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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In re Brook Mining Co., LLC coal mine)
Permit – PT0841) EQC Docket No. 20-4802
)
)
)

**BROOK’S RESPONSE AND REPLY TO PRBRC’S REPLY TO BROOK MOTION FOR
SUMMARY JUDGMENT AND PRBRC’S CROSS-MOTION FOR SUMMARY
JUDGMENT, AND BROOK’S JOINDER AND ADOPTION OF DEPARTMENT OF
ENVIRONMENTAL QUALITY’S MEMORANDUM IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AND MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Brook Mining Co., LLC, by and through its attorneys Patrick J. Crank, Abbigail C. Forwood, and Jim D. Seward of the firm Crank Legal Group, P.C., and hereby submits *Brook’s Response and Reply to PRBRC’s Reply to Brook Motion for Summary Judgment and PRBRC’s Cross-Motion for Summary Judgment, and Brook’s Joinder and Adoption of Department of Environmental Quality’s Memorandum in Support of Motion for Summary Judgment and Motion for Summary Judgment* as follows:

There have been hundreds of pages of Briefs filed in this appeal. To alleviate further burden upon the Environmental Quality Council (“EQC”), Brook Mining Co., LLC (“Brook”)

hereby adopts in full the Wyoming Department of Environmental Quality (“WDEQ”) Memorandum in Support of Motion for Summary Judgment (“WDEQ Memorandum”).

There were five issues that were raised in the Powder River Basin Resource Council (“PRBRC”) Petition and all parties have now requested summary judgment on all five issues. As a clear and concise reply to the PRBRC Motion for Summary Judgment Brook adopts the facts and argument from the WDEQ Memorandum in Support of Motion for Summary Judgment. For clarity and ease of the reader Brook points out that WDEQ addressed Issues One and Two of the PRBRC Petition in one section of the WDEQ Argument, labeled roman numeral one.

Issues 1 and 2 – Brook’s current subsidence control plan meets all applicable requirements.

Brook adopts and incorporates by reference the entire WDEQ Memorandum. Brook hereby replies to the PRBRC allegations with the exceptional factual and legal argument set forth in the WDEQ Memorandum. Specifically, as its legal argument Brook relies on Brook’s original Motion and Brief for Summary Judgment on the merits and as outlined on pages 3-8 and 19-28 of the WDEQ Memorandum. *See*, Department of Environmental Quality’s Memorandum in Support of Motion for Summary Judgment, pages 3-8 and 19-28. There are no genuine issues of material fact and summary judgment must be granted to Brook on Issues 1 and 2.

Issue 3 - Brook’s application covers all required mine facilities and roads.

Brook replies to Issue 3 with the exceptional factual and legal argument set forth in the WDEQ Memorandum. Specifically, as its legal argument Brook relies on Brook’s original Motion and Brief for Summary Judgment on the merits and as outlined on pages 3-8 and 28-39 of the WDEQ Memorandum. *See*, Department of Environmental Quality’s Memorandum in Support of Motion for Summary Judgment, pages 3-8 and 28-39. There are no genuine issues of material fact and summary judgment must be granted to Brook on Issue 3.

Issue 4 - Brook's application includes the required estimates of coal production.

Brook replies to the PRBRC allegations with the factual and legal argument set forth in the WDEQ Memorandum. Specifically, as its legal argument Brook relies on Brook's original Motion and Brief for Summary Judgment on the merits and as outlined on pages 3-8 and 39-40 of the WDEQ Memorandum. *See*, Department of Environmental Quality's Memorandum in Support of Motion for Summary Judgment, pages 3-8 and 39-40. There are no genuine issues of material fact and summary judgment must be granted to Brook on Issue 4.

Issue 5 - Brook was not required to name an operator at the application stage.

Brook replies to the PRBRC allegations with the exceptional factual and legal argument set forth in the WDEQ Memorandum. Specifically, as its legal argument Brook relies on Brook's original Motion and Brief for Summary Judgment on the merits and as outlined on pages 3-8 and 40-41 of the WDEQ Memorandum. *See*, Department of Environmental Quality's Memorandum in Support of Motion for Summary Judgment, pages 3-8 and 40-41. There are no genuine issues of material fact and summary judgment must be granted to Brook.

