

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

**IN RE BENTONITE PERFORMANCE )  
MINERALS LLC ) DOCKET 18-1601**

**PETITIONER BENTONITE PERFORMANCE MINERALS, LLC'S RESPONSE IN  
OPPOSITION TO RESPONDENT 2U RANCH, LLC'S MOTION TO DISMISS**

Petitioner Bentonite Performance Minerals, LLC (BPM), pursuant to Chapter 2, Section 11(a) of the Rules of the Wyoming Department of Environmental Quality (DEQ) and the Hearing Examiner's August 21, 2018 Order of Schedule, hereby responds in opposition to Respondent 2U Ranch LLC's (2U) Motion to Dismiss the above-captioned proceeding and states as follows in support:

**Introduction**

In an effort to further frustrate this proceeding, 2U alleges – for the first time and without factual or legal support – that BPM trespassed on its surface lands to collect baseline soil, vegetation, and wildlife data. 2U's allegations are spurious. Wyo. Stat. Ann. § 6-3-414, the data trespass statute relied upon by 2U, does not criminalize access by persons having an ownership interest in the property or permission from a property owner to access the property. When the surface was severed from the mineral estate, the State of Wyoming expressly reserved the right to enter and use the surface lands to develop the minerals. When the State of Wyoming leased the bentonite to BPM, it assigned its rights to access and use the surface to BPM. As a result, BPM has the right to enter upon, occupy, and enjoy such surface areas as are necessary for the mining of bentonite. This includes the right to access the surface lands to gather resource data related to the mining operations. Gathering baseline resource data is a lawful exercise of BPM's property rights and cannot constitute a trespass.

BPM's motion to dismiss underscores its fundamental misunderstanding of this dispute and its property rights. BPM has property rights associated with its bentonite lease, including the right to access and use the surface lands as reasonably necessary to develop the leased bentonite deposits. Ever since the State of Wyoming severed the surface estate from the mineral estate in 1939, the subsequent owners of the surface lands (including 2U) have had no legal interest in the mineral estate and no legal right to obstruct or block the development of the minerals. BPM, in exercising the State of Wyoming's property rights to access and use the surface lands to gather resource data necessary for the development of its mineral estate cannot constitute a trespass. One cannot trespass on its own property, and Wyo. Stat. Ann. § 6-3-414 acknowledges this reality.

Setting aside the fact that BPM had the right to collect baseline data from the surface lands above the leased bentonite, the EQC lacks the statutory and regulatory authority to resolve issues of trespass. Wyo. Stat. § 6-3-414 is a criminal statute. The authority to interpret and enforce a criminal trespass statute rests exclusively with the Wyoming judiciary. 2U presents no argument and BPM identifies no support for the premise that the Wyoming Legislature intended to vest the EQC with the authority to resolve data trespass disputes. Absent the requisite statutory or regulatory directive, the EQC does not have the authority to interpret or enforce Wyo. Stat. § 6-3-414 or grant the relief requested by 2U.

Even if the EQC were vested with the authority to resolve trespass disputes, the issue exceeds the scope of this proceeding. Pursuant to the Order of Schedule, the scope of this proceeding is limited to determining whether (1) the mining and reclamation plans have been submitted to 2U; (2) the mining and reclamation plans adequately detail the proposed surface use, including routes of ingress and egress; (3) that the proposed surface use does not

substantially prohibit the operations of the surface owner; and (4) the proposed reclamation plan reclaims the surface lands to their approved future use of grazingland as soon as feasibly possible. 2U's allegations of trespass are irrelevant because an Order in Lieu of Consent proceeding in no way implicates baseline soil, vegetation, or wildlife data. The mining and reclamation plans at issue here constitute one aspect of a mine permit amendment application; the plans do not include or rely upon baseline soil, vegetation, or wildlife data. As such, granting the relief requested by 2U – the expungement of DEQ records – would have no consequence on this proceeding.

