation has fallen on the watershed. As a result, water has not been available to recharge the springs. He also indicated that the quantity of water flowing in the Bear Canyon Mine has been relatively constant since 1984. Therefore, it is his opinion that the Co-Op Mining operation is not interfering with, nor are they responsible for the reduced flows at the protestants' springs.

Mr. Appel, speaking in behalf of the protestants, indicated that the concerns of his clients centered around two main problems: First, a reduction in the quantity of water available for delivery to the culinary and municipal water systems; Secondly, the degradation of the water quality, particularly in Birch Spring. Collectively, the protestants provide culinary and municipal water to approximately 4000 people in Emery County, and these sources of water are invaluable. Mr. Appel feels that the water that has historically been diverted by the applicant has been done without the benefit of a properly approved water right. He also stated that the applicant's historic water use exceeds the limit of their private water right, which according to his information is limited to the irrigation of 0.50 acre.

His clients believe that the continuing decline in flow at Birch Spring and Big Bear Spring, can be attributed to the applicant's mining activity in Bear Canyon. During a 120 day period in late 1989 and early 1990, the water flow at Birch Spring increased approximately threefold. During this same time period, the other springs in the area continued to experience a slight decrease in flow. Also during this unusual flow event, oil and grease were found in Birch Spring. As a result, the protestants have filed protests against the renewal of the applicant's mining permit with the Division of Oil, Gas & Mining, as well as this water application.

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It is the opinion of the protestants that the applicant's mining operation has interfered with the quantity and quality of their culinary springs. As a result, the granting of this change application, and the renewal of the applicant's mine permit should be held in question. Mr. Appel feels that his clients rights have been jeopardized as a result of the applicant's ongoing violations of their current mining permit as it pertains to their underground as well as surface operations, and the approval of this water right will result in continued problems.

Attorney Kingston stated that data obtained from core holes drilled at the Bear Canyon Mine indicated that the regional aquifer which underlies the mining permit area, is below the area being mined. As a result, contamination from in-mine work could not influence the quality of the protestants' water sources. In a similar manner, the re-charge area for the protestants' springs is located up slope from the applicant's surface facilities. Contamination of the springs from this area of the mining operation would be highly unlikely. He further indicated that Co-Op will drill four monitor wells to further define the location of the regional aquifer in relation to their mining activities. Additional sampling will also be scheduled which will include Big Bear and Birch Springs, if the protestants will allow access to these sources.

Mr. Appel asked that he be allowed ten days from the date of the hearing to provide supplemental comments to the hearing record. This request was granted. Mr. Kingston was afforded an opportunity to provide a response to Mr. Appel's comments.

On May 23, 1991, this office received Mr. Appel's additional comments. They centered around the lack of information contained on the applicant's change application. He pointed to deficiencies with respect to the prior points of diversion, places and extent of use. Again, he raised the issue concerning the applicant's private water right. He also questioned the supplemental nature of the change application. He feels that the approval of this application will result in an enlargement of the water right. Attorney Appel also pointed out that his clients' use of the water is statutorily recognized as a higher priority use than that of the applicant. Therefore, interference should not be allowed to continue. Because of the many deficiencies found in the application, and the enlargement and priority issues, Mr. Appel believes that the application should be denied by the State Engineer.

On June 3, 1991, this office received Mr. Kingston's response. He indicated that the issues raised and addressed at the hearing, had not changed. The historic water use by the applicant at Trail and Bear Canyons has not significantly changed. The applicant has maintained a personal water right, as well as shares in the Company to cover their water use. Mr. Kingston pointed out that the information contained on the change application is adequate, and does represent the intent of the applicant. Therefore, he feels that the application should be approved, and allow the applicant to continue the historic use of the water.

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The State Engineer has reviewed the written responses from the applicant in defense of the application, as well as the report prepared by Earthfax Engineering. Likewise, all of the information, testimony and reports provided by the protestants, which includes two reports from geologist Bryce Montgomery, have also been reviewed. It appears that there are two issues that need to be resolved. One is the protestants' concerns with the physical mining operation of the applicant, and their purported interference with the underground water flow paths, as well as aquifer contamination. These are matters that are not within the jurisdiction of the State Engineer to resolve, and will not be dealt with in this proceeding. It appears that the applicant and protestants should continue to work with the Division of Oil, Gas & Mining, in an attempt to resolve these concerns.

The second issue which will be addressed in these proceedings is whether or not the proposed change application can be approved in accordance with the provisions of Sections 73-3-3 and 73-3-8. It is believed that the change application as filed with this Division contains all of the relevant information and meets the statutory requirements of the law. It is not vague and misrepresentative of the applicant's intentions. It is noted that the origin of the water rights held by the protestants and the applicant are based on share ownership in the Huntington-Cleveland Irrigation Company. The pertinent rights were decreed in the A.H. Christensen Decree dated January 28, 1915. The relative priorities of the applicant's and protestants' water rights are equal. It is recognized that domestic and municipal uses are superior to other uses with the same priority if water availability becomes a critical issue, and there is insufficient water to provide for all uses. However, it is the opinion of the State Engineer that a critical water shortage does not exist which may require such a declaration.

In reviewing all of the pertinent information, including information from a recent field examination, it is believed that the current water use at the Bear Canyon Mine and the associated uses in Trail Canyon have not significantly changed over the past many years. The applicant is not seeking to divert additional water nor change water sources beyond current practices. It is the opinion of this Division that there has not been definitive information provided by the protestants concerning the applicant's interference with historic flows at the protestants' springs. Each party is encouraged to sample and monitor their water sources for their own protection, and for the mutual benefit of each. It is the opinion of the State Engineer that the approval of this change application will not interfere with the water rights of the protestants or other water users on Huntington Creek.

It is, therefore, **ORDERED** and Change Application Number 93-3657 (a15965) is hereby **APPROVED** subject to all prior rights and the following conditions:

- 1) The applicant must install totalizing water meters at the spring and the mine portal to measure all water diverted and utilized, and provide additional information concerning the in-mine use. A written report of the annual water use is to be provided to the State appointed River Commissioner. Any costs

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associated with the monitoring and regulating this change application shall be borne by the applicant.

- 2) No changes in the points of diversion can be made without prior authorization from the Division of Water Rights.
- 3) Continued ownership of the shares of stock must be maintained which provide the basis for this change application.

This Decision is subject to the provisions of Rule R655-6-17 (1992 Utah Administrative Code--formerly R625) of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 2nd day of July, 1992.


Robert L. Morgan, P.E., State Engineer

RLM/MPP/mjk/jb

Mailed a copy of the foregoing Memorandum Decision this 2nd day of July, 1992, to:

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Judy Barbour, Secretary