Patrick J. Crank (5-2305)
pat@cranklegalgroup.com
Abbigail C. Forwood (7-4814)
abbi@cranklegalgroup.com
Jim D. Seward
jim@cranklegalgroup.com
CRANK LEGAL GROUP, P.C.
1815 Evans Ave.
Cheyenne, WY 82001
(307) 634-2994
Fax: (307) 635-7155

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

REPLY TO POWDER RIVER BASIN RESOURCE COUNCIL'S COMBINED RESPONSE IN OPPOSITION TO BROOK MINING CO., LLC'S MOTION FOR SUMMARY JUDGMENT FOR LACK OF STANDING AND MEMORANDUM OF POINTS AND AUTHORITIES FOR CROSS MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF STANDING

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 its *Reply to Powder River Basin Resource Council's Combined Response in Opposition to Brook Mining Co., LLC's Motion for Summary Judgment for Lack of Standing and Memorandum of Points and Authorities for Cross Motion for Summary Judgment on the Issue of Standing ("Response-Standing")* as follows:

The filing of a Summary Judgment motion and the response to a Summary Judgment Motion are hyper technical exercises of legal motion practice. Years of guidance and precedent from the Supreme Court and the Wyoming Rules of Civil Procedure require strict compliance with the Rules of Civil Procedure. Failure to strictly follow the Rules of Civil Procedure and

precedent must result in either the denial of a motion or the granting of a motion for summary judgment. The Powder River Basin Resource Council ("PRBRC") has failed to comply with the Rules of Civil Procedure in their Response-Standing and the EQC must grant summary judgment to Brook on the issue of standing.

There can be no argument over the operation of Rule 56, WRCP, and how an administrative body must review summary judgment motions. In fact, the PRBRC does not even address the Standard of Review that Brook has supplied to the EQC in the *Brief in Support of Respondent Brook Mining, LLC, Motion for Summary Judgment for Lack of Standing.* ("Brief in Support-Standing"). They have accordingly admitted that the law and procedure outlined for consideration of Summary Judgment Motions outlined by Brook is applicable. That Standard of Review is set forth in Brief in Support-Standing, at pages 2 - 4. The entire standard will not be set forth in this Reply in its entirety.

Most importantly here, once the movant has made a prima facia showing that there are no contested issues of fact and the movant is entitled to judgment as a matter of law, the party responding to the summary judgment motion must come forward with competent admissible evidence to avoid summary judgment. The Court has repeatedly stated:

An opposition to summary judgment must assert substantiated facts rather than conclusory statements or mere opinions. *See, McClellan v. Britain,* 826 P.2d 245, 247-48 (Wyo. 1992); *Clark v. Industrial Co.,* 818 P.2d 626, 628 (Wyo. 1991). "Categorical assertions of ultimate facts without supporting evidence cannot defeat summary judgment. [citations omitted.]" *Seamster v. Rumph,* 698 P.2d 103, 106 (Wyo. 1985). The material presented to the court as a basis for summary judgment "should be as carefully tailored and professionally correct

as any evidence which is admissible to the court at the time of trial." *Lane Co. v. Busch Development, Inc.*, 662 P.2d 419, 426 (Wyo. 1983).

The Response-Standing filed by the PRBRC is fatally deficient in several ways. The wholly inadequate and legally deficient Response-Standing must result in the EQC granting the motion for summary judgment filed by Brook.[1] Fatal legal errors committed by the PRBRC in their Response-Standing include:

1. Failure to provide analysis or address any of the standing tests and factors set forth in the substantial body of Wyoming Supreme Court decisions establishing what is necessary to have standing to challenge an administrative decision. The PRBRC incorrectly claimed that federal authority controls and totally failed to file any response addressing standing under the applicable state law. The PRBRC has accordingly conceded the arguments made by Brook and has waived its opportunity to discuss applicable State legal standards on standing;
2. Failure to submit admissible, credible and competent evidence establishing that the PRBRC has members and the members' injuries can be used by the PRBRC to establish standing to challenge the permit in question;
3. Failure to provide analysis how the PRBRC has standing as a corporate non-breathing entity independent of the nonexistent standing allegedly conferred by their members' interests;

[1] The baseless nature of the PRBRC arguments in the Response-Standing is graphically illustrated by the fact that the PRBRC cites no legal authority other than a reference to the dismissal of the pending appeal on the first permit, a case for a basic rule of statutory construction, and the Oxford English Dictionary for a definition of "smoke and mirrors" in the first 14 pages of a 21 page brief. In the following 7 pages, the PRBRC cites to federal case law which as explained *infra,* has no bearing or precedential value in this matter.

