

objections to Brook’s application, including Big Horn’s objection, the Council decided that before it has jurisdiction to hear a contested case, an objector must request a hearing. The Council’s decision means that a hearing request filed with the Council must occur on the same timetable as a request for an informal conference with the DEQ under Section 406(k). Big Horn’s request does not meet that timetable; so the Council has no jurisdiction to hear it. *See* Council’s Order of Dismissal, 2 filed today, February 22, 2017 in Docket 17-4801 (Ex. A).

Even if Big Horn had made a timely request, it had no right to make one. Big Horn promised that if Brook sought to develop a mine where Brook now seeks to, Big Horn would not “oppose any such mine plan before any governmental agency and will take no action, direct or indirect, to induce any federal, state, or local agency to disapprove or otherwise object to such mine plan.” (Ex. A, 1983 Lease Release Agreement, 2.) Big Horn has broken that promise twice. First, when it refused to consent to Brook’s mine plan and opposed Brook before this very Council. And now when it objected to Brook’s permit application. Big Horn’s strategy has become clear—convince state agencies to deny or at least needlessly delay Brook’s permit application. These efforts fly in the face of Big Horn’s contractual duties and are the opposite of what Big Horn promised 34 years ago. The time has come to enforce Big Horn’s promise.

ARGUMENT

I. Big Horn’s request for a contested case hearing is untimely.

Under the Act, the public had 30 days after the final publication date of Brook’s permit application to object or comment. Wyo. Stat. Ann. § 35-11-406(j), (k). Section 406(k) allows someone who comments or objects to request an informal conference with the DEQ Director. *Id.* That request must occur within the 30-day statutory period because the informal conference with the director shall take place within 20 days “after the final date for filing objections....” *Id.* at (k); DEQ Rules of Practice and Procedure Ch. 3 § 3.

Because the Council decided that an objector must request a contested case hearing to get one, the same deadlines and procedures in Section 406(k) apply. (Ex. A, 2.) Section 406(k) creates deadlines to ensure the permit application process moves forward in a timely manner. Thus, whether requesting an informal conference or a public hearing, the deadline is the same.

But Big Horn did not meet this deadline. (Ex. A, 2.) Brook's final day of publishing its permit application was December 27, 2016. The public had until January 27, 2017 to object or comment. Big Horn objected within that time period and requested an informal conference with the director. But Big Horn waited until February 15, 2017 to request a contested case hearing—19 days after the deadline. (Big Horn's Jurisdiction Brief, 5.) Even that request was contingent on the DEQ Director denying a renewed request for an informal conference, a procedure not set out in statutes or regulations. Simply put, Big Horn did not request a contested case within 30 days of the final publication date. Their Petition is untimely and should be dismissed.

Big Horn may contend that the statute does not set a deadline to request a contested case. That's the problem. The statute contemplates either an informal conference or a hearing within 20 days of the final date to file objections. Although the Council decided that the statute also requires an objector request a contested case before the Council has jurisdiction, that process must follow the deadlines set forth in the statute because the Council has no authority to create new procedures or deadlines not already provided in the statute. *Amoco Production Co. v. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000) (explaining an agency's power depends upon statutes, so "they must find within the statute warrant for the exercise of any authority which they claim.") Big Horn asked for this process and now must live with the consequences.

II. Big Horn has no right to a contested case hearing.

It does not matter if Big Horn met the deadline for requesting a contested case because Big Horn cannot request one. Doing so violates its obligations to Brook. As the Council knows

from the Order in Lieu of Consent Hearing and discussed on September 28, 2016, Big Horn agreed not to oppose any mine plan before a governmental agency and take no steps to get a state agency to disapprove of the mine plan when it executed the 1983 Lease Release Agreement. (Ex. B, 2.) But that is exactly what Big Horn has done. Big Horn's objection letter states it "feels strongly that the Brook Mine permit application should not be approved or deemed technically complete." (Ex. C, Big Horn Objection, 10.)

The Council should not enable Big Horn to breach its contract with Brook. Instead, it should exercise its authority to dismiss Big Horn's request. The Council has the authority to exclude Big Horn before any hearing if it finds that Big Horn engaged in "contemptuous conduct" or has used "dilatory tactics." Wyo. Admin. Code § ENV PP Ch. 1 Sec. 13. Big Horn has done both by ignoring its contractual obligation to Brook.

