



Isaac N. Sutphin, P.C.
Phone (307) 778-4263
Fax (307) 778-8175
INSutphin@hollandhart.com

March 16, 2016

VIA HAND DELIVERY

Wyoming Environmental Quality Council
Attn: Jim Ruby
125 W. 25th Street
Herschler Building 1W, Room 1714
Cheyenne, WY 82002

**Re: Brook Mine Application for Permit to Mine
WDEQ/LQD TFN 6 2/025
Request for Order in Lieu of Consent &
Request for Hearing**

Dear Mr. Ruby:

On behalf of Brook Mining Company, LLC (Brook), I am writing to request that the Environmental Quality Council (EQC) convene a hearing and subsequently issue an order in lieu of consent under Wyo. Stat. § 35-11-406(b)(xii). Brook has applied for a permit to extract coal it owns in Sheridan County, Wyoming. In addition to the right to mine, which Brook obtained as a successor in interest to Sheridan-Wyoming Coal Company (SWC), Brook is the owner of extensive surface use rights in the area of the proposed mine. Nevertheless, and despite its best efforts, Brook has not secured the consent of two affected surface owners to its mine and reclamation plan.

As set forth more fully herein, because the surface owners have withheld their consent and because the Wyoming Department of Environmental Quality, Land Quality Division (WDEQ/LQD) has refused to acknowledge Brook's right to proceed without specific surface owner consent, Brook requests that the EQC issue an order in lieu of that consent. As explained below, Brook meets all of the requirements for the EQC to issue an order in lieu of that consent.

I. Introduction

Brook is a Wyoming limited liability company with its principal office located at 1101 Sugarview Drive, Suite 201, Sheridan, WY 82801. Brook is the developer and operator of the coal and mining interests owned by Ramaco Wyoming Coal, LLC (Ramaco) by virtue of an October 31, 2014 lease agreement between Brook and Ramaco. Ramaco is a successor in interest to SWC, which originally owned the surface and the mineral estate in the lands at issue.

Pursuant to a Warranty Deed dated June 28, 1954, SWC conveyed a parcel of surface property to Big Horn Coal Company (BHC). The 1954 Deed included a reservation of the

mineral estate to SWC, including the right to mine coal, as well as broad rights to use the surface as necessary or convenient for mining.

As a successor in interest under the 1954 Deed, Brook leases fee coal (owned by Ramaco) located in Sheridan County, Wyoming. On October 31, 2014, Brook applied to the WDEQ/LQD for a permit to mine the coal it leases. The WDEQ/LQD issued a letter on November 4, 2014, confirming the permit application, bearing a WDEQ/LQD file number of TFN 6 2/025, was deemed complete pursuant to Wyo. Stat. § 35-11-406. As set forth in the Mine Permit Application, Brook, through its lease from Ramaco, has the present right to enter onto, develop, mine, remove, and ship coal from the subject lands. Although there are other surface owners who have consented to Brook's plans, the surface of some of the lands upon which Brook also proposes to operate are owned by BHC and Padlock Ranch (Padlock). These parties have not consented to Brook's plans.

Notwithstanding the broad surface use rights Brook enjoys under the 1954 Deed, it undertook efforts to work cooperatively with both Padlock and BHC to reach an agreement on consent to Brook's mine plan and its reclamation plan. Unfortunately, after years of negotiating with both surface owners to secure their consent, neither company will cooperate.

Faced with two surface owners that refused—without a readily apparent or justifiable reason—Brook explained to the WDEQ/LQD that Brook did not need the consent of these landowners. Brook argued that the 1954 Deed already gave it the right to mine coal as well as the right to use the surface as is “necessary or convenient” to mine coal, which eliminated any consent issues. (Ex. A, 1954 Deed.) But after months of discussion with the WDEQ/LQD and the Wyoming Attorney General's office, the Attorney General himself told Brook to request an order in lieu of consent. Hence, Brook has filed this petition.

II. Relevant Facts

On October 31, 2014, Brook applied to the WDEQ/LQD for a permit to mine coal using surface mining techniques. As the EQC is aware, a mining permit is the certification that the tract of land described may be mined by an operator licensed to do so in conformance with a mining plan and a reclamation plan approved by the WDEQ/LQD. Brook currently holds a technically adequate mining plan and reclamation plan.

