

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

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IN THE MATTER OF OBJECTIONS TO)
THE PERMIT APPLICATION OF AMAX) Permit No. 428-T2
COAL WEST, INC., EAGLE BUTTE MINE) Docket No. 2573-94

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Environmental Quality Council

PROTESTORS' BRIEF AND AUTHORITY CONCERNING NOTICE
AND DISCOVERY ISSUES AND REGULATORY CHANGES

Roger Pfeil and Linda Pfeil, by and through their undersigned attorneys, submit the following argument and authority in support of their objection and protest to AMAX's proposed revision to the 428-T2 mining plan for proposed change in sequence and order of mining.

I. INTRODUCTION.

On July 26, 1994 a hearing was held on Roger and Linda Pfeil's objection to AMAX Coal West, Inc.'s application to revise the order and sequence of mining in its mine plan. The revision sought permission to mine adjacent to the Rawhide Village Subdivision in 1994-95 for the first time since mining ended there in 1990.

The Pfeils objected on the basis that the proposed change would deny them the use and enjoyment of their property for over ten years that they otherwise would have received by having the mine progress in a south and easterly direction away from them until the year 2007. They asserted that they relied on AMAX's numerous representations in the 1989-90 mine plan renewal process that the order and progression of mining would take the mine south and east away from Rawhide Village until at least the year 2007. They also raised objections concerning fears that renewed mining so close to the Rawhide Subdivision would damage the hydrologic

balance in the area. Pfeils argued that despite requiring public notice for the Form 11 revision, DEQ had not required any additional groundwater drawdown modeling to predict the effect of the change in order and sequence of mining proposed by AMAX.

At the conclusion of the July 26, 1994 trial of this matter Hearing Examiner Bergman requested briefs from the parties concerning notice and due process issues in this case. This brief is the Pfeil's opening submission.

II. FACTS.

At the July 26, 1994 trial a number of facts bearing on notice and due process issues in this case were placed into the record. Facts pertinent to the arguments in this Brief are as follows:

A. In 1990, and likely several years earlier, AMAX became aware that mining coal adjacent to the Rawhide Village Subdivision could be economically desirable. AMAX waited until the fall and early winter of 1993 to formally apply for permission to change the order and sequence of their 1990 428-T2 mining plan to allow mining adjacent to Rawhide Village in 1994-95.

B. When it sought the revision AMAX argued that the revision did not require public notice and opportunity for hearing.

C. Shortly after applying for the revision in early January 1994, AMAX entered into a contract to provide high BTU coal to a utility named SWECO. At the time this contract was entered into AMAX knew it did not have the revision approved. At that time AMAX also knew that it had to mine the coal adjacent to Rawhide Village

in 1994-95 to economically perform its obligations under the January 1994 SWECO contract.

D. After AMAX's revision application was received, the Wyoming Department of Environmental Quality required AMAX to proceed with the revision application as a Form 11 revision requiring public notice and an opportunity for hearing.

E. Roger and Linda Pfeil live adjacent to the Eagle Butte Coal Mine. Their home is approximately 1600 feet from the West Pit of the mine where AMAX seeks its revision to begin mining coal in the years 1994-95.

F. The Pfeils received in the mail written notice that AMAX Coal West, Inc., a subsidiary of Cyprus Minerals Coal Company, had filed a Form 11 revision application "which alters the direction and sequence of the mine plan progression through the end of 1995" for the Eagle Butte Mine in Campbell County, Wyoming on May 23, 1994.

G. Page 2 of the public notice mine permit transfer and revision sheet stated that "all objections must be filed on or before July 6, 1994." The public notice also stated that "an informal conference or public hearing shall be held within twenty (20) days after the final date for filing objections unless a different period is stipulated to by the parties." The notice went on to indicate the schedule for publication of the notice and to state that any "hearing would be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act (Section

16-3-101 through 16-3-115), and the right of judicial review shall be afforded as provided in that Act.

H. The notice did not explain how the order and sequence of mining at Eagle Butte would be altered under the Revision. The notice did not explain or warn objectors that they had to file their objections more than 33 days before the hearing date if they wanted any hope of conducting written or deposition discovery.

