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ATTORNEYS FOR PERMIT APPLICANT  
BROOK MINING COMPANY, LLC

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

IN RE BROOK MINE APPLICATION )  
 ) Civil Action No. 17-4802  
TFN 6 2-025 )

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**REPLY IN SUPPORT OF BROOK MINE’S MOTION TO DISMISS BIG HORN COAL  
COMPANY’S PETITION FOR A CONTESTED CASE HEARING**

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**INTRODUCTION**

Brook agrees with Big Horn that other than the deadline to file permit objections, the Environmental Quality Act (Act) does not explicitly impose a deadline to request a contested case for objections to a permit application. But that misses the point of Brook’s argument. The Act does not set an additional deadline because the permit objection deadline applies universally and because the Act requires an informal conference or contested case occur within 20 days of the final date for filing objections. Wyo. Stat. Ann. § 35-11-406(j), (k); DEQ Rules of Practice and Procedure Ch. 3 § 3. An objector does not have to request a contested case. But this Council found otherwise. While Brook disagreed with the Council’s decision insisting on a request for a contested case, Brook’s motion merely argues the consequences of that ruling, namely that a logical deadline must exist to request a contested case. Under the plain language of the Act, the

only appropriate deadline is 30 days following the last date of publication. Big Horn's response simply asserts that it has a right to make the request. Nevertheless, the right to make such a request does not set a deadline or prove this Council has jurisdiction to hear Big Horn's objection. Nor does it somehow breathe life into an otherwise untimely request.

**I. A logical reading of the Council's ruling makes Big Horn's request untimely.**

This Council's authority comes from the Act. *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.") To avoid exceeding its authority, the Council can impose only deadlines the legislature prescribed. *See id.* So if an objector must request a contested case, that request should have a deadline set forth in the Act, which is the deadline to object and request an informal conference. *See* Wyo. Stat. Ann. § 35-11-406(j), (k); DEQ Rules of Practice and Procedure Ch. 3 § 3. (Brook's Mot. 2-3.) Therefore, the logical deadline to request a contested case was January 27, 2017, making Big Horn's request untimely.

Nonetheless, Big Horn asserts Brook stipulated to an extended deadline and waived its objections. (Big Horn's Resp. 8.) Brook did neither. Brook agreed to a March date for the originally docketed 20-day hearing. But Brook never agreed to a deadline for Big Horn to request a contested case hearing. Brook has also objected to extending deadlines and the current procedure in its brief in support of the Council's jurisdiction and during the scheduling conference in this case and case 17-4801.<sup>1</sup>

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<sup>1</sup> The Fishers and Powder River Basin Resource Council's responses made the same arguments about timeliness and objections. To avoid duplication, Brook's arguments here apply to the Fishers and PRBRC's responses.

**II. Big Horn's defense of the 1983 Release Agreement proves why the Council should dismiss.**

Big Horn argues that the Council does not have authority to interpret or enforce the 1983 Release Agreement. (Big Horn's Resp. 10.) Brook's Motion does not require the Council to interpret the 1983 Agreement. Instead, Brook asks the Council to apply undisputed facts to decide if Big Horn has engaged in "contemptuous conduct" and "dilatory tactics." Wyo. Admin. Code § ENV PP Ch. 1 Sec. 13.

Big Horn agrees the 1983 Agreement is a valid contract. At the Order in Lieu of Consent Hearing conducted before this Council in August 2016, Big Horn's Mine Manager, Jordan Sweeney, said the 1983 Agreement controlled the extent of the rights between Big Horn and Brook in certain sections of land. (Transcript of Hearing Proceedings, Vol. II of II, p. 30, attached as Ex. A.) Big Horn agrees that the 1983 Agreement requires it not oppose Brook's mine plan before a governmental agency or take steps to get a state agency to disapprove of the mine plan. (Ex. B, 1983 Agreement, 2.) Big Horn also agrees it has objected to Brook's permit application, stating it "feels strongly that the Brook Mine permit application should not be approved or deemed technically complete." (Ex. C, Big Horn Objection, 10.)

Despite this consensus, Big Horn argues only a court should decide issues related to the 1983 Agreement. (Big Horn's Resp. 11-12.) This continues Big Horn's pattern. When Brook asked a court to declare its rights to mine coal, Big Horn moved to dismiss the case, arguing "the Wyoming Department of Environmental Quality is the **only entity** that can give Ramaco and Brook the right to start mining on Big Horn Coal's property." (Ex. D, excerpt from Hearing Transcript on Big Horn's Mot. to Dismiss, 5.) When Brook petitioned this Council for an order in lieu of consent, Big Horn asserted the district court had jurisdiction to decide the issue before

the relevant agencies acted. (Ex. E, Big Horn's Resp. to Brook's Req. for Ord in Lieu, 5.) After the Council decided to hear Brook's petition, Big Horn asked the Council to enforce the 1983 Agreement and find it precluded Brook from "accessing certain surface lands to extract coal by surface mining methods." (Ex. F, Big Horn's Memo and Proposed Findings, 10.) Now that Brook argues the 1983 Agreement affects this case, Big Horn contends the Council cannot consider or enforce it. (Big Horn's Resp. 11-12.)

No matter where Brook has turned to enforce its rights, Big Horn has argued the proper decision-maker is someone else, even if inconsistent with Big Horn's previous statements. That amounts to a delay tactic, which shows contempt for Brook, Brook's rights, and the permitting process.

### **CONCLUSION**

Big Horn's response ascribes bad motives to Brook. But that is merely a smokescreen to obscure two realities: 1) a deadline must exist that complies with statutory deadlines; and 2) Big Horn contracted away its right to object 34 years ago. Big Horn's name-calling does not change this conclusion. Therefore, Brook requests the Council dismiss Big Horn's February 15, 2017 Petition for a contested case hearing.

DATED: March 21, 2017.



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## CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2017, I served a true and correct copy of the foregoing by email to the following:

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