4. Failure to submit and identify admissible, credible, and competent evidence showing the type of injury necessary to have standing to challenge the permit in question; and,

5. Rather than submit evidence as required by Rule 56, WRCP, the PRBRC submitted illogical and unsupported argument and fatally deficient, speculative and inadmissible declarations from nonparties to this action.

In summary, PRBRC has failed to establish that there are material factual disputes on the issue of standing that preclude granting Brook's summary judgment motion as a matter of law. The deficient Response-Standing and erroneous legal arguments made by the PRBRC have conceded the motion. This appeal must be dismissed.

THE RESPONSE FILED BY THE PRBRC FAILS TO ESTABLISH THAT THE PRBRC HAS MEMBERS AS DEFINED AND REQUIRED BY THE PRBRC BYLAWS

The Response, at pages two to seven, sets forth argument by the PRBRC that it has members and that the six individuals named in the petition are members of the PRBRC. This argument is nothing more than a stream of consciousness from the attorney for the PRBRC without citation of any legal authority and fails to provide any admissible evidence that shows that Brook is not entitled to judgment as a matter of law. The only "evidence" that may exist to show a material issue of fact might be the declarations of the six individuals named in the Petition. These declarations will be discussed further *infra* but even those declarations do not support, other than in conclusory terms, that the PRBRC has members. Because the PRBRC has failed to offer any admissible evidence that it has members, the EQC has no choice but to grant the summary judgment motion sought by Brook on the issue of standing. The PRBRC has failed to recognize that a response to a summary judgment motion requires the identification and

submission of admissible and competent evidence and that a response which contains only baseless argument and the opinion of counsel cannot defeat a summary judgment motion.

As noted on page seven of Ramaco's Brief in Support-Standing, the PRBRC bylaws very explicitly provide that in order to be member of the PRBRC, a member "shall pay an annual membership fee." *See*, page 7 of Brief in Support-Standing, Exhibit "D" attached thereto. Pursuant to this clear and unmistakable mandate, no one can be a member without paying an "annual membership fee." Pursuant to the bylaws, no one can serve on the Board of Directors of the PRBRC unless they are a member in good standing. Exhibit D. No one, per the bylaws, can be a member, and certainly not a member in good standing, without having paid an annual membership fee. Per the bylaws, no one can serve as an officer on the Board of Directors unless they are a member in good standing. *Id.* Per the 990's filed by the PRBRC and signed by Jill Morrison under the pains and penalties of perjury, the PRBRC collected no membership fees or dues in 2016 to 2018. *See* Brief in Support-Standing at page seven, and Exhibit "C". This admissible evidence filed in support of Brook's motion for summary judgment most certainly met the prima facia showing necessary to require the PRBRC to submit admissible and credible evidence that the PRBRC has members who have paid annual membership fees as required by the PRBRC bylaws.[2]

The PRBRC failed to submit any credible evidence that they have any members that paid annual membership fees as required by the bylaws. Instead of having their CPA prepare and file an affidavit showing the membership fees paid by alleged PRBRC members and documenting

[2] Other evidence supporting Brook's *prima facia* showing included that none of the six individuals named in the Petition stated in either written comment or in testimony at the informal conference that they were members of the PRBRC and the six individuals' fatal decision to not appeal the issuance of the permits themselves. *See,* Brief in Support–Standing, pp.5, 21-25. Other evidence included the uncontested fact that the PRBRC is in large part funded by out of state environmental activist organizations. *Id.*, Exhibit "E".

that the six individuals named in the complaint had actually paid membership fees, the PRBRC responded only with unsupported argument and improper "tax opinions" by Shannon Anderson. This unsupported argument includes opinion, without any basis in fact or the requisite showing that Ms. Anderson is an expert on federal tax law, that there are many members of the PRBRC and that anyone that provides a contribution of any sort to the PRBRC is a member. As we understand the argument, and according to the baseless opinion of Ms. Anderson, no one pays a separate "annual membership fee" in order to allow "contributors" to obtain maximum tax deductions for their charitable contributions. This practice of treating contributions to the PRBRC in a manner directly inconsistent with the PRBRC bylaws and to provide maximum tax deductions to those who contribute to the PRBRC seems very questionable. It seems obvious that if an entity's bylaws require the payment of an annual membership fee, the entity would collect that fee, honestly report those fees to the IRS, and let the taxpayer determine the propriety of whether the membership fee is deductible under federal law. No entity should endeavor to make a membership fee appear to be a contribution to try and help the contributor take a deduction that is not allowable under federal law. That is, however, what the PRBRC has admitted to doing in their Response-Standing.

