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ATTORNEYS FOR CONTURA COAL WEST, LLC

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

IN RE CONTURA COAL WEST, LLC –)
PT0214)
)
) OAH Docket No. 19-004-220
) Docket No.18-4803
) Consolidated with 18-4805

**CONTURA COAL WEST, LLC’S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY
ABOUT ALLEGED WILLFUL VIOLATIONS OF ENVIRONMENTAL LAWS**

INTRODUCTION

Powder River Basin Resource Council (PRBRC) has alleged that Contura Coal West, LLC (Contura) cannot transfer its permit for the Belle Ayr Mine to Blackjewel, LLC (Blackjewel) because Blackjewel allegedly has ties to a company that PRBRC believes has a history of “willful violations” of laws governing other mining operations. (Objections and Petition for Hearing on the Proposed Transfer of Coal Mine Permits PT0214 (Belle Ayr Mine) and PT0428 (Eagle Butte Mine) from Contura Coal West to Blackjewel, LLC, attached hereto as Ex. 1 (PRBRC Obj. & Pet. for Hrng.), ¶¶ 4, 32, 35.) PRBRC’s proof for this assertion is a collection of newspaper articles and screenshots from employee reviews. In other words, PRBRC has nothing more than mere speculation, conjecture, and hearsay that it suggests adds up to willful acts. For the reasons set forth herein none of PRBRC’s evidence is admissible. Therefore,

Contura respectfully requests that the Council preclude PRBRC from offering any evidence about willful violations.

RELEVANT FACTS

PRBRC's claims about willful violations stem from the Environmental Quality Act prohibiting a party from receiving a permit if "after a finding by the director or council, after opportunity for hearing, that the applicant or operator specified in the application controls or has controlled mining operations with a demonstrated **pattern of willful violations** of such nature and duration with such resulting irreparable harm to the environment as to indicate **reckless, knowing or intentional conduct.**" Wyo. Stat. Ann. § 35-11-406(o) (emphasis added). As part of a permit transfer application, an applicant must provide a schedule, "listing all notices of violation which resulted in enforcement action of this act, and any law, rule or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation during the three (3) year period prior to the date of application." Wyo. Stat. Ann. 35-11-406(a)(xiv). To verify this schedule, the Department of Environmental Quality checks the Office of Surface Mining's Automatic Violator System (AVS). (PRBRC Obj. & Pet. for Hrng), ¶ 31.)

Based on this, PRBRC alleges that Blackjewel has common ownership and control with Revelation Energy, who has allegedly willfully violated environmental laws in operating other mines. (PRBRC Obj. & Pet. for Hrng, ¶¶ 4, 32, 35.) PRBRC then concludes Blackjewel can never receive a permit in Wyoming. (PRBRC Obj. & Pet. for Hrng), ¶ 36.) To prove these allegations, PRBRC must have competent, admissible evidence. But the only documents PRBRC

has produced, either as exhibits to its request for a hearing or in discovery, include newspaper articles about mine accidents, employee reviews of Revelation Energy, and printouts of Automatic Violator System (AVS) searches. To date, PRBRC has neither produced nor disclosed any witnesses or evidence that speak to the intent behind the events reported in the articles, statements by employees, or the reported violations. As a result, PRBRC's disclosed "proof" of willful violations relies on several types of inadmissible evidence.

ARGUMENT

1. The newspaper articles and employee reviews are inadmissible hearsay.

In evidentiary hearings like this one, hearsay is not admissible. Wyo. R. Evid. 802. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* at 801. A statement includes an "oral or written assertion." *Id.* A declarant is "a person who makes a statement." *Id.* The newspaper articles and employee reviews are written assertions that also contain oral assertions in the form of quotes. (PRBRC Obj. & Pet. for Hrng, Ex. 9.) The declarant in these articles and reviews include the employees, the author of the articles, and anyone quoted in the articles. None of these people will testify during the May 15-16, 2019 evidentiary hearing. So, the newspaper articles and employee reviews are out of court statements made by declarants who will not testify at trial offered for the truth of the matters asserted. In other words, they are inadmissible hearsay and should be excluded.

2. The newspaper articles and employee reviews are irrelevant and therefore inadmissible.

For any evidence that PRBRC offers to support its arguments described above to be relevant, it must have "any tendency to make the existence of any fact that is of consequence to

the determination of the action more probable or less probable than it would be without the evidence.” Wyo. R. Evid. 401. Although evidence may be relevant, it may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice....” Wyo. R. Evid. 403. While the applicable statutes and regulations do not define willful, Black’s Law Dictionary defines it as an act that “involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong.” (Willful, Black’s Law Dictionary (10th ed. 2014.)) Therefore, any evidence about willful violations must speak to the consciousness or purpose of the actor—in this case Revelation Energy.

But PRBRC has yet to produce in discovery or attach to any of its filings with the Council any evidence that could speak to Revelation Energy’s intent or purpose. All the so-called evidence is from third-party sources with no apparent knowledge of Revelation Energy’s decisions. Likewise, PRBRC has no witnesses who can speak to Revelation Energy’s decision-making process. As a result, PRBRC has no evidence or testimony that shows a tendency for Revelation Energy to have willful violations.

To the extent PRBRC would contend the newspaper articles and other documents show a “pattern and practice” of intentional violations, that depends on the Council inferring that mine accidents and reported violations without any context to prove Revelation Energy has acted with “conscious wrong or evil purpose.” *See* PRBRC Obj. & Pet. for Hrng, ¶¶ 37, 41; Willful, Black’s Law Dictionary (10th ed. 2014.) That inference would lack any factual support and require the Council to assume that any violation of federal or state mining laws is done with evil purpose. That is nonsense. Mining is a dangerous industry and accidents happen. That they are accidents should dispel any inference of evil purpose. The mere occurrence of an event is not in and of

itself evidence of conscious wrong or evil purpose. In other words, the Council must draw an illogical and unsupported inference to create some relevancy for this type of proof. But that inference would be unduly prejudicial and outweigh any probative value. The Council should therefore exclude evidence or testimony seeking this inference. *See* W.R.E. 403.

3. None of PRBRC's witnesses can testify about Revelation Energy's intent.

PRBRC's witness list shows it intends to call three witnesses who are currently employed by the Department of Environmental Quality (DEQ). (PRBRC Designation of Witnesses.) PRBRC's two may call witnesses are not employees of Revelation Energy. For any witness to testify about Revelation Energy's intent, they must have "personal knowledge of the matter." Wyo. R. Evid. 602. But no PRBRC witness has personal knowledge of Revelation Energy, any violation ascribed to Revelation Energy, or Revelation Energy's efforts to address violations. Therefore, PRBRC has no witnesses who can testify about whether Revelation Energy acted willfully.

CONCLUSION

For the reasons above, Contura respectfully requests the Council preclude PRBRC from offering any evidence or testimony that it would use to allege the existence of willful violations. This should include precluding any newspaper articles, employee reviews, or other documents that PRBRC has attached to its request for a hearing. It should also include prohibiting any witnesses from testifying on this subject as well.

DATED: April 15, 2019.

/s/ Jeffrey S. Pope

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, I served the foregoing by placing a true and correct copy via E-mail to the following:

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*/s/ Jeffrey S. Pope**Motion*