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February 21, 2012

*Celebrating 50 Years*

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**By email: [kms@masterslawfirm.com](mailto:kms@masterslawfirm.com)**

Kathryn Sellars  
The Masters Law Firm, PC  
152 Colorado Avenue  
Montrose, CO 81401

Re: Gunn/Maynes Erosion Control

Dear Kathryn:

This letter is the status report requested by the Board of County Commissioners in the last meeting.

I. History of Tire Reuse

Bertha Gunn, Butch Gunn's mother, owns the Burro Property. Ms. Gunn is 89 years old. The property contains a draw that is approximately 20 feet deep and 25 feet wide. The draw is dry year round except for a short period after a substantial rain event. The sides of the draw are vertical due to erosion.

Since the 1940s, Butch's father buried used tires in the draw to control erosion and to allow cattle to cross the draw. This conserved the soil and prevented new channels from forming and further eroding the land. The buried tires also disperse the occasional runoff to irrigate a wider area of the property for grazing. After 1989, some of these tires came from Maynes Tire in Montrose. Many farmers and ranchers in this part of Colorado and across the country have reused tires and other materials for exactly this purpose. The Gunns did not pay any money for the tires and no one paid the Gunns to take the tires. The Gunns certainly had no idea that reusing old tires to control erosion on agricultural land was not an entirely acceptable practice.

In August of 2011, a 100 year rain event and flash flood washed some unburied tires into Cow Creek and Burro Creek. These tires had not been buried because Mr. Gunn's backhoe had broken down that summer.

II. Work to Date

Mr. Gunn and Maynes Tire have collected all the tires from the creeks except for the tires that remain on Colorado Division of Wildlife lands. Mr. Dave Hale of the Division states in the attached email that these tires cannot be collected until April or May of this year due to snow and ice. In total, Mr. Gunn and Maynes Tire have spent approximately 500 man hours collecting approximately 1000 tires to date. We are preparing a report to the Colorado Department of Health and Environment ("CDPHE") detailing their cleanup efforts. This report should be submitted next week and a copy will be provided to the Ouray County Commissioners.

Contrary to an article in the Ouray County Plaindealer in December 2011, Mr. Gunn and Maynes Tire did not use any heavy equipment to collect the tires out of Cow Creek or any other waterway. They manually removed the tires and loaded them on an ATV. The work that is the subject of the article was performed by a ditch company at the confluence of the ditch and Cow Creek. Mr. Gunn and Maynes Tire were not asked to comment on the story by the reporter and just learned of the story in the last week. The information in the story about their involvement is false.

We have researched, contacted and interviewed the following companies regarding a closure plan for the tires on the property.

ERO Resource Company  
Denver and Grand Junction, Colorado

Forest Management, Inc.  
Lamar, Colorado

Pinyon Environmental  
Denver, Colorado

AgriTech Consulting  
Littleton, Colorado

Employees of Forest Management, Inc. have visited the property and are researching options for closure including the option of removing the tires. We also have contacted several companies that process, reuse and dispose of used tires. We have contacted several persons in the county regarding potential reuses for the tires.

Unfortunately, the option of removing the tires is cost prohibitive for Ms. Gunn without significant financial assistance. Besides a minimum of support she receives from Butch and another son, she receives only \$360 per month from social security. Butch Gunn is also on social security.

### III. County Ordinances

The Solid Wastes Disposal Sites and Facilities Act (the "Act"), C.R.S. § 30-20-100.5, *et seq.*, was enacted long after the Gunns began reusing the tires for erosion control on their land. The Act defines the Board of County Commissioners as the "governing body having jurisdiction" over the Gunn property. As the governing body having jurisdiction, the county passed Ordinance 95-1 in 1995, approximately 50 years after the Gunns began attempting to control erosion on the property by reusing tires.

