STATE OF WYOMING	)	IN THE DISTRICT COURT
	) SS.	
COUNTY OF LARAMIE	)	FIRST JUDICIAL DISTRICT

POWDER RIVER BASIN RESOURCE COUNCIL, Petitioner, v. WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent.	)	Docket No. 191-144

FILED
AUG 20 2019
DIANE SANCHEZ
CLERK OF THE DISTRICT COURT

ORDER GRANTING PETITIONER'S REQUEST FOR PRODUCTION OF RECORDS PURSUANT TO THE WYOMING PUBLIC RECORDS ACT

INTRODUCTION AND BACKGROUND

The issue in this dispute is whether the Wyoming Department of Environmental Quality ("DEQ") should be compelled to produce an appraisal of a mining company's real property. The mining company, Contura Coal West, LLC ("Contura"), operated the Belle Ayr Mine in Campbell County, Wyoming. Contura used real property it owned in Campbell County to post a "collateral bond" to secure part of the costs of reclaiming the mining property. As part of the bonding process, DEQ required Contura to obtain an appraisal of its real property. Contura obtained the appraisal and provided it to DEQ.

Powder River Basin Resource Council ("PRBRC") subsequently requested DEQ provide it with a copy of the appraisal pursuant to Wyoming's Public Records Act ("WPRA" or "Act"). *See* WYO. STAT. ANN. § 16-4-201 et. seq. Blackjewel LLC, the successor in interest to Contura, objected to the release of the appraisal, claiming it contained confidential information about

Blackjewel's commercial and financial resources.[1] Relying on Blackjewel's assertions, DEQ withheld the appraisal from inspection as "confidential commercial, financial, geological, or geophysical data" under the WPRA. *See id.* § 16-4-203(d)(v).

On February 5, 2019, PRBRC filed a *Petition for Review of Administrative Action Complaint for Order to Show Cause* with this court. In its *Petition,* PRBRC sought an order from this court directing Respondent to release the land appraisal. This court interpreted the *Petition* as an application for order to show cause pursuant to WYO. STAT. ANN. § 16-4-203(f) of the WPRA. *See Powder River Basin Res. Council v. Wyo. Oil & Gas Comm'n,* 2014 WY 37, ¶ 28, 320 P.3d 222, 230 (Wyo. 2014) ("Proceedings to challenge denial of access to documents claimed to be public must follow procedures established by the WPRA, and those are not subject to review under the Administrative Procedures Act."). This court issued an *Order to Show Cause* on April 24, 2019. DEQ filed its *Response to Application for Order to Show Cause* on May 2, 2019. PRBRC filed its *Reply to [DEQ's] Response to Application for Order to Show Cause* on May 22, 2019. Both parties appeared before this court for a show cause hearing on May 29, 2019.

After the show cause hearing, this court issued an *Order Requiring Supplemental Briefing* on June 27, 2019, requiring the parties to address the potential impact of the United States Supreme Court's recent decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019) on this litigation. Both parties filed supplemental briefs on July 16, 2019.

Having reviewed the file, the pleadings, the parties' briefing, and the evidence and

---

[1] PRBRC argues Blackjewel lacked standing to challenge the records request, and that any claim to confidentiality of the appraisal was forfeited when Contura allowed Blackjewel, a mining competitor, access to the appraisal. The court disagrees and finds Blackjewel enjoyed standing to object to the public release of the appraisal. The property in question continues to serve as collateral for the reclamation obligations of the mine. As the successor in interest to the mining permit, Blackjewel has a genuine interest in this controversy, and not just a theoretical interest. A justiciable controversy exists, and Blackjewel has standing. *See, e.g., Allred v. Bebout*, 2018 WY 8, ¶ 37, 409 P.3d 260, 270 (Wyo. 2018) (discussing the four-part test Wyoming courts should use to address standing (citing *Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974)).

arguments from the show cause hearing, and being fully advised in the premises, the court **GRANTS** Petitioner's order to show cause and orders the production of the requested records pursuant to the WPRA.

ISSUE

Has DEQ met its burden of establishing that the real estate appraisal is exempt from disclosure under the WPRA?

FACTS

The salient facts in this litigation are not in dispute. DEQ oversees a mining permit issued for the operation of the Belle Ayr Mine, a large surface coal mine in Campbell County's Powder River Basin. The Wyoming Environmental Quality Act ("WEQA") requires an open-pit mine operator post a bond or other security with DEQ to cover the cost of reclaiming the disturbed land area. WYO. STAT. ANN. § 35-11-417. In Wyoming, a coal company may use a combination of financial assurance instruments, including third-party surety agreements, letters of credit, cash collateral, and real property collateral to meet the security requirements. *See* WYO. STAT. ANN. § 35-11-417. The Wyoming Legislature has given the Environmental Quality Council authority to enact rules and regulations pertaining to the posting of financial assurances. *See id.*; *see also id.* § 35-11-112(a)(i); *Land Quality—Coal*, DEQ RULES & REGS. ch. 11.

