

Reasons why both the “PETITIONER BENTONITE PERFORMANCE MINERALS, LLC’S MOTION FOR SUMMARY JUDGMENT” and “PETITIONER BENTONITE PERFORMANCE MINERALS, LLC’S MOTION TO LIMIT TESTIMONY AND EVIDENCE AT HEARING” should be denied:

Both motions are based on “2U’s own sworn testimony”. The deposition of Ronald Ericsson is not “2U’s own sworn testimony” as he was not an owner, manager and did not have authorization to make any decisions regarding 2U Ranch LLC (see Appendix A). This makes his testimony irrelevant and is grounds for denial of both motions.

Bold wording indicates wording from the Summary Judgement.

The scope of this proceeding is narrow and limited because DEQ/LQD has not yet had the opportunity to review BPM’s proposed mining and reclamation operations or approve, amend or deny BPM’s proposed permit amendment.

2U Ranch LLC response: The DEQ received the “Amendment to a permit to mine” on March 2, 2016 (see Appendix A). DEQ has had almost three years to review BPM’s proposed mining and reclamation operations.

Accordingly, substantive issues such as whether BPM’s proposed reclamation plan complies with the Wyoming Environmental Quality Act (EQA) and its implementing regulations are appropriately beyond the scope of this proceeding.

2U Ranch LLC response: BPM’s proposed reclamation plan must comply with the Wyoming Environmental Quality Act (EQA) and its implementing regulations are not appropriately beyond the scope of this proceeding as shown by the following “CONCLUSIONS OF LAW” in LeFavre vs. EQC 1987 (Appendix A):

1. The Environmental Quality Council has jurisdiction over both the subject matter and parties to this proceeding.
2. Due and proper notice of the hearing in this matter has been given in all respects as required by law and, specifically, by Section 35-11-406(k), Wyoming Statutes, 1977, as amended.
3. The policy and purpose of the Wyoming Environmental Quality Act is to enable the State to prevent, reduce and eliminate pollution, to preserve, and enhance the air, water and reclaim the land of Wyoming and to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the State.
4. The archaeological, historic, recreational, and wildlife values which are unique to the Natural Corrals area must be preserved and enhanced in accordance with the policy and purpose of the Environmental Quality Act.

5. Section 35-11-402, Wyoming Statutes 1977, as amended, requires that land must be reclaimed to its highest previous use.

6. The Applicant has presented no evidence to demonstrate that the Natural Corrals can be reclaimed to its archaeological, historic, wildlife, and recreational use.

7. Section 35-11-406(m)(iii), Wyoming Statutes 1977, as amended, provides that a permit may be denied if any part of the proposed operation, or reclamation program, or proposed future use is contrary to the law or policy of this state, or the United States.

8. The Applicant bears the burden of proving that his application is complete and that it meets all legal requirements; and has failed to demonstrate that this burden has been met insofar as the Applicant seeks to amend Permit No. 503 to include the Natural Corrals.

2U has a single objection to BPM's permit amendment application: that the proposed reclamation plan does not require the replanting of trees disturbed by the proposed mining operations.

2U Ranch LLC response: Irrelevant to the motions. BPM has based this off of "2U's own sworn testimony". The deposition of Ronald Ericsson is not "2U's own sworn testimony" as he was not an owner, manager and did not have authorization to make any decisions regarding 2U Ranch LLC (see Appendix A).

With respect to reclamation, this proceeding simply concerns whether the proposed reclamation plan reclaims the surface lands to their approved future use as soon as feasibly possible. Wyoming Statute § 35-11-406(b)(xii) in no way implicates the substantive reclamation standards prescribed by the EQA.

2U Ranch LLC response: The approved future use of the surface is defined by W.S. 35—11-402 (a) (i), Establishment of Standards which states that reclamation should be to the "highest previous use of the affected lands, the surrounding terrain and natural vegetation, surface and subsurface flowing or stationary water bodies, wildlife and aquatic habitat and resources, and acceptable uses after reclamation including the utility and capacity of the reclaimed lands to support such uses" and by LQD Noncoal rules and regulations, chapter 3, section 2 (a) (i) which states "reclamation shall restore the land to a condition equal to or greater than the highest previous use. The land, after reclamation, must be suitable for the previous use which was of the greatest economic or social value to the community area, or must have a use which is of more economic or social value than all of the other previous uses".

BPM's reclamation plan will not restore the disturbed mining lands to the required future use – highest previous use standard because:

- The reclamation plan does not include information on reclaiming trees. This is mandated by W.S. 35-11-402 (a) which states reclamation must include: (iv) Revegetation of affected lands including species to be used, methods of planting and other details necessary to assure the development of a vegetative cover consistent with the surrounding terrain and the highest prior use standards set out in paragraph (i) of this subsection.

