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

**IN RE BLACK HILLS BENTONITE)
PERMIT TO MINE NO. 248c) DOCKET 17-1601**

**RESPONSE IN OPPOSITION TO
PETITION TO THE ENVIRONMENTAL QUALITY COUNCIL
FOR ORDER IN LIEU OF LANDOWNER CONSENT**

COME NOW Respondents, TTT Ranch Company, a Wyoming corporation (“**TTT Ranch Company**”), and James H. Crossingham, Jr. (“**Crossingham**”), by and through their attorney Scott P. Klosterman of the law firm of WILLIAMS, PORTER, DAY & NEVILLE, P.C., and hereby submit their response in opposition to the Petition of Black Hills Bentonite, LLC (“**BHB**”) to the Environmental Quality Council for Order in Lieu of Landowner Consent (“**Petition**”). In support of their opposition to the Petition, Respondents state as follows:

1. TTT Ranch Company is the surface owner of certain lands in Johnson County, Wyoming as shown in the Warranty Deed attached hereto as **Exhibit “A”**. Those lands include all lands within BHB’s proposed Herco Amendment, to wit (“**Herco Amendment**”):
Township 41 North, Range 81 West, 6th PM
Section 2: SE¼SE¼
Section 11: E½
2. Crossingham is president of TTT Ranch Company.

3. TTT Ranch Company and Crossingham do not own any mineral rights in any lands within the proposed Herco Amendment area.
4. There is no agreement between TTT Ranch Company and BHB regarding BHB's use and occupation of TTT Ranch Company's surface estate within the Herco Amendment area, or the payment of damages resulting from BHB's proposed mining and reclamation activities thereon.
5. Where a mine permit application is deficient or contains material misrepresentations, a surface owner cannot be required to give written consent to the mine and reclamation plan, nor can the Environmental Quality Council ("EQC") issue an order in lieu of surface owner consent.
6. BHB's proposed Herco Amendment is deficient in that it does not comply with the requirements for surface mining under state and federal laws, rules and regulations including, without limitation, BHB's (a) intentional avoidance of state and federal requirements for commencing and completing reclamation by delaying reclamation of a large disturbed area until it has completed mining in the last of many small sequential pit cuts; (b) failure to monitor and protect air and water quality; and (c) failure to execute a bond or undertaking to the state for the use and benefit of TTT Ranch Company in an amount sufficient to secure payment for surface damages.
7. BHB's proposed Herco Amendment contains material misrepresentations including, without limitation, the erroneous assertion that it has the legal right to mine on all lands within the Herco Amendment area.
8. In Paragraph 9 of the Petition, BHB erroneously asserts that it "...owns and/or leases the minerals within the Herco Amendment area and therefore has the legal right to mine the land encompassed within the area of its amended application".
9. Pursuant to WYO. STAT. § 35-11-406(a)(ii), a mining permit application shall¹ contain a sworn statement stating that the applicant has the right and power by legal estate owned to mine from the land for which the permit is desired.
10. BHB has no legal right to mine on the E½SE¼ of Section 11, T.41N., R.81W. Helen Rowe owns mining claim TTT 13-27, WMC 309575 on this land as shown on **Exhibit "B"** attached hereto. Helen Rowe has not granted any legal rights to the bentonite on mining claim TTT 13-27 to BHB.
11. BHB has no legal right to mine on the W½SE¼ of Section 11, T.41N., R.81W. Pamela Watson filed a Notice of Intent to Locate mining claims on those lands, as shown in **Exhibit "C"** attached hereto. Pamela Watson has the exclusive right to locate mining claims on those lands, and has not granted any legal rights to the bentonite to BHB.

¹ "The choice of the word 'shall' intimates the absence of discretion ..." *In re LePage*, 2001 WY 26, ¶12, 18 P.3d 1177, 1180 (Wyo. 2001); *Stutzman v. Office of Wyo. State Eng'r*, 2006 WY 30, ¶17, 130 P.3d 470, 475 (Wyo. 2006) (use of the word "shall" denotes that the act is mandatory).

12. A mining claim cannot be located or maintained without an intent to mine. 30 U.S.C. 612(a). “The all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country. Consequently, title to mineral lands cannot be acquired unless for the prime purpose of mining or extracting minerals. We therefore hold that an attempted location for any other purpose than that thus specified is wholly void.” *United States v. Nogueira*, 403 F.2d 816, 823-25 (9th Cir. 1968). See also, *United States v. Zweifel*, 508 F.2d 1150, 1153-54 (10th Cir. 1975).
13. By letter dated April 22, 2008, Bruce Lawson gave written notice to TTT Ranch Company that he and other potential claimants did not intend to develop mineral resources on any mining claims they might locate. Lawson’s letter stated “...I will not be conducting any exploration activities on these lands nor do I have any plans to develop any minerals on these claims should they exist.” See, **Exhibit “D”** attached hereto. On May 22, 2008, acting for himself and as agent for seven (7) family members, Lawson recorded a location certificate for mining claim Bobcat #10 on the SE¼ of Section 11, T.41N., R.81W. See, **Exhibit “E”** attached hereto. The mining claim Bobcat #10 is void ab initio, and the Bentonite Lease Agreement marked as Exhibit 5 to the Petition is of no force and effect.
14. Pursuant to WYO. STAT. § 35-11-416(a), “...a permit shall not be issued without the execution of a bond or undertaking to the state, whichever is applicable, for the use and benefit of the surface owner or owners of the land, in an amount sufficient to secure the payment for any damages to the surface estate, to the crops and forage, or to the tangible improvements of the surface owner.” The amount of the bond is to be commensurate with the reasonable value of the surrounding land, and the effect of the overall operation of the landowner. Financial loss from disruption of the surface owner’s operations must be considered as part of the damage. Unless it agrees otherwise, damages must be paid to TTT Ranch Company annually. *Id.*
15. The surface damages bond required under WYO. STAT. § 35-11-416(a) is in addition to the performance bond required for reclamation.
16. BHB has violated WYO. STAT. § 35-11-416(a) by failing to post a bond for the use and benefit of TTT Ranch Company.
17. James H. Crossingham, IV (“**James IV**”) owns unpatented mining claim TTT #10, which covers certain lands in Section 11, T.41N., R.81W. Copies of the location certificate and 2017 Affidavit of Assessment of mining claim TTT#10 WMC 303691 are attached hereto as **Exhibit “F”**.
18. As owner of mining claim TTT #10, James IV owns the bentonite minerals on the following lands within the proposed Herco Amendment, to wit:
Township 41 North, Range 81 West, 6th PM
Section 11: S½NE¼, NW¼NE¼
19. TTT Ranch Company and Crossingham do not own any interest in mining claim TTT #10.

