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ATTORNEY FOR OBJECTORS
BIG HORN COAL COMPANY

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

IN RE BROOK MINE APPLICATION)
) **Docket Nos. 17-4802, 17-**
) **4803, and 17-4804**
TFN 6 2-025) **(Consolidated)**

**BIG HORN COAL COMPANY’S RESPONSE TO BROOK’S
OBJECTIONS AND PROPOSAL FOR STIPULATION**

Big Horn Coal Company (“Big Horn”), by and through its undersigned counsel of record, hereby submits this Response to Brook Mining Company, LLC’s (“Brook”) Objections to Admissibility of Objectors’ Witness and Exhibits.

I. Response to Objections to Big Horn’s Exhibits

Brook has objected to roughly 75 of the exhibits proposed by Big Horn, Powder River Basin Resource Council (“PRBRC”) and the Fishers, nearly all of which rely on the Wyoming Rules of Evidence and most of which, at least in part, rely on a hearsay objection. Specifically to Big Horn, Brook has objected to Big

Horn Exhibits 1, 3, 5, 6, 8, and 9. Brook objects to Big Horn's Exhibits 1, 3, 8 and 9 solely on the basis of hearsay. Brook objects to Exhibits 5 and 6 based on hearsay, but also alleges that Big Horn failed to produce Exhibit 5 in discovery and that Exhibit 6 lacks foundation and relevance.

The Council should summarily dismiss all of Brook's hearsay objections. The Wyoming Supreme Court has ruled on numerous occasions that hearsay evidence is admissible in administrative proceedings as long as the evidence meets the requirements of Wyo. Stat. Ann. § 16-3-108(a). *See e.g. Matter of Goddard*, 914 P.2d 1233, 1238 (Wyo. 1996); *Story v. Wyoming State Board of Medical Examiners*, 721 P.2d 1013, 1018 (Wyo.1986); *Lunde v. State ex rel. Wyo. Workers' Comp. Div.*, 6 P.3d 1256, 1260 (Wyo.2000). Wyo. Stat. Ann. § 16-3-108(a) requires that evidence offered and considered in a contested administrative proceeding not be "irrelevant, immaterial or unduly repetitious," and instead be "the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs." Big Horn Exhibits 3, 4, 7, 8 and 9 are documents already part of the administrative record in this proceeding. Big Horn Exhibit 6 is comprised of documents of public record in Wyoming Department of Environmental Quality Land Quality Division files and are identified as such on the face of each page of the exhibit. These exhibits, as well as Big Horn Exhibit 1 (Big Horn witness Sweeney's CV) are, consistent with the Council's instructions to the parties and the intent of Wyo. Stat. Ann. § 16-3-108(a), offered in documentary form to expedite

the volume and duration of testimony required to be presented at hearing. For these reasons, Brook's hearsay objections lack merit. The appropriate evidentiary standard is whether the evidence is "probative, trustworthy and credible," which, if Brook won't stipulate to the exhibits, can be demonstrated by Big Horn and determined by the hearing examiner at the time the evidence is offered. *See Goddard*, 914 P.2d at 1238 (stating that the "[a]dmissibility of evidence is committed to the discretion of the hearing examiner").

Brook's allegation that Exhibit 5 was not produced in discovery is patently false. In delivering Exhibit 5 to the Council and to the parties, Big Horn expressly noted that the delivery of each exhibit, including Exhibit 5, constituted any necessary supplemental production to its discovery responses. *See Exhibit A*. Therefore the exhibit was appropriately produced in discovery.

Moreover, in its previous discovery responses, Big Horn noted the Council's specific deadline of May 17, 2017 for identifying exhibits and thus the ability to produce additional documents as exhibits at that time. This is exactly what Big Horn did in its delivery of Exhibit 5. Rule 26 of the Wyoming Rules of Civil Procedure makes clear that all discovery obligations of the rules may be superseded by court orders, and thus it is the Council's requirement from the Order of Consolidation and Schedule that dictates when exhibits must be provided to other parties.¹ Big Horn's

¹ Wyo. Stat. Ann. § 16-3-107(g) states that "In all contested cases the taking of depositions and discovery shall be available to the parties in accordance with the provisions of Rules 26, 28

prior discovery responses repeatedly referenced the Council's order and May 17, 2017 deadline for delivery of exhibits as the controlling deadline. Exhibit 5 is an important aspect of Big Horn's case, was continually being developed, was not completed until May 17, 2017, and could not have been provided earlier; therefore, Big Horn did not belatedly produce Exhibit 5.

As to Brook's additional objection to Big Horn Exhibit 6, foundation and relevancy are determinations that must be made at the time the exhibit is introduced and offered into evidence. The hearing officer has discretion to determine whether or not evidence is admissible at a contested case hearing. *Clark v. State ex rel. Wyoming Workers' Safety and Compensation Div.*, 968 P.2d 436 (Wyo. 1998). Big Horn Exhibit 6 cannot be excluded based on Brook's objection alone.

In sum, Brook's objections premised upon various rules of evidence are red herrings that disregard the nature of this case and this Council's discretion. Administrative hearings are governed by the Wyoming Administrative Procedure Act, not the rules of evidence. "Administrative agencies acting in a judicial or quasi judicial capacity are not bound by the rules of evidence that govern trials by courts or juries." *Griffin v. State ex rel. Dept. of Transp.*, 2002 WY 82, ¶ 11 (Wyo. 2002).

through 37 (excepting Rule 37(b)(1) and 37(b)(2)(D) therefrom) of the Wyoming Rules of Civil Procedure in effect on the date of the enactment of this act and any subsequent rule amendments thereto. All references therein to the "court" shall be deemed to refer to the appropriate 'agency'[".]"

Rather it is Wyo. Stat. Ann. § 16-8-108(a) and the discretion of the hearing officer which set the standard for the admission of evidence.

II. Stipulations and Judicial Notice

In order to expedite the presentation of evidence at the hearing, Big Horn would also like to put on the record its stipulation to various exhibits and request that the Council take judicial (official) notice of certain exhibits.

Big Horn will stipulate to the admissibility of any document kept in the records of DEQ and publicly available, including DEQ Exhibits 1-13, 22-27, 29, and 31-35. Big Horn will stipulate to additional DEQ Exhibits and Brook Exhibits to the extent that DEQ and/or Brook affirmatively represents that any such additional exhibit is kept in the records of DEQ and publicly available. Big Horn also has no objection and will stipulate to the admissibility of all exhibits proposed by PRBRC and the Fishers.

As with its Prehearing Memorandum, and to avoid consuming time at hearing establishing unnecessary foundation and offering as exhibits, Big Horn requests, pursuant to Wyo. Stat. Ann. § 16-23-108(d), that the Council take judicial (official) notice of all *current versions* of applicable statutes, rules and regulations, and official, governmental guidance documents. This would include DEQ Exhibits 22-24 and Exhibits A and B to Big Horn's Prehearing Memorandum. In this vein, Big Horn objects that Brook has proposed as Exhibits copies of inapplicable, outdated versions of Wyoming law. Specifically, Big Horn objects to Brook's

Exhibits 3-5 and requests that the Council prohibit admission of those exhibits into evidence and instead take judicial notice of current law.

DATED: May 22, 2017.

By 

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CERTIFICATE OF SERVICE

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

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