I. Relying on the July 6, 1994 deadline set forth in the notice they had received, the Pfeils filed a formal set of objections to application for mine permit revision to AMAX Coal West Eagle Butte Mine Form 11 Revision application on July 6, 1994.

J. The Environmental Quality Council upon receipt of the objection from the Pfeils set a hearing date of July 26, 1994 and required all parties to submit a list of witnesses, exhibits and summation of facts and legal issues to the Council by Friday, July 22, 1994. The EQC signed and issued its notice of hearing and order in that regard on July 18, 1994 (eight days before the hearing).

K. The Pfeils made a motion for a continuance of the hearing on July 20, 1994 on the grounds that the scheduling of the hearing twenty (20) days after the deadline for filing objections deprived them of discovery and that the notice and hearing scheduled in this case and generally W.S. 35-11-406(k) effectively deprived them of any right to conduct discovery, to prepare for the hearing, to arrange for hydrology experts to provide testimony at the hearing,

and to have a meaningful and fair opportunity to participate in the hearing.

L. The Pfeils filed a discovery request and a notice of service of discovery on AMAX on July 21, 1994. AMAX did not respond to this request.

M. The Pfeils also filed a motion for an informal conference pursuant to the offer that they be granted such a conference on July 21, 1994. The request for an informal conference was transferred by the EQC to the DEQ on July 22, 1994 and was formally denied by the Director of the DEQ on July 22, 1994.

N. At trial AMAX officials testified that they would operate dewatering pumps to dewater the overburden in the area adjacent to Rawhide Village Subdivision if they were allowed to mine there in 1994-95.

O. At trial AMAX's groundwater hydrologist, Doyl Fritz, testified that he had previously modeled projected groundwater drawdowns in that area in 1990 using a MODFLOW computer model. He admitted that many of the values placed in the MODFLOW model to predict groundwater drawdowns were based on his own personal interpretation of the availability and character of groundwater and geology in the area--not actual well monitoring data. He also admitted that other hydrologists might arrive at different drawdown conclusions than he did based on the data he used to set up AMAX's MODFLOW model.

P. Mr. Fritz also admitted on cross-examination that the last time he updated the earlier model with new data it took him and his

staff of "four or five" people a matter of three to four months to complete that new modeling. He also stated that it took more than two months to set up and complete the first MODFLOW groundwater modeling that was done for the Eagle Butte mine.

Q. Mr. Fritz also admitted that for another expert to verify his MODFLOW modeling and conclusions they would need to review his data and computer modeling input numbers and re-run the model.

R. At the hearing, despite the unavailability of discovery to the Pfeils and the admissions by Mr. Fritz and other AMAX witnesses that they could not even update their own groundwater modeling for mining next to Rawhide Village in less than 3-4 months, the Pfeils' motion for a continuance was denied.

III. ARGUMENT.

The Pfeils' arguments concerning lack of discovery and notice to them concerning the July 26, 1994 proceedings are two-fold. First, Pfeils contend that the hearing schedule mandated by W.S. 35-11-406 both on its face and particularly in this case effectively denies them any fair or meaningful opportunity to prepare for the July 26, 1994 hearing. Second, Pfeils contend that the actual written Notice they received from AMAX about the proposed Form 11 revision application was misleading and incomplete.

A. Inadequacy of Notice.

1. AMAX and DEQ Failed To Comply With State Statutes And DEQ Rules.

The actual written notice the Pfeils received on May 22, 1994 did not comply with the plain language of W.S. 35-11-406(j) and

denied them due process of law. The notice was inadequate to inform them of the effect of the proposed Form 11 revision. The notice also failed to inform the Pfeils that if they waited until the deadline for filing objections they essentially forfeited all hope of ever conducting discovery in the matter.