The contested appraisal in this case stems from a history of permitting actions, including two recent transfers of the permit for the Belle Ayr Mine. In 2016, Alpha Coal West ("Alpha") applied to transfer its permit for the Belle Ayr Mine to Contura. As part of that permit transfer, Contura used real property as a collateral bond to secure $26,749,000 of its overall $119,060,000 bond obligation for the Belle Ayr Mine. Before it accepted the real property as collateral, however, DEQ required an acceptable appraiser determine the fair market value of the real property for

bonding purposes. *Id.* ch. 11, § 3(c)(i)(A) (superseded May 3, 2019).

Contura hired Robert Brockman, a certified appraiser, to appraise two ranch properties and appurtenant leasehold interests that it proposed to use for collateral.[2] The appraiser examined each respective ranch property with respect to various factors such as location, improvements, soil quality, and productivity. The appraisal contains numerous photographs of improvements and terrain features on the ranch properties. The appraisal also includes an analysis of five recently-sold ranch properties used by the appraiser to draw comparisons and ultimately determine the fair market value of the Contura properties.

Mr. Brockman completed the appraisal on July 7, 2017, and DEQ accepted it in support of the $26,749,000 Contura pledged as real property collateral. *See* Pet. Review App. B at 2; DEQ Resp. at 3. DEQ presently holds a first lien mortgage on the ranch land in question. *See* PRBRC Reply Ex. A. Contura applied to renew its permit for the Belle Ayr Mine in May 2018, using the same real property collateral to cover its reclamation bond obligations. PRBRC Reply at 3. On July 18, 2018, Mr. Brockman recertified the accuracy of his original appraisal. *See* R. at 11.

In September 2018, Contura also filed an application asking DEQ to transfer its mining permit to Blackjewel. *See* DEQ Resp. at 4; PRBRC Reply at 4. As a transferee, Blackjewel is required to meet the same bonding requirements as the original permit holder. *See* WYO. STAT. ANN. § 35-11-408. DEQ has allowed Blackjewel to retain the $26,749,000 collateral real property bond previously used by Contura in partial satisfaction of its bonding requirement. Pet. Review App. B at 1.

On October 4, 2018, PRBRC submitted a public records request to DEQ requesting the following documents:

---

[2] DEQ has provided the court with the full appraisal report to review *in camera*. The appraisal report was filed under seal.

> (1) Any appraisal or valuation reports for real property used as collateral for the reclamation bond obligations of Contura and/or Blackjewel[, and]
>
> (2) Any correspondence, including electronic correspondence, between Contura and/or Blackjewel and DEQ staff regarding the real property bonds, the property appraisals, and/or records confidentiality.

R. at 1.

On October 5, 2018, Blackjewel's general counsel sent a letter to DEQ objecting to the release of the real property appraisal, stating "[t]he confidentiality of the appraisal report is tantamount and vital to our continued viability and remaining competitive in the coal market." R. at 13. On October 12, 2018, DEQ replied to PRBRC's records request, claiming the appraisal report qualified as confidential material under WYO. STAT. ANN. § 16-4-203(d)(v) of the WPRA. R. at 11–12.[3] This litigation ensued.

LEGAL STANDARD

PRBRC claims DEQ has unlawfully withheld documents it is required to produce under both the WPRA and the WEQA. This court must construe these statutes under the Wyoming Supreme Court's well-established rules for statutory interpretation:

> In interpreting statutes, our primary consideration is to determine the legislature's intent. All statutes must be construed *in pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony. Statutory construction is a question of law, so our standard of review is *de novo*. We endeavor to interpret statutes in accordance with the legislature's intent. We begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute *in pari materia*. When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation.

[3] Based on the record, it appears DEQ complied with the second part of the records request regarding correspondence between DEQ and Contura and Blackjewel, and that issue is not before the court in this litigation.

. . . .

> Only if we determine the language of a statute is ambiguous will we proceed to the next step, which involves applying general principles of statutory construction to the language of the statute in order to construe any ambiguous language to accurately reflect the intent of the legislature. If this Court determines that the language of the statute is not ambiguous, there is no room for further construction. We will apply the language of the statute using its ordinary and obvious meaning.

PRBRC, 2014 WY 37, ¶ 19, 320 P.3d at 228–29 (alteration in original) (citations omitted).

DISCUSSION

A. Procedural Issue

As a threshold issue, this court must address a procedural matter. PRBRC styled its initial pleading as a *Petition for Review of Administrative Action Complaint for Order to Show Cause*, filed on February 5, 2019. In its pleading, PRBRC claimed "[t]his Court has jurisdiction to hear the [PRBRC's] Petition for Review of DEQ's final administrative action pursuant to Wyo. Stat. § 16-3-114 (Wyoming Administrative Procedure Act), W.R.A.P. 12, and Wyo. Stat. § 35-11-1101." Pet. Review at 2, ¶ 3. PRBRC further claimed DEQ's partial denial of its records request was "arbitrary, capricious and an abuse of discretion, and not in accordance with the law," citing WYO. STAT. ANN. § 16-3-114(c)(ii)(A). *Id.* ¶ 2.

