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**UNITED STATES DEPARTMENT OF THE INTERIOR
 OFFICE OF HEARINGS AND APPEALS
 INTERIOR BOARD OF LAND APPEALS**

COP COAL DEVELOPMENT COMPANY,

Appellant.

(Appeal of February 17, 2011 BLM decision Approving Minor Modification to Resource and Recovery and Protection Plan (R2P2), adding an extra entryway on the northwest edge of the 4th Left North Pillar Section, Change No. 3, Castle Valley Mine No. 4 (Castle Valley Mining, LLC, Operator)

IBLA 2012-0138

**PETITION FOR STAY PENDING
 APPEAL (43 C.F.R. 4.21)**

[Oral argument requested]

3482 (UTG 023)
 UTU-73342 (LMU)
 U-020668 (Lead Coal Lease)

Pursuant to 43 C.F.R. § 4.21, C.O.P. Coal Development Company, (“COP”), hereby petitions for a stay, pending appeal, of the decision of the United States Department of the Interior, Bureau of Land Management, Green River District, Price Field Office (the “BLM”), dated February 17, 2012, (the “February 17, 2012 Decision”), approving Castle Valley Mining

LLC's ("Castle Valley" or "CV") modification to Resource Recovery and Protection Plan ("R2P2"), 4th Left Pillar Section, Castle Valley Mine #4, also known as the "Bear Canyon Mine" (the "Mine"), with reference to the above-identified LMU and coal leases (collectively, the "Bear Canyon LMU" or "LMU").

A copy of the January 6, 2012 Decision was never served upon COP or its counsel. Nevertheless, A copy of the February 17, 2012 Decision, which references the January 6, 2012 Decision, and by which COP first learned of it, is Tab 1 in the CD-Rom included with this Petition.¹

I. BACKGROUND FACTS

In January, 2008, an involuntary bankruptcy case was commenced against C.W. Mining Company ("CWM"), in the United States Bankruptcy Court for the District of Utah, Case No. 08-20105. Kenneth A. Rushton was ultimately appointed Chapter 7 Trustee (the "Trustee"). *Declaration of Charles Reynolds in Support of Petition for Stay, dated December 15, 2011* ("*Reynolds Dec.*") at Tab 6. A copy of that Declaration is included at Tab 2.

COP is the fee owner of certain real property within the Bear Canyon Logical Mining Unit (LMU) UTU-73342, including the property on which is located the Bear Canyon Mine or, as identified in the BLM Decision, Castle Valley No. 3 and No. 4 Mines (the "Mine"). COP is

¹ In the interest of judicial economy, particularly since the referenced documents and exhibits have been attached to numerous previous pleadings before this Board, all exhibits to this Petition are included on the CD Rom, submitted simultaneously with this Petition. Hard copies of most of these exhibits are attached to COP's Statement of Reasons filed in IBLA 2012-137. References to the exhibits in this Petition, therefore, will indicate that they are "included as Tab X", meaning that they are included on the accompanying CD.

also the fee owner of certain coal and is the lessee under various Federal coal leases within the Bear Canyon LMU, some of which are identified below. *Reynolds Dec.* at 7.

In March of 1997, COP and CWM entered into a “Coal Operating Agreement”, whereby COP granted to CWM the right “to operate and control” the Mine for purposes reasonably incidental to mining for a limited period of 25 years. In CWM’s bankruptcy case, the Trustee sold CWM’s rights under the Coal Operating Agreement to Castle Valley Mining, LLC (“Castle Valley”), the applicant in this matter. COP and others objected to the motion, and a trial was held. *Reynolds Dec.* at 8. A copy of the “Order Authorizing Sale of Mine Assets Free and Clear of All Liens...” (the “Sale Order”), entered by the Bankruptcy Court on August 4, 2010, is included as Tab 3 (including a copy of the Operating Agreement). Included as Tab 4 are relevant pages of the transcript of the hearing on the objections to the Sale Order.

On or about December 14, 2010, only ten days after the Sale Order was entered by the Bankruptcy Court, the BLM (Utah State Office) received an R2P2 modification request from Castle Valley, related to the Mine. The proposed modification sought to change the layout in the Tank Seam of the Mine by changing the mining method from longwall (which had been approved in July, 2006) to room-and-pillar mining, resulting in a change to the layout, timing, and recoverable tonnage projection for the entire LMU, UTU-73342, which includes Federal coal leases SL-025431; SL-069985; UTU-024316; UTU-024318; UTU-46484; UTU-020668; UTU-38727; UTU-51923; UTU-61048; and UTU-61049. On January 7, 2011, the BLM (Utah State Office) issued a decision approving the requested modification (the “January 7 Decision”), a copy of which is attached hereto at Tab 5. *Reynolds Dec.* at 9.

