

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

FILED

STATE OF WYOMING

FEB 25 2008

Terri A. Lorenzon, Director
Environmental Quality Council

IN RE: TO THE FINAL DETERMINATION)
OF REIMBURSEMENT OF FUNDS)
LINCOLN COUNTY LANDFILLS)

Docket No. 07-3216

LINCOLN COUNTY LANDFILL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR SUMMARY JUDGEMENT

COMES NOW, the Lincoln County Landfill, by and through Joseph Cole, Deputy Lincoln County and Prosecuting Attorney, and in support of its Motion for Summary Judgement under Rule 56(a0, W.R.C.P., informs the Council as follows:

1. On September 25, 2007 the Department of Environmental Quality (the Department) sent Bob Rawlings, the manager of the Lincoln County Landfill a letter rejecting Lincoln County's application for a grant under W.S. 35-11-521. The letter (Attachment A) stated that the Department had considered Lincoln County's application, and that it had considered the recommendations of the Water and Waste Advisory Board, that reimbursement be provided. The letter then said the Department determined that the County was not eligible for reimbursement under the statute. This was because the actions proposed by the County were, "not needed to meet **minimum** Department standards." (*Emphasis addcd*). Lincoln County maintains that, under the clear language of W.S.s 35-11-521 and 35-11-522, the Department was not authorized to review and reject Lincoln county's grant application in the face of a favorable recommendation from the Water and Waste Advisory Board (the Board). As a matter of

law, if the Board recommends the grant, the Department was required to award it.

2. The issue before the Council is one of statutory interpretation. W.S. 35-11-521 authorizes grants to landfills for, among other things, "Installing new monitoring systems or upgrading existing monitoring systems to meet standards for systems established by the department under this article." W.S. 35-11-521(a)(iii). The same statute authorizes the Department to set the standards for landfill water quality. W.S. 35-11-521 does not, however, authorize the Department to make the grants. Grant making authority is found in W.S. 35-11-522.

3. Grants are made in a three-step process. First, applications are made to the Department. The Department, if funding is available, reviews the grants, determines their eligibility under W.S. 35-11-521 and makes recommendations to the Water and Waste Advisory Board. See W.S. 35-11-522(b). The Board then holds hearings and makes grant recommendations to the director of the Department. See W.S. 35-11-522(c). Finally, "[t]he director shall award grants in consideration of recommendations provided by the water and waste advisory board." W.S. 35-11-522(d). W.S. 35-11-522 as gives grant making discretionary power to the Board rather than to the Department. The language of 35-11-522(d) is mandatory rather than discretionary, so the Department may not decline grants approved by the Board. Therefore, as a matter of law, the Department could not deny the Lincoln County Landfill grant once Board approved it.

4. The Supreme Court has said:

The rules of statutory construction are well-known:

We first decide whether the statute is clear or ambiguous. This Court makes that determination as a matter of law. A "statute is unambiguous if its wording is such that reasonable persons are able to agree as to its meaning with consistency and predictability." Allied-Signal, Inc. v. Wyoming State Board of Equalization, 813 P.2d [214,] 220 [(Wyo.1991)]. A "statute is ambiguous only if it is found to be vague or uncertain and subject to varying interpretations." 813 P.2d at 219-20.

If we determine that a statute is clear and unambiguous, we give effect to the plain language of the statute.

We begin by making an "inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection." Parker Land and Cattle Company v. Wyoming Game and Fish Commission, 845 P.2d 1040, 1042 (Wyo.1993) (*quoting Rasmussen v. Baker*, 7 Wyo. 117, 133, 50 P. 819, 823 (1897)). We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe together all parts of the statute in *pari materia*.

State Department of Revenue and Taxation v. Pacificorp, 872 P.2d 1163, 1166 (Wyo.1994). If we determine that the statute is ambiguous, we resort to general principles of statutory construction to determine the legislature's intent.

State v. Bannan Energy Corporation, 999 P.2d 1306, 1308-09 (Wyo.2000) (some citations omitted); see also Wyodak Resources Development Corporation v. Wyoming Department of Revenue, 2002 WY 181, ¶ 9, 60 P.3d 129, ¶ 9 (Wyo.2002).

Airtouch Communications, Inc. v. Dep't of Revenue, 2003 WY 114, ¶ 10, 76 P.3d 342, 347 (Wyo.2003).

