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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

	) Docket No. 24-1601
	)
In re: Black Hills Bentonite	)
Permit to Mine No. 248C	)
Murphy Creek Update Area	)
	)
	)

PETITIONER BLACK HILLS BENTONITE, LLC'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW Petitioner, Black Hills Bentonite, LLC ("**BHB**"), a Wyoming limited liability company, through its undersigned counsel, Kayla A. Albertson, Patrick R. Tolley, and John A. Masterson of Welborn Sullivan Meck & Tooley, P.C., and submits its Memorandum in support of its *Motion for Summary Judgment* (the "**Motion**").

I. BACKGROUND FACTS

This matter concerns land more particularly described as (the "**Property**"): the N½ of Section 1, Township 41 North, Range 83 West, 6th P.M., Johnson County, Wyoming. The Petitioner, BHB, is a Wyoming limited liability company, in good standing with the State of Wyoming, with bentonite mining and processing operations dating back to 1947.

On November 29, 1957, a patent to mine the Property was granted to various individuals by the United States through the Bureau of Land Management office located in Cheyenne, Wyoming. *See* Patent No. 1176995 attached to the *Petition* as **Exhibit A** and incorporated by this reference[1]. Bethlehem Steel Company acquired the rights to mine all bentonite on the Property on December 24, 1957. *See* **Exhibit B**.

BHB acquired the mining rights to all the bentonite under the Property from Bethlehem Steel Corporation through a Warranty Deed dated April 17, 1991, recorded in Johnson County as Instrument No. 490529. *See* **Exhibit C**. Bruce and Betty Jean Firnekas ("**Respondents**") acquired the surface interest of the Property on December 18, 2013, as evidenced by Warranty Deed recorded in Johnson County as Document No. 134738 (the "**Firnekas Warranty Deed**"). *See* **Exhibit D**. The Firnekas Warranty Deed states the Property is "subject to easement[s] and reservations appearing of record," therefore explicitly incorporating all easements and reservations found in the prior instruments of conveyance in the Firnekas' chain of title. *See* **Exhibit E**. Bethlehem Steel specifically reserved all mineral rights. Such reservations include, but are not limited to:

> "all mineral rights...including bentonite, are hereby excepted from this deed and shall remain in the Grantors, their heirs, devisees, successors and assigns..." and "the bentonite...was sold to...Bethlehem Steel Company..." and "...that Bethlehem Steel Company, and its successors and assigns shall at all times have the full and exclusive right to mine and remove the bentonite from said lands...and also may enter, reenter, use and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of said bentonite, including drilling, stripping of overburden from the bentonite, depositing such overburden on the surface of said premises, and other activities connected with mining, production and removal of bentonite therefore, without liability in damages for any injury to the surface..." and "...that necessary buildings, installations, or drilling equipment pertinent to the mining, production or removal of bentonite may be erected by [Bethlehem Steel Company], its successors and assigns, including the erection of any lines necessary to bring public utility services to the premises where

[1] For ease of reference and brevity, all references to exhibits will be to those found within the Petition. All and each of these are therefore incorporated into this Motion by such reference.

drilling, mining or other activities connected with the mining, production or removal of bentonite may be carried on, or for any other mining or drilling purposes...."

BHB became Bethlehem Steel Company's successor in interest when it purchased the rights to mine the bentonite in 1991. *See* **Exhibit C**. BHB owns the right to mine all the bentonite on the Property and to use the Property in any manner consistent with the reservation. BHB has already properly filed, with the state, its mine plan revision for Permit to Mine 248C (the "Revision"). *See* **Exhibit F**. The Revision amends Permit to Mine 248C to include the Property. BHB has approximately 41.6 acres of current or proposed mining features on the Property[2]. *See* **Exhibit G**.

The deed into BHB already has the necessary "instruments of consent" from the surface landowner under Wyo. Stat. § 35-11-406(b)(xii); however, out of an abundance of caution and in conjunction with the application, BHB sought written surface owner consent from the Respondents. On August 24, 2021, BHB sent a complete copy of the mining and reclamation plans, legal descriptions of the Property, description of the access roads, detailed drawings and description of the proposed reclamation, and all other documents required by Wyo. Stat. § 35-11-406(b) to the Respondents. *See* **Exhibit H**; s*ee also* **Exhibit F**. Counsel for the Respondents responded to BHB on or about December 3, 2021, to negotiate the terms of a surface use agreement. *See* **Exhibit I**. Counsel for the Respondents sent another letter on or about April 25, 2022, again requesting to negotiate the terms of a surface use agreement. *See* **Exhibit J**. Thereafter, the Respondents and BHB conducted negotiations regarding a surface use agreement without the assistance of counsel, but did not reach an agreement. Despite the efforts of BHB to

[2] As noted in the Revision, future mining could affect up to an additional 130 acres.

come to terms on an acceptable surface use agreement and establish a good working relationship, the Respondents have refused to consent to the surface use by BHB.

II. STANDARD OF REVIEW

Chapter 2 of the Department of Environmental Quality's Rules of Practice and Procedure specifically incorporates Rule 56 of the Wyoming Rules of Civil Procedure, authorizing the Council to decide the merits of the matter on summary judgment. The Wyoming Supreme Court has stated the standard of review for summary judgment often and consistently. Summary judgment is proper when there are no genuine issues of material fact, and the prevailing party is entitled to judgment as a matter of law. *See Gayhart v. Goody*, 2004 WY 112, ¶ 11, 98 P.3d 164, 168 (Wyo. 2004). Even if it existed here however, the mere presence of a scintilla of evidence to support the non-movant's position cannot create a genuine issue of material fact. *See Johnson v. Lindon City Corporation*, 405 F.3d 1065, 1068 (10th Cir. 2005).