On February 4, 2011, COP timely appealed the January 7 Decision, which appeal has been assigned IBLA Nos. 2011 112 (“Appeal 2011-112”). In its Statement of Reasons and Petition for Stay in that appeal, COP argued that the January 7 Decision violated COP’s due process rights because even though COP is the landowner and Federal lessee, the modification (which potentially impacts COP’s rights and responsibilities) was approved without its input, approval or consent.

On or about July 29, 2011, Castle Valley submitted a request for a revised mining plan for the Mine, seeking further modification to the R2P2, affecting the mining layout and timing of the continuous miner sections in certain coal areas and leases in the “Tank Seam” of the Mine. COP was not made aware of the application, either by Castle Valley or the BLM. *Reynolds Dec.* at 10.

On or about November 2, 2011, the BLM issued a decision, approving Castle Valley’s request. That decision was appealed and assigned appeal number IBLA-2012-0039. COP first learned of Castle Valley’s application and the decision when the Office of the Regional Solicitor submitted a copy of the decision in Appeal 2011-112 (consolidated) on or about November 8, 2011, and served a copy on counsel for COP. *Reynolds Dec.* at 10.

On or about September 27, 2011, Castle Valley submitted another request for modification of the R2P2. COP was not aware of that request, nor the resulting BLM Decision issued on November 17, 2011. *Reynolds Dec.* at 11. After learning of it, COP timely appealed that decision (IBLA 2011-52).

On or about January 6, 2012, the BLM granted Castle Valley's application (of unknown date) to turn the development of 4th Left (the "B" section) by 90 degrees, creating what the BLM calls "4th Left North". This decision was been timely appealed (IBLA 2012-137). COP only learned of the January 6, 2012 Decision when it was mentioned preliminary to BLM's February 17, 2012 Decision granting Castle Valley's request to add an extra entryway on the northwest edge of the new 4th Left North panel. That Decision has also been timely appealed (IBLA 2012-138) and is the subject of the instant petition for stay.

On March 15, 2012, the IBLA granted BLM's motion to consolidate all of these related appeals that had been filed at that time, i.e. prior to the filing of IBLA 2012-137 and -138. With their Statement of Reasons, COP has filed motions to include -137 and -138 in the larger group of consolidated appeals. The abbreviated term, "BLM Decisions," as used in the Consolidated Appeals (and herein), is expanded to include all of these Decisions.

COP has appealed the BLM Decisions, based primarily on the fact that as a landowner and Federal lessee, it is entitled to certain due process rights with respect to the Mine and because BLM has violated its own regulations numerous times in approving the various Decisions described above. COP's property and contract rights are being completely ignored by both Castle Valley and the BLM, as decisions are made—without notice to COP—concerning the Mine and the R2P2, decisions that have potential economic impact upon COP and its property interests, rights and obligations. COP has identified similar due process violations in its other recent appeals related to the Mine and the operation of Castle Valley, and it appears that Castle Valley and the BLM continue to make critical decisions with respect to the Mine and the

mining process that impact COP, without providing basic due process: the right to notice and a hearing; and without due regard for the statutory and regulatory requirement of achieving maximum economic recovery (MER) of the coal and avoiding waste of this valuable resource. COP therefore seeks a stay of the BLM Decision pending this appeal in order to remedy the violation of its due process rights and to redress damage to its financial interests in the coal in this LMU resulting from violations of BLM's regulations.²

II. ARGUMENT: THE BLM DECISION SHOULD BE STAYED PENDING APPEAL.

Pursuant to governing regulations, a stay pending appeal is appropriate when the appellant can demonstrate:

- (i) The relative harm to the parties if the stay is granted or denied,
- (ii) The likelihood of the appellant's success on the merits,
- (iii) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (iv) Whether the public interest favors granting the stay...

43 C.F.R. § 4.21. In the present case, all four elements are satisfied. The following sections elaborate.³

² COP further incorporates the facts and exhibits set forth in its Statement of Reasons filed in the present appeal, 2012-137, by reference, in order to avoid duplication.

