

IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR CAMPBELL COUNTY, WYOMING

FILED

NOV 29 1994

Terri A. Lorenson, Attorney
Environmental Quality Council

ROGER D. PFEIL,)
LINDA JO PFEIL)
JOSEPH M. GILSDORF,)
and KARLA J. OKSANEN,)
)
Petitioners,)
)
v.)
)
AMAX COAL WEST, INC., and the)
ENVIRONMENTAL QUALITY COUNCIL,)
)
Respondents.)

Civil Action No. 19718

**RESPONDENT AMAX COAL WEST, INC.'S
OBJECTION TO PETITIONERS' MOTION TO SUPPLEMENT RECORD**

Petitioners Joseph M. Gilsdorf and Karla J. Oksanen have moved the court to remand this case to the Environmental Quality Council ("Council") to supplement the record. Amax Coal West, Inc. ("Amax"), by and through its attorneys Holland & Hart, objects to this motion for the following reasons.

A. Legal Basis for Supplementing Record.

Rule 12.08, W.R.A.P., provides that an agency may be ordered to take additional evidence if:

it is shown to the satisfaction of the court the additional evidence is material, and good cause for failure to present it in the proceeding before the agency existed.

For reasons discussed below, the "new" evidence Petitioners offer is not material, and they have barely suggested an explanation, much less good cause, for their failure to present such evidence to the Council at the hearing. Because they do not meet the legal requirements for supplementing the record under Rule 12.08, their

motion should be denied. See In re State Bank Charter Application of Security Bank, Buffalo, 606 P.2d 296 (Wyo. 1980).

B. THE "NEW" EVIDENCE OFFERED BY PETITIONERS IS NOT MATERIAL BECAUSE IT IS ALREADY IN THE RECORD

Petitioners' argument is that the notice required under Wyo. Stat. § 35-11-406(j) was mailed to the wrong address. At the hearing, Amax presented evidence that it mailed notice to Petitioners at 300 Hillside Drive in Gillette, the address found by Campbell County Abstract Company in a search of the county real estate records. Transcript at 89-91. Petitioners offered evidence that their address was 205 Battle Cry Lane in Gillette, and this was the address to which their county tax notices were sent. Transcript at 163, 235-36.¹ The Council considered the evidence, and found in favor of Amax. Order at ¶¶ 27 and 28.²

Petitioners now want to "supplement" the record with further evidence that the county assessor's office lists their address as 205 Battle Cry Lane in Gillette. Because this evidence is already in the record, it cannot be considered material. Petitioners may wish, in hind sight, that they had presented their evidence in a different format or more convincingly. That wish does not render

¹ The Transcript of the hearing in this matter, In re Amax Coal Co., Eagle Butte Mine, Docket No. 2573-94 (July 26, 1994), will be referred to in this memorandum as "Transcript."

² The Environmental Quality Council's Findings of Fact, Conclusions of Law, and Order in this matter, In re Amax Coal Co., Eagle Butte Mine, Docket No. 2573-94 (July 26, 1994), will be referred to in this memorandum as "Order."

the evidence material, or provide "good cause" for their failure to present the evidence at the hearing in the format they now prefer.

**C. THE "NEW" EVIDENCE IS NOT MATERIAL
BECAUSE IT HAS NO LEGAL CONSEQUENCE**

In Grams v. Environmental Quality Council, 730 P.2d 784 (Wyo. 1986), the Wyoming Supreme Court considered a similar situation in which the appellant claimed notice was not properly sent. The court indicated 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. . . . [A]n error must be prejudicial and affect the substantial rights of the appellant to warrant reversal." Id. at 787.

Even if this court ordered the Council to take the evidence offered by Petitioners, the evidence would have no legal impact. At the hearing, Petitioners presented evidence regarding the different address, but absolutely no evidence that the alleged defect prejudiced them or affected their substantial rights. The "new" information offered now provides no evidence of prejudice. In reality, Petitioners did receive notice, acted on that notice by filing a timely objection, and took advantage of the opportunity to present their case at hearing. At no time before or during the hearing did they suggest they needed additional time to prepare for the hearing or move for a continuance. Issues not raised before the agency cannot be heard on appeal. State Bank Charter Application, 606 P.2d at 299-300. The facts are that Petitioners

suffered no prejudice, and the "new" evidence does not change that. See Order, ¶¶ 29-36.

