

**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)
)

ORDER FOLLOWING PREHEARING CONFERENCE

This matter came before the Hearing Examiner for a prehearing conference on August 8, 2024 via video conference. Appearing for Black Hills Bentonite was Kayla A. Albertson, Patrick R. Tolley, and John A. Masterson of Welborn Sullivan Meck & Tooley, P.C. Appearing for Bruce and Betty Jean Firnekas (Landowners) was Mitchell H. Edwards and Kenna J. Blaney of Nicholas & Tangeman, LLC.

The purpose of the prehearing conference was to discuss the relevant factual and legal issues and claims, witnesses, exhibits, burden of proof, and other matters related to the upcoming contested case scheduled for August 15 in Cheyenne, Wyoming.

Witnesses

Neither party has any objections to any of the listed witnesses in the parties' prehearing disclosure statements.

Stipulated Facts

The parties confirmed that they are in agreement with the stipulated facts in their prehearing disclosure statements. If the parties agree to additional stipulated facts, they must file them with the Council prior to the contested case.

Exhibits

Black Hills did not anticipate that it will object to any of the Landowners' exhibits (Exhibits 1 – 4); however, at the time of the prehearing conference, Black Hills was unwilling to stipulate to

the admission of the exhibits until it could confirm the accuracy of the exhibits. The Hearing Examiner requests that Black Hills notify the Council prior to the contested case if it will stipulate to the admission of those exhibits.

The Landowners agreed to stipulate to the admission of Black Hills' exhibits listed in its prehearing disclosure statement with the exception of Exhibits G and L. The Hearing Examiner requests that the Landowners notify the Council prior to the contested case if they will stipulate to the admission of Exhibits G and L.

Claims/Issues to be Decided by the Council

Black Hills contends that the main issue for the Council to decide is what rights are currently held by Black Hills to enter upon and mine bentonite on Landowners' land. Black Hills alleges that it is currently allowed to enter upon Landowners' land and mine bentonite without needing Landowners' consent or permission because of Black Hills' rights outlined in duly recorded land records.

Second, Black Hills contends that if a statutory process applies, the Council must decide whether Black Hills has satisfied the four elements outlined in Wyo. Stat. Ann. § 35-11-406(b)(xii)(A) – (D).

Landowners contend that the main issue for the Council to decide is whether Wyo. Stat. Ann. § 35-11-406(b)(xi) or (xii) applies, and if (xii) applies, whether the four elements in (b)(xii)(A) – (D) are satisfied. The Landowners further allege that if (xi) applies, the Council cannot issue an order in lieu of consent.

The Hearing Examiner concludes that the issues to be decided by the Council are whether Wyo. Stat. Ann. § 35-11-406(b)(xi) or (xii) applies, and if (xii) applies, whether the four elements in (b)(xii)(A) – (D) are satisfied.

The Council does not have the authority to decide whether Black Hills’ and the Landowners’ deeds allow Black Hills to enter upon Landowners’ land and mine bentonite without needing Landowners’ consent as outlined in § 35-11-406(b)(xi) or (xii). Black Hills contends that the “first and dispositive issue is that Respondents’ consent is not necessary under the facts and circumstances presented.” See *Black Hills’ Prehearing Disclosure Statement*, p. 3. However, the Council is not statutorily authorized to decide that issue—the Council is required to follow the statutory process outlined in § 35-11-406(b)(xi) and (xii).

Burden of Proof

The parties agree that Black Hills has the burden of proof to show by a preponderance of the evidence that the four elements in Wyo. Stat. Ann. § 35-11-406(b)(xii)(A) – (D) are satisfied.

However, the Hearing Examiner also concludes that Black Hills has the burden to prove that § 406(b)(xii) is the appropriate statute in this case which requires Black Hills to prove that Wyo. Stat. Ann. § 35-11-406(b)(xi) does not apply.

Contested Case Hearing

The final contested case hearing is set for **August 15, 2024 beginning at 9:00 a.m., at the Hathaway Building, 2300 Capitol Ave, Cheyenne, WY.** The contested case hearing will be one day. A court reporter will report the hearing.

Other Matters

The parties shall make appropriate arrangements for the attendance of their witnesses at the contested case hearing. Parties or their witnesses shall be allowed to participate in the contested case by phone or videoconference if attendance in person is not feasible. In this case, Bruce Firnekas is allowed to testify via phone or videoconference. If any other party, attorney, or witness requires special accommodations, the Council shall be notified as soon as possible so the necessary arrangements may be made.

All parties are encouraged to continue to make reasonable efforts to resolve the case. The parties shall promptly notify the Hearing Examiner of all settlements, stipulations, agency orders, or other action eliminating the need for a contested case hearing.

The information provided in this order is binding on each party throughout the course of the contested case unless modified by the Hearing Examiner.

So **ORDERED** this 9th day of August 2024.



Ryan Greene (Aug 9, 2024 12:21 MDT)

Ryan Greene, Hearing Examiner
Environmental Quality Council