

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF A MINING PERMIT)
APPLICATION OF RISSLER & McMURRY,)
INC., TFN 2 6/247)

DOCKET NO. 2373-92

O R D E R

On January 10, 1994, the Protestants in the above-entitled matter, the Friends of Bessemer Mountain, filed a Motion to Continue the contested case hearing scheduled to begin on February 22, 1994. Subsequently, the Protestants filed a Motion to Compel Discovery, Request for Costs and Certificate of Compliance, and a Motion to Add an Expert Witness. The parties were notified to submit their arguments on these Motions by January 21, 1994.

On January 31, 1994, the Hearing Examiner, Kim D. Cannon, held a conference call with Don Rissler, attorney for Rissler & McMurry, the Applicant, Terri A. Lorenzon, attorney for the Environmental Quality Council, Thomas A. Roan, attorney for the Department of Environmental Quality, Christopher H. Hawks, attorney for the Protestants, and Gary Shockey, attorney for the Protestants participating. All parties having been given an opportunity to be heard, and all parties' schedules having been considered, the Hearing Examiner finds as follows:

1. As the application of Rissler & McMurry for a mining permit in this matter was amended with the filing of additional material with the Land Quality Division of the Department of Environmental Quality on or before July 9, 1993, notice of the application for the mining permit was published in the Casper Star Tribune on July 10, 11, and 17, 1993.

2. On July 15, 1993, the Wyoming Supreme Court decided Matter of Bessemer Mt., 856 P.2d 450 (Wyo. 1993), which decision remanded consideration of the area in which the application for the mining permit was filed. The Court stated as follows:

We direct that the EQC adopt the factors and criteria which will serve as standards for the classification of lands as "very rare or uncommon." This direction is consistent with the cases set forth above as well as the statutory requirements. We reverse the decision of the EQC and remand this case for future determination to be made in the light of standards encompassing appropriate criteria and factors for the classification, adopted pursuant to a regular rulemaking proceeding in accordance with the Wyoming Administrative Procedure Act. 856 P.2d at 455.

3. The Wyoming Supreme Court having remanded the issues pertaining to designation to the Environmental Quality Council on the appeal of the Applicant Rissler & McMurry, the Environmental Quality Council determined at its next regularly scheduled meeting on September 16 and 17, 1993 to promulgate appropriate rules and regulations pursuant to the decision of the Wyoming Supreme Court and reconsider whether the area in which the mine permit application had been filed was subject to designation under Wyo. Stat. §35-11-112(v) before hearing the contested case proceeding involving the protest to the issuance of the mining permit.

4. To expedite (1) handling of the promulgation of rules and regulations pursuant to Wyo. Stat. §35-11-112(a)(v) under the terms of the remand from the Wyoming Supreme Court, (2) handling of the petition to designate areas pursuant to those rules and regulations, and (3) the disposition of the contested case proceedings, the Environmental Quality Council at the September 16-17, 1993 meeting established a schedule for hearings on the most expedited basis possible considering the notice requirements of the Wyoming Administrative Procedure Act for the publication of notice of intended action with respect to the adoption of regulations, the hearing on such proposed regulations, the adoption of regulations, the review and approval by the Governor of regulations and the filing of regulations with the Registrar of Rules. On September 17, 1993, it was determined by the Environmental Quality Council that the earliest a comprehensive draft of rules and regulations could be produced and notice given of the Environmental Quality Council's intended action to adopt those regulations was October 26, 1993. The 45 day notice of intended action under Wyo. Stat. §16-3-103(a)(i) could then be given permitting an Environmental Quality Council hearing on the adoption of rules and regulations on December 14, 1993. Assuming that, if such rules and regulations were properly adopted, that they may not be signed by the Governor and filed with the Registrar of Rules for 60 days under Wyo. Stat. §16-3-104(a), the hearing on the petition to designate areas in the vicinity of Bessemer Mountain was scheduled to commence in Casper, Wyoming on February 16-18, 1994.

