

Mitchell H. Edwards, WSB 6-3880
Kenna J. Blaney, WSB 8-7098
NICHOLAS & TANGEMAN, LLC
170 N. 5th Street; P.O. Box 928
Laramie, WY 82073-0928
(307) 742-7140
edwardsm@wyolegal.com
kblaney@wyolegal.com
Attorneys for Landowners

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

IN THE MATTER OF BLACK HILLS)
BENTONITE PERMIT TO MINE NO. 248C) Docket No. 24-1601
MURPHY CREEK UPDATE AREA)
)

**LANDOWNERS’ RESPONSE IN OPPOSITION
TO MOTION FOR SUMMARY JUDGEMENT**

Landowners, Bruce Firnekas and Betty Jean Firnekas, hereby respond in opposition to Black Hills Bentonite’s Motion for Summary Judgment. The Environmental Quality Council must deny Black Hills Bentonite’s motion.

On March 20, 2024, Black Hills Bentonite filed a Petition with the Environmental Quality Council (“EQC”) requesting that the EQC issue an “Order In Lieu of Landowner Consent under WYO. STAT. § 35-11-406(b)(xii).” See Petition. As part of the statements made by Black Hills Bentonite in the Petition, Black Hills Bentonite stated that Landowners “have refused to consent to the surface use by BHB.” See Petition, ¶ 17. Since 1973, Wyoming law has provided protection to landowners, requiring that any application for a permit to mine, where the landowner is different than the owner of the mineral estate (i.e. a split estate), include “an instrument of consent” from the resident, agricultural landowner, or the surface landowner, and

requiring the posting of a bond to protect and pay the landowner. See WYO. STAT. § 35-11-406(b)(xi-xii) (requiring consent); and, WYO. STAT. § 35-11-416 (requiring posting of bond).¹

The only thing that Black Hills Bentonite's motion shows (particularly with any competent evidence) is that the mineral owner is different than the landowner, i.e. that a split estate exists. Landowners agree there exists no dispute that regarding this particular property that a split estate exists, i.e. that the owner of the mineral estate is separate from the owner of the surface estate. But whether the estate is a split estate is only one part of an analysis regarding the requirement to obtain consent to a mine plan and reclamation plan under Wyoming law. Instead of seeking an order in lieu of landowner consent, Black Hills Bentonite's motion seeks a declaratory judgment as to what a statement in an old deed says and means, and what its rights are under that statement in relation to Landowners' property rights under Landowners' warranty deed. It appears that Black Hills Bentonite seeks a declaratory judgment not for the issuance of an order in lieu of landowner consent, but instead seeks an order that it is not required to obtain consent to the mining plan and reclamation plan from the landowner as required by state law. This Council does not have the authority or jurisdiction to make such a declaration judgment, particularly under a proceeding brought to seek an order in lieu of consent. See WYO. STAT. § 1-37-101, *et seq.* (Uniform Declaratory Judgments Act). Only "[c]ourts of record within their respective jurisdictions may declare rights, status and other legal relations. WYO. STAT. § 1-37-102; *see also, Best v. Best*, 2015 WY 133, 357 P.3d 1149 (Wyo. 2015).

In the case of a resident or agricultural landowner, the required consent must include permission to enter and commence surface mining operations **and also** written approval of the applicant's mining plan and reclamation plan. WYO. STAT. § 35-11-406(b)(xi) (emphasis added).

¹ Wyoming law has required bonding for the protection of the landowner since 1957. See W.S. 1957, § 35-502.33; *see also Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 547 (Wyo. 1988)

Regardless of permission to enter, a resident or agricultural landowner could not remotely be considered to have provided consent to the applicant's mine plan and reclamation plan decades before any such mine plan or reclamation plan was created or submitted with an application for a permit to mine. In the case of a resident or agricultural landowner, without both the written permission to enter and commence mining and also written approval of the mining plan and reclamation plan, the application for a permit to mine cannot be approved. *Id.* There is no alternative procedure to obtaining said permission to enter and commence mining and/or written approval of the mine plan and reclamation plan. *Id.* "Those owners [residents or agricultural landowners] were given an absolute veto to an application" *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 547 (Wyo. 1988). Here, Landowners acquired their title through conveyance from members of their immediate family, who have held title since as far back as July 11, 1962 when Landowners' father, Church Firnekas, acquired the property.² (See *Exhibit 1*, attached hereto). And, the property is used for agricultural ranching operations (e.g. grazing). Black Hills Bentonite was notified that the property was used for grazing as far back as May 5, 2022 when Landowners were trying to get Black Hills Bentonite to engage in negotiations. (See *Exhibit 2*, attached hereto).

