THE STATE OF WYOMING

ENVIRONMENTAL QUALITY COUNCIL

July 18, 2007

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This document will be included with the case file. Waiver for this document does not extend to any other document. It is for the purpose of this case only.

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MEMO TO THE COUNCIL

FROM: Terri Lorenzon
EQC Director/Attorney

Bridget Hill
Asst. Attorney General

RE: Legal Issues in Teletractor Case, Docket No. 07-4801

DATE: June 20, 2007

Background

At the Teletractors contested case hearing in Pinedale, the Council asked for additional briefing on two issues: 1) whether the county was a party entitled to notice under WYO. STAT. § 35-11-406 due to its interest in the county road near the mine, and 2) whether under the facts of this case the proposed operation poses a "public nuisance or endangers the pubic health and safety" because it would increase the traffic on the county road.

NOTICE TO SURFACE OWNERS—Terri Lorenzon

EXECUTIVE SUMMARY

The Council has asked whether a county should receive notice of pending mine permits under the terms of the Environmental Quality Act (the Act) where a county road is used as a haul road. Specifically, §406(j) of Article 4, the Land Quality portion of the Act, with explanatory material in italics, provides:

> "For initial applications *(for mine permits)* or additions of new lands the applicant shall also *(a publication schedule precedes this sentence)* mail a copy of the notice within five (5) days after the publication to all surface owners of record of the land within the permit area, to surface owners of record of immediately adjacent lands, and to any surface owners within one-half (1/2) mile of the proposed mining site. The applicant shall mail a copy of the application mining plan map within five (5) days after first publication to the Wyoming oil and gas commission. Proof of notice and sworn statement of mailing shall be attached to and become part of the application."

A county would be entitled to notice of a pending mine permit if it has title to any lands that are part of the county road or the right-of way. I used several avenues of inquiry to explore whether a county could be a surface owner for purposes of the Act. I looked through case law and I read through statutes. I also talked with several people about how counties establish county roads and the legal documents that either establishes an easement or a right-of-way. I wanted to know what really happens.

In researching the law regarding public roads or highways, I found that counties have used various legal instruments to create public roads since Wyoming became a state. That is no surprise as to old roads, but the practice continues today to some extent. The case law refers to surface use agreements, leases, easements, and rights of way. Practice indicates that easements refer to the use of the surface with no transfer of title to the county. A right-of-way implies that the county has taken title of the land in the right-of-way. Counties have used eminent domain to condemn a right-of-way to build or expand a county road, and they can use adverse possession to obtain title or an easement. I expect that there are roads that are dedicated to the counties through several different legal instruments. For example, one landowner may have donated land for a public road and another landowner has his land condemned by the county for the same road. Also consider that roads have been modified, moved, expanded, and abandoned over time so the surface ownership or title may have changed .

County roads may involve a transfer of title to the county, and if a mine permit includes use of such a road, the county is entitled to notice. The prolific use of the terms easement and right-of-way has blurred the legal distinctions. To know whether a particular county road involves a transfer of title, a person would need to research the road in the county commissioner records and the county clerk's office. I asked a person who works establishing rights of way for pipelines and roads whether such research is difficult and he said yes. He said the records are old and the road may have been modified several times. Tracking down who has title to lands used in the road and right-of way is not for sissies.

If an applicant for a mine permit is going to use a county road, the title research should be done by the applicant. The information on title of the land used for the road and right-of-way would be included in the application. This is already done for other surface owners, but perhaps a different solution would be more efficient. DEQ could set a policy, or ask for a regulation, that requires notice of all mine permits in a county to the county. Even if a road is established by easement, as stated in the county letter in the Teletractor case, notice to the appropriate person, could serve to bring the county into the discussion of the impacts of additional truck traffic on the county road. The county is responsible for safety and maintenance and the additional industrial traffic will impact the county obligations for the road. With only 23 counties in Wyoming and the potential benefits of bringing the counties into the mine permit discussion, the burden to notify that is on the applicant is small. If not, DEQ can require permit applicants to provide a detailed analysis of the title to lands used for roads and rights of way, and only the surface owners of record would be notified pursuant to the statute.

As for Teletractors, the County Clerk stated that there is an easement for the county road in this case. You can rely on the Clerk and conclude that the County has a right of surface use only. They would not be entitled to notice. If you want to make certain of the status, then either the mine, Land Quality, or an assistant AG assigned to land quality could research the road and document whether the County has title to any portion of the road. Then they would receive notice—which means the mine permit would be delayed as the notice is issued and a comment period runs. If all this happens and you do not want to delay the permit, Teletractors could get a waiver from the County stating that they will not be objecting to the mine.