Brook's application contained all of the required elements for a permit under Wyoming's Environmental Quality Act. The WDEQ/LQD soon deemed the application complete and ready for technical review.

During the technical review, the WDEQ/LQD raised the issue of whether Padlock and BHC had consented to Brook's mine plan and reclamation plan. Padlock and BHC are both surface landowners as defined by Wyo. Stat. § 35-11-406(b)(xii). The WDEQ/LQD asserted that under the Environmental Quality Act, both surface owners must consent to Brook's mine and

reclamation plan before the WDEQ/LQD can advise Brook Mine in writing that the application is suitable for publication under Wyo. Stat. § 35-11-406(j).

Prior to this request from the WDEQ/LQD, Brook had engaged in good-faith negotiations with Padlock and BHC. Although Brook asserted consent from these landowners was not necessary in light of the 1954 Deed, it sought to cooperate with the surface owners in the interest of establishing a good working relationship.

By the time the consent issue was raised by the WDEQ/LQD, Brook had already provided copies of the mine and reclamation plans and requested the two landowners consent. Both refused. Despite that refusal, Brook did not—and still does not—believe it needed the surface owner consent from these two parties. And Brook told the WDEQ/LQD the same. In its Round 3 comment responses, Brook explained that the 1954 Deed made this issue irrelevant:

The Environmental Quality Act's (EQA) surface owner consent requirements allow surface owners to have input regarding new coal mines that could potentially affect their land. However, the right to consent or to withhold consent has limits. When a separate process gives the mineral estate owner broad, dominant rights to use the surface, the surface owner no longer has the right to withhold consent to proposed mining and reclamation plans. Indeed, under those circumstances, the surface owner has *no* interests left to protect. *WMYO Fuels, Inc. Edwards*, 723 P.2d 1230 (Wyo. 1986). In that scenario, the consent requirement of the EQA does not apply. *See id.*

Here, the surface owners (Padlock Ranch and Big Horn Coal) have no interests left to protect under the EQA. The clear wording of the 1954 Deed established that fact. Before Sheridan-Wyoming Coal and Big Horn Coal executed the 1954 Deed, Sheridan-Wyoming Coal already had the common law right to use the surface above its mineral estate. *Sanford v. Arjay Oil Co.*, 686 P.2d 566 (Wyo. 1984). Sheridan-Wyoming Coal had that right with or without the surface owner's consent. *See id.*; *A-W Land Co., LLC v. Anadarko E&P Co. LP*, No. 09-CV-02293-MSK-MJW, 2015 WL 4464414, at *3-4 (D. Colo. July 22, 2015). This is unequivocally true because, prior to the 1954 Deed, Sheridan-Wyoming Coal owned both the surface and the minerals. Thus, when Sheridan-Wyoming Coal decided to convey certain rights in the surface to Big Horn Coal, it enjoyed all the rights in the surface and exercised its ability to retain some of those surface rights.

(Ex. B, Round 4 Comment Response)

This response, however, did not satisfy the WDEQ/LQD. It sent Brook another round of comments directed at the same subject. In an effort to move a project forward that could bring hundreds of jobs to Wyoming, Brook asked the Attorney General to review the issues that his representative had identified for the WDEQ/LQD. And he agreed to such review.

After the Attorney General had reviewed the issues, he asked Brook to submit a more detailed explanation of its legal position and a comparison of similar permit requests that the WDEQ/LQD had issued. Brook provided this information. After further review, the Attorney General could not conclude that Brook's reserved surface use rights met the statutory definition of "consent" and instead informed Brook that it should request an order in lieu of consent from the EQC.

Following the Attorney General's decision, Brook received the WDEQ/LQD's notice that its permit application was still deficient without surface owner consent. (Ex. C, Round 5 Comments)

Brook realizes that the WDEQ/LQD's choice not to deny the permit may make a request for an order in lieu seem premature. But Brook has petitioned the EQC for help because: 1) the Wyoming Attorney General directed Brook to take this action; and 2) the Environmental Quality Act does not require the WDEQ/LQD to deny a permit before an order in lieu can become an option.

