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ATTORNEYS FOR PERMIT APPLICANT
BROOK MINING COMPANY, LLC

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN RE BROOK MINE APPLICATION	)	
	)	Civil Action No. 17-4802
TFN 6 2-025	)	

BROOK MINE'S RESPONSE BRIEF TO POWDER RIVER BASIN RESOURCE COUNCIL'S BRIEF ON STATUTES AND REGULATIONS THAT THE COUNCIL MUST CONSIDER AND REQUEST FOR ORAL ARGUMENT

INTRODUCTION

Despite differences as to sufficiency of Brook Mine's (Brook) permit application, Brook and the Powder River Basin Resource Council (PRBRC) agree that Brook bears the burden of proof; the Council should review DEQ's administration of section 406(a)-(h) and associated regulations; DEQ has not issued a cumulative hydrologic impact assessment; and DEQ has not yet made the findings required by section 406(n). Still, Brook and PRBRC disagree on two issues: 1) whether the Council should make the findings required by section 406(n); and 2) whether under section 406(p) the Council "steps into the place of the DEQ director to make a 'decision on the application.'" (PRBRC Br. at 1.) The answer to both is no.

While PRBRC argues otherwise, its arguments are long on assertions but short on proof. PRBRC fails to explain why the Council has the legal authority to make the findings under 406(n) or step into the place of the DEQ director. Although the Wyoming Supreme Court has not addressed the legal issues the Council asked the parties to brief, that does not mean the Council can ignore established legal principles even if PRBRC wants the Council to do so. The rules of statutory interpretation and the Council's limited authority constrain the Council's role here. (*See* Brook's Br. at 2-6.) By ignoring this settled law, PRBRC invites the Council to make two errors of law.

ARGUMENT

I. The plain language of Section 406(n) and this Council's limited review do not allow the Council to make the 406(n) findings.

Like a court, the Council must give a statute's words their plain meaning to find the "most likely, most reasonable, interpretation of the statute, given its design and purpose." *In the Interest of JB*, 2017 WY 26, ¶ 12, 390 P.3d 357, 360 (Wyo. 2017). But the Council cannot read words into the statute or render provisions meaningless. *City of Casper v. Holloway*, 2015 WY 93, ¶ 20, 354 P.3d 65, 71 (Wyo. 2015).

The Council would have to violate these principles to make the 406(n) findings. The plain language of section 406(n) states that the administrator makes the findings. Wyo. Stat. Ann. § 35-11-406(n) ("the administrator finds in writing..."). To insert the Council into this process would ignore the word "administrator" and read the word "Council" into 406(n). Wyoming law permits neither approach. *In the Interest of JB*, ¶ 12, 390 P.3d at 360; *Holloway*, ¶ 20, 354 P.3d at 71. Beyond changing section 406(n), inserting the Council in the place of the administrator would render the administrator's specific statutory and regulatory authority to "enforce and administer [the Environmental Quality Act]" moot. *See* Wyo. Stat. Ann. § 35-11-110(a); Wyo.

Admin. Code § ENV LQC Ch. 12 § 1(a)(iv) ("In addition to the specific findings required by W.S. § 35-11-406(n), no permit shall be approved unless the administrator also finds in writing...").

The Surface Mining Control and Reclamation Act (SMCRA) again provides a good foil to PRBRC's position. Under SMCRA, the "regulatory authority" makes the findings for the federal counterpart of 406(n). *See* 30 U.S.C. § 1260(b). Here, the regulatory authority is DEQ; so having the DEQ administrator make the findings under 406(n) ensures Wyoming's compliance with SMCRA.

Section 406(o), which deals with operators with previous violations, erases any doubt about 406(n)'s plain meaning. Section 406(o) states, "[n]o permit shall be issued to an applicant after a finding **by the director or council**...." *Id.* This language demonstrates that the legislature could allow either the administrator or the Council to make findings if it had wanted. But the legislature chose not to put language in 406(n) that specified the Council.

