

summary judgment. *See* BHB's *Motion for Summary Judgment* at 4. In the absence of a dispute over a material fact, the first requirement of summary judgment is conclusively established.¹ *Id.*

The Response injects irrelevant, diversionary arguments into what is a simple application of black letter law to the undisputed facts. Summary judgment is appropriate, and BHB requests this Council grant BHB's *Motion for Summary Judgment* in its entirety and bring an appropriate and efficient resolution to this matter.

ARGUMENT

A. BHB has complied with the proper process to obtain an order in lieu of landowner consent, meeting all the required elements under Wyo. Stat. § 35-11-406(b)(xii).

Wyo. Stat. § 35-11-406(b)(xi) applies to a resident or agricultural landowner, setting forth the need for an "instrument of consent" before mining can begin. The statute applicable in this matter, however, is Wyo. Stat. § 35-11-406(b)(xii), which, when set out in its entirety, shows the legislature's intent to allow mining on a split estate in lieu of the landowner's consent under certain circumstances. Respondents, referring to Wyo. Stat. § 35-11-406(b)(xii), do not set out the entire statute, which is necessary for a complete analysis:

(xii) For any application filed after March 1, 1975, **including any lands privately owned but not covered by the provisions of paragraph (b)(xi) of this section** an instrument of consent from the surface landowner, if different from the owner of the mineral estate, to the mining plan and reclamation plan. If consent cannot be obtained as to the mining plan or reclamation plan or both, the applicant may request a hearing before the environmental quality council. The council shall issue an order in lieu of consent if it finds:

- (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;

¹ As no material fact is in dispute, the need for a hearing on the facts is unnecessary.

(D) The proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible.

(emphasis added).

BHB has clearly shown all the elements required to obtain an order in lieu of landowner consent under Wyo. Stat. § 35-11-406(b)(xii). On August 24, 2021, BHB mailed Respondents the mine and reclamation plan revision (the “**Plans**”) for their review and subsequent approval. Respondents received the Plans on August 25, 2021, via certified mail. *See* Certified Mail attached hereto and incorporated herein as Exhibit K and *see* Exhibit H of the Petition.² Moreover, counsel for the Respondents acknowledged receipt of the same in its letter dated April 25, 2022, as evidenced by Exhibit J attached to the Petition.

Next, BHB’s Plans establish the full proposed surface use, including egress and ingress routes. *See* Exhibit F, attached to BHB’s Petition. Section 2.0 of the Plans, “Description of the Mine Facilities,” extends from page MP-3 to MP-9. This Section explicitly describes the proposed surface use and includes Section 2.2, “Access and Haul Roads,” which elaborates on BHB’s planned ingress and egress road routes on MP-3.

BHB’s mining operations would not substantially prohibit the Respondents’ use of the Property. BHB has frequently, in its past mining endeavors and throughout its current mining operations on neighboring lands, mined on agricultural lands and properly reclaimed the lands for further use for agricultural purposes. It has also worked in conjunction with surface owners to maintain the safety of cattle during mining operations. The Plans state that no buildings, processing plants, or other facilities would be constructed in conjunction with the mining activities proposed for the Property, thus diminishing any problems the Respondents may have with the mining

² All exhibits referenced are a continuation of the exhibits from BHB's Petition and are Incorporated herein.

activities. Exhibit F of the Petition MP-3. BHB takes all possible measures to avoid disturbing the surface owner's operations. More specifically, when mining on lands used for livestock, BHB works with the landowners to ensure bentonite pits are fenced off so livestock are safe. *See* Affidavit of Larry Madsen attached hereto and incorporated herein as Exhibit L. Moreover, Respondents have neither objected nor argued that any proposed mining activity by BHB would substantially prohibit their operations on the Property.

BHB's Plans thoroughly convey its intent to mine the Property in segments and to reclaim it as quickly and efficiently as possible. Exhibit F of the Petition MP-1. The Plans propose that reclamation will occur concurrently with each new bentonite pit being developed in the advancing sequence of the mining plan. *Id.*

BHB has gone above and beyond the requirements laid out in Wyo. Stat. § 35-11-406(b)(xii), thus providing more than sufficient grounds for the Council to grant BHB's prayer for relief.

