

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

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

**PETITIONER BENTONITE PERFORMANCE MINERALS, LLC'S MOTION TO LIMIT
TESTIMONY AND EVIDENCE AT HEARING**

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 December 3, 2018 Corrected Order, hereby moves the Hearing Examiner to exclude Respondent 2U Ranch, LLC ("2U") from submitting evidence at hearing related to questions and topics 2U refused to answer during discovery and depositions. BPM states as follows in support:

BACKGROUND AND FACTS

1. On November 30, 2018, BPM moved the Hearing Examiner to compel compliance with BPM's Notice of Deposition and Request for Production and sanction 2U for discovery abuses. The Parties appeared for a hearing on BPM's motion on December 3, 2018.

2. At the hearing, the Parties agreed to reschedule the deposition of Mr. Ronald Ericsson for the following week and to conduct the deposition through video conference. During the hearing, counsel for BPM emphasized the importance that Mr. Ericsson have access to certain documents at his deposition and produce documents responsive to BPM's Request for Production prior to the deposition:

We are willing to accommodate a VC, video conference, deposition. We prefer it was – it was video. We do have a number of documents that we'd like to walk through with Ronald. But what we would ask is that we have a few days to review those documents that we expect they'll produce shortly to us. We expect that given that review and what we would like to go through in the deposition, that we can conduct it by video conference. And we would only ask that the Ericssons, being more familiar with Alpine, Texas, identify a location in Alpine that is appropriate for supporting a VC, having the video so that we can see each

other. We can – we can point at different documents. We can walk through things just so it’s more functional.

Hr’g Tr. at 39:15-40:3; see also, 18:12-19:12 (emphasizing the importance of the Parties accessing various documents during the deposition).

3. The Hearing Examiner acknowledged that BPM’s request that Mr. Ericsson access documents during the deposition was reasonable. Hr’g Tr. 41:17-23.

4. With respect to producing documents responsive to BPM’s Request for Production, Mr. Ericsson represented that all responsive documents had been identified and compiled and were available for immediate production. Hr’g Tr. 13:1-3; 14:9-10.

5. At the end of the hearing, the Hearing Examiner ordered Mr. Ericsson (1) deliver all documents responsive to BPM’s Request for Production on or before December 4, 2018, and (2) sit for a telephonic deposition on or before December 12, 2018. December 3, 2018 Corrected Order at ¶¶ 2 and 5.

6. With respect to the rescheduled telephonic deposition, the Hearing Examiner instructed Mr. Ericsson “to make a very good faith effort with regard to those telephone interrogatories.” Hr’g Tr. 39:4-8.

7. On December 4 and 5, 2018, Mr. Ericsson produced to BPM eleven documents and six photographs (Produced Documents). BPM identifies only two documents as being responsive to BPM’s eight specific requests for production: (1) an unsigned grazing lease between Lonesome Country LC and Mule Shoe Ranch, Inc. [BPM Request for Production No. 2], and (2) a May 24, 2018 letter from BPM to 2U requesting surface owner consent, together with the enclosed mining and reclamation plans [BPM Request for Production No. 8].

8. In the days to follow, the Parties agreed to a December 12, 2018 deposition date. However, the Parties were unsuccessful in securing facilities in Alpine, Texas capable of hosting

a video conference, and on December 10, 2018, counsel for BPM informed Mr. Ericsson that the deposition would be conducted by telephone and that documents to be utilized during the deposition would be provided by mail the following day:

In an effort to avoid technical difficulties on Wednesday, BPM proposes that your deposition be conducted over telephone as opposed to skype. While a video deposition is certainly preferable, we are hopeful that we can accomplish the same by telephone with less potential issues arising. To facilitate the deposition by telephone, we will provide by next-day-air (1) **a flash drive with deposition documents** and (2) a map of the subject lands. We will also make the documents available electronically through our firm's network should the flash drive not arrive by Wednesday. Please provide at your earliest convenience (1) your current mailing address and (2) the telephone number by which we can reach you at 9:00am MST on Wednesday morning. It is our hope that this approach will best accommodate your deposition. Please do not hesitate to contact us with any questions or concerns you may have.

Ex. A, 12/10/18 BPM email to 2U (emphasis added).

9. Mr. Ericsson received and reviewed the documents contained on the flash drive and the map of the subject lands on December 11, 2018, the day before his scheduled telephonic deposition. (Deposition of Ronald Ericsson ("Ronald Dep."), attached as **Ex. B**, 10:2-12, 10:25-11:11).

10. Counsel for BPM conducted a telephonic deposition of Mr. Ericsson on December 12, 2018.

11. From the outset, Mr. Ericsson was unresponsive and combative. Despite having access to a computer, Mr. Ericsson refused to either access or answer questions about the documents provided by BPM on the flash drive. The following exchange is offered to demonstrate Mr. Ericsson's refusal to meaningfully participate in the deposition:

Q: Okay. And just quickly, the last instruction. All of the documents that I've sent to you we have affixed with a Bates stamp, and so during the course of this deposition, I will be referring to the documents by that number. And you just mentioned that you did receive that flash drive. Do you have access to those documents during this deposition?