Contemptuous conduct is conduct that shows a lack of respect for something or someone. Meriam-Webster's Dictionary. Big Horn's refusal to keep its promises to Brook shows a lack of respect for Brook and the law. It does not require a court to decide that Big Horn has broken its promise to Brook; the Council can review the plain language of the 1983 Agreement to make that determination. *Claman v. Popp*, 279 P.3d 1003, 1013 (Wyo. 2012) (analyzing a contract begins with its "plain language.") Big Horn's choice to break its promises shows it does not respect Brook or Wyoming law. See *Schlinger v McGhee*, 268 P.3d 264, 268 (Wyo. 2012) (explaining how Wyoming law enforces parties' contracts). Wyoming case law compels the Council to dismiss Big Horn's request.

Big Horn's reason for breaking its promises is simple—delay. Big Horn has used the order in lieu of consent process and the public comment process to needlessly delay Brook's mine permit. Big Horn first asked this Council to deny an order in lieu needed for the permit

process to proceed. Even though Brook prevailed, Big Horn's stance added months to the process. Big Horn has objected again seeking to delay permit approval. Big Horn has also tried to delay the statutorily required 20-day hearing to some unknown date months later. Simply put, Big Horn has spent more than a year using procedural hurdles to derail and delay Brook's permit application despite promising the opposite. That is the very definition of a dilatory tactic.

Should Big Horn's broken promises not be enough to dismiss, the Council should limit what Big Horn can present. Big Horn objected extensively to Brook's mine plan and reclamation plan during the order in lieu of consent process—and lost. Big Horn's current objections repeat many of the same arguments. For example, Big Horn continues to object to an alleged lack of detail in the mine and reclamation plans. But Wyoming law does not allow Big Horn the chance to argue issues already raised and decided between the same parties. *Slavens v. Board of County Comm'rs for Unita County*, 854 P.2d 683, 685-86 (Wyo. 1993) (explaining that collateral estoppel applies to administrative proceedings barring relitigation of the same claims.) This means that if the Council allows Big Horn to participate at all, Big Horn should only be permitted to address objections 10, 11, 14, and 15. All other objections either repeat objections raised in the order in lieu process or could have been raised then.

CONCLUSION

The Council has spoken on the need for objectors to request a contested case. (Ex. A, 2.) But that has consequences for all objectors. None of the objectors, Big Horn included, have filed a request for a contested case hearing within the deadlines set out in Section 406(k). (Ex. A, 2.) Big Horn's late request does not excuse its failure to meet the deadline. Besides not meeting its obligations under the statute, Big Horn has shown that it will not meet its obligations to Brook. Big Horn contracted away the right to object to Brook's permit application 34 years ago. The

Council should not allow Big Horn to violate the terms of the 1983 Release Agreement. Therefore, Brook requests the Council dismiss Big Horn's February 15, 2017 Petition for a contested case hearing.

Without waiving any of its arguments, Brook respectfully asserts that if the Council decides to hear Big Horn's objections, the Council must proceed expeditiously. The Environmental Quality Act unequivocally sets out a 20-day timeline for holding an informal conference or a public hearing. Even giving Big Horn the benefit of allowing its late-filed Petition to proceed, the Council is statutorily obligated to hold a hearing on Big Horn's objections by March 7, 2017.

DATED: February 22, 2017.



Thomas L. Sansonetti (Wyo. State Bar # 43354)
Isaac N. Sutphin, P.C. (Wyo. State Bar # 6-3711)
Jeffrey S. Pope (Wyo. State Bar # 7-4859)
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347
Telephone: (307) 778-4200
tlsansonetti@hollandhart.com
insutphin@hollandhart.com
jspope@hollandhart.com

ATTORNEYS FOR PERMIT APPLICANT
BROOK MINING COMPANY, LLC

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2017, I served a true and correct copy of the foregoing by email to the following:

Lynnette J. Boomgaarden
Clayton H. Gregersen
Crowley Fleck, PLLP
237 Storey Boulevard, Suite 110
Cheyenne, WY 82009
lboomgaarden@crowleyfleck.com
cgregersen@crowleyfleck.com
Attorneys for Big Horn Coal

Andrew Kuhlmann
Assist. Attorney General
andrew.kuhlmann@wyo.gov
james.larock@wyo.gov
Attorneys for DEQ

Alan Edwards
Deputy Director, DEQ
Alan.edwards@wyo.gov

Brook Collins
38 Monarch Road
Ranchester, WY 82839
bpcharlie@wbaccess.net

David Bagley
Jim Ruby
Environmental Quality Council
Jim.ruby@wyo.gov

Todd Parfitt
Director, DEQ
200 W. 17th Street
Cheyenne, WY 82002
Todd.Parfitt@wyo.gov

Shannon Anderson
Powder River Basin Resource Council
sanderson@powderriverbasin.org

Jay Gilbertz
Attorney for Mary and David Brezik-Fisher
jgilbertz@yonkeetoner.com

Mayor Peter Clark
Town of Ranchester
mayor@ranchesterwyoming.com


