

C/015/025 Incoming

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OCT 09 2012

DIV. OF OIL, GAS & MINING

Attorneys for COP Coal Development Company

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

COP COAL DEVELOPMENT COMPANY,

Appellant.

(Appeal from a decision by the Utah State Office, Bureau of Land Management, approving a Modification of the Resource Recovery and Protection Plan for the Continuous Miner Pillar panels in the Castle Valley nos. 3 and 4 Mines within the Bear Canyon Logical Mining Unit. UTU-73342)

IBLA 2012-039, 052 (and consolidated cases)

**MOTION FOR RECONSIDERATION  
and  
MOTION FOR REFERRAL TO AN ALJ  
FOR SUBMISSION OF EVIDENCE**

**[Oral argument requested]**

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

On August 6, 2012, the Board ruled on the merits of the above-identified appeals (2012-039 and -052), having earlier, on June 21, 2012, ruled on the merits of the underlying appeals in IBLA 2011-111 and -112. On August 20, 2012, COP filed a Motion for Reconsideration and a Motion for Referral for Fact-Finding in the -111 and -112 appeals (hereinafter Motion for

File in:

C/0150025 Incoming  
Date 10092012 Refer to: Expandable

- Confidential
- Shelf
- Expandable

Reconsideration). Two other related appeals, IBLA 2012-137 and -138, are still pending, together with Petitions for Stay of the underlying BLM decisions. Motions to Consolidate were filed among all of these six appeals. On March 15, 2012, the Board issued an order in 2011-111, consolidating -111, -112, -039, and -052. The motion to consolidate -137 and -138 with those consolidated appeals is still pending.

Despite the consolidations, the Board ruled separately in the two groups of cases (2011-111 and -112) and (2012-039 and -052), and there has been no ruling in 2012-137 and -138, either on the merits, on the petition for stay, or on the motions to consolidate these two appeals with the others mentioned here.

As discussed in its Motion for Reconsideration in appeals 2011-111 and -112, COP believes there have been significant misrepresentations of material fact on which both the BLM and the IBLA have relied in their respective decisions to date. For example, in the Board's Order of June 21, 2012, the Board observed that

Castle Valley indicates that the coal (mined by C.W. Mining, its predecessor) did not meet "existing contract specifications" because it exceeded the specified ash content and thus fell below the BTU/pound specified in the existing coal supply contracts. *The poor quality of the coal led directly to CWM's involuntary bankruptcy.*

182 IBLA 262-3, emphasis added. As described in COP's Motion for Reconsideration in 2011-111 and -112, the alleged "poor quality of the coal" and the fact that CW Mining was mining using the longwall method had nothing *whatsoever* to do with the involuntary bankruptcy. These same misrepresentations of material fact also affect the IBLA 2012-039 and -052 appeals as well as the IBLA 2012-137 and -138 appeals.

In its Motion for Reconsideration in 2012-111 and -112, COP fully responds to Castle Valley's argument about the saleability and quality of its coal, as well as its glib mischaracterization that CWM "longwalled itself into bankruptcy."<sup>1</sup> That response bears re-emphasis in this motion, and as explained in the following paragraphs, Castle Valley's assertions concerning the economic viability of long wall mining—which assertions were adopted by the Board—are incorrect. Because this false "fact" was relied upon in the Board's decision in this matter, it seriously weakens the foundation of that decision and urges for reconsideration.

While it is extraneous to COP's actual appeal before the Board, COP sets out below some chronology and procedural history of CW Mining's bankruptcy for the purpose of demonstrating that *the coal quality coming out of the Tank Seam using the longwall method had nothing to do with C.W. Mining's bankruptcy and was, contrary to Castle Valley's many aspersions, both adequate for all coal sale contracts and very much economically viable.*

As set forth multiple times in COP's appeal documents, the CWM bankruptcy was an involuntary bankruptcy proceeding, filed against it in January, 2008. Of the three petitioning creditors filing the involuntary bankruptcy, the largest (by a huge margin) was Aquila, Inc.<sup>2</sup> A copy of the Involuntary Bankruptcy Petition is attached hereto as Tab 1. Prior to the bankruptcy filing, Aquila obtained judgment against CWM for over \$24 million in the United States District Court for the District of Utah, (*Aquila, Inc. v. C.W. Mining*, Case No. 2:05-cv-00555 (Judge Tena Campbell)). A copy of that Judgment is attached hereto as Tab 2. The Judgment was

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<sup>1</sup>Castle Valley made this remark (and thereby created the related inference) in its Answer. Since replies to Answers are expressly discouraged in the IBLA rules and regulations, COP relied upon its requested hearing as the appropriate opportunity to clarify Castle Valley's misstatement. Because COP was not granted a hearing, COP must address the issue here, requesting not only reconsideration but a formal hearing to address that and related issues.