The PRBRC continues to argue baseless claims of speculation and conjecture while offering little or no legal authority. Worse yet, the only information the PRBRC offers to try and defeat summary judgment is an inadmissible affidavit of its expert witness. The PRBRC failed to provide the new report of its expert in a timely manner under the rules and thus attempted subterfuge to slide it into the Marino Affidavit. As described in the Brook Motion to Strike and Brief, on the issue, the Affidavit must be stricken from the record as it clearly violates the WRCP and binding Wyoming Supreme Court precedent. *See*, Brook Motion to Strike Affidavit of Gennaro G. Marino and Brief in support, filed simultaneously herewith.

The Wyoming Supreme Court has held that compliance with the rules of civil procedure in summary judgment matters is mandatory. The "Court has said that "[t]he Wyoming Rules of

Civil Procedure were adopted to promote an orderly and efficient means for the handling and disposing of litigation. Compliance with these rules of procedure in summary judgment matters is mandatory."” *Greenwood v. Wierdsma*, 741 P.2d 1079, 1084 (Wyo.1987) (quoting *Hickey v. Burnett*, 707 P.2d 741, 745 (Wyo.1985)). Quoted in, *Kibbee v. First Interstate Bank*, ¶ 39, 988. [emphasis added]. In either a blatant act of dishonesty, an obvious showing of incompetency, or a brash attempt at skirting the law, the PRBRC’s use of non-admissible evidence, conjecture and speculation must have consequences. That consequence is a decision granting summary judgment to Brook on all issues.

The standard of review for summary judgment is well established in Wyoming:

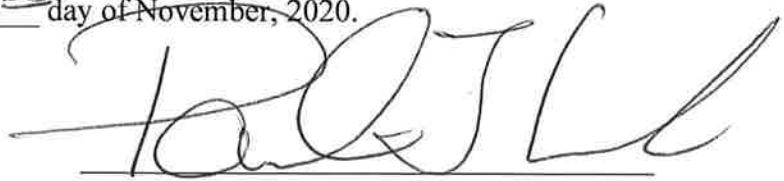
“The party requesting a summary judgment bears the initial burden of establishing a prima facie case for summary judgment. If he carries his burden, " **the party who is opposing the motion for summary judgment must present specific facts to demonstrate that a genuine issue of material fact exists.**" Id. [citing *Christensen v. Carbon County*, 2004 WY 135, ¶ 8, 100 P.3d 411, 413 (Wyo.2004) (quoting *Metz Beverage Co. v. Wyoming Beverages, Inc.*, 2002 WY 21, ¶ 9, 39 P.3d 1051, 1055 (Wyo.2002)).] We have explained the duties of the party opposing a motion for summary judgment as follows: " After a movant has adequately supported the motion for summary judgment, **the opposing party must come forward with competent evidence admissible at trial** showing there are genuine issues of material fact. The opposing party must affirmatively set forth material, specific facts in opposition to a motion for summary judgment, and **cannot rely only upon allegations and pleadings ...**, and conclusory statements or mere opinions are insufficient to satisfy the opposing party's burden." **The evidence opposing a prima facie case on a motion for summary judgment " must be competent and admissible, lest the rule permitting summary judgments be entirely eviscerated by plaintiffs proceeding to trial on the basis of mere conjecture or wishful speculation.**" Speculation, conjecture, the suggestion of a possibility, guesses, or even probability, are insufficient to establish an issue of material fact.

Kibbee v. First Interstate Bank, 210 WY 143, ¶ 28, 242 P.3d 973, 982 (Wyo. 2010).

The PRBRC has failed to offer competent admissible evidence to overcome the prima facie case for summary judgment established by Brook and the WDEQ. The PRBRC is

attempting to sell the EQC a shiny new pole barn that is only comprised of a floating barn roof. The barn has no supporting structure (competent admissible evidence) and no foundation (legal authority). The barn roof must fall just as summary judgment must be granted to Brook and the Petition shall be dismissed.

Respectfully submitted this 3RD day of November, 2020.

A handwritten signature in black ink, appearing to read "Patrick J. Crank", written over a horizontal line.

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CERTIFICATE OF SERVICE

This is to certify that on the 3RD day of November, 2020, a true and correct copy of the foregoing was served upon the following:

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Patrick J. Crank