³ While they are not presented in numerical order, the following discussion addresses each element of Section 4.21 in a logical fashion.

A. COP is Likely to Succeed on the Merits of its Appeal.

1. COP has substantial property interest in the Mine and the Coal Leases. The BLM Decision was issued without notice to COP and, therefore, in violation of its due process rights. Moreover, BLM has clearly violated its regulations in several instances in approving the various Decisions including and stemming from the January 7, 2011 Decision.

The thrust of COP's appeal is twofold: (1) that the instant BLM Decision, as well as the January 7, 2011, Decision and other decisions related to the modification of the R2P2, were issued in violation of COP's due process rights and should therefore be stayed and reversed, and (2) that those same Decisions violated both BLM regulatory requirements and the public policy represented therein. As the following paragraphs illustrate, COP has a high likelihood of prevailing on these points in this appeal (and the other Consolidated Appeals) because, although it has genuine and valuable property interests at stake, it was deprived of notice and an opportunity for a hearing related to its property interests and was, therefore, completely excluded from the decision-making process affecting those interests. What is more, BLM is required, but has failed to assure maximum economic recovery (MER) of the federal coal resource and has, rather, systematically failed to properly apply and enforce regulations designed to ensure compliance with this requirement, as set out in COP's Statement of Reasons in this appeal (incorporated here by reference).

The fundamental, constitutional concept of "due process of law" mandates that property interests will not be deprived—or even "negatively affected by governmental actors"—without providing proper notice and "pre-deprivation hearing." *See Marcus v. McCollum*, 394 F.3d 813,

818 (10th Cir. 2004). The government cannot—or at least should not—negatively impact property interests without those basic requirements of notice and a hearing.

In the present case, COP is the owner of fee coal within the LMU – including coal in the Tank Seam and Hiawatha Seam. Further, COP is the primary Federal coal lessee in the LMU. While Castle Valley may be the current operator of the Mine, that will not last forever. The Operating Agreement under which Castle Valley derives its temporary rights to operate the Mine (as transferred from the CWM Trustee) will expire, by its own terms, in 2022. If Castle Valley defaults, its rights may terminate sooner. In any event, the right to mine the coal from the Mine will revert back to COP. COP therefore has a vested interest to ensure that mining is carried out in the most effective and efficient manner possible, focusing on MER and minimizing, as much as possible, the amount of coal that may be abandoned in the Mine through a particular mining method. (*See various regulations, infra*). Given that COP will have both rights and responsibilities in this coal when Castle Valley's term interest expires, it is hardly an unreasonable expectation for COP to want to be involved in decisions affecting those rights and responsibilities in the interim. These are rights that the BLM's own regulations, as well as the Constitution, were designed to protect.

Applications have been made for modification to the mining methodology without notice to COP and an opportunity for COP to evaluate how the decisions may affect its property interests. And as Mr. Reynolds has testified, , the proposed changes in mining layout have significant potential impact on COP. *Reynolds Dec.* at 13 (discussed more fully below). Further, as COP points out in its Statement of Reasons in IBLA Appeal 2011-039 and -052 (Consolidated

with IBLA 2011-111 and -112), the modification to the R2P2, generally, does *not* capitalize upon or ensure MER of the coal, and also adversely affects COP's property rights. The actions of Castle Valley and the BLM are unilateral, fail to provide COP with fundamental due process considerations, and stand in violation of the statutory and regulatory requirements for attaining MER of the available coal.

Further, COP, as lessee, remains under a host of obligations under its lease, including royalty obligations. The Federal regulations in Title 43 place the responsibility for mine operations, for "diligent development and continued operation," for payment of royalties, and for other obligations, upon the "operator/lessee" of the mine. *See, e.g.*, 43 C.F.R. §§ 3481.1 and 3483.1 ("Diligent development and continued operation requirement," requiring an "operator/lessee" to achieve and maintain diligent development of Federal coal leases). The consequence for failing to satisfy those obligations, including achieving and maintaining diligence, can be termination of the Federal coal leases. *See* 43 C.F.R. § 3483.2.