<sup>2</sup> Aquila's claim was over \$24 million. The other two claimants, combined, were less than \$25,000.

entered after a three-day bench trial in February 2007. The District Court entered extensive Findings of Fact and Conclusions of Law, a copy of which is attached hereto as Tab 3.

Several salient facts surrounding the Aquila lawsuit—and the general chronology of events—reveal why Castle Valley’s attempts to link CWM’s bankruptcy to its long-wall mining are both unfounded and improper. First, the Aquila lawsuit was filed in 2005 (as noted in the case number). CWM did not even submit its R2P2 seeking authorization to mine using the long-wall method until July 2006. *See Declaration of Charles Reynolds, dated March 20, 2012, at 2-4 and Ex. A.* A copy of Mr. Reynolds’ Declaration (and its Exhibit A) is attached hereto as Tab 4.<sup>3</sup> The Findings and Conclusions indicate that all of Aquila’s claims arose prior to 2005 when the lawsuit was filed. Second, in its lawsuit, Aquila claimed that CWM breached its contracts with Aquila by failing to supply the correct quantity and quality of coal. CWM raised defenses, including its argument that the *force majeure* clause in the contract excused its performance. CWM argued that the primary cause of failure to produce the coal was labor difficulties, specifically a “walkout” of approximately half of CWM’s employees in 2003. The court recognized the impact of the labor dispute but found that certain other geologic problems with the Mine during that same pre-2005 time frame (hot spots, mud, roof collapses) may have also had an impact. *See Findings and Conclusions, Tab 3, at 3-6.*

All of these events occurred *prior* to CWM even *requesting* authorization to mine with the long-wall method. Long-wall mining could not have possibly been an issue in the Aquila

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<sup>3</sup> Because of the size volume of the exhibits attached to Mr. Reynolds’ March 2012 Declaration, the attached copy has the full text of the Declaration but only Exhibit A. The full Declaration, with all Exhibits, is included in the CD of supporting documents, referenced in Note 6 below.

litigation because it had not yet commenced. Nowhere in the Findings and Conclusions does the District Court even mention long-wall mining.

The court in the Aquila litigation concluded, among other things, that the *force majeure* clause did not excuse CWM from performing its contract and awarded judgment against CWM for \$24 million on October 30, 2007.

With that judgment in hand, Aquila elected to file the Involuntary Bankruptcy Petition a few months later in early January, 2008, presumably as a method to enforce and attempt to collect on its judgment. Again, Aquila's judgment was based on its claims of breach of contract. Those claims had nothing whatsoever to do with long-wall mining. Based on these facts, therefore, Castle Valley cannot logically or legitimately assert that CWM "long-walled itself into bankruptcy," and any reliance on that argument by the Board is misplaced.

Likewise, if given the opportunity, COP will discredit Castle Valley's assertions that long-wall mining is inherently uneconomical in the Bear Canyon Mine. COP can and will show that the coal mined by CWM using long-wall equipment, even when it mined through the sandstone channel in Panel 3, was sold at a profit and met all quality requirements under the existing contracts.<sup>4</sup> Longwall mining was a viable method of mining coal in the Tank Seam, and would have recovered significantly more saleable coal than will the room-and-pillar method. The difference is that the royalty holders, COP and the United States, will not obtain royalty

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<sup>4</sup> As set forth in the various Declarations of Charles Reynolds in support of the related and consolidated appeals before the Board, CWM, as operator, was mining at a profit, using the long-wall method. *See, generally, Declaration of Charles Reynolds in Support of Statement of Reasons (IBLA 2012-039), dated Feb. 1, 2012; and Declaration of Charles Reynolds (IBLA 2012-039 and 052, consolidated), dated March 20, 2012, CD, Tabs 6 and 9.* Mr. Reynolds' declarations of that fact, under oath, should be sufficient. The books and financial records of CWM are currently in possession of the bankruptcy trustee and not freely accessible by COP. Nonetheless, if the Board grants this Motion for reconsideration and approves COP's application to have the matter heard before an ALJ, COP will attempt to review and obtain copies of those financial records from the Trustee, through the bankruptcy discovery process.

