

IN THE DISTRICT COURT IN AND FOR CAMPBELL COUNTY, WYOMING

ROGER D. PFEIL and LINDA JO PFEIL, husband and wife, for themselves and for their minor children, and JOSEPH M. GILSDORF and KARLA J. OKSANEN,

Petitioners,

vs.

AMAX COAL WEST, INC., a subsidiary of Cyprus AMAX Coal Company, and ENVIRONMENTAL QUALITY COUNCIL of the STATE OF WYOMING,

Respondents.

FILED

NOV 17 1994

Terri A. Lorenzon, Attorney
Environmental Quality Council

Civil Action No. _____

MOTION TO SUPPLEMENT THE RECORD
PURSUANT TO W.R.A.P. 12.08 AND ALTERNATIVE MOTION
FOR THE COURT TO TAKE JUDICIAL NOTICE OF OFFICIAL RECORDS
FROM THE CAMPBELL COUNTY, WYOMING ASSESSOR'S OFFICE

Petitioners, Joseph M. Gilsdorf ("Gilsdorf") and Karla J. Oksanen ("Oksanen"), by and through their undersigned attorneys, respectfully petition the Court to enter its Order remanding the above captioned matter to the Respondent, Environmental Quality Council ("EQC" or "Council"), so that the Council can supplement the record with additional material evidence showing that notice was not properly provided in a timely way to Gilsdorf and Oksanen.

A. Introduction and Facts.

The facts concerning this case are fully described in the Petition For Review filed by Petitioners, Roger D. Pfeil and Linda Jo Pfeil, Gilsdorf and Oksanen in this case. The facts and statements contained in that petition concerning the law are incorporated herein by reference.

The EQC entered an Order on November 7, 1994 allowing Amax Coal West, Inc. ("Amax") to revise its 428-T2 mining permit to radically alter the order and sequence of mining in the Eagle Butte Coal mine. Amax's revision was processed by the Wyoming Department of Environmental Quality ("DEQ") under the mandatory notice requirements of W.S. 35-11-406(j).

Gilsdorf and Oksanen live within one-half mile of the mine and were therefore entitled by statute and due process to receive properly mailed due process notice of Amax's proposed Form 11 revision. W.S. 35-11-406(j). This statute required notice to be mailed to Gilsdorf and Oksanen at the address shown for them in the Campbell County records within five days after the first publication of the notice in the local newspaper (in this case about May 23, 1994). *Id.* This did not happen. Finding ¶27 of the Council's order states:

The protestants own property in Rawhide Subdivision, within one half mile of Amax's Eagle Butte Mine. All the protestants received notice mailed by Amax. Evidence at the hearing indicated that the notice originally mailed to Gilsdorf and Oksanen was returned to Amax. This notice was sent as certified mail on May 23, 1994.¹ The testimony reflected that Amax had obtained the addresses for the protestants from the Campbell County property records in 1993. Although Gilsdorf and Oksanen testified that the address used by Amax on May 23rd was outdated and they could not understand how the wrong address could have been given to Amax, the testimony of the Amax witnesses was not refuted.

(Emphasis added).

This finding confirms that Gilsdorf and Oksanen were denied proper mailed notice. The finding is also inherently arbitrary

¹ This notice was mailed to Gilsdorf and Oksanen at 300 Hillside Drive, Gillette, Wyoming.

since, on the one hand, it admits that evidence was presented by Gilsdorf and Oksanen that their address of record in the Campbell County, Wyoming property records at the time notice was supposed to be mailed to them was their present address of 205 Battle Cry Lane, but on the other hand states that no evidence was presented to support that conclusion.

B. Motion To Supplement Under W.R.A.P. 12.08.

As shown by the attached official certified records from the Campbell County Assessor's Office, the only address of record for Gilsdorf and Oksanen in May of 1994 was their address at 205 Battle Cry Lane in the Rawhide Subdivision. Certified records and supporting Affidavit from Campbell County Assessor Jerry Shatzer are attached hereto as Exhibit "A". The official County record also shows that Amax's assertion at trial that they mailed to Gilsdorf and Oksanen's address of record in May, 1993 is, at best, seriously mistaken. There is no conceivable way that Amax could have actually checked the Campbell County records for Gilsdorf and Oksanen's address in May 1994 and obtained any address other than 205 Battle Cry Lane for Gilsdorf and Oksanen.

