BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

POST-HEARING REPLY MEMORANDUM

Apparently conceding they cannot win on substantive issues, counsel for the Pfeils instead focuses on procedure and the notices given to the Pfeils. Even if the Pfeils' counsel could show a deficiency in the notices (and as set forth below, there was no deficiency), the evidence is that the Pfeils suffered no prejudice. Moreover, any deficiency was cured when, after receiving notice, by Mr. Pfeil read and reviewed Amax's revision application. The Pfeils have not carried their burden of showing either substantive or procedural problems which would justify reopening this hearing or delaying the permit revision.

I. WHAT IS THE PURPOSE OF NOTICE?

The purpose of notice is indicated by the word itself. Notice "is knowledge of facts which would naturally lead an honest and prudent person to make inquiry, and does not necessarily mean knowledge of all facts." Black's Law Dictionary at 957 (5th Ed. 1979), citing Wayne Building and Loan Co. of Wooster v. Yarborough, 228 N.E.2d 841, 847 (Ohio 1967). The purpose of notice is to notify people of a proceeding in which they might have an interest.

The purpose of notice is not, as the Pfeils' counsel argues, to provide comprehensive details of the substance of a proceeding. Rather, the purpose is to let the party know he should inquire into

the details and the substance. The purpose of notice is not to provide extensive explanations of the all procedures or discovery tactics to be followed. The purpose is to alert a party that he should learn the appropriate procedures or hire an attorney who knows them.

> The notice which must be given must afford the defendant 'a reasonable opportunity to know the claims of the opposing party and to meet them.' Morgan v. United States, 304 U.S. 1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129 (1938).

White v. Board of Trustees, 648 P.2d 528, 535 (Wyo. 1982), cert. denied 459 U.S. 1107 (1983).

II. THE NOTICES RECEIVED BY THE PFEILS IN THIS CASE ACHIEVED THE BASIC PURPOSE OF NOTICE AND COMPLIED WITH THE STATUTORY AND REGULATORY REQUIREMENTS.

Judged against the real purpose of notice, the notices in this case certainly provided enough information to alert the Pfeils to the nature, substance, and procedures of the proceeding. The adequacy of the notices is even more plain when tested against the applicable statutes and regulations. Table I, attached to this reply brief, lists each requirement of the applicable statute, Wyo. Stat. 35-11-406(j), and shows how completely the notices complied with each and every requirement.

The notices fare equally well measured against the applicable regulations. Chapter XIV, Section 3(a), Land Quality Division Rules and Regulations, requires the notices to contain:

(1) "a general description of the proposed revision." The notices described the proposed revision as follows:

> a transfer of Permit No. 428-T2 (Eagle Butte Mine) to AMAX Coal West, Inc., a subsidiary of Cyprus AMAX Coal

> Company [and] a Form 11 Revision application which alters the direction and the sequence of the Mine Plan progression through the end of 1995.

Exhibits A-10 and Pfeil 21.

(2) "the location at which information about the application for permit revision may be obtained." The notices stated:

> Information regarding this transfer application or permit revision may be reviewed at the offices of the Land Quality Division at the Herschler Building, 122 West 25th Street, Cheyenne, Wyoming 82002, the offices of the land Quality Division District III office at 2161 Coffeen Avenue, Sheridan, Wyoming 82801, the Campbell County Clerk at 500 South Gillette Avenue, #220, Gillette, Wyoming 82716 or the Eagle Butte Mine Office of AMAX Coal West, Inc.

Exhibits A-10 and Pfeil 21.

(3) "the location and final date for filing objections to the application." The notices indicated:

> Objections to the proposed mine permit transfer application or permit revision must be filed with the Administrator, Land Quality Division at the above address. . . . All objections must be filed on or before July 6, 1994.

Exhibits A-10 and Pfeil 21.