In many cases, the operator and lessee are the same entity. The regulations, however, contemplate that they may be distinct entities. *See* 43 C.F.R. § 3480.0-5(a)(27) ("Operator/lessee means lessee, licensee, and/or one conducting operations on a Federal lease or license under a written contract or written agreement with the lessee or licensee." Emphasis added). In the present case, they are distinct. COP is the owner of fee coal and the lessee under many of the above-referenced Federal coal leases. COP then subleases to the mine operator—formerly CWM and now Castle Valley. Under the regulations, however, *both* Castle Valley and COP have obligations, responsibilities, and rights under the Federal coal leases.

Despite the fact that COP is still the lessee under the Federal leases in question and has rights and responsibilities with respect to those leases, Castle Valley filed the request for modification without notice to COP. Likewise, despite COP's clear legal interest in this coal, the BLM granted the request but did not give COP the opportunity to present any objections or have a hearing on the matter.

As things now stand, COP is bound by the BLM Decision and by whatever obligations or consequences may arise because of it, including the possible impact on the Federal coal leases and COP's rights thereunder, as well as other rights COP may have. The BLM Decision puts COP in the untenable position of having rights and responsibilities under the Federal coal leases but no voice in decisions affecting those leases.

Simply stated, Castle Valley, as an operator and sublessee, cannot undertake to modify or alter operations under those leases with the BLM (such as modifying the R2P2) without at least notice to COP. COP is not the standard assignor of operating interests; it retains a future right to the minerals, both to the federal minerals it has leased and to its own fee minerals. The R2P2 itself now purports to extend mining operations well beyond the term interest under which Castle Valley now operates and into the period when COP will be left with whatever is left when Castle Valley's term interest expires. To exclude COP from decisions affecting that future interest is a violation of not only of due process but also of fundamental contract principles. It is tantamount to an unconstitutional taking by adversely affecting property interests without notice or compensation. It warrants a stay and, ultimately, the reversal of the BLM Decision so the process can be conducted fairly.

2. The Sale Order from the Bankruptcy Court, contrary to the Board's conclusion in Appeal 2011-112, actually provides for COP's participation in the R2P2 determination process.

In its Order denying COP's Petition for Stay in Appeal 2011-112, the Board made reference to Findings of Fact and Conclusions of Law entered by the Bankruptcy Court in the context of the Trustee's motion to sell to Castle Valley the right to mine under the COP Operating Agreement. The Board cites one comment from those Findings and Conclusions where the Bankruptcy Court indicates that COP would not have "veto power" over any R2P2 applications submitted by Castle Valley. The Board appears to interpret that statement as meaning that COP would have no right to notice of any proposed modifications and no right to even participate in the application process or decision-making. That interpretation is overbroad, incorrect, and does not address the full scope of the Bankruptcy Court's ultimate decisions embodied in the Sale Order (Tab 2).

After the entry of the Findings and Conclusions, the Trustee proposed a detailed Sale Order. Objections were filed (by COP and others) and a hearing was held to address those objections. (*See Transcript*, Tab 3). In its objection to the proposed order, COP suggests that paragraph 10(a) contain language permitting COP to participate in legitimate proceedings before federal agencies with respect to the R2P2. (*Transcript*, at 8.). In response, the Court simply clarifies that it will listen to the party's concerns and objections and ultimately make its own determination as to the language of the order. (*Transcript*, at p. 9.)

The hearing on the objections was conducted on August 3, 2010. On August 4, 2010, the Court entered the Sale Order. The court revised paragraph 10 from the version of the Sale Order

proposed by the Trustee, taking COP's objections into account, and ultimately ordered as follows:

COP has no veto power or other right of control as to the contents or approval of updated resource recovery and protection plans ("R2P2's"). *"Nothing in this Order shall be interpreted to prevent any party from participating in any proceeding related to the R2P2 or amendments."*

(Sale Order (Tab 2) at p. 4, emphasis added).