payments for unproduced, wasted coal, while Castle Valley will maximize its immediate profits (during the term of its operating interest) and will likely even benefit financially by leaving the reclamation efforts to the next operator of the Mine.<sup>5</sup>

In addition to this argument refuting Castle Valley's position concerning the quality of CWM's coal and the economic viability of longwall mining, COP incorporates, by this reference, all other arguments and documents filed in COP's Motion for Reconsideration and Motion for Referral for Fact-Finding of August 20, 2012, filed in 2011-111 and -112, in support of its present request that the Board reconsider its ruling in the above-captioned appeal.<sup>6</sup>

As further grounds for reconsideration, COP submits that BLM exceeded its authority in at least three instances *because those decisions affected the fee coal and not the federal coal only*: 1- in approving both the fundamental change in mining method from longwall mining to room-and-pillar mining, 2- in approving the change in mining development to permit the extension of the 1<sup>st</sup> North Mains ahead of the planned mining sequence schedule, which extended directly across COP's fee coal, and 3- in determining that the changes met the MER requirement. In all three of these instances, and indirectly on others of the appealed decisions, BLM's approval actions encompassed and authorized not only how the federal coal would be mined, but the fee coal also.

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<sup>5</sup> The tonnage production rates of the Mine are a matter of public record, and those documents are in the possession of the BLM. In January 2008, using the long-wall method, CWM was mining approximately 1.2 million tons per year. Documents available to COP indicate that Castle Valley, using room and pillar, is now producing approximately 500,000 tons per year, but Castle Valley has disputed that assertion in other pleadings before the Board. The fact of that dispute adds further weight to COP's request to submit the entire factual presentation to an ALJ, in order to have all the evidence not only presented, but also to afford the parties the opportunity to cross examine witnesses related to that documentary evidence, to give the fact-finder the complete evidentiary picture.

<sup>6</sup> Even though this appeal is consolidated with IBLA 2011-111 and -112, COP nonetheless provides, for the Board's reference (and to comply with the pertinent regulations), a CD with the relevant documents in support of this Motion, which documents have been previously provided to the Board in various appeals, including the Motion for Reconsideration filed in 2011-111 and -112. .

COP requests that the matter be considered and reviewed as a whole, rather than in piecemeal fashion, for the whole picture looks rather different now than when COP filed its Statement of Reasons in Appeal 2011-112. The related BLM decisions also on appeal in these cases addressing Castle Valley's continuing requests for R2P2 modification, have prompted additional helpful arguments and bases for COP's conclusions that all of these decisions are inappropriate. See particularly COP's arguments in its Statement of Reasons in IBLA 2012-137 and 2012-138, together with the exhibits attached thereto and/or referenced therein.

### CONCLUSION

As noted in its August 30, 2012, Motion for Reconsideration in the IBLA 2011-111 and -112 appeals, COP is aware of the extraordinary nature of requests for reconsideration before the Board, in general, and of this specific request in particular. As described herein, however, the facts of this case, the ongoing and growing nature of the harm to COP, and the patterns of subsequent BLM decisions affecting this Mine demonstrate that reconsideration of the Board's Order of August 6, 2012, is warranted. Moreover, certain highly material facts are in dispute, facts which the August 6, 2012, Order, as well as the BLM decisions appealed from, accepted as true or about which it accepted only one version of facts without the opportunity for presentation and cross-examination, material facts which COP believes to be in error. COP believes these circumstances and disputed facts warrant reconsideration and therefore also moves that the matter be referred to an Administrative Law Judge for findings of fact on the issues set forth herein, before the Board issues a final order.

In light of these subsequent developments, COP requests that the Board's Order of August 6, 2012, be reconsidered, that the matter be referred to an administrative law judge for

fact-finding, and that it then be consolidated and considered together with COP's Motion for Reconsideration in IBLA 2011-111 and -112, at the same time the Board is deliberating on the merits of the more recent appeals and petitions for stay in IBLA 2012-137 and 2012-138.

DATED this 4<sup>TH</sup> day of October, 2012.

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in black ink, appearing to read 'Kim R. Wilson', is written over a horizontal line.

