

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

IN RE BENTONITE PERFORMANCE)
MINERALS LLC) **DOCKET 18-1601**

**PETITIONER BENTONITE PERFORMANCE MINERALS, LLC'S MOTION FOR
SUMMARY JUDGMENT**

Petitioner Bentonite Performance Minerals, LLC (BPM), pursuant to Chapter 2, Section 11(a) of the Rules of the Wyoming Department of Environmental Quality (DEQ) and the Hearing Examiner's August 21, 2018 Order of Schedule, hereby moves for summary judgment against Respondent 2U Ranch, LLC (2U) pursuant to Rule 56 of the Wyoming Rules of Civil Procedure. BPM states as follows in support:

Introduction

The scope of an Order in Lieu of Consent proceeding is narrow and limited to the four statutory elements of Wyoming Statute § 35-11-406(b)(xii). The EQC is only tasked with determining whether (1) the proposed mining and reclamation plans have been submitted to 2U; (2) the proposed mining and reclamation plans adequately detail the proposed surface use, including routes of ingress and egress; (3) that the proposed surface use does not substantially prohibit the operations of the surface owner; and (4) the proposed reclamation plan reclaims the surface lands to their approved future use as soon as feasibly possible. *Id.*; August 21, 2018 Order of Schedule at 1. As recognized by the Hearing Examiner, this proceeding does not concern (1) whether the permit application is technically correct, (2) whether the mineral lease is valid or (3) whether DEQ Land Quality Division (LQD) should issue the permit. *Id.* at 2.

The scope of this proceeding is narrow and limited because DEQ/LQD has not yet had the opportunity to review BPM's proposed mining and reclamation operations or approve, amend or deny BPM's proposed permit amendment. Accordingly, substantive issues such as

whether BPM's proposed reclamation plan complies with the Wyoming Environmental Quality Act (EQA) and its implementing regulations are appropriately beyond the scope of this proceeding. The DEQ/LQD will make such determinations after it reviews and processes the permit amendment application, and, only then, will interested parties have the opportunity to challenge those determinations as being unlawful. The remedy sought by BPM in this proceeding, namely the issuance of an Order in Lieu of Consent, simply authorizes DEQ/LQD to initiate the permit amendment application review process.

As discussed below, 2U has a single objection to BPM's permit amendment application: that the proposed reclamation plan does not require the replanting of trees disturbed by the proposed mining operations. 2U's objection is premature and beyond the scope of this proceeding. With respect to reclamation, this proceeding simply concerns whether the proposed reclamation plan reclaims the surface lands to their approved future use as soon as feasibly possible. Wyoming Statute § 35-11-406(b)(xii) in no way implicates the substantive reclamation standards prescribed by the EQA. Because 2U raises no factual or legal dispute within the scope of this proceeding, summary judgment is appropriate.

2U will have an opportunity to challenge BPM's substantive reclamation obligations, but only after DEQ/LQD processes the permit amendment application. If 2U is sincere in its opposition to the proposed disturbance of trees and BPM's proposed reclamation of the subject lands, it is obligated to pursue its legal challenge in accordance with the administrative process and after DEQ/LQD has processed BPM's application. An Order in Lieu of Consent proceeding is not that process.

Background and Facts

BPM conducts bentonite surface mining operations pursuant to Mine Permit 267C. Certain bentonite deposits included in Mine Permit 267C exist under lands owned by 2U, and BPM has previously conducted mining operations on 2U lands. BPM is the lessee of certain unpermitted bentonite deposits owned by the State of Wyoming, existing under 2U lands and immediately adjacent to (and a continuation of) the bentonite deposits previously mined by BPM on 2U lands. **Ex. A**, Lease 0-42804. Pursuant to Lease 0-42804, the State of Wyoming granted BPM the exclusive right and privilege to strip-mine, extract, remove, and dispose of the bentonite deposits. *Id.* at 1. The lease provides BPM the right to enter upon, occupy and use such 2U lands as necessary for the mining of bentonite. *Id.* at 4.

Beginning in 2014, BPM initiated efforts to amend Mine Permit 267C to include the Lease 0-42804 bentonite deposits. BPM notified 2U of its intent to develop the Lease 0-42804 bentonite deposits and, in the years to follow, solicited 2U's review and input regarding the proposed operations. BPM worked closely with 2U in planning the development of Lease 0-42804, and the Parties discussed all aspects of the anticipated operations, including routes of ingress and egress, surface disturbance, mining progression, and reclamation. The submitted mining and reclamation plans – first provided to 2U on January 8, 2016 – reflect 2U's involvement in developing the proposed mining and reclamation operations. **Ex. B**, 1/8/16 Mining and Reclamation Plans.

