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**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 IN REGARD TO PROTESTANTS' MOTION TO CONTINUE  
ON THE GROUNDS THAT APPLICANT DOES NOT HAVE  
PERMISSION TO MINE FROM LANDOWNER**

This brief is in response to Friends of Bessemer Mountain (FBM) letter of June 29, 1993 to the Land Quality Administrator, Roger Shaffer, wherein they allege that Rissler & McMurry's mining permit application is incomplete because they do not have permission of Mr. Stalkup to mine.

**Introduction - Facts**

Protestants are principally relying upon W.S. § 1-26-515 (June 1988), for their argument which states:

"Upon abandonment, nonuse for a period of ten (10) years, or transfer or attempted transfer to a use where the transferee could not have condemned for the new use, or where the new use is not identical to the original use and new damages to the landowner whose property was condemned for the original use will occur, any easement authorized under this act terminates."

Rissler & McMurry Company begin its condemnation of Defendant's George William Snodgrass, Phyllis J. Snodgrass, State of Wyoming Farm Loan Board, and Rodney L. Stalkup's land, with the filing of its complaint on September 12, 1990. Attached hereto as Exhibit "A" is a copy of that complaint. Plaintiff subsequently filed two amendments to the complaint. One on September 26, 1990 and one on October 23, 1990. These amendments are attached as Exhibit "B" and "C". Exhibit "C" was granted by the Court at the condemnation hearing on November 7, 1990. The complaint and condemnation was filed pursuant to W.S. § 1-26-504, Id., and Rule

71.1, W.R.C.P. Rule 71.1 W.R.C.P. (rev. 1977), requires that the complaint states the "authority for the taking, the use for which the property is to be taken, and the necessity for the taking..." In the original complaint, applicants alleged as their authority that they were the owners of a mineral lease from the D.E.Q., No. 767ET for the purpose of establishing a limestone quarry. (paragraph 5, original complaint in condemnation).

This was in error and applicant amended its complaint in condemnation on September 26, 1990 to include "all of Section, 16 T32 N R.81 West of the 6 p.m. located in Natrona County, Wyoming, 640 acres." This represents applicant's authority for its taking. The subsequent amended dealt with the size of the roadway and is not relevant to this brief. Therefore, petitioners are incorrect when they state that applicant only condemned the roadway for a 10 acre ET. As the September 26, 1990 Amendment demonstrates, applicant's condemned the right-of-way for the entire 640 acres. Furthermore, a copy of the Order and Judgment in Condemnation attached hereto as Exhibit "D" does not limit the scope of applicant's easement to the original 10 acre ET.

#### Law

As is well established under Wyoming law, permission of the landowner to mine, is not necessary once the mining company condemns or proceeds in condemnation. Wymo Fuels, Inc., 723 P.2d at 1231 (1986); Stalkup v. State Department of Environmental Quality, 838 P.2d 705 (Wyo. 1992) at 711-712.

Therefore, the only issue is, has Rissler & McMurry abandoned its easement by expanding its mine operation. First of all, this is not a question that the Environmental Quality Council can decide, since abandonment must be brought in the District Court for the State of Wyoming. Secondly, a plain reading of the statute tells us that abandonment can only occur for non-use for a period of 10 years, transfer or attempted transfer to a use where the transferee could not have condemned anyway, or where the new use is not identical to the original use and (emphasis added) new damages to the landowner whose property was condemned for the original use

will occur.... Rissler & McMurry Company used the road for its mine operation in October of 1990 and has used the road since in various ways in order to continue their mining operation. The proposed use is identical to the subsequent use, i.e., to haul limestone.

Secondly, even if the original condemnation herein is limited, applicant can re-condemn the same roadway.

Third, the applicable part of the statute includes the conjunctive "and new damages to the landowner will occur..." In the present case, landowners received damages in the amount of \$187,000.00, plus interest and costs. Although this judgment was subsequently reversed in the Wyoming Supreme Court, defendants received this judgment based upon their representations to the jury that Rissler & McMurry Company would continue to mine for 30 years and that applicant was expanding its mine operation. (See appraisal documents from Eugene Hoffman attached hereto as Exhibit "E").

Protestants allege that applicant stated to the District Court that its mine was limited to 10 acres. This is a mis-characterization. Pursuant to Rule 71.1, the condemnor must show necessity. The 10 acre ET provided the necessity as applicant did not have a mine permit.

Although it is true when a corporation is authorized to condemn land for a specific purpose, as for example, a railroad right-of-way, it may not divert the use to other purposes. It is well established that the condemnor can use the easement when the new use is of the same general character as the original use. 26 Am. Jur. 2d Eminent Domain, § 144 (1966). Nicholas on Eminent Domain, § 9.35. Therefore, it has been held that a city street has no greater burden than a country road, or an alley. A change from a street to a parkway, doesn't entitle the owner to additional compensation. It has also been held that a railroad is of no greater burden than a canal. Although the word "identical", has not been litigated in Wyoming, if the proposed mine site is determined to be a non-identical use, then the question becomes only whether the landowner is entitled to additional damages. Land

& Water Review, Vol. 18 (1983). Wyoming Statute § 1-26-815, still applies and allows applicant to condemn the necessary right-of-way. As held in Stalkup v. State Dept. of Envir. Quality, Id., the mere fact that applicant began its operation with a 10 acre ET, does not change the rule of Wymo Fuels, Inc., Id.

Therefore, consent of the landowner is not necessary in this case and this is not grounds for denial of applicant's permit.

DATED this 20 day of August, 1993.

FOR THE APPLICANT:

BY: 

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 20 day of August, 1993, I served the foregoing Brief in regard to Protestants' Motion to Continue on the Grounds that Applicant does not have Permission to Mine from Landowner on the following by mailing a true and correct copy of same by United States mail, first class, postage prepaid and addressed as follows:

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