IN THE SIXTH JUDICIAL 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,	)	
v.	)	Civil Action No. 19718
AMAX COAL WEST, INC., a subsidiary of Cyprus AMAX Coal Company, and ENVIRONMENTAL QUALITY COUNCIL of the STATE OF WYOMING,	)	
Respondents.	)	

RESPONDENT AMAX COAL WEST, INC.'S
OBJECTION TO PETITIONERS' MOTION FOR INTERIM STAY

Amax Coal West, Inc. ("Amax"), by and through its attorneys Holland & Hart, objects to "Petitioners' Motion For Interim Stay of November 7, 1994 Order of Environmental Quality Council Approving Form 11 Revision to 428-T2 Mine Permit" on the following grounds.

BACKGROUND

The Amax Eagle Butte Mine is currently operating in an area adjacent to the Rawhide Village Subdivision, as it has been legally permitted to do for nearly two decades. In 1976, the Land Quality Division ("LQD") of the Wyoming Department of Environmental Quality issued Permit No. 428 to Amax for the Eagle Butte Mine. Under this first permit, mining would occur next to Rawhide Village in 1983.

In 1985, the permit was revised under a new state regulatory program, and reissued as Permit No. 428-T1. Under the revised permit, mining would occur next to the subdivision in 1993. Then, in 1990, the permit was renewed and revised as Permit No. 428-T2. Under this permit, mining next to the subdivision would occur after the year 2000. See Transcript[1] at 48-56, and Exhibit A-14.

In December 1993, Amax applied to revise the permit to change the sequence and timing of Eagle Butte mining operations. This is the revision currently at issue. The revision does not expand the amount of land Amax can mine, move the operation any closer to the subdivision, or change the location of the lands which Amax has been authorized to mine for more than 18 years. The only change is a return to Amax's earlier schedule under which mining near the subdivision can begin again in 1994.

On May 13, 1994, LQD determined the application for revision was complete, and notified Amax to commence public notice pursuant to Wyo. Stat. § 35-11-406(j). Amax published in the Gillette News-Record the notice which had been drafted and approved by LQD. The

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[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."

content of the notice was consistent with that of other notices previously published for permit revisions. Order[2] at ¶ 25.

Concurrent with the newspaper publication, and pursuant to the same statute, Amax mailed copies of the notice to surface owners of record of all lands within the permit area, immediately adjacent to the permit area, and within one-half mile of the proposed mining site. To identify these landowners, Amax had hired Campbell County Abstract Company to search the Campbell County real estate records. Amax mailed notice all such owners. Transcript at 89-90.

Interested parties had until July 6, 1994, to file objections to the requested permit revision. Petitioners in this matter all filed objections before the deadline. Complying with the mandatory twenty day time limit of Wyo. Stat. § 35-11-406, the Environmental Quality Council ("Council") held an evidentiary hearing on the matter on July 26, 1994. The Pfeils appeared and were represented by counsel. Gilsdorf and Oksanen appeared pro se. The Pfeils moved to continue the hearing. Gilsdorf and Oksanen did not.

After the hearing, the Council considered the Petitioners' protests at public meetings held October 5 and 24, 1994. On November 7, 1994, the Council issued its Order granting Amax's

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[2] In re Amax Coal Co., Eagle Butte Mine, Docket No. 2573-94, Findings of Fact, Conclusions of Law, and Order (Nov. 7, 1994). This will be referred to in this memorandum as the "Order." A copy is attached as Exhibit A.

request to revise the permit. Now before the Court is Petitioners' appeal of the Council's Order pursuant to Wyo. Stat. § 35-11-1001(a). In addition, Petitioners have moved to stay the Order pursuant to Wyo. Stat. § 35-11-1001(c) and Rule 12.05, W.R.A.P.

