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

In re: Black Hills Bentonite  
Permit to Mine No. 248C  
Murphy Creek Update Area

) Docket No. 24-1601  
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**PETITIONER BLACK HILLS BENTONITE, LLC'S  
PREHEARING DISCLOSURE STATEMENT**

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COMES NOW, Petitioner, Black Hills Bentonite, LLC (“BHB”), a Wyoming limited liability company, through its undersigned counsel, Kayla A. Albertson, Patrick R. Tolley, and John A. Mastertson of Welborn Sullivan Meck & Tooley, P.C., and pursuant to the *Order Setting Prehearing Conference, Final Hearing, and Requiring Disclosures* dated June 11, 2024 and in accordance with Ch. 2, Section 18 of the DEQ Practice and Procedure for Contested Case Hearings, hereby submits its *Prehearing Disclosure Statement*.

*(a)(i) A complete list of all witnesses who will or may testify, together with information on how that witness may be contacted, and a brief description of the testimony the witness is expected to give in the case.*

**1. Doug Gibson**

Black Hills Bentonite  
P.O. Box 9  
Mills, WY 82644  
(307) 265-3740

Mr. Gibson is an Environmental Technician for BHB and is authorized to testify on its behalf. It is anticipated that Mr. Gibson may testify to his knowledge and recollection regarding the facts and circumstances of this matter, including knowledge of BHB, its mining and production operations, mining permits for the Murphy Creek area, negotiations with Bruce and Betty Firnekas regarding mining in the Murphy Creek area, any other allegations alleged in the Petition, and his training and experience.

**2. Larry Madsen**

Black Hills Bentonite  
P.O. Box 9  
Mills, WY 82644  
(307) 265-3740

Mr. Madsen is BHB's Managing Director and is authorized to testify on its behalf. It is anticipated that Mr. Madsen may testify to his knowledge and recollection regarding the facts and circumstances of this matter, including his knowledge of BHB, its mining and production operations, mining permits for the Murphy Creek area, negotiations with Bruce and Betty Firnekas regarding mining in the Murphy Creek area, any other allegations alleged in the Petition, and his training and experience.

**3. Bruce Firnekas**

Respondent  
521 South Hamilton  
Powell, Wyoming 82435

As the surface estate owner, Mr. Firnekas is a named party in this matter. It is anticipated that Mr. Firnekas may testify to his knowledge and recollection regarding the facts and circumstances of this matter, including his knowledge of the surface area at issue, all contact and negotiations with BHB, prior dealings with BHB, and any other allegations alleged in the Petition.

4. BHB reserves the right to call: (1) any and all “will call” and “may call” witnesses listed by Respondents; (2) any witness necessary for impeachment or rebuttal; and (3) any witness necessary to lay a foundation for exhibits. BHB further reserves the right to supplement this list of witnesses upon reasonable notice to Respondents prior to the contested case hearing in this matter.

*(a)(ii) A statement of the specific claims, defenses, and issues that the party asserts are before the hearing officer for hearing, based on the party's filing.*

The first and dispositive issue is that Respondents' consent is not necessary under the facts and circumstances presented. BHB owns all the necessary rights—those for which consent is usually required in a split estate. Respondents advocate for the application of a statutory scheme outside the facts presented. Statutory application or construction is simply unnecessary and risks clouding the issues.

As shown by the duly recorded land records filed in Johnson County, Bethlehem Steel Company reserved the mineral and production rights beneath the Property.<sup>1</sup> The rights are explicit and broad:

3. That said Bethlehem Steel Company, its successors and assigns, **shall at all times have the full and exclusive right to mine and remove the bentonite from said lands and premises.** They 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 the mining, production and removal of bentonite therefrom, **without liability in damages for any injury to the surface of said premises by reason thereof.** (emphasis supplied)

BHB acquired all these rights in 1991 also as evidenced by the Johnson County land records as Instrument No. 490529.

The rights held by BHB allow it to enter and mine the bentonite without needing Respondent's permission. BHB also doesn't need Respondent's approval for the mining and reclamation plan, as explained in more detail in BHB's *Motion for Summary Judgment*.<sup>2</sup> Respondents came into possession of the surface with no rights as to the bentonite or its mining, and subject to all the conditions of the reservation. Without rights to mine or produce bentonite, established by a clear, unambiguous deed, they have no right to the protections granted other surface owners by statute. Freedom to contract is well-established. See *Colton v. Town of Dubois*, 2022 WY 138, ¶22, 519 P.3d 976, 982 (Wyo. 2022) (“[P]ublic policy or interest is also served when we recognize an individual's right to freely contract, including the freedom to settle and waive claims when the parties so intend, *Hassler v. Circle C. Res.*, 2022 WY 28, ¶ 12, 505 P.3d 169, 173 (Wyo. 2022) (“Competent parties have the right to freely contract.” (citation omitted)); *Finley Res., Inc. v. EP Energy E&P Co., L.P.*, 2019 WY 65, ¶ 24, 443 P.3d 838, 846–47 (Wyo. 2019) (noting “[t]he right of private contract is no small part of the liberty of the citizen” (quoting *Nuhome Invs., LLC v. Weller*, 2003 WY 171, ¶ 8, 81 P.3d 940, 944 (Wyo. 2003))). We do not lightly interfere with this liberty. *Hassler*, ¶ 12, 505 P.3d at 173; *Finley Res., Inc.*, ¶ 24, 443 P.3d at 846.) and consistent with Wyoming’s Constitution, which states in Article 1, Section 35: “No ex post facto law, nor any law impairing the obligation of contracts, shall ever be made.” (emphasis added).