Whatever conclusion one reaches as to the propriety of these tax shenanigans, the PRBRC has not submitted competent and admissible evidence that the PRBRC has any members that comply with the PRBRC bylaws. Such as the PRBRC alleges standing in this matter that arises from interests held by its members, it has no members and therefor has no standing on that basis to pursue this appeal.

The declarations submitted on behalf of the six individuals named in the petition do not change this result and in fact support their lack of membership in the PRBRC. Most

significantly, none of these individuals allege that they paid an annual membership fee to the PRBRC.

Gillian Mallone states in her declaration that "I'm proud to contribute money to the organization each year…" and "…I contribute my own funds…" Response, Exhibit A, p. 2. William "Bill" Bensel states: "…I currently have a family membership. We contribute money each year to the organization to renew our membership…" *Id*, Exhibit B, p. 1. John Buyok states: "…we give money every year to PRBRC to renew our membership." *Id.* Exhibit C, p. 1. Anton Bocek states: "We are members who financially contribute to the organization each year to renew our membership." *Id*, Exhibit D, p 1. Joanne Westbrook states: "…I give a donation to the organization each year to renew my membership." *Id.* Exhibit E.

Several things are telling from these statements. First none of these people state that they pay an "annual membership fee" as required by the bylaws to be a member of the PRBRC. All of these people allege that they make annual contributions or donations. It appears that these statements have been carefully tailored to match and support the accounting shenanigans discussed *supra.* The likelihood that all six of these individuals would have discussed their financial contributions to the PRBRC in the same manner as the questionable accounting practices of the PRBRC seems very remote. It is unfortunate that the PRBRC has deceived these folks into believing they are members of this organization in order to achieve maximum tax deductions for contributors and increased "membership" for the PRBRC.

The other issue that needs to be addressed is what effect these individuals' statements that "I am a member of the PRBRC" has on standing. The answer is nothing. These are hardworking honest folks who no doubt believe they are members of the PRBRC. However, if the conclusion that "I am a member" is based on thin air and nothing other than a belief and the

actions of the PRBRC, they cannot be a member of the PRBRC. These folks cannot be members for purposes of standing analysis based on the PRBRC bylaws, the PRBRC filings with the IRS, and the admissions of the PRBRC in the Response-Standing that the PRBRC collects no "annual membership fees" in order to try and maximize tax deductions for its alleged members. If someone states they are a registered voter but does not fill out the proper paperwork with county authorities, they may believe they are a registered voter but they cannot be a registered voter by operation of law. If the PRBRC fails to demand and collect "annual membership fees" under their bylaws that they adopted, no one can be a member of the PRBRC. There can be no Board of Directors of the PRBRC; there can be no officers of the Board of Directors of the PRBRC. The PRBRC has failed to follow the rules they chose to govern their entity and these folks' good faith belief that they are "members" cannot establish standing. In addition, none of the six individuals appealed the issuance of the Permit, are parties to this appeal, and are not real parties in interest to this matter.

It would be improper for the EQC to ignore that there are no contested issues of material facts based on the Petition and the PRBRC Response-Standing to this membership issue and allow this matter to go forward. Brook recognizes that this is a technical legal argument that may not be very satisfying or appealing to the EQC members. That being recognized, standing is an issue of constitutional magnitude and this appeal is no trivial matter. Millions of dollars have been spent by Brook to obtain the permit. Either the PRBRC has standing or they do not. The PRBRC cannot be given a break because they were sloppy, made bad legal arguments, or decided to account for contributions to maximize tax deductions for their supporters. Brook is entitled to an unbiased application of the law no matter how any member of the EQC may feel about the technical nature of the arguments showing there is no standing conferred on the

PRBRC by nonexistent members. The PRBRC chose their path and they have failed to operate their entity in a manner allowing them to pursue the appeal on the backs of their alleged members. Their recklessness with regard to the filing of their tax returns and accounting systems is solely their fault and it has legal significance and consequences in this matter. Dismissal of the appeal may seem to be harsh, but it is required by the law.

If the PRBRC had members who paid an "annual membership fee" they could have easily filed an affidavit from their accountant showing the amount of those membership fees and when the six individuals paid their annual membership fees. Those membership fees and dues would be reported on the tax returns filed with the IRS. The PRBRC "members" could have filed their own appeal challenging the Permit. They did not do so and failure to do so is fatal to their pursuit of this appeal.

