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## The Effect of Energy Development on the Courts

John R. Perry

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# ENERGY SYMPOSIUM TRANSCRIPT: THE EFFECT OF ENERGY DEVELOPMENT ON THE COURTS

*Hon. John R. Perry\**

My thanks for the opportunity to address you today. I hope to add some color and flesh out what happens in the judiciary [in Wyoming]. To get that done, one of the things I need to do is I need to talk a little bit about the different court levels because the information that I have may be somewhat anecdotal, but there is a fairly good explanation for that. As many of you in litigation might know, we have, essentially, two types of courts in Wyoming: we have constitutional courts and we have statutory courts. The constitutional courts are the [Wyoming] Supreme Court and district courts; circuit courts in Wyoming are the statutory courts. The significance of that is that as budgetary authorities, each court is treated differently. By way of example, the circuit courts, being statutory courts, report directly to the supreme court on budgetary matters. In other words, all of the circuit courts' budgets are included in the supreme court's budget when they go before the legislature. Each district judge in Wyoming is a separate budgetary agency. The significance of that is found in the fact that circuit courts are entirely administered in a linear fashion. That is, they employ their clerks. As a consequence, much of the information that they have available is subject to relatively uniform reporting requirements. Given that circuit courts are courts of limited jurisdiction, many of the models that are used for that reporting are fairly straightforward. District courts are not that way. We have twenty-three elected clerks of court in the state of Wyoming who administer their counties, their individual counties, in some cases, in remarkably different fashions. We have at least five major docketing control programs that are being employed at the county levels in Wyoming. While the information gathering model that is employed by the court administration in Cheyenne is, certainly, an excellent model, the problem we find in trying to rely on that data is that the clerks do not report it all the same. I was made aware of this in the Sixth Judicial District's efforts to get a third district judge. And, when I

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\* The following is a transcript from the Honorable John R. Perry, from Wyoming's Sixth Judicial District, addressing participants of The *Wyoming Law Review's* Energy Symposium, February 23, 2007 at the University of Wyoming, College of Law. Judge Perry was part of a panel discussing the community impacts of energy development in Wyoming. Justice William U. Hill of the Wyoming Supreme Court moderated the panel. Other panelists included, Lynne Boomgaarden, Director of Wyoming State Lands and Investments; and Dona Playton, Director of the University of Wyoming Domestic Violence Legal Services Clinic. Perry offers some background on Wyoming's court system and analyzes the impacts of energy development related to the recent population surge on Wyoming's judicial resources. *Wyoming Law Review* expresses its heart-felt appreciation to Judge Perry and all the participants and speakers that attended the Energy Symposium.

started going through those reporting forms, and I would come across a line-item that said that a particular judge had forty-seven domestic jury trials in the last reporting year, it just kind of jumps right out at you. For those of you that are not in litigation, you do not get a jury trial in domestic relations cases in Wyoming. It is, while probably not impossible, darn near impossible for any district judge to impanel forty-seven juries and [conduct] those trials in one year. And as I looked through those reports, it was apparent, that once again while the model is fine, the information may cause some controversy when it gets to the other end.

So, what I attempted to do to flesh this out for you today was, number one, I surveyed every district judge in the state, particularly those in the eight counties that Lynne [Boomgaarden] addressed, and I found, by and large, that the problems that we confront in Campbell County, which is one of the counties in the Sixth Judicial District, are far and away representative of the other impacted counties. The one distinction that I might draw for you is that there is, or at least appears to be, a distinct social difference between the people that work in the coal industries as opposed to the people that work in oil and gas and coal-bed methane. The coal industries have been there, and their support structure has been there, for many, many years. As a consequence, they have developed a culture all their own. It is a very stable community. We rarely see some of the boom effects from the coal industry. There is certainly an ebb and flow that may happen with the price per ton of coal, but it is dissimilar from the types of things that we see in the oil and gas industry. I give you that explanation so that, again, you will understand that when I use Campbell County I use that as being representative and at least made some effort to validate the effect with the other impacted counties and some of the counties that are not directly impacted but indirectly impacted that essentially become bedroom communities.