In 1975, the Wyoming legislature provided surface owner protection to other landowners who were/are not residents or agricultural landowners. WYO. STAT. § 35-11-406(b)(xii). The protection of these other owners, using their land for other purposes, i.e. those that do not meet the definition of Section 406(b)(xi), were not granted absolute veto power over mine permit applications, but were/are afforded a qualified veto power. *Id.*; see also, *Belle Fourche Pipeline Co.*, 766 P.2d at 547. For applications for permits to mine after March 1, 1975 that include lands

² Chester Firnekas is Landowners' brother. Landowner Bruce Firnekas has owned the property since 2001, when his brother conveyed the property to him as joint tenants with rights of survivorship. (See *Exhibit 1*).

not covered by Section 406(b)(xi) the applicant is required to obtain an “instrument of consent, ... , to the mining plan and reclamation plan.” WYO. STAT. § 35-11-406(b)(xii). Again, it is impossible to obtain an instrument of consent to the mine plan and reclamation plan from the surface landowner prior to the mine plan and reclamation plan being created and submitted. If the permit applicant cannot obtain consent “as to the mining plan or reclamation plan or both,” from a surface landowner, who is not a resident or agricultural landowner, then and only then can the applicant request a order in lieu of consent from the EQC.³ In order to obtain an order in lieu of consent from the EQC, as to these other surface landowners, the applicant has to prove and the EQC has to find: (A) That the mining plan and the reclamation plan have been submitted to the surface owner for approval; (B) That the mining plan and the reclamation plan is detailed so as to illustrate the full proposed surface use including proposed routes of egress and ingress; (C) That the use does not substantially prohibit the operations of the surface owner; and, (D) The proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible. *Id.* Even if Landowners were merely surface landowners under Section 406(b)(xii), Black Hills Bentonite has not provided competent evidence to meet its burden under the statute for an order in lieu of consent.

As the Wyoming Supreme Court has held:

³ In both its Petition and now in its Motion, Black Hills Bentonite boldly asserts that it has attempted to negotiate a surface use agreement with Landowners. This is simply false, and a false attempt to paint Landowners as being uncooperative. Rather, it is Landowners who have sought to negotiate a surface use agreement with Black Hills Bentonite which would provide both consent and address the bonding requirement. (See *Exhibit I, Exhibit J, Exhibit 2, and Exhibit 3*). At each and every effort by Landowners, Black Hills Bentonite has rebuffed and refused to even remotely undertake any effort to negotiate a surface use agreement with Landowners. In fact, most recently, in response to the Landowners request to negotiate a surface use agreement to resolve this issue, Black Hills Bentonite responded by filing its Motion and stating: “Please note that we spoke with our client regarding the offer to settle consistent with a surface use agreement. Black Hills Bentonite has decided to decline the offer and continue with the ongoing litigation with the EQC.” (See *Exhibit 3*).

The effect of all of this legislation was to alter the traditional relationship between the dominant mineral estate and the servient surface estate. A residential or agricultural land owner was afforded a dominant position with respect to a mining application because of the absolute veto power. A surface owner who devoted the land to other purposes also enjoyed a dominant position in light of the qualified veto power extended to him.

Belle Fourche Pipeline Co., 766 P.2d at 547 (emphasis added).

Not only do the Landowners here enjoy an absolute veto power as agricultural landowners under Section 406(b)(xi), but even if the Landowners were considered other surface landowners under Section 406(b)(xii), Black Hills Bentonite has not shown (let alone even discussed) the required elements it must show to obtain an order in lieu of consent. And, even then, if it obtains consent, without an agreement with Landowners, Wyoming law requires Black Hills Bentonite to post a bond for the “use and benefit of the surface owner” or a “permit shall not be issued.” WYO. STAT. § 35-11-416.