Section 3(a) also indicates that notice should contain ""that information required in Section 1(b)(i), (ii), [and] (iii)." This is confusing, however, because Section 1(b) sets forth the required contents of an application for a non-significant revision. When the Council promulgated Sections 3(a) and 1(b), it could not have meant that notice should reproduce the entire contents of an application for revision. Even if a newspaper might agree to publish several hundred extra pages of text and large maps and distribute that bulk to all its readers, the cost of publishing an

entire application in the newspaper for four weeks would be prohibitive. Mailing the entire application to all of the nearby landowners would be similarly expensive and equally wasteful. The paper needed to publish and mail out an entire revision application would destroy enough trees and cause enough environmental damage to dwarf the Pfeils' concerns. That is not what the Council intended.

Fortunately, neither the law nor common sense dictates such an absurd result. Statutes must be interpreted to accomplish the intent of the legislature, and regulations must be interpreted to accomplish the intent of the agency which promulgated them. Regulations, like statutes, "should not be interpreted in a manner producing absurd results." In re JRW, 814 P.2d 1256, 1263 (Wyo. 1991).

> We know well the rule that in construing statutes an absurd result should be avoided. There is a presumption that the legislature intends to adopt legislation that is reasonable and logical.

Gertsell v. Department of Revenue & Taxation, 769 P.2d 389, 394 (Wyo. 1989); see also State Bd. of Equalization v. Cheyenne Newspapers, Inc., 611 P.2d 805, 809 (Wyo. 1980) ("Statutes should be given reasonable, practical construction."); In re Romer, 436 P.2d 956, 958 (Wyo. 1968) (A statute "if susceptible of other interpretation will not be construed so as to produce absurd results.")

To avoid absurd results, Section 3(a) cannot be read to mean that the entire application for revision must be published in the newspaper and mailed to landowners. What the Council intended by these regulations was to provide notice. Thus, just as the purpose

of notice is to alert readers to the nature of a proceeding, the purpose of 3(a) must be to alert persons to the information specified in Section 1(b)(i), (ii), and (iii).

Section 3(a), interpreted in a reasonable and logical way, was fully satisfied by the notices in this case. Section 1(b)(i) says an application must contain a brief description of the change and why the change is being sought. The notifications described the proposed change as follows:

> a transfer of Permit No. 428-T2 (Eagle Butte Mine) to AMAX Coal West, Inc. . . . and a Form 11 Revision application which alters the direction and the sequence of the Mine Plan progression throughout the end of 1995.

Exhibits A-10 and Pfeil 21.

Section 1(b)(ii) says an application must contain "an outline or index indicating what pages, maps, tables, or other parts of the approved permit are affected by the revision." The notifications properly indicated where to find the outline or index, along with the rest of the information in the application:

> Information regarding this transfer application or permit revision may be reviewed at the offices of the Land Quality Division at the Herschler Building, 122 West 25th Street, Cheyenne, Wyoming 82002, the offices of the land Quality Division District III office at 2161 Coffeen Avenue, Sheridan, Wyoming 82801, the Campbell County Clerk at 500 South Gillette Avenue, #220, Gillette, Wyoming 82716 or the Eagle Butte Mine Office of AMAX Coal West, Inc.

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Section 1(b)(iii) says the application must contain "additional information necessary to support or justify the change." Again, the notifications satisfied this requirement by

directing readers where to find and review the application and such additional information as needed to support the change.

III. IF NOTICE ACCOMPLISHES ITS BASIC PURPOSE, TECHNICAL IMPERFECTIONS DO NOT MATTER.

Because the purpose of notice is to alert people, not to recite every scrap of available information, technical defects do not render notice ineffective. Under Wyoming law, notice is judged on its substance, not on the technicalities:

> The requirements of the law are met where the notice given the defendants is not misleading and apprises him or her of the issues in controversy. Intercontinental Industries, Inc. v. American Stock Exchange, 452 F.2d 935 (5th Cir. 1971), cert. denied 409 U.S. 842, 93 S.Ct. 41, 34 L.Ed.2d 81.