"When the language is not clear or is ambiguous, the court must look to the mischief the statute was intended to cure, the historical setting surrounding its enactment, the public policy of the state, the conclusions of law, and other prior and contemporaneous facts and circumstances, making use of the accepted rules of construction to ascertain a legislative intent that is reasonable and consistent." State ex rel. Motor Vehicle Div. v. Holtz, 674 P.2d 732, 736 (Wyo.1983). The ultimate goal is to determine the intent of the legislature.

Cotton v. McCulloh, 2005 WY 159, ¶ 14, 125 P.3d 252, 257-8 (Wyo. 2005).

5. The best way to analyze the statute is to begin at the end. The last step in the grant process is that, "The director **shall** award grants in consideration of recommendations provided by the water and waste advisory board." W.S. 35-11-522(d), *emphasis added*. "Shall" is mandatory, rather than discretionary language. An entity, which is instructed that it shall perform an act, must perform that act.

In particular, we have repeatedly found the word "shall" in a statute to be mandatory. Stutzman v. Office of Wyo. State Eng'r, 2006 WY 30, ¶ 17, 130 P.3d 470, 475 (Wyo.2006) ("Where the legislature uses the word 'shall,' this Court accepts the provision as mandatory and has no right to make the law contrary to what the legislature prescribed."); see *also* Merrill v. Jansma, 2004 WY 26, ¶ 42, 86 P.3d 270, 288 (Wyo.2004); and In re DCP, 2001 WY 77, ¶ 16, 30 P.3d 29, 32 (Wyo.2001). "The choice of the word 'shall' intimates an absence of discretion...." In re LePage, 2001 WY 26, ¶ 12, 18 P.3d 1177, 1180 (Wyo.2001).

LN v. Laramie Co. Dep't of Family Services, 2007 WY 189, ¶ 5, 171 P.3d 1077, 1080 (Wyo. 2007). Thus the director must award grants.

6. The phrase "in consideration of" is an idiomatic phrase meaning "in view of, on account of" or "in return for." The American Heritage Dictionary of the English Language, 4th ed. (Houghton Mifflin, 2006). Because there is no exchange between the director and the board, the second meaning is obviously incorrect. The phrase "in consideration of" has been used several times in recent Supreme Court cases. In context, the most appropriate synonym would be "because of". For example:

On May 16, 2002, the State of Wyoming, in **consideration of** full payment and in conformity with Wyo. Stat. Ann. § 36-9-112, issued a patent conveying the property to the Bentleys. The patent conveys the property "[s]ubject to any and all rights of way or easements of record previously granted under the laws of the State of Wyoming or reserved to the United States upon or across the above described lands."

Bentley v. Director of Office of State Lands and Investments, 2007 WY 94, ¶ 10, 160

P.3d 1109, 1113 (Wyo. 2007).

NOW, THEREFORE, in consideration of the increase in development potential to which the Grantor shall be entitled by Teton County's Land Development Regulations ... Grantor grants and conveys Grantee an Open Space Easement.

Wilson v. Board of County Com'rs of County of Teton, 2007 WY 42, ¶ 2, 153 P.3d 917, 923 (Wyo. 2007).

Amoco simply does not present cogent argument nor does it cite pertinent authority that allowing intervention as a matter of right was reversible error under the circumstances of this case, especially **in consideration of** the circumstance that the evidence presented at hearing would likely have been identical whether Sweetwater County was a party or not. We hold that the SBOE's decision to allow Sweetwater County to intervene does not require reversal.

BP America Production Co. v. Department of Revenue, 2006 WY 27, ¶ 24, 130 P.3d 438, 466 (Wyo. 2006).

The Commission replied by letter dated March 27, 2001:

This responds to your letter to the Chairman of the Wyoming Public Service Commission of March 8, 2001, seeking the opinion of the Commission as to whether or not Basin Electric Power Cooperative (Basin) must obtain a certificate of public convenience and necessity from the Commission for the construction of a 230 kV transmission line to support the Wyoming service territory of Powder River Energy Corporation (Powder River Energy), primarily **in consideration of** the growth being experienced by Powder River Energy in coal bed methane-related electric loads. In your letter, you specifically state that Basin proposes to build a 230 kV electric transmission line from the Teckla substation to the PacifiCorp 230 kV line near the Campbell/Johnson County line. You state that the line will be approximately 70 miles long, that it will cost approximately \$14,000,000, and that Basin's target in-service date is April 2003.