On February 24, 2016, BPM formally requested DEQ/LQD amend Mine Permit 267C to include those bentonite deposits covered by Lease 0-42804 by filing a permit amendment application with DEQ/LQD, and on June 28, 2016, the DEQ/LQD determined that the Mine Permit 267C amendment application satisfied completeness requirements. **Ex. C**, 6/28/16 LQD

Completeness Letter. However, the DEQ suspended the processing of the permit amendment application pending the submission by BPM of an executed Form 8 (Surface Owner Consent Form) or, alternatively, an Order in Lieu of Consent. Unable to obtain the requisite surface owner consent from 2U, BPM requested the EQC convene a hearing and issue an Order in Lieu of Consent as prescribed by Wyo. Stat. § 35-11-406(b)(xii). The issuance by the EQC of an Order in Lieu of Consent will allow DEQ/LQD to process the permit amendment application and determine whether the proposed operations comply with the substantive mining and reclamation requirement of the EQA and its implementing regulations.

Throughout the course of this proceeding, 2U has made clear that it has a single objection to BPM's proposed permit amendment application: that the proposed reclamation plan does not require the replanting of trees disturbed by the proposed mining operations. Notably, for purposes of this proceeding, 2U does not contest whether it received the proposed mining and reclamation plans or whether the mining and reclamation plans are sufficiently detailed so as to illustrate BPM's full proposed surface use. Moreover, 2U identifies no existing uses of the subject lands by 2U that will be disrupted or otherwise impacted by the proposed mining and reclamation operations.

Legal Standard

The EQC conducts contested case proceedings in accordance with the Wyoming Rules of Civil Procedure. DEQ Rules, Chapter 2, Section 2. The Wyoming Rules of Civil Procedure instruct the EQC to grant summary judgment when the pleadings, the discovery and disclosure materials on file show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wyo. R. Civ. P. 56; *James v. Taco John's Int'l, Inc.*, 2018 WY 96, ¶ 7, 425 P.3d 572, 576 (Wyo. 2018). BPM, as the party

requesting summary judgment, bears the initial burden of establishing a prima facie case that no genuine issue of material fact exists, and that summary judgment should be granted as a matter of law. *Bogdanski v. Budzik*, 2018 WY 7, ¶ 18, 408 P.3d 1156, 1160 (Wyo. 2018). After BPM has adequately supported the motion for summary judgment, the burden shifts to 2U to provide “competent evidence admissible at trial showing there are genuine issues of material fact.”

Jones v. Schabron, 2005 WY 65, ¶ 10, 113 P.3d 34, 37 (Wyo. 2005). 2U, as the party opposing the motion for summary judgment, “must present specific facts; relying on conclusory statements or mere opinion will not satisfy that burden, nor will relying solely upon allegations and pleadings.” *Bogdanski*, ¶ 18, 408 P.3d at 1161. “A material fact is one which, if proved, would have the effect of establishing or refuting an essential element of the cause of action or defense asserted by the parties.” *Claman v. Popp*, 2012 WY 92, ¶ 21, 279 P.3d 1003, 1011 (Wyo. 2012).

Argument

The EQA grants a mine permit applicant a statutory right to petition the EQC for and Order in Lieu of Consent in the absence of obtaining surface owner consent to proposed mining and reclamation operations. The EQA mandates that the EQC issue an Order in Lieu of Consent if it finds that (1) the proposed mining and reclamation plans have been submitted to the surface owner; (2) the proposed mining and reclamation plans adequately detail the proposed surface use, including routes of ingress and egress; (3) the proposed surface use does not substantially prohibit the operations of the surface owner; and (4) the proposed reclamation plan reclaims the surface lands to their approved future use as soon as feasibly possible. Wyo. Stat. § 35-11-406(b)(xii). Notably, the four statutory elements do not implicate substantive or technical aspects of the permit application such as specific reclamation obligations. The purpose of an Order in Lieu of Consent proceeding is simply to confirm that the permit applicant has provided

the surface owner the opportunity to review the proposed mining and reclamation operations, that the proposed mining and reclamation operations sufficiently detail the permit applicant's proposed surface use, that the surface owner's existing uses of the surface lands are not substantially disrupted by the proposed operations, and that proposed reclamation of disturbed lands is conducted as soon as feasibly possible.