DEFINITIONS: In addition to the definitions in the DEQ brief here are a couple of general definitions of easement and right-of-way.

Easement: An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road). The land benefiting from an easement is called the *dominant estate;* the land burdened by the easement is called the *servient estate.* Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land. The primary recognized easements are (1) a right-of-way, (2) a right of entry for any purpose relating to the dominant estate, (3) a right to the support of land and buildings, (4) a right of light and air, (5) a right to water, (6) a right to do some act that would otherwise amount to a nuisance, and (7) a right to place or keep something on the servient estate.

Right-of-way: The right to pass through property owned by another. A right-of-way may be established by contract, by longstanding usage, or by public authority (as with a highway).

EQC CASE LAW

We have two EQC cases that speak to the issue of surface ownership. *Belle Fourche Pipeline v. EQC*, 766 P.2d 537 (1988) and *WYMO Fuels, Inc. v. Edwards, et al,* 723 P.2d 1230 (1986) are cases in which the EQC decided cases based

on the surface ownership of lands.

In Bell Fourche Pipeline, Atlantic Richfield Company (ARCO) obtained a federal coal lease for a section of land in Campbell County. The people who owned the surface estate in this section leased a portion of the section to Black Hills Oil Marketers, and the lease was assigned to Eighty-Eight Oil Company in 1967. Belle Fourche was granted a right-of-way for oil and gas pipelines in 1971. Belle Fourche's pipeline serves the Eighty Eight Oil truck receiving station. When ARCO purchased the surface estate almost 10 years later, the purchase was subject to the existing easements and rights of way.

ARCO planned to mine (Coal Creek Mine) the area where Eighty-Eight Oil maintained a truck receiving station that has tanks, pumps, meters, valves and other equipment and through the Belle Fourche pipeline. All parties recognized the facilities would need to be relocated. The parties did not agree on a new location and Eighty-Eight Oil argued that ARCO should pay the costs of relocation. Section 35-11-416 requires bonding for surface damage to crops, forage, or tangible improvements of the surface owner. The Act does not require a mine to pay for relocation. The mine is also required to identify the interests of a party like Eighty Eight and Belle Fourche and to state whether the area will be mined.

Eighty Eight Oil and Belle Fourche came to the Council seeking compensation for the relocation of the oil and gas facility and pipeline while it argued it was a surface owner under the surface owner consent provisions of the Act. Surface owner consent is contained in §35-11-406(b) (xii).

The Council determined that Eight Eight had a lease and Belle Fourche held easements and neither company had title to the land. Both companies are surface users but they are not surface owners. .The Council further decided that it has no jurisdiction to award damages to the companies.

In the second EQC case, WYMO Fuels applied for a surface coal mine permit and as part of the permit process, WYMO sought surface owner consent from the Mills family and the Edwards family. Both families denied consent as they had leased the surface to the Neil Butte Company. Neil Butte was a competitor of WYMO and it refused consent. At this point, WYMO started condemnation proceedings in federal district court. In 1980, the federal court gave WYMO a "permanent right-of-way easement to lay, maintain, inspect, replace, erect, operate, and remove a railroad spur track and mine truck haul road, and appurtenances, over, through, upon, and across the real property of the Mills and Edwards".

The Edwards and Mills argued that they continued to have the right to consent to the mine permit, and the absence of their consent doomed the WYMO permit. WYMO argued the condemnation of the right-of-way gave them surface owner consent.

The EQC decided that the condemnation dispensed with the need for the Mills and Edward consent. They were compensated for the taking of their land. They had no interest remaining that would be protected by the Act. If the Council were to agree with Mills and Edwards, the Council would have effectively nullified the condemnation. The District Court reversed the Council decision and the Supreme Court reversed the district court and agreed with the EQC.

Bringing these two EQC cases together, you can see that it is important to look at the documents/process to identify the ownership of land. In Belle Fourche, the complaining parties had only a lease and an easement. In WYMO, the mine condemned a right-of-way, and the Supreme Court stated the "whole concept of eminent domain is the taking of private property without the owner's consent." The mine has compensated the landowners. The federal court had given consent for the landowners.

What do these two cases say about Teletractors or other small mine permits? DEQ, and by extension an applicant for a mine permit, must look at the lands included in a county road and determine whether the county holds title to lands within the road. Because the road is dedicated to public use, the mine does not need permission to use the road. However, the mine may need to notify the county as a surface owner.