Kim R. Wilson (Utah State Bar 3512)  
David L. Pinkston (Utah State Bar 6630)  
Scott H. Martin (Utah State Bar No. 7750)  
P. Matthew Cox (Utah State Bar 9879)  
Attorneys for COP Coal Development Company  
10 Exchange Place, Eleventh Floor  
P.O. Box 45000  
Salt Lake City, UT 84145  
(801) 521-9000

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, that on the 4<sup>TH</sup> day of October, 2012, a true and correct copy of the foregoing was delivered as noted below, in accordance with the applicable rules, to the following:

Interior Board of Land Appeals  
Office of Hearing and Appeals  
801 North Quincy St., Suite 300  
Arlington, VA 22203  
Fax: (703) 235-8349  
(Original, via *Federal Express*)

Corey Heaps  
CASTLE VALLEY MINING LLC  
2352 North 7<sup>th</sup> Street, Unit B  
Grand Junction, CO 81501  
(Via *U.S. Mail*)

Lawrence J. Jensen, Regional Solicitor  
John Steiger, Deputy Regional Solicitor  
U.S. Department of the Interior  
Office of the Regional Solicitor  
Salt Lake City Intermountain Region  
6201 Federal Bldg.  
125 S. State Street  
Salt Lake City, UT 84138-1180  
(Via *U.S. Mail*)

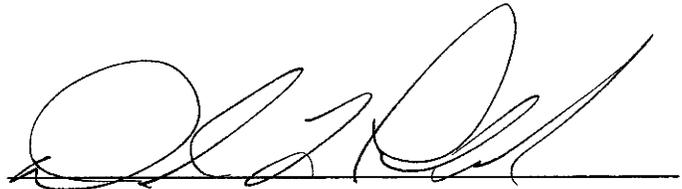
U.S. Department of Interior  
Bureau of Land Management  
Utah State Office  
440 West 200 South, Suite 500  
Salt Lake City, UT 84101  
(Via *U.S. Mail*)

George Hofmann  
PARSONS KINGHORN HARRIS, PC  
111 East Broadway, Suite 1100  
Salt Lake City, UT 84111  
(Via *U.S. Mail*)

A. John Davis, III  
HOLLAND & HART, LLP  
222 South Main Street, Suite 2200  
Salt Lake City, UT 84101  
(Via *U.S. Mail*)

Utah Division of Oil Gas & Mining  
1594 West North Temple, Suite 1210  
Salt Lake City, UT 84114-5801  
(Via *U.S. Mail*)

David E. Kingston  
3212 South State Street  
Salt Lake City, UT 84115  
(Via *U.S. Mail*)



**TAB 1**

**TAB 1**



Official Form 5 (12/07) -- Page 2.

Name of Debtor C. W. Mining Company  
Case No. \_\_\_\_\_

**TRANSFER OF CLAIM**

Check this box if there has been a transfer of any claim against the debtor or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).

**REQUEST FOR RELIEF**

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition. If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

*[Signature]* (General Counsel & Corporate Secretary)  
Signature of Petitioner or Representative (State title)  
Aquila, Inc. January 7, 2008  
Name of Petitioner Date Signed

x *Keith Kelly* Jan 8, 2007  
Signature of Attorney Date  
Keith A. Kelly, Roy Quinney & Webster P.C.  
Name of Attorney Firm (If any)  
36 South State Street, P.O. Box 45385, SLC, UT 84145-0385  
Address  
801-532-1500  
Telephone No.

Name & Mailing Address of Individual  
Chris Reitz  
20 W 9<sup>th</sup> Street  
Kansas City, MO 64105  
Signing in Representative Capacity

x \_\_\_\_\_  
Signature of Petitioner or Representative (State title)  
Mesa Air Corporation Co.  
Name of Petitioner Date Signed  
Name & Mailing Address of Individual  
Signing in Representative Capacity

x \_\_\_\_\_  
Signature of Attorney Date  
Name of Attorney Firm (If any)  
Address  
Telephone No.

x \_\_\_\_\_  
Signature of Petitioner or Representative (State title)  
House of Pumps, Inc.  
Name of Petitioner Date Signed  
Name & Mailing Address of Individual  
Signing in Representative Capacity

x \_\_\_\_\_  
Signature of Attorney Date  
Name of Attorney Firm (If any)  
Address  
Telephone No.