The party requesting summary judgment bears the 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. Wyo. R. Civ. P. 56(c); *Throckmartin v. Century 21 Top Realty*, 2010 WY 23, ¶ 12, 226 P.3d 793, 798 (Wyo. 2010).

Once a prima facie showing is made, the burden shifts to the party opposing the motion to present evidence showing there are genuine issues of material fact. *Boehm v. Cody Country. Chamber of Commerce*, 748 P.2d 704, 710 (Wyo. 1987) (citing *England v. Simmons*, 728 P.2d 1137, 1140-41 (Wyo. 1986)). The party opposing the motion must present facts; relying on conclusory statements or mere opinion will not satisfy that burden, nor will relying solely upon allegations and pleadings. *Boehm*, 748 P.2d at 710. The facts presented are considered from the vantage point most favorable to the party opposing the motion, and that party is given the benefit

of all favorable inferences that may fairly be drawn from the record. *Union Pacific R. Co. v. Caballo Coal Co.*, ¶ 12, 246 P.3d 867 at 871 (Wyo. 2011).

III. ARGUMENT

A. The Firnekas Warranty Dead is clear and unambiguous, and BHB has the right to use the surface of the Property.

The Wyoming Supreme Court has determined that deeds are considered contracts, and as such, they must be interpreted using typical contract interpretation principles. *See Miner v. Jesse & Grace,* LLC, 2014 WY 17, ¶ 20, 317 P.3d 1124, 1132 (Wyo. 2014). When interpreting a contract or a deed, "the words used in the contract [deed] are afforded the plain meaning that a reasonable person would give them." *See Wadi Petroleum, Inc. v. Ultra Resources, Inc.*, 65 P.3d 703, 708 (Wyo. 2003); *Doctors' Co. v. Insurance Corp. of America*, 864 P.2d 1018, 1023 (Wyo. 1993). If the language of a deed is clear and unambiguous, then the court looks to the "four corners" of the deed in ascertaining the parties' intent. *See Caballo Coal Co. v. Fid. Exploration & Prod. Co.*, 2004 WY 6, ¶ 11, 84 P.3d 311, 314 (Wyo. 2004). "In the absence of any ambiguity, the contract [deed] will be enforced according to its terms because no construction is appropriate." *Sinclair Oil Corp. v. Republic Ins. Co.*, 929 P.2d 535, 539 (Wyo. 1996).

"When contract [deed] provisions are not ambiguous or uncertain, the document speaks for itself." *Kirkwood v. CUNA Mutual Insurance* Society, 937 P.2d 206, 209 (Wyo. 1997). The Firnekas Warranty Deed speaks for itself and could not be more clear. It explicitly provides for the mining and removal of bentonite, as well as the use of the surface as reasonably necessary for mining operations. The language is unambiguous, stating that the mineral rights holder:

> "shall at all times have the full and exclusive right to mine and remove the bentonite from said lands...and also may enter, reenter, use and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of said bentonite, including drilling, stripping of overburden from the bentonite, depositing such overburden on the surface of said premises, and

other activities connected with mining, production and removal of bentonite therefore, without liability in damages for any injury to the surface...."

See **Exhibit D** and **Exhibit E**. There is no ambiguity in the language of the deed, and it must be enforced as written; the deed supports BHB's right to use the surface for mining without "liability in damages" to the surface owner and without other accommodation, including the execution of any surface use agreement. From the publicly recorded chain of title, the Respondents knew – or were certainly on notice – that they took the Property subject to the rights to mine the bentonite and use the surface as necessary to conduct their operations. Therefore, this Council should enter summary judgment in favor of BHB to allow it to continue its mining operations regardless of Respondents' consent.

B. Respondents' refusal to consent has caused unnecessary delay resulting in excessive expenses, time, and waste of resources.

Rule 1 of the Wyoming Rules of Civil Procedure requires that the parties "secure the just, speedy, and inexpensive determination of every action and proceeding." *See* Wyo. R. Civ. P. 1. The Firnekas Warranty Deed speaks for itself and grants BHB the right to mine bentonite and use the Property's surface to complete its mining operations. Respondents' refusal to consent to the surface use for mining has resulted in unreasonable delays, subjecting BHB to an unnecessary and excessive waste of time, resources, and expenses. Respondents' unjustified objections to BHB's use of the surface have forced BHB to undertake legal action, significantly increasing the cost and efforts required to commence mining operations. BHB has attempted, voluntarily and in good faith, to come to terms with the Respondents, despite the clear language of the reservations permitting the mining operations. Respondents have refused to negotiate, resulting in this matter coming before this Council. By delaying this matter, Respondents have not only required the parties to expend resources but now require this Council to use its own time and resources. This is an outrageous proposition when the title documents leave no question as to BHB's rights, and when

BHB, despite having no obligation to do so, nonetheless attempted to reach a surface use agreement. The futility of Respondent's claims is self-evident – all on a matter that could have been resolved prior to this action being initiated. Respondents have not complied with Wyo. R. Civ. P. 1; therefore, summary judgment should be entered in favor of BHB.

CONCLUSION

Respondents can marshal no evidence sufficient to overcome BHB's *Motion for Summary Judgment* and have not provided any evidence supporting their position. Therefore, summary judgment should be entered in favor of BHB.

WHEREFORE, BHB prays that this Council grant its prayer for relief as enumerated in its *Motion for Summary Judgment* filed herewith.

DATED this 12 day of July 2024.

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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was served herein this 12 day of July 2024, sent via US Postal Service and Email as follows:

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