- The reclamation plan does not include specific reclamation plan text which details tree replanting methods and locations as required by Reclamation Plan Section 2.11.8.6 Post-mining Tree Restoration. This is required when the surface owner specifically requests restoration in writing. 2U requested that trees to be replanted in a certified letter to BPM (see Appendix A).
- The reclamation plan does not include tree planting migration as required in the BPM's wildlife plan and by request of the Wyoming Game and Fish Department (see Appendix A).
- The reclamation plan does not include wildlife reclamation as required by LQD Noncoal rules and regulations, chapter 3, section 2 (a) (ii) Operators are required to restore wildlife habitat, whenever the Administrator determines that this restoration is possible, on affected land in a manner commensurate with or superior to habitat conditions which existed before the land became affected, unless the land is private and the proposed use is for a residential or agricultural purpose which may preclude its use as wildlife habitat.
- The reclamation plan does not include wetlands migration as required by Water Quality, Rules and Regulations, Wyoming Surface Water Quality Standards, Chapter 1, Section 12.
- The reclamation plan must include tree restoration as was required in Klover vs EQC (Appendix A). In addition, reestablishment of animal habitat which would include replacement of trees destroyed or displaced by mining operations is required as was ordered in Klover vs EQC (Appendix A).
- The reclamation plan states three out of pit overburden piles will be constructed in relation to mining on the WSL04 claim in violation of the highest previous use of the affected lands and surrounding terrain.
- The reclamation plan must include tree replanting (DEQ, Non Coal, Standard Operating Procedure,(SOP) No. 7.4, Land Quality Division, SUBJECT: Bond Release Procedures for Bentonite Mines, Category 4: Lands Disturbed Post August 1981. Lands affected on after September 1, 1981. Reclamation goals on these lands are outlined in WDEQ/LQD Chapter 3, Section 2 (d). Bond release on Category 4 lands is evaluated through an application and a field inspection that addresses the following criteria:(h) If the approved Reclamation Plan includes a specific commitment(s) (i.e. trees, stockpond, etc.), the commitment(s) must be fulfilled.)
- DEQ – Non Coal, Chapter 3 Non Coal Mine Environmental Protection Performance Standards, Revegetation states “reforestation shall be deemed to be complete when a reasonable population density as established in the reclamation plan has been achieved, the trees have shown themselves capable of continued growth for a minimum period of five years following planting, and the understory vegetation is adequate to control erosion and is appropriate for the land-use goal”. “The plan shall include the method and schedule of revegetation, including but not limited to species of plants, seeding rates, seeding techniques, mulching requirements or other erosion control techniques, and seeding times to be used in a given area for reclamation purposes”.
- Trees cannot be restored on bentonite reclaimed areas even under the best conditions such as in a greenhouse with supplemental water and soil treatments (see Appendix A).
- BPM cannot reclaim the ponderosa pines, bur oaks or rocky mountain junipers due to the poor soil quality overburden that will be used to reclaim the mining disturbances.

1. Section 2.5.4.15 Wyoming State Lease 42804 Amendment Overburden Data states “The laboratory overburden analysis for Wyoming State Lease 42804 indicate **unsuitably acidic overburden** in each of the tiers of sampling except for S1A 0-5' and 20-25' and S2A tier 25-30'. Therefore BPM proposes to utilize overburden material (tier's 20-30') for reclamation (see Appendix A).
 2. These trees grow best in 6.0 to 7.0 soil pH (See Appendix A. NRCS, 2011) and the problem is the proposed tier's 20-30' for reclamation will still require at least 20' of overburden soil that is unsuitably acidic and will not allow tree growth (see Appendix A).
 3. In addition, these trees will not grow in soils with a high silt and/or clay content (See Appendix A. NRCS, 2011; Shepperd and Battaglia, 2002). Tier's 20-30' overburden soil is almost entirely composed of silt and clay [93% (51% silt and 42% clay) and 84% (32% silt and 52% clay)], respectively. The remaining overburden is extremely high in silt and clay and will not support trees (see Appendix A).
 4. Mature ponderosa pine can have a taproot up to 36 feet which is necessary as an anchor to prevent uprooting (See Appendix A. Ponderosa Pine. 2019a). Mature ponderosa pines seldom grow roots past 3 ft in heavy clay soils and would not be able to support their height or survive high winds without being uprooted during reclamation (See Appendix A. Ponderosa Pine. 2019b).
- DEQ Guideline No. 2 Vegetation Requirements for Exploration By Dozing, Regular Mines, and In Situ Leaching Ch. 2, Sect. 2(G) states that the reclamation plan should address the following Fish and Wildlife Habitat items:
 - 1) Areal distribution of shrubs and trees on the post mining landscape.
 - 2) Species occurring and estimated density of each.
 - 3) Methods used to establish shrubs and trees.
 - 4) Assessment of the quantitative and qualitative aspects of the post mining shrub and tree communities in terms of providing wildlife habitat.