The import of this language is clear. While COP agrees that it may not "veto" a proposed R2P2, it certainly has the right, as ordered by the Bankruptcy Court, to participate in any proceedings before the BLM related to the R2P2 or its amendments or modifications. It has a right to have its objections voiced and heard. It has a right to be advised and notified of proposed modifications that affect its property rights. It has a right to express to the BLM the concerns, as a property holder, of potential impact the BLM's decisions might have on those property interests. The Sale Order clearly does not preclude COP from participation. The Bankruptcy Court, after hearing COP's Objection, specifically included language in the Order that would protect those rights. Castle Valley and the BLM have completely ignored those same rights that the Bankruptcy Court took such pains to protect. That willful exclusion of COP is in derogation of COP's constitutional due process rights and cannot be countenanced.⁴

⁴ In that same Order, the Board cited to *Exxon Co., USA*, 156 IBLA 387, 400 n.9 (2002) to support its conclusion that no notice was necessary to COP and that no regulations had been cited requiring it. The footnote from *Exxon* reads as follows: "Although Exxon argues that MMS was obligated to communicate with Exxon, as lessee, not just Shell, concerning lease matters, Exxon's designation of Shell as the operator of affected portion of lease OCS-G 4733, as well as of the proposed High Island Block A-6 Unit, authorized Shell to act on Exxon's behalf regarding the lease and unit."

The *Exxon* case is distinct from the present case in at least one important way. Here, Castle Valley may be the operator, but they are certainly not the designee of COP. Castle Valley purchased the right to Mine from the

The bankruptcy court addressed this issue again in a recent hearing and clarified that its prior ruling on the Sale Order (and the related Findings and Conclusions) does not preclude COP (or ANR, for that matter) from participation in the administrative process.

It would be nice if our discussion today resulted in a clarification of the Court's position. I think the Order is very clear on the assumption and the Sale Order that while COP and ANR don't have any veto power, certainly they are permitted and entitled to talk to governmental agencies, raise issues with governmental agencies. If Rhino [Castle Valley] thought that my Sale Order was going to muzzle ANR and COP, I don't know where they would have gotten that impression. But as I've said, the Order was clearly intended to try and limit harassment; but certainly raising legitimate concerns with governmental agencies is different. ...

Transcript, 2/13/12 Hearing, relevant portions of which are attached in the CD as Tab 6.

In appealing these Decisions, COP is seeking redress for its genuine and "legitimate concerns," as expressly contemplated by the Bankruptcy Court.

3. BLM violated its own regulations in several ways in approving the various modifications to the R2P2, sometimes after unauthorized mining changes had already been made in the mine.

BLM's actions in approving the Decision in question, as well as the related Decisions at issue in the Consolidated Appeals, also violated BLM regulations in several instances, including (1) taking arbitrary and capricious action in approving changes to the R2P2 based on hypothetical assumptions whose falsity could easily have been established, (2) not properly accounting for (and possibility obscuring) the 25% reduction in coal recovery inherent in a shift

Trustee, but COP strenuously objected. While COP acknowledges that in acquiring CWM's contract rights, Castle Valley stepped into CWM's shoes and was authorized to act on behalf of COP with respect to the Mine, it emphasizes that this authorization came with specific and binding time limits and, accordingly, leaves specific residual interests in COP that cannot be ignored. The question of whether specific regulations require notice to COP is irrelevant because the Constitution requires it. Fundamental principles of due process and basic fairness also require it. COP is an entity with a property interest affected by the application and the potential decision. It is a question of due process, rather than specific regulatory requirements.

from longwall mining to room-and-pillar mining while still asserting that MER would be achieved, (3) allowing Castle Valley to “cowboy” the mine with its own decisions and actions before applying for—let alone receiving—approval from the BLM for the changes; and (4) approving such changes after the fact without penalty or, in all cases but one, even warning. Moreover, when error number (1) above was in fact discovered, the BLM made no effort to revise the R2P2 back to where it might properly have achieved MER.

IBLA precedent holds that changes in mining operations without prior approval constitute a *per se* failure to achieve MER. *Cyprus Shoshone Coal Corp.*, 143 IBLA 308. Yet, BLM has repeatedly allowed this practice without penalty, approving such changes after the fact. COP submits that this point alone warrants a finding of likelihood of success on the merits and warrants a stay of the Decision appealed from.⁵

Moreover, the January 2011 Decision approving the change from long-wall to room-and-pillar mining was premised on the hypothetical assumption that a sandstone channel extended throughout the Tank Seam, justifying the change to room-and-pillar mining. This assumption was not correct – a fact of which Castle Valley was aware, and which BLM should have (and easily could have) ascertained. The sandstone channel rose into the ceiling, disappearing into the rock strata above the coal, leaving three full remaining panels of coal unaffected and a fourth only barely affected. BLM’s decision in this regard was therefore arbitrary and capricious, without supporting facts, but nonetheless allowed the shift to room-and-pillar mining and its