Okay, let's talk about what happened in Campbell County and in our efforts there to establish good statistics, good data. Very simply put, from 2000 to 2004, which is really just past the threshold of coal-bed methane development, the caseload in Campbell County exploded. In 2005, the legislature authorized our [Sixth District] third district judge—we were very happy with that. To give you an idea of why we needed that, seven years ago when I came to the district bench, Campbell County was handling 14,187 docket entries. Okay, what are docket entries? Docket entries are not necessarily the start or the finish of a case; they can be each individual filing in a new or ongoing litigation. So, we have 14,187 when I get there, and three years later, in 2003, for the two of us that were handling those 14,187, the Campbell County Clerk of District Court had 40,932 docket entries. The next year, 2004, we had 48,349 docket entries; 2005: 51,873; 2006: 55,494. If this holds true to form, based on what has happened since January 1, we are on track for docket entries exceeding 60,000 for the year 2007. The impact on the judicial system has been staggering. To put it as one of my former law clerks put it to a presentation of our local bar association—on a daily basis we

do not measure our documentary trail in pages, we measure it in feet. Seriously, what has that meant? All right, I want to talk about each of the levels of litigation, the impact not only on the court system, but on the users of that system and on the significance, as it boils down to an economic underclass, that seems to follow CBM-type development around.

From 2000 to 2004, we represented to the Wyoming Legislature that our criminal case load had doubled. In fact, our criminal case load had increased more than four times. We did not use those numbers because, quite frankly, I did not think anybody would believe them. We went from stacking criminal cases from four or five deep in each rotation of trial to stacking them between eighteen and twenty-two deep. While we are not doing it at quite that level [today]—we do have three judges—the impact of our criminal load has not changed. A significant part of that is certainly due to coal-bed methane development. While a lot of this will be long-term development, most of the evidence shows (and the reason that I am familiar with this is extensive coal-bed methane litigation that has occurred in our courts, my court in particular where the expert testimony is) that these fields are time-limited. As a consequence, the quicker the extraction process is completed regarding coal-bed methane, the better off, arguably, the state is. But certainly, the mineral owners and the lessees are [better off]. While the footprints of those wells are smaller, the well spacing is closer. The goal, quite frankly, based on the expert testimony, is to have as many wells as possible, to pull as much gas as quickly as you can, with the idea that some of those fields may have lives as short as five to six years; others may go up to twelve, but at some point in time they are going to be done. To run those fields, there is a substantial class of workers that engage in what Dona [Playton] talked about as very difficult, long hours, cold weather, and, quite frankly, a lot of it that is cash-based. A significant part of that is paid under the table, sometimes while not paid under the table, really a cash transaction where the cash is available—it is almost like a Sutter's Mill effect. If the money is there, and the want is there, then whatever the product might be, it is going to be available for cash. And we see that in Campbell County. During the last three years, we have seen multiple cases that involved major drug distribution efforts, not only domestic efforts, but efforts coming out of Mexico. There have been multiple cases where cash seizures have been in excess of \$100,000 by way of some of the transactions that are happening with methamphetamine. Certainly, this precipitates the filing of many more criminal cases and puts additional strains on not only the prosecutor's office, but the public defender's office. Right now, our public defender's office, by virtue of the cost of the housing and the cost of living, is down three people. Each of our public defenders right now is handling about 250 active cases; impossible for any one lawyer.

The impact alone on the criminal justice system is not just drug and drug-related or conspiracy-related cases. It also manifests itself in other ways. We see an increase in theft crimes, major larceny cases. By way of example, many of these operations are mobile operations. It is not uncommon to see a theft where the

allegations are that someone merely backs up to the pump or whatever it happens to be, puts it on the trailer hitch, and drives off with a \$30,000-plus piece of equipment. Given the fact that we do have a significant part of our economy that is cash-based, you have people that have one of everything. They have snowmobiles, Sea-Doos, four-wheelers, and we see an awful lot of those cases where literally somebody either from within the district, more often [from] without the district, backs up to those trailers, hooks them [up], drives them down to Colorado, and repaints. It takes a while to find them but we have a significant number of those theft crimes.

We also have a significant number of crimes that are sexually based. While certainly I do not want to overplay this, the types that are common to see are, once again, within these support industries for CBM. You find young men who are there alone. And more often than not, when there are sexually-related crimes, we find that they have to do with third-degree sexual assault, what some would refer to as statutory rape, indecent liberty crimes, that are not focused on high school kids, but on junior high kids. As a consequence, we have staggering juvenile and health statistics that I will talk about momentarily.