In response, DEQ filed a *Request for Setting* on April 3, 2019, and also filed the agency's record with this court. In its *Request for Setting*, DEQ argued this litigation should be governed solely by WYO. STAT. ANN. § 16-4-203(f), and that this court should set the matter for a "show cause" hearing. The court held a status hearing to address this issue on April 24, 2019, and ultimately agreed with DEQ's argument. The court subsequently issued an *Order to Show Cause* on April 24, 2019 and conducted a show cause hearing on May 29, 2019.

The court continues to believe this matter is properly resolved pursuant to WYO. STAT. ANN. § 16-4-203(f) and not the Wyoming Administrative Procedures Act ("WAPA"). This court

finds the Wyoming Supreme Court's previous decision in *PRBRC* is dispositive on this issue. *See PRBRC*, 2014 WY 37, ¶ 28, 320 P.3d at 230. Similar to the present case, the issue in *PRBRC* involved the denial of a records request PRBRC made to a state agency (Wyoming Oil and Gas Conservation Commission). In that case, PRBRC did not request the district court issue "an order to show cause" under WYO. STAT. ANN. § 16-4-203(f) of WPRA, which provides:

> Any person aggrieved by the failure of a governmental entity to release records on the specified date mutually agreed upon . . . may:
>
> . . . .
>
> (i) Apply to the district court of the district wherein the record is found for an order to direct the custodian of the record to show cause why he should not permit the inspection of the record and to compel the production of the record if applicable.

WYO. STAT. ANN. § 16-4-203(f)(i). Instead of seeking an order to show cause in that case, PRBRC sought review of the records denial pursuant to the WAPA. The district court reviewed the agency's denial of the records request pursuant to the WAPA and did not conduct an independent show cause hearing.

In reversing and remanding the case to the district court, the Wyoming Supreme Court stated: "We hold that Appellants were required to follow the procedures set forth in the WPRA, which they did not do. The WPRA requires the **district court** to **independently determine** whether information must be disclosed or not, **rather than to review a decision of the Supervisor as an administrative decision**." *PRBRC*, 2014 WY 37, ¶ 2, 320 P.3d at 224 (emphasis added).

This court finds *PRBRC* controlling. In its *Response to DEQ's Request for Setting*, PRBRC attempted to distinguish the present case from the earlier *PRBRC* case. PRBRC argued this case is governed by two statutes: the WEQA and WPRA. PRBRC argues "[o]nly the DEQ is subject to the WEQA and WPRA, although other administrative agencies are also subject to the WPRA. As such, this case presents a matter of first impression for the procedure to review a public records

action or inaction taken by the DEQ." PRBRC Resp. Request for Setting at 2, ¶ 1.

It is true that DEQ is governed by both statutes, but that fact does not alter the rationale from *PRBRC* that disputes over the release of public records should be resolved in the first instance by the district courts in a show cause hearing. Both the WPRA and WEQA contain specific statutory provisions dealing with the "openness" of public records for inspection. *See* WYO. STAT. ANN. § 16-4-202(a) ("All public records shall be open for inspection by any person at reasonable times, during business hours of the governmental entity, except as provided in this act . . . ."); *see also* WYO. STAT. ANN. § 35-11-1101(a) ("Any records, reports or information obtained under this act or the rules, regulations and standards promulgated hereunder are available to the public."). Section 35-11-1101(c) also references the WPRA and provides that "[i]n any suit under this section **or the Public Records Act**, W.S. 16-4-201 et seq., to compel the release of information under this act, the court may access against the state reasonable attorney fees and other litigation costs . . . ." WYO. STAT. ANN. § 35-11-1101(c) (emphasis added).

While PRBRC cites to WYO. STAT. ANN. § 35-11-1101 in its briefing, it does not provide grounds as to why this court should not follow the show cause hearing process specifically contemplated by WYO. STAT. ANN. § 16-4-203(f) of the WPRA in resolving this records dispute. Both parties appear to agree in their briefing that the ultimate determination of whether DEQ properly withheld the appraisal report is governed by various exceptions set forth in the WPRA. As the Wyoming Supreme Court noted in *PRBRC*:

> The legislature anticipated that records custodians and the public would at times disagree as to whether information was subject to inspection under the Act and specified a procedure to resolve those conflicts in the district court in § 16-4-203(f)
>
> . . . .
>
> Any person denied the right of access to public records can therefore apply to the district court for an order directing the custodian of the record to show cause why

inspection should not be permitted.

PRBRC, 2014 WY 37, ¶¶ 22–23, 320 P.3d at 229 (citations omitted).

Consistent with *PRBRC*, this court finds the WPRA and WYO. STAT. ANN. § 16-4-203(f) set forth the governing law and the process for resolving this dispute. Accordingly, the court will address the parties' arguments as to whether DEQ properly withheld the appraisal report pursuant to the statutory exceptions set forth in the WPRA.

B. Analysis Under the WPRA

The WPRA provides that records of the state, its agencies, and local government entities "shall be open for inspection by any person at reasonable times." WYO. STAT. ANN. § 16-4-202(a). The Act, however, also authorizes a records custodian to deny access to certain records under certain enumerated exemptions. *See* WYO. STAT. ANN. § 16-4-203(b), (d).