20. James IV does not own rights in the surface estate on any lands within the Herco Amendment, and therefore lacks legal authority to grant surface owner consent to BHB's proposed mine and reclamation plan.
21. By Assignment dated July 12, 2013, James IV assigned the bentonite on mining claim TTT #10 to BHB ("**Assignment**"). BHB's right to mine bentonite on mining claim TTT #10 expires on May 1, 2020. A copy of the Assignment is attached hereto as **Exhibit "G"**.
22. BHB's proposed mine and reclamation plan violates the terms of the Assignment, as it does not require BHB to complete all mining and reclamation activities by April 30, 2020, and forfeit its right to use and occupy the surface estate by May 1, 2020.
23. TTT Ranch Company is not a party to the Assignment, and thus the Assignment does not constitute an instrument of consent from the surface owner, as claimed by BHB.
24. EQC cannot issue an order in lieu of the surface owner's consent unless the mine and reclamation plan is detailed so as to illustrate the full proposed surface use. WYO. STAT. § 35-11-406(b)(xii)(B). BHB's proposed mine and reclamation plan is silent as to a date that mining and reclamation will be completed. While BHB states that its mining operations may last approximately five years, there is insufficient detail to predict if and when mining and reclamation will actually be completed. Thus, the mine and reclamation plan lacks the required detail regarding the full scope and duration of its use of TTT Ranch Company's surface.
25. EQC cannot issue an order in lieu of the surface owner's consent unless BHB's proposed use will not substantially prohibit the surface owner's operations. WYO. STAT. § 35-11-406(b)(xii)(C). TTT Ranch Company's ranching operations in the Herco Amendment area will be substantially prohibited by BHB's proposed mining activities. Moreover, because BHB fails to state a date when its mining and reclamation activities will be completed, the time period during which TTT Ranch Company's operations will be substantially prohibited is unclear.
26. EQC cannot issue an order in lieu of the surface owner's consent unless the mine and reclamation plan will return the surface to its approved future use as soon as feasibly possible. WYO. STAT. § 35-11-406(b)(xii)(D). Pursuant to the terms of the Assignment, BHB admitted that it is feasible to complete mining and reclamation in the proposed Herco Amendment area by April 30, 2020. However, BHB's proposed mine and reclamation plan is silent as to the date that mining and reclamation will be completed, and thus fails to return the land to its approved future use as soon as feasibly possible.
27. In summary, BHB has: (a) violated WYO. STAT. § 35-11-406(a)(ii) by erroneously asserting that it has the legal right to mine on all lands within the Herco Amendment area, (b) violated WYO. STAT. § 35-11-416(a) by failing to post a bond for the use and benefit of TTT Ranch Company, (c) submitted a mine and reclamation plan that violates the terms of the

Assignment by failing to provide that all activities will be completed by April 30, 2020, and it will forfeit its right to use and occupy the surface estate on May 1, 2020, (d) failed to meet its burden of proof under WYO. STAT. § 35-11-406(b)(xii)(B) that its mine and reclamation plan is sufficiently detailed so as to illustrate the full proposed surface use, (e) failed to meet its burden of proof under WYO. STAT. § 35-11-406(b)(xii)(C) that its use will not substantially prohibit the surface owner's operations, and (f) failed to meet its burden of proof under WYO. STAT. § 35-11-406(b)(xii)(D) that the mine and reclamation plan will return the surface to its approved future use as soon as feasibly possible.

WHEREFORE, Respondents respectfully request that the Council deny BHB's Petition to the Environmental Quality Council for Order in Lieu of Landowner Consent for all of the reasons set forth above.

DATED this 29th day of November, 2017.

TTT RANCH COMPANY and
JAMES H. CROSSINGHAM, JR.,
Respondents

/s/ Scott P. Klosterman
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing **RESPONSE IN OPPOSITION TO PETITION TO THE ENVIRONMENTAL QUALITY COUNCIL FOR ORDER IN LIEU OF LANDOWNER CONSENT** was served upon counsel in the manner set forth below this 29th day of November, 2017.

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- U.S. Mail (Postage Prepaid)
- Fax
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/s/ Scott P. Klosterman _____
Scott P. Klosterman