Agricultural land is exempted from Ordinance 95-1. The Gunn property is agricultural and has been designated agricultural by the Ouray County Assessor. That agricultural property is exempt was upheld by the Colorado Court of Appeals in *Zweygardt v. Bd. of County Comm'rs*

of *Elbert County*, 190 P.3d 848 (Colo. App. 2008). See also, C.R.S. § 30-15-401(1)(a)(I)(A) (excluding from a county's police power the regulation of solid waste on agricultural land). The federal Clean Water Act ("CWA") is consistent in exempting agricultural and maintenance activities from its dredge and fill prohibition.<sup>1</sup> See 33 U.S.C. § 1344(f).

It is difficult to understand how the county can cite Ms. Gunn for violating Ordinance 95-1 when the county as the governing body with jurisdiction has exempted her property from the applicable county ordinance. As an exempt property, Ms. Gunn had no ability to get a certificate of designation from the county pursuant to C.R.S. § 30-20-103 and had no reason to believe one was required. Ms. Gunn simply continued with an erosion control activity that was widespread in the farming and ranching community and not prohibited by the county.

In any case, nothing in the Act or regulations provides that closure must include the removal of the tires at the property. In fact, the county itself has not removed solid waste from any of the solid waste sites it has owned and operated in the past when the county closed those sites. Instead, the county has only been required to provide adequate cover for closure among other actions far short of removal of the waste. It is undisputed that the tires cause no danger to water quality and it is clear that the remaining tires will withstand a substantial rain event as they remained secure in the 100 year flash flood of August 2011.

#### IV. CDPHE Waste Tire Grants

Notwithstanding that it appears that Ms. Gunn has not violated the county's ordinance, Ms. Gunn remains willing to accept removal of the tires under the CDPHE Waste Tire Removal Grant Program. See <http://www.cdphe.state.co.us/oeis/wtprog/cleanupgrantproc.html>. This program provides funds specifically for the removal and reuse of used tires. According to telephone discussions with CDPHE there currently is over one million dollars in the fund that must be spent on projects such as this one by June of this year.

By Colorado statute, tire retailers like Maynes Tire collect a \$1.50 fee for each new tire they sell and send these fees to CDPHE. This money collected and provided to CDPHE has been used in part to create this fund to finance the removal and reuse of used tires. Some of the potential reuses for these tires include school playgrounds, ball fields, road base and for tire-derived fuel. If removal and reuse is the county's goal, we strongly encourage the county to sponsor application to the fund for the money to make this goal a possibility. This appears to be a win-win-win for all involved which is a rare occurrence in these matters. We are more than happy to draft the application and will continue our research into the removal and reuse of the tires that supports the application.

If the goal is to punish Ms. Gunn for attempting erosion control through an activity that has been widespread in the farming and ranching community and is specifically exempted by the

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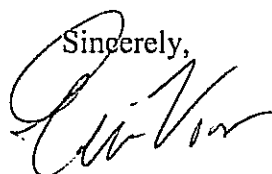
<sup>1</sup> It is not clear that the federal government has jurisdiction over the draw and we have made a Freedom of Information Act request to the Army Corp of Engineers to understand their position on this issue. They have recognized our request but to date have not provided the information requested.

Kathryn Sellars  
February 21, 2012  
Page 4

county's ordinance and the CWA, we see no winners in this deal. We hope that you will reconsider your apparent rejection of the fund option.

Ms. Gunn and our clients are interested in cooperating in any manner possible given their financial situation. We will continue our work evaluating closure options and will engage a consulting firm to assist in that respect notwithstanding the inapplicability of the county's ordinance. We will share information developed by the consulting firm and welcome discussions on closure options and the CDPHE fund with any and all of the involved parties. Our clients are interested in resolving this matter but simply do not have the financial resources to remove the tires without substantial help.

Thanks and let me know your questions.

Sincerely,  
  
Eric J. Voogt

cc: Scott Schultz, Esq., Colorado Attorney General's Office  
Amy Ondos, Esq.  
Clients