BPM’s reclamation plan will not restore the disturbed mining lands to the to their approved future use as soon as feasibly possible as required by W. S. 35 11 406, Application for Permit; Generally; Denial; Limitations, (D) states that “the proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible” because:

- Section 2.10.7 Mining Progression Time Schedule states: “Neither the Wyoming Environmental Quality Act nor the Noncoal Rules and Regulations require a specific time schedule”. This is refuted by DEQ, Land quality – Non Coal, Ch 2: Regular Non Coal Mine Permit Applications, Sec 2 (b) (ii) states that “A time schedule for each major step in the reclamation which coordinates the operator’s reclamation plan with the mining plan in such a manner so as to facilitate reclamation at the earliest possible time consistent with Chapter 3, Section 2(k) and the orderly development of the mining property.”
- Section 2.11.3.3 Reclamation Progression Maps and Schedules states: “reclamation backfilling in a specific cut will begin within (3) years from the date of the cut was initiated and permanent

seeding will be completed no later than five (5) years from the date the cut was initiated. If the start of mining is unknown then the schedule of reclamation is unknown.

- How can reclamation return the surface to its approved future use as soon as feasibly possible when it is not known when the mining will occur? This needs to be multiplied by four as this is the number of pits to be mined.

Throughout the course of this proceeding, 2U has made clear that it has a single objection to BPM's proposed permit amendment application: that the proposed reclamation plan does not require the replanting of trees disturbed by the proposed mining operations. Notably, for purposes of this proceeding, 2U does not contest whether it received the proposed mining and reclamation plans or whether the mining and reclamation plans are sufficiently detailed so as to illustrate BPM's full proposed surface use. Moreover, 2U identifies no existing uses of the subject lands by 2U that will be disrupted or otherwise impacted by the proposed mining and reclamation operations.

2U Ranch LLC response: Irrelevant to the motions. BPM has based this off of "2U's own sworn testimony". The deposition of Ronald Ericsson is not "2U's own sworn testimony" as he was not an owner, manager and did not have authorization to make any decisions regarding 2U Ranch LLC (see Appendix A).

Here, according to 2U's own sworn testimony, 2U has withheld its consent to BPM's proposed operations for one reason: that the proposed reclamation plan does not require the replanting of trees disturbed by the proposed mining operations. 2U has testified under oath that it does not contest that the proposed mining permit was submitted (Element 1) or that the proposed plan was adequately detailed (Element 2). As to whether the proposed mining plan substantially interferes with the surface owner's uses, 2U has refused to identify or discuss any existing uses by 2U of the subject lands.

2U Ranch LLC response: Irrelevant to the motions. BPM has based this off of "2U's own sworn testimony". The deposition of Ronald Ericsson is not "2U's own sworn testimony" as he was not an owner, manager and did not have authorization to make any decisions regarding 2U Ranch LLC (see Appendix A).

With respect to reclamation, an Order in Lieu of Consent proceeding simply concerns whether the proposed reclamation plan reclaims the surface lands to their approved future use as soon as feasibly possible. Wyo. Stat. § 35-11-406(b)(xii). An Order in Lieu of Consent proceeding in no way implicates the substantive reclamation standards prescribed by the EQA and its implementing regulations.

2U Ranch LLC response: The approved future use of the surface is defined by W.S. 35—11-402 (a) (i), Establishment of Standards which states that reclamation should be to the "highest previous use of the affected lands, the surrounding terrain and natural vegetation, surface and subsurface flowing or stationary water bodies, wildlife and aquatic habitat and resources, and acceptable uses after reclamation including the utility and capacity of the reclaimed lands to support such uses" and by LQD Noncoal rules and regulations, chapter 3, section 2 (a) (i) which states "reclamation shall restore the land to a condition equal to or greater than the highest previous use. The land, after reclamation, must

be suitable for the previous use which was of the greatest economic or social value to the community area, or must have a use which is of more economic or social value than all of the other previous uses “.

