



plan revisions dated August 26, 2016, to its post hearing brief. The Council did not consider those mine plan revisions. The Council subsequently deliberated on this matter on September 28, 2016.

The Council, having heard and considered all the evidence in this case and being fully advised, pursuant to the Wyoming Administrative Procedure Act, Wyo. Stat. Ann. § 16-3-110, unanimously (6-0) finds and concludes as follows:

## **II. JURISDICTION**

This case arises from a request from Brook Mine to the Council for the issuance of an order in lieu of surface owner consent. Brook Mine was unable to obtain surface owner consent to its mining plan and reclamation plan from Padlock Ranch and Big Horn Coal. Under Wyo. Stat. Ann. § 35-11-406(b)(xii), if consent cannot be obtained as to the mining plan or reclamation plan or both, Brook Mine may request a hearing before the Council. Accordingly, this matter is properly before the Council and the Council has jurisdiction over this matter and the parties.

## **III. PRELIMINARY MATTER**

### **A. Voluntary Dismissal of Padlock Ranch**

Following the contested case, Brook Mine and Padlock Ranch, on September 27, 2016, entered into a confidential surface use agreement and Padlock Ranch signed a Form 8, Surface Landowners Consent. Based upon the surface use agreement and executed Form 8, Brook Mine, on October 5, filed an unopposed motion to dismiss Padlock Ranch with prejudice from the proceeding. On October 12, 2016, the Council granted the motion. (*See Order Granting Unopposed Motion to Dismiss Respondent Padlock Ranch Company with Prejudice*). Padlock Ranch is no longer a party to this matter—this order only applies to Big Horn Coal.

#### IV. STATEMENT OF THE CASE/ISSUES AND CONTENTIONS

Brook Mine is petitioning the Council for an order in lieu of consent under Wyo. Stat. Ann. § 35-11-406(b)(xii) after it could not obtain Big Horn Coal's consent. Under that statute, if consent cannot be obtained from a surface owner as to the mining plan and reclamation plan, the Council shall issue an order in lieu of consent if it finds:

- (A) That the mining plan and the reclamation plan have been submitted to the surface owner for approval;
- (B) That 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;
- (C) That the use does not substantially prohibit the operations of the surface owner;
- (D) The proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible;
- (E) For surface coal mining operations, that the applicant has the legal authority to extract coal by surface mining methods.

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

This dispute centers on whether Brook Mine has proven all five elements. Brook Mine claims that it has proved all five elements, and as a result, the Council must issue an order in lieu of consent against Big Horn Coal. Big Horn Coal disagrees and asserts that Brook Mine has failed to meet its burden on elements two through five (B through E). Big Horn Coal concedes that Brook Mine submitted to Big Horn Coal its mining plan and reclamation plan.

## V. FINDINGS OF FACT

1. Brook Mine is the owner of the mineral rights under the surface of lands owned by Big Horn Coal. *Brook Mine Exhs. 3, 7; Transcript – Barron testimony, pp. 108-09; Transcript – Sweeney testimony, p. 272, volume II, p. 29.*

2. On October 31, 2014, Brook Mine submitted an application for a permit to mine coal under lands owned by Big Horn Coal to the Department of Environmental Quality (DEQ). *Brook Mine Exhs. 7, 23; Transcript – Barron testimony, pp. 33-34.*

3. Brook Mine sent a copy of the draft mine and reclamation plans to Big Horn Coal in October 2014 and sent the revised current mine and reclamation plans to Big Horn Coal on February 3, 2016. *Brook Mine Exhs. 1, 2, 5, 7; Transcript – Barron testimony, pp. 51-53.* Big Horn Coal received those current plans. *Brook Mine Exh. 7; Transcript – Barron testimony, pp. 52-53; Transcript – Sweeney testimony, volume II, pp. 5, 41.*

4. At the same time, Brook Mine requested surface owner consent from Big Horn Coal. *Brook Mine Exh. 7.*

5. Big Horn Coal has refused to give its consent to Brook Mine's plans.

6. In October 2015, Brook Mine provided the current mine and reclamation plans to DEQ. *Transcript – Barron testimony, p. 52; Brook Mine Exhs. 1, 2.*

7. The purpose of the mine plan is to provide an overall description of how Brook Mine is going to conduct mining activities. *Transcript – Barron testimony, p. 54.*

8. The purpose of the reclamation plan is to explain how Brook Mine is going to restore disturbed areas to equal or better use. *Transcript – Barron testimony, pp. 54-55.*

9. DEQ reviewed Brook Mine's permit application, including the plans, for completeness. *Transcript – Kristianson testimony, pp. 148-49.*

10. As part of its completeness review, DEQ determines whether all of the application components required by statute and rule have been provided by the applicant. *Transcript – Kristianson testimony, pp. 148-49.*

