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BIG HORN COAL COMPANY

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

IN RE BROOK MINE APPLICATION)
) Civil Action No. 16-1601
)

**RESPONDENT BIG HORN COAL COMPANY'S RESPONSE TO
PETITIONER'S MOTION TO CONFIRM JURISDICTION**

Petitioner's Motion to Confirm Jurisdiction grossly contorts Respondent Big Horn Coal Company's (BHC) position as stated in its response to the Petition for an Order in Lieu of Consent (the Petition). There is a big difference between asserting that Petitioner has overstated its legal rights to use BHC surface under deed reservation language being litigated before the district court, (BHC Response to the Petition at pp. 5-6), and asserting that the Environmental Quality Council (EQC) is without jurisdiction to determine whether Petitioner has met its burden of proving one of the statutory elements in support of the Petition. BHC's response to the Petition cannot fairly be read to challenge the EQC's jurisdiction in this matter.

The EQC certainly has jurisdiction to determine whether Petitioner has met its burden of establishing, pursuant to W.S. § 35-11-406(b)(xii)(E), that it “has the legal authority to extract coal by surface mining methods,” and what constitutes the requisite “legal authority.”¹ With regard to Petitioner’s “legal authority,” BHC has never disputed that Petitioner holds coal rights underlying BHC surface lands. BHC does, however, dispute Petitioner’s bald assertion it enjoys broad surface use rights under “the 1954 Deed” (Petition, p. 2), which Deed establishes Brook’s “legal authority to mine coal” under W.S. § 35-11-406(b)(xii)(E) (Petition, p. 5).

It was Petitioner who invoked the court’s jurisdiction to determine Petitioner’s legal rights to surface use to mine coal under the 1954 Deed when it filed a complaint in the district court on November 5, 2014, seeking a declaratory judgment that Petitioner “owns the present right under the 1954 Deed to go onto the BHC Lands and to engage in and conduct all necessary coal mining activities pursuant to the pending Brook Mine Plan Application” See Complaint at p. 8, *Brook Mining Company, LLC v. Big Horn Coal Company*, Civil Action No. CV 2014-372 (Fourth Judicial District Court, Sheridan

¹ By Petitioner’s own admission, the Wyoming Attorney General rejected Petitioner’s argument that it “did not need the consent of [BHC]” because “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.” (Petition, p. 2.) In rejecting Petitioner’s argument, the Attorney General advised Petitioner “to request an order in lieu of consent.” (Petition, pp. 2, 4.) “Legal authority” must, therefore, require something other than surface landowner consent as contemplated by W.S. § 35-11-406(b)(xii).

County). In answering Petitioner's amended complaint,² and in support of BHC's Motion for Summary Judgment, BHC ardently disputed the surface rights Petitioner claims under the 1954 Deed and asserted that BHC has the exclusive use of the surface lands at issue pursuant to BHC's rights under the 1983 Release Agreement in which Sheridan-Wyoming Coal Company, Petitioner's predecessor in interest, expressly granted the right to BHC to leave intact any and all permanent structures, stockpiles, or spoils materials placed, or to be placed in the future, on specified portions of land conveyed to BHC in the 1954 Deed. As stated in BHC's response to the Petition, the district court denied the parties' respective motions for summary judgment and the matter of determining Petitioner's and BHC's respective surface rights under the 1954 Deed and 1983 Release Agreement remains squarely before the court. (BHC Response to Petition at p. 6). Indeed, contrary to Petitioner's reliance on statements made in BHC's long-since-denied motion to dismiss the litigation,³ Petitioner and BHC recently reported to the District Court they have agreed to stay the litigation pending final resolution of all regulatory proceedings and any appeals therefrom.

Having invoked the court's jurisdiction, Petitioner cannot now be allowed to forum shop by relying on the 1954 Deed as its "legal authority" under W.S. § 35-11-406(b)(xii)(E), in hope that the EQC will interpret the 1954 Deed more to Petitioner's advantage than did the district court when it denied Petitioner's motion for summary

² BHC answered Petitioner's Amended Complaint for Quiet Title and Declaratory Judgment filed with the District Court, Fourth Judicial District, on January 23, 2015.

³ The District Court denied BHC's Motion to Dismiss on January 21, 2015.

judgment. More important, while the EQC has express statutory authority to determine whether Petitioner has satisfied W.S. § 35-11-406(b)(xii)(E), such statutory authority does not extend to the legal interpretation of real property conveyance documents like the 1954 Deed and the 1983 Release Agreement. The EQC is limited in authority to the powers legislatively delegated. *Exxon Mobil Corp. v. Wyoming Dept. of Revenue*, 266 P.3d 944, 951 (Wyo. 2011). Because agencies are creatures of statutes, they must find within the statutes creating them, justification for the exercise of any authority which they claim. *Id.* Under W.S. § 35-11-112, the legislature determined that the EQC “shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the [department of environmental quality] or its air quality, land quality, solid and hazardous waste management or water quality divisions.” The EQC’s statutory authority does not extend to the application of Wyoming common law to interpret deeds or assignments. The courts regularly decide such issues.

It is for these reasons that BHC asserted in its response to the Petition that Petitioner has overstated the scope of its legal authority under the 1954 Deed. The EQC’s determination of whether Petitioner has otherwise met its burden of proving it has the required “legal authority” under W.S. § 35-11-406(b)(xii)(E) is independent of the court’s interpretation of the 1954 Deed and 1983 Release Agreement. Petitioner’s Motion to Confirm Jurisdiction has no basis in fact or law, is a waste of EQC resources, and should be denied.

Respectfully submitted June 10, 2016.

By


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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2016, I served a true and correct copy of **Big Horn Coal Company's Response to Petitioner's Motion to Confirm Jurisdiction** by electronic filing with the Environmental Quality Council and by United States mail, postage prepaid and addressed to the following:

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