⁵ To save space in this Petition, COP does not fully reproduce here all of its arguments on violations of BLM regulations by the Decision(s) appealed from. They are presented in full in the Statement of Reasons in this appeal and are incorporated here by reference.

inherent 25% reduction in recoverable coal, as well as the potential loss of coal, both in the Tank Seam and the Hiawatha Seam, due to the loss of support structure inherent in the creation of “4th Left North” pillar section and the new entry to its northwest edge. Castle Valley’s expert report on this point offers some promising new information on this point, but this is an important enough issue that COP would like time to verify the conclusions drawn and, in a requested hearing, have the opportunity to cross-examine. This decision is therefore in violation of the MER requirement and should therefore be stayed, set aside and remanded.

The change in mining pattern and method also adversely affect the eventual recovery in the lower Hiawatha Seam, having been made with apparent disregard for the placement of support pillars relative to the planned mining below. This also will result in much less efficient recovery of coal from the Hiawatha Seam, another violation of the MER standard.

Detailed arguments on the above points are set out in COP’s Statement of Reasons in this appeal, and are incorporated here by reference, in the interest of space and judicial economy. Suffice it to say, however, that BLM’s actions in this series of decisions affecting the Tank Seam clearly violate the MER standard of the Mineral Lands Leasing Act of 1920 and its supporting regulations. These decisions should therefore be set aside. These clear violations make it likely that COP will indeed prevail on the merits of this appeal, warranting a stay in the interim to avoid further damage to recoverability of coal remaining in the Mine.

B. **Absent a Stay Of The BLM Decision, The Harm To COP Will Be Irreparable and Clearly More Detrimental to COP than any Potential Harm Castle Valley might Suffer from the Proposed Stay.**

The next two elements of Section 4.12 can be combined: The harm to COP would be irreparable if no stay is granted; and the balance of harms weighs in favor of COP.

Significantly, the harm at issue here is two-fold, including harm both to COP's due process rights in connection with its long-term property interests and to COP's immediate economic interests in the form of lost royalties due to inefficient mining methods leaving recoverable coal in the ground.

The harm to COP that arises from the modification to the R2P2, generally, is outlined fully in COP's pleadings and Declarations in the Consolidated Appeals, as well as IBLA 2012-137 and -138, and the attachments to those Statements of Reasons, particularly the various Declarations of Charles Reynolds.⁶ Specifically, it is COP's position that the proposed modifications violate the MER requirement in that they result in less efficient mining practices, necessarily abandon significant amounts of coal in the mine, and generally jeopardize full recovery of the remaining coal reserves, as discussed below.⁷

If Castle Valley is permitted to proceed in the method they have proposed, in both the original R2P2 modification and this recent "minor" modification, the irreparable harm to COP will be devastating and irreparable. The BLM suggests that it has expert reports that indicate

⁶ A copy of Mr. Reynolds' March 20, 2012 Declaration, filed in support of the Statement of Reasons in Appeals IBLA 2011-137 and -138 is included as Tab 7, for the record and for the Board's convenience.

⁷ To save space in this Petition, COP does not fully reproduce here all of its arguments on violations of BLM regulations by the Decision(s) appealed from. They are presented in full in the Statement of Reasons in this appeal and are incorporated here by reference.

that the retreat mining method will have no significant impact on stresses, the ability to continue with multiple seam mining, and the compatibility with long-wall mining. If so, however, these reports are not accurate. The ninety-degree turn introduced by the forming of the “4th Left North” necessitates an abandonment of otherwise recoverable coal due to insufficient local roof support, but also derogates the support pattern necessary for optimal eventual recovery of the coal in the lower Hiawatha Seam. The application by Castle Valley appears to rely, at least in part, upon the theory that previous multiple-seam retreat mining was successful in the Mine. As Mr. Reynolds testifies, based on his years of experience with the Mine, such is not the case, precisely because of such errors in the support structure. Previously, some reserves were lost in the bottom seam, due to improper panel layout between the two seams. The proposed layout in the Tank seam (the upper seam) creates an untenable risk of (a) precluding future longwall mining in the Hiawatha (lower) seam; and (b) consequently abandoning many millions of tons of coal that would be rendered unrecoverable. Thus, at the end of Castle Valley’s lease in 2022, Castle Valley will have abandoned, or caused to be unrecoverable, millions of tons coal that could have been recovered had the longwall method been properly employed. That risk constitutes irreparable harm to COP, as landowner, owner of fee coal, and lessee of Federal Coal.