THE DECLARATIONS FILED BY THE PRBRC CONTAIN ONLY SPECULATIVE AND NON-ADMISSIBLE CLAIMS OF INJURY OR DAMAGE AND ARE INSUFFICIENT TO DEFEAT A SUMMARY JUDGMENT MOTION

Accepting for the sake of argument that the six individuals named in the Petition are actually members of the PRBRC, the declarations submitted by these six individuals attached to the Response-Standing do not in any way satisfy the type of evidence that must be submitted to defeat a summary judgment motion. In order to defeat a summary judgment motion, the responding party must submit "substantiated facts rather than conclusory statements or mere opinions." "[C]ategorical assertions of ultimate facts without supporting evidence cannot defeat summary judgment." Evidence submitted in opposition to a summary judgment motion must be "carefully tailored and professionally correct as any evidence which is admissible to the court at the time of trial." *See*, cases cited on page 2 of this Reply-Standing.

As noted in the Brief in Support-Standing filed by Brook, the allegations of the Petition and the written comments and testimony of these individuals at the informal conference do not establish the type of individualized and concrete injury necessary to establish standing under *Brimmer* and a number of other Wyoming standing cases. *See,* Brief in Support-Standing at pp. 5-27. The declarations filed in opposition to Brook's Summary Judgment motion on standing likewise do not show the type of individualized and concrete injury necessary to provide associational standing to the PRBRC.

The EQC should carefully review all declarations. Brook will carefully analyze the declaration of John Buyok, Exhibit C to the Response-Standing filed by the PRBRC. The problems identified in the Buyok declaration exist in each declaration filed by the PRBRC. No declaration contains the type of admissible and substantiated evidence necessary to defeat the summary judgment sought by Brook.

Paragraph ten of the John Buyok declaration provides:

> I regularly travel on and move farm machinery on the state highway to and from Ranchester, and I am concerned that Brook hasn't included the road in its traffic plan. It doesn't seem like the company has an agreement with WYDOT to use the road or to repair it if the heavy trucks cause damage. It also becomes much more dangerous to move slow farm machinery on the highway if there is heavy truck traffic.

The problems with paragraph ten are many. Mr. Buyok, without any basis in fact whatsoever, speculates that there is some requirement to include a state highway in the vicinity of the mine in a traffic plan for the mine. This is a legal conclusion that Mr. Buyok is not qualified to make and is in fact not required by WEQA. *See,* Respondent Brook Mining Co., Brief in Support of Motion for Summary Judgment filed on October 14, 2020, Issue 3, pp. 20-24. In addition, Mr. Buyok speculates that there must be some type of agreement with WYDOT to repair state highways if "heavy trucks" cause damage to the state highways. Mr. Buyok does not

describe what type of vehicles he is referring to regarding "heavy trucks" and does not define that term for anyone reading the declaration. The coal being transported to the iCam facility may be hauled in a pickup truck or perhaps some larger type of truck but certainly will not be hauled there in the multi-ton haul trucks used throughout the Power River Basin. *Id.* Last, Mr. Buyok makes the speculative comment that it will be much more dangerous to move slow farm machinery on the highway if there is heavy truck traffic. My Buyok does not state that he routinely or ever moves slow farm machinery on the highway nor provide any data or facts concerning how often there will be heavy truck traffic on the highway. Mr. Buyok does not provide any factual explanation of how having trucks hauling whatever amount of coal may be transported to the iCam facility will actually make the highway "more dangerous." Paragraph ten of the declaration contains categorical assertions of opinion without any supporting facts and is nothing more than rife speculation that some event may occur in the future. None of this testimony would be admissible in court.

Paragraph 11 of the Buyok declaration provides:

> I am also concerned about the blasting that will be done at the mine. One of the new trenches that's going to be opened up isn't very far away across the valley. It's less than a mile from my house and less than a half mile from my property. The alluvium in the Tongue River Valley transmits vibrations very well so I'm, afraid that even if the blasting is relatively light because it's a smaller mine, there will be vibrations that cause more subsidence on the north side of the river. When the Big Horn Mine was in operation, we would occasionally have flyrock on our property from their blasting. This mine is three to three and a half miles closer than the Big Horn Mine was and so physical damage from blasting is also a concern.

Paragraph eleven is as flawed as paragraph ten. Without any factual support or expert opinion or analysis, Mr. Buyok speculates that even "light blasting" a mile from his house might cause subsidence on the north side of the river. This statement is pure and unadulterated speculation unsupported by any expert analysis. This speculation does not establish concrete and

individualized harm and is not the type of carefully tailored admissible and competent evidence necessary to defeat a summary judgment motion.

Paragraph 12 of the Buyok declaration provides:

> Our property and our farming operations depend on water resources, including surface, underground and alluvial as we live on the Tongue River. Over the years, our family has spent thousands of dollars investing in our water supply systems for the home and farm. My wife and I worry that the mine could dewater our aquifers or impact our water wells because of blasting.