White v. Board of Trustees, 648 P.2d 528, 535 (Wyo. 1982), cert. denied 459 U.S. 1107 (1983). The law in other states is equally plain. For example, the Supreme Court of Alaska has written:

> Moreover, since the basic element to be satisfied is the opportunity to prepare one's case, the actual content of the notice is not dispositive. The question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings.

North State Tel. Co. v. Alaska Public Utilities Comm'n, 522 P.2d 711, 714 (Alaska 1974) (citing K. Davis, Administrative Law § 8.04 and § 8.05 and at 525 (1958)). In Oregon,

> The doctrine of substantial compliance is used . . . 'to avoid the harsh results of insisting on literal compliance with statutory notice provisions where the purpose of these requirements has been met.' It requires the court to determine the sufficiency of the notice given in light of the statute's objectives and to ignore claims of technical deficiency when the purpose of the statute is served.

State v. Vandepoll, 846 P.2d 1174, 1176 (Or. App. 1993) (citations omitted). In Colorado:

> The [notice] must put interested parties 'to the extent reasonably possible on inquiry notice of the nature, scope, and impact of the proposed diversion.' Thus, compliance with the statutory notice provisions is evaluated on an inquiry notice standard. . . . [A]lleged deficiencies invalidate the [notice] only if the [notice] taken as a whole is insufficient to inform or put the reader on inquiry of the nature, scope and impact of the proposed diversion.

Monaghan Farms v. City & County of Denver, 807 P.2d 9, 15 (Colo. 1991). And in Arizona:

> The question whether actual notice is sufficient arises in situations where the person to be notified received such notice but in a form or by a procedure that did not comply with the governing statute. The general rule is that one having actual notice is not prejudiced and cannot complain of the failure to receive actual notice.

In re Estate of Ivester, 812 P.2d 1411 (Ariz. App. 1991) (citations omitted). In the Ivester case, one party "was not notified as required" by statute, but had actual notice because he read his brother's mail. The court ruled that such notice was adequate and lawful, despite its failure to comply strictly with the statute.

As discussed above, the Pfeils must assert a very strained reading of the regulations to show a problem with the notices. But even if they could convince the Council to adopt their reading of the regulations, all they have proven is a harmless technical defect. The notice did not have to contain the entire text of the revision application to apprise the Pfeils of the proceeding.[1] In

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[1] In the case of Monaghan Farms v. City and County of Denver, 807 P.2d 9, 16-17 n.8, the lower court had observed: "my opinion is that if this notice isn't good enough, I don't know what in the world notice would be, because it seems to me the notice in this case has just been pretty much excruciating, unless . . . you are required to divine what the ultimate decision of this Court will be and publish that . . . before the case begins."

reality, the notices did alert the Pfeils to the proceeding, as proven by the fact that Mr. Pfeil went out and read the application after receiving the notice. The notices did inform them of the procedures for participation, as proven by the fact that the Pfeils filed their protest properly and on time in accordance with the notices. The Pfeils' argument cannot alter the fact that the notices did what they were supposed to do, and are therefore adequate under the law.

IV. EVEN IF THERE WERE TECHNICAL DEFECTS IN THE NOTICES, THE PFEILS SUFFERED NO PREJUDICE AND THE DEFECTS WERE CURED

When the Wyoming Supreme Court considered the issue of notice under these same Land Quality statutes and regulations, it:

> stated that the main consideration is the gravity of the error, not its mere occurrence, and that the onus is placed upon the appellant to show how the error was prejudicial. Furthermore, we have recognized that an error must be prejudicial and affect the substantial rights of the appellant to warrant reversal.

Grams v. Environmental Quality Council, 730 P.2d 784, 786 (Wyo. 1986) (citations omitted). Thus, even if the Pfeils could show an error in the notice, they are entitled to relief only if they show "how any such error substantially prejudiced them." Id. at 788.