BPM’s reclamation plan will not restore the disturbed mining lands to the required future use – highest previous use standard because:

- The reclamation plan does not include information on reclaiming trees. This is mandated by W.S. 35-11-402 (a) which states reclamation must include: (iv) Revegetation of affected lands including species to be used, methods of planting and other details necessary to assure the development of a vegetative cover consistent with the surrounding terrain and the highest prior use standards set out in paragraph (i) of this subsection.
- The reclamation plan does not include specific reclamation plan text which details tree replanting methods and locations as required by Reclamation Plan Section 2.11.8.6 Post-mining Tree Restoration. This is required when the surface owner specifically requests restoration in writing. 2U requested that trees to be replanted in a certified letter to BPM (see Appendix A).
- The reclamation plan does not include tree planting migration as required in the BPM’s wildlife plan and by request of the Wyoming Game and Fish Department (see Appendix A).
- The reclamation plan does not include wildlife reclamation as required by LQD Noncoal rules and regulations, chapter 3, section 2 (a) (ii) Operators are required to restore wildlife habitat, whenever the Administrator determines that this restoration is possible, on affected land in a manner commensurate with or superior to habitat conditions which existed before the land became affected, unless the land is private and the proposed use is for a residential or agricultural purpose which may preclude its use as wildlife habitat.
- The reclamation plan does not include wetlands migration as required by Water Quality, Rules and Regulations, Wyoming Surface Water Quality Standards, Chapter 1, Section 12.
- The reclamation plan must include tree restoration as was required in Klover vs EQC (Appendix A). In addition, reestablishment of animal habitat which would include replacement of trees destroyed or displaced by mining operations is required as was ordered in Klover vs EQC (Appendix A).
- The reclamation plan states three out of pit overburden piles will be constructed in relation to mining on the WSL04 claim in violation of the highest previous use of the affected lands and surrounding terrain.
- The reclamation plan must include tree replanting (DEQ, Non Coal, Standard Operating Procedure,(SOP) No. 7.4, Land Quality Division, SUBJECT: Bond Release Procedures for Bentonite Mines, Category 4: Lands Disturbed Post August 1981. Lands affected on after September 1, 1981. Reclamation goals on these lands are outlined in WDEQ/LQD Chapter 3, Section 2 (d). Bond release on Category 4 lands is evaluated through an application and a field inspection that addresses the following criteria:(h) If the approved Reclamation Plan includes a specific commitment(s) (i.e. trees, stockpond, etc.), the commitment(s) must be fulfilled.)
- DEQ – Non Coal, Chapter 3 Non Coal Mine Environmental Protection Performance Standards, Revegetation states “reforestation shall be deemed to be complete when a reasonable population density as established in the reclamation plan has been achieved, the trees have

shown themselves capable of continued growth for a minimum period of five years following planting, and the understory vegetation is adequate to control erosion and is appropriate for the land-use goal". "The plan shall include the method and schedule of revegetation, including but not limited to species of plants, seeding rates, seeding techniques, mulching requirements or other erosion control techniques, and seeding times to be used in a given area for reclamation purposes".

- Trees cannot be restored on bentonite reclaimed areas even under the best conditions such as in a greenhouse with supplemental water and soil treatments (see Appendix A).
- BPM cannot reclaim the ponderosa pines, bur oaks or rocky mountain junipers due to the poor soil quality overburden that will be used to reclaim the mining disturbances.
 1. Section 2.5.4.15 Wyoming State Lease 42804 Amendment Overburden Data states "The laboratory overburden analysis for Wyoming State Lease 42804 indicate **unsuitably acidic overburden** in each of the tiers of sampling except for S1A 0-5' and 20-25' and S2A tier 25-30'. Therefore BPM proposes to utilize overburden material (tier's 20-30') for reclamation (see Appendix A).
 2. These trees grow best in 6.0 to 7.0 soil pH (See Appendix A. NRCS, 2011) and the problem is the proposed tier's 20-30' for reclamation will still require at least 20' of overburden soil that is unsuitably acidic and will not allow tree growth (see Appendix A).
 3. In addition, these trees will not grow in soils with a high silt and/or clay content (See Appendix A. NRCS, 2011; Shepperd and Battaglia, 2002). Tier's 20-30' overburden soil is almost entirely composed of silt and clay [93% (51% silt and 42% clay) and 84% (32% silt and 52% clay)], respectively. The remaining overburden is extremely high in silt and clay and will not support trees (see Appendix A).
 4. Mature ponderosa pine can have a taproot up to 36 feet which is necessary as an anchor to prevent uprooting (See Appendix A, Ponderosa Pine. 2019a). Mature ponderosa pines seldom grow roots past 3 ft in heavy clay soils and would not be able to support their height or survive high winds without being uprooted during reclamation (See Appendix A. Ponderosa Pine. 2019b).
- DEQ Guideline No. 2 Vegetation Requirements for Exploration By Dozing, Regular Mines, and In Situ Leaching Ch. 2, Sect. 2(G) states that the reclamation plan should address the following Fish and Wildlife Habitat items:
 - 1) Areal distribution of shrubs and trees on the post mining landscape.
 - 2) Species occurring and estimated density of each.
 - 3) Methods used to establish shrubs and trees.
 - 4) Assessment of the quantitative and qualitative aspects of the post mining shrub and tree communities in terms of providing wildlife habitat.