First, Mr. Buyok is not a real party in interest here. He did not appeal the issuance of the Permit. The PRBRC has not sought to overturn the Permit on any issues related to effects the mine may have on aquifers or impacts to water wells. Thus, any comments or worries that Mr. Buyok may have with regard to water well or aquifer issues are totally irrelevant to this proceeding. If he wanted to pursue those issues, he should have filed his own appeal challenging the Permit on those grounds. Second, Mr. Buyok's "worries" regarding water resources are pure speculation and unsupported by any facts or data to even support his "worries." His comment on water issues would not be admissible in any court and are pure speculation not supported by other facts or data in the declaration.

Paragraph 14 of the Buyok declaration states:

> As mentioned, subsidence is a real concern for me because I have lived with the impacts that it can cause to the land and public safety. I'm concerned not only about the mine opening up historic subsidence areas, but also creating new ones. I've read Dr. Marino's reports throughout this proceeding and during the last hearing and **it really concerns me that DEQ is letting Brook get a permit without doing the right subsidence evaluation before-hand**. (emphasis added).

These types of statements are an unfortunate and factually inaccurate characterization being perpetrated by the PRBRC in this appeal. The statement that "...DEQ is letting Brook get a permit without doing the right subsidence evaluation before-hand" is totally false. Conditions nine and ten of the Permit expressly require Brook to engage in extensive analysis and testing for

all highwall mining areas. All material subsidence comments made by Marino have been incorporated into the Permit. *Id.*, Issue One, pp. 7-16. The PRBRC has failed to file an expert designation which would allow Marino to offer any testimony on subsidence issues as controlled by the Permit and Conditions nine and ten. *Id,* Exhibit F. Mr. Buyok has no expert credentials to comment on subsidence issues and there is no factual basis for his comment in any event.

Paragraph 15 of the Buyok declaration provides:

> What's worse, through its permit conditions, DEQ took away my right to comment and to work with PRBRC and any experts hired by the organization to comment on the subsidence analysis information that will be submitted later on. I would definitely want an ability to comment on this information because it is critical to how the company will be protecting public safety and the land in and around the permit area, which happens to include a lot of acreage used by the pubic for hunting and recreation.

Once again, this comment is totally false and is being perpetrated by the PRBRC to inflame its membership. Every revision to any mine plan, including the future submissions of technical data required by conditions nine and ten of the Permit, must, by law, be reviewed by DEQ for a determination whether the proposed revision is a deviation from the mine plan or a non-significant revision. If the revision is deemed by DEQ to be a significant deviation, public comment must be allowed. This process must occur by operation of WEQA. *Id.,* Issue Three, pp. 16-20. Mr. Buyok's comment on a legal issue are not admissible, and incompetent evidence on the question of summary judgment. The unsupported opinion he makes is factually inaccurate and inconsistent with Wyoming law.

Mr. Buyok's comments about his worries or concerns of having a coal mine in Wyoming in paragraphs 16, 17 and 18 express concerns that can have no relevance or consideration on the issue of standing. Any person, faced with some development near their home, will make the statement that they want no development in their back yard. These statements are nothing more than an expression of that sentiment. It is a political statement that has no bearing on legal issues

of standing and cannot affect a decision on summary judgment. These statements have no relevance on the issue of whether the Permit was properly issued under Wyoming's regulatory scheme. His statements are incompetent, inadmissible, and not relevant. They are also incredibly speculative, not supported in any basis in fact, and cannot provide standing to the PRBRC. In addition, the "injury" Mr. Buyok discusses in these paragraphs is no different in degree or impact than the "injury" to the general public. "Injury" of this type cannot give rise to standing. *NLRF v. Converse County,* 2012 WY 158 (Wyo. 2012) ¶32.

Any review of the other declarations filed by the PRBRC shows that those declarations are fatally deficient for the same reasons identified for the Buyok declaration. The PRBRC has completely failed to offer the type of evidence necessary to defeat the summary judgment motion filed by Brook. That failure to identify admissible evidence to show that there are contested issues of material fact on the issue of standing to pursue this appeal is fatal to the PRBRC appeal.