In construing the Act and its various exemptions, this court is guided by the Act's purpose of maintaining "an open and accountable government." *Aland v. Mead,* 2014 WY 83, ¶ 12, 327 P.3d 752, 759 (Wyo. 2014); *Freudenthal v. Cheyenne Newspapers, Inc.*, 2010 WY 80, ¶ 19, 233 P.3d 933, 938 (Wyo. 2010). The Wyoming Supreme Court has observed: "The WPRA, like the FOIA [Freedom of Information Act], requires that disclosure generally prevail over secrecy. 'Implementation of that goal is provided by affording a liberal interpretation to the WPRA and construing its exceptions narrowly.'" *PRBRC*, 2014 WY 37, ¶ 33, 320 P.3d at 231 (citations omitted).

"Consistent with the WPRA's purpose to maintain a transparent and accountable government and an informed electorate, the exceptions for production are construed narrowly." *Aland,* 2014 WY 83, ¶ 13, 327 P.3d at 759. "[T]here is an inherent presumption that 'the denial of inspection is contrary to public policy.'" *Id.* (quoting *PRBRC*, 2014 WY 37, ¶¶ 32–34, 320 P.3d

at 231).

The WPRA contains two general categories of exemptions. Section 16-4-203(b) specifies various records to which a custodian *may* deny right of access where disclosure would be contrary to public interest. Section 16-4-203(d), on the other hand, specifies records to which a records custodian *shall* deny access. In *PRBRC*, the Wyoming Supreme Court noted the WPRA strikes "a delicate balance between the public's right of access to government records and the protection of proprietary information." *PRBRC*, 2014 WY 37, ¶ 35, 320 P.3d at 231.

In this case, the parties disagree as to which WPRA exemption governs the real property appraisal report. In declining to release the appraisal, DEQ relied on the records exemption set forth in WYO. STAT. ANN. § 16-4-203(d)(v) [hereafter 203(d)(v)], which provides:

> (d) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law:
>
> . . . .
>
> (v) Trade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person.

WYO. STAT. ANN. § 16-4-203(d)(v).

PRBRC, in turn, believes production of the appraisal report is governed by WYO. STAT. ANN. § 16-4-203(b)(iv) [hereafter 203(b)(iv)], which provides:

> (b) The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:
>
> . . . .
>
> (iv) Except as otherwise provided by Wyoming statutes or for the owner of the property, the contents of real estate appraisals **made for the governmental entity,** relative to the acquisition of property **or any interest in property for public use,** until such time as title of the property or property interest has passed to the governmental entity. The contents of the appraisal shall be available to the owner of the property or property interest at any time.

Id. § 16-4-203(b)(iv) (emphasis added).

The court will address both statutory exemptions, starting with PRBRC's claim that 203(b)(iv) warrants DEQ in releasing the real estate appraisal report.

1. WYO. STAT. ANN. § 16-4-203(b)(iv): Real Estate Appraisals Made for a Governmental Entity

Section 203(b)(iv) provides that a records custodian may release real estate appraisals "made for the governmental entity," once the government has acquired "title" of the property, or the property interest has passed to the government. *See id.* Under the statute, a custodian has no authority to release an appraisal report to the public until the private property interest the government is seeking actually passes or vests in the government. *Id.* Once the government acquires the property interest, however, the real estate appraisal can be released to the public. *See id.*

The statute appears to strike a delicate balance. The statute affords the real estate appraisal confidentiality during the initial acquisition or negotiation stage, so that a governmental entity is not placed at a competitive disadvantage by having to make public its own appraisal. However, once the property (or property interest) has been acquired by the government, the statute provides for transparency and public disclosure. When the property interest has passed, the public can then request and review the appraisal to determine if public funds were properly expended, or public interests adequately protected in the transaction.

PRBRC argues 203(b)(iv) is the operative section that governs this dispute and that the statute mandates disclosure. PRBRC further claims 203(b)(iv) controls over the more general "confidentiality" provisions of 203(d)(v) upon which DEQ relies. PRBRC makes this argument based on the well-established maxim of statutory interpretation that "a specific statute controls over a general statute on the same subject." *Thunderbasin Land, Livestock & Inv. Co. v. Cty. of*

Laramie Cty., 5 P.3d 774, 782 (Wyo. 2010) (citation omitted).

To be sure, 203(b)(iv) is a specific statute dealing with "real estate appraisals" and determines when government appraisals should either be withheld or released under the WPRA. Therefore, if the court determines the appraisal in this case constitutes an appraisal made for a governmental entity, it must conclude that the more specific "real estate appraisal" exemption found in 203(b)(iv) controls over the more general "confidential commercial" exemption found in 203(d)(v). Stated differently, this court must determine if the appraisal in this case fits or falls within the category of real estate appraisals contemplated by 203(b)(iv). If it does, then the very specific WPRA exemption dealing with appraisals must control over the more general exemption of 203(d)(v).