A. The EQC should grant Summary Judgment as it relates to Elements 1, 2 and 3.

1. 2U does not contest that they received the proposed mining and reclamation plans (Element 1) or that the plans do not adequately detail the proposed surface use of the subject lands (Element 2).

2U testified under oath that it does not contest Elements 1 or 2 of the Order in Lieu of Consent analysis:

Q: Based on what you just said, I understand your position to be that BPM takes issue with the fourth element of the statutory requirements. And to be clear, the first element requires that a mining plan and a reclamation plan be submitted to you. Do you contest that?

A: No.

Q: And the second element requires that the mining plan and the reclamation plan be detailed to illustrate the full proposed surface use, including the proposed routes of ingress and egress. Do you dispute that?

A: No.

Ronald Dep. 41:12-241.

With respect to Element 1, BPM first provided 2U with the proposed mining and reclamation plans on January 8, 2016. Ex. B, 1/8/16 Mining and Reclamation Plans. In September 2017, BPM provided 2U with the entire permit amendment application on a flash drive, together with the proposed mining and reclamation plans. Ex. D, 9/22/17 Consent Letter. On May 24, 2018, BPM again provided 2U with the proposed mining and reclamation plans by mail. Ex. E, 5/24/18 Consent Letter. With respect to Element 2, it is not a surprise that 2U makes no objections. Ronald Dep. 41:12-18. In January and February 2016, 2U conducted a detailed review of the proposed mining and reclamation plans and provided substantive revisions that are reflected in the finalized mining and reclamation plans submitted with BPM's permit amendment application materials to DEQ/LQD. See for example, Ex. F, 2/4/16 Tetrault Email (providing 2U with revised reclamation plan incorporating requests regarding reservoirs and permanent roads). Because 2U does not contest Elements 1 or 2 there exists no genuine issue as to any material fact and BPM is entitled to judgment as a matter of law on Elements 1 and 2 of the Order in Lieu of Consent analysis 2. 2U failed to identify and refused to discuss any existing surface uses by 2U of the subject lands, much less any existing uses that will be substantially prohibited by BPM's proposed mining operations (Element 3).

With respect to Element 3, the proposed operations must not substantially prohibit the existing operations of the surface owner. Wyo. Stat. § 35-11-406(b)(xii). Throughout the discovery process, 2U has identified no existing uses of the subject lands by 2U, much less any existing uses that will be "substantially prohibited" by the proposed operations. BPM's Request for Production sought all documentation evidencing existing uses by 2U of the subject lands that 2U alleges will be adversely impacted by the proposed operations. Ex. G, Notice of Deposition at 5. 2U produced no documents responsive to the request. At deposition, Mr. Ericsson categorically refused to identify or discuss 2U's existing uses of the subject lands. Ronald Dep. 44:16-45:10. Pressed on the issue, Mr. Ericsson testified that 2U's existing use of the subject lands were not relevant for purposes of this proceeding:

Q: The real thing that we're interested in is understanding how you use your land.

And are you willing and able to talk about this?

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

Ronald Dep. 43:13-17.

Because 2U has failed to identify any existing uses of the subject lands either in response to BPM's Request for Production or in deposition testimony, there exists no genuine issue as to any material fact and BPM is entitled to judgment as a matter of law on Element 3 of the Order in Lieu of Consent analysis.

B. The EQC lacks the jurisdictional authority to resolve 2U's objection to the disturbance of trees in an Order in Lieu of Consent proceeding because Element 4 does not implicate substantive reclamation obligations. With Elements 1, 2, and 3 conceded by 2U, the only issue remaining is whether BPM can establish Element 4 – that the proposed reclamation plan reclaims the lands to their approved future use as soon as feasibly possible. At his December 12, 2018 deposition, Mr. Ericsson testified repeatedly that 2U's sole basis for withholding consent and objecting to the issuance of an Order in Lieu of Consent rests with the "reclamation" aspect of the Order in Lieu of Consent analysis.² Mr. Ericsson summarized 2U's refusal to consent to the proposed operations and its objection to BPM's request for and Order in Lieu of Consent as follows:

Q: Mr. Ericsson, I'm going to take a step back here. And it may be worthwhile that you take a five-minute break and collect yourself, but –

A: Oh, no. I want this over with, I'm not going to be here for six hours, whether you like it or not.

Q: Ronald, it's important that you participate in this process, that you allow us to –

A: It's important – it's important that you ask questions that are relevant to the hearing. This has to do with reclamation. It has nothing to do with anything else.