PRBRC's position would also ask the Council to exceed its statutory authority. (Brook Br. at 2-6.); *Amoco Prod. Co. v. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000) (explaining an agency's power depends upon statutes, so "they must find within the statute warrant for the exercise of any authority which they claim.") Under the Environmental Quality Act, the Council has authority to conduct contested cases about "the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof." Wyo. Stat. Ann. § 35-11-112(a)(iii). This means the Council's review is limited to what DEQ has administered; in other words, whether DEQ correctly deemed the permit application complete, without deficiencies, and suitable for publication. (Brook Br. at 3-4.) This same logic means the Council does not consider section

406(n) because the DEQ administrator has not yet issued any findings under that section. (*Id.* at 4-5.)

Without any legal support, PRBRC claims the Council can bypass the plain language of 406(n) because the Council has authority to grant permits. (PRBRC Br. at 2.) This argument has two fatal flaws. First, the Council's authority to grant a permit does not apply here. As Brook's opening brief explained, the specific statutes that define the Council's authority in a contested case and DEQ's authority in the permitting process control over a general statute about granting permits. (Brook Br. at 5-6.)

Second, the statute that gives the Council authority to grant permits states the authority "is subject to applicable state law." Wyo. Stat. Ann. § 35-11-112(c)(ii). The applicable state law here is section 406, which gives the administrator the authority to make the findings under 406(n). Likewise, the director has the power to issue permits. Wyo. Stat. Ann. § 35-11-406(p). So the applicable state law divests the Council of authority to grant permits governed by Section 406.

On a practical level this makes sense because the Council has a different role. In a contested case, the Council acts as a quasi-judicial body—not a regulator. *See Amoco Prod. Co. v. Dep't of Revenue*, 2004 WY 89, ¶ 24, 94 P.3d 430, 441 (Wyo. 2004) (explaining the boards exercises quasi-judicial authority when deciding contested cases.) But if the Council makes the 406(n) findings, it becomes the regulator. This would prevent the Council from reviewing the regulator's work thus undermining the Council's purpose in a contested case. *See* Wyo. Stat. Ann. § 35-11-112(a)(iii).

PRBRC also asserts, without citing any legal support, that the Council must make the 406(n) findings to avoid the process becoming "meaningless." (PRBRC Br. at 9.) This wrongly

implies PRBRC or other objectors have no means to challenge DEQ's findings under 406(n). PRBRC and any other objector can appeal the Council's decision, including a decision not to make the 406(n) findings. Objectors can appeal the DEQ Director's decision to issue a permit to Brook. The objectors will also have access to DEQ's 406(n) findings and the cumulative hydrologic impact assessment because they will be publically available documents.

Even so, PRBRC's assertion does not make sense. This process began because the objectors challenged DEQ's decision that Brook's permit application was suitable for publication. DEQ does not have to make the findings under 406(n) to deem a permit suitable for publication and did not here. *See* Wyo. Stat. Ann. § 35-11-406(a)-(h). To now inject 406(n) into the process is akin to allowing the public to allege deficiencies in Brook's permit application before DEQ has finished the completeness review to ensure the application has everything required. Neither approach makes practical sense.

PRBRC's approach also misses how section 406(n) functions in the larger scheme of the permitting process. Wyoming statutes and regulations require Brook's permit application to provide detailed information necessary for the administrator to make the 406(n) findings. But that information alone is not sufficient to make the findings because DEQ must perform the cumulative hydrologic impact assessment and other analyses before it makes the 406(n) findings. *See* Wyo. Stat. Ann. § 35-11-406(n)(iii); Wyo. Admin. Code § ENV LQC Ch. 19 sec. 2; Wyo. Admin. Code § ENV LQC Ch. 12 § 1(a)(iv). Those assessments use information and data from the permit application along with internal DEQ information and data. The Council, however,

does not have DEQ's internal information or data, or the statutory authority to conduct the required assessments, making PRBRC's argument legally and practically impossible.[1]

The lone legal support PRBRC cites for the Council to make the 406(n) findings is *Grams v. Envt'l Quality Council*, 730 P.2d 784 (Wyo. 1986). (PRBRC Br. at 2.) But PRBRC has mislead the Council about what the Wyoming Supreme Court held in *Grams*. *Grams* decided the following:

- the objectors received adequate notice of the contested case. 730 P.2d at 786-86;
- the Council correctly denied the objectors' request for a continuance. *Id.* at 788;
- the limits on objectors' discovery rights. *Id.*;
- the permit applicant's revisions to the application were not *ex parte* communications with DEQ. *Id.* at 789;
- the Council did not shift the burden of proof from the permit applicant. *Id.*; and
- the Council correctly decided the permit application was complete. *Id.* at 790.