If 2U is sincere in their belief that BPM trespassed on its lands, it is obligated to pursue its remedy through the appropriate legal authority. The EQC is not that authority. BPM respectfully requests that the motion should be denied.

#### **Threshold Matter Regarding Effective Date of Wyo. Stat. § 6-3-414**

It is not disputed that BPM obtained baseline soil, vegetation, and wildlife data from Lease 0-42804 surface lands in 2014. Wyo. Stat. Ann. § 6-3-414, the data trespass statute relied upon by 2U, was not in force and effect until March 5, 2015. *See* Laws 2015, Ch. 146, § 1, eff. March 5, 2015. The data trespass statute cannot be applied retroactively, and BPM could not have violated a law that did not exist. *See Johnson v. Safeway Stores, Inc.*, 568 P.2d 908, 914 (Wyo. 1977); *see also Mullinax Concrete Serv. Co. v. Zowada*, 2012 WY 55, ¶ 6, 275 P.3d 474, 476 (Wyo. 2012). As such, 2U's allegations of data trespass prior to March 5, 2015 are entirely without legal basis and must be denied.

#### **Background and Facts**

BPM conducts bentonite surface mining operations pursuant to Mine Permit 267C. Certain bentonite deposits included in Mine Permit 267C exist under surface lands owned by 2U,

and BPM has conducted strip-mining operations on 2U surface lands. A Surface Use and Haulage Agreement (SUA), dated June 1, 2007, provided BPM access to approximately 1,827.64 acres of 2U surface lands for purposes of conducting bentonite mining operations. Ex. A, SUA. The SUA expired by its terms on May 31, 2017.

BPM is the lessee of certain unpermitted bentonite deposits owned by the State of Wyoming and existing under 2U surface lands. Ex. B, Lease 0-42804. Pursuant to Lease 0-42804, the State of Wyoming granted BPM the exclusive right and privilege to strip-mine, extract, remove, and dispose of an estimated 1,000,000 tons of bentonite deposits under approximately 608.66 acres of 2U surface lands. *Id.* at 1. Notably, the lease provides BPM “the right to enter upon, occupy and enjoy such surface areas of the described tract as are necessary for the mining of bentonite and the construction of all buildings and other surface improvements incidental to the work contemplated by this lease.” *Id.* at 4.

Beginning in 2014, BPM initiated efforts to amend Mine Permit 267C to include the Lease 0-42804 bentonite deposits. BPM notified 2U of its intent to develop the Lease 0-42804 bentonite deposits and, in the years to follow, solicited 2U’s review and input regarding the proposed operations. Ex. C, Taylor Letter. BPM worked closely with 2U in planning the development of Lease 0-42804, and the parties discussed all aspects of the anticipated operations, including routes of ingress and egress, surface disturbance, mining progression, and reclamation. Even though BPM had the leasehold right to access the Lease 0-42804 surface lands, out of courtesy, it coordinated these activities with 2U. Though not legally obligated, BPM notified 2U of its intent to access Lease 0-42804 surface lands to gather baseline soil, vegetation and wildlife data necessary for the processing the Mine Permit 267C amendment

application. At no point did 2U object. The parties' interactions regarding the collection of baseline data from Lease 0-42804 surface lands are as follows:

- On April 25, 2014, BPM notified 2U that, throughout the year as weather permitted, BPM and their consultants would be collecting baseline data (soils, vegetation, wildlife, hydrology, etc.) on Lease 0-42804 surface lands for the purpose of amending Mine Permit 267C. 2U did not object.
- On May 15, 2014, BPM's Environmental Specialist, Jennifer Hartman, and a consultant conducted a brief field reconnaissance on Lease 0-42804 surface lands in preparation for the vegetation and wildlife survey.
- In June 2014, BPM again notified 2U that a consultant intended to conduct baseline vegetation and wildlife surveys on June 17 and 18. BPM informed 2U that the consultant intended to camp overnight on Lease 0-42804 surface lands. 2U advised BPM to warn the consultant to watch out for mountain lions.
- On June 17 and 18, 2014, biologist Amber Travsky collected vegetation data from Lease 0-42804 surface lands and camped overnight on the property.
- On July 14, 2014, Hartman and BPM Mine Manager Joel Severin met with 2U representatives Ronald and Scott Ericsson. The parties discussed, among other matters, BPM's need to gather additional baseline data on Lease 0-42804 surface lands. The Ericssons did not object to BPM gathering the baseline data. In fact, the Ericssons encouraged BPM to explore for bentonite deposits on 2U surface lands north of the boundary of Lease 0-42804 near Green Mountain.
- From August 11 to 15, 2014, a second consultant collected soils information on Lease 0-42804 surface lands.
- On December 16, 2014, BPM collected soil samples on Lease 0-42804 surface lands.
- In January 2016 and February 2016, during ongoing mining operations on adjacent 2U lands, Hartman conducted two raptor studies on Lease 0-42804 lands.

Ex. D, Hartman Declaration.

On February 24, 2016, BPM formally requested the DEQ amend Mine Permit 267C to include those bentonite deposits covered by Lease 0-42804. The submitted application materials included, among other information, the proposed mining and reclamation plans and the baseline soil, vegetation, and wildlife data obtained by BPM's consultants. At no point did 2U protest the permit amendment application or raise issue with the utilization of the baseline data collected

from 2U surface lands. On June 28, 2016, the DEQ determined that the Mine Permit 267C amendment application satisfied completeness requirements. Ex. E, LQD Letter. However, the DEQ suspended the processing of the amendment application pending the submission by BPM of an executed Form 8 (Surface Owner Consent Form) or, alternatively, an Order in Lieu of Consent. Unable to agree to the terms of a surface access agreement with 2U and obtain the requisite surface owner consent, BPM requested the EQC convene a hearing and issue an Order in Lieu of Consent as prescribed by Wyo. Stat. § 35-11-406(b)(xii). The issuance by the EQC of an Order in Lieu of Consent will allow DEQ to process the Mine Permit 267C amendment application.

### **Legal Standard**

The EQC conducts contested case proceedings in accordance with the Wyoming Rules of Civil Procedure. DEQ Rules, Chapter 2, Section 2. On September 17, 2018, 2U filed a Motion to Dismiss pursuant to Rule 12 of the Wyoming Rules of Civil Procedure. A Rule 12 Motion to Dismiss is converted to a Rule 56 Motion for Summary Judgment if materials outside the pleadings are offered and considered. *Wilson v. Bd. of Cty. Comm'rs of Cty. of Teton*, 153 P.3d 917, 921–22 (Wyo. 2007). In this instance, the parties offer evidence beyond the pleadings, thus converting the Motion to Dismiss to a Motion for Summary Judgment. The Council thus applies the standard of review for summary judgment.

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *James v. Taco John's Int'l, Inc.*, 2018 WY 96, ¶ 7 (Wyo. 2018). The Council examines the record from the vantage point most favorable to the party opposing the motion – in this case, BPM – and gives that party all favorable inferences which may be fairly drawn. *Id.* 2U, as the party requesting summary

judgment, bears the initial burden of establishing a prima facie case that no genuine issue of material fact exists, and that summary judgment should be granted as a matter of law. *Bogdanski v. Budzik*, 408 P.3d 1156, 1160 (Wyo. 2018). After a movant has adequately supported the motion for summary judgment, the burden shifts to the opposing party to provide “competent evidence admissible at trial showing there are genuine issues of material fact.” *Jones v. Schabron*, 113 P.3d 34, 37 (Wyo. 2005). The party opposing the motion must present specific facts; relying on conclusory statements or mere opinion will not satisfy that burden, nor will relying solely upon allegations and pleadings.” *Bogdanski*, 408 P.3d at 1161. A material fact is one which, if proved, would have the effect of establishing or refuting an essential element of the cause of action or defense asserted by the parties. *Claman v. Popp*, 279 P.3d 1003, 1011 (Wyo. 2012).