5. With the provision that all discovery could proceed on schedule in the contested case proceeding concerning the issuance of the mine permit (EQC Docket No. 2373-92), the hearing on the mine permit application was scheduled to commence on Tuesday, February 22, 1994 in Casper, Wyoming.

6. On September 18, 1993, immediately following the scheduling of dates, the Protestants served Depositions on Written Questions to Roger Shaffer, Pat Bauman and Steve Ingle who were responsible for responding to the discovery on or before October 18, 1993. The individuals served with Depositions on Written Questions had previously been identified by the mine permit Applicant as witnesses who the Applicant would call. No response was made to the discovery on or before October 18, 1993. The

discovery had been forwarded by the Applicant to the Department of Environmental Quality for completion, and the Protestants granted a continuance on the request of Assistant Attorney General Thomas A. Roan until December 14, 1993. As of the hearing on these motions on January 31, 1994, no response of any kind to any of the questions propounded by the Protestants had been presented by the individual witnesses for the Applicant on whom the Depositions on Written Questions were served.

7. The Protestants take the position that it is necessary for them to have discovery completed in a timely manner before going forward with the scheduled hearing on February 22, 1994, that the Applicant has an obligation to assure the completion of appropriate discovery responses pertaining to its witnesses, that as of January 31, 1994 no responses of any kind to any of the questions have been forthcoming and it does not appear likely that they will be completed before the contested case proceeding is scheduled to commence on February 22, 1994. The Protestants further argue that there are no business days between February 18, 1994 when the designation hearing may be concluded and the commencement of the contested case proceeding on February 22, 1994 due to February 21, 1994 being Presidents' Day, a national holiday. All parties are entitled to have properly submitted discovery completed prior to the commencement of a contested case hearing. The Protestants are not responsible for any of the delay in the completion of the discovery pertaining to witnesses designated by the Applicant.

8. All parties are entitled to prepare for a contested case hearing. Where, as here, the Protestants have not been able to secure the completion of proper discovery in a timely manner and where the Protestants ask for time between the completion of the designation hearing and the contested case hearing to prepare for the contested case hearing to the extent that action may be taken by the Environmental Quality Council which may bear upon the issues in the contested case hearing, a continuance is appropriate. After the February 22-24, 1994 dates, which had previously been set aside for the contested case hearing, the next earlier dates at which all seven members of the Environmental Quality Council could convene for a hearing in Casper, Wyoming of at least a three day duration is April 25-27, 1994.

IT IS HEREBY ORDERED THAT:

1. The hearing in this matter, previously scheduled to begin on February 22, 1994 is continued until April 25, 1994, the next date on which all Council members are available. Three (3) days shall be set aside for the hearing with the conclusion of the hearing on April 27, 1994;

2. A prehearing conference will be held on April 11, 1994 at 2:00 p.m. at the DEQ District Office, Pronghorn Room, 3030 Energy Lane, Casper, Wyoming. All parties shall provide all information necessary to supplement and update previous Prehearing Memorandums, and this information shall be served on all opposing parties and the Council by the end of the business day on April 6, 1994;

3. All discovery shall be completed by the end of the business day on April 1, 1994;

4. All Motions in this case shall be filed with the EQC on or before the end of the business day on April 1, 1994;

5. All parties may designate additional witnesses on or before March 1, 1994, and twenty (20) days shall be allowed for responses to written discovery by the new witnesses;

6. All parties may add new issues to supplement their previous designation of issues by the end of the business day on March 1, 1994;

7. The Motion to Compel, is granted, and witnesses at the DEQ, that is, Roger Shaffer, Pat Bauman, and Steve Ingle, and any other witnesses who have not responded to discovery, shall respond by the end of the business day on February 28, 1994. The witnesses shall respond to all questions propounded in the Protestant's written discovery; and

8. All parties shall appear on April 11, 1994 for the prehearing conference, and on April 25, 1994 to present evidence, in this matter.

IT IS SO ORDERED this 23 day of February, 1994.



KIM D. CANNON, Hearing Examiner