Pursuant to W.S. 35-11-406(j) interested persons must receive notice of a proposed action which contains, among other things: "information regarding . . . **the proposed dates of commencement and completion of the [proposed action], the proposed future use of the affected land**" Pursuant to DEQ Land Quality Rules and Regulations Chapter XIV, Section 3 (a): "The notice shall contain that information required in Section 1.(b)(i), (ii), (iii), and a general description of the proposed revision" Pursuant to DEQ Land Quality Rules and Regulations Chapter XIV, Section 1.(b), (ii), (iii) the notice must contain: "A brief description of the change and why the change is being sought . . . [a]n outline or index indicating what pages, maps, tables, or other parts of the approved permit are affected by the revision . . . [a]dditional information necessary to support or justify the change."

Pfeils submit that the notice sent out in this case does not begin to meet all of these requirements. In fact the notice is outright misleading about the proposed timing, description and affects of the change in order and sequence of mining proposed. Specifically the notice is deficient in the following ways:

1. The notice does not provide specific dates of commencement showing the change in the order and sequence of mining proposed and

the location of the changes in the order and sequence of mining. You cannot read the notice and gain any understanding of how the mining schedule will change or where mining will occur under the proposed revision. A violation of W.S. 35-11-406(j).

2. The notice does not explain the proposed future use of the affected land in the context of the proposed change in the order and sequence of mining. A violation of W.S. 35-11-406(j).

3. The notice does not set out the specific calendar dates on which the proposed revision in the order and sequence of mining will occur. A violation of W.S. 35-11-406(j).

4. The notice does not contain any substantive description of the change proposed in the order and sequence of mining. A violation of W.S. 35-11-406(j) and DEQ Land Quality Rules Chapter XIV, Section 3 (a).

5. The notice itself does not contain an **"outline or index indicating what pages, maps, tables, or other parts of the approved permit are affected by the revision"** A violation of DEQ Land Quality Rules Chapter XIV, Section 1.(b), (ii), (iii).

6. The notice does not inform the reader that although no groundwater modeling to predict the potential affects of the proposed Form 11 revision was done DEQ has determined that there will be no adverse affects on groundwater in the Rawhide Village area. A violation of W.S. 35-11-406(j) and DEQ Land Quality Rules Chapter XIV, Section 1.(b), (ii), (iii).

A notice which does not comply with applicable statutes and DEQ rules is insufficient on its face and denies the person

receiving notice due process of law. U.S. Const. Amend XIV; Wyo. Const. Art. 1, § 6; White v. Board of Trustees, 648 P.2d 528, 535 (Wyo. 1982) cert. denied 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed. 2d 956 (1983); Devous v. Board of Medical Examiners, 845 P.2d 408, 416 (Wyo. 1993). The notice the Pfeils received on May 22, 1994 did not begin to adequately describe the substance, scope or potential affects of AMAX's proposal to significantly change the order and sequence of mining at Eagle Butte. It utterly failed to inform objectors what tables, maps or other parts of the approved permit calling for mining in a direction away from Rawhide Subdivision were being changed. It did not inform objectors that the DEQ had undertaken no new studies or investigations about the affects on the groundwater in the Rawhide Village area from the change and that no previous model existed to predict those affects under the mining schedule set out in the revision.

The clear statutory and regulatory deficiencies in the notice are fatal. The notice should be reissued and another trial held after the Pfeils have had a full and fair opportunity to conduct discovery and prepare their case.

2. AMAX's Notice Did Not Inform The Pfeils That They Might Forfeit Any Ability To Conduct Discovery If They Waited To File An Objection Until The July 6, 1994 Deadline.

The notice that was given in this case based on the fast-track hearing schedule set out in W.S. 35-11-406(k) was inadequate and misleading to citizen protestors concerning their procedural rights.

The notice very specifically sets forth a deadline by which objections must be filed and a hearing held but contains absolutely no explanation to citizen protestors that if they wait until the deadline to file an objection they will have essentially no right or ability to complete discovery prior to trial.¹ In this sense the notice given to the Pfeils creates a procedural trap in which an unsophisticated citizen protestor is led to believe they will have a right to a full and fair hearing on complicated scientific issues, but in reality forces them to litigate against a highly funded mining corporation with no discovery and no preparation.

