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Ardelle M. Kissler, Clerk  
Environmental Quality Council

BEFORE THE  
ENVIRONMENTAL QUALITY COUNCIL

STATE OF WYOMING

DOCKET NO. 686-80

|                       |   |                                     |
|-----------------------|---|-------------------------------------|
| IN THE MATTER OF A    | ) |                                     |
| PERMIT APPLICATION    | ) | <u>FINDINGS OF FACT AND</u>         |
| FROM FORT UNION MINE, | ) | <u>CONCLUSIONS OF LAW AND ORDER</u> |
| A PARTNERSHIP         |   |                                     |

Having reviewed the record in this matter, including the Briefs filed by all parties, and having heard argument, the Environmental Quality Council finds and concludes as follows:

UNCONTESTED FACTS

1. The Fort Union Mine filed an application for an Air Quality permit to modify its existing coal mining operation in Campbell County, Wyoming. The application proposed the expansion of the Fort Union Coal Mine and included specific surface and mineral properties known as the Dry Fork property.

2. Within the thirty (30) day comment period pursuant to Section 21m, Air Quality Rules and Regulations, Peabody Coal Company and Cities Service Company, owners of the property included in the application, protested the issuance of the permit to Fort Union Mine.

3. On April 30, 1980, the air quality permit was issued to Fort Union Mine with a condition which provided as follows:

"Fort Union Mine, a partnership, shall within sixty (60) days, of the issuance of this decision, submit to the Division a sworn statement that the applicant has the right and power by legal estate owned or legal

interest held to conduct the mining operation in the manner and on all properties as proposed in the permit application. Failure to comply with this condition shall render this approval null and void."

4. Peabody Coal Company filed an application for an air quality permit to construct a surface coal mining operation on the Dry Fork properties including the same properties covered by the Fort Union permit application.

5. On June 20, 1980, Fort Union Mine appealed the inclusion of the special condition contained in its air quality permit.

6. On June 27, 1980, Peabody Coal Company and Cities Service Company protested the issuance of the air quality permit to Fort Union Mine.

7. The record discloses no sworn statement was filed by Fort Union in response to the condition set out in paragraph 3 above.

8. Fort Union Mine, Peabody Coal Company, and Cities Service Company stipulated to the ownership of the property, including all surface and mineral interests, within the area covered by the application for a permit to modify. Said stipulation, filed as part of the record and incorporated by reference herein, provides that while Fort Union Mine does own or control certain surface interests, it has no ownership interest in the coal estate underlying any of the property covered by the application for a permit to modify.

9. The stipulation further provides that Peabody Coal Company (Cities Service Company by agreement with Peabody Coal Company) does have the ownership, or control of, the coal estate underlying said property.

10. Petitioners, Cities Service Company and Peabody Coal Company, filed a Motion for Summary Judgment alleging



there were no material facts at issue and requesting judgment in their favor as a matter of law.

11. Pursuant to notice to all parties, the Environmental Quality Council heard argument on the Motion for Summary Judgment on October 6, 1980.

12. Fort Union has not asserted in its Application for Air Quality Permit, or in its Petition to Strike Special Condition (or the Amendment thereto), or in any sworn statement filed pursuant to the special condition that it was authorized to act for the owner of the subject mineral estate in applying for the air quality permit. Owner authorization was thus not clearly raised initially by Fort Union as a basis for granting the permit.

However, even if such an assertion had been initially made, the fact that the undisputed owner of the mineral estate has filed a formal protest and has actively opposed any issuance of the permit to Fort Union would seem to constitute an irrebuttable presumption that Fort Union lacked the necessary authorization to act for the owner and it is sufficient to convince this Council that no material issue of fact exists concerning the ownership of the subject mineral estate or whether Fort Union was authorized by the owner to act for the owner in obtaining the permit.

#### CONCLUSIONS OF LAW

1. The Environmental Quality Council has jurisdiction over this matter pursuant to W.S. 35-11-112 and the Rules of Practice and Procedure of the Department of Environmental Quality.

2. Rule 56 of the Wyoming Rules of Civil Procedure, as adopted by the Rules of Practice and Procedure, Chapter II, Rule 14, provides that Summary Judgment is appropriate

where there is no genuine issue as to any material fact and where the movant is entitled to judgment as a matter of law.

3. Due and proper notice as required by law was provided to all parties.

4. There is no genuine issue of material fact to be determined with respect to the Motion for Summary Judgment filed by Peabody Coal Company and Cities Service Company.

5. Existing law recognizes the rights of owners of property on which air pollution sources are to be located and requires that either the owner, or one authorized to act for the owner, be the applicant for an air quality permit to construct or modify.

6. Where the owner of the mining operation proposed to be permitted has filed a valid protest to the issuance of that air quality permit pursuant to the Air Quality Standards and Regulations, Section 21m, and has filed a conflicting permit application, the requirements of the law have not been met and the permit cannot be issued.

7. The filing of the protest to the issuance of the air quality permit to Fort Union Coal Mine by Peabody Coal Company and Cities Service Company was timely filed. Section 21m, Air Quality Standards and Regulations.

8. The Director of the Department of Environmental Quality has the authority to impose conditions on permits as long as such conditions are necessary to accomplish the purposes of the Environmental Quality Act and are not inconsistent with existing rules, regulations and standards.

9. The condition imposed on the Fort Union Mine permit which required a sworn statement of ownership within sixty (60) days of the issuance of the permit was not inconsistent with the existing rules, regulations and standards and was



necessary to the accomplishment of the purposes of the Environmental Quality Act.

10. Pursuant to existing law and the terms of the condition, and Fort Union having failed to file a sworn statement, the Fort Union Mine permit is null and void.

11. Issues concerning any alleged breach of an explicit or implicit agency or operational agreement between the parties, or any alleged withdrawal of owner authorization are matters over which this Council lacks the necessary jurisdiction to entertain or remedy, and are problems which, if they do exist, more properly lie within the jurisdiction of an appropriate court of law or equity.

NOW, THEREFORE, it is hereby Ordered that:

1. Peabody Coal Company's and Cities Service Company's Motion for Summary Judgment is hereby granted.

2. Fort Union Mine's Petition is hereby denied.

3. The condition imposed on the Fort Union Coal Mine permit requiring a sworn statement regarding ownership be filed within sixty (60) days was reasonable and authorized by statute, and is, hereby, approved.

4. Fort Union Mine's Motions to Dismiss Peabody Coal Company and Cities Service Company for lack of standing are denied.

So ORDERED this 10<sup>th</sup> day of November, 1980.

ENVIRONMENTAL QUALITY COUNCIL:

Maxine Patterson  
Maxine Patterson

Ronald C. Surdam  
Ronald C. Surdam

David B. Park  
David B. Park

Lee E. Keith  
Lee E. Keith

Glenn A. Goss  
Glenn A. Goss

CERTIFICATE OF SERVICE

I, Terri Lorenzon, do hereby certify that on this 19<sup>th</sup>  
day of November, 1980, I served the foregoing Findings of Fact  
and Conclusions of Law and Order by placing true and correct copies in  
the United States mail, postage prepaid, addressed to the following:

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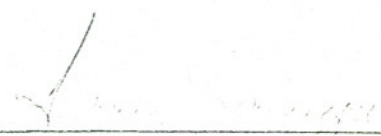
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cc: Frank O'Donnell  
(coal outlink)