BROOK HAS NOT WAIVED ANY ABILITY TO CHALLENGE STANDING IN THIS MATTER

The PRBRC makes the argument that Brook has waived its ability to challenge PRBRC standing in this matter based on failure to object on standing grounds in earlier related proceedings or because no one has historically challenged PRBRC's standing in other matters before the EQC. This is a preposterous argument, and it is not supported by Wyoming law. The Wyoming Supreme Court has ruled that standing may be raised at any time by any party. In *Northern Laramie Range Foundation v. Converse County*, 2012 WY 158 (Wyo. 2012) the court stated:

> "The existence of standing is a legal issue that we review *de novo.* " *Halliburton Energy Services v. Gunter,* 2007 WY 151, ¶ 10, 167 P.3d 645, 649 (Wyo.2007). *See also, Northfork Citizens for Resp. Dev. v. Park County Bd. of County Comm'rs,* 2008 WY 88, ¶ 6, 189 P.3d 260, 262 (Wyo.2008). **Standing is a jurisprudential rule that implicates a court's subject matter jurisdiction; thus, it can be raised at any time**. *Hicks v. Dowd,* 2007 WY 74, ¶ 18, 157 P.3d 914, 918 (Wyo.2007), citing *Granite Springs Retreat Ass'n, Inc. v. Manning,* 2006 WY 60, ¶ 5, 133 P.3d 1005, 1009-10 (Wyo.2006); *Mutual of Omaha Ins. Co. v. Blury-Losolla,* 952 P.2d 1117, 1119-20 (Wyo.1998).

> In general, the doctrine of standing centers on whether a party" is properly situated to assert an issue for judicial determination." *Cox v. City of Cheyenne,* 2003 WY 146, ¶ 9, 79 P.3d 500, 505 (Wyo.2003). A party has standing when it has a personal stake in the outcome of a case. *Id.* Given this is an agency action, we start with the applicable statutes and rules to define who has an interest in the matter. The Converse County regulations were adopted pursuant to § 18-5-501 *et seq.* Section 18-5-508 states that " [a]ny party aggrieved by the final decision of the board of county commissioners may have the decision reviewed by the district court pursuant to Rule 12 of the Wyoming Rules of Appellate Procedure." W.R.A.P. 12.01 provides judicial review to " any person aggrieved or adversely affected in fact" by agency action. Similarly, § 16-3-114(a) provides that " any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction ... is entitled to judicial review...."
>
> A litigant is " aggrieved or adversely affected in fact" by an agency action if he has a " legally recognizable interest in that which will be affected by the action." *Roe v. Bd. of County Comm'rs, Campbell County,* 997 P.2d 1021, 1023 (Wyo.2000) (citation omitted). In order to establish standing for judicial review of an agency action, a litigant must show injury or potential injury by " 'alleg[ing] a perceptible, rather than speculative, harm resulting from agency action.' " *Hoke v. Moyer,* 865 P.2d 624, 628 (Wyo.1993), quoting *Foster's Inc. v. City of Laramie,* 718 P.2d 868, 872 (Wyo.1986). " 'The interest which will sustain a right to appeal must generally be substantial, immediate, and pecuniary. A future, contingent, or merely speculative interest is ordinarily not sufficient.' " *L Slash X Cattle Co., Inc. v. Texaco, Inc.,* 623 P.2d 764, 769 (Wyo.1981), quoting 4 Am.Jur.2d *Appeal and Error* § 180. Specifically, in the context of zoning or land use planning, [a]n aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest that is or will be affected by the action of the zoning authority in question. An individual having standing must have a definite interest exceeding the general interest in community good shared in common with all citizens.

Northern Laramie Range Foundation at ¶ 23 (citation omitted and emphasis added).

Thus, all arguments that Brook did not raise this issue soon enough in related but separate proceedings or that no one has challenged the PRBRC in other unrelated matters must fail. These arguments are nonsensical, not supported by any citation to relevant case law, are directly inconsistent with Wyoming precedent, and must be rejected.

DEQ RULES DO NOT AUTOMATICALLY AND UNCONDITIONALLY GUARANTEE THAT ANYONE THAT COMMENTS ON A COAL MINING PERMIT HAS AN ABSOLUTE RIGHT TO CONTEST THAT PERMIT WITH THE EQC

The PRBRC argues that DEQ rules somehow automatically and unconditionally guarantee standing for any "interested person" who speaks at an informal conference with regard to a coal mining permit to challenge any aspect of the Permit before the EQC. This argument is also without any merit. This argument ignores Wyoming case law and is inconsistent with the applicable rules themselves. To accept this argument, the EQC would have to ignore a multitude of Wyoming Supreme Court opinions which the EQC has no power or authority to do. In addition, this argument is directly contrary to admissions in the PRBRC Petition in this matter which admits that one must have been, at a minimum, adversely affected by the issuance of the Permit.

