

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

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

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

LANDOWNERS' PREHEARING DISCLOSURE STATEMENT

Pursuant to the *Order Setting Prehearing Conference, Final Hearing, and Requiring Disclosure*, Landowners, Bruce Firnekas and Betty Jean Firnekas, hereby file and serve their Prehearing Disclosure Statement.

I. LIST OF WITNESSES.

Landowners **may call** the following witnesses at hearing:

Bruce Firnekas

For purposes of testifying at hearing, Mr. Firnekas can be contacted by phone 307-754-5863

Mr. Firnekas and his wife Betty Jean Firnekas are the owners Lots 1-4 and the S1/2N1/2 of Section 1, Township 41 North, Range 83 West. Mr. Firnekas has information about legal title to his property being held by a member of his immediate family since at least 1962 and being conveyed to him by immediate family members (including that his father was Church Firnekas and his older brother was Chester Firnekas); information about agricultural use of the property

(including but not limited to livestock grazing by immediate family); and, communications with Black Hills Bentonite.

Landowners reserve the right to call any witness listed by any other party to these proceedings, or to call others in rebuttal to any testimony presented by the Applicant.

II. STATEMENT OF SPECIFIC CLAIMS, DEFENSES, AND ISSUES BEFORE THE COUNCIL BASED ON THE PARTY'S INITIAL FILING.

On March 20, 2024, Black Hills Bentonite filed a *Petition* with the Environmental Quality Council ("EQC") requesting that the EQC issue an "Order In Lieu of Landowner Consent under WYO. STAT. § 35-11-406(b)(xii)." All applications for a mining permit filed after March 1, 1975 require the applicant submit an instrument of consent to the mining plan and reclamation plan. Section 406(b)(xii) provides:

(b) The application shall include a mining plan and reclamation plan dealing with the extent to which the mining operation will disturb or change the lands to be affected, the proposed future use or uses and the plan whereby the operator will reclaim the affected lands to the proposed future use or uses. The mining plan and reclamation plan shall be consistent with the objectives and purposes of this act and of the rules and regulations promulgated. The mining plan and reclamation plan shall include the following:

(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;

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

(E) For surface coal mining operations, that the applicant has the legal authority to extract coal by surface mining methods.

WYO. STAT. § 35-11-406(b)(xii)(emphasis added). If the provisions of paragraph (b)(xi) apply, then the provisions of paragraph (b)(xii) above are not available to the applicant and the EQC cannot issue an order in lieu of consent. *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 547 (Wyo. 1988) (emphasis added), holds:

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

Section 406(b)(xi) provides:

(xi) For an application filed after March 1, 1975, an **instrument of consent from the resident or agricultural landowner**, if different from the owner of the mineral estate, **granting the applicant permission to enter and commence surface mining operation, and also written approval of the applicant's mining plan and reclamation plan**. As used in this paragraph “resident or agricultural landowner” means a natural person or persons who, or a corporation of which the majority stockholder or stockholders:

(A) Hold legal or equitable title to the land surface directly or through stockholdings, such title having been acquired prior to January 1, 1970, or having been acquired through descent, inheritance or by gift or conveyance from a member of the immediate family of such owner; and

(B) Have their principal place of residence on the land, or personally conduct farming or ranching operations upon a farm or ranch unit to be affected by the surface mining operation, or receive directly a significant portion of their income from such farming or ranching operations.

WYO. STAT. § 35-11-406(b)(xii)(emphasis added).

Accordingly, the EQC must first decide whether the provisions of paragraph (b)(xi) or paragraph (b)(xii) are applicable. If the provisions of paragraph (b)(xi) are applicable the inquiry ends and the EQC must dismiss the petition for an order in lieu of consent. If the provisions of paragraph (b)(xi) are not applicable, then the EQC must be able to make the findings provided in paragraph (b)(xii)(A-D) or deny the petition.

To be clear, any order by the EQC under this petition, if such an order is appropriate, cannot include and must not allow for the permit to be issued without the applicant posting an addition bond for the use and benefit of the surface owner or owners of the land, in an amount sufficient to secure the payment for any damages to the surface estate, to the crops and forage, or to the tangible improvements of the surface owner. The bond is in addition to the reclamation performance bond, and the amount is to be set by the administrator. This bonding requirement is outside of the authority of the EQC under the authority cited for the Applicant's Petition for an Order in Lieu of Consent.

§ 35-11-416. Protection of the surface owner

(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, in an amount sufficient to secure the payment for any damages to the surface estate, to the crops and forage, or to the tangible improvements of the surface owner.** This amount shall be determined by the administrator and shall be commensurate with the reasonable value of the surrounding land, and the effect of the overall operation of the landowner. **This bond is in addition to the performance bond required for reclamation by this act.** As damage is determined it shall be paid. Financial loss resulting from disruption of the surface owner's operation shall be considered as part of the damage. A bond for surface damage shall not be required when the agreement negotiated between the surface owner and the mineral owner or developer waives any requirement therefor. Payment of damages shall be paid annually unless otherwise agreed to by the surface owner and the operator.

WYO. STAT. ANN. § 35-11-416 (emphasis added).

III. STATEMENT OF BURDEN OF PROOF.

Under Section 406(b)(xii) the applicant first has the burden of proof to establish that the lands included in its application are not covered by paragraph (b)(xi). WYO. STAT. § 35-11-406(b)(xii). If the applicant can establish that the lands are not covered by paragraph (b)(xi), then the applicant must prove that it is entitled to an order in lieu of consent under the required findings set out in paragraph (b)(xii).