In conclusion, the Council must deny Black Hills Bentonite’s Motion for Summary Judgment.

Dated this 18th day of July 2024.



Mitchell H. Edwards, WSB 6-3880

Kenna J. Blaney, WSB 8-7098

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edwardsm@wyolegal.com

kblaney@wyolegal.com

Attorneys for Landowners

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 18th day of July 2024, I caused a true and correct copy of the foregoing document to be served as follows:

Patrick Tolley [X] U.S. Mail
John Masterson [] Fed Ex/UPS
Kayla Albertson [] Hand-Delivered
Welborn Sullivan Meck & Tooley, P.C. [X] E-Mail
159 North Wolcott, Suite 220
Casper, WY 82601
ptolley@wsmtlaw.com
jmasterson@wsmtlaw.com
kalbertson@wsmtlaw.com

Todd Parfitt, Director [X] U.S. Mail
Wyoming Dept. of Environmental Quality [] Fed Ex/UPS
200 West 17th Street [] Hand-Delivered
Cheyenne, WY 82002 [X] E-Mail
karin.quigley@wyo.gov

Gregory Weisz [X] U.S. Mail
Wyoming Attorney General's Office [] Fed Ex/UPS
109 State Capitol [] Hand-Delivered
Cheyenne, WY 82002 [X] E-Mail
gregory.weisz@wyo.gov

Wyoming Environmental Quality Council [X] U.S. Mail
2300 Capital Ave. [] Fed Ex/UPS
Hathaway Bldg. 1st, Room 136 [] Hand-Delivered
Cheyenne, WY 82002 [X] E-Mail
ryan.schelhaas@wyo.gov
kellie.doran1@wyo.gov

Original


Mitchell H. Edwards

WARRANTY DEED

MITCHELL JOHNSON and JEAN JOHNSON, husband and wife,

grantor^s of Johnson County, and State of Wyoming, for and in consideration of \$4,000.00 (four thousand four hundred) DOLLARS in hand paid, receipt whereof is hereby acknowledged, CONVEY AND WARRANT TO CHURCH H. FIRKSEAS

grantor of Johnson County, and State of Wyoming, the following described real estate, situate in Johnson County and State of Wyoming, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the State, to-wit:

Township 42 North, Range 82 West 6th P.M., Section 31: SE 1/4

Township 41 North, Range 83 West 6th P.M., Section 1: Lots 1, 2, 3, 4 and SW 1/4

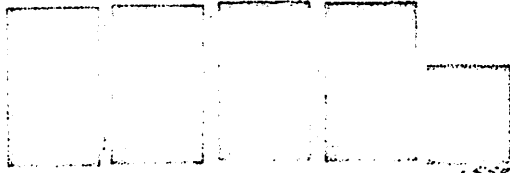
Township 42 North, Range 83 West 6th P.M., Section 35: SE 1/4

containing 400 acres, more or less; together with all improvements situate thereon and all appurtenances thereunto belonging; subject to easements and reservations appearing of record.

STATE OF WYOMING }
COUNTY OF F. HINSCH }
at 2:30 P. M., a 0 448 duly recorded in Book 224-34 page 124 Fee \$3.00

This instrument was filed for record on 4-19-62
By *Chas. H. Firkeas* Deputy Register of Deeds.

2488



WITNESS our hand on this 11th day of July 19 62

Mitchell Johnson
Jean Johnson

THE STATE OF WYOMING,
County of Johnson } ss.

On this 11th day of July, 19 62, before me personally appeared Mitchell Johnson and Jean Johnson, husband and wife,

to me known to be the person described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.