For due process to be satisfied the notice should provide citizen objectors like the Pfeils with a reasonable opportunity to know the actual claims of the opposing party and to meet them. U.S. Const. Amend XIV; Wyo. Const. Art. 1, § 6; White v. Board of Trustees, 648 P.2d 528, 535 (Wyo. 1982) cert. denied 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed. 2d 956 (1983). The notice the Pfeils received in this case amounted to nothing more than an invitation to a hearing about issues they were not apprised of carried forward under a fast-track procedure that put them at a decided and unknowing disadvantage. AMAX and the State are in a weak position to argue otherwise in light of their refusal to even consider granting the Pfeils a continuance when they requested one in this matter.

¹ The procedural details about why this occurs are described infra in Section B.1.

B. Unavailability Of Discovery Denied The Pfeils A Meaningful Due Process Hearing.

1. The Hearing Schedule Under W.S. 35-11-406 Puts Citizen Objectors At An Unfair Procedural Disadvantage.

The most distressing aspect of this case is a problem that W.S. 35-11-406 has created for this Council for years now: Can a citizen protester ever obtain a fair and meaningful due process hearing under the rigid time constraints set out in W.S. 35-11-406(k) and concurrent DEQ rules and regulations?

The statutory scenario here is simple and harsh on protestors. When a mine entity like AMAX seeks to make a significant revision to their approved mining plans they are required to give public notice and be prepared to participate in a public hearing before the EQC. Under W.S. 35-11-406, once public notice is required any person who files an objection to the proposed action would have a maximum of 78 days to file their objection, conduct and complete discovery and prepare expert testimony for the hearing assuming it takes two days to mail them notice.² Discovery is not available to an objector until they file a formal objection under W.S. 35-11-406 or the Wyoming Administrative Procedure Act.

² Pursuant to W.S. 35-11-406(j) notice must be published for four consecutive weeks after DEQ requires public notice. Pursuant to W.S. 35-11-406(k) the deadline for objections is thirty days after the last publication date of the notice. Any hearing on the matter must then occur no later than twenty days after the last date for filing objections. *Id.* Assuming the publication period takes 30 days, persons who file objections have a maximum of roughly 80 days to conduct discovery and prepare for trial. If the notice is published in a period of time less than 30 days that time period is shorter.

In this case the Pfeils received actual notice of the Form 11 revision on May 23, 1994. The deadline for final objections expired on July 6, 1994. The EQC hearing took place on July 26, 1994. The Pfeils had a total of 64 days to file an objection, serve and complete discovery and locate and prepare experts for trial.

Under these statutes and rules, protestors who file objections under W.S. 35-11-406(k) are theoretically given the right to conduct discovery which will allow them to obtain evidence helpful to them in putting on a persuasive and meaningful case before the Environmental Quality Council at the time of hearing.³ However, as the Pfeils' case illustrates, if the objector waits until the filing deadline set out in the notice (20 days before the hearing), they essentially forfeit all ability to conduct any written discovery prior to their hearing.⁴

³ W.S. 35-11-406(j) provides: "Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved."

W.S. 35-11-406(k) provides: "The hearing shall be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act, and right of judicial review shall be afforded as provided in that act."

W.S. 35-11-406(g) provides: "[i]n all contested cases the taking of depositions and discovery shall be available to the parties in accordance with the provisions of Rules 26, 28-37 (excepting Rule 37(b)(1) and 37(b)(2)(D) therefrom) of the Wyoming Rules of Civil Procedure in effect on the date of the enactment of this Act and any subsequent rule and amendments thereto.

⁴ The Wyoming Rules of Civil Procedure provide that written discovery is generally available to parties in a broad sense such that any evidence that is relevant or which might lead to the discovery of relevant evidence is discoverable. W.R.C.P. 26. Responses to written discovery in the form of interrogatories, requests for admission, requests for production of documents, or depositions upon written questions are not required to be filed

2. Citizen Objectors Under W.S. 35-11-406 Are Constitutionally Entitled To A Full and Fair Opportunity to Conduct Discovery And To Prepare Their Case Regardless Of The Time Limits Set Forth In W.S. 35-11-406(k).