B. Respondents' reliance upon *Belle Fourche Pipeline Co. v. State* is fundamentally misplaced.

Additionally, Respondents rely heavily on *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537 (Wyo. 1988). *Belle Fourche* is not only limited in scope and inapplicable here but also conflates the issues. The law Respondents cite from *Belle Fourche* is dicta and is not controlling authority. "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to [the] determination of the case in hand are obiter dicta, and lack the force of an adjudication." *Claim of Moriarity*, 899 P.2d 879, 885 (Wyo. 1995) (Citing to BLACKS LAW DICTIONARY 454 (6th ed. 1990)). This was pointed out directly by Wyoming's Federal District Court in a reported case:

“While this Court appreciates the interesting discussion of various estates in *Belle Fourche*, the discussion relied upon by Chevron is dicta. The case is also much more limited, as recognized by Chevron, in that it simply addressed the statutory protections for fee surface owners under the Wyoming Environmental Quality Act. *Belle Fourche* does not address the common law right to lateral support of land.”

N.W. Pipeline GP v. Chevron Mining Inc., No. 12-CV-021, 2013 WL 12086869, at 3 (D. Wyo. Feb. 26, 2013).³

Put differently, when Respondents attempt to show that an agricultural landowner has a dominant estate over the mineral estate, they are directly citing inapplicable, inoperable, if not editorial, dicta. *See Belle Fourche Pipeline Co.*, 766 P.2d at 547. Such arguments should be disregarded.

C. Respondents do not have the absolute power to veto BHB's right to mine the bentonite on the Property.

Respondents make the bold but misleading claim that BHB is seeking a declaratory judgment on the language of the deeds. BHB has not and is not requesting such a decision from this Council. The simple and straightforward question, rather, is whether BHB, having fully complied with its statutory and regulatory obligations, qualifies for an “Order in Lieu of Landowner Consent Under Wyo. Stat. § 35-11-406(b)(xii).” *See* BHB’s Petition.

The Response cites *Belle Fourche Pipeline Co. v. State*, alleging that case gives landowners the right to an “absolute veto to an application” for mining operations. *Belle Fourche* 766 P.2d 537, at 547. As already discussed, this reliance is misleading and incorrect. Taking Respondents’ interpretation further, the landowners would have a right to veto any mining plan, eliminating an applicant’s right to mine entirely. This conclusion not only runs afoul of the state’s inherent

³ In this case Chevron argued that the Wyoming Supreme Court has not endorsed the common law right to lateral support of land within the context of mining operations, and cites to *Belle Fourche Pipeline Co.*, 766 P.2d 537. The Court points out that *Belle Fourche* does not address the common law right to lateral support of land and does not resolve Chevron’s issue.

interest in minerals but would place Wyo. Stat. § 35-11-406(b)(xi) in direct conflict with Wyo. Stat. § 35-11-406(b)(xii).⁴ “Interpretation should not produce an absurd result.” *Decker v. State ex rel. Wyo. Med. Comm’n*, 2008 WY 100, ¶ 16, 191 P.3d 105, 118 (Wyo. 2008). The Wyoming Supreme Court went on to interpret the statute and rules for surface mining to say, “[i]t seems clear that the purpose of these statutes was not to hinder development of the surface mining, but rather to permit such development while protecting the surface of the land itself.” *Belle Fourche Pipeline Co.*, 766 P.2d at 549. Wyo. Stat. § 35-11-406(b)(xi) applies to a resident or agricultural landowner, setting forth the need for an “instrument of consent” before mining can begin. The statute applicable in this matter, however, is Wyo. Stat. § 35-11-406(b)(xii), which, when set out in its entirety, shows the legislature’s intent to allow mining on a split estate in lieu of the landowner’s consent under certain circumstances. The statute explicitly provides a solution when landowners have exercised their right to veto the mining plan.

The plain and obvious meaning of Wyo. Stat. § 35-11-406(b)(xii), by specifically including lands defined under Wyo. Stat. § 35-11-406(b)(xi) is the existence of a “safety valve” for an applicant who, should they meet certain criteria, will be granted a permit in lieu of the landowner’s consent. If a landowner’s veto of an application eliminated an applicant’s ability to mine, Wyo. Stat. § 35-11-406(b)(xii) would not provide an alternative method to obtain consent. Here, BHB has the necessary “instruments of consent” through the chain of title specifically reserving the right to enter the Property to mine all the bentonite. BHB is lacking approval from the Respondents for the Plans to do so. Respondents have the right to veto BHB’s mining plan, which they have exercised. However, BHB has properly brought this action to obtain an order in lieu of landowner

⁴ “The law long has recognized an initial, irrefutable principle that there must be a legitimate area in which the owner of the minerals of necessity has inherent rights to the surface relating to the opportunity to find and develop minerals.” *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 544 (Wyo. 1988).

consent. Respondents' veto does not serve as a complete bar to BHB's right to mine the Property. The veto itself only serves the limited purpose of allowing the landowner the right to veto a mining plan, requiring an applicant to prove the elements laid out in Wyo. Stat. § 35-11-406(b)(xii) to the Environmental Quality Council to obtain alternative permission for surface use.