To understand why the Pfeils were not prejudiced by the notices, it is important for the Council to consider what Amax's application for revision really is. It is not the thick, complex, multi-volume mine permit application with which this Council is familiar. The application for revision is a single volume about an inch thick, and most of that a half-dozen maps setting out the proposed change in mining direction and sequence. The revision

application is too big to publish in a newspaper, but it can be read fairly quickly and is relatively easy to understand. Against this background, it is easier to realize that the Pfeils did not suffer any prejudice due to notice.

The Pfeils complain of problems with the notices, but they presented no evidence of any prejudice caused by the alleged problems. The Pfeils' main complaint is not that notice was defective, but that the hearing was held too soon. The timing of the hearing is set by statute, and is unconnected to the adequacy of their notice. The Pfeils did not testify that they delayed their preparation because the notice did not contain the entire revision application. They did not testify that the notices caused them to put off hiring an attorney, or misled them into delaying their discovery requests until three days before the hearing, or caused them any delay or confusion whatsoever. Absent a showing of prejudice, the notices were legally adequate. Grams, supra; Palmer v. Crook County School Dist. 1, 785 P.2d 1160, 1163 (Wyo. 1990).

Moreover, any technical deficiencies they might cite were fully cured when, after receiving the notice, Mr. Pfeil went and read the application:

Q: [by Ms. Kite] How did you become aware of this permit revision?
A: [by Mr. Pfeil] We received a letter from AMAX stating that they were wanted to go through the revision of the mining permit.

* * *

Q: Have you ever gone to review the mine permit applications either in 1985 or 1990 or 1994?
A: Only time I did was in '94 when we received the most recent revision.

Transcript at 317, 321. Even if the notice did not contain an index or the contents of the revision application, this defect has no significance when Mr. Pfeil actually reviewed the index and the application itself. The notices plainly told Mr. Pfeil where to find and read the application. Mr. Pfeil took advantage of the notices, and did go find and read the application. Where "the complaining litigant had knowledge of the facts, 'the requirement of notification purposed to inform may be satisfied by actual knowledge, especially when it is acted upon.'" Landover Brooks, Inc. v. Prince George's County, 566 A.2d 792 (Md. App. 1989) (citations omitted); First National Bank v. Oklahoma Sav. & Loan Bd., 569 P.2d 993 (Okla. 1977). After Mr. Pfeil acted on the notices and read the application, it would not have mattered if the notice contained minor errors.

The Pfeils did receive notice, and that notice alerted them to the proceeding. Because of that notice, Mr. Pfeil went to the office where the application was available and read it. After reading the application, they decided to, and did, file a protest. These undisputed facts clearly demonstrate that the notices did what notice is supposed to do.

V. CONCLUSION.

The purpose of notice is to alert the parties to a proceeding in which they have an interest. The notices in this case fulfilled that purpose. The defects asserted by the Pfeils' counsel depend on a strained reading of the regulations which leads to an absurd result. When the law is read reasonably, as it must be, the

notices plainly complied. Even if there had been a defect, there is no evidence that it caused any prejudice, and it was fully cured when Mr. Pfeil read the actual revision application. The notices adequately alerted the Pfeils to the proceeding, and their complaints should not be allowed to delay this permit revision any further.

Dated this 2nd day of September, 1994.

Marilyn S. Kite, P.C.
Holland & Hart
P.O. Box 68
Jackson, WY 83001

-and-

Steven R. Youngbauer
Amax Coal West, Inc.
P.O. Box 3005
Gillette, WY 82717

ATTORNEYS FOR PERMIT APPLICANT
AMAX COAL WEST, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 1994, I served a copy of the foregoing POST-HEARING REPLY MEMORANDUM by placing it in the United States mail, postage prepaid and addressed to the following:

Joe Gilsdorf
Carla Okasanen
205 Battle Cry Lane
Gillette, WY 82716

Anthony T. Wendtland
P.O. Box 728
Sheridan, WY 82801
(307) 672-8955

Thomas A. Roan
Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002

and by hand delivering it to the following:

Terri A. Lorenzon
Environmental Quality Council
2301 Central Avenue, Room 407
Cheyenne, WY 82002

MSK:ewh:52199.02(CHY)