The Council did find that the applicant had proven the elements of 406(n). *Id.* at 789. But the Supreme Court never held the Council must make the 406(n) findings.[2]

The *Grams* case still leaves the relevant law as the statute governing this Council's authority and the law for applying and interpreting statutes. That law leads to one outcome, the Council does not make the 406(n) findings.

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[1] PRBRC suggests that the Council has to make these findings because no opportunity exists for DEQ to make them. (PRBRC Br. at 8.) But section 406(p) gives DEQ 15 days after the Council's decision to make the required findings under 406(n).

[2] It is unknown from the Supreme Court's opinion and the Council's order if DEQ issued a CHIA or the 406(n) findings before the permit application went to publication. (See Decision attached as Ex. 1)

II. The Council does not have the authority under Section 406(p) to "step into the place of the Director" and make a final decision on the permit application.

Section 406(p) states, "[i]f a hearing is held, the council shall issue findings of fact and a decision on the application within sixty (60) days after the final hearing. The director shall issue or deny the permit no later than fifteen (15) days from receipt of any findings of fact and decision of the environmental quality council." Wyo. Stat. Ann. § 35-11-406(p). In deciding what this language means, the same rules described above apply. The Council must apply the plain language of the statute and avoid rendering provisions meaningless. *In the Interest of JB*, ¶ 12, 390 P.3d at 360; *Holloway*, ¶ 20, 354 P.3d at 71. The Council must also consider each statutory section *in pari materia* (sections with the same subject) giving effect to each "word, clause, and sentence according to their arrangement and connection." *In the Interest of JB*, ¶ 12, 390 P.3d at 360.

These rules mean the phrase "decision on application" should be read together with the Council's authority and the other parts of section 406. As Brook's opening brief explains, the Council has the authority to review the laws and regulations DEQ has administered. (Brook Br. at 6-7.) To date, DEQ has decided only that Brook's permit application was complete, without deficiency, and suitable for publication. Before a permit can issue, the remaining findings under section 406 fall to either the administrator or DEQ director. Wyo. Stat. Ann. § 35-11-406(m)-(n). And the DEQ director issues the permit. *Id.* at 406(p). Reading these provisions together means the Council's "decision on the application" should decide if DEQ correctly determined the application was complete, without deficiency, and suitable for publication.

PRBRC, however, argues section 406(p) authorizes the Council to make a "final" decision on the permit application. (PRBRC Br. at 1-3.) This asks the Council to violate basic principles of statutory interpretation. To start, words and phrases key to PRBRC's argument are

missing. The word "final" or anything similar do not appear in 406(p). The phrase "step into the place of" or anything similar also do not appear. So PRBRC asks the Council to insert words into the statute, something Wyoming law prohibits. *Holloway*, ¶ 20, 354 P.3d at 71. Likewise, the Council would have to make the 406(n) findings to render a final decision, which ignores the specific language of 406(n) that the administrator makes those findings and renders it meaningless in this case.[3] *Id.* This leaves the only logical and legally permissible reading of "decision on the application" as a decision on whether Brook's permit application was complete, without deficiencies, and suitable for publication.[4]

CONCLUSION

PRBRC's brief relies on the faulty assumption that this hearing will decide all aspects of the permitting process. But no law supports that reading. The legislature chose not to include a hearing specific to 406(n) or state that the 406(n) findings must occur before the public comment process. Likewise, section 406 does not grant the Council authority to make these decisions or render a final decision. Should PRBRC or any objector wish to change that reality, they can do so through the legislature—not through the Council. Rather, the Council can exercise only the authority the legislature granted it. Here, that means reviewing whether DEQ correctly administered section 406(a)-(h) and its associated regulations.

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[3] PRBRC hints that DEQ cannot make the findings because Mr. Wendtland recused himself. (PRBRC Br. at 8.) This is nonsense. DEQ personnel testified that Alan Edwards serves as acting administrator for Brook's permit application and can/will make the 406(n) findings.