The petition filed by the PRBRC in this matter admits and alleges that:

> The objections and concerns of the Resource Council members demonstrate that the Resource Council, through representation of its members, is an "interested person" within the meaning of the Wyoming Environmental Quality Act ("WEQA" or "Act") section 406(p) and a "**person with an interest which is or may be adversely affected" within the meaning of Ch.1 § 17(b) of DEQ's Rules of Practice and Procedure**. The Resource Council's objections are attached as Appendix A to this petition for hearing and the comments of individual Resource Council members are available on the DEQ's website.

Petition at ¶ 6. (emphasis added).

Chapter 1, Section 17(b) of the Department of Environmental Quality Rules of Practice and Procedure, cited by the Petitioner in the Petition, provides that "...**the applicant or any person with an interest which is or may be adversely affected may appeal** a decision to the Council..." (emphasis added).

The rule relied on by the PRBRC, and the admission that this rule applies to this appeal made in the Petition filed by the PRBRC to initiate this matter, must resolve this issue and lead

to the rejection of the ten plus pages of briefing in the Response-Standing that any person who comments at the informal conference is an "interested person" and has an automatic and irrevocable right to appeal the issuance of a Permit to the EQC.[3] This argument has no support and the Response-Standing contains no citation to authority to support this baseless and unfounded argument. Litigants are bound by admissions in their pleadings and this argument, which is directly inconsistent with the admissions in the PRBRC Petition, cannot overcome that hurdle. *See, Elkhorn Ranch, Inc. v. Board of County Commissioners, Crook County,* 2002 WY 167(Wyo. 2002) ¶19. The argument is also directly inconsistent with the large and binding body of case law in Wyoming on standing issues.

FEDERAL COURTS DECISIONS DISCUSSING THE "CASE OR CONTROVERSY" STANDARD REQUIRED BY THE U.S. CONSTITUTION HAVE NO PRECEDENTIAL VALUE OR BEARING ON THE SUMMARY JUDGMENT MOTION.

The PRBRC incorrectly claims, without citing any relevant or binding legal authority, that U.S. Constitutional precedent applies in this proceeding as to standing. The PRBRC states: "[T]he analysis should be based on federal constitutional standing…" PRBRC Response-Standing, p. 14. The PRBRC then goes on to cite congressional reports regarding "Citizen Suits," §420[4] as authority for requiring the application of federal law in this Wyoming state proceeding.

The court in *Allred v. Bebout*, 2018 WY 18 (Wyo. 2018) clearly rejected this legal proposition:

---

[3] In the Brief in Support-Standing, Brook has analyzed the various ambiguous and defined terms used in WEQA that pertain to coal mining permit appeals to EQC. Despite the ambiguity contained within WEQA and adopted rules, it is uncontroverted that in order to appeal the issuance of a coal mining permit a person must have suffered "adverse consequences" or be an "aggrieved party". *See*, pages 10 to 12 of Brief in Support-Standing. To find otherwise would effectively overrule a multitude of cases from the Wyoming Supreme Court and ignore all concepts of separation of powers required by the Wyoming Constitution which is at the heart of standing considerations.

[4] "Citizen Suits" under federal statutory provisions are a far different beast than the appeal of an administrative issuance of a Permit. "Citizen Suits" allow a private party to seek civil damages as a private attorney general for environmental harm. *See,* 30 U.S.C. §1210. Congressional comments and case law under an entity different federal statutory scheme has no precedential value or applicability to this matter. None of the allegedly affected PRBRC members appealed the issuance of the Permit and certainly have not filed a claim seeking civil damages.

> "**Appellants assert that our standing analysis should not be governed by federal law, and we agree**. Federal standing law rests largely on the " case or controversy" requirements of Article III, Section 2 of the United States Constitution. *Flast v. Cohen,* 392 U.S. 83, 94-95, 88 S.Ct. 1942, 1949-50, 20 L.Ed.2d 947 (1968). The Wyoming Constitution has no comparable provision, and instead it contains provisions such as article I, section 8, providing for access to courts. Robert B. Keiter, *The Wyoming State Constitution*, at 31-32 (2d ed. 2017). **We have on occasion found guidance in federal standing law**, *see White v. Woods,* 2009 WY 29A, ¶ 20, 208 P.3d 597, 603 (Wyo. 2009); *Miller v. Wyo. Dep't of Health,* 2012 WY 65, ¶ 18, 275 P.3d 1257, 1261 (Wyo. 2012), **and we continue to do so, although we recognize that we are not bound by the tight constraints of federal law on this issue.**" (emphasis added).

Allred v. Bebout, 2018 WY 18 (Wyo. 2018), ¶ 35.

The Allred case conclusively rejects the argument made by the PRBRC. The federal cases and argument advanced by the PRBRC from those cases must be rejected.