The WYMO case states that the families whose land was condemned by the mine have no interest in the condemned land that would be protected by the Act; therefore, the ownership of the surface must belong to WYMO. If there were a circumstance where another party sought an easement for use where WYMO held its easement, then consent would be necessary from WYMO. The title and the rights belonging to a surface owner must reside somewhere and the Court said these rights are not in the original owners. The right to consent transferred to the mine. This is also what happens when a county condemns lands for a public road. If Sublette County condemned land for the county road at issue in Teletractors, any parcel of land, then Sublette County is entitled to notice.

WYOMING STATUTES

In 1951, the Wyoming legislature codified W.S. 24-3-101-127 and these sections govern the dedication, modification, and vacation of county roads. Section 24-3-126(c)(i) states that "upon the entry of the resolution of abandonment, all title and interest, except as herein provided, to the highway right-of-way" shall transfer back to the adjacent landowner..

A previous section, §24-1-101 declares "On or after January 1, 1924, all roads within the state to be highways if those roads have been or may be declared by law to be state or county highways". County commissioners had to record any roads that should be highways before that date.

After January 1, 1924, counties had to follow the procedures set forth in the statutes, §24-3-101-133. In order to designate highways or public roads. Roads can be established by prescription (adverse possession—where the county gains title through use over time), by consent of landowners, by purchase, and by condemnation.

OTHER WYOMING CASE LAW:

There are a series of older cases in Wyoming that concern whether a particular road was properly established as a public road and whether the designation as a public road has been vacated properly. There are old cases and new cases on whether a party, which is sometimes a county, has established a right by prescription i.e. continuous and conspicuous use for a statutory period of time. A recent string of cases have resulted from disputes over road closures where access is suddenly barred. The newest of these cases is *Powder River Ranch, Inc. v. Michelena,* 103 P.3d 876, 2005 WY 1. In this case. the Supreme Court upheld a finding that a neighboring landowner obtained title to a road by prescription.

Nixon v. Edwards, 72 Wyo. 274, 265 P.2d 287, (WY 1953) thoroughly recites the history of public roads in Wyoming. *Rocky Mountain Sheep Co. v. Board of County Commissioners,* 73 Wyo. 11, 269 P.2d 314 (1954) discusses how a county can obtain title to lands by prescription and it is cited here because it discusses the transfer of title to a county in this process. It demonstrates that counties may have title to lands that are used for a public right-of-way.

Schott v. Miller, 943 P.2d 1174 (WY 1997) and *Hansuld v. Lariat Diesel Corporation,* 81 P.3d, 215, 2003 WY 165 are cases where the Wyoming Supreme Court discusses what happens when a county vacates a public road, or abandons the public road, and the title to land in the right-of-way reverts to adjacent landowners. In one case a person had an easement in the right-of-way and that easement was extinguished by the reversion of title to the adjacent landowner.

I mention these case because they all discuss the title to lands in the public right-of-way for the road. Public roads are not only established by easements for use of the surface, the county may have title to some or all of the lands tied up with a county road. The requirement for notice under the Act, which is recited at the beginning of this memorandum references those surface owners within ½ mile of the proposed mining site and adjacent surface owners. When the trucks from a gravel pit travel on a public road, either directly from a pit area or from a mine haul road, the truck is leaving a mine site and surface owners within ½ mile are entitled to notice.

PUBLIC NUISANCE—Bridget Hill

Discussion

The question of whether the Teletractors' gravel mine poses a "public nuisance or endangers the public health and safety" must be determined in the context of the applicable statutes. Specifically, WYO. STAT. § 35-11-406 provides:

> (m) The requested permit, other than a surface coal mining permit, shall be granted if the applicant demonstrates that the application complies with the requirements of this act and all applicable federal and state laws. The director shall not deny a permit except for one (1) or more of the following reasons:
>
> ***
>
> (vii) The proposed operation constitutes a public nuisance or endangers the public health and safety[.]

The plain language of this statute indicates that it is the "proposed operation" that must constitute the public nuisance or

endangerment to the public health and safety. The extent of a "proposed operation" is not specifically stated within the text of the Environmental Quality Act (EQA). However, as noted by the DEQ memorandum of law, "operation" is generally defined only as the activities that take place in removing the minerals from the "affected lands." See, WYO. STAT. § 35-11-103(e). Nevertheless, one may argue that trucking the gravel on a public road is still part of the process of removing the minerals from the affected lands.