### **Argument**

2U alleges – for the first time and without factual or legal support – that BPM trespassed on its surface lands to collect baseline soil, vegetation, and wildlife data in violation Wyo. Stat. § 6-3-414. 2U’s motion fails for multiple reasons. First, 2U’s allegation of trespass is demonstrably false. At all times relevant, BPM – as the leasehold owner of the bentonite deposits under 2U surface lands – had the legal right to access the surface estate. Moreover, 2U was aware of and authorized the collection of baseline resource data. Second, even if 2U’s allegation was credible, the EQC lacks the authority to interpret or enforce a criminal trespass statute. Lastly, issues related to baseline soil, vegetation, and wildlife data fall beyond the limited scope of this proceeding. Even if the EQC had the authority to grant the relief requested by 2U, such action (i.e., the expungement of DEQ resource data) would be of no consequence to this proceeding.

**A. BPM did not trespass because it has a leasehold interest in the mineral estate that authorizes access and use of the surface lands, and BPM obtained verbal and contractual authorization from 2U to collect the baseline data.**

Wyo. Stat. Ann. § 6-3-414 criminalizes the unlawful trespass of real property for the purpose of collecting resource data. A person cannot violate Wyo. Stat. Ann. § 6-3-414 if they have an ownership interest in the real property, a contractual right, or written or verbal permission of the owner, lessee or agent of the owner to enter onto the private land to collect the resource data. Wyo. Stat. Ann. § 6-3-414(a)(ii), (b), (c)(ii). Because BPM had (1) a leasehold interest in the bentonite deposits under the subject surface lands granting access to and use of the surface estate, (2) a contractual right to access the surface lands pursuant to a surface use agreement, and (3) verbal permission from 2U, it could not have violated Wyo. Stat. Ann. § 6-3-414 when it gathered baseline resource data in 2014.

Prior to May 9, 1939, the State of Wyoming owned 100% the surface estate and 100% of the mineral estate of Lease 0-42804 lands. On May 9, 1939, the State of Wyoming sold the surface estate to Clarence and Bert Robbins, subject to the following reservation:

The party of the first part [State of Wyoming] hereby reserves to the Wyoming Farm Loan Board, its successors and assigns, all minerals and mineral rights in and to the above described premise and **the right of ingress and egress to said premises and the use of so much of the surface thereof as may be necessary to prospect for, develop and remove such minerals**, or any part thereof.

Ex. F, Warranty Deed at 2 (emphasis added). The State of Wyoming's reservation of the mineral estate, together with the surface access and use rights necessary to develop the mineral estate, have been public record since October 24, 1939. *Id.* 2U is a successor in interest to the Robbins. 2U took ownership of the Lease 0-42804 surface lands subject to the State of Wyoming's express mineral and surface access and use reservation. 2U's property rights are burdened by and subservient to the State of Wyoming's 1939 reservation.



BPM is the lessee of the State of Wyoming's bentonite deposits under 2U surface lands, and as such, assumes the property rights of the mineral owner. It is a long-standing and fundamental principle of real property law that the mineral estate has dominance over the surface estate. *Holbrook v. Cont'l Oil Co.*, 73 Wyo. 321, 332 (1955) (surface lands subject to the dominant right of the defendants' mineral leases); *Mingo Oil Producers v. Kamp Cattle Co.*, 776 P.2d 736 (Wyo. 1989) (surface landowner could not require lessee to execute an access damage agreement before granting an initial right of access under terms of the mineral lease). Lease 0-42804 recognizes this fundamental principle by granting BPM the right to enter upon, occupy, and enjoy such surface areas as are necessary for the mining of bentonite. Ex. B, Lease 0-42804 at 4. The State of Wyoming, in leasing its bentonite deposits to BPM (together with all rights incidental to developing the minerals), expressly authorized BPM to access the surface lands. BPM is entitled, as the lessee of the dominant mineral estate, to possess that portion of 2U's surface estate "reasonably necessary" for the exploration, production, and storage of the bentonite. *Sanford v. Arjay Oil Co.*, 686 P.2d 566, 572 (Wyo. 1984); *Ready v. Texaco, Inc.*, 410 P.2d 983, 986 (Wyo. 1966) (mineral lessee's right to access the surface lands for purposes of exploration and development is incidental to the mineral lease). As such, 2U cannot prevent BPM from accessing and developing its minerals (i.e., BPM exercising the property rights reserved by the State of Wyoming in 1939), and BPM's access of 2U's surface lands for purposes of developing its minerals cannot constitute a trespass (i.e., BPM cannot trespass on property rights reserved by the State of Wyoming in 1939 and assigned by lease to BPM).