In order to determine if the appraisal fits within the appraisals covered by 203(b)(iv), this court believes it must answer the following questions: (1) Is the document in question a real estate appraisal?; (2) Was the appraisal "made for a governmental entity"?; and (3) Was the appraisal made relative to the acquisition of property *or an interest in property* for public use? If the answers to the first three questions are in the affirmative, the court must also ask a fourth question: Has title to the property, *or a property interest*, passed to the governmental entity? If the property interest has passed, then 203(b)(iv) requires disclosure of the appraisal. The court will address all four questions.

(i) Is this document a real estate appraisal?

As a starting point, there is no question that the document at issue in this case is a real estate appraisal. Mr. Brockman (a certified appraiser) prepared the appraisal report on July 7, 2017, and sent it to Mike Lepchitz, Vice-President of Contura. The appraisal establishes the market value for two ranch properties owned by Contura in Campbell County, Wyoming. Mr. Brockman arrives

at his ultimate valuations for both ranch properties by considering numerous factors, including a comparison of the value of other ranches sold in the general vicinity. There is no dispute the document at issue is a real estate appraisal.

(ii) Was the appraisal "made for a governmental entity"?

There is also no question that Contura paid for the real estate appraisal, which begs the next question: Was this appraisal "made for a governmental entity" (i.e. DEQ) as contemplated by 203(b)(iv), or was it instead a "private" appraisal made for Contura?

To answer this question, the court must look at the primary reason or purpose served by the real estate appraisal. Both parties agree the appraisal was generated so DEQ could determine the market value of the ranch properties that Contura proposed using as bonding collateral. Mr. Brockman certainly understood this government purpose in his initial email to Contura discussing the appraisal, when he stated "[y]ou, members of your legal staff, *and members of the Wyoming DEQ would be the users of the appraisal.*" Appraisal at 80 (emphasis added).

The appraisal in this case is clearly mandated by DEQ's rules and regulations as a necessary component of the reclamation bonding process. Under agency rules, a real estate appraisal *must* be completed and provided to DEQ if the mining operator proposes using real property as collateral for its "self-bonding" obligations. The administrative rule in place at the time of the appraisal, provided:

> (i) For any collateral offered to support a self-bond, the following information shall be provided:
>
> (A) The value of the property. The property shall be valued at the difference between the fair market value and any reasonable expense anticipated by the Department in selling the property. The fair market value shall be determined by an appraiser or appraisers proposed by the operator. The appraiser or appraisers shall be selected by the Administrator. The Administrator has the option to reject any appraiser proposed by the operator. **The appraisal shall be expeditiously made, and copy thereof furnished to the Administrator and the operator.** The

expense of the appraisal shall be borne by the operator.

Land Quality—Coal, DEQ RULES & REGS. ch. 11, § 3(c)(i)(A) (superseded May 3, 2019) (emphasis added).

The rule not only mandates that an appraisal be "made," but that a copy of the appraisal be furnished to DEQ. The rule gives DEQ the ability to select the real estate appraiser and the right to "reject" any appraiser proposed by the operator. The administrative rule underscores the important public purpose served by the appraisal. The appraisal assures both DEQ and the public that the property the mining operator proposes to use as collateral has value sufficient to cover the costs of reclaiming the land should the mine ever close or the operator abandon its mining permit.

In short, the court concludes the appraisal was "made for" a governmental agency (DEQ) as an important part of the reclamation bonding process, and that the public possesses a strong interest in knowing that the mining company posted adequate collateral to secure its reclamation obligations.

(iii) Was the appraisal made relative to the acquisition of property *or an interest in property* for a public use?

As DEQ's rules make clear, a real estate appraisal is essential to ascertain the "value" of the land the operator proposes using as collateral for his "self-bond." *See id.* Once the operator secures the necessary appraisal and establishes the land value, DEQ's rules next require the operator to execute a first-lien mortgage on the real property and record the mortgage. The rule provides:

> (v) If the Administrator accepts any property as collateral to support a self-bond, the Administrator shall, as applicable, require possession by the Department of the personal property, **or a mortgage or security agreement** executed by the operator in favor of the Department of Environmental Quality. The requirement shall be that which is sufficient to vest such interest in the property in the Department to secure the right and power to sell or otherwise dispose of the property by public or private proceedings so as to ensure reclamation of the affected lands in accordance with

the Act.

> (A) Any **mortgage** shall be executed **and duly recorded** as required by law so as to be first in time and constitute notice to any prospective subsequent purchaser of the same real property or any portion thereof.

Id. § 3(c)(v)(A) (emphasis added).

The appraisal in this case was made in accordance with DEQ's rules, so that DEQ could acquire a mortgage and a security interest in the operator's real property. Contura used the real property in question as part of its "self-bond." As both parties have noted, and as the record reflects, DEQ holds a first-lien mortgage in the land in question. Should the operator default on his reclamation responsibilities, DEQ has the right to sell the property. Without question, the first lien mortgage serves an important public use or purpose of "ensur[ing] reclamation of the affected lands in accordance with the Act." *Id.* § 3(c)(v). The court concludes the third question must also be answered in the affirmative.

