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February 3, 2016

VIA OVERNIGHT DELIVERY

Bjarne Kristiansen, PG
Natural Resources Program Principal
Wyoming Department of Environmental Quality
Land Quality Division- District III
2100 West 5th Street
Sheridan, WY 82801

Re: Brook Mine Permit Application
Response to Round 4 Adjudication Comments
TFN 6 2/025

Dear Mr. Kristiansen:

Thank you for the opportunity to respond to the Department of Environmental Quality's (DEQ) latest round of comments on the Brook Mine Permit Application. The Applicant received the Round 4 Adjudication Comments on January 14, 2016. The comments focused on surface owner consent and concluded that the Permit Application is still deficient. As discussed below, the consent of surface owners is a non-issue and should not impede the next stage of the permit process. Based on the following, we request the permit application be deemed technically adequate and, pursuant to DEQ policy and procedure, put forward for public comment as soon as possible.

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*

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Oil Co., 686 P.2d 566 (Wyo. 1984).[1] 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.

In conveying some of the surface rights to Big Horn Coal, Sheridan-Wyoming Coal created a **new** broad surface use right (to the extent those rights were associated with development of its mineral estate) that expanded Sheridan-Wyoming Coal's rights beyond what the common law would allow for a typical mineral estate holder. *Burnell v. Roush*, 404 P.2d 836, 839-40 (Wyo. 1965) (holding that a reservation "creates a new right, a thing not in esse.") Unlike the typical surface use rights under the common law and the surface rights that existed when the mineral and surface estates were unified (prior to the 1954 Deed), the new right the 1954 Deed created was separate from the other surface rights. *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 important because the plain language of the Deed includes not only the common law right to use whatever is "necessary," but whatever is determined to be "convenient" to the owner of the mineral estate. To conclude otherwise would strip the entire meaning from the 1954 Deed contrary to well-established Wyoming law.

Unlike the customary sticks in the bundle of property rights a surface owner receives, the 1954 Deed explicitly reserved access rights to the mineral estate holder and effectively recognized a new stick. This new right applied only to Sheridan-Wyoming Coal and its successors' use of the surface for coal mining. The surface owners, Big Horn Coal and later Padlock Ranch, never owned any interest in this stick; once the mineral owner determined to develop its holdings, it was entitled to use as much of the surface as "necessary or convenient" for its project. Indeed, the surface owners cannot even contend that their right to consent or withhold consent is not subject to termination because such a right never existed in the surface owner. Without that right, the current surface owners' consent to the Brooks mining and reclamation plans are completely irrelevant.

In short, the 1954 Deed gave Sheridan-Wyoming Coal and its successors a permanent, exclusive easement for coal mining. An easement grants an "interest in land which entitles the easement holder to a limited use or enjoyment over another person's property." *Leeks Canyon Ranch, LLC v. Callahan River Ranch, LLC*, 327 P.3d 732, 737-38 (Wyo. 2014). Parties create easements through documents, such as deeds. *Id.* Here, the reservation in the 1954 Deed created an interest in the surface that allowed a specific, limited use of the surface for coal mining—an

[1] The common law right entitles the mineral estate owner to use the surface as is "reasonably necessary" to access the underlying minerals. *Id.* at 572.

easement. Although the Deed did not define the scope of the easement, it did not need to because later coal mining operations and the permitting process (including approval of the mining and reclamation plans) would do that. *See Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 854-59 (Wyo. 1996). The current permit explains the necessary and convenient coal mining operations that must take place and, as a result, defines the scope of the easement.

Because Sheridan-Wyoming Coal and its successors have an easement over the surface property for coal mining, those rights "are paramount to the extent of the easement and include all rights incident or necessary to its proper enjoyment." *WMYO Fuels, Inc.*, 723 P.2d at 1236. For Brook to enjoy its easement, the Department cannot require separate surface owner consent to the mining and reclamation plans. Otherwise, the easement will cease to be paramount; instead, it will become subject to the whims of those surface owners who granted Brook the easement with full knowledge that the dominant mineral estate would someday use the surface for mining coal. The Court in *WYMO* rejected this outcome. It noted that the consent provisions in the Environmental Quality Act could not defeat the rights a party may acquire through a process like condemnation or agreement. *Id.* at 1236. Put simply, allowing Padlock or Big Horn Coal to insist on consent under the Environmental Quality Act would amount to an improper taking of Brook's dominant surface use rights. Ironically, these surface owners are attempting to extort additional compensation from Brook for the privilege of using the surface. However, Big Horn Coal's (and by conveyance, Padlock Ranch's) limited surface rights never included the power to exclude Brook, so long as Brook's use was limited to "necessary or convenient" to develop its mineral estate.