In addition to having a mineral leasehold interest (together with the incidental rights of surface access and use), BPM had a contractual right and verbal authorization from 2U to access the subject lands for purposes of collecting baseline data. The SUA included approximately 200

acres of the Lease 0-42804 surface lands, and the SUA expressly authorized access to those lands for the “usage of the surface occasioned by BPM’s mining, hauling and *related activities* on the Property.” SUA at 1 (emphasis added). BPM collected its baseline soil, vegetation, and wildlife data in 2014, nearly three years before the SUA expired on May 31, 2017. At the time of collection – and at all times during the preparation of the Mine Permit 267C amendment application – BPM was contractually entitled to collect data from those surface lands covered by the SUA.

To the extent the SUA did not cover Lease 0-42804 surface lands, as a matter of courtesy, BPM notified 2U of its intent to gather baseline data. Each time 2U provided verbal authorization. On April 25, 2014, prior to entering the property, BPM notified 2U that it would collect baseline data throughout the year as weather permitted. Ex. D, Hartman Declaration. 2U did not object. *Id.* In June 2014, BPM again notified 2U that the consultant intended to conduct additional baseline vegetation and wildlife surveys and camp overnight on Lease 0-42804 surface lands. *Id.* 2U did not object and advised BPM to warn the consultant to watch out for mountain lions. *Id.* The consultant, duly advised, collected baseline data over a two-day period and camped on Lease 0-42804 surface lands. *Id.* On July 14, 2014, 2U discussed with Severin and Hartman the gathering of additional baseline data from Lease 0-42804 surface lands. *Id.* 2U did not object to BPM’s consultants gathering additional resource data and, in fact, encouraged BPM to explore for bentonite deposits on 2U surface lands north of the boundary of Lease 0-42804 near Green Mountain. *Id.* Subsequently, from August 11 to 15, 2014, a second consultant collected additional baseline data. *Id.* At no point did 2U object or allege trespass.

The data trespass statute relied upon by 2U does not criminalize access by persons having a mineral leasehold interest in the property, permission from an owner of the property, or a

contractual right to access the surface lands. BPM had all three. Because BPM had a leasehold interest in the dominant mineral estate granting access to and use of the surface estate, as well as verbal permission and the contractual right to enter 2U's lands, it did not violate Wyo. Stat. Ann. § 6-3-414.

**B. EQC lacks the jurisdictional authority to resolve 2U's trespass allegation.**

Regardless of the merits of 2U's claim of trespass, the EQC cannot grant the relief requested. The EQC lacks the statutory and regulatory authority to resolve disputes of criminal trespass or expunge the records of the DEQ. The authority rests exclusively with the Wyoming judiciary. Wyo. Const. art. V, § 10 (district courts in Wyoming have jurisdiction over all criminal cases except as otherwise provided in statute); Wyo. Stat. § 5-9-129 (circuit courts have original jurisdiction in all misdemeanor criminal cases). Wyo. Stat. § 6-3-414 is a misdemeanor criminal statute. 2U presents no argument and BPM identifies no support for the premise that the Wyoming Legislature intended to vest the EQC with the authority to interpret or enforce the data trespass statute. Absent such evidence, the EQC lacks the authority to interpret or enforce Wyo. Stat. § 6-3-414. If 2U is sincere in their belief that BPM trespassed on its lands, it is obligated to pursue its remedy through the appropriate legal authority. The EQC is not that authority.

