

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE OBJECTION)
TO THE SMALL MINE PERMIT OF)
McMURRY READY MIX CO.)
TFN 5 3/143)
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Docket No. 10-4803

FILED

FEB 25 2011

Jim Ruby, Executive Secretary
Environmental Quality Council

EAST FORK LIMITED PARTNERSHIP'S
OBJECTION

COMES NOW East Fork Limited Partnership ("East Fork"), by and through its attorneys, and, submits the following objections to Boulder Residents proposed Findings of Fact, Conclusions of Law and Order. Recognizing the extensiveness of the objection papers filed by the Department of Environmental Quality ("DEQ") and McMurry Ready Mix Co ("McMurry"), the command of W.S. §16-3-110 requiring an "explicit statement of the underlying facts supporting the findings", and the case law cited by McMurry, East Fork shows the Environmental Quality Council ("Council") as follows:

DISCUSSION

I. MATERIAL ISSUES, FINDINGS OF FACT, CONCLUSIONS

Wyoming Statute §16-3-110 "impos[es a] duty upon the [Council] to 'make findings of basic facts upon all of the material issues in the proceeding **and** upon which its ultimate findings of fact or conclusions are based.'" Billings v. Wyoming State Bd. of Outfitters and

Professional Guides, 837 P.2d 84, 86 (Wyo. 1992) (bold and underlined emphasis added).

The use of the “**and**” conjunction is important. It requires the Council to ‘make findings of basic facts upon all the materials issues . . . upon which its ultimate findings of fact or conclusions are based. Only the ultimate findings of fact or conclusions need support from basic facts.

The only issues discussed during the Council’s January 13, 2011, deliberation that may be construed as ultimate findings of fact or conclusions are 1) sage grouse, 2) hours of operation, and 3) access. Therefore, the council is only required and, arguably, able to make findings of basic facts necessary to support the Council’s findings of ultimate fact that McMurry’s permit application 1) fails to meet the requirements of the Governor’s Executive Order 2010-4 on Greater Sage-Grouse, 2) that McMurry’s current use of the gravel pit constitutes a threat to public safety due to the access road, and 3) that twenty-four (24) hour operation, seven (7) days a week will constitute a public nuisance.

II. COUNCIL’S DELIBERATIONS

It must be noted, the Council’s deliberations on McMurry’s permit are void of any mention of any ultimate fact or conclusion regarding East Fork’s zoning and ditch and water rights objections. It is, therefore, imprudent to assume the Council ruled one way or the other regarding East Fork’s zoning and water and ditch rights objections. The motion to deny the permit was moved and seconded to deny the issuance of McMurry’s permit within thirty-

eight (38) seconds of this mater being before the Council. At one minute seventeen seconds (01:17) in the audio recording, Doctor Ogden, assumingly the originator of the motion and first person to speak as to the basis of the motion, states “. . . I have come to the conclusion that the level of three hundred trucks per day on a public road represents a public nuisance.” Audio Recording of Deliberation (“A.R.D.”), @ 01:17. Dr. Ogden’s motion was based on the conclusion that the permit would represent a public nuisance.

III. INCOMPATABLE ULTIMATE FACTS AND BASIC FACTS

The tenor of the Council’s deliberation of the motion to deny was set by Dr. Ogden’s discussion of public nuisance effect of McMurry’s mine. The opinions of the Council Members were far from unanimous, but the Council’s decision was only one (1) vote short of unanimity. They ayes were John N. Morris, Catherine Guschewsky, Thomas Coverdale, Dennis M. Boal, Tim Flitner, and Dr. Fred Ogden. The sole nay was F. David Searle.

Concededly, the Council’s decision not to discuss East Fork’s zoning and ditch objections to the permit may be construed as implicit rejection. However, a finding against East Fork’s objections to zoning issues and ditch rights would require conclusions of law based on ultimate findings of fact which, in turn, must be supported by basic findings of fact which are nonexistent in the record.

For instance, one possible ultimate finding of fact that defeats East Fork’s zoning objection is that it is permissible for the DEQ to defer to Sublette County’s interpretation of

its zoning resolutions. That ultimate finding falls short because East Fork objected based on Sublette County Zoning law and, additionally, on Wyoming State zoning law. Neither McMurry nor DEQ provided any argument rebutting East Fork's legal argument that the permit would violate W.S. 18-5-101 et seq.

Next, the sole ownership evidence regarding the Banes No. 1 Ditch and the Hittle Enlargement of the Jorgensen Ditch ("Hittle Ditch") was that they are owned by East Fork. No other ownership testimony or evidence was presented. Evidence was provided that the water rights in the Hittle Ditch were purportedly abandoned, but Ken Routh's testimony that part of the Hittle Ditch is still in use and that East Fork claims ownership to the entire Hittle Ditch was un rebutted. These are clearly surface ownership interests in the property subject to the permit. There are no basic facts in the record that could support the conclusion that East Fork has no ownership rights in the Banes No. 1 Ditch and the Hittle Ditch.

The only conclusion that could defeat East Fork's objection as to its ditch rights would be that the DEQ is without the ability to make the applicant get approval from surface rights owners. Such a finding would fly directly in the face of DEQ's practice and efforts in this permit process. Namely, the DEQ required McMurry to gain approval from the Ditch Company and the State Engineer's office in order to move the Banes No. 1 Ditch and the Hittle Ditch.

CONCLUSION

Wyoming Statute § 35-11-206(p) requires the Council to issue “findings of fact and decision a on the application”. The Council should limit such findings of fact to the facts actually discussed and the conclusions necessary to reach its decision, i.e. the matters actually discussed during the Council’s deliberation.

After reviewing the findings of fact and conclusions of law submitted by DEQ, East Fork agrees substantial with such findings of fact and conclusions of law. East Fork proposes that the Council approve the DEQ’s proposed findings of fact and conclusions of law as submitted herewith in red-line format.

DATED this 25th day of February, 2011.

EAST FORK LIMITED PARTNERSHIP,
Objector.

By: _____/s_____
Jon Aimone, 6-4433

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CERTIFICATE OF SERVICE

I certify that, on February 25, 2010, I served a true and correct copy of the foregoing by electronic mail, to the following:

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