ARGUMENT

A. A Stay May be Granted Only Under Certain Conditions.

Filing an appeal of an agency decision does not stay the agency decision. However, under Rule 12.05, W.R.A.P., and the Environmental Quality Act ("EQA"), Wyo. Stat. § 35-11-1001(c), decisions of the Council may be stayed under certain conditions. Rule 12.05 provides that, where a stay involves "preventing an agency or another party from committing or continuing an act or course of action, the provisions of Rule 65, W.R.C.P., relating to injunctions shall apply." Rule 65, in turn, requires the applicant for a temporary injunction to notify the adverse parties and file a bond for the costs and damages that may be incurred by a party wrongfully enjoined.

Courts, in applying these rules and statutes, weigh several factors in determining whether to grant temporary relief. These factors include whether the movant is likely to prevail on the merits; whether or not the movant will suffer irreparable harm if the relief is not granted; whether, and to what extent, the opposing party will suffer injury if relief is granted; and whether

and how the public interest will be affected. Esquibel v. Torvick, 571 F. Supp. 732 (D. Wyo. 1983). The granting of a preliminary injunction or similar relief is an extraordinary exercise of the court's equitable powers, and is appropriate only if there is no adequate remedy at law. Rialto Theater, Inc. v. Commonwealth Theaters, Inc., 714 P.2d 328, 332 (Wyo. 1986).

The EQA states these requirements in different language. More specifically, for a stay of Council decisions, the EQA provides:

> In a proceeding to review any order or decision of the department providing for regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87, the court may under conditions it prescribes grant temporary relief pending final determination of the review of the proceedings if: (i) all parties to the proceedings were notified and given opportunity for hearing on the request for temporary relief; (ii) the party requesting relief shows there is a substantial likelihood he will prevail on the final determination of the proceeding; and (iii) the relief will not adversely affect public health and safety or cause significant environmental harm to land, air or water resources.

Wyo. Stat. § 35-11-1001(c).

In sum, under the applicable rules, statutes, and case law, the court may grant Petitioners' motion to stay only if they meet their burden of establishing that: (a) all parties have been notified and given an opportunity for hearing; (b) Petitioners have substantial likelihood of success on the merits; (c) the relief will not adversely affect the public health and safety or cause

significant environmental harm; (d) irreparable harm will occur without the stay; and (e) an appropriate bond is filed.

B. Petitioners Have Not Met the Requirements for a Stay

None of the Petitioners can demonstrate a likelihood of success on the merits of their appeal. Petitioners Gilsdorf and Oksanen complain about notice, and the Pfeils make bald assertions that the Order was arbitrary and capricious and not supported by substantial evidence. These same complaints were already considered and rejected by the Council. Moreover, they are almost precisely the same arguments rejected by the Wyoming Supreme Court in Grams v. Environmental Quality Council, 730 P.2d 784 (Wyo. 1984).

On the most basic level, none of the complaints about the evidentiary record or the factual findings supporting the Council's decision can overcome the basic legal tenet that courts defer to agency decisions. It is firmly established precedent that a reviewing court will not disturb factual findings of an administrative agency absent a particularly strong showing by the appellant. See, e.g., Wyoming Dept. of Employment v. Wyoming Restaurant Assoc., 859 P.2d 1281, 1285-86 (Wyo. 1993). Judged by this legal standard, Petitioners' motion for stay utterly fails to show a likelihood of overturning the Council's decision.

1. **The Record Supports the Council's Findings and Conclusions That All Notice Requirements Were Met.**

The statutory section regarding notification of interested parties in such situations provides:

> The applicant shall cause notice of the application to be published in a newspaper of general circulation in the locality of the proposed mining site once a week for four consecutive weeks commencing within fifteen (15) days after being notified by the administrator. The notice shall contain information regarding the identity of the applicant, the location of the proposed operation, the proposed dates of the commencement and completion of the operation, the proposed future use of the affected land, the location at which the information about the application may be obtained, and the location and final date for filing objections to the application. The applicant shall mail a copy of the notice within five (5) days after first publication to all surface owners of record of the land within the permit area, to surface owners of record of immediately adjacent lands, to any surface owners within one-half (1/2) mile of the proposed mining site, and to the operator of any oil and gas well within the permit area or, if there is no oil and gas well, to the lessee of record of any oil and gas lease within the permit area. Proof of notice and mailing shall be attached to and become part of the application.