A I've got the flash drive.

Q: And are you able to access them?

A: No.

Q: Do you have a computer, Mr. Ericsson?

A: Yes, I have a computer. You sent me e-mails.

Q: Yes. So are you able to access the flash drive during this deposition? It's important that you be able to review the documents as we walk through them.

A: No.

Q: And why is that?

A: Because I'm on the conference call.

Q: Mr. Ericsson, in developing this deposition, there's been a lot of conversation about the importance of reviewing documents during the course of this deposition. Do you remember those conversations?

A: This hearing is about reclamation, only reclamation, not all the documents in there.

Q: Mr. Ericsson –

A: I will respond to – I will respond to questions on reclamation. That's what the hearing is about.

Q: Mr. Ericsson, its important –

A: That won't take six hours. That won't take six hours.

Q: It's important that we walk through some of these documents with you, and regardless of whether or not you think they're relevant for this hearing, I have the opportunity, on behalf of BPM, to ask you questions about some of these documents and further understand what your position is, and to facilitate that, it's important that these documents are in front of you. So to the extent you can –

A: Let me read to you, "Beyond the scope of the proceedings as ordered by the hearing examiner." This is about reclamation.

Q: Mr. Ericsson, I fully understand –

A: There's a whole pile of documents that are not relevant. Only one thing is involved here, reclamation is not complete.

[...]

Q: Ronald, I understand your position, but the fact of the matter is that we're entitled to conduct your deposition of you and to go over these documents, and we believe that they are relevant, and we believe that they will be used at hearing. We intend to use –

A: I will respond – I will respond again and again and again if you want to take six hours. It’s beyond the scope of the proceeding as ordered by the hearing examiner. This is about reclamation, so if you want to spend six hours of me reading that, then go ahead. If you want to talk about reclamation, I’m here, and I’m on the record, and I will answer.

Q: Ronald, I very much want to speak to you about any number of aspects of reclamation for the subject lands, and to do that, we need to look at some of these documents so that we can –

A: The only thing that we are concerned about are the trees. We’re not going to fight on the soil conservation, not all of that. That’s not a concern of ours. We won’t object to that. We have one objection, restoring and not taking 10,936 trees, which BPM said they will not restore unless the landowner puts it in writing that they want them restored, which we did.

Ronald Dep. 11:12-13:8, 14:2-15:1.

12. During the deposition, Mr. Ericsson refused to answer questions regarding the ownership and management structure of 2U, the current and prior use of the subject lands by 2U or third parties, prior bentonite mining and reclamation on 2U’s lands, and Mr. Ericsson’s interactions with BPM in the years and months preceding the initiation of this proceeding. Mr. Ericsson repeatedly responded that the questions were “beyond the scope of the proceedings as ordered by the hearing examiner” and “asked and answered.” *See* Ronald Dep. 31-33, 46-56. The following exchange is again offered to demonstrate Mr. Ericsson’s refusal to meaningfully participate in the deposition:

Q: Okay. And so returning to the Notice of Deposition, BPM 000380, again, I’d just like to run through these quickly. Have you provided all documentation, and this is in regard to Request No. 1, of any existing uses of the subject lands?

A: I don’t understand the question.

Q: Well, we requested all documentation of existing uses of the subject lands that may be impacted by the proposed mining operation.

A: And we sent those – we sent those documents.

Q: Okay. And so you’ve identified all existing uses of the subject lands in your responses?

A: No. You asked for documents.

Q: Okay. And what I’d like to do now is have you tell me what the existing uses are.

A: Beyond the scope of the proceedings ordered by the hearing examiner.

Q: Again, Mr. Ericsson –

A: Asked and answered.

Ronald Dep. 44:16-45:10.

13. Mr. Ericsson refused to discuss 2U's Produced Documents and informed counsel for BPM that certain documents responsive to BPM's Request for Production were not produced. Mr. Ericsson further refused to provide information on the nature of the non-produced documents or the reason for withholding production. Ronald Dep. 29:21-33:1. The following exchange is again offered to demonstrate Mr. Ericsson's refusal to meaningfully participate in the deposition:

Q: When did you receive the Notice of Deposition?

A: Which one?

Q: The first one that we've been talking about this morning that's been marked as BPM 000 –

A: You know the answer to that because you sent it certified with a return. It's in your records.

Q: And I will represent for the record that you received it by e-mail on November 5th of 2018, and you received it by certified mail on November 8th, 2018 and –

A: You have the records.