(iv) Has a property interest passed to the governmental entity?

Having answered the first three questions in the affirmative, the court must determine if a property interest has "passed" to DEQ. Under 203(b)(iv), a real estate appraisal remains confidential until such time as "title of the property *or property interest* has passed to the governmental entity." WYO. STAT. ANN. § 16-4-203(b)(iv) (emphasis added). Once either title or a property interest has passed to the governmental entity, then the appraisal loses its confidential protections and is subject to public disclosure.

Here, an equitable property interest has passed to the government. It is undisputed that DEQ holds a first-lien mortgage on the land in question to secure the mining operator's reclamation obligations. A "mortgage" is defined as "[a] conveyance of title to property that is given as security for the payment of a debt or the performance of a duty." *Mortgage*, BLACK'S LAW DICTIONARY

(7th ed. 1999). In *Patel v. Kahn*, the Wyoming Supreme Court observed that a mortgage lien is an "encumbrance" which is enforceable against the land if the "obligation which it secures" is not otherwise paid. *Patel v. Kahn*, 970 P.2d 836, 839 (Wyo. 1998). "A mortgage lien **vests the mortgagee with an equitable interest**, while the mortgagor retains legal title to the property." *Id.* (emphasis added).

It is true that Contura continues to hold legal title to the property in question. It is equally true that DEQ's first lien mortgage provides it with an "equitable interest" in the property, and that this property interest vested (or passed) at the time of execution and delivery of the mortgage to DEQ. Section 203(b)(iv) does not distinguish between legal and equitable property interests. Moreover, 203(b)(iv) does not restrict the disclosure of appraisals to only those appraisals done to purchase or acquire "legal title." Rather, the statute is broadly worded to include appraisals "relative to the acquisition of property **or any interest in property** for public use." WYO. STAT. ANN. § 16-4-203(b)(iv) (emphasis added). The court believes this language encompasses the real estate appraisal in this case, which was done as part of the process to create a legally enforceable mortgage and security interest in DEQ's favor.

The court therefore concludes that a property interest has vested and passed to DEQ, and that the appraisal is subject to disclosure pursuant to 203(b)(iv).

2. WYO. STAT. ANN. § 16-4-203(d)(v): Confidential Commercial or Financial Exemption

In their briefing, DEQ does not address the potential applicability of 203(b)(iv) to this case, even though 203(b)(iv) specifically applies to real estate appraisals. Instead, DEQ relies entirely upon the general exception set forth in 203(d)(v).[4] Under that exception, a custodian shall withhold

[4] During oral argument in this case, counsel for DEQ never directly explained why 203(b)(iv) should not be applied to this case. Counsel instead argued that the two exceptions are not mutually exclusive, and that DEQ would be justified in relying entirely on the exception set forth in 203(d)(v), even if the court found that 203(b)(iv) applied. The court disagrees. DEQ's argument runs contrary to the maxim of statutory interpretation that "a specific statute controls

records if they contain confidential commercial or financial information.

To be clear, the court does not believe it is required to address the applicability of 203(d)(v) to this case, given its conclusion that 203(b)(iv) mandates disclosure. When a specific statute exists on a subject, it controls over a general statute on the same subject. *Thunderbasin Land, Livestock & Inv. Co.*, 5 P.3d at 782 (specific statute dealing with providing for trial de novo for damages in road case controls over the more general provisions of the WAPA that addresses all types of agency decisions). Here, a specific statute exists that governs when a real estate appraisal may be withheld and when it must be disclosed as a public record. The court finds, consistent with Wyoming's rules for statutory interpretation, that the specific language of 203(b)(iv) controls over the more general language found in 203(d)(v).

However, in the event the court is incorrect in its conclusion that 203(b)(iv) applies to this case, the court determines it is prudent to also address DEQ's argument that 203(d)(v) provides an exemption from disclosure. Both parties have extensively briefed this issue and have even provided supplemental briefing in light of the United States Supreme Court's recent decision in *Food Marketing*. The issue is therefore ripe for discussion, and the court will address DEQ's argument.

In *Sublette County Rural Health Care District v. Miley*, the Wyoming Supreme Court had occasion to apply the language set out in 203(d)(v) to a dispute that involved production of financial reports from a rural health care clinic. *See Sublette Cty. Rural Health Care Dist. v. Miley*, 942 P.2d 1101 (Wyo. 1997). The Wyoming Supreme Court ultimately reversed the decision of the district court finding the financial records were "confidential" under 203(d)(v).

In reaching this conclusion, the Wyoming Supreme Court discussed the language of the

---

over a general statute on the same subject." *Thunderbasin Land, Livestock & Inv. Co. v. Cty. Laramie Cty.*, 5 P.3d 774, 782 (Wyo. 2000).

statute that requires a custodian to deny the right of inspection if the requested records include "[t]rade secrets, privileged information and confidential commercial, financial [] data furnished by or obtained from any person." *Id.* at 1102–03. The Wyoming Supreme Court noted, "[w]e find our statutory language to be clear and unambiguous." *Id.* at 1103. Nevertheless, the Wyoming Supreme Court proceeded to interpret the "plain language" of the statute and incorporate a federal court's interpretation of similar language found in FOIA, 5 U.S.C. § 552(b)(4). *See id.* (citing *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (noting a "dual rationale" exists for the exception set out in 203(d)(v)). First, the Wyoming Supreme Court stated the confidentiality exception serves to "encourage cooperation" on the part of those who otherwise could not be required to provide information to a governmental agency. Second, the exception serves "to protect the rights of those who are required to provide such information." *Sublette Cty.*, 942 P.2d at 1103.