11. Following DEQ's determination that a permit application is complete, DEQ then begins its internal analysis of the permit application for its technical adequacy. The technical analysis takes place during a series of rounds where DEQ examines the permit application, combines all of its comments, suggestions, and objections, and sends those to the applicant who then responds to DEQ. As a result, the applicant may update the permit, address deficiencies if they exist, and refine the plans to meet DEQ's rules and statutes. *Transcript – Kristianson testimony, pp. 149-51.*

12. When DEQ reviews an application for completeness and technical adequacy, DEQ looks at the mining and reclamation plans on a detailed basis. *Transcript – Kristianson testimony, pp. 179-80.*

13. DEQ has determined that Brook Mine's mine and reclamation plans contain all the elements and components necessary for a complete application. *Brook Mine Exhs. 1, 2, 37; Transcript – Barron testimony, pp. 56-60.*

14. The mine and reclamation plans have gone through five rounds of technical review by DEQ. During this review period, DEQ requested Brook Mine correct deficiencies in the plans, and at times, asked Brook Mine to provide more detail or less detail. *Brook Mine Exh. 22; Transcript – Barron testimony, pp. 63-65; Transcript – Kristianson testimony, p. 151.*

Based upon DEQ's comments and review, Brook Mine made changes to the plans. *Transcript – Barron testimony, p. 66.*

15. In reviewing Brook Mine's application, DEQ utilized eleven experts to conduct the internal analysis. *Transcript – Kristianson testimony, p. 149.* As part of that internal analysis, DEQ's experts compared Brook Mine's permit application against Wyoming's statutes, rules, standard procedures, procedures that are utilized currently in the industry, and procedures utilized by experts in the industry. The analysis also looked at vegetation, wildlife, geology, hydrology, the mine plan, and the reclamation plan. *Transcript – Kristianson testimony, pp. 149-50.*

16. Following five rounds of review and comment, DEQ only noted one final deficiency—surface owner consent to the mine and reclamation plans. *Transcript – Barron testimony, p. 66.* DEQ has sufficient detail concerning the mine and reclamation plans. *Transcript – Kristianson testimony, pp. 151-52.*

17. The mine plan is broken up into roughly twenty-eight separate sections. Those sections, in part, include specific topics or headings such as “general description of mining operations”, “mine facilities”, “roads, railroads and other transport systems”, “mining methods, schedules, and assessments”, “mining hydrology”, “signs, markers and buffer zones”, “blasting plan and schedule”, and “protection of other resources, structures and surfaces”. *Brook Mine Exh. 1.*

18. Each heading contains a general description which may ultimately refer to exhibits, tables, or addenda which contain much greater detail than the general description. *Brook Mine Exh. 1; Transcript – Barron testimony, pp. 67-69.*

19. The section titled “roads, railroads and other transport systems” discusses the roads on the mine network and explains the routes of ingress and egress. *Brook Mine Exh. 1; Transcript – Barron testimony, pp. 69-70.*

20. Brook Mine’s mine plan:

- a) shows the location of the mining pits and trenches;
- b) shows the location of the overall disturbance area on Big Horn Coal’s land;
- c) shows the sequence of how coal will be mined;
- d) shows the location of the haul road network;
- e) describes the facilities;
- f) shows how and where topsoil will be disturbed;
- g) shows the placement of the overburden; and
- h) shows the years and sequencing of all mining operations.

*Brook Mine Exh. 1; Transcript – Barron testimony, pp. 72-87; Transcript – Kristianson testimony, pp. 164-65; Transcript – Sweeney testimony, volume II, pp. 37-38.*

21. Brook Mine’s mine plan will not disturb Big Horn Coal’s shop, bridge, and rail siding. *Brook Mine Exh. 1; Transcript – Barron testimony, p. 87.*

22. The reclamation plan is broken up into roughly seventeen separate sections. Those sections, in part, include specific topics or headings such as “postmining land use”, “contouring plan for affected lands”, “spoil replacement”, “topsoil replacement”, “revegetation practices”, “wildlife restoration”, “final hydrologic restoration”, “wetland mitigation”, “reclamation of mine facilities, road, and railroads”, and “reclamation schedule”. *Brook Mine Exh. 2.*

23. The reclamation plan:

- a) shows how soil will be replaced;
- b) shows how pits will be filled in;
- c) shows how the land will be revegetated; and
- d) shows how sampling will be done to ensure compliance with post-mining land use reclamation criteria.