Wyo. Stat. § 35-11-406(j).

In this action, Amax was notified by LQD that it was required to perform public notice on May 13, 1994. Amax published notice in the Gillette New-Record on May 20, May 26, June 1, and June 6, 1994. Additionally, on May 20, 1994, Amax mailed copies of the notice to the Pfeils, and to Gilsdorf and Oksanen.

The statute expressly requires notice to "owners of record" of lands in, adjacent to, or within one-half mile of the permit area.

Wyo. Stat. § 35-11-406(j). Because the statute refers to "owners of record," the official real estate records of the county must be relied on to determine the identities and addresses of such people. It is established practice for Amax and other mine operators to rely on the county real estate records. Affidavit of Vernon L. Brown, ¶ 3. It is a practice approved by the Wyoming Supreme Court in Grams, 730 P.2d at 788.

Amax hired Campbell County Abstract to search the county real estate records to determine the identities and addresses of those entitled to notice under Wyo. Stat. § 35-11-406(j). The search showed Petitioners Gilsdorf and Oksanen owned property within one-half mile of the permit area, and indicated their address was 300 Hillside Drive in Gillette. Amax sent notice to that address. Transcript at 89-91; Affidavit of Vernon L. Brown at ¶¶ 2-4.

At the hearing, Petitioner Oksanen indicated that notice had been sent to the wrong address. Transcript at 163, 235-36. Amax presented evidence that it had sent notice to the address of record provided by Campbell County Abstract. Transcript at 89-90. The Council considered this evidence, and found Amax had mailed a timely notice to the required address. There is substantial evidence in the record to support this finding. Order at ¶¶ 27 and 28. Similarly, in Grams, Amax had sent notice to the appellant, but she claimed she did not receive it because she lived at a

different address. When Amax obtained the new address, it immediately sent her a second notice. Grams, 730 P.2d at 788. The court held Amax had acted properly in mailing notice to the address of record, found that the notice had arrived in time for Grams to file her protest, and noted that she did in fact file the protest. Id. In Grams, as in this case, Amax fulfilled its responsibility by mailing notice to the address found in the county records, then went beyond its legal obligation by sending another notice.

Even if the notice had not been properly mailed, the mere occurrence of error is not enough to reverse an agency decision. Petitioners must show more than just error. The "error must be prejudicial and affect the substantial rights of the appellant to warrant reversal." Grams, 730 P.2d at 787.

In their motion for stay, Petitioners did not even plead, much less demonstrate, that the alleged error was prejudicial or affected any substantial right. There is no evidence on record to support such a claim. The Council specifically found there was no prejudice arising from the notice given. Order at ¶ 33. Indeed, Petitioners' assertion that they did not have adequate notice seems disingenuous in light of their behavior. Petitioner Oksanen called Amax to ask about the notice. She obviously had actual knowledge of the situation, or she would not have made the inquiry. Amax sent another notice, which Petitioners received in time to file

objections. They did file timely objections. They participated fully in the public hearing, and had every opportunity to make any statements or present any evidence they liked. At no time before or during the hearing did they request a continuance or suggest in any way that they needed more time to prepare. Petitioners Gilsdorf and Oksanen have not shown, and cannot show, the prejudice which the courts require to reverse the agency decision on notice. Petitioners Gilsdorf and Oksanen have not demonstrated, and cannot demonstrate, a substantial likelihood of success on the merits.