[4] PRBRC also claims in its list of applicable laws that the Council's decision should include Wyo. Stat. Ann. §§ 35-11-415(b), 417(c). These claims require little discussion. Section 415 applies only if DEQ issued a permit. *Id.* at 415(a). Section 417 applies only before an operator begins mining, which requires a permit. So neither of these sections apply.

Brook requests the Council schedule oral argument on the parties' briefings relating to statutes and regulations the Council must consider.

DATED: June 30, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, I served a true and correct copy of the foregoing by email to the following:

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Exhibit 1

File

BEFORE THE

ENVIRONMENTAL QUALITY COUNCIL

STATE OF WYOMING

IN THE MATTER OF OBJECTIONS)
TO THE PERMIT APPLICATION OF)
AMAX COAL COMPANY, EAGLE BUTTE MINE,)
TFN 1 6/212)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PERMIT

The application of Amax Coal Company for a surface coal mining permit and the objections thereto of LeRoy Grams and Mary H. Grams were considered by the Environmental Quality Council at a public meeting in Jackson, Wyoming, on September 30, 1985, following an evidentiary hearing held in Cheyenne, Wyoming, on August 28, 1985. Amax Coal Company appeared and was represented by Steven R. Youngbauer of Amax Coal Company. Mary H. Grams did not appear and was not represented at the hearing, and LeRoy Grams appeared pro se. The Land Quality Division of the Department of Environmental Quality appeared and was represented by Weldon S. Caldbeck, an Assistant Attorney General. Having considered the evidence presented at the hearing and the arguments of counsel, the Environmental Quality Council hereby finds and concludes as follows:

FINDINGS OF FACT

1. This proceeding arises from the application of Amax Coal Company, a division of Amax Incorporated (hereinafter "Amax"), to the Department of Environmental Quality, Land Quality Division, to obtain a permit to conduct surface coal mining activities.

2. The Eagle Butte Mine received a permit from the Land Quality Division in 1976. This permit application was submitted pursuant to Wyoming statutes and regulations that implement the Surface Mining Control and Reclamation Act, P.L. 95-87.

3. On May 21, 1985, the Land Quality Division, determined the Eagle Butte Mine application, assigned the temporary filing number TFN

11-19

1 6/212, is complete and suitable for final publication pursuant to W.S, 35-11-406(g).

4. LeRoy Grams and Mary H. Grams, received notice of the filing of the permit application pursuant to W.S. 35-11-406(g) and (j).

5. On August 6, 1985, the Land Quality Division received timely, written objections from the protestants LeRoy Grams and Mary H. Grams.

6. On August 20, 1985, Amax filed a Motion to Dismiss alleging that specified allegations in the protestants' petitions failed to state a claim upon which relief could be granted, and further stating that the Council lacked subject-matter jurisdiction over the issues raised.

7. Mary H. Grams is the owner of the surface estate of lands contiguous to the proposed mine permit area and water rights appurtenant to such lands (as described subsequently by the protestants' attorney), comprising the NW¼ of Section 34, NE¼ of Section 33 and the NE¼NW¼ of Section 32, Township 51 North, Range 72 West, 6th P.M., Campbell County, Wyoming.

8. LeRoy Grams is the owner of all mineral rights underlying the lands owned by Mary H. Grams described in the above paragraph.

9. The protestant, Mary H. Grams, presented no evidence to substantiate allegations in her petition protesting the issuance of the mining permit to Amax Coal Company.

10. Evidence at the hearing demonstrated that the Eagle Butte Mine application does not request approval to mine the Little Rawhide Tract which was purchased in the 1982 coal lease sale held by the Department of Interior.

11. Evidence at the hearing demonstrated that access to the Grams' property will not be limited due to the mining operation, and a highway location project to which Mr. Grams objected, is a project of the Wyoming Highway Department and not Amax Coal Company.

12. The protestant, LeRoy Grams, produced no evidence on the issues raised in his petition alleging that:

A. The mining operation consitutes a public and private nuisance;

B. The coal company originally sought authorization for mining on an area and for a time in excess of that authorized by the Environmental Quality Act;

C. The application does not contain a map required by the Environmental Quality Act;

D. The reclamation plan did not comply with the Environmental Quality Act;

E. Amax Coal Company is in non-compliance with its current permit;

F. The present operation has lowered the groundwater on the Grams' property;

G. The issuance of this permit is contrary to the law and policy of the State of Wyoming and the United States;

H. Unidentified test holes were drilled beyond the terms of an exploration permit; and

I. No accommodation was made for private oil and gas leases or abandoned oil and gas wells.

13. Section 1.8 of the permit application contains a legal description of the permit area and this description does include the railroad to the point it splits to the Carter spur.