On the other hand, the only harm that would come to Castle Valley by issuing the stay would be the economic inconvenience of putting a longwall miner back in place, an action that would not have been necessary had they not determined to modify the R2P2 to facilitate their short term interests at the expense of maximizing overall total recovery. In other words, they would suffer no harm that they themselves did not cause, no harm that is not the direct result of

their own inappropriate decisions. Castle Valley would then continue mining in the same manner as before the major (and minor) changes to the R2P2 were approved.

Castle Valley may argue economic harm, even impossibility, but any harm to Castle Valley is ultimately of its own making. It is far more important for this tribunal to honor COP's due process rights and property interests and to demand compliance with properly promulgated regulations in furtherance of Congress' directives to secure "maximum economic recovery," MER, of the coal. To do less would be to excuse violations of these priority public policies. In sum, the principal harm to COP is the injury to its due process rights and the economic harm in lost royalties from the coal left unrecovered and unrecoverable under the changed mining regimen and plan, and these interests weigh substantially more in the judicial scales than whatever harm Castle Valley could possibly suggest from continuing its operations without these current modifications, particularly given that Castle Valley has shown such disregard to following the established R2P2 requirements.

On the due process and property interest question, COP simply seeks a seat at the table, so to speak, as is its constitutional right. On the question of violation of BLM's regulations, COP simply seeks to have the duly promulgated and enforceable regulations actually enforced, thereby providing the economic benefits bargained for, both by the United States and by COP. Neither of these objects is unreasonable or even a stretch. Either should be the normal expectation of a citizen or corporation in this country. On the other hand, to allow Castle Valley to continue mining in the manner permitted by this BLM decision would do irreparable damage to both of those rights, allow Castle Valley to continue to benefit from its cavalier and self-

servicing course of conduct, and waive or look the other way at BLM's negligent enforcement of the regulations it is bound to follow. The only way to avoid such constitutional injury is to stay the effectiveness of the BLM decision, reverse it, then address it again with COP's active involvement as a contributing, active player, in the common interests of all parties, and with harm to no party's legitimate interests.

C. **The Granting Of the Stay Is Consistent With Public Interest.**

While often the least considered element in this context (or related injunctive relief), perhaps the clearest element in this case is the fact that the issuance of the stay is in furtherance of the public interest, as alluded to above.

To allow an administrative decision to proceed when the decision was obtained in violation of constitutional due process rights is problematic on a public scale because it dilutes everyone's due process rights. Federal courts generally hold that preventing a violation of due process (even in the similar context of injunctive relief), is an important public interest. *See Allstates Humane Game Fowl Organization, Inc. v. City of Jacksonville*, 2008 WL 2949442, *13 (M.D. Fla. 2008) ("The public interest in maintaining due process is considerable and has been clearly established. To deny the injunction would allow the Defendants to violate Plaintiffs' basic freedoms enjoyed under the Constitution.").

This result is intuitive and almost goes without saying. The citizenry is interested in seeing that constitutional rights are preserved, even if it means an inconvenience to others by staying the effectiveness of a decision. Those constitutional rights—in the public eye—are paramount to any interest that Castle Valley might have in proceeding forward with mining

activities in the manner they desire. Castle Valley's request involves no question of mine safety or any benefit to the public other than its own economic interest. The constitutional interests of COP in assuring that the process is carried out correctly is significantly more important and consistent with public interest.

Similarly, when the BLM can "cut this much slack" in the enforcement of its coal mining regulations, the regulations and the public policy they represent become meaningless. MER is a requirement for the BLM to ensure that this valuable public resource is optimally recovered and not wasted, as Congress intended in passing the Mineral Lands Leasing Act of 1920, and as implemented in the BLM regulations. This is the public policy, and it is derogated by BLM's lax enforcement of those regulations.

Thus, the stay is consistent with the public interest and should be granted.

CONCLUSION

Having satisfied all elements of Section 4.21, COP has established its entitlement to a stay of the implementation of the BLM decision during the pendency of this appeal.

DATED this 22nd day of June, 2012.

SNOW, CHRISTENSEN & MARTINEAU



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on the 22nd day of June, 2012, a true and correct copy of the foregoing was delivered as noted below, in accordance with the applicable rules, to the following:

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