And you keep asking questions that are not relevant.

Q: And now this is a part of the Order [of Schedule] I'd like you to focus on. "The Petitioner has filed a Petition for Order in Lieu of Consent. A hearing on this matter only looks to identify whether four statutory elements have been met. Notably, 2U only takes issue with the fact that BPM's proposed reclamation plan does not prescribe the replanting of trees disturbed by the proposed mining operations. During this proceeding, 2U has refused to further discuss other aspects of the proposed operations, and as set out in BPM's concurrently filed Motion to Limit Testimony, 2U should not be allowed to create new testimony regarding issues they refused to discuss at deposition or otherwise raise in discovery.

Those elements are," and the hearing examiner proceeds to identify the four statutory elements. Do you remember this now?

A: I remember the four.

Q: Okay. And what do you remember the four to be? And I'm happy to read them into the record if you prefer.

A: I know what they – I know what they are. The one that we don't agree with is reclamation is not complete.

Q: Right, and that's what I'm – that's what I'm trying to get at here is where you're at and what your position is, and so what I would like –

A: I will tell you my position again and again and again. We do not accept that BPM can comply with the DEQ regulation, with the Wyoming statutes which requires that the trees, the land be restored to the value equal or better than prior to being mined. That's what the issue's all about. We've requested for almost two years to get BPM to explain how they're going to restore the trees, and we've received an answer no, no, no. Why? It's not possible. And the law requires it, the DEQ regulations require it. BPM knows it, the attorneys know it, and we know it, and everybody's trying to avoid it. And that's what the Council hearing's about, and that's why we didn't sign the landowner's surface agreement.

Ronald Dep. 33:14-25; 39:9-40:6; 57:12-19.

2U Ranch LLC response: Irrelevant to the motions. BPM has based this off of "2U's own sworn testimony". The deposition of Ronald Ericsson is not "2U's own sworn testimony" as he was not an owner, manager and did not have authorization to make any decisions regarding 2U Ranch LLC (see Appendix A).

The EQA only requires that a mine permit application include, among other materials, "a mining plan and reclamation plan dealing with the extent to which the mining operation will disturb or change the lands to be affected, the proposed future use or uses and the plan whereby the operator will reclaim the affected lands to the proposed future use or uses." Wyo. Stat. § 35- 11-406(b). BPM's permit amendment application details the extent to which the mining operation will disturb the subject lands, proposes a future use of grazingland, and specifies reclamation requirements designed to achieve the proposed future use. The proposed future use of grazingland is consistent with the approved future use for 2U's immediately adjacent lands covered by Mine Permit 267C and the fact that the subject lands have been leased to 2U's neighbor for years for the purpose of grazing cattle:

2U Ranch LLC response: *BPM'S permit amendment application proposes a future use of grazingland, but the permit has not been approved, therefore the future use of this land has **not** been designated to be only grazingland. This necessitates that the reclamation plan include information on restoring to the highest previous use for recreation, hunting, wildlife habitat (wetlands-springs), view-scape (the surrounding terrain) as well as grazing.*

The approved future use is not just grazingland as shown by W.S. 35—11-402 (a) (i), Establishment of Standards which states that reclamation should be to the “highest previous use of the affected lands, the surrounding terrain and natural vegetation, surface and subsurface flowing or stationary water bodies, wildlife and aquatic habitat and resources, and acceptable uses after reclamation including the utility and capacity of the reclaimed lands to support such uses” and by LQD Noncoal rules and regulations, chapter 3, section 2 (a) (i) which states “reclamation shall restore the land to a condition equal to or greater than the highest previous use. The land, after reclamation, must be suitable for the previous use which was of the greatest economic or social value to the community area, or must have a use which is of more economic or social value than all of the other previous uses “.

In addition, this land has been historically used for recreation, hunting, wildlife habitat (wetlands-springs), view-scape (the surrounding terrain) as well as grazing.

BPM’s reclamation plan

BPM’s reclamation plan will not restore the disturbed mining lands to the required future use – highest previous use standard because:

- The reclamation plan does not include information on reclaiming trees. This is mandated by W.S. 35-11-402 (a) which states reclamation must include: (iv) Revegetation of affected lands including species to be used, methods of planting and other details necessary to assure the development of a vegetative cover consistent with the surrounding terrain and the highest prior use standards set out in paragraph (i) of this subsection.
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- The reclamation plan must include tree restoration as was required in Klover vs EQC (Appendix A). In addition, reestablishment of animal habitat which would include replacement of trees destroyed or displaced by mining operations is required as was ordered in Klover vs EQC (Appendix A).