**PETITIONING CREDITORS**

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Aquila, Inc. 20 W. 9 <sup>th</sup> Street Kansas City, MO 64105	Judgment entered by 1 SDC, Utah 10/30/07	\$24,841,988.00 (less payment of \$275,000; + accruing post judgment interest)
Mesa Air Corporation Co. 1534 W. 105th St. West Valley City, UT 84119	Trade Debt	Amount of Claim
House of Pumps, Inc. 8510 S. Sandy Parkway Sandy, UT 84070	Trade Debt	Amount of Claim

Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement, and the name of attorney and petitioning creditor information in the format above. Total Amount of Petitioners' Claims

continuation of sheets attached

Official Form 5 (12/07) - Page 2.

Name of Debtor C. W. Mining Company  
Case No. \_\_\_\_\_

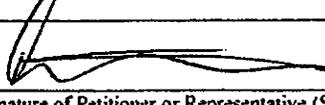
**TRANSFER OF CLAIM**

Check this box if there has been a transfer of any claim against the debtor or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).

**REQUEST FOR RELIEF**

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition. If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

<p>x _____ Signature of Petitioner or Representative (State title) <u>Aquila, Inc.</u> Name of Petitioner _____ Date Signed _____</p> <p>Name &amp; Mailing _____ Address of Individual _____ Signing in Representative _____ Capacity _____</p>	<p>x _____ Signature of Attorney _____ Date _____</p> <p>Name of Attorney Firm (If any) _____ Address _____ Telephone No. _____</p>
<p>x _____ Signature of Petitioner or Representative (State title) <u>Mycerals Equipment Co.</u> Name of Petitioner _____ Date Signed _____</p> <p>Name &amp; Mailing _____ Address of Individual _____ Signing in Representative _____ Capacity _____</p>	<p>x _____ Signature of Attorney _____ Date _____</p> <p>Name of Attorney Firm (If any) _____ Address _____ Telephone No. _____</p>
<p>x  _____ Signature of Petitioner or Representative (State title) <u>Pres.</u> <u>House of Pumps, Inc.</u> Name of Petitioner _____ Date Signed <u>1-7-08</u></p> <p>Name &amp; Mailing <u>Court Winigear</u> Address of Individual <u>12111 Tuxany Creek Way</u> Signing in Representative _____ Capacity <u>PRESIDENT</u></p>	<p>x <u>Keith Kelly</u> _____ <u>Jan. 8, 2007</u> Signature of Attorney _____ Date _____ <u>Ray Quinney + Nebeker</u> Name of Attorney Firm (If any) _____ <u>36 S. State St., PO Box 45385, SLC UT 84145-0385</u> Address _____ <u>801-532-1500</u> Telephone No. _____</p>

**PETITIONING CREDITORS**

Name and Address of Petitioner:	Nature of Claim	Amount of Claim
Aquila, Inc. 20 W. 9 <sup>th</sup> Street Kansas City, MO	Judgment entered by USDC, Utah 10/30/07	\$24,841,988.00 (less payment of \$275,000; + accruing post judgment interest)
<del>Mycerals Equipment Co. 1659 N. 3800 S. West Valley City, UT 84119</del>	<del>Nature of Claim Trade Debt</del>	<del>Amount of Claim</del>
House of Pumps, Inc. 8510 S. Sandy Parkway Sandy, UT 84070	Trade Debt	\$19,255.62
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

\_\_\_\_\_ continuation of sheets attached

Official Form 5 (12/07) - Page 3.