As the owner of real property adjacent to the Eagle Butte Mine, the Pfeils hold certain inherent rights arising under the United States Constitution and the Wyoming Constitution. These rights focus on the Pfeils' entitlement to basic due process and fairness in the public notice comment and participation process that the legislature specifically set up in W.S. 35-11-406. See generally U.S. Const. Amend. XIV and Wyo. Const. Art 1, §§ 6 and 7. Further, when the legislature creates a legal requirement that interested persons are entitled to notice and to a meaningful opportunity to oppose actions taken by large surface coal mines and to do so in the context of a meaningful due process hearing, all of those rights come into play and must be respected. *Id.*; White, 648 P.2d at 535; Holm v. State, 494 P.2d 740, 743 (Wyo. 1965). Due process in this context requires proper notice and a meaningful and fair hearing any time an interested person with a property right may be affected by government action. Lawrence Allison & Associates West v. Archer, 767 P.2d 989, 997 (Wyo. 1989) (citing Boddie v. Connecticut, 410 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971)).

until thirty (30) days after the written discovery is served plus three (3) days if the discovery is served by mail. W.R.C.P. 31, 33, 34, 36 and 6(d). Depositions upon oral examination may be taken pursuant to Wyoming Rules of Civil Procedure 26 and 30. However, under Rule 30(a)(1), leave of court must be granted if the plaintiff seeks to take a deposition "prior to the expiration of 30 days after service of summons and complaint upon any defendant or service made under Rule 4(e)."

A due process hearing is meaningful in a constitutional sense if it provides the interested or aggrieved party with a fair opportunity to defend his rights. In The Matter Of G.P., 670 P.2d 976, 987-88 (Wyo. 1984). Inherent in a fair opportunity to defend a constitutionally protected property right is a full and fair opportunity to discover evidence and to prepare for the hearing that will be held. The mere fact that a hearing is scheduled and held does not, in and of itself, satisfy the requirements of due process. Instead, the critical ingredients to satisfy the requirements of due process are a finding that the substantive opportunity to be heard was fair in all respects under the circumstances involved. Matthews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 14 (1976); Lawrence Allison & Associates West, 767 P.2d at 997. "[D]ue process is flexible and calls for such procedural protections as a particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

In this case it is important to view these due process requirements in the context of the issues and hearings contemplated by W.S. 35-11-406(k). This statute is a part of the Wyoming Environmental Quality Act. One of the goals of the Act was to provide a due process mechanism that would allow non-lawyer private citizens to receive reasonable public notice of proposed surface coal mining activities that might affect the environment. Another goal of the legislation was to provide a fair and meaningful opportunity for a due process hearing in which private citizens

could object to and oppose proposed surface coal mining activities before the EQC in a trial-like setting. At the time the legislation was passed it was understood that these matters can be highly technical and can require expert scientific analysis to understand.

Keeping these basic goals of the Wyoming Environmental Quality Act in mind, a meaningful due process hearing for a private citizen in an objection proceeding under W.S. 35-11-406(k) would have to provide several basic opportunities for citizen objectors, including:

- a. A substantive opportunity to conduct discovery before the hearing;
- b. A reasonable and fair opportunity to locate and retain expert scientific witnesses who could provide testimony to refute opinions given by Mine experts; and,
- c. A reasonable and fair opportunity for the objector's experts to review pertinent information obtained in discovery and to analyze data and form conclusions about the matters at issue in the hearing.

The only way to provide these opportunities is to provide a fair and reasonable amount of time for objectors to complete these tasks beyond the 60-80 day time schedule that W.S. 35-11-406 allows the Mine to impose on citizen objectors. Any time the EQC fails to grant a continuance in a case that demands additional time for the citizen objectors to accomplish these tasks, its actions are arbitrary and capricious because they effectively deny the citizen

objector any meaningful opportunity to prepare and present their case.