D. BHB has complied with all bonding requirements for mining operations – there is no requirement for a bond to be paid to the surface owner.

Bonding aims to ensure that sufficient funds are available to reclaim the land disturbed by mining activities, restoring it to an environmentally sound condition and suitable for future use.⁵ Respondents also claim that Wyoming law requires BHB to post a bond directly to the surface owner. *See Response* at 5. While “use and benefit of the surface owner” are certainly in the statute, as crafted in the Response, it might imply that BHB is required to put in place a bond for the direct benefit of the Respondents. This is patently incorrect. The relevant bonding statute here, Wyo. Stat. § 35-11-416(a) is unequivocal that while for the ultimate benefit of the surface owner, the bond is to the state:

- (a) In those instances in which the surface owner is not the owner of the mineral estate proposed to be mined by mining operations a permit shall not be issued without the execution of a bond or undertaking **to the state**, whichever is applicable, for the use and benefit of the surface owner or owners of the land... (emphasis added).

Additional statutes repeat this requirement: “[a]ll bonds shall ... be made payable to the State of Wyoming.” Wyo. Stat. § 35-11-417(b) (emphasis added). BHB has complied with these requirements and has been in continuous compliance since the grant of Permit to Mine 248C.

The State can use the bond to restore the surface if the operator fails to reclaim the land disturbed by mining activities. BHB cannot acquire a bond while this litigation is pending. BHB

⁵ [file:///C:/Users/mbennett/Downloads/SMP_handbook_Part_I_updatedlinks_\(4_2016\)%20\(1\).pdf](file:///C:/Users/mbennett/Downloads/SMP_handbook_Part_I_updatedlinks_(4_2016)%20(1).pdf)

must have the approval of the Plans either from the Firnekases or through an Order in Lieu of Landowner Consent. The Department of Environmental Quality then approves the Plans and determines a bond amount to be paid to the state based on the same. *See* Exhibit L.

E. Surface use agreements are not required for bentonite mining under Wyoming law.

Wyoming law only requires surface use agreements for oil and gas operations. Under Wyo. Stat. § 30-5-402:

(f) [a]fter providing the notice of proposed oil and gas operations to the surface owner, the oil and gas operator and the surface owner shall attempt good faith negotiations to reach a surface use agreement for the protection of the surface resources, reclamation activities, timely completion of reclamation of the disturbed areas and payment for damages caused by the oil and gas operations.

Nothing in statute or case law requires a surface use agreement for bentonite mining. Where there are no statutory requirements for a surface use agreement, it is possible for the requirement for a surface use agreement to arise contractually. In this instance, the parties have not entered into a contract requiring a surface use agreement. Still, the conditions and stipulations in the warranty deed from the original patentees to Bethlehem Steel Company act as a surface use agreement. *See* Exhibit B attached to the Petition. The conditions and stipulations contained in the warranty deed provide for the following:

1. The Grantee, its successors and assigns, may enter, reenter, use and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of bentonite, including drilling, stripping the overburden from the bentonite, depositing the overburden on the surface of the premises, and other activities connected with mining, production and removal of bentonite, without liability in damages to the Grantors, or any of them, or to any other person or persons claiming through or under them or any of them, for any injury to the surface of the premises by reason thereof.
2. The Grantee, its successors and assigns, to the extent reasonably practicable, shall conduct stripping, mining and related activities in such a manner as to cause the least inconvenience to anyone exploiting other minerals on the premises, or carrying on ranching or grazing operations. However, mining of bentonite shall at all times be regarded as the dominant

and primary use of the premises and in case of any conflict between uses, Grantee's right to conduct mining activities shall prevail.

3. Grantee will at all times protect the fences, gates, irrigation ditches, flumes, reservoirs, and roads which exist, or may be constructed on the premises, and will place cattle guards through Grantor's fences for any road necessary or connected with bentonite mining operations and activities.
4. Grantee may erect buildings, installations, or drilling equipment on the premises necessary for mining, production or removal of bentonite, including bringing necessary public utilities to the premises.