Charles H. Firkeas
Notary Public

My commission expires on the 12th day of April, A. D., 19 65

WARRANTY DEED—FORM NO. 9

WARRANTY DEED

CHURCH H. FIRNEKAS and MAGGIE E. FIRNEKAS, husband and wife.

grantor, of Johnson County, and State of Wyoming, for and in consideration of Six thousand and 00/100ths

DOLLARS in hand paid, receipt whereof is hereby acknowledged, CONVEY AND WARRANT TO CHESTER O. FIRNEKAS

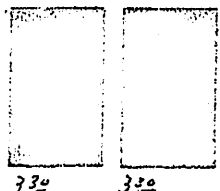
grantee, of Johnson County and State of Wyoming

the following described real estate, situate in Johnson County and State of Wyoming, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the State, to-wit:

- Township 42 North, Range 82 West 6th P.M. Section 31: SE 1/4 NW 1/4
Township 41 North, Range 83 West 6th P.M. Section 1: Lots 1, 2, 3, 4 and S 1/2 NW 1/4
Township 42 North, Range 83 West 6th P.M. Section 35: SE 1/4 SE 1/4

containing 400 acres, more or less, together with all improvements situate thereon and all appurtenances thereunto belonging, subject to easement and reservations appearing of record.

STATE OF WYOMING } ss. 24517
COUNTY OF J. H. S. N }
This instrument was filed for record on Jan. 9, 1967
9:25 A.M. and was duly recorded in Book 87A-2 page
36 Fee \$ 2.00



By _____ Deputy Register of Deeds

WITNESS my hand and seal this 6th day of January 1967

Church H. Firnekas
Maggie E. Firnekas

State of WYOMING
County of Johnson

The foregoing instrument was acknowledged before me this 6th day of January 1967, by Church H. Firnekas and Maggie E. Firnekas. Witness my hand and official seal.

Notary Public Title of Officer

My Commission Expires: April 12, 1970

030422

This Instrument Filed for Record on the
26th day of March 2001 at 10 o'clock A.M.
and Recorded in Book 87A44 of Deeds
Page 26
No. 9600 Linda Walker
County Clerk

WARRANTY DEED

CHESTER O. FIRNEKAS, A SINGLE PERSON

grantor of JOHNSON County, and State
of WYOMING, for and in consideration of TEN DOLLARS (\$10.00) AND
OTHER CONSIDERATIONS DOLLARS

in hand paid, receipt whereof is hereby acknowledged, CONVEY AND WARRANT TO
CHESTER O. FIRNEKAS AND BRUCE H. FIRNEKAS, AS JOINT TENANTS WITH RIGHT OF
SURVIVORSHIP

grantee S. of JOHNSON & BECK-HORN COUNTIES County and State of WYOMING
the following described real estate, situate in JOHNSON County and State
of Wyoming, to-wit:

TOWNSHIP 42 NORTH, RANGE 82 WEST 6TH P.M.
SECTION 31: SE1/4NW1/4

TOWNSHIP 41 NORTH, RANGE 83 WEST 6TH P.M.
SECTION 1: LOTS 1,2,3,4 AND S1/2N1/2

TOWNSHIP 42 NORTH, RANGE 83 WEST 6TH P.M.
SECTION 35: SE1/4SE1/4

CONTAINING 400 ACRES, MORE OR LESS,

TOGETHER WITH ALL IMPROVEMENTS SITUATE THEREON AND
ALL APPURTENANCES THEREUNTO BELONGING,

SUBJECT TO EASEMENT AND RESERVATIONS APPEARING OF RECORD.

030533 STATE OF WYOMING } ss. Re Record
COUNTY OF JOHNSON }
This instrument was filed for record on 3-29-2001
10:45A at the office of the County Clerk 87A44 page
26 for \$6.00
Linda Walker Register or Clerk
Deputy

Hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the State of Wyoming.

WITNESS hand this 26th day of March 2001
Chester O. (Chet) Firnekas

Attest Seal:

STATE OF Wyoming } ss.
COUNTY OF Johnson }

The foregoing instrument was acknowledged before me by Chester O. (Chet) Firnekas

this 26th day of March 2001

Witness my hand and official seal.