Of course, with this as well as with the drug culture, naturally we see some increase in crimes of violence—robbery, armed burglary. During the last year, [there have been] eight different homicide cases in Campbell County, arguably they might tangentially be related to drugs. I think that is a weak argument at best. Most of the time those types of homicide cases just happen for different sets of circumstances. But the effect is still the same for all of us in the trial courts, whether at the circuit court level or the district court level. We see a dramatic increase of criminal pretrial hearings, whether those are motions to suppress searches or statements, competency hearings, motions to transfer cases to juvenile court, and by necessity—given the fact that under our rules of criminal procedure, absent compelling cases, criminal cases must be tried in 180 days—those pretrial hearings must be given a priority. The effect of that then is to delay many cases that are also important, but do not have the same types of [procedural or constitutional] time constraints: child support enforcement, domestic relations cases, [and] paternity cases. Again, the strain on court personnel and the lawyers [is] almost beyond comprehension.

I want to talk a little bit about drug courts and some of the causes and effects that happen with the legislature—very well-intended measures as some of you may know. About five or six years ago, the legislature began working on the Addicted Offender Accountability Act, which encouraged the creation of both juvenile and adult drug courts, as Justice Hill told you. We in Campbell County started with the first felony-only level drug court, essentially to deal with some of these problems at the local level. We have a jail that essentially is capable of handling 109 inmates that routinely has 150-plus. We have major problems. We have to try to deal with some of these measures at the local level. Moreover, we assign some significance

to the fact that this is the direction the Legislature wants us to go. We started out with the drug court trying to focus on first-level offenders. In the six years we have done that, we have changed it now to where we deal with the most severe offenders; in other words, people with the most severe substance abuse problems. The reason I wanted to talk to you about that [is to] bring this into focus, [especially] how it relates to the cause and effect. You may remember that, in July 2004, the legislature enacted the Child Endangering Statute. Which statute is that? [WYO. STAT. ANN. § 6-4-405 (2005)] What does that do? That statute essentially says that no person shall knowingly and willfully cause or permit a child to absorb, inhale, or otherwise ingest methamphetamine, remain in a room, dwelling or vehicle where the person knows methamphetamine is being manufactured, or sold, or remain in a room, dwelling or vehicle, on and on. The effect of that has been in the Campbell County Adult Drug Court, to take a drug court that was primarily focused on males between the ages of seventeen and twenty-five and completely turn that around where predominantly our drug court now is young women, seventeen to twenty-five. In fact, my multi-disciplinary team calls this statute the “Meth Mom Statute.” Why is that? It is because, most often as a natural effect of what law enforcement does, the person who gets caught with the meth while the kids are there is mom, not the person who is out working. So, I do not know if the legislature could have anticipated that, but that is part of the effect . . . we see. To follow up on one of things that Dona [Playton] said, we are using “Our Families, Our Future.” It is a great program and it seems to really help some of those young women get back on track.

An interesting effect of that drug court is that we actually have employers that call every week and ask if we have drug court candidates who are ready to come back into the employment stream—because they are heavily supervised. The employers know that they are going to be clean and sober. The employers know that we make them show up to work on time all the time, so we do not have any problem getting these people jobs given our economy.

So now we have the “Meth Mom Statute,” obviously part of the effect there is that we have any of a number of children who are in protective custody with the Department of Family Services. [For example] in one morning, in three separate cases, I had three moms, thirteen kids in protective custody, and part of that is that the science and research shows that methamphetamine, particularly long-term methamphetamine, hyper-sexualizes people. Consequently, we see many of these families that have multiple dads, multiple children; it is not uncommon. I mention those three once again to give you a feel for what is representative when we see methamphetamine and how it relates to the Sutter’s Mill effect. It is not uncommon to have a young woman who is subject then to both criminal and juvenile court jurisdiction be under the age of thirty and have four children that are under the supervision of the Department of Family Services. How that has further impacted your court system and the users of the court system is that again, with very good intentions, the legislature decided that these juvenile cases needed

to be attended to as quickly as possible. Consequently, effective July 1, 2004, it changed so that district courts, not juvenile courts, have to administer those trials. The statute now says that in no case shall the trial be conducted more than sixty days from the date of the filing of the petition. The effect of that then is to take much of the other very important civil litigation and bump it. It just goes away.