D. PETITIONERS HAVE NOT SHOWN GOOD CAUSE FOR FAILING TO PRESENT THIS EVIDENCE AT THE HEARING.

In their motion to supplement the record, Petitioners barely hint at any reasons for their failure to present the "new" evidence at the hearing. Their pro se appearance provides no excuse: "[O]ur firm rule . . . requires a pro se litigant to comply with the same procedural standards as those litigants represented by counsel." Gaub v. Simpson, 866 P.2d 765, 766 n.1 (Wyo. 1993), quoting Stone v. Stone, 842 P.2d 545, 547 (Wyo. 1992). See also, Armstrong v. Pickett, 865 P.2d 49, 50 (Wyo. 1993) ("Pro se litigants are subject to the same procedural rules and standards as are attorneys.") Their new complaint of inadequate time provides no excuse: they did not move to continue the hearing, or even hint to the Council that they needed more time to prepare. Having failed to raise the issue below, they cannot raise it now, State Bank Charter Application, 606 P.2d at 299-300, and cannot claim "good cause" for failure to present the evidence to the agency.

The hearing transcript reveals that the Council gave Petitioners every opportunity to say whatever they wanted, and present whatever evidence they liked. Petitioners have not suggested that this "new" evidence is newly discovered, indicated it was not available to them at the time of the hearing, or presented any other explanation which courts accept as "good

cause." Having failed to make the showing required by the rule, Petitioners are not entitled to have the case remanded to supplement the record.

**E. IF THE COURT WISHES TO CONSIDER THE EVIDENCE,
IT SHOULD BE ADDED TO THE RECORD UNDER RULE 12.07**

Even though the "new" evidence is not material because it is already in the record and has no legal significance, and even though Petitioners have not shown good cause for their failure to present the evidence at the hearing, the court may feel the "new" evidence clarifies the record. If so, the appropriate procedure is not to remand the case to the agency, but simply to add the information to the record.

As provided in Rule 12.07, "The reviewing court may require or permit subsequent additions or corrections to the record." The evidence is readily available to the court in the form of the affidavits and certified documents offered by Petitioners. It would be an unjustified waste of time, effort and expense for the court, the agency, and the parties -- not to mention contrary to Rule 12.08 -- to remand the case to the agency to supplement the record with this redundant and immaterial evidence.


While believing it is unnecessary, Amax actually has no strong objection to allowing the Petitioners to clarify the record under Rule 12.07, so long as Amax is provided the same opportunity. If Petitioners add an affidavit and documents to the record, then to complete the picture and provide the full explanation, Amax should

similarly be allowed to add an affidavit and documents to the record. The information Amax would propose to add is attached to this memorandum, and consists of the Affidavit of Vernon L. Brown and the attached certified deed.

F. CONCLUSION.

Petitioners' motion to remand this case to the agency for the taking of additional evidence should be denied because Petitioners have completely failed to meet the legal standards required for a remand. The "new" evidence is not material because it is already in the record and has no legal significance. There is no good cause for Petitioners' failure to present this evidence at the hearing. Even if the court believed the "new" evidence helps to clarify the record, then Petitioner and Amax should be given equal opportunity to add to the record under Rule 12.07, W.R.A.P.

Respectfully submitted this 29th day of November, 1994



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

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

ATTORNEYS FOR RESPONDENT
AMAX COAL WEST, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 1994, I caused a true and correct copy of the foregoing RESPONDENT AMAX COAL WEST, INC.'S OBJECTION TO PETITIONERS' MOTION TO SUPPLEMENT RECORD to be served on the following:

By Federal Express: Anthony T. Wendtland
 Davis and Cannon
 40 South Main Street
 Sheridan, WY 82801

By hand delivery: Terri A. Lorenzon, Attorney
 Environmental Quality Council
 2301 Central Avenue, Room 407
 Cheyenne, WY 82002

Dennis Hemmer, Director
Department of Environmental Quality
122 West 25th Street, Herschler Building
Cheyenne, WY 82002

Richard Chancellor, Acting Administrator
Land Quality Division
Department of Environmental Quality
122 West 25th Street, Herschler Building
Cheyenne, WY 82002

Thomas A. Roan
Michael Barrash
Mary B. Guthrie
Assistant Attorney General
Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002