The Pfeils have no complaints about the timeliness of their notice, which they received more than two months prior to the hearing. Instead, their complaint is that the notice which stated that the proposed revision would alter "the direction and sequence of the Mine Plan progression through the end of 1995" was inadequate under the regulations. On this issue, the Council expressly found that the notice contained all the information required by statute; that it provided actual and adequate notice to the Pfeils; that the Pfeils acted on that knowledge by filing a timely objection and participating in the hearing; that any alleged defect in notice was harmless; and that the Pfeils completely failed to show they had been prejudiced by any alleged defect in their notification. Order at ¶¶ 29-39. There is substantial evidence in the record to support every one of these findings.

With the deference appropriately given to an agency's findings, the Pfeils, like Gilsdorf and Oksanen, cannot demonstrate a likelihood of success on the merits.

2. Balancing the Equities Favors Denial of the Stay.

The power to grant a stay in this case is an exercise of the court's equitable discretion. The United States Supreme Court has held that, absent express statutory mandate to the contrary, courts retain their "traditional equitable discretion." Weinberger v. Romero-Barcelo, 456 U.S. 305, 319 (1982). As one court stated, "a clear and valid legislative command must be identified to restrict this inherent equitable power, either in the plain language of the statute or in authoritative legislative history." United States v. Hardage, 663 F.Supp. 1280, 1285 (W.D. Okla. 1987). The Hardage Court determined that, even in the area of environmental law and under the extensive statutory provisions of the Superfund Amendments and Reauthorization Act of 1986, courts retain their traditional inherent equitable powers. Id. at 1285.

Exercising its equitable power in this case, the court must weigh the equities to determine whether temporary relief should be granted. The balance of equities in this case tips toward Amax, and demonstrates why a stay should not be granted.

Petitioners have not shown they will suffer irreparable harm absent a stay. As noted before, Amax's right to mine this coal is

undisputed, pre-exists this permit revision, and was established long before Petitioners purchased their property in Rawhide Village. Petitioners have never argued that Amax does not have the right to mine in this area, only that they wish Amax would do it later. But Petitioners have not identified any credible evidence to prove they or the environment will be harmed if the operation occurs now rather than later. To the contrary, Amax proved at the hearing, and the Council determined, that Amax's permit and revision satisfy the many statutory and regulatory requirements designed to prevent irreparable harm and protect Petitioners and the environment.

Amax will, however, suffer irreparable harm if its operations are stayed. A stay resulting in a six month delay would force Amax to incur over three million dollars in unnecessary expenses. A stay resulting in a year's delay would impose losses exceeding eight million dollars. See Affidavit of Randy Burggraff, attached as Exhibit B. There is no realistic possibility that Amax could recover damages of this magnitude from Petitioners, making the potential damage to Amax as irreparable as it is severe.

Petitioners, in contrast, remain fully protected whether or not the stay is granted. The permit and revision were found to meet all the statutory and regulatory requirements which protect Petitioners and the environment. Order at ¶¶ 13, 17, and 22.

Petitioners have clear rights under state law to recover for any loss or damage, see Order at ¶¶ 16 and 21, and cannot seriously contend that Amax would be unable to respond in damages in the unlikely event of loss or damage.

Rather than maintaining the status quo as Petitioners suggest, a stay would dramatically change the current operations at the Eagle Butte mine. Pursuant to authorization from the Council, received almost a year after the application was filed, Amax moved its equipment into the area and began mining. Halting these ongoing operations would not only alter the status quo, it would force Amax to incur unnecessary and unrecoverable expenses as noted above. Indeed, avoiding such costs was the main impetus for the permit revision. Thus, a stay would not maintain the status quo, but rather, by changing the status quo, inequitably delay Amax's operations and cause significant, irreparable harm to Amax.

Moreover, if the stay were granted, Petitioners would accomplish the delay which is their ultimate goal. Their basic assertion is that they do not want mining in the area to occur now, but at some later time. A stay would effectively grant this relief before the court can consider the matter fully, and without requiring Petitioners to meet their legal burden of proving the Council's decision was contrary to law. It is well established that a court should not order temporary equitable relief when the

effect is to provide the relief sought by a party without going through a trial on the merits. Simpson v. Petroleum, Inc., 548 P.2d 1, 3 (Wyo. 1976); Weiss v. State ex rel. Danigan, 434 P.2d 761, 763 (Wyo. 1967). Petitioners' objection to the timing of this mining operation does not rise to the level of irreparable harm, and does not justify this court invoking its equitable powers to effect a dramatic change of current operations at the mine.