Bridle Bit Ranch Co. v. Basin Elec. Power Co-op., 2005 WY 108, ¶ 10, 118 P.3d 996, 1001 (Wyo., 2005). As can be seen from these examples, "in consideration of" is not an

ambiguous phrase. It means "on account of".

7. A "recommendation" is "1. The act of recommending; 2. Something that recommends, especially a favorable statement concerning character or qualifications; 3. Something, such as a course of action, that is recommended. See Synonyms at advice." The American Heritage Dictionary of the English Language, 4th ed. (Houghton Mifflin, 2006). Nothing in the term "recommendation" gives the Department discretion in awarding grants.

8. The statute is not ambiguous. The director must award the grants in view of or on account of the advice of the Board. Discretion is vested in the Board, which makes recommendations. The director has no discretion to ignore them. If the director had discretion in making the grants, the statute would read, the director **may** award grants **after** consideration of the recommendations provided by the water and waste advisory board. Because the statute is unambiguous and mandatory, the Department acted improperly in denying the Lincoln County Landfill grant recommended by the Water and Waste Advisory Board.

9. This makes sense in view of W.S. 35-11-522(c) "Following a public hearing, the water and waste advisory board shall provide recommendations for grant awards to the director." It is the Board that takes evidence and hears argument. The Board would be subject to the requirements of the Wyoming Public Meeting laws, W.S. 16-4-401 *et seq.*, and to the Wyoming Administrative Procedures Act, W.S. 16-3-101, *et seq.* Most significantly, the contested case rules, W.S.s 16-3-107 through 16-3-114 would apply. The Department has an opportunity to be heard at the Board hearing, indeed, under

W.S. 35-11-522(b), the Department must present its recommendations regarding each grant application to the Board. Its views on eligibility can, or rather, must be presented to the Board and considered. If the Department disagrees with the Board recommendations, it can appeal. W.S. 16-3-114. What it cannot do, because the statutes make no provision for it to do so, is override the recommendations of the Board after conducting an internal review of the Board's grant recommendations.

10. The first step in the grant process is found in W.S. 35-11-522(b):

When funds are available, applications for grants under W.S. 35-11-521 shall be submitted in a form approved by the department. The department shall review all grant applications, determine the eligibility of projects in accordance with W.S. 35-11-521 and provide recommendations for grant funding to the water and waste advisory board.

Grantees must submit applications in the proper form to the Department, which must review the applications, determine their eligibility. The Department must, then submit its recommendations to the Board. Nowhere in either 35-11-522(b) or (c) does the statute say the Board shall follow the recommendations of the Department. Instead, after receiving the Department's recommendations, the Board must hold a public hearing. Obviously the discretionary power regarding grants is vested in the Board rather than the Department.

11. Lincoln County is an entity qualified to receive grants under W.S. 35-11-521. W.S. 35-11-521 concerns grants for municipal solid waste landfills. Such landfills include county operated properties. W.S. 35-11-103(a)(ix) specifies that, "Municipality" means a city, town, county, district, association or other public body." Thus the County was a qualified entity.

12. Also, the Department rejected the Lincoln County grant application because, after considering the application from Lincoln County and the recommendations of the Board, the Department determined the new wells were “not needed to meet minimum Department standards.” (Attachment A, *emphasis added*). While W.S.s 35-11-521(b)(iii) does authorize the Department to promulgate standards, W.S. 35-11-521 does not require that grants be used to meet minimum department standards. It says grants may be used for, “Installing new monitor systems or upgrading existing monitoring systems to meet standards for the systems established by the department under this article.” The statute does not say funds are only to be provided to meet “minimum” standards established by the Department. The Supreme Court, when interpreting statutes, has specifically said courts may not add words. See In re Estate of Foster, 13 P.3d 686, 692 (Wyo. 2000) and Worcester v. State, 2001 WY 82, ¶ 15, 30 P.3d 47, 53 (Wyo. 2001). The Department, by reading the word “minimum” into the statutory authorization for grants has unduly restricted the discretion of the Board. If grants had been intended only to meet the Department’s minimum standards, the statute would have said so. Reading W.S.s 35-11-521 and 522 in their entirety, that clearly was not the intent of the legislature. The Board may recommend grants that to allow landfills to meet more than the Department’s minimum standards.