Name of Debtor C. W. Mining Company  
Case No. \_\_\_\_\_

TRANSFER OF CLAIM		
<input type="checkbox"/> Check this box if there has been a transfer of any claim against the debtor or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).		
REQUEST FOR RELIEF		
Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition. If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.		
Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.		
<p><i>[Signature]</i>                      x _____                      Signature of Petitioner or Representative (State title)  <u>OWELL PRECAST, L.L.C.</u>                      Name of Petitioner</p> <p><u>1/08/2008</u>                      Date Signed</p> <p>Name &amp; Mailing                      Address of Individual                      Signing in Representative                      Capacity</p> <p><u>Ryan Balls</u>  <u>P.O. 2347</u>  <u>Sandy, UT 84091</u></p>	<p><i>[Signature]</i> <u>1/9/08</u>                      x _____                      Signature of Attorney  <u>Olsen Shaway &amp; Nielson LLC</u>                      Name of Attorney Firm (If any)  <u>45 W. 10000 So. # 200, Sandy UT 84090</u>                      Address  <u>801-562-8855</u>                      Telephone No.</p>	
<p>x _____                      Signature of Petitioner or Representative (State title)</p> <p>Name of Petitioner _____                      Date Signed _____</p> <p>Name &amp; Mailing                      Address of Individual                      Signing in Representative                      Capacity</p>	<p>x _____                      Signature of Attorney _____                      Date _____</p> <p>Name of Attorney Firm (If any) _____                      Address _____                      Telephone No. _____</p>	
<p>x _____                      Signature of Petitioner or Representative (State title)</p> <p>Name of Petitioner _____                      Date Signed _____</p> <p>Name &amp; Mailing                      Address of Individual                      Signing in Representative                      Capacity</p>	<p>x _____                      Signature of Attorney _____                      Date _____</p> <p>Name of Attorney Firm (If any) _____                      Address _____                      Telephone No. _____</p>	
PETITIONING CREDITORS		
Name and Address of Petitioner: <u>OWELL PRECAST, L.L.C.</u> <u>16500 S. 500 W.</u> <u>P.O. Box 2347</u> <u>Sandy, UT 84091</u>	Nature of Claim Trade Debt	Amount of Claim \$3,440.00
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims <u>\$ 24,589,683.62</u>

\_\_\_\_\_ continuation of sheets attached

**TAB 2**

**TAB 2**

AO 450 (Rev. 5/85) Judgment in a Civil Case

# United States District Court

2007 OCT 30 3:30

Central Division for the District of Utah

DISTRICT OF UTAH

BY: DEPUTY CLERK

Aquila, Inc.

## JUDGMENT IN A CIVIL CASE

v.

C.W. Mining,  
d/b/a Co-Op Mining Company

Case Number: 2:05cv00555 TC

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

### IT IS ORDERED AND ADJUDGED

That judgement is granted in favor of the plaintiff: the court concludes that the defendant breached the Contract, and that the defendant has not shown that its failure to perform should be excused. The court awards Aquila, Inc. damages of \$24,841,988.

October 30, 2007  
Date

D. Mark Jones  
Clerk of Court

(By) Deputy Clerk

**TAB 3**

**TAB 3**

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

<p>AQUILA, INC.,  Plaintiff,  vs.  C. W. MINING, d/b/a CoOp Mining Company,  Defendant.</p>	<p>AMENDED FINDINGS OF FACT AND CONCLUSION OF LAW  Case No. 2:05-CV-00555 TC</p>
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**INTRODUCTION**

This diversity action arises out of a contract dispute between two companies, Plaintiff Aquila, Inc. ("Aquila") and Defendant C. W. Mining, Inc. ("CWM"). Aquila claims that CWM breached a coal supply contract ("the Contract") with Aquila and that Aquila was damaged by the breach. CWM has raised a number of defenses in support of its argument that its failure to fulfill its obligations under the Contract was excused. After a trial to the court, the court concludes that CWM breached the Contract, that CWM has not shown that its failure to perform should be excused, and that Aquila has suffered damages of \$24,841,988.

**FINDINGS OF FACT**

**A. The Parties**

Aquila is a Delaware corporation with its principal place of business in Kansas City, Missouri. Aquila provides electric utility service in Missouri and Colorado and natural gas utility service to its customers in Colorado, Iowa, Kansas, and Nebraska. CWM is a Utah corporation and is in the business of coal production in Emery County, Utah.

**B. The September 2003 Contract**

In April 2003, Aquila was seeking a source of coal for two of its coal-fired power plants located in Missouri—the Lake Road and Sibley plants. When CWM expressed an interest, representatives of the two companies, Elden Kingston for CWM and Phil Rogers for Aquila, met and on September 16, 2003, they executed the Contract, which Aquila had drafted. (Pl.'s Ex. 1.)

The term of the Contract ran from January 1, 2004, to December 31, 2006, although Aquila had an option to extend the Contract for an additional two years (through December 2008). The Contract required CWM to deliver 450,000 tons of coal during 2004 and 550,000 tons of coal in 2005 and 2006. If Aquila exercised its option to extend the Contract until 2008, CWM was obligated to deliver 550,000 tons of coal in each of the two additional years. The Contract required Aquila to pay CWM \$19.40 per ton in 2004, \$19.99 in 2005, \$20.59 in 2006, \$21.62 in 2007 and \$22.72 in 2008. The Contract included requirements concerning the quality of the coal to be delivered by CWM with certain price adjustments made based upon the quality. The Contract included a Force Majeure provision, which is discussed in more detail below.