As administrators, we do not have a choice. The legislature says we have to do these cases in this period of time, and as a consequence we had some of our docketing in 2004 even for divorces that would go out as far as forty-eight months for complex civil litigation. It was going out as far as fifty-four months to even get a setting on the calendar. Those juvenile filings have continued to increase. The most dramatic of those was in 2004-2005, after the enactment of the "Meth Mom Statute," our juvenile filing on neglect and abuse more than doubled in the first five months of 2005.

[Another] problem in this type of economy is that it is almost impossible to get representation for these people, lawyers to step up. Why is that? Well, number one: there is a limitation on what counties will authorize on a per hour rate for lawyers. Lawyers in my district right now as a threshold can very reasonably charge \$140 per hour and be more than competitive and that is with virtually no experience. Many of the firms that hire associates bill their associate time out at between \$140 per hour and \$150 per hour. In the Sixth Judicial District, lawyers are compensated for this type of work by the county at about \$80 per hour if they have less than five years of experience. Moreover, the legislature decided that we needed to have specialized categories of training for guardians ad litem in neglect and abuse cases, and while those lawyers can get compensated at \$100 per hour, sometimes we are pulling guardians as far as five counties away to get representation for the children. Similarly, we are pulling right now to get representation for those parents who are swept up in the juvenile system. We are pulling lawyers from six different counties. It is hard work and the cost to the taxpayer on these cases can be staggering. While certainly I do not mean to tell you that it is representative, when the district judges' conference meets quarterly, we talk about the cost of those cases, many of which are not disclosed on a per case basis. You can find the bill in the Department of Family Services budget, what the total cost is. But I am aware of at least three cases this last quarter where the cost per child to the taxpayers through the Department of Family Services, has exceeded \$1 million. Now, if you think about it, you could take that \$1 million, you could house the child and their family under supervision in a separate setting and literally pay for that child's college tuition, room and board, books and get it all done for less than \$1 million. But that is the cost.

Let us turn to civil litigation. By the end of 2004, our trial dockets for civil litigation extended out more than two and a half years; that is due in part to the complexity of that litigation. Much of that litigation is related to the extractive industries. The time that is requested for trial is far greater in those cases. It is not

unusual for us to get trial requests of fifteen trial days or more. I got one [this week] for thirty-five trial days. The effect of that essentially is to bring one-third of our docket to a complete stop for that period of time. We have had cases that have extended for thirty-plus trial days. What happens then is that all of those criminal cases, all of those juvenile cases, the emergency matters and domestic relations cases are shifted on to the remaining judge or judges, and as a result the [dates] that practitioners have waited so long to get often have to be bumped because of the types of litigation that we see. We see personal injury law that has to do with the extractive industries, contractual problems, insurance-reinsurance problems, absolutely unbelievable expenditures in cost of litigation and time. As an effect then, many of the people Dona [Playton] referred to cannot find lawyers for domestic relations cases.

Consequently, every district judge in the state has seen an increase in pro se filings, essentially where people attempt to represent themselves. I mean, certainly we have domestic relations practitioners in the Sixth Judicial District and they have all of the cases they can handle. There are many of those practitioners right now who will not take a case unless their client understands that the chances are that the case is not going to get any place for about ten months. And that is a practical effect: [it is] just the way it works. And two, these domestic relations practitioners get their money up front. I mean, that is just a competent way to do business in the practice of law. Many of these people who follow this Sutter's Mill syndrome, the underclass, cannot afford to pay that. Moreover, we fall prey at the trial courts to the idea that domestic relations law is simple enough [for] do-it-yourselfers. And, while it may be true of some individuals who have a higher degree of sophistication, it is almost always untrue of the people that we see attempting to use the system. They wind up with provisions in their decrees regarding property, debts, and visitation that are virtually unenforceable. About the best we can do as trial judges is to review those cases from the Wyoming Child Support Guidelines presumptive levels, make sure that [the] presumptive support amounts are correct, make sure that they have an appropriate income withholding order in place, and pass over those cases.

What happens now in default cases (very justifiably if you take a look at the effects of Rule 55(b)(2) of the Rules of Civil Procedure) where they involve children, since children really are in most of those cases third parties who are unrepresented, you really do have to have some type of a hearing to know and understand what the effect is going to be on those children. Imagine the shock the pro se litigant faces when he or she shows up and realizes that it is not like it is on TV. There is not some burly bailiff who is going to swear them in and stand between them while they try to mudsling back and forth in front of a district judge; it just does not happen. [It is a] very difficult matter, [and] very hard to explain to many of those poor folks who try that. The other part of that too is that it is very difficult to know how to allocate pro se time on a court calendar.