III. The Council should issue an order in lieu of consent.

The Environmental Quality Act mandates that the Council issue an order in lieu of consent when:

- the mining plan and the reclamation plan have been submitted to the surface owner for approval; and
- the mining plan and the reclamation plan is detailed so as to illustrate the full proposed surface use including proposed routes of egress and ingress; and
- the use does not substantially prohibit the operations of the surface owner; and
- the proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible; and
- the applicant has the legal authority to extract coal by surface mining methods

Wyo. Stat. § 35-11-406(b)(xii)(A)-(E).

Here, Brook believes the evidence will show that no one has disputed that these five elements are met. Consistent with the statute:

1) Brook submitted its mine and reclamation plans to Padlock and BHC for approval. (Ex. D, July 23, 2014 Letter to Ambre;¹ Ex. E, August 11, 2014 Letter to Padlock.)² Recently, Brook resent its updated mine and reclamation plans to Padlock and BHC for approval. (Ex. F, February 3, 2016 Letter to Lighthouse Resources, Inc.³; Ex. G, February 3, 2016 Letter to Padlock.) Neither BHC nor Padlock consented to Brook's mine plan and reclamation plan.

2) Brook's current mine plan and reclamation plan detail the full use of the surface and all routes of ingress and egress. (Ex. H Brook Mine Plan; Ex. I, Brook Reclamation Plan.) The Round 5 Technical Comments from WDEQ/LQD list no reasons for deficiency of the mining plan and reclamation plan, thereby deeming the mining plan and reclamation plan "technically adequate." (See Ex. C.)

3) Brook's mining operations will not substantially prohibit the operations of either BHC or Padlock. The mine plan sets forth the proposed use of the property for coal mining and is consistent with minimizing the impact upon existing surface operations.

4) By its explicit terms, Brook's reclamation plan will reclaim the surface as soon as feasibly possible. (See Ex. I)

5) Brook has the legal authority to mine coal. The 1954 Deed gives Brook ownership of the coal and the use of the surface as is "necessary or convenient" to mine that coal. (Ex. A.)

Although no one has notified Brook it disputes those five elements, Brook believes that any debate over the elements for an order in lieu will focus on whether or not Brook's mine and reclamation plan substantially prohibit the operations of Padlock and BHC. Brook believes and asserts that the evidence will show BHC has no surface operations that Brook's mine or reclamation plan will adversely affect. Indeed, BHC has an on-going reclamation of decades old mining on its surface, which is in its last stages of finalization. And even though Padlock has some surface ranching operations, Brook's proposed mine plan will not substantially prohibit those operations. Indeed, Brook has met with Padlock to assure them that mutual accommodation could be made for a continuation of their limited grazing operations.

IV. Brook requests an expedited hearing.

Brook requested WDEQ/LQD issue a permit almost 16 months ago. It has spent the last several months engaged in a back and forth with WDEQ/LQD and the Attorney General's office. At this stage, the consent issue is all that prevents WDEQ/LQD from putting the permit application forward for public comment. This is an important project that will bring many new jobs and significant revenues to Wyoming. In light of the delays experienced thus far in the

¹ Ambre is the parent company of BHC.

² These letters come from Ramaco, which is the parent company of Brook.

³ On April 23, 2015, Ambre changed its name to Lighthouse Resources, Inc.



March 16, 2016

Page 6

project and the importance of making meaningful progress, Brook respectfully requests the Council set an expedited hearing on this petition.

V. Conclusion

The Environmental Quality Act exists to balance the rights of mineral owners and surface owners. It does not exist to give surface owners veto power over mining projects that will bring hundreds of jobs and substantial revenue to Wyoming. Likewise, it does not exist to give surface owners the leverage to extract large dollar amounts from mineral owners. WDEQ/LQD has previously approved permits for applicants with rights similar to those Brook already has. But here, Padlock and BHC have both attempted to use the consent provisions to extract ransom payments from Brook.

The EQC has the authority to prevent ransom from being required by granting Brook an order in lieu of consent. Brook can and will prove that all of the elements for an order in lieu of consent are met. To that end, Brook requests a hearing before the Council to present evidence that proves the EQC should issue an order in lieu of consent.

Sincerely,

Isaac N. Sutphin, P.C.

INS:jk
Enclosures

cc: Big Horn Coal Company
Padlock Ranch

8558194_4