The undisputed evidence in this case proves these conclusions. Here, AMAX's groundwater modeling expert, Doyl Fritz, admitted on cross-examination that this updating work took him three to four months time using a staff of several people at his consulting office. He further admitted that actually setting the model up, running the data and comparing modeling results for this type of model would take more than four months time. Pfeils' expert witness, Walter Mersch, testified that Mr. Fritz's time estimates of three to four months to perform a simple update of the MODFLOW groundwater model to predict groundwater drawdowns under Rawhide Village Subdivision were accurate. Mr. Mersch also indicated that the process of reviewing Mr. Fritz's work and rerunning the MODFLOW model could take longer than 3-4 months.

Based on these undisputed facts, there is no plausible way that interested parties like the Pfeils could complete discovery,⁵ hire an expert and provide that expert with the information necessary for him to form opinions concerning the issues at hand

⁵ The discovery alone in this type of a case, were it a normal civil matter filed in district court, would easily consume a minimum of 6 months time. The mandatory schedule set forth in the statute effectively strips an objector of his rights to employ any reasonable discovery for the purposes of: (1) clarifying the issues which should be listed in the objection; (2) identifying the location and contents of literally thousands of pages of technical data, reports, documents, correspondence, exhibits and the like for review prior to the hearing; (3) obtaining and reviewing full and fair discovery responses from the mining company and from the State of Wyoming; (4) arranging a reasonable schedule for prehearing depositions of persons who can provide lay and expert testimony on the issues before the Council.

and have that expert complete his work and be prepared to give testimony at a hearing within the 64 days AMAX allowed them prior to the July 26, 1994 hearing. In this sense there was nothing "meaningful" about the July 26, 1994 hearing that AMAX forced the Pfeils to participate in. Even if the Pfeils had filed their objection on or about May 23, 1994 and commenced discovery at that time, they simply could not have prepared for trial on the issue about whether AMAX might cause premature damage or change in the hydrologic balance under or around Rawhide Village Subdivision.⁶

If constitutional due process is a flexible concept that must be applied to the circumstances of a particular hearing, then in this case the concept of due process requires that the Pfeils be given a continuance whether AMAX stipulates to one or not. Morrisey, 408 U.S. at 481. If citizen objectors like the Pfeils will always be forced to a quick hearing on complicated scientific issues with no practical opportunity to complete discovery and to prepare expert testimony then giving them public notice is meaningless. Worse, if the Pfeils' case is an example of the full

⁶ This also assumes that AMAX would have fully complied with all of the Pfeil's discovery without objection. Pfeils believe it is highly likely that AMAX would have responded to their discovery efforts with objections, claims of privilege and request for protective orders from AMAX which could have easily consumed the remaining 60 days or so left for the Pfeils to prepare their case prior to the July 26, 1994 hearing. Even assuming that the Pfeils receive a prompt response from AMAX within 33 days or less to all their written discovery, they would effectively be left with less than a month to take depositions of AMAX witnesses and experts to provide the results of that information to their own expert and to have their own expert review, analyze and run the water modeling scenarios that they needed to complete to participate in the hearing in a meaningful way and to prepare that expert testimony for trial.

extent of due process available to citizen objectors under W.S. 35-11-406, then this Council is wasting its time presiding over unfair one-sided hearings where the Mine involved controls the evidence and the litigation schedule in all respects. The only way to avoid this is to grant a continuance to allow fair discovery and preparation on highly technical issues raised in these objections.

3. AMAX Is Estopped To Argue That The Pfeils Were Dilatory--AMAX Was Dilatory In Applying For A Mine Plan Revision After It Obligated Itself To Provide Coal It Could Only Mine Out of Sequence And Adjacent To Rawhide Village Subdivision.

AMAX or the State may try to argue that the Pfeils were dilatory and waited too long to file their objection. These types of arguments would constitute a self-serving smokescreen against the issues of basic fairness the Pfeils are asserting.