Q: Mr. Ericsson, again, I would request that you refrain from interjecting while I'm speaking for purposes of the court reporter maintaining an accurate record.

A: I heard you before.

Q: And I understand that you may have heard me, but you continue to do it.

A: And you're continuing to pad this for no purpose. You're going way beyond the scope of the hearing.

Q: Mr. Ericsson, you received this Notice of Deposition –

A: Mr. Ericsson, Mr. Ericsson. It's Ronald, Ronald, Ronald, Ronald.

Q: Ronald, you received this Notice of Deposition before you left Wyoming, is that correct?

- A: Yes.
- Q: And last week you participated in a conference call with the hearing examiner on the 3rd of December, is that correct?
- A: You know it's correct. You were on the line.
- Q: Yes, Ronald, but I need to make this – make this – reflect it in the record.
- A: Asked and answered.
- Q: Ronald, in that hearing, do you recall testifying to the hearing examiner that you collected all responsive documents in Wyoming and took them with you to Texas?
- A: Not all. That would take a pickup load.
- Q: So there's a pickup load of responsive documents in Wyoming?
- A: This is beyond the hearing. It's beyond the scope of the proceedings ordered by the hearing examiner.
- Q: Mr. – Ronald, what I'm trying to establish is whether or not you complied with our discovery request.
- A: Asked and answered.

Ronald Dep. 31:5-33:1.

14. Mr. Ericsson continued in this combative and unresponsive manner until ending the deposition by abruptly terminating the telephone call after approximately two hours. Ronald Dep. 107:10-23. The entirety of the deposition transcript has been attached hereto.

15. The deposition was of no value to BPM and served only to further frustrate the discovery process.

16. BPM has the right to discover the factual basis for 2U's refusal to consent to the proposed mining and reclamation plans.

17. 2U's actions throughout the course of this proceeding have frustrated the discovery process and unfairly prejudiced BPM.

18. BPM incurred costs and expenses preparing for and attending the December 12, 2018 telephone deposition, including but not limited to attorney's fees, court reporter costs, and mailing expenses.

ARGUMENT

1. The EQC conducts contested case proceedings in accordance with the Wyoming Rules of Civil Procedure. DEQ Rules, Ch. 2, § 2.

2. Mr. Ericsson's refusal to respond to questioning or otherwise meaningfully participate in the deposition or produce documents responsive to BPM's Request for Production violates the Hearing Examiner's December 3, 2018 Order and constitutes sanctionable conduct under the Wyoming Rules of Civil Procedure. Wyo. R. Civ. P. 37(b).

3. Available sanctions include but are not limited to (1) directing that factual matters be resolved against the disobedient party; (2) prohibiting the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence; or (3) rendering a default judgment against the disobedient party. Wyo. R. Civ. P. 37(d)(3); 37(b)(2)(A)(i)-(vi).

4. BPM has the right to discover the factual basis for 2U's refusal to consent to the proposed mining and reclamation plans, and 2U's actions continue to frustrate the discovery process, unfairly prejudice BPM, and constitute sanctionable conduct under the Wyoming Rules of Civil Procedure.

5. As a matter of fairness, Mr. Ericsson and 2U should not be allowed to testify at hearing regarding topics and questions that they refused to answer during the deposition.

6. Specifically, Mr. Ericsson and 2U should not be allowed to testify as to:

- a. whether BPM's mining and reclamation plans have been submitted to 2U for approval;
- b. whether BPM's mining and reclamation plans are detailed so as to illustrate the full proposed surface use, including proposed routes of ingress and egress;
- c. whether BPM's surface use substantially prohibits the operations of 2U; and
- d. whether the proposed reclamation plan reclaims the surface to its approved future use as soon as feasibly possible.

7. Pursuant to Wyo. R. Civ. P. 37(a)(1), the undersigned counsel for BPM certifies that the movant has in good faith conferred or attempted to confer with the 2U and Mr. Ericsson to obtain the discovery sought without EQC intervention.

WHEREFORE, the movant requests the Hearing Examiner order as follows:

1. Direct that 2U not be allowed to present evidence related to any question or topic raised at deposition that were not answered.
2. Direct that 2U not be allowed to testify to matters not addressed at the deposition as a result of Mr. Ericsson prematurely terminating the telephonic deposition or related to any question or topic that he refused to answer.
3. Prohibit 2U from supporting or opposing designated claims or defenses or from introducing designated matters in evidence regarding matters beyond tree restoration.
4. Such further relief as the Hearing Examiner may deem just and equitable.
5. A proposed Order is submitted with this Motion.

DATED this 21st day of December 2018.

A handwritten signature in blue ink, appearing to be "M. J. Micheli".

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, I served a true and correct copy of the foregoing PETITIONER BENTONITE PERFORMANCE MINERALS, LLC'S MOTION TO LIMIT TESTIMONY AND EVIDENCE AT HEARING 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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