**C. Performance of the Contract and Force Majeure**

CWM does not dispute that it failed to deliver the quantity and quality of coal required by the Contract. Specifically, CWM delivered only 127,807 tons of coal to Aquila in 2004 and 32,148 tons in 2005. After that, CWM delivered no coal to Aquila. Aquila is adamant that if CWM had tendered the amount of coal required by the Contract for those years, Aquila would have purchased it.

But CWM claims that its admitted failure to perform was legally excused. CWM's chief defense is that labor problems and geological problems interfered with its coal production and so

its performance was excused under the force majeure clause of the Contract. CWM also raises other defenses to excuse its performance.

1. The Labor Dispute

Charles Reynolds, a long-time employee of CWM and now the president, testified about CWM's coal production and the various problems CWM experienced during the life of the Contract. According to Mr. Reynolds, in 2001 and 2002, CWM's annual coal production was between 1 million and 1.2 million tons. CWM believed that it would produce the same amount in 2003 but would increase production in the next few years. CWM intended to use coal from its number one mine to fill its obligations to Aquila. At the time it entered into the Contract, the number one mine had approximately 1.8 million tons remaining, or about two year's worth of reserves. CWM also anticipated that in the future, it would be producing coal from its number three and four mines where CWM was just beginning to mine. (CWM's number two mine had been exhausted and was no longer in operation.)

CWM's labor problems began in September 2003 when between 50 and 70 of CWM's 120 employees walked out. Some left in protest over actions taken by CWM to discipline an employee, William Estrada, and some left because of dissatisfaction with wages and what the employees believed were inadequate benefits. But according to CWM, because CWM was a party to a collective bargaining agreement with the International Association of United Workers Union (hereinafter "IAUWU") which prohibited the workers from striking, CWM understandably believed that all labor issues would be quickly resolved.

CWM made efforts to hire replacement workers. Mr. Reynolds described those efforts:

We contacted the job service office, let them know we needed employees. We also contacted the employees that were still working, let them know if they knew of anyone needing—that was interested in working, that we'd make jobs available. We also published ads for jobs in the local newspaper. And we—we

contacted the company called price mine service, which is a mine contracting company that's in the Price area there to see if they had available contract workers.

(Transcript of Feb. 13, 2007 (hereinafter "Feb. 13 Tr.") at 166.)

CWM was able to hire between twenty-five and thirty replacement workers, six or eight of whom were full-time workers, the rest part-time. CWM, as part of an agreement that it reached with the IAUWU, prepared a list showing that as of April 1, 2004, it had only three job openings. (Pl.'s Ex. 67.)

## 2. Geological Problems

In addition to the labor problems, CWM was experiencing other problems which ultimately forced it to close the number one mine, losing the 1.8 million tons of coal it had anticipated producing for Aquila. First, in the fall of 2003, there were several roof collapses. Aquila claims that a shortage of manpower prevented CWM from fixing the roofs. But as a result of the roof collapses, in January 2004, the Federal Mine Safety and Health Administration (hereinafter "MSHA") ordered CWM to seal the number one mine. (The mine remains permanently sealed.)

At the time MSHA ordered CWM to seal the number one mine, neither the number three nor the number four mine was fully operational. But, as Mr. Reynolds explained, CWM still believed that it could meet all its contractual requirements. Mr. Reynolds testified:

Now, we figured we were still okay as far as our contracts, but the production was going to be low for the next 60 to 90 days because we had to—there's a block of coal out here in this seam that has no coal above it. There's no coal in the tank seam over that area. And so we figured we could go in here and retreat this coal without affecting any reserves and it would still give us some retreat mining to meet our contracts with. And so in December of 2003 and January 2004 we began developing down into that block to generate a block to replace the reserves we had lost in the number one mine.

(Feb. 13 Tr. 175.)

Soon, though, CWM ran into trouble in the number three mine. Mr. Reynolds testified that:

in mid-March, as we were developing south in the number three mine, we began to encounter coal that was extremely high temperatures. And as we continued to mine, we found we were mining into an area that appeared to be actively on fire. And so we made the decision to turn and try to go around that.

(Id. at 180.)