Therefore, any request or demand for a surface use agreement between the parties is moot and unnecessary.

F. BHB and Respondents disagree on whether attempts to settle have been made and delays have been caused.

Finally, BHB and Respondents disagree on whether attempts have been made to resolve this matter. There is no question that BHB has attempted to obtain consent from Respondents to use the surface for their mining operations. *See* Exhibit H attached to the Petition. Respondents have made clear they do not wish to grant BHB consent. *See* Exhibit L. Who disagrees and why, who's attempted to settle or not, or what and when efforts were made and failed, however, is irrelevant under the applicable statute. Negotiation or compromise, by any party, is not mandated by law, merely that "consent cannot be obtained." Wyo. Stat. § 35-11-406(b)(xii). The fact is that there is no surface use agreement or consent to the Plans. However, whether a resolution has been attempted by the parties to this litigation is irrelevant because BHB has strictly complied with Wyoming statute and should, therefore, be granted its prayer for relief as requested in its *Motion for Summary Judgment*.

CONCLUSION

There are no genuine issues of material fact in this case. Respondents' opposition fails to provide fact or law to counter the proof supporting BHB's claims. Specifically:

1) BHB has complied with the proper process to obtain an order in lieu of landowner consent, meeting all the required elements under Wyo. Stat. § 35-11-406(b)(xii);

2) Respondents' reliance upon *Belle Fourche Pipeline Co. v. State* is fundamentally misplaced;

3) Respondents do not have the absolute power to veto BHB's right to mine the bentonite on the Property;

4) BHB has complied with all bonding requirements for mining operations– there is no requirement for a bond to be paid to the surface owner;

5) Surface use agreements are not required for bentonite mining under Wyoming law; and

6) BHB and Respondents disagree on whether attempts to settle have been made and delays have been caused.

While Respondents attempt to conjure a legal basis to deny summary judgment, long-settled principles of statutory construction and property law cannot be ignored. Respondents' arguments fail to refute the facts and law presented by BHB.

WHEREFORE, Summary Judgment should be entered in favor of BHB, and BHB prays that this Council grant its prayer for relief as enumerated in its *Motion for Summary Judgment*.

DATED this 23rd day of July 2024.



KAYLA A. ALBERTSON (#8-6708)
PATRICK R. TOLLEY (#7-4534)
JOHN A. MASTERTON (#5-2386)
Welborn Sullivan Meck & Tooley, P.C.
159 North Wolcott, Suite 220
Casper, WY 82601
(307) 234-6907
kalbertson@wsmtlaw.com
ptolley@wsmtlaw.com
jmasterton@wsmtlaw.com

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was served herein this 23rd day of July 2024, sent via US Postal Service and Email as follows:

Mitchell H. Edwards
Kenna J. Baney
Nicholas & Tangeman, LLC
170 N. Fifth St. P.O. Box 928
Laramie, WY 82073
edwardsm@wyolegal.com

Attorneys for Firnekas


Wyoming Environmental Quality Council
2300 Capital Ave.
Hathaway Bldg. 1st, Room 136
Cheyenne, WY 82002

Todd Parfitt
Director of Wyoming DEQ
200 W 17th St.
Cheyenne, WY 82002
Karin.quigley@wyo.gov



Welborn Sullivan Meck & Tooley, P.C.

EXHIBIT K

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	A. Signature <input checked="" type="checkbox"/> <i>SR</i> <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee	
1. Article Addressed to: Bruce & Betty Jean Firneckas 521 South Hamilton Powell, WY 82435  9590 9402 6448 0346 6897 74	B. Received by (Printed Name) <i>COOZ/C19</i>	C. Date of Delivery <i>02/25/21</i>
2. Article Number (Transfer from service label) 7012 2920 0000 7697 6424	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input checked="" type="checkbox"/> No	
PS Form 3811, July 2020 PSN 7530-02-000-9053	3. Service Type <input checked="" type="checkbox"/> Adult Signature <input type="checkbox"/> Priority Mail Express® <input type="checkbox"/> Adult Signature Restricted Delivery <input type="checkbox"/> Registered Mail™ <input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Registered Mail Restricted Delivery <input type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Signature Confirmation™ <input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Signature Confirmation Restricted Delivery <input type="checkbox"/> Collect on Delivery Restricted Delivery <input type="checkbox"/> Insured Mail <input type="checkbox"/> Insured Mail <input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)	