*Brook Mine Exh. 2; Transcript – Barron testimony, pp. 87-91.*

24. Based upon Brook Mine's reclamation plan, on average, Brook Mine will reclaim the trenches and replace topsoil in those areas within about a two-year period. The total length of time before the land is completely reclaimed could take approximately five years, however, Brook Mine will try to reclaim as they mine. *Transcript – Barron testimony, pp. 103-05.*

25. DEQ has expressed no concerns regarding the speed of Brook Mine's reclamation. *Transcript – Barron testimony, p. 107.* The time line in Brook Mine's reclamation plan is acceptable to DEQ. *Transcript – Kristianson testimony, p. 164.* Brook Mine's reclamation plan is designed to reclaim the surface as soon as feasibly possible. *Transcript – Kristianson testimony, p. 165.*

26. The methods used by Brook Mine to extract its coal are necessary or convenient. *Transcript – Barron testimony, pp. 107-108.*

27. In the permit application area, Big Horn Coal has a shop, rail spur, and load-out facility. Big Horn Coal also leases some of its lands for grazing. *Transcript – Barron testimony, pp. 101-103; Transcript – Sweeney testimony, p. 275.*



28. Big Horn Coal has no current mining activity in the permit area because it is in full reclamation. *Transcript – Barron testimony, p. 101; Transcript – Sweeney testimony, p. 275, volume II, p. 40.*

29. Big Horn Coal's reclamation plan that is on file with DEQ requires reclamation of its rail spur, the shop, and the load-out facility. *Transcript – Sweeney testimony, p. 275, volume II, pp. 45-46.* Under its reclamation plan, Big Horn Coal is required to demolish its shop, demolish its rail spur, and demolish its load-out facility. *Transcript – Sweeney testimony, volume II, p. 37.*

30. Big Horn Coal has been in contact with DEQ about using its lands that are currently in reclamation for future mining of a state coal lease, however, Big Horn Coal has not amended its current mine or reclamation plan. *Transcript – Sweeney testimony, pp. 275-76.*

31. Big Horn Coal has had discussions with DEQ about changing the zoning of its property where the shop is located to industrial, however, Big Horn Coal has not filed an application with Sheridan county to change the zoning in that area. *Transcript – Sweeney testimony, volume II, pp. 46-48.*

32. Big Horn Coal is utilizing its shop for industrial activities but it has not submitted a post-mining land use change with DEQ. *Transcript – Barron testimony, p. 101; Transcript – Sweeney testimony, pp. 276-77.*

33. In Brook Mine's mine plan, there is an overburden pile that is located on one of the roads that the shop tenant might use when accessing the shop, however, Brook Mine has left room to either move the road or move the stockpile so the tenant could continue to use the shop. *Transcript – Barron testimony, pp. 101-03.*

34. Brook Mine's mine plan also does not impede Big Horn Coal's rail siding or bridge that is utilized for some of its grazing leases. *Transcript – Barron testimony, p. 102.*

35. Brook Mine's mine plan will affect a portion of Big Horn Coal's grazing leases, however, most of the grazing leases will continue. The grazing will not be able to continue in the pit area, any ramp or road that leaves the pit, and where topsoil has been striped and removed. *Transcript – Barron testimony, pp. 102-03.*

36. In 1954, the Sheridan Wyoming Coal Company, through a warranty deed, granted Big Horn Coal the surface rights to the land at issue in this matter, however, Sheridan Wyoming Coal Company reserved "unto itself, its successors and assigns all gas, oil, coal and other minerals contained in all of the above described lands, together with the right to mine, explore, drill, extract and remove the same, and including the right to use so much of the surface of said lands as may be necessary or convenient in order to enable the Grantor, its successors and assigns to mine, explore, drill, extract and remove said oil, gas, coal and other minerals." *Brook Mine Exh. 3; Transcript – Barron testimony, p. 109.*

37. Brook Mine is the successor and assign to the Sheridan Wyoming Coal Company in the warranty deed. *Transcript – Barron testimony, pp. 109, 143-44; Transcript – Atkins, p. 184; Transcript – Sweeney testimony, p. 272.*

## VI. CONCLUSIONS OF LAW

### A. Principles of Law

38. Paragraphs 1 through 37 of the findings of fact are fully incorporated herein.

39. This matter is properly before the Council upon Brook Mine's petition for an order in lieu of consent under Wyo. Stat. Ann. § 35-11-406(b)(xii).

40. Wyoming Statutes § 35-11-406(b)(xii) provides that:

If consent cannot be obtained as to the mining plan or reclamation plan or both, the applicant may request a hearing before the environmental quality council. The council shall issue an order in lieu of consent if it finds:

(A) That the mining plan and the reclamation plan have been submitted to the surface owner for approval;

(B) That 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;

(C) That the use does not substantially prohibit the operations of the surface owner;

(D) The proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible;

(E) For surface coal mining operations, that the applicant has the legal authority to extract coal by surface mining methods.