13. Furthermore, one of the Board’s responsibilities is recommending standards to be adopted by the Department. See W.S. 35-11-114(b). More specifically, the hearing on the grant criteria was held by the Board. W.S. 35-11-522(a). Therefore the Board had to be aware of the minimum standards when they heard the Lincoln County

presentations. The statutes do not bind the Board to recommending only grants to meet minimum Department standards. Therefore the Department should not have rejected the Board's recommendation of the Lincoln County grant.

WHEREFORE, because the Department had no authority to reject the Lincoln County grant once it was recommended by the Water and Waste Advisory Board, the grant should be approved as a matter of law. The Lincoln County landfill asks for summary judgement in this matter and that the Department be directed to honor the recommendation of the Water and Waste Advisory Board to compensate the Lincoln County Landfill for the Kemmerer and Cokeville well projects in the sum of \$1,053.90.

DATED: This 25th day of February, 2008.



JOSEPH COLE
DEPUTY LINCOLN COUNTY
ATTORNEY

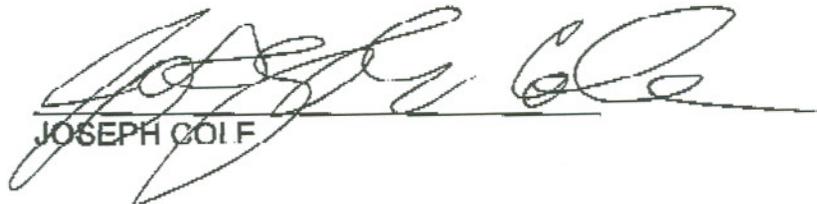
CERTIFICATE OF SERVICE

I, Joseph Cole, hereby certify that on the 25th day of February, 2008, I caused a true and correct copy of the Memorandum of Law by placing same in the United States mail, postage pre-paid at Afton, Wyoming and addressed as follows:

Michael Barrash
Assistant Attorney General
P.O. Box 847
Kemmerer, WY 83101

And by Fax to.

307-777-6946



JOSEPH COLE

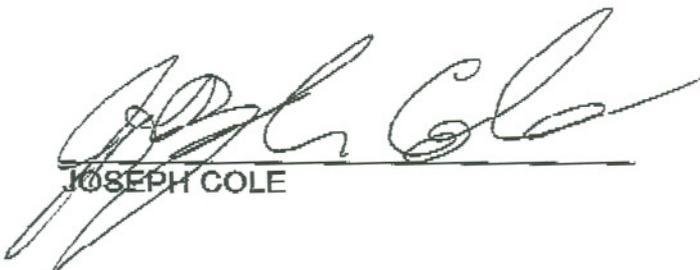
CORRECTED CERTIFICATE OF SERVICE

I Joseph Cole, hereby certify that on the 25th day of February, 2008, I caused a true and correct copy of the Memorandum of Law by placing same in the United States mail, postage pre-paid at Afton, Wyoming and addressed as follows:

Michael Barrash
Office of the Attorney General
123 State Capitol
Cheyenne, WY 82002

And by Fax to:

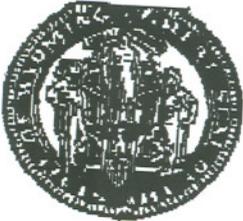
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JOSEPH COLE

FEB, 22, 2008 1:10PM LINCOLN CNTY ATTYN

NO. 932 P. 1 P. 1



Department of Environmental Quality



To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Dave Freudenthal, Governor

John Corra, Director

September 26, 2007

Mr. Bob Rawlings
Lincoln County Landfill Manager
P.O. Box 670
Kemmerer, WY 83101

RE: Lincoln County's Application for Reimbursement under W.S. 35-11-621 and W.S. 35-11-522, Cokeville #1 Landfill (SHWD File #10.335) and Kemmerer #1 Landfill (SHWD File #10.345)

Dear Mr. Rawlings,

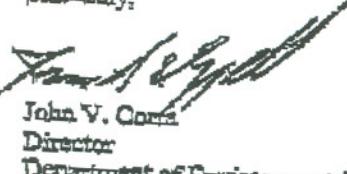
The Department of Environmental Quality (Department) has considered Lincoln County's application for reimbursement for the preparation of work plans to install additional monitoring wells at the facilities referenced above. The Department has also considered the Water and Waste Advisory Board's recommendation that reimbursement be provided in the amount of \$1,053.90 for 50% of the cost incurred by the County to prepare these work plans.

