

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

AUG 18 1993

Terri A. Lorenzon, Attorney
Environmental Quality Council

IN THE MATTER OF A MINING PERMIT)
APPLICATION OF RISSLER & MCMURRY) DOCKET NO. 2373-92
COMPANY, TFN 2 6/247)

ORDERS

29

This matter came before the Environmental Quality Council (the Council) for hearing on June 24, 1993 at the Oil & Gas Commission Building (Basko Building), 777 West 1st Street, Casper, Wyoming. Kim D. Cannon, a member of the Environmental Quality Council served as Hearing Examiner. Other members of the Council present were John C. Darrington, Fred H. Carr, and Vincent R. Lee. Also present was Carmen C. Curtis, Secretary for the Environmental Quality Council; Christopher H. Hawks and Gary L. Shockey of Lawyers and Advocates for Wyoming, appearing on behalf of the Friends of Bessemer Mountain; Tom Roan and Jane Caton, Assistant Attorneys General, appearing on behalf of the Department of Environmental Quality, Land Quality Division (DEQ); Richard Lincoln, appearing on his own behalf; and Donald J. Rissler and John R. Hursh of Central Wyoming Law Associates appearing on behalf of Rissler & McMurry Company (Applicant).

Motions were filed by the parties appearing before the Environmental Quality Council, and this Order will set forth the rulings on individual motions. Additional facts will be given as each Motion is discussed.

PARTIES TO THE CASE:

All persons who objected to the issuance of mine permit TFN 2 6/247 to Rissler & McMurry Company, the Protestants, were notified individually of the proceedings in this matter. A Notice of Hearing and Order was served on the parties beginning on May 20, 1993. In addition, notice was published in a newspaper of general circulation on June 2, 8, 15, and 20,

1993. All Protestants were notified that any party who did not file a prehearing memorandum by the close of business on June 18, 1993, or who did not appear at the hearing on June 24, 1993, and who had not been excused from the hearing by the Hearing Examiner, would be dismissed from the case.

The Council, received four (4) prehearing memorandums by June 18, 1993. Memorandums were submitted on behalf of Richard Lincoln, the Friends of Bessemer Mountain, Rissler & McMurry Company, and the Department of Environmental Quality, Land Quality Division. The Hearing Examiner, Kim Cannon, questioned the audience at the hearing as to whether there were any Protestants in the audience who failed to file a memorandum and who wished to continue as a party to this case. No response was received. The Council did not receive any requests to be excused from this hearing. The Hearing Examiner questioned the audience as to whether a Protestant had submitted a prehearing memorandum that for some reason had not been received by the Council. There was no response. No late memorandums were received.

Pursuant to the Order issued on May 20, 1993, the Council found that all Protestants who failed to appear and who did not file a prehearing memorandum should be dismissed from the case. The Friends of Bessemer Mountain submitted a membership list and will continue to be represented by Lawyers and Advocates for Wyoming. The parties stipulated that the membership of the Friends of Bessemer Mountain could change, and Mr. Shockey agreed to keep all parties apprised of such changes.

The Council was informed that Jeffrey Gosman who had previously entered an appearance on behalf of George William Snodgrass, Phyllis J. Snodgrass, Rodney L. Stalkup and Laura Stalkup, would no longer be representing them in this matter.

ORDER OF PROCEEDING:

With the agreement of the parties, the Hearing Examiner set the following order of proceeding for the evidentiary portion of the hearing. The

Applicant will proceed first. The Applicant will be followed by the DEQ, which will be followed by the Friends of Bessemer Mountain. Richard Lincoln will then present his case. At that point in time, the Applicant will have an opportunity to make an additional presentation regarding the specifics of the objections raised by the Friends of Bessemer Mountain and Richard Lincoln.

OPENING STATEMENTS:

The Applicant filed a Motion to Postpone Opening Statements until the evidentiary portion of the hearing. In addition, the Applicant moved that opening statements be limited to thirty minutes in length. Other parties to the proceeding had no objections to the Applicant's motion. The Hearing Examiner found that all parties to the case should have the opportunity to present opening statements prior to presentation of their evidence, and the opening statements should be limited to thirty minutes in length.