Domestic Return Receipt

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CERTIFIED MAIL™ RECEIPT BHB
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1. Article Number 7012 2920 0000 7697 6424	2. Date of Receipt 02/25/21
3. Recipient Name Bruce & Betty Jean Firneckas	4. Post Office Powell, WY
5. Recipient Address 521 South Hamilton Powell, WY 82435	6. Signature <i>[Signature]</i>

PS Form 3800, August 2006 See Reverse for Instructions

EXHIBIT L

6. BHB has an extensive history of conducting bentonite mining operations on property being used for agricultural and ranching operations, such as those claimed by Respondents.
7. BHB has mined on similar properties neighboring the Property, all without issues prohibiting livestock or agricultural operations.
8. BHB implements the following procedures and precautions to ensure that none of the agricultural operations are substantially prohibited for surface owners:
 - a. Direct communication and collaboration with the landowner;
 - b. Fencing off the bentonite pits to ensure livestock safety; and
 - c. Complying with any other reasonable requests the landowner may have.
9. BHB is currently seeking to conduct bentonite mining operations on the land more particularly described as (the “**Property**”): the N½ of Section 1, Township 41 North, Range 83 West, 6th P.M., Johnson County, Wyoming.
10. BHB owns the mineral rights to the Property, and Bruce and Betty Jean Firnekas (“**Respondents**”) own the surface rights to the Property.
11. According to the reservations in BHB’s deed, BHB “shall at all times have the full and exclusive right to mine and remove the bentonite from said lands...and also may enter, reenter, use and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of said bentonite, including drilling, stripping of overburden from the bentonite, depositing such overburden on the surface of said premises, and other activities connected with mining, production and removal of bentonite therefore, without liability in damages for any injury to the surface....”

12. BHB timely filed its amended mining and reclamation plan for the Property with the Land Quality Division.
13. The mining and reclamation plan includes the proposed routes for ingress and egress.
14. The proposed lands to be mined are Included in the mining and reclamation plan.
15. The mining and reclamation plan includes a map demonstrating the routes for ingress and egress and the lands to be mined.
16. The mining and reclamation plan describes how BHB plans to reclaim the land concurrently with mining operations.
17. BHB has worked with the Department of Environmental Quality to determine the appropriate bond amount so it is in accordance with its Permit to Mine 482C for the prior mining operations.
18. Currently, BHB cannot post a bond for its amended mining operations, including the Property, until Respondents or the EQC approve the mining and reclamation plans.
19. On August 24, 2021, BHB sent Respondents a Form 8 (Surface Owner Consent Form) to sign, along with copies of the mining plan and reclamation plan for the Property to obtain Respondents consent. See Exhibit F attached to the Petition.
20. On December 3, 2021, counsel for Respondents sent BHB a letter informing them they would like to negotiate a surface use agreement. See Exhibit I attached to the Petition.
21. On April 26, 2022, a letter was received by BHB's counsel from Respondents' Counsel, stating Respondents were not willing to sign a surface landowner's consent.
22. On July 5, 2023, Your Affiant contacted Respondents to arrange a meeting to discuss mining on the Property.

23. On July 19, 2023, Your Affiant traveled to Powell, Wyoming, to meet with Respondents in person to discuss consent for BHB's mining and reclamation plan.
24. At this meeting, Respondents informed Your Affiant that they would not consent to BHB's mining and reclamation plan.
25. On November 19, 2023, Doug Gibson, Environmental Technician for BHB, and Your Affiant had a phone call with Respondents to try and negotiate an agreement again. Respondents informed us they were unwilling to grant BHB consent to the mining and reclamation plan.
26. Respondents have not communicated how mining operations will inhibit their surface use of the Property.
27. On March 20, 2024, BHB filed its Petition to the Environmental Quality Council for an Order in Lieu of Landowner Consent.

Further Affiant sayeth naught.

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DATED this 23 day of July 2024.

Larry Madsen

Larry Madsen, individually and as
Managing Director of Black Hills Bentonite,
LLC

STATE OF WYOMING)
)ss.
COUNTY OF NATRONA)

Subscribed and sworn to before me on this 23 day of July 2024 by Larry Madsen, an individual known or otherwise identified to me as the Affiant.

Witness my official seal and hand.

A. Parker

Notary Public

My Commission expires: 4/26/2030