- The reclamation plan states three out of pit overburden piles will be constructed in relation to mining on the WSL04 claim in violation of the highest previous use of the affected lands and surrounding terrain.
- The reclamation plan must include tree replanting (DEQ, Non Coal, Standard Operating Procedure,(SOP) No. 7.4, Land Quality Division, SUBJECT: Bond Release Procedures for Bentonite Mines, Category 4: Lands Disturbed Post August 1981. Lands affected on after September 1, 1981. Reclamation goals on these lands are outlined in WDEQ/LQD Chapter 3, Section 2 (d). Bond release on Category 4 lands is evaluated through an application and a field inspection that addresses the following criteria:(h) If the approved Reclamation Plan includes a specific commitment(s) (i.e. trees, stockpond, etc.), the commitment(s) must be fulfilled.)
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 2. These trees grow best in 6.0 to 7.0 soil pH (See Appendix A. NRCS, 2011) and the problem is the proposed tier's 20-30' for reclamation will still require at least 20' of overburden soil that is unsuitably acidic and will not allow tree growth (see Appendix A).
 3. In addition, these trees will not grow in soils with a high silt and/or clay content (See Appendix A. NRCS, 2011; Shepperd and Battaglia, 2002). Tier's 20-30' overburden soil is almost entirely composed of silt and clay [93% (51% silt and 42% clay) and 84% (32% silt and 52% clay)], respectively. The remaining overburden is extremely high in silt and clay and will not support trees (see Appendix A).
 4. Mature ponderosa pine can have a taproot up to 36 feet which is necessary as an anchor to prevent uprooting (See Appendix A. Ponderosa Pine. 2019a). Mature ponderosa pines seldom grow roots past 3 ft in heavy clay soils and would not be able to support their height or survive high winds without being uprooted during reclamation (See Appendix A. Ponderosa Pine. 2019b).

- DEQ Guideline No. 2 Vegetation Requirements for Exploration By Dozing, Regular Mines, and In Situ Leaching Ch. 2, Sect. 2(G) states that the reclamation plan should address the following Fish and Wildlife Habitat items:
 - 1) Areal distribution of shrubs and trees on the post mining landscape.
 - 2) Species occurring and estimated density of each.
 - 3) Methods used to establish shrubs and trees.
 - 4) Assessment of the quantitative and qualitative aspects of the post mining shrub and tree communities in terms of providing wildlife habitat.

Q: Moving forward, the next document I'd like to enter into the record is 2U-0017.

I'll represent that this is a Lease Agreement that we received from Ronald

Ericsson in response to BPM's request for production of documents. Mr.

Ericsson, are you familiar with this Lease Agreement?

A: You're talking about the grazing lease?

Q: It appears to be a grazing lease with Mule Shoe.

A: It isn't appearing to. It is.

A: The grazing lease is the grazing lease. That's what you do on a ranch. You don't sell grass. You sell grass through livestock.

Q: How many years have you grazed the subject lands?

A: Do you understand Wyoming ranches? What do you think they do with land?

What is a ranch? That's a – that's an irrelevant question.

Q: And how long has Mule Shoe leased those lands from 2U?

A: Four years.

Q: Okay. And so the record is clear, if I go back four years, would that be the summer of 2014? Is that the leasing period that would have initiated the agreement with Mule Shoe?

A: 15.

Q: 2015, okay. And has that lease always covered all of 2U's lands or just part of 2U's lands?

A: All.

Q: All. And so since 2015, the subject lands, which are the subject to this proceeding, have been covered by a lease to Mule Shoe?

A: Yes.

Ronald Dep. 28:21-29:5, 45:23-25; 48:13-49:-2; see also, Ex. H, Grazing Lease.

2U Ranch LLC response: Irrelevant to the motions. BPM has based this off of “2U’s own sworn testimony”. The deposition of Ronald Ericsson is not “2U’s own sworn testimony” as he was not an owner, manager and did not have authorization to make any decisions regarding 2U Ranch LLC (see Appendix A).

BPM’s proposed reclamation plan specifies reclamation requirements designed to achieve the proposed future use of grazingland. 2U’s complaint that the proposed plan does not prescribe “tree restoration” is misplaced and premature.

2U Ranch LLC response: The approved future use is not just grazingland as shown by W.S. 35—11-402 (a) (i), Establishment of Standards which states that reclamation should be to the “highest previous use of the affected lands, the surrounding terrain and natural vegetation, surface and subsurface flowing or stationary water bodies, wildlife and aquatic habitat and resources, and acceptable uses after reclamation including the utility and capacity of the reclaimed lands to support such uses” and by LQD Noncoal rules and regulations, chapter 3, section 2 (a) (i) which states “reclamation shall restore the land to a condition equal to or greater than the highest previous use. The land, after reclamation, must be suitable for the previous use which was of the greatest economic or social value to the community area, or must have a use which is of more economic or social value than all of the other previous uses “. \

In addition, this land has been historically used for recreation, hunting, wildlife habitat as well as grazing.