MOTIONS IN LIMINE:

The Applicant filed Motions in Limine to restrict the presentation of evidence which it considered to be irrelevant to the proceeding. The Hearing Examiner found that such motion should be raised at the time the evidence that is to be challenged is to be presented.

SCHEDULING ORDER:

The Applicant requested an order for the scheduling of discovery. The Parties agreed to designate individuals for depositions within ten (10) days of the close of the hearing.

Gary L. Shockey informed the Council that he intended to submit depositions by written question. He requested that the scheduling order provide that the answers to his depositions may be given under oath in the same manner as is provided for with interrogatories. The respondents to Mr. Shockey's depositions would not then need to appear before a court reporter to give answers to his questions.

The parties stipulated that depositions by written question may be

submitted under oath and court reporters are not necessary to certify answers to the depositions. The parties further agreed to allow depositions and other discovery through the end of business on August 12, 1993. All interrogatories and depositions by written question must be submitted by the close of business on July 12, 1993.

The Applicant requested that there be a limit set on the number of written interrogatories or written questions that could be submitted. The Hearing Examiner found that a limit was unnecessary as the parties may seek relief from burdensome discovery.

MOTION TO PRE-QUALIFY EXPERTS:

The Applicant moved to pre-qualify experts pursuant to the DEQ Rules of Practice and Procedure, Chapter II, Section 8. (b.). Mr. Rissler asked that the Council set aside time for the pre-qualification of all experts. Mr. Shockey argued that the procedure of having attorneys qualify expert witnesses at the time the witness begins to testify is the preferable procedure. The Hearing Examiner found that the DEQ Rules of Practice and Procedure, Chapter II, Section 8.(b.) did not speak to the issue of pre-qualifying experts, and agreed that the preferable procedure is to have all experts qualified at the time of their testimony .

MOTION TO VIEW SITE:

The Applicant moved that the Council view the mine site, and the Council members agreed to the request. The Hearing Examiner specified that only the Council members would participate in the viewing, unless the parties are notified otherwise.

MOTION TO VOIR DIRE:

The Applicant moved to voir dire the Council members. Mr. Rissler argued that Ririe v. the Board of Trustees of School District No. 1, 674 P.2d 214 (1983) allows the voir dire of administrative hearing boards. Mr. Rissler stated that because of the prior hearing held by the Council in the designation of Bessemer Mountain as rare and uncommon, he was concerned that there may be "preconceived prejudices or notions that

were formed as a result of that hearing” where there was no opportunity to cross-examine. In addition, Mr. Rissler stated that there had been numerous newspaper stories regarding this case and he was concerned that the newspaper advertisements contained erroneous information.

Mr. Shockey argued that he did not believe the voir dire of the Council was necessary or required. He did not know of any fact that would indicate that Council members were biased or prejudiced. He also argued that any Council member who feels he is biased or prejudiced could make an appropriate disclosure on the record.

Mr. Roan stated there was only speculation about potential prejudice, and he did not have any reason to believe that any Council member was prejudiced in the case. In addition, he noted that the rule of necessity may require that only the Council members are authorized to hold this hearing.

Mr. Lincoln stated he was comfortable with the actions of the Council and he had not witnessed prejudice on the part of any Council member.

The Hearing Examiner, Mr. Cannon, stated that his reading of Ririe v. Board of Trustees and Board of Trustees and Laramie County School District No. 1 v. Spiegel, 549 P.2d 1161 (1976), was that the law requires some showing of prejudice or bias beyond mere citation of the case law. Mr. Cannon questioned Mr. Rissler as to whether he had any affidavits or any other indications that a Council member was biased or prejudiced in the matter before the Council. Mr. Rissler responded that he was concerned that the Council members may have preconceived ideas about some of the features which the Council sought to protect with its order of designation for Bessemer Mountain. Mr. Rissler said he did not have any basis to suggest that a member of the Council had any personal or financial interest of the outcome of the proceeding.

The Council found, that the proceeding concerning the designation of Bessemer Mountain as rare and uncommon was a separate proceeding.