14. Section 1.10 of the permit application contains a demonstration that the current and proposed operation is in compliance with the Environmental Quality Act.

15. Section 2 of the permit application contains a general description of the area including a description of wildlife. No bald eagle roosts, bald eagle nests, or black-footed ferrets have been observed within or adjacent to the permit area by the U.S. Fish and Wildlife Service, wildlife consultants, or Amax Coal Company during studies conducted through 1985.

16. Neither the Amax Coal Company permit area nor the Grams' property contains habitat, such as Ponderosa Pine Hills or wooded riparian bottoms, suitable for bald eagle roosts.

17. Neither the Amax Coal Company permit area nor the Grams' property contains extensive colonies of burrowing animals, primarily prairie dogs, which are needed to support black-footed ferret populations.

18. Although bald eagles and golden eagles have been seen on the Grams' property and on the permit area, no evidence was produced indicating they roosted or nested in the area.

19. It is highly unlikely that black-footed ferrets live in the Eagle Butte Mine permit area or in the vicinity of the permit area.

20. Although drainage into a livestock reservoir on the Grams' property will be affected by the mining operation, much of the drainage area will remain intact.

21. The three (3) groundwater wells located on the Grams' property will not be significantly affected by the mining operation, and permit provisions for mitigation are sufficient for any unforeseen problems.

22. The reclamation plan will accomplish reclamation as required by the Environmental Quality Act.

23. The permit application contains a plan for special handling of acid and toxic materials to prevent contamination of ground or surface waters.

24. Eagle Butte Mine is grandfathered under W.S. 35-11-406(n)(v)(B) in regard to mining an alluvial valley floor.

25. All maps required by the Environmental Quality Act are included in the permit application.

26. Section 3.0 of the permit application contains a ground control plan that identifies a safe slope and benching conditions in order that the topographic surface beyond the affected area will not be in danger of collapse or nor will there be danger of interior collapse. There will be no lack of lateral and subjacent support for the Grams' property.

27. Amax Coal Company's mining operation will not mine around the Grams' property, thus, leaving that property with unreclaimed, vertical walls.

28. Section 3.8 of the permit application contains a blasting plan which insures that explosives will be used in accordance with existing state and federal laws. No blasting activities will occur within one half mile of the Grams' ranch buildings.

29. The proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

30. No prime farmland is included within the permit area.

CONCLUSIONS OF LAW

1. This proceeding is under the Wyoming Environmental Quality Act, W.S. 35-11-101 through 1207, 1977 as amended.

2. Statutory notice was given by the applicant, Amax Coal Company.

3. Actual and statutory notice of the application was received by the protestants.

4. As the Eagle Butte Mine application, TFN 1 6/212, does not request approval to mine the Little Rawhide Tract, which was issued in the 1982 coal lease sale held by the Department of Interior, allegations concerning the existing permit allegations that this permit application should be deemed incomplete because of the 1982 coal lease sale should be dismissed.

5. The protestants are not precluded by this order from seeking any relief from any state agency having jurisdiction in the event of future, adverse effects on groundwater underlying the Grams' property.

6. The protestants, LeRoy Grams and Mary H. Grams, have not met their burden of going forward with evidence to demonstrate this permit application is incomplete.

7. Amax Coal Company has met its burden of proof demonstrating that the Eagle Butte Mine is in compliance with W.S. 35-11-406(n), and all other applicable state laws.

ORDER

IT IS HEREBY ORDERED THAT:

1. Allegations IV, V, VI, VII, VIII, X, XIV, and XV of the objections of LeRoy Grams, and allegations IV, V, VI, VII, and VIII of the objections of Mary H. Grams, are hereby dismissed; and

2. The permit to mine shall be granted pursuant to W.S. 35-11-406(p).

DATED this 19th day of November, 1985.

Edgar L. Langrand
Hearing Examiner