In an analogous case, the Superior Court of Pennsylvania held that a mineral owner who had a deed that granted it the right to use the surface as was "necessary or convenient" did not need landowner consent to acquire a permit. *See Sedat, Inc. v. Fisher*, 420 Pa.Super. 469 (Sup. Ct. Pa. 1992). The Superior Court explained that the language in the deed eliminated any need for the mineral estate owner to acquire separate consent from the surface owner. *Id.* at 475-76. "The Legislature did not contemplate requiring an entity such as Sedat to obtain the consent of the surface landowner to conduct mining activities in an estate in land which it already owned by virtue of a duly recorded deed of severance." *Id.* at 478. The Court found that this operated as implied consent to the mineral estate's operations and met the requirements of Pennsylvania's version of the Environmental Quality Act.

Although Pennsylvania uses a slightly different statutory scheme than Wyoming, *WYMO Fuels* makes this a distinction without a difference. *WYMO Fuels* holds that certain events can substitute for surface owner consent or eliminate the surface owner's right to consent. *WMYO Fuels, Inc.*, 723 P.2d at 1235-37. In short, the Environmental Quality Act does not require form over substance. If a separate process—condemnation or otherwise—gives the mineral owner all of the rights needed to mine, then the surface owner does not have any interest left to protect.

In this case, the 1954 Deed reserved to Sheridan-Wyoming Coal and its successors (Brook) all of the rights needed to mine coal. This is consistent with the fact that Sheridan-Wyoming Coal owned all of the rights to the surface estate and the mineral estate prior to the 1954 Deed. While Big Horn Coal bargained to purchase some of Sheridan-Wyoming Coal's surface rights, it did not do so at the expense of the coal estate. To find otherwise would effectively strand a valuable natural resource. Put simply, the right to consent or to withhold consent was not bargained for in 1954 and Brook should not be forced to purchase consent that it already possesses. The specific surface use reservation from the 1954 Deed means either: 1) the Deed serves as the surface owner's consent to Brook's mining operations; or 2) the surface owner's right to consent (or to withhold consent) remained exclusively with Brook's predecessor, Sheridan-Wyoming Coal. No matter the conclusion, the 1954 Deed eliminated any need for Brook to obtain (perhaps at great expense) any additional consent to its mining and reclamation plans.

All of this means that Brook has acquired all rights necessary for the Wyoming Department of Environmental Quality to move its permit forward to the public comment stage. That process will allow surface owners to raise concerns about any interests they claim need protection —should they choose to do so. But that burden falls on them: the Department should not serve as a proxy to protect interests that do not exist.

Finally, it is important to note that Brook is simply asking DEQ to take steps consistent with DEQ's own permit approval process. Based on a quick review of publically available Permit Adjudication Files, Brook has identified several examples of permit applications being put to public comment (and ultimately being approved) without formal DEQ Form 8 landowner consents. In many cases, applicants demonstrate surface owner consent by attaching deeds or other documents of conveyance reserving or granting rights to use the surface to develop the mineral estate. In fact, like the 1954 Deed, some of the examples include deeds with nearly identical "necessary or convenient" language. These examples illustrate the very process Brook is requesting. Although the landowner consent sections of the Permit Adjudication Files are somewhat voluminous, I have enclosed an executive summary and supporting documents for your review.

Thank you for your attention to this important matter. For the reasons set forth herein, Brook will not be providing any additional evidence of landowner consent to its mining and reclamation plans. The information provided herein, as well as the materials and analysis previously submitted in response to earlier DEQ Comments, is adequate to establish additional landowner consent is not necessary. Brook respectfully asks that DEQ deem the Permit

Application complete and immediately put the Application forward for public comment. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Isaac N. Sutphin, P.C.
a Partner of Holland & Hart LLP

Enclosures

cc: Andrew Kuhlmann (w/o enclosures)
Wyoming Department of Environmental Quality (Cheyenne) (w/ enclosures)