



PEABODY ENERGY
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Peabody Caballo Mining, LLC

July 3, 2023

Via electronic comment portal at <http://lq.wyomingdeq.commentinput.com/>

Mr. Kyle Wendtland
Administrator
Land Quality Division
Department of
Environmental Quality,
200 W. 17th Street, Suite 10,
Cheyenne, WY 82002

Re: Renewal of Coal Mining Permit #PTO433

Dear Mr. Wendtland:

Peabody Caballo Mining, LLC (“Peabody”) is the holder of Coal Mining Permit #PTO433, proposed for renewal (“Permit”) by the Land Quality Division (“LQD”). The Permit as proposed for renewal is fully compliant with Wyoming regulatory requirements and should be renewed. However, Peabody understands that objections related to surface consent may be submitted. Based on Peabody’s understanding of what the objections may be, Peabody addresses them in these contingent objection-responses and request for informal conference. If no objections are lodged, then these comments are moot and there is no need for the LQD to respond.

Background

The Permit has been in effect for decades, and has been renewed on several occasions. As related to surface consent, Peabody has possessed surface consent in the form of Surface Access Agreements (“Agreements”) dated as far back as 1976 with the owners of the adjacent Belle Ayr Mine, providing each owner detailed rights and cross-rights to mine and have necessary surface access at the shared boundary between the two Mines. These Agreements are on file with the LQD and have been repeatedly confirmed as sufficient by the LQD in prior permit renewals. Importantly, the Agreements provide that the Parties’ respective commitments run with the land and are binding on successors and assigns. There have been no changes to the Agreements executed by the Parties for over a decade, and LQD has granted renewals irrespective of prior bankruptcy proceedings that have plagued the Belle Ayre Mine owners over time.

In 2019, the then-owner of the Belle Ayre Mine, Blackjewel LLC (“Blackjewel”) went through federal bankruptcy reorganization, similar to the fate of prior predecessor owners. Eagle Specialty Minerals (“ESM”) obtained certain of the Blackjewel assets, including the Belle Ayre Mine through that bankruptcy proceeding. In communications with Peabody, and as Peabody understands it, informal communications with the LQD, ESM has asserted that the Agreements were terminated as part of ESM’s acquisition of the Belle Ayre Mine. Notably, Peabody has never received any Notice of Termination under the Agreements either from ESM or from any court with jurisdiction over the lands.

Surface Consent and Permit Renewals

Peabody notes that re-examination or re-affirmation of surface consent is not a regulatory criterion for permit renewals. *See* Wyo. Stat. § 35-11-405(e). Rather, the permittee has the initial burden at the time the application for a permit is submitted, to demonstrate and maintain valid surface consent at all times, independent of the renewal process. Wyo. Stat. § 35-11-406(a)(x). Peabody has satisfied that requirement by providing the Agreements, which include terms for clear surface access rights which have not changed. Peabody has therefore met its burden to show surface consent.

To disturb this consent, ESM (or any other party making a similar claim) must provide definitive evidence that the consent is no longer valid. It is their burden to show that consent has been terminated. In prior discussions with the LQD, the LQD has correctly observed that it is not the LQD’s role or expertise to adjudicate surface consent disputes. Consequently, the documentation that a surface owner must provide to show that an existing surface access agreement providing consent is no longer valid must be sufficiently clear and compelling that it does not require the LQD to undertake a complex analysis of document terms or access law.

We are unaware of any such sufficiently clear and compelling documentation that would justify a position that the Agreements providing surface consent to Peabody have somehow become invalid. Indeed, no documentation has been provided to Peabody, or as we understand it, been provided to LQD, that undermines the validity of the Agreements. There has been no executed termination notice of the Agreements, and no express court order terminating the Agreements. A mere phone call or written objections from a surface owner simply asserting a withdrawal of consent or theorizing that a separate bankruptcy proceeding somehow terminates consent does not satisfy the burden.

In an attempt to show the Agreements are invalid, ESM has argued that it believes that the Agreements were terminated because the Agreements were rejected during the bankruptcy process. But the Bankruptcy Code is quite clear that rejection of a contract does not terminate the contract; it merely places the bankrupt party (in that case, BlackJewel) in breach. 11 U.S.C. § 365(g). The code is equally clear that in such case, the lessee may elect to retain possession of the property for the balance of the term of the lease and for any renewal or extension of such rights. 11 U.S.C. § 365(h)(1). Peabody is of course not asking LQD to determine Peabody’s lease

rights; but it is equally true that the LQD should not be determining ESM's rights. This is why it is essential that the party seeking to disturb the surface consent status quo must show such a change through clear and compelling evidence.

This burden-shifting and clear level of proof is especially important given the nature of coal mining operations. Coal companies enter into complex access agreements that run with the land precisely because they are undertaking multi-decade, massively land-disturbing investments and operations. A regulatory regime that would permit a surface owner to bypass the terms of these contracts and upend consent just by writing a letter to the LQD asserting the surface owner thinks the agreement is no longer valid or the owner has changed its mind, would be a recipe for chaos. Nothing in Wyoming law or SMCRA supports such an interpretation of the regulatory requirements.

Peabody is of course, guessing at any specific information ESM may or may not have provided the LQD that Peabody has not seen, and therefore cannot respond or opine about any new documentation or arguments that may have been presented by ESM. This is why Peabody respectfully requests an informal conference in the event that ESM, or other parties, lodge an objection to permit renewal that LQD does not conclude is deficient on its face. Due process requires such an opportunity, at a minimum.

Peabody thanks the LQD for the opportunity to provide these objection-responses, and please feel free to contact me to discuss any questions or concerns.

Sincerely,

A handwritten signature in blue ink that reads "Bryce West" with a note in parentheses "(For Bryce West)".

Bryce West

Vice President

Peabody Caballo Mining, LLC