In this regard, it may be helpful to also recognize the purpose of the EQA. In particular, WYO. STAT. § 35-11-102 states:

> [w]hereas pollution of the air, water and land of this state will imperil public health and welfare, create public and private nuisances, be harmful to wildlife, fish and aquatic life, and impair domestic, agricultural, industrial, recreational and other beneficial uses; it is hereby declared to be the policy and purpose of this act **to enable the state to prevent, reduce and eliminate pollution; to preserve, and enhance the air, water and reclaim the land of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state** ..."

(Emphasis added). Keeping this purpose in mind when considering WYO. STAT. § 35-11-406, seems to indicate that the public nuisance or endangerment to public health or safety is to be caused by the mining activity itself.

Beyond this general statutory guidance, it does not appear that other areas of the law present a lot of assistance for considering what constitutes a "public nuisance" in this instance. First, the phrase "pubic nuisance" is not defined within the provisions of the EQA. However, a "public nuisance" is generally known to be an unreasonable interference with a right common to the general public. *Butler v. Advanced Drainage Systems*, 717 N.W.2d 760, 769 (Wis. 2006). Whether increased traffic could be such an unreasonable interference is uncertain.

Indeed, a review of the Wyoming case law related to "public nuisance" and increased traffic did not offer a particularly helpful analysis for this matter. In the zoning and annexation context, the Wyoming Supreme court has noted "increased traffic" may be a perceptible harm sufficient to confer standing on an adjacent property owner. See, *Cox v. City of Cheyenne*, 2003 WY 146, ¶ 14, 79 P.3d 500, 506 (Wyo. 2003); *Hirschfield v. Board of County Comm'rs,* 944 P.2d 1139, 1143 (Wyo. 1997); *Hoke v. Moyer,* 865 P.2d 624, 628 (Wyo. 1993). However, it does not appear that the Court has ever opined that increased traffic would constitute some sort of public nuisance or endangerment to public health and safety. Furthermore, in many instances the Wyoming Legislature has seen fit to declare particular acts to be a public nuisance. *See e.g.* WYO. STAT. §§ 6-6-209 (structures, boats, or vehicles used for prostitution, gambling, and liquor); 11-31-301 (animals running at large); 24-10-102 (outdoor advertising near highways). Due to these types of specific statutes, it appears the Court has not presented a general "public nuisance" analysis which can be applied in this instance.

Although not completely analogous, the Court has considered "nuisance" in the tort context. There the Court has reasoned, "[l]iability for a nuisance may be imposed on any of three bases: (1) intentional invasion of the plaintiff's interests, or (2) negligent invasion of such interests, or (3) conduct which is abnormal and out-of-place in its surroundings and so falls fairly within the principle of strict liability." *Timmons v. Reed*, 569 P.2d 112, 123 (Wyo. 1977). The Restatement (Second) of Torts also presents a general meaning of "public nuisance." It provides:

> (1) A public nuisance is an **unreasonable** interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) whether the conduct involves a **significant interference** with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or

> long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

REST. 2D, TORTS, § 821B (1979)(emphasis added). Although this tort reasoning is different then the issue before Council, it may give the Council an indication of the general considerations for "public nuisance."

The Council could apply those general considerations in the following ways. First, the Council could consider whether the gravel operation and use of the public highway is abnormal and out-of-place in its surroundings. In this instance, it does not appear to be. In fact, a significant amount of mineral development goes on in that approximate area. Second, the Council could consider whether the addition of gravel trucks to a county road is conduct proscribed by statute (or some other regulation). Again, this does not appear to be the case. Indeed, based on the testimony and additional filings it appears the county has placed no regulations on the roads. Third, the Council could consider whether use of the county road is continuing in nature. In this instance, the testimony from Mr. Biffle indicated that he did not use his trucks continuously, and the volume of their use was driven by business demand. Finally, the Council could consider whether the use of the county road involves a **significant interference** with the public's health, safety, peace, comfort or convenience. Because, Teletractors would be using a public county road already being used for mineral purposes there is some question of whether increased traffic along this road could be considered a "significant interference" with the public's rights.

Lastly, as noted in DEQ's memorandum of law, it does appear that the Wyoming Legislature has given the authority to regulate traffic to entities other than the DEQ. Specifically, WYO. STAT. § 24-1-104 provides, "All county roads shall be under the supervision, management and control of the board of county commissioners of the county wherein such roads are located …" In addition, the statutes indicate an intent to allow the public the free use of public highways. See, WYO. STAT. § 31-5-110(a). As such, it may be difficult to find that an increase of the traffic on those roadways would be a "public nuisance."