The Wyoming Supreme Court proceeded to adopt the "two-factor" test articulated by the *National Parks'* court, noting the test received "wide spread acceptance" outside the District of Columbia Circuit. To fit within the *National Parks* test, a government custodian must show disclosure was "likely either: (1) to impair the government's future ability to obtain necessary information; or (2) cause substantial harm to the competitive position of the persons providing the information." *Id.* Using that test, the Wyoming Supreme Court concluded the financial records at issue in *Sublette County* were exempt from disclosure.

After the show cause hearing in this case, the United States Supreme Court issued its decision in *Food Marketing*. In that case, the United States Supreme Court rejected the "substantial competitive harm" requirement of the *National Parks* decision, finding it was the product of "a casual disregard of the rules of statutory interpretation." *Food Marketing*, 139 S. Ct. at 2364. The

Court found no basis in the statute for adding or inserting a "substantial competitive harm" analysis given the plain language from Exception 4 of FOIA. The plain language of Exemption 4 simply provides that "confidential" private-sector "commercial or financial information" in the government's possession is exempt from disclosure. Given that FOIA does not define the term "confidential," the courts must afford the term its "ordinary, contemporary, common meaning." *Id.* at 2362. The United States Supreme Court stated:

> The term "confidential" meant then, as it does now, "private" or "secret." Contemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential. In one sense, information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it. In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.

Id. at 2363 (citations omitted).

The United States Supreme Court noted the first condition must be met for the exception to apply—i.e., that the information customarily be "kept private" or closely held. However, the United States Supreme Court did not decide whether the second condition—that the government provided "privacy assurances" to the party in collecting the data—is also a mandatory condition needed to invoke the exception. In *Food Marketing*, there was no question that the documents were customarily kept private **and** that the government had collected the requested documents under assurances of privacy, so both conditions were satisfied.

Following the issuance of the *Food Marketing* opinion, this court directed both parties to provide supplemental briefing addressing the potential impact of that decision on this case. Both parties provided timely supplemental briefs on July 16, 2019. In its brief, DEQ argued that *Food Marketing* has a substantial impact on Wyoming law, and that the United States Supreme Court's recent opinion would likely cause the Wyoming Supreme Court to reverse its *Sublette County*

analysis (which incorporates the *National Parks* test). In making that argument, DEQ posits that the Wyoming Supreme Court has consistently looked to federal FOIA decisions in seeking guidance on how similar or parallel exceptions in the WPRA should be interpreted. *PRBRC*, 2014 WY 37, ¶ 37, 320 P.3d at 232 (citing cases). DEQ argues

> *Food Marketing* overrules the federal precedent that informed the Wyoming Supreme Court's decision in *Sublette County*. Considering this major reversal in FOIA law, the Wyoming Supreme Court would be justified in reversing *Sublette County* and adopting *Food Marketing* as the standard for evaluating whether commercial or financial information is "confidential" under Section 203(d)(v) of the Public Records Act.

DEQ Suppl. Br. at 3–4.

In its supplemental brief, *PRBRC* essentially urges this court to disregard the *Food Marketing* decision. PRBRC notes that only the Wyoming Supreme Court can overrule its own precedent and that a district court does not have that ability. *See* PRBRC Suppl. Br. at 5. While it is certainly true that this court cannot overrule *Sublette County*, that does not mean this court must ignore pertinent case law from the United States Supreme Court that calls into serious question the continuing viability of Wyoming Supreme Court precedent.

In short, this court agrees with DEQ's analysis of *Food Marketing's* likely impact on Wyoming law. The court agrees that the Wyoming Supreme Court would be fully justified in reversing the standard it adopted in *Sublette County* and adopting the *Food Marketing* standard as the proper basis for evaluating whether information the government collects from a private party is "confidential" under 203(d)(v). The court bases this statement on the fact that the Wyoming Supreme Court has consistently considered FOIA precedent as persuasive authority in interpreting WPRA cases and has specifically noted "the philosophy behind the FOIA is consistent with that which led to the adoption of the WPRA." *PRBRC*, 2014 WY 37, ¶ 37, 320 P.3d at 232.

Accordingly, this court will analyze the "confidentiality" of the appraisal report under both

the *Food Marketing* standard as well as the *Sublette County* (or *National Parks*) standard. As a starting point for this discussion, the court notes that *Food Marketing* sets a "lower bar" for claiming confidentiality than the *National Parks* test. Unlike the *National Parks* standard, the *Food Marketing* standard does not require a records custodian to prove the release of the requested document would result in "substantial competitive harm." Accordingly, if the government fails to meet the *Food Marketing* test for claiming confidentiality, it almost certainly fails the higher bar set by *National Parks* and *Sublette County*.