The Department has determined that the County is not eligible for reimbursement. This determination is based on the eligibility requirements of W.S. 35-11-621 which state that eligible activities include:

W.S. 35-11-521, (b) (iii) "Installing new monitor systems or upgrading existing monitor systems to meet standards for the systems established by the department under this article".

The Department has previously determined that, at the present time, the monitoring networks at these facilities are adequate and that additional wells are not needed to meet minimum Department standards. Therefore, because these activities are not required to meet Department standards, the activities are not eligible for reimbursement. However, if improvements to the monitoring network are required by the Department in order to characterize the nature and extent of a release, some portion of the costs associated with these improvements may be eligible for reimbursement, if funds are available.

Sincerely,


John V. Corra
Director
Department of Environmental Quality


LeRoy C. Fousner, P.E., CORE
Administrator
Solid and Hazardous Waste Division

cc: Bob Doctor >> Laura Daye, >> SHWD Casper Files 10.335 and 10.345
SHWD; Cheyenne Files 10.335 and 10.345
Glenn Sugano, Chairman, Water and Waste Advisory Board, 222 Virginia Street, Rock Springs, WY 82901



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Attachment

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2 that? Can we just shorten our process and decide amongst
3 ourselves whether or not we think this has any merit,
4 rather than call for a technical discussion? Because I
5 know not all the people that Leroy has on staff are here
6 to talk about the technical side of this. And we do have
7 trihydro here that could speak to any questions that the
8 board has. I thought that maybe that would be a good
9 way -- a way for us to proceed from here on out with our
10 meetings, is at least be able to tell Mr. Cora what we
11 think of the review and the appeal and just let it go at
12 that.

13 So with that, I'll ask for board comments.

14 MS. CAHN: AS I recall from our last
15 meeting, we had a lengthy discussion on this. And it
16 certainly was my opinion that the district was -- or the
17 county was being very proactive in going above and beyond
18 the requirements because of a unique situation that they
19 were in hydrogeologically and that it was a reasonable
20 request.

21 MR. SUGANO: Any other discussion from the
22 board?

23 (No response.)

24 MR. SUGANO: I would then entertain a
25 motion to have an action taken on the request from

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1 Cokeville Number 1 and Kemmerer Number 1.

2 MS. CAHN: Is there more discussion?

3 MR. OLSON: I'll make a motion. I would
4 move that the Water and Waste Advisory Board recommend to
5 Director Cora that work pertaining to the Cokeville
6 Number 1 and Kemmerer Number 1 landfills in the amount of

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Attachment

B 2 pages

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7 \$1,053.90, we recommend that that amount be reimbursed.

8 MS. CAHN: I second.

9 MR. SUGANO: We have a motion and a
10 second. All those in favor signify by -- well, wait a
11 minute. We may have an abstention.

12 MS. BEDESSEM: I abstain.

13 MR. SUGANO: Marge Bedessem will abstain
14 from voting on this issue.

15 Motion and a second to go ahead and approve the
16 funding for this. All those in favor say aye.

17 MS. CAHN: Aye.

18 MR. WELLES: Aye.

19 MR. OLSON: Aye.

20 MR. SUGANO: Aye. Opposed?

21 (No response.)

22 MR. SUGANO: Motion does carry.

23 MR. DOCTOR: Mr. Chairman, would the board
24 like to prepare a written statement to Mr. Cora that we
25 could forward to him with these other documents on your

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1 behalf? We would be happy to do that if you'd like to.
2 So it's not just the recommendation. We would be happy
3 to do that. If you would forward that to Laura or
4 myself, we will make sure that John gets that at the same
5 time he receives the rest of this stuff.

6 MR. SUGANO: We'd be happy to do that,
7 Bob.

8 Now, there's an action on the other landfill.

9 MR. OLSON: These were together.

10 MR. SUGANO: I'm sorry. I wasn't