Here, according to 2U's own sworn testimony, 2U has withheld its consent to BPM's proposed operations for **one** reason: that the proposed reclamation plan does not require the replanting of trees disturbed by the proposed mining operations. 2U has testified under oath that it does not contest that the proposed mining permit was submitted (Element 1) or that the proposed plan was adequately detailed (Element 2). As to whether the proposed mining plan substantially interferes with the surface owner's uses, 2U has refused to identify or discuss any existing uses by 2U of the subject lands.

2U's sole objection to BPM's request for an Order in Lieu of Consent (i.e. the replanting of trees) is premature and beyond the scope of this proceeding. With respect to reclamation, an Order in Lieu of Consent proceeding simply concerns whether the proposed reclamation plan reclaims the surface lands to their approved future use as soon as feasibly possible. Wyo. Stat. § 35-11-406(b)(xii). An Order in Lieu of Consent proceeding in no way implicates the substantive reclamation standards prescribed by the EQA and its implementing regulations. 2U will have an opportunity to challenge BPM's substantive reclamation obligations, but only after DEQ/LQD processes and approves the permit amendment application. Because there exist no genuine issues of material fact regarding the four elements of Wyo. Stat. § 35-11-406(b)(xii), BPM is entitled to judgment as a matter of law.

A. The EQC should grant Summary Judgment as it relates to Elements 1, 2 and 3.

1. 2U does not contest that they received the proposed mining and reclamation plans (Element 1) or that the plans do not adequately detail the proposed surface use of the subject lands (Element 2).

2U testified under oath that it does not contest Elements 1 or 2 of the Order in Lieu of

Consent analysis:

Q: Based on what you just said, I understand your position to be that BPM takes issue with the fourth element of the statutory requirements. And to be clear, the first element requires that a mining plan and a reclamation plan be submitted to you. Do you contest that?

A: No.

Q: And the second element requires that the mining plan and the reclamation plan be detailed to illustrate the full proposed surface use, including the proposed routes of ingress and egress. Do you dispute that?

A: No.

Ronald Dep. 41:12-24¹.

With respect to Element 1, BPM first provided 2U with the proposed mining and reclamation plans on January 8, 2016. **Ex. B**, 1/8/16 Mining and Reclamation Plans. In September 2017, BPM provided 2U with the entire permit amendment application on a flash drive, together with the proposed mining and reclamation plans. **Ex. D**, 9/22/17 Consent Letter. On May 24, 2018, BPM again provided 2U with the proposed mining and reclamation plans by mail. **Ex. E**, 5/24/18 Consent Letter. With respect to Element 2, it is not a surprise that 2U makes no objections. Ronald Dep. 41:12-18. In January and February 2016, 2U conducted a detailed reviewed of the proposed mining and reclamation plans and provided substantive revisions that are reflected in the finalized mining and reclamation plans submitted with BPM's

¹ The transcript of the December 12, 2018 Deposition of Ronald Ericsson is attached in its entirety as Exhibit B to BPM's concurrently filed *Motion to Limit Testimony and Evidence at Hearing* ("Motion to Limit Testimony").

permit amendment application materials to DEQ/LQD. See for example, **Ex. F**, 2/4/16 Tetrault Email (providing 2U with revised reclamation plan incorporating requests regarding reservoirs and permanent roads).

Because 2U does not contest Elements 1 or 2 there exists no genuine issue as to any material fact and BPM is entitled to judgment as a matter of law on Elements 1 and 2 of the Order in Lieu of Consent analysis

2. 2U failed to identify and refused to discuss any existing surface uses by 2U of the subject lands, much less any existing uses that will be substantially prohibited by BPM's proposed mining operations (Element 3).

With respect to Element 3, the proposed operations must not substantially prohibit the existing operations of the surface owner. Wyo. Stat. § 35-11-406(b)(xii). Throughout the discovery process, 2U has identified no existing uses of the subject lands by 2U, much less any existing uses that will be “substantially prohibited” by the proposed operations. BPM’s Request for Production sought all documentation evidencing existing uses by 2U of the subject lands that 2U alleges will be adversely impacted by the proposed operations. **Ex. G**, Notice of Deposition at 5. 2U produced no documents responsive to the request. At deposition, Mr. Ericsson categorically refused to identify or discuss 2U’s existing uses of the subject lands. Ronald Dep. 44:16-45:10. Pressed on the issue, Mr. Ericsson testified that 2U’s existing use of the subject lands were not relevant for purposes of this proceeding:

Q: The real thing that we’re interested in is understanding how you use your land. And are you willing and able to talk about this?