The court has considered both standards. Regardless of which standard is applied, the court finds the appraisal report in this case is not a confidential commercial or financial document under 203(d)(v) of the WPRA. In reaching this conclusion, the court finds it is important that only the WPRA contains a specific exemption pertaining to real estate appraisals. *See* WYO. STAT. ANN. § 16-4-203(b)(iv). FOIA does not have a corresponding special statutory section dealing with real estate appraisals. Federal courts typically analyze the confidentiality of appraisals prepared for government use pursuant to FOIA's Exemption 5. *See, e.g., Hoover v. U.S. Dep't of Interior*, 611 F.2d 1132 (5th Cir. 1980).

The court finds this difference between the two statutes significant. The Wyoming Legislature has seen fit to express its own special policy on when an appraisal prepared for government use is "confidential" and when it is not. Even if this court is wrong in its earlier conclusion that 203(b)(iv) specifically "mandates" the release of this appraisal, the language and framework the legislature employed in crafting 203(b)(iv) is certainly instructive to a determination of when an appraisal should be deemed "confidential" under 203(d)(v) of the WPRA. As the Wyoming Supreme Court has noted, "[a]ll statutes must be construed *in pari materia* and, in ascertaining the meaning of a given law, all statues relating to the same subject or

having the same general purpose must be considered and construed in harmony." *PRBRC*, 2014 WY 37, ¶ 19, 320 P.3d at 228.

Here, 203(b)(iv) establishes that appraisals made for a governmental entity only enjoy "confidentiality" until such time as the government acquires the relevant property interest. Once the governmental entity has acquired the property interest, then the appraisal is no longer deemed confidential and can be released to the public. This special framework for determining confidentiality serves an important public purpose under the WPRA. It allows a careful balancing of the government's need to protect proprietary information with the public's right to know. In this case, the public possesses an important right to know if its government has adequate security or collateral to cover the costs of reclaiming coal mining property. The WPRA always favors disclosure over secrecy, and "creates a presumption that the denial of inspection is contrary to public policy." *Id.* at ¶ 34.

Reading 203(b)(iv) and 203(d)(v) together, and "harmonizing" the two provisions, the court concludes that any claim to confidentiality that Contura or Blackjewel believed it had in maintaining the privacy of the appraisal was forfeited once they made the deliberate choice to pledge these properties to secure an important public obligation. Once Contura decided to use the property as reclamation collateral, and once it delivered the mortgage to DEQ for filing, it lost any claim that the real estate appraisal was "confidential" under 203(b)(iv) and 203(d)(v).

Finally, the court has carefully reviewed the appraisal report that DEQ submitted for an *in camera* review. The court finds little, if any, information in the report that could be considered "private" or "secret" in nature. To the contrary, much of the information contained in the appraisal is available in the public domain or through various websites. For example, the legal descriptions of the subject properties are all publicly available through county clerk and recorder offices. So

too is information about comparable real estate sales and transactions. Additionally, the public in this case already knows the "total value" that the appraiser assigned to both ranch properties, as this amount is contained in the bonding information already in PRBRC's possession.

Further, courts in other states that have reviewed requests for release of real estate appraisal information have generally found that appraisal documents are not exempt from disclosure to the public under state FOIA statutes. *See What Constitutes Commercial or Financial Information Exclusive of Trade Secrets, Exempt from Disclosure Under State Freedom of Information Acts—Specific Applications*, 8 A.L.R. 117, § 25 (6th ed. 2005). Thus, the court concludes the real estate appraisal in this case is not a confidential commercial document under 203(d)(v).

CONCLUSION

For the foregoing reasons, the court **GRANTS** Petitioner's Order to Show Cause and **ORDERS** the real estate appraisal be released pursuant to the WPRA.

DATED this 15th day of August, 2019.

HON. STEVEN K. SHARPE
First Judicial District Court

Copies to:

Shannon Anderson - m
Powder River Basin Resource Council
934 N. Main St.,
Sheridan, WY 82801

Travis Stills, *pro hac vice* - m
Energy & Conservation Law
1911 Main Ave., Suite 238
Durango, CO 81301

STATE OF WYOMING COUNTY OF LARAMIE, SS CHEYENNE

I Diane Sanchez, Clerk of the District Court in and for the County of Laramie, Wyoming, do hereby certify that the within and foregoing is a full true and correct copy of the original thereof as the same appears on file or of record in my office and that the same is in full force and effect as of this date.

Witness my hand and seal of said court this 20 day of Aug 20 19

DIANE SANCHEZ
Clerk of District Court

By _____ Deputy

James Kaste - M
Matt VanWormer
Wyoming Attorney General's Office
2424 Pioneer Ave.
Cheyenne, WY 82002

I hereby certify that I distributed a true and correct copy of the foregoing this 20 day of August, 2019, as indicated. [M-mail; B-box in Clerk's Office, H-hand delivery; F-facsimile transmission.]

Deputy Clerk