Gilsdorf and Oksanen believe these judicially noticeable facts need to be added to this record to promote a fair result and to allow the Council to avoid rendering an inherently arbitrary and unfair order. The Wyoming Supreme Court has recently held that basic due process is inherent in all administrative proceedings. Amoco Production Co., et al., v. Wyoming State Board of Equalization, et al., Slip. Op. Case No. 93-104 at page 9 (Wyo.

October 6, 1994) and cases cited therein. Justice, fair play and judicial economy would best be served by a remand to the Environmental Quality Council requiring that the Affidavit and certified records of the Campbell County Assessor's Office be added to the record in this case, and that the Environmental Quality Council's decision be reconsidered on the basis of that undisputable evidence. A remand on this basis would further justice and due process in this matter. See Louisiana Land and Exploration Co. v. Wyo. Oil and Gas Conserv. Comm., 809 P.2d 775, 780-782, (Wyo. 1991).

Gilsdorf and Oksanen respectfully request that the Court remand the matter for the taking of additional evidence that the official and certified records of the Campbell County, Wyoming Assessor's Office show that for the years 1991 through the present, Petitioners, Joseph M. Gilsdorf and Karla J. Oksanen, are shown as having the address of "205 Battle Cry Lane" in the Rawhide Subdivision in Campbell County, Wyoming.

Good cause also exists under W.R.A.P. 12.08 in that Gilsdorf and Oksanen:

- 1) were not represented by counsel at the hearing; and
- 2) were denied a fair opportunity to prepare for the hearing due to the unreasonably short notice. There is no logical or reasonable argument what could be advanced to justify such an egregious denial of due process.

B. Judicial Notice.

Alternatively, this Court has the power to take judicial notice of the Campbell County Assessor's Office land records as described in the attached Exhibit "A" for purposes of this case. Washakie County School District No. One v. Herschler, 606 P.2d 310, 322-23 (Wyo. 1980) cert. den.; Hot Springs Co. School Dist. No. One v. Washakie Co. School Dist. No. One, 449 U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 28 (1980).


Gilsdorf and Oksanen contend that if judicial notice is taken of the undisputable facts set forth in the attached Exhibit "A", the findings of the Environment Quality Council at paragraph 27, page 5 of their November 7, 1994 Findings of Fact, Conclusions of Law and Order are arbitrary, capricious and unsupported by substantial evidence on their face. Because of this glaring lack of notice to Gilsdorf and Oksanen, and the due process violation it engenders, the Court has authority on that basis alone to remand this entire matter to the Environmental Quality Council for new notice to all parties pursuant to W.S. 37-11-406(j) and for a new hearing if protests are filed pursuant to that new and proper notice.

WHEREFORE, Petitioners, Joseph M. Gilsdorf and Karla J. Oksanen, respectfully request that the Court remand this matter to the Environmental Quality Council pursuant to W.R.A.P. 12.08 for the taking of additional evidence to supplement the record with the information contained in the attached Exhibit "A". Alternatively, Petitioners, Gilsdorf and Oksanen, respectfully request that the

Court take judicial notice of the undisputable facts set forth in the attached Exhibit "A" and remand this entire matter to the Environmental Quality Council with instructions to the Council to order the DEQ and Amax to issue new notice pursuant to all of the requirements of W.S. 35-11-406(j) and DEQ Rules and Regulations. Amax should be stayed from acting under the Order until this matter is settled.

RESPECTFULLY SUBMITTED this 15th day of November, 1994.

DAVIS and CANNON

By: 


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REQUEST FOR HEARING

Petitioners, by and through their undersigned attorneys, hereby request that the Court set an immediate hearing on the Motion of Petitioners, Joseph M. Gilsdorf and Karla J. Oksanen, for a remand to supplement the record pursuant to W.R.A.P. 12.08.

RESPECTFULLY SUBMITTED this 15th day of November, 1994.

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