Wyoming maintains an approved program for regulating surface coal mining operations in accordance with SMCRA. *See* 30 U.S.C. §§ 1253 through 1255; 30 C.F.R. § 950.10. SMCRA creates a system of cooperative federalism "in which responsibility for the regulation of surface coal mining in the United States is shared between the U.S. Secretary of the Interior and State regulatory authorities." *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001). SMCRA established baseline national standards and "encouraged the States, through an offer of exclusive regulatory jurisdiction, to enact their own laws incorporating these minimum standards." *Id.* States enjoy flexibility in shaping their programs, so long as the State's provisions are no less stringent than, nor inconsistent with, SMCRA and its implementing regulations. 30 U.S.C. § 1255(b).

The Secretary of the Interior ("Secretary") approved Wyoming's program on November 26, 1980. Conditional Approval of the Permanent Program Submission From the State of Wyoming Under the Surface Mining Control and Reclamation Act of 1977-- Final rule, 45 Fed. Reg. 78637, 78678 (Nov. 26, 1980); 30 C.F.R. § 950.10. Wyoming's program consists of the

Land Quality article of the Act, the Department's Land Quality-Coal Rules, and portions of the Department's Rules of Practice and Procedure. 45 Fed. Reg. at 78640; 30 C.F.R. § 950.15 (listing approved program amendments). **The Secretary's approval gave Wyoming "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" within the State.** 30 U.S.C. § 1253(a). Under SMCRA, **Wyoming's "statutes and regulations become operative, and the federal law and regulations**, while continuing to provide the blueprint against which to evaluate the State's program, **drop out as operative provisions**." *Bragg*, 248 F.3d at 289 (internal quotation marks omitted) (emphasis added).

The PRBRC is familiar with this settled legal precedent as outlined in the *Bragg* case. The argument that federal law controls is false. *Bragg* was cited extensively in the recent Wyoming Supreme Court briefing in the previous Brook petition and presents a well-established principle of exclusive jurisdiction in primacy states.

All SMCRA provisions "drop out" and are not applicable in this case. Wyoming has exclusive jurisdiction over this case and Wyoming standing law applies.

THE PRBRC FAILED TO PRESENT ANY ARGUMENT OR AUTHORITY TO ESTABLISH STANDING INDEPENDENT OF ITS MEMBERS AND HAS WAIVED ANY ABILITY TO CLAIM STANDING AS AN ENTITY

The PRBRC failed to even address arguments made by Brook that the PRBRC has no standing to pursue this matter as an entity without regard to injury suffered by its alleged members. Having failed to contest the arguments made by Brook, the EQC must find that the PRRBC has no standing as a corporate entity to pursue the appeal.

CONCLUSION

The PRBRC has failed to establish in its Response–Standing and attached declarations that it has standing to pursue this appeal. Under Rule 56, WRCP, and binding Wyoming precedent, the PRBRC had to present admissible, non-speculative, and competent evidence to

show that there are contested issues of material fact that preclude granting Brook's Motion for Summary Judgment. PRBRC has failed to do so and the EQC must grant the Summary Judgment Motion and dismiss the appeal.

Respectfully submitted this 22nd day of October, 2020.

Patrick J. Crank, 5-2305
Abbigail C. Forwood, 7-4814
Jim D. Seward, SD #2689
CRANK LEGAL GROUP, P.C.
1815 Evans Ave.
Cheyenne, WY 82001
(307) 634-2994

CERTIFICATE OF SERVICE

This is to certify that on the 22ND day of October, 2020, a true and correct copy of the foregoing REPLY TO POWDER RIVER BASIN RESOURCE COUNCIL'S COMBINED RESPONSE IN OPPOSITION TO BROOK MINING CO., LLC'S MOTION FOR SUMMARY JUDGMENT FOR LACK OF STANDING AND MEMORANDUM OF POINTS AND AUTHORITIES FOR CROSS MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF STANDING was served upon the following:

Shannon Anderson Powder River Basin Resource Council 934 N. Main Street Sheridan, WY 82801 sanderson@powderriverbasin.org	[ ] U.S. Mail [ ] Fed Ex [X] Email [ ] Hand Delivered
Wyoming EQC - Original 2300 Capitol Ave. Hathaway Building 1st, Room 136 Cheyenne, WY 82002	[x] U.S. Mail [ ] Fed Ex [ ] Email [ ] Hand Delivered
Matt VanWormer Senior Assistant Attorney General Wyoming Attorney General's Office Kendrick Building 2320 Capitol Avenue Cheyenne, WY 82002 Matt.vanwormer@wyo.gov	[ ] U.S. Mail [ ] Fed Ex [X] Email [ ] Hand Delivered

Patrick J. Crank