

Thomas L. Sansonetti (Wyo. State Bar # 43354)  
Isaac N. Sutphin, P.C. (Wyo. State Bar # 6-3711)  
Jeffrey S. Pope (Wyo. State Bar # 7-4859)  
HOLLAND & HART LLP  
2515 Warren Avenue, Suite 450  
P.O. Box 1347  
Cheyenne, WY 82003-1347  
Telephone: (307) 778-4200  
tlsansonetti@hollandhart.com  
insutphin@hollandhart.com  
jspope@hollandhart.com

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 MOTION TO STRIKE POWDER RIVER BASIN RESOURCE  
COUNCIL'S SUPPLEMENTAL EXPERT REPORT**

---

**INTRODUCTION**

A month and a half after the end of the June 7th hearing, three months after the April 21st deadline for written discovery, and four months after the March 17th deadline to name expert witnesses, Powder River Basin Resource Council (PRBRC) submitted a new expert report with its proposed findings of fact and conclusions of law. Exhibit A to those findings is a July 11, 2017 letter from Mark Eslinger to Shannon Anderson. Mr. Eslinger provides “information concerning the Ground Control Plan and its relation to subsidence.” Mr. Eslinger describes the law he believes applies to a ground control plan. He concludes that “the Ground Control Plan does not deal with subsidence.” He also attached his resume. Mr. Eslinger’s letter is an expert report. *See* Wyo. R. Civ. P. 26(a)(2)(B) (stating an expert report must contain an expert’s opinion, the basis for that opinion, and a curriculum vitae.)

Allowing or considering a new expert report after the expert designation deadline, after discovery, and after the hearing undermines Brook Mine's (Brook) basic right to a fair hearing—a reversible error. While Brook does not doubt the Council has tired of motions, PRBRC's attempt to introduce new expert testimony has left Brook no choice.<sup>1</sup> Therefore, Brook requests the Council strike Exhibit A and the reference to it in paragraph 104 of PRBRC's proposed findings.

### **ARGUMENT**

The Council conducts contested cases with reference to the Wyoming Rules of Civil Procedure. Wyo. Admin. Code ENV Practice & Proc. Ch. 2, § 2. Wyoming's Rules of Civil Procedure allow a decision-maker to strike "redundant, immaterial, impertinent, or scandalous" matters from pleadings. Wyo. R. Civ. P. 12(f).

At best, PRBRC submitting Exhibit A is redundant. PRBRC's designated expert, Dr. Marino, discussed the Mine Safety and Health Administration (MSHA) generally and why he did not think Brook's ground control plan would address subsidence. At worst, PRBRC submitting Exhibit A is an underhanded tactic. PRBRC knew long ago that Brook planned to develop and submit an MSHA ground control plan engineered to prevent subsidence. PRBRC's objection letter dated January 27, 2017 states "[t]he Subsidence Control Plan references a Ground Control Plan that is approved by MSHA and is required under 30 C.F.R. § 77.1000." (PRBRC Hr'g Ex. 1 at 12.) From January 27, 2017 until the expert designation deadline of March 17, PRBRC had

---

<sup>1</sup> In an effort to avoid filing this motion, Brook's counsel emailed PRBRC's counsel and requested PRBRC withdraw Exhibit A and the reference to Exhibit A in paragraph 104. (See email attached as Exhibit 1.) PRBRC has not responded to Brook's request.

time to designate an expert on this issue. But PRBRC did not. It waited until discovery, the hearing, the final briefing, and any chance of Brook responding had ended.

This attempt to smuggle in additional expert testimony also fails Wyoming's five factor test for supplementing or adding expert reports after the expert designation or report deadline. Those factors are: 1) "whether allowing the evidence would incurably surprise or prejudice the opposing party;" 2) "whether excluding the evidence would incurably prejudice the party seeking to introduce it;" 3) "whether the party seeking to introduce the testimony failed to comply with the evidentiary rules inadvertently or willfully;" 4) "the impact of allowing the proposed testimony on the orderliness and efficiency of the trial;" and 5) "the impact of excluding the proposed testimony on the completeness of the information before the court or jury." *Forbes v. Forbes*, 2015 WY 13, ¶ 83, 341 P.3d 1041, 1063 (Wyo. 2015).

Allowing Exhibit A would incurably prejudice Brook because Brook has no chance to respond beyond this motion. But PRBRC would suffer no prejudice because it presented testimony about Brook's ground control plan. PRBRC has acted willfully because it could have designated and submitted the opinions in Exhibit A on time. Its knowledge of Brook's ground control plan in January and designation of three experts before the March 17th deadline prove as much. Allowing Exhibit A would impact more than the orderliness or efficiency of the hearing, it would defeat Brook's right to rebut evidence. Finally, excluding Exhibit A would not impact the completeness of information because PRBRC already presented testimony on the issue.

Therefore, Brook requests the Council strike Exhibit A to PRBRC's proposed findings of fact and conclusions of law and the reference to Exhibit A in paragraph 104. In the alternative, Brook requests the Council state it will not consider either as part of its decision in this case.<sup>2</sup>

---

<sup>2</sup> Brook has included a proposed order to this effect.

DATED: July 26, 2017.



---

Thomas L. Sansonetti (Wyo. State Bar # 43354)  
Isaac N. Sutphin, P.C. (Wyo. State Bar # 6-3711)  
Jeffrey S. Pope (Wyo. State Bar # 7-4859)  
HOLLAND & HART LLP  
2515 Warren Avenue, Suite 450  
P.O. Box 1347  
Cheyenne, WY 82003-1347  
Telephone: (307) 778-4200  
tlsansonetti@hollandhart.com  
insutphin@hollandhart.com  
jspope@hollandhart.com

ATTORNEYS FOR PERMIT APPLICANT  
BROOK MINING COMPANY, LLC

## CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2017, I served a true and correct copy of the foregoing by email to the following:

Lynnette J. Boomgaarden  
Clayton H. Gregersen  
Crowley Fleck, PLLP  
237 Storey Boulevard, Suite 110  
Cheyenne, WY 82009  
lboomgaarden@crowleyfleck.com  
cgregersen@crowleyfleck.com  
Attorneys for Big Horn Coal

Todd Parfitt  
Director, DEQ  
200 W. 17th Street  
Cheyenne, WY 82002  
Todd.Parfitt@wyo.gov

Andrew Kuhlmann  
Assist. Attorney General  
andrew.kuhlmann@wyo.gov  
james.larock@wyo.gov  
Attorneys for DEQ

Shannon Anderson  
Powder River Basin Resource Council  
sanderson@powderriverbasin.org

Alan Edwards  
Deputy Director, DEQ  
Alan.edwards@wyo.gov

Jay Gilbertz  
Attorney for Mary and David Brezik-Fisher  
jgilbertz@yonkeetoner.com

David Bagley  
Jim Ruby  
Environmental Quality Council  
Jim.ruby@wyo.gov