During that proceeding, the Council members stated that questions regarding the mine permit proposed by Rissler & McMurry Company were separate from the designation question. All Council members stated that they were able to judge the questions regarding the mine permit on the evidence presented before them. The distinction between the rulemaking hearing and a contested case hearing, and the issues involved in those hearings, were clear to the Council members. The Council members stated they have removed themselves from cases where there has been a conflict of interest in the past. In addition, the Council members stated that the designation of Bessemer Mountain as rare and uncommon does not automatically preclude mining.

The Hearing Examiner found that in both the Spiegel case and the Ririe case, administrative bodies are entitled to a presumption of honesty and integrity. There must be some indication that there may be bias or prejudice on the part of the Council members, and parties are not automatically entitled to voir dire the Council with administrative agencies. He noted that there had been no suggestion by affidavit, or otherwise, of bias or prejudice on the part of any Council member.

MOTION FOR A CONTINUANCE:

The Friends of Bessemer Mountain filed a Motion for a Continuance. Mr. Shockey and the other parties to the case presented argument on this issue. The Council found that to the extent that the paleontological study was found by the DEQ to be a necessary part of the application and needed to be included as part of that application, the application was not complete as of April 19, 1993 because that study had not been completed. The Applicant and the DEQ agreed to combine the paleontological study and the application as it appeared on April 19, 1993 and publish a new public notice. The Motion for a Continuance and the subsequent ruling of the Council on this motion are the subject of a separate order issued on July 9, 1993.

As a result of the agreement that the application is incomplete, the Council remanded the permit application to the DEQ. This order contains

additional rulings on the procedures in the case and the parties to the case which flow from the remand of the permit application to the DEQ.

ORDERS

IT IS HEREBY ORDERED THAT:

1. The Applicant's Motions in Limine will be argued at the time the evidence that is the subject of each Motion is presented;
2. The Applicant's Motion on Opening Statements, which will allow each party to make an opening statement at the beginning of the party's presentation of evidence and which will limit the opening statements to thirty minutes in length, is granted;
3. The Applicant's Motion for a Scheduling Order is granted. All parties shall designate within ten (10) days of the close of this hearing those individuals who will be deposed; all depositions by written question shall be submitted by the close of business on July 12, 1993; all interrogatories shall be submitted by the close of business on July 12, 1993, and all discovery shall be completed by the close of business day on August 12, 1993;
4. Pursuant to the stipulation of the parties, depositions by written question may be submitted under oath in the same manner as interrogatories. The parties responding to depositions by written questions shall not be required to present answers through a court reporter;
5. The Applicant's Motion to Pre-qualify Experts is denied;
6. The Applicant's Motion to View the mining operation is granted;
7. The Applicant's Motion to Voir Dire the Council members is denied;
8. Pursuant to the stipulation of the parties, all prehearing work

completed at this time shall be incorporated into the subsequent hearings that will be held in this matter. The written objections to the Applicant's mine permit No. TFN 2 6/247, previously filed by the Friends of Bessemer Mountain, and Richard Lincoln will be carried over into the next hearing. These two (2) parties do not have to file new objections;

9. All determinations concerning the parties to this proceeding, including the dismissal of parties will be carried over to the next proceeding. Protestants who file objections to the permit application during the new comment period will be added to the proceeding at the appropriate time.

10. The hearing dates scheduled for August 19 and 20, 1993 are vacated;

11. Upon review of the Class 3 Paleontological Survey, the parties will have an opportunity to raise objections and offer witnesses in regard to information provided in that report; and

13. The following individuals having failed to file a prehearing memorandum pursuant to the Order of the Council, and having failed to appear at this hearing either on their own behalf or through an attorney, or having withdrawn from the case, are hereby dismissed from the case.

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IT IS SO ORDERED this 17th day of August, 1993


KIM D. CANNON, Hearing Examiner

CERTIFICATE OF SERVICE

I, TERRI A. LORENZON, certify that at Cheyenne, Wyoming, on the 18th day of August, 1993, I served a copy of the foregoing ORDERS by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to:

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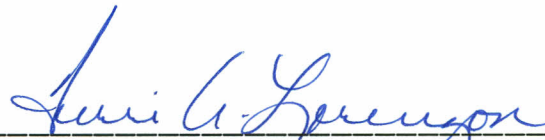
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