Weighing these factors in the equitable balance -- the lack of irreparable harm shown by Petitioners if the stay is denied, the irreparable harm to Amax if the stay is granted, the continuing protections afforded Petitioners and the environment through the permit and state law, the alteration of the status quo, and the potential for granting Petitioners the relief they seek in the guise of a temporary stay -- weighs the balance in favor of denying the motion for stay.

3. This Petition is Facially Deficient.

Rule 12.06, W.R.A.P., states that a petition for review shall not exceed 5 pages. The petition now before the court is 25 pages.

Failure to comply with this rule is grounds "for such action as the appellate court may deem appropriate, including but not limited to: citation of counsel or party for contempt; refusal to consider offending party's contentions; assessment of costs; dismissal; or affirmance." Rule 1.02, W.R.A.P. The Wyoming

Supreme Court has found a proper sanction for overly-long pleadings was to disregard the excess pages. Matter of Adoption of G.S.D., 716 P.2d 984 (Wyo. 1986). There, appellant's brief was 7 pages over the 70 page limit of Rule 5.05, W.R.A.P. G.S.D., 716 P.2d at 986. The court refused to consider or address the issues discussed in pages beyond the 70-page limit.

The situation before this court is more egregious by far. G.S.D.'s brief was merely 10% longer than allowed by the rules. Petitioners' is 500% longer. If ever the sanction of dismissal specified in Rule 1.02 were justified, this blatant disregard of the rules is the case. Alternatively, as the Wyoming Supreme Court has done, this court could disregard all of the petition past the fifth page. At the very least, this court should strike the Petition for Review and require Petitioners to file a valid appeal. Whatever sanction is chosen, Petitioners cannot establish that they have a substantial likelihood of success on the basis of a facially invalid complaint.

4. No Stay Should Be Granted Without a Bond.

The purpose of requiring a bond is to protect the stayed party against damages which occur during the pendency of the appeal. See, e.g., V-1 Oil Co. v. People, 799 P.2d 1199, 1203 (Wyo. 1990); Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977). In the present case, Petitioners have made no effort to offer a bond

to protect Amax against the damages it would suffer if the stay were granted. This alone is an appropriate basis for denying the motion for interim stay. In the alternative, if the Court determines that a stay is warranted, it should require Petitioners to post a bond to protect against damages caused by the stay.

Amax does face serious and unrecoverable damage if a stay is granted. See Affidavit of Randy Burggraff, attached as Exhibit B. Unless a bond is posted, Amax has no realistic chance of recovering for this injury from Petitioners. If Petitioners want to impose these damages upon Amax on the chance they may win their lawsuit, then the rules, the statutes, and equity dictate that Petitioners back up that risk with the necessary bond.

CONCLUSION

Petitioners purchased their property after mining operations next to Rawhide Village were already approved. Petitioners knew mining would eventually occur in this area. What is ultimately at issue is Petitioner's simple preference that the mining not occur right now, but at some later date they would find more convenient. They should not be allowed to use the equitable powers of the court to accomplish that result in the guise of a temporary stay.

Petitioners have not made the showings required to obtain a stay. In particular, they have not shown a likelihood of success, they have not offered a bond, and their petition for review is

defective on its face. Whether or not the stay is granted, Petitioners will be fully protected against damage to their property while this appeal goes forward. Amax, in contrast, will be exposed to substantial and unrecoverable losses if the stay is granted. The equities weigh against granting a stay in this matter. For all of these reasons, Amax respectfully requests that this Court deny Petitioners' Motion for an Interim Stay.

Dated this 29th day of November, 1994.

for

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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 FOR AN INTERIM STAY to be served on the following:

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