The State of Wyoming
First Judicial District

EDWARD L. GRANT
JUDGE

LARAMIE COUNTY COURTHOUSE
CHEYENNE, WYOMING
82001

April 14, 1995

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Re: *Rissler & McMurry v. State*
Docket 136-071

Dear Counsel:

The Court will grant defendant's 12(b)(6) motion for the reasons given here.

On July 2, 1989, Rissler & McMurry Company (hereafter "Rissler") entered into a ten-year "Limestone Mining Lease" with the State of Wyoming. The lease covered a section of state-owned land on Bessemer Mountain in Natrona County. Under the terms of the lease, Rissler agreed to comply with all state statutory requirements and valid regulations.

Rissler began mining operations on ten acres of the leased land as allowed under W.S. §35-11-401(e)(vi)(Supp. 1994) in late 1992. On December 17, 1991, Rissler submitted a small mine permit application with the Department of Environmental Quality (DEQ) pursuant to W.S. §35-11-405(a)(Supp. 1994). The DEQ certified the permit complete and suitable for publication on March 13, 1992. Rissler published notice of the pending permit application as required by statute. The DEQ received numerous written objections to the permit application during the thirty-two day comment period.

The written objections prompted the DEQ director to refer the permit application to the Environmental Quality Council (EQC) for a formal hearing. In a separate proceeding, the EQC designated Bessemer Mountain as "rare or uncommon" after a two-day hearing in April, 1992. The EQC remanded the permit application to the DEQ with directions to evaluate the permit application in light of the "rare or uncommon" designation. Rissler later stipulated (on June 24, 1993) that certain aspects of its permit application were not included in the application at the time of the EQC hearing.

On June 23, 1993, the DEQ certified the remanded permit application as complete and suitable for publication. The EQC subsequently dismissed the DEQ certification without prejudice. It again remanded the permit application with directions for the DEQ to review the findings of a Rissler-conducted survey on paleontology of the area before certifying the application as complete. The EQC also vacated a scheduled August 19-20, 1993, hearing on the matter in light of its remand order.

On July 10, 1993, the DEQ once again certified the permit application as complete and suitable for publication. The published notice elicited numerous objections to the permit application. The DEQ director again forwarded the application to the EQC for a formal hearing. The EQC determined it would treat the permit application hearing as a contested case pursuant to the Wyoming Administrative Procedure Act. It scheduled a hearing on the matter on August 25, 1993.

Contemporaneous with the July, 1993, DEQ and EQC actions on the permit application, the Wyoming Supreme Court reversed the EQC's designation of Bessemer Mountain as "rare of uncommon" on July 15, 1993. The Court found that the EQC failed to adopt standards for the "rare or uncommon" classification in accordance with the Wyoming Administrative Procedure Act rulemaking requirements. The EQC adopted properly promulgated rules for the "rare or uncommon" designation in December, 1993.

The EQC ruled on several motions at the August 25 hearing. It then set a contested case hearing on the permit application for February 22, 1994. The State Auditor formally denied the claims six days later. On February 23, 1994, the DEQ received a notice of immediate withdrawal of the small mine permit application. The next day, Rissler filed this lawsuit against the State of Wyoming in the First District Court.

The defendant claims that the complaint should be dismissed for the reason, among others, that plaintiff has failed to exhaust the administrative remedies available to it, having

withdrawn its small mine permit application after the second designation of the proposed site as rare and uncommon, pursuant to § 35-11-1001(b). Plaintiff asserts that further pursuit of the permit would be futile and that it did all that it can reasonably be expected to do. This may or may not be so.

But plaintiff acting as it did, faces a more fundamental problem. The complaint, in view of applicable law, establishes that no Fifth Amendment "taking" has occurred because the state statute provides a procedure for the determination of whether a permit denied on the basis of rare and uncommon designation constitutes a taking and provides a basis and procedure for just compensation. Wyoming Statute §35-11-101(b), Wyoming Eminent Domain Act, §1-26-501 *et seq.* and W.R.C.P. 71.1. Wyoming Statute §35-11-101(b)(1994) reads as follows:

> (b) Any person having a legal interest in the mineral rights or any person or corporation having a producing mine or having made substantial capital expenditures and commitments to mine mineral rights with respect to which the state has prohibited mining operations because the mining operations or proposed mining operations would irreparably harm, destroy or materially impair an area that has been designated to be of a unique and irreplaceable historical, archeological, scenic or natural value, may petition the district court for the district in which the mineral rights are located to determine whether the prohibition so restricts the use of the property as to constitute an unconstitutional taking without compensation. Upon a determination that a taking has occurred the value of the investment in the property or interests condemned shall be ascertained and damages shall be assessed as in other condemnation proceedings.

The United States Supreme Court has held that assuming that a regulatory restriction on the use of land was a taking as proscribed by the Fifth Amendment, the owner's claim was premature because he had not obtained a final administrative decision concerning the effect of the zoning regulation on the use of his property **or** utilized statutory provisions to obtain compensation. The prematurity was held to be dispositive of a due process denial claim as well as of the takings claim. The developer's claim was not "ripe". *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 187, 87 L. Ed. 2d 126, 105 S. Ct. 3108, (1985) *quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297, (1981).

The Court held that because the developer had not applied for variances from the disputed zoning regulation, there could be no determination of the extent of the economic impact of the regulation. Rissler responds to that proposition here by asserting the doctrine of futility. But the Court in *Hamilton* did not limit its holding to the requirement of exhaustion of administrative remedies. It said at page 143 of 87 L. Ed. 2d:

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 297, n 40, 69 L. Ed. 2d 1, 101 S. Ct. 2352. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation'" exist at the time of the taking. [Citations omitted.] If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. *Monsanto*, 467 U.S., at 1013, 1018, n 21, 81 L. Ed. 2d 815, 104 S. Ct. 2862.
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At p. 147:

> In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment.

In *Lucas v. So. Carolina Coastal Council*, 120 L. Ed 798 (1992), relied on here by both parties, the defendant Council argued this principal, seeking dismissal of Lucas's takings claim against it. The Court refused to apply the rule, but only because the South Carolina Supreme Court had rejected that disposition. Otherwise, this rule would have been applied.

> We think these considerations would preclude review had the South Carolina Supreme Court rested its judgment on ripeness grounds, as it was (essentially) invited to do by the Council, see Brief for Respondent 9, n 3. The South Carolina Supreme Court shrugged off the possibility of further administrative and trial proceedings, however, preferring to dispose of Lucas's takings claim on the merits.

Lucas v. So. Carolina Coastal Council, 120 L. Ed. 2d 798 (1992), at 810.

The state, by the statues and rules cited above has provided a "reasonable, certain and adequate provision for obtaining compensation," the presence of which makes this action premature and perhaps unnecessary by the standard applied in *Hamilton* and acknowledged to be appropriate in *Lucas*. Mr. Donovan will please submit a form of order. Thank you.

Very truly yours,

Edward L. Grant
District Judge

ELG/laa