BPM’s reclamation plan will not restore the disturbed mining lands to the required future use – highest previous use standard because:

- The reclamation plan does not include information on reclaiming trees. This is mandated by W.S. 35-11-402 (a) which states reclamation must include: (iv) Revegetation of affected lands including species to be used, methods of planting and other details necessary to assure the development of a vegetative cover consistent with the surrounding terrain and the highest prior use standards set out in paragraph (i) of this subsection.
- The reclamation plan does not include specific reclamation plan text which details tree replanting methods and locations as required by Reclamation Plan Section 2.11.8.6 Post-mining Tree Restoration. This is required when the surface owner specifically requests restoration in writing. 2U requested that trees to be replanted in a certified letter to BPM (see Appendix A).
- The reclamation plan does not include tree planting migration as required in the BPM’s wildlife plan and by request of the Wyoming Game and Fish Department (see Appendix A).

- The reclamation plan does not include wildlife reclamation as required by LQD Noncoal rules and regulations, chapter 3, section 2 (a) (ii) Operators are required to restore wildlife habitat, whenever the Administrator determines that this restoration is possible, on affected land in a manner commensurate with or superior to habitat conditions which existed before the land became affected, unless the land is private and the proposed use is for a residential or agricultural purpose which may preclude its use as wildlife habitat.
- The reclamation plan does not include wetlands migration as required by Water Quality, Rules and Regulations, Wyoming Surface Water Quality Standards, Chapter 1, Section 12.
- The reclamation plan must include tree restoration as was required in Klover vs EQC (Appendix A). In addition, reestablishment of animal habitat which would include replacement of trees destroyed or displaced by mining operations is required as was ordered in Klover vs EQC (Appendix A).
- The reclamation plan states three out of pit overburden piles will be constructed in relation to mining on the WSL04 claim in violation of the highest previous use of the affected lands and surrounding terrain.
- The reclamation plan must include tree replanting (DEQ, Non Coal, Standard Operating Procedure,(SOP) No. 7.4, Land Quality Division, SUBJECT: Bond Release Procedures for Bentonite Mines, Category 4: Lands Disturbed Post August 1981. Lands affected on after September 1, 1981. Reclamation goals on these lands are outlined in WDEQ/LQD Chapter 3, Section 2 (d). Bond release on Category 4 lands is evaluated through an application and a field inspection that addresses the following criteria:(h) If the approved Reclamation Plan includes a specific commitment(s) (i.e. trees, stockpond, etc.), the commitment(s) must be fulfilled.)
- DEQ – Non Coal, Chapter 3 Non Coal Mine Environmental Protection Performance Standards, Revegetation states “reforestation shall be deemed to be complete when a reasonable population density as established in the reclamation plan has been achieved, the trees have shown themselves capable of continued growth for a minimum period of five years following planting, and the understory vegetation is adequate to control erosion and is appropriate for the land-use goal”. “The plan shall include the method and schedule of revegetation, including but not limited to species of plants, seeding rates, seeding techniques, mulching requirements or other erosion control techniques, and seeding times to be used in a given area for reclamation purposes”.
- Trees cannot be restored on bentonite reclaimed areas even under the best conditions such as in a greenhouse with supplemental water and soil treatments (see Appendix A).
- BPM cannot reclaim the ponderosa pines, bur oaks or rocky mountain junipers due to the poor soil quality overburden that will be used to reclaim the mining disturbances.
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The proposed reclamation methods and schedules have previously been approved for and implemented on 2U's immediately adjacent lands impacted by BPM's mining operations and are consistent with the industries' best practices.

2U Ranch LLC response: Not relevant as this is the first time BPM proposed to mine trees, wetlands, springs or permanently damaged the view-scape or lands used for recreation on the 2U Ranch LLC.

BPM has met its burden by providing competent and admissible evidence that BPM has taken the steps necessary to mandate the issuance of an Order in Lieu of Consent as prescribed by Wyo. Stat. § 35-11-406(b)(xii). The evidence supports the conclusion that (1) the proposed mining and reclamation plans have been submitted to 2U; (2) the proposed mining and reclamation plans adequately detail the proposed surface use, including routes of ingress and egress; (3) the proposed surface use does not substantially prohibit the operations of 2U; and (4) the proposed reclamation plan reclaims the surface lands to their approved future use as soon as feasibly possible. Because BPM has established each element of the Order in Lieu of Consent analysis, and because there exists no genuine issue as to any material fact, BPM is entitled to judgment as a matter of law.

2U Ranch LLC response: 2U disagrees with BPM on these issues.