

Donald J. Rissler
Central Wyoming Law Associates, P.C.
P.O. Box 1783
Riverton, WY 82501
(307) 856-4157

FILED
AUG 23 1993

Terri A. Lorenzon, Attorney
Environmental Quality Council

**BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

IN THE MATTER OF A MINING PERMIT)
APPLICATION OF RISSLER & MCMURRY, INC.) Docket No. 2373-92
TFN 2 6/247)

BRIEF ON BURDEN OF PROOF

Protestants allege that Applicant has the burden of proving the allegations set forth in its application for a mining permit. Protestants rely primarily upon three cases: Glenn v. Board of County Commissions, Sheridan County, 440 P.2d 1 (Wyo. 1968); Pam Am Petroleum Corp. v. Wyoming Oil & Gas Conservation Comm., 46 P.2d 550 (Wyo. 1968); Chicago Northwestern Railway Co. v. Public Service Commission of Wyo., 334 P.2d 519 (Wyo. 1959). Although Applicant agrees, that it has the burden of going forward with the evidence and presenting a prima facie case, Applicant does not have to prove a negative. This fits within the scheme of W.S. § 35-11-406 (1988). Pursuant to 35-11-406(m) the requested permit, "shall (emphasis added) be granted if the applicant demonstrates that the application complies with the requirements of this Act....The director shall not deny a permit, except for one or more of the following reasons":....The statute then goes on to set out what must be shown in order for the director to deny the permit. As set out in Pam Am Petroleum Corp., Id., the term burden of proof is "used in a dual sense and may mean the burden of establishing the case as a whole or the burden on a party to make out a prima facie case in his favor at a certain stage during the hearing."

In the present case, Applicant only needs to make out a prima facie case in its favor demonstrating that the permit complies with the statute and the D.E.Q. requirements. It is then up to the Protestants to show why the permit should not be granted. As presented in W.S. § 35-11-406, Protestants must show that "any part of proposed operation...is contrary to the law or policy of this

State...; the proposed use would irreparably harm, destroy, or materially impair any area that has been designated...rare and uncommon...; that the proposed operation "will cause pollution of any waterway; that the applicant has had other permits revoked; that the operation constitutes a public nuisance...; that the affected land lies within 300 feet of any existing occupied dwelling...; that the operator is unable to produce the bonds required....." (emphasis added). The entire statute is written in the affirmative. In Mil Truck Lines v. Public Service Commission, 702 P.2d 1373 (Utah 1986), it was held that "although an applicant generally has the burden of proof in a proceeding for new authority, a protestant who urges an adverse impact on it as a reason for denying the application, has the burden of proof on that point. That burden cannot be met simply by conclusory statements in oral testimony."

Usually in administrative proceedings, the burden of proof is upon the party asserting the affirmance of an issue. This is usually the claimant, but the party resisting a claim may have the burden of proving a bar to such claim for example, a statutory exception. 2 Am. Jur. 2nd Administrative Law, § 391 (1962).

Protestants rely upon application of Chicago Northwestern, supra, for their statement that the burden of proof is on the Applicant to prove the application is complete.

In Chicago Northwestern, supra, the Public Service Commission had a formal rule within the Commission that the complainant had the burden of establishing the facts upon which he based his complaint. There is no formal rule in this case.

In the present case, W.S. § 35-11-406, draws a distinction between coal mining permits and other mining permits. In regard to coal mining permits, the statute clearing says "the applicant for a surface coal mining permit has the burden of establishing that his application is in compliance with this Act and all applicable state laws." (Emphasis added). No surface coal mining permit shall be approved, unless the applicant affirmatively demonstrates that the administrator finds in writing:....(Emphasis added). In

the case of coal mining permits, the applicant clearly has the burden of proof on all issues. This is not the case in regular mining permits. If the State Legislature did not intend this, they would not have made the distinction.

In the present case, once petitioner goes forward with the evidence and demonstrates to the satisfaction of the Council that its application is complete, then the burden of proof is upon the protestants to demonstrate why the application should not issue. The presumption is in favor of the applicant not protestants as in coal permits. Once the administrator determines that the application is technically complete, applicant has made its prima facie case and it is up to protestants to disprove it.

DATED this 20 day of August, 1993.

FOR THE APPLICANT:

BY: Don Rissler
Donald J. Rissler
CENTRAL WYOMING LAW ASSOC., P.C.
P.O. Box 1783
Riverton, WY 82501
Telephone: (307) 856-4157

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of August, 1993, I served the foregoing Brief on Burden of Proof on the following by mailing a true and correct copy of same by United States mail, first class, postage prepaid and addressed as follows:

Christopher H. Hawks
Gary L. Shockey
Lawyers & Advocates for Wyoming
P.O. Box 548
Jackson, WY 83001

Richard Lincoln
Box 1662
Mills, WY 82644

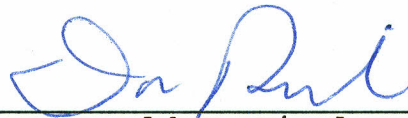
Dennis Hemmer, Director
Department of Environmental Quality
122 W. 25th Street, Herschler Building
Cheyenne, WY 82002

Roger Shaffer, Administrator
Department of Environmental Quality
Land Quality Division
122 W. 25th Street, Herschler Bldg.
Cheyenne, WY 82002

Thomas A. Roan & Jane Caton
Assistant Attorney Generals

Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002

Terri A. Lorenzon
Attorney
Environmental Quality Council
2301 Central Ave., Rm. 407
Cheyenne, WY 82002



Donald J. Rissler