Let me turn just for a moment to those cases that are mineral-industry-specific cases and the effects they have on the local court system. Of course, we have the tax evaluation cases, the cases that will be coming up that have to do with split estates, and environmental quality issues. I want to talk briefly about the taxation cases in particular. Those cases have become so highly specialized that each time the legislature changes that law, they all become the subject of new and distinct litigation before the State Board of Equalization. As an administrative effect, we have to review those cases. In most of those cases, the records are voluminous. They involve a degree of expertise that quite candidly at the trial court level we just do not have. Now, there are some of us who have had to acquire [the knowledge], but still, many of those cases for the purposes of review could become essentially matters that a single trial judge and a law clerk could very easily spend thirty days on that they just do not have. It is not unusual for trial judges in mineral-impacted districts to have as many as sixteen settings a day on their calendars. That is not unusual. So, the question then becomes how do we deal with these voluminous records, these tax cases that are of paramount importance, not only to the litigants but to the state as a source of income? Some of them are subject to certification under the Rules of Appellate Procedure, many are not, and we have to deal with those.

We are just now beginning to deal with the water discharge cases. Many of those are being litigated around the state. Of course, given the competitive nature of the coal industries, the next thing on the horizon will be the [Dakota, Minnesota & East Coast Railroad project] trying to get a new rail spur into Campbell County so that they can become competitive with the other rail providers: essentially, exporting coal out of Campbell County. There are at least fifty of those eminent domain cases now or condemnation cases for rights of way that we are aware of that encompass four judicial districts. It is entirely conceivable that out of those fifty we are looking at in excess of 200 trial days to get those days if we assume that half of them settle. And, by the way, all of those are jury demand cases. So, collectively at the district bench, we cannot help but wonder how we are going to deal with that, particularly in the north half of the state that is most affected by those railroad matters.

I do not mean to exclude the circuit courts in all of this. Certainly they are the courts of entry, and they have been impacted as well, separate and apart from felony level drug courts. You will see that many of these circuit courts given their load are attempting to put into place DUI courts to deal with those offenders. They just do not have the ability to incarcerate everybody and are trying alternatives at local supervision. Campbell County's Circuit Court has the second highest DUI load in the state. They have to deal with the domestic violence cases under the Family Violence Protection Act. One of the effects that I have discussed with the circuit court judges, as some of you may know, the circuit court now may extend a family violence protection order for up to a year if the litigants are represented by counsel. Then, often those hearings become mini-custody battles

where attorneys will request a day or two days to try those cases in front of circuit court judges. Circuit judges, quite frankly, are not equipped to handle that when they are doing—as in my district—as many as seventy arraignments a day. So, that too is an impact on the court systems and on the people who use them.

I want to talk finally a little bit about one of the topics that Lynne [Boomgaarden] broached; that is the disparity in county funding and the types of things that need to happen at the county level. Certainly, when we see our impacts, they impact court personnel as well. It is hard in impacted districts to get law clerks. It is hard in impacted districts to get court reporters. They cannot find housing. When they cannot find housing, the prices are so radically inflated, that it often times causes court personnel to put in a request that they reside in another county and actually commute to the impacted county. But the bigger problem is—turning back then to the difference in the types of systems that we have and the fact that district courts are administered at the county level with elected clerks of district court—those counties are the ones that are responsible for the brick, the mortar, the courtrooms, and the support facilities that deal with impacted court systems. Without the support of those local officials, the foresight and courage of those local officials, much as Lynne [Boomgaarden] said, to move beyond the notion that this is all going to go away, it does not matter how many judges we put in place; it does not matter how many times we try [alternative dispute resolution] or drug courts. Without the facilities, without the brick and mortar to administer those cases, they do not get done. Natrona County is a perfect example of that where, understandably, they do not have the facilities at the district court level that they need to effectively administer Natrona County's ongoing case load. That is not one of our problems in the Sixth Judicial District, but it will continue to grow as a problem statewide. If you take a look at many of the outlying courts (Weston, Niobrara, just to name a few), those courtrooms are old, they are not secure, and they do not lend themselves to the types of things that we have come to see now before the judiciary during this century.

So, once again, without that courage, without that support, of local county governments, this just is not going to get done. Many thanks again.