**C. 2U's request is beyond the scope of this proceeding because the four statutory elements necessary for the issuance of an Order in Lieu of Consent do not implicate baseline resource data.**

Pursuant to the Order of Schedule issued by the Hearing Examiner on August 21, 2018, the scope of this proceeding is limited to determining whether (1) the mining and reclamation plans have been submitted to 2U; (2) the mining and reclamation plans adequately detail the proposed surface use, including routes of ingress and egress; (3) that the proposed surface use does not substantially prohibit the operations of the surface owner; and (4) the proposed

reclamation plan reclaims the surface lands to their approved future use of grazingland as soon as feasibly possible. Order of Schedule at 1. 2U's allegations of trespass are irrelevant because an Order in Lieu of Consent proceeding in no way implicates baseline soil, vegetation, or wildlife data. The mining and reclamation plans at issue here do not include or rely upon baseline soil, vegetation, or wildlife data. The mining and reclamation plans are simply one aspect of the mine permit amendment application submitted by BPM to DEQ; the plans only detail the proposed mining progression, surface use and disturbance (including routes of ingress and egress), and the reclamation of the disturbed lands. A cursory review of the mining and reclamation plans proves this point. Ex. G, Mine Permit 267C Section 2.10 (Mining Plan); Ex. H, Mine Permit 267C Section 2.11 (Reclamation Plan).

As such, the remedy sought by 2U – the expungement of the baseline soil, vegetation, and wildlife data – would not cause “the mining and reclamation plans to cease to exist” as alleged by 2U. Motion to Dismiss at 1. In fact, such expungement of resource data would have no impact or bearing on the mining and reclamation plans. At hearing, BPM intends to establish the four Order in Lieu of Consent statutory elements without the use of baseline soil, vegetation, or wildlife data. Therefore, granting the relief requested by 2U would be of no consequence to this proceeding. BPM has a statutory right to petition the EQC for an Order in Lieu of Consent and to be heard at hearing. 2U's spurious claims of trespass does not abrogate BPM's lawful right to pursue an Order in Lieu of Consent from the EQC and the motion must be denied.

### **Conclusion**

BPM has met its burden by providing competent and admissible evidence that BPM lawfully obtained the resource data from 2U's surface lands. The evidence, viewed in the light most favorable to BPM, supports the conclusion that, at all relevant times, BPM had the requisite

leasehold interest, contractual right, and verbal authorization to collect baseline data from 2U's surface lands. Moreover, 2U's motion fails as a matter of law. The EQC lacks jurisdiction to interpret or enforce a criminal trespass statute or grant the relief requested by 2U. If 2U is sincere in their belief that BPM trespassed on its lands, it is obligated to pursue its remedy through the appropriate legal authority. Just as BPM must comply with the law, so must 2U. In the absence of any factual or legal basis to grant the motion, 2U's motion to dismiss must be denied.

DATED this 5 day of October 2018.



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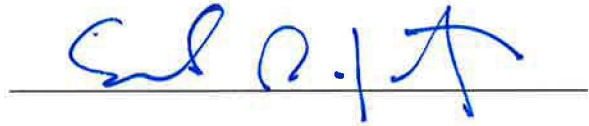
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 5, 2018, I served a true and correct copy of the foregoing  
RESPONSE IN OPPOSITION TO RESPONDENT 2U RANCH, LLC'S MOTION TO DISMISS  
by email to:

2U Ranch, LLC  
c/o Ronald Ericsson  
ericsson@childselect.com

Jim Ruby  
Executive Secretary, Wyoming Environmental Quality Council  
jim.ruby@wyo.gov



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