A: Beyond the scope of the proceedings as ordered by the hearing examiner.

Ronald Dep. 43:13-17.

Because 2U has failed to identify any existing uses of the subject lands either in response to BPM’s Request for Production or in deposition testimony, there exists no genuine issue as to

any material fact and BPM is entitled to judgment as a matter of law on Element 3 of the Order in Lieu of Consent analysis.

B. The EQC lacks the jurisdictional authority to resolve 2U’s objection to the disturbance of trees in an Order in Lieu of Consent proceeding because Element 4 does not implicate substantive reclamation obligations.

With Elements 1, 2, and 3 conceded by 2U, the only issue remaining is whether BPM can establish Element 4 – that the proposed reclamation plan reclaims the lands to their approved future use as soon as feasibly possible. At his December 12, 2018 deposition, Mr. Ericsson testified repeatedly that 2U’s sole basis for withholding consent and objecting to the issuance of an Order in Lieu of Consent rests with the “reclamation” aspect of the Order in Lieu of Consent analysis.² Mr. Ericsson summarized 2U’s refusal to consent to the proposed operations and its objection to BPM’s request for an Order in Lieu of Consent as follows:

Q: Mr. Ericsson, I’m going to take a step back here. And it may be worthwhile that you take a five-minute break and collect yourself, but –

A: Oh, no. I want this over with, I’m not going to be here for six hours, whether you like it or not.

Q: Ronald, it’s important that you participate in this process, that you allow us to –

A: It’s important – it’s important that you ask questions that are relevant to the hearing. This has to do with reclamation. It has nothing to do with anything else. And you keep asking questions that are not relevant.

Q: And now this is a part of the Order [of Schedule] I’d like you to focus on. “The Petitioner has filed a Petition for Order in Lieu of Consent. A hearing on this matter only looks to identify whether four statutory elements have been met.

² Notably, 2U only takes issue with the fact that BPM’s proposed reclamation plan does not prescribe the replanting of trees disturbed by the proposed mining operations. During this proceeding, 2U has refused to further discuss other aspects of the proposed operations, and as set out in BPM’s concurrently filed Motion to Limit Testimony, 2U should not be allowed to create new testimony regarding issues they refused to discuss at deposition or otherwise raise in discovery.

Those elements are,” and the hearing examiner proceeds to identify the four statutory elements. Do you remember this now?

A: I remember the four.

Q: Okay. And what do you remember the four to be? And I’m happy to read them into the record if you prefer.

A: I know what they – I know what they are. The one that we don’t agree with is reclamation is not complete.

Q: Right, and that’s what I’m – that’s what I’m trying to get at here is where you’re at and what your position is, and so what I would like –

A: I will tell you my position again and again and again. We do not accept that BPM can comply with the DEQ regulation, with the Wyoming statutes which requires that the trees, the land be restored to the value equal or better than prior to being mined. That’s what the issue’s all about.

. . . . We’ve requested for almost two years to get BPM to explain how they’re going to restore the trees, and we’ve received an answer no, no, no. Why? It’s not possible. And the law requires it, the DEQ regulations require it. BPM knows it, the attorneys know it, and we know it, and everybody’s trying to avoid it. And that’s what the Council hearing’s about, and that’s why we didn’t sign the landowner’s surface agreement.

Ronald Dep. 33:14-25; 39:9-40:6; 57:12-19.

The EQA only requires that a mine permit application include, among other materials, “a mining plan and reclamation plan dealing with the extent to which the mining operation will disturb or change the lands to be affected, the proposed future use or uses and the plan whereby the operator will reclaim the affected lands to the proposed future use or uses.” Wyo. Stat. § 35-11-406(b). BPM’s permit amendment application details the extent to which the mining operation will disturb the subject lands, proposes a future use of grazingland, and specifies reclamation requirements designed to achieve the proposed future use. The proposed future use of grazingland is consistent with the approved future use for 2U’s immediately adjacent lands

covered by Mine Permit 267C and the fact that the subject lands have been leased to 2U's neighbor for years for the purpose of grazing cattle:

Q: Moving forward, the next document I'd like to enter into the record is 2U-0017. I'll represent that this is a Lease Agreement that we received from Ronald Ericsson in response to BPM's request for production of documents. Mr. Ericsson, are you familiar with this Lease Agreement?