IV. STATEMENT OF STIPULATED FACTS.

Landowners stipulate to the following facts:

1. On November 29, 1957 the United States granted a patent to certain placer mining claims, including claims embracing Lots 1-4 and the S1/2N1/2 of Section 1, Township 41 North, Range 83 West, to Rose Greene, Elden Keith, Zola Keith, Lee Keith, Leon Keith, Waldo Teeter, Sam Gibson, W.B. Barnard, Evelyn Ilsley, A.C. Harding, Otis Reynolds, John Criswell, R.L. Greene, and Harry T. Thorson (collectively “Patentees”), granting the land and certain minerals to the Patentees and reserving certain minerals to the United States.
2. Certain of the, but not all of the, Patentees executed a Warranty Deed, dated December 24, 1957, to Bethlehem Steel Company, a Delaware Corporation, conveying interest in the bentonite in and under certain placer mining claims. Patentee Sam Gibson did not execute, and is not a named Grantor, in the Warranty Deed.
3. Bethlehem Steel Company, on April 17, 1991, executed a Warranty Deed to Black Hills Bentonite Company, a Wyoming general partnership, conveying to Black Hills Bentonite Company, a Wyoming general partnership, its interest in bentonite in and under certain placer mining claims, including claims embracing Lots 1-4 and the S1/2N1/2 of Section 1, Township 41 North, Range 83 West.
4. Landowners, Bruce Firnekas and Betty Jean Firnekas, are owners of the surface estate in Lots 1-4 and the S1/2N1/2 of Section 1, Township 41 North, Range 83 West.
5. Landowners acquired their title to the surface estate through descent, inheritance or by gift or conveyance from a member of their immediate family. Church Firnekas acquired the property from Mitchell Johnson and Jean Johnson, husband and wife, by Warranty Deed dated July 11, 1962; Church Firnekas conveyed the property to his

son Chester Firnekas in 1967; Chester Firnekas conveyed the property to him and his brother, Bruce Firnekas, as joint tenants with rights of survivorship, in 2001; Chester Firnekas and Bruce Firnekas conveyed the property to Bruce Firnekas and his wife Betty Jean Firnekas in 2013. Church Firnekas is Bruce Firnekas's father, and Chester Firnekas is Bruce Firnekas's brother.

6. The matter concerns land more particularly described as Lots 1-4 and the S1/2N1/2 of Section 1, Township 41 North, Range 83 West (the "Property"). The Property consists of a split estate, whereby the mineral estate owners are different from the surface estate owners.
7. Applicant Black Hills Bentonite, a Limited Liability Company, is a Wyoming limited liability company, organized in Wyoming in 1991 ("BHB").
8. Applicant BHB has applied to the Wyoming Department of Environmental Quality for a mining permit to revise its Permit to Mine 248C to include the Property.
9. Counsel for Landowners responded to Applicant BHB on December 3, 2021, by letter, seeking to negotiate the terms of a surface use agreement.
10. Counsel for Landowners sent another letter, on or about April 25, 2022, to Counsel for BHB, again requesting to negotiate the terms of a surface use agreement.
11. Landowners have not provided approval of the Applicant's mining plan and reclamation plan.

V. LIST OF ALL DOCUMENTS, STATEMENTS, ETC.

The following is a list of all documents, statements, etc., which Landowners will or may introduce into evidence, identified by numbers beginning with #1: **SEE LANDOWNERS' INDEX LIST OF EXHIBITS ATTACHED HERETO.**

Dated this 31st day of July 2024.

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

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 31st day of July 2024, I caused a true and correct copy of the foregoing document to be served as follows:

Patrick Tolley	<input checked="" type="checkbox"/> U.S. Mail
John Masterson	<input type="checkbox"/> Fed Ex/UPS
Kayla Albertson	<input type="checkbox"/> Hand-Delivered
Welborn Sullivan Meck & Tooley, P.C.	<input checked="" type="checkbox"/> E-Mail
159 North Wolcott, Suite 220	
Casper, WY 82601	
ptolley@wsmtlaw.com	
jmasterson@wsmtlaw.com	
kalbertson@wsmtlaw.com	

Todd Parfitt, Director	<input checked="" type="checkbox"/> U.S. Mail
Wyoming Dept. of Environmental Quality	<input type="checkbox"/> Fed Ex/UPS
200 West 17 th Street	<input type="checkbox"/> Hand-Delivered
Cheyenne, WY 82002	<input checked="" type="checkbox"/> E-Mail
karin.quigley@wyo.gov	

Gregory Weisz	<input checked="" type="checkbox"/> U.S. Mail
Wyoming Attorney General's Office	<input type="checkbox"/> Fed Ex/UPS
109 State Capitol	<input type="checkbox"/> Hand-Delivered
Cheyenne, WY 82002	<input checked="" type="checkbox"/> E-Mail
gregory.weisz@wyo.gov	

Wyoming Environmental Quality Council	<input checked="" type="checkbox"/> U.S. Mail
2300 Capital Ave.	<input type="checkbox"/> Fed Ex/UPS
Hathaway Bldg. 1 st , Room 136	<input type="checkbox"/> Hand-Delivered
Cheyenne, WY 82002	<input checked="" type="checkbox"/> E-Mail
ryan.schelhaas@wyo.gov	
kellie.doran1@wyo.gov	

s/Mitchell Edwards _____
Mitchell H. Edwards

LANDOWNERS' INDEX OF EXHIBITS

<u>Exhibit Number</u>	<u>Exhibit Description</u>	<u>Exhibit Pages</u>
1	Land Records – Deed Chain of Title of Landowners	1-001 through 1-019
2	Correspondence re: Use of Property	2-001
3	Mine Plan (June 2021) – Submitted by Applicant to Landowners	3-001 through 3-022
4	Reclamation Plan (August 2019) – Submitted by Applicant to Landowners	4-001 through 4-011

Landowners reserve the right to use and introduce any exhibits listed by Applicant, or to use and introduce any evidence as responsive or rebuttal evidence.