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

41. When analyzing the language of a statute, the “paramount consideration is the legislature’s intent as reflected in the plain and ordinary meaning of the words used in the statute.” *Horse Creek Conservation Dist. v. State ex rel. Wyo. Att’y Gen.*, 2009 WY 143, ¶ 14, 221 P.3d 306, 312 (Wyo. 2009) (citing *Krenning v. Heart Mountain Irrigation Dist.*, 2009 WY 11, ¶ 9, 200 P.3d 774, 778 (Wyo. 2009)). “A statute is clear and unambiguous if its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability.” *Id.* “When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction.” *Cheyenne Newspapers, Inc. v. Building Code Bd. of App. of City of Cheyenne*, 2010 WY 2, ¶ 9,

222 P.3d 158, 162 (Wyo. 2010) (quoting *BP Am. Prod. Co. v. Dep't of Revenue*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo. 2005)).

42. The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof. *JM v. Department of Family Services*, 922 P.2d 219, 221 (Wyo. 1996). The normal standard of proof in administrative hearings is the preponderance of the evidence standard. *Id.* at 223.

43. In this case, Brook Mine, the proponent of the order in lieu of consent, has the burden of proof and the standard of proof is the preponderance of the evidence.

#### **B. Applications of Principles of Law**

44. The Council finds and concludes that it has jurisdiction over this matter under Wyo. Stat. Ann. § 35-11-406(b)(xii).

45. As part of Brook Mine's petition, the Council is required to determine whether Brook Mine has proven, by a preponderance of the evidence, all five elements in Wyo. Stat. Ann. § 35-11-406(b)(xii)(A) through (E).

46. The Council finds and concludes that based upon the testimony and exhibits provided during the contested case, Brook Mine has proven, by a preponderance of the evidence, all five elements.

47. The Council finds that Brook Mine has proved the first element—that its mining and reclamation plans have been submitted to Big Horn Coal for approval. Big Horn Coal concedes this fact.

48. The Council finds that Brook Mine has proved the second element—that its mining and reclamation plans are detailed so as to illustrate the full proposed surface use including proposed routes of egress and ingress.

49. Big Horn Coal contends that Brook Mine’s plans are not detailed to illustrate the full proposed surface use, however, the undisputed facts prove the opposite. The plans:

- show the location of the mining pits and trenches;
- show the location of the overall disturbance area on Big Horn Coal’s land;
- show the sequence of how coal will be mined;
- show the location of the haul road network;
- describe the facilities;
- show how and where topsoil will be disturbed;
- show the placement of the overburden and topsoil;
- show the years and sequencing of all mining operations;
- show how soil will be replaced;
- show how pits will be filled in;
- show how the land will be revegetated; and
- show how sampling will be done to ensure compliance with post-mining land use reclamation criteria.

50. The Council finds that Brook Mine has proved the third element—that its use does not substantially prohibit the operations of Big Horn Coal.

51. Big Horn Coal claims that Brook Mine’s use of its land will substantially prohibit its operations, specifically, the renting of its shop, renting of its rail spur, and the grazing leases.

However, Brook Mine's use of the lands will not substantially prohibit Big Horn Coal's operations. Big Horn Coal's reclamation plan that is on file with DEQ requires Big Horn Coal to reclaim its rail spur, the shop, and the load-out facility—not rent them out. Under its current reclamation plan, the only operations Big Horn Coal is authorized to conduct is to demolish the shop, demolish the rail spur, and demolish the load-out facility. Further, even if those operations were authorized, Brook Mine's use would still not substantially prohibit them. Grazing can continue on other parts of Big Horn Coal's surface.

52. Big Horn Coal claims that it plans to change its reclamation plan and the current zoning to allow future industrial operations on its lands, however, Big Horn Coal provided no evidence other than unsupported statements. The Council gives no weight to Big Horn Coal's testimony about its possible future operations because the testimony relies on too many "what ifs" and speculation. The Council is required under the statute to evaluate Big Horn Coal's current operations, not future operations. Brook Mine's use will not substantially prohibit Big Horn Coal's operations.

53. The Council finds that Brook Mine has proved the fourth element—that Brook Mine's proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible. Brook Mine's reclamation plan is designed to reclaim the surface as soon as feasibly possible. DEQ has expressed no concerns about the speed of Brook Mine's reclamation plan.

54. The Council finds that Brook Mine has proved the fifth element—that it has the legal authority to extract coal by surface mining methods. The 1954 warranty deed grants Brook

Mine the legal authority to extract coal by surface mining methods under Big Horn Coal's lands.  
Big Horn Coal concedes that Brook Mine is the owner of the coal under its lands.

**VII. ORDER**

**IT IS HEREBY ORDERED** that Brook Mine's petition for an order in lieu of consent as to its mining plan and reclamation plan is granted and issued against Big Horn Coal.

**ENTERED** this 17<sup>th</sup> day of November, 2016.



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Aaron Clark, Hearing Examiner  
Environmental Quality Council