Secondly, Respondents maintain that a statutory process must be followed, despite the clear ownership interests of BHB precluding it. Even under the Respondent’s theory, however, BHB has met the statutory prerequisites for an Order in Lieu of Landowner Consent under Wyo. Stat. § 35-11-406(b)(xii), namely:

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<sup>1</sup> True and accurate copies of all recorded instruments referred to are attachments to BHB’s *Petition for Order in Lieu of Landowner Consent*. They will not be attached here but are incorporated by this reference.

<sup>2</sup> State permits, however, are a distinct matter. BHB is still required to obtain them for the mining and reclamation.

- (A) The mining plan and reclamation plan have been submitted to the surface owner for approval;
- (B) 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) The use does not substantially prohibit the operations of the surface owner; and
- (D) The proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible.

The record already establishes all the above. Respondents' reliance upon Wyo. Stat. § 35-11-406(b)(xi) and dicta from the Wyoming Supreme Court in *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537 (Wyo. 1988) conflates the statutory scheme even if it were applicable. The statutes simply do not apply, and if they did, BHB is in full compliance with Wyo. Stat. § 35-11-406(b)(xii).

Finally, Respondents continue to argue that BHB is required to pay a bond directly to Respondents or on Respondent's behalf. There is no doubt that BHB is to secure a bond in the amount determined by the state, as it does with all its mining operations and has for decades. BHB will honor these obligations.

In attempting to establish a positive working relationship with Respondents, BHB provided notice and the opportunity to reach a surface use agreement with them. Those efforts were unsuccessful. In an effort to be transparent and exceed their obligations as the mineral owners with full rights to enter the Property to mine, they have submitted their *Petition*, and seek its approval.

***(a)(iii) A statement of the burden of proof to be assigned in the contested case with reference to specific regulatory, statutory, constitutional, or other authority established by relevant case law.***

BHB bears the burden of proof to a preponderance of the evidence that the reservations and easements contained in the chain of title for the Property are valid and accurate. Additionally, pursuant to Wyo. Stat. § 35-11-406(b)(xii), BHB bears the burden of proof on each of the four (4) factors listed above. Respondents bear the burden of proof on any defenses they raise.

***(a)(iv) A statement of stipulated facts. If the parties are unable to stipulate to facts, the parties shall indicate what efforts have been made to stipulate to facts and the reasons facts cannot be stipulated.***

Counsel for both parties have exchanged emails and a phone conference to discuss the facts of the case. The parties have stipulated 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, Patentees executed a Warranty Deed, dated December 24, 1957, to Bethlehem Steel Company, a Delaware Corporation, conveying an 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, was organized in Wyoming in 1991.
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 a letter, on or about April 25, 2022, to Counsel for BHB, 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.

***(a)(v) A complete list of all documents, statements, etc., which the party will or may introduce into evidence.***

BHB may introduce the following documents into evidence:

- A. Patent No. 1176995
- B. Bethlehem Steel Company Warranty Deed dated December 24, 1957 and recorded in Johnson County as Instrument No. 76324
- C. BHB Warranty Deed dated April 17, 1991 and recorded in Johnson County as Instrument No. 490529
- D. Firnekas Warranty Deed dated December 18, 2013 and recorded in Johnson County as Document No. 134738
- E. 1961 Deed dated July 31, 1961 and recorded in Johnson County as Document No. 94523
- F. Permit to Mine 248C – Murphy Creek Updated Area 2021 Mine Plan Revision
- G. Permit to Mine No. 248C – Murphy Creek Updated Area Firnekas Lands Map
- H. Letter to Firnekases from BHB dated August 24, 2021
- I. Letter from Mitch Edwards to BHB dated December 3, 2021
- J. Letter from Mitch Edwards dated April 25, 2022
- K. Certified Mail dated August 25, 2021
- L. Affidavit of Larry Madsen

Each of the exhibits listed is an attachment to a pleading in this matter. The Parties are continuing to negotiate stipulated exhibits for this matter.

In addition to the exhibits listed above, BHB reserves the right to offer: (1) any exhibit listed by Respondents (unless objected to); (2) any exhibit needed for impeachment or rebuttal; and (3) any exhibit necessary and appropriate for demonstrative purposes. With notice, if possible, BHB further reserves the right to supplement their exhibits with any documents produced or identified in discovery, or as otherwise reasonably appropriate prior to the contested case hearing in this matter.

***(a)(vi) An approximation of the time required for the hearing.***

Petitioner believes this contested case hearing will require one full day.

**DATED** this 31<sup>st</sup> day of July 2024.



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**Certificate of Service**

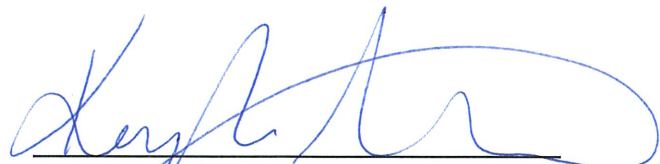
The undersigned hereby certifies that a true and correct copy of the foregoing was served herein this 31<sup>st</sup> day of July 2024, sent via US Postal Service and Email as follows:

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