As described above, the undisputed testimony of AMAX's own experts and employees at the July 26, 1994 trial shows that even if the Pfeils had been able to take advantage of the full 64 days available to them they could not have completed discovery and prepared their case with a qualified groundwater expert.⁷

Most striking here is that AMAX has admitted that it created its own economic difficulties concerning the change in order and sequence in mining proposed in the Form 11 revision. AMAX's

⁷ Any argument by AMAX that 64 days was sufficient time to complete discovery in a case like this also assumes that AMAX would not have objected to the Pfeils' discovery in any way. The Pfeils respectfully suggest that it is at best unlikely that AMAX would have complied with all discovery tendered to them without making a number of objections. AMAX's trial counsel objected during the July 26, 1994 proceeding a number of times any time the Pfeils' counsel attempted to ask what documents he could have discovered had time been available to do so.

witnesses admitted that they had knowledge of the availability and attractiveness of the revision to mine coal out of sequence adjacent to Rawhide Village at least ten years sooner than they had earlier represented for a full three years. They also admitted that they entered into a contract to provide high BTU coal to a utility company in 1994 and 1995 prior to obtaining the revision that would allow them to mine adjacent to Rawhide Village. AMAX's correspondence also indicates that they had initially planned to obtain the revision allowing them to mine next to Rawhide Village out of sequence without public notice.

If AMAX and the State of Wyoming are going to argue that Roger and Linda Pfeil are somehow dilatory because they waited until the deadline set forth in the notice given to them to file an objection and then, after finding out how unfair the scheduling set forth in W.S. 35-11-406(k) was to their ability to effectively litigate their objection and hire counsel, then the Pfeils are entitled to ask the Council to infer that AMAX's plan to contradict its own representations about when it would mine next to Rawhide Village and to do so without any public input if possible. The Pfeils are also entitled to ask the Council to infer that AMAX chose to put itself in an economic bind by contracting to sell coal it did not have permission to mine even though it knew about that coal three years before it made its application.

4. The Grams Case Does Not Control This Case.

AMAX and the State of Wyoming may also argue that the case of Grams v. The Department of Environmental Quality, 730 P.2d 784

(Wyo. 1986), has already decided this issue against the Pfeils. This would be a mischaracterization of the Court's discussion of the discovery and due process issues in that case. In Grams, the Wyoming Supreme Court simply found that the record before it did not properly preserve the discovery and timing issues created in some cases by W.S. 35-11-406 for review on appeal. The Grams decision is fact specific and did not involve a record like the one in this case which establishes that these objectors could not have participated meaningfully in the hearing on July 26, 1994 even if they had filed their objection immediately upon receiving notice and commence discovery at that time.

IV. CONCLUSION.

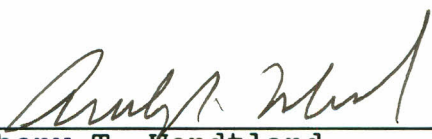
In conclusion, Roger and Linda Pfeil are not asking that the Eagle Butte Coal Mine be shut down. They do believe that the change in order and sequence of mining substantially affect their property rights and may endanger the hydrologic balance of the groundwater in their immediate area. On that basis they are simply seeking to participate in a meaningful way in the public hearing process that was noticed by the State of Wyoming pursuant to state law concerning AMAX's proposed revision. At this point that opportunity has been denied to them by a rigid application of W.S. 35-11-406(k) and by AMAX's refusal to stipulate to a continuance.

Roger and Linda Pfeil respectfully request that the Council reconsider its denial of their Motion For A Continuance in this matter.

Dated this 12th day of August, 1994.

DAVIS and CANNON

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CERTIFICATE OF SERVICE

I, Anthony T. Wendtland, attorney for Objectors Roger D. Pfeil and Linda J. Pfeil and their minor children in the above-entitled and numbered cause, do hereby certify that on the 12th day of August, 1994, I caused a true and correct copy of the Protestors' Brief And Authority Concerning Notice And Discovery Issues And Regulatory Changes to be served by placing the same in the United States mail, postage prepaid at Sheridan, Wyoming, to:

AMAX Coal West, Inc.
c/o Marilyn Kite
Holland & Hart
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Jackson, Wyoming 83001


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