A: You're talking about the grazing lease?

Q: It appears to be a grazing lease with Mule Shoe.

A: It isn't appearing to. It is.

A: The grazing lease is the grazing lease. That's what you do on a ranch. You don't sell grass. You sell grass through livestock.

Q: How many years have you grazed the subject lands?

A: Do you understand Wyoming ranches? What do you think they do with land? What is a ranch? That's a – that's an irrelevant question.

Q: And how long has Mule Shoe leased those lands from 2U?

A: Four years.

Q: Okay. And so the record is clear, if I go back four years, would that be the summer of 2014? Is that the leasing period that would have initiated the agreement with Mule Shoe?

A: '15.

Q: 2015, okay. And has that lease always covered all of 2U's lands or just part of 2U's lands?

A: All.

Q: All. And so since 2015, the subject lands, which are the subject to this proceeding, have been covered by a lease to Mule Shoe?

A: Yes.

Ronald Dep. 28:21-29:5, 45:23-25; 48:13-49:-2; *see also*, **Ex. H**, Grazing Lease.

BPM's proposed reclamation plan specifies reclamation requirements designed to achieve the proposed future use of grazingland. 2U's complaint that the proposed plan does not prescribe "tree restoration" is misplaced and premature. Element 4 of the Order in Lieu of Consent analysis does not implicate the substantive or technical reclamation obligations prescribed by the EQA. Wyo. Stat. § 35-11-406(b)(xii); *see also*, August 21, 2018 Order of Schedule at 2 (precluding testimony at hearing regarding (1) the technical aspects of the permit amendment or (2) whether LQD/DEQ should issue the permit amendment as proposed). The question of whether BPM's proposed future use of grazingland is appropriate or necessitates the replanting of disturbed trees will be determined by the DEQ/LQD when it processes the permit application. For purposes of this proceeding, Element 4 of the Order in Lieu of Consent analysis only concerns whether the proposed reclamation plan reclaims the disturbed lands as soon as feasibly possible. Wyo. Stat. § 35-11-406(b)(xii). Here, BPM proposes the identical reclamation methods and schedules, namely, concurrent back-casting, as previously approved by DEQ/LQD for lands covered by Mine Permit 267C. The proposed reclamation methods and schedules have previously been approved for and implemented on 2U's immediately adjacent lands impacted by BPM's mining operations and are consistent with the industries' best practices.

The reason that substantive aspects of the proposed mining and reclamation operations are beyond the scope of an Order in Lieu of Consent proceeding is self-evident: the mining and reclamation plans are only proposals. The issuance by the EQC of an Order in Lieu of Consent simply allows DEQ/LQD to process the permit application and determine whether the mining and reclamation operations, as proposed by the applicant in the permit application materials, comply with the EQA and its implementing regulations. After DEQ/LQD processes the permit

application and makes its decision on the proposed mining and reclamation operations, 2U will have the opportunity to challenge any aspect of the permit it deems unlawful, including substantive reclamation obligations. However, 2U's claims are premature and have no bearing on this proceeding.

Conclusion

BPM has met its burden by providing competent and admissible evidence that BPM has taken the steps necessary to mandate the issuance of an Order in Lieu of Consent as prescribed by Wyo. Stat. § 35-11-406(b)(xii). The evidence supports the conclusion that (1) the proposed mining and reclamation plans have been submitted to 2U; (2) the proposed mining and reclamation plans adequately detail the proposed surface use, including routes of ingress and egress; (3) the proposed surface use does not substantially prohibit the operations of 2U; and (4) the proposed reclamation plan reclaims the surface lands to their approved future use as soon as feasibly possible. Because BPM has established each element of the Order in Lieu of Consent analysis, and because there exists no genuine issue as to any material fact, BPM is entitled to judgment as a matter of law.

DATED this 21st day of December 2018.



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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, I served a true and correct copy of the foregoing PETITIONER BENTONITE PERFORMANCE MINERALS, LLC'S MOTION FOR SUMMARY JUDGMENT by email to:

2U Ranch, LLC
c/o Ronald Ericsson
ericsson@childselect.com

Jim Ruby
Executive Secretary, Wyoming Environmental Quality Council
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