CWM was, at the same time, readying mine number four for production, but because the development was going slowly, CWM depended on coal from the number three mine to meet its requirements. But CWM was running into problems in the number three mine. Ken Defa, a long-time CWM employee, testified that as the miners advanced into the number three mine, “[t]he floor turned to mud, and we had a pretty tough time mining because of the muddy conditions.” (Transcript of Feb. 14, 2007 (hereinafter “Feb. 14 Tr.”) at 8.) According to Mr. Defa, he had never encountered so much mud in a mine throughout his thirty-eight years of mining. (Id. at 9.) The miners also ran into roof problems and hot spots in the number three mine.

Despite CWM’s claim that its labor problems caused its inability to perform under the Contract, the evidence leads to the conclusion that it was a combination of the closure of the number one mine, the muddy conditions and the hot coal in the number three mine, and the fact that CWM had not begun full production from the number four mine, that accounted for CWM having only three job openings in April 2004. In fact, Mr. Reynolds testified that:

the reason for the list being short at that time was we had encountered that hot spot in the one section, and we were working on the rock tunnel in the other section, and we had no other areas to put the employees to work at that time. And so that was the reason for the job list as short as it was.

(Feb. 13 Tr. 216.)

Moreover, the problems with the number three mine and the slow development of mine four appear to be the immediate reason that in April 2005, CWM notified Aquila that it was canceling the Contract. Mr. Reynolds testified, in response to a question why CWM cancelled the Contract, that CWM had again run into a hot spot in mine number three “[a]nd we could see there was no coal ahead of us in the near future that we could retreat . . . and we knew that we were not going to fill the—be able to fill the production levels because of that burnout and because of the hot zone there, that the reserves we thought we had were not there.” (Id. at 185.)

**D. Notice to Aquila**

**1. Written Notice**

On December 22, 2003, CWM sent a letter notifying Aquila that because of “labor problems . . . [a]s per section 13 ‘Force Majeure’ of our coal supply contract, we are notifying all of our customers that we may have to reduce our shipments over the next 60 to 90 days.” (Pl.’s Ex. 4.) CWM wrote Aquila on April 8, 2004, that “due to the continued labor situation . . . [i]t appears that our 2d quarter 2004 production will be approximately 50% of normal.” (Pl.’s Ex. 5.) On September 3, 2004, CWM sent Aquila “an update on the Force Majeure problems.” (Pl.’s Ex. 6.) CWM discussed progress in “the current employment situation” and expressed optimism that because of an agreement with the National Labor Relations Board, CWM would soon “begin to get our labor force back to normal.” (Id.)

Aquila wrote CWM on August 25, 2004, with questions about CWM’s “most recent notice of Force Majeure dated April 8, 2004 . . . .” (Pl.’s Ex. 7.) Specifically, Aquila asked for information about the amount of coal CWM expected to send Aquila “during the fourth quarter of 2004 and calendar year 2005, together with any other information that will enable Aquila to adequately cover expected short positions in a timely manner.” (Id.) Aquila also asked for

information about CWM's "plan to mitigate or remedy its labor disputes that could affect its ability to perform under the Agreement for the fourth quarter of 2004 and calendar year 2005."

(Id.)

In a letter dated April 18, 2005, CWM wrote Aquila that it was terminating the Contract:

[d]ue to the fact that we have not been able to fulfill our tonnage requirements, and it appears that this problem may be extended throughout a good part of this year, it was decided at a recent meeting of the board of directors, that we should cancel this contract as per paragraph 13B "If a Force Majeure continues for more than six (6) months then either party may terminate this Agreement by giving written notice to the other party without penalty or cost."

(Pl.'s Ex. 10.)

In the same letter, CWM offered to continue producing coal for Aquila under a new contract: "[w]e would still be very much interested in discussing a new coal supply agreement that would take into account our present production, then increasing our production when this Force Majeure problem is solved." (Id.) Aquila declined CWM's offer.

It is undisputed that in all of its written notices to Aquila, CWM did not refer to anything other than its labor problems as a force majeure event. In fact, in a letter CWM sent Aquila two months after it canceled the Contract, CWM described only the labor problem as a force majeure.

(Pl.'s Ex. 9.)

## 2. Actual Notice

Even though CWM did not send written notice to Aquila of any of CWM's other problems, Aquila learned about them. In March 2004, Phil Rogers visited the CWM mining operation. Charles Reynolds told Mr. Rogers that mine number one was closed, showed him maps of mines three and four, and took him to