My Commission expires: 1-6-2003

Linda Walker
County Clerk

WARRANTY DEED

CHESTER O. FIRNEKAS AND BRUCE H. FIRNEKAS, AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP

grantor S of JOHNSON & PARK COUNTIES County, and State of WYOMING, for and in consideration of TEN DOLLARS (\$10.00) AND

OTHER CONSIDERATIONS DOLLARS

In hand paid, receipt whereof is hereby acknowledged, CONVEY AND WARRANT TO BRUCE H. FIRNEKAS AND BETTY JEAN FIRNEKAS, AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP

grantee S of PARK County, and State of WYOMING the following described real estate, situate in JOHNSON County, and State of Wyoming, to-wit:

TOWNSHIP 42 NORTH, RANGE 82 WEST 6TH P.M.
SECTION 31: SE 1/4 NW 1/4

TOWNSHIP 41 NORTH, RANGE 83 WEST 6TH P.M.
SECTION 1: LOTS 1,2,3,4 AND S 1/2 N 1/2

TOWNSHIP 42 NORTH, RANGE 83 WEST 6TH P.M.
SECTION 35: SE 1/4 SE 1/4

CONTAINING 400 ACRES, MORE OR LESS,
TOGETHER WITH ALL IMPROVEMENTS SITUATE THEREON AND ALL APPURTENANCES THEREUNTO BELONGING,
SUBJECT TO EASEMENT AND RESERVATIONS APPEARING OF RECORD.

STATE OF WYOMING }
COUNTY OF JOHNSON } SS Doc Number: 134738
This instrument was Filed for record on 12/18/2013 at 1:58 PM
and was duly recorded in book: 87A-61 page: 98 - 98 fees: 12.00
Wicki Salzman Johnson County Clerk
By _____, Deputy

Hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the State of Wyoming.

WITNESS _____ hand this 18th day of December, 2013
Chester O. Firnekas
Bruce H. Firnekas

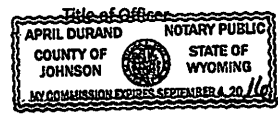
Attest Seal:

STATE OF Wyoming
COUNTY OF Johnson

The foregoing instrument was acknowledged before me by Chester O. Firnekas and Bruce H. Firnekas
This 18th day of December, 2013

Witness my hand and official seal. April Durand

My Commission expires: 9-4-2016



Mitchell Edwards

From: Mitchell Edwards
Sent: Thursday, May 12, 2022 3:10 PM
To: Patrick Tolley
Subject: BHB - Firnekas

Pat:

I spoke to my client about their use of the property. I was correct that they run cattle (cows and calves) on the property. Usually the land is grazed through out the year, for sure in spring after calving and through the summer. They also will bring cattle back in the winter for grazing. There aren't any stock wells on the property, but there are seep springs in the draws that are the source of water.

Mitch

Mitchell H. Edwards
NICHOLAS & TANGEMAN, LLC
P.O. Box 928; 170 N. 5th Street
Laramie, WY 82073-0928
Telephone: (307) 742-7140
Fax: (307) 742-7160
www.wyolegal.com



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If you received this message in error, please notify us by telephone or e-mail and delete the above message.
Thank you.

Mitchell Edwards

From: Kayla Albertson <kalbertson@wsmtlaw.com>
Sent: Friday, July 12, 2024 3:20 PM
To: Mitchell Edwards
Cc: Patrick Tolley; John Masterson; Mary Bennett
Subject: BHB and Firnekas Permit to Mine 248C
Attachments: BHB Memo in support of Motion for Summary Judgment.pdf; BHB Motion for Summary Judgment.pdf

External Email: Use caution before replying, clicking links, and opening attachments.

Good afternoon, Mr. Edwards -

I have attached Black Hills Bentonite's Motion for Summary Judgment and the Memorandum in support of the Motion for Summary Judgment for your records.

A copy of this will be mailed to your office.

Please note that we spoke with our client regarding the offer to settle consistent with a surface use agreement. Black Hills Bentonite has decided to decline the offer and continue with the ongoing litigation with the EQC.

Thank you, and have a good weekend!

Kayla A. Albertson
Attorney
Welborn Sullivan Meck & Tooley, P.C.
159 North Wolcott, Suite 220
Casper, WY 82601
Office: 307-234-6907
wsmtlaw.com KAlbertson@wsmtlaw.com

My workday may look different from your workday. Please do not feel obligated to respond outside of your normal working hours.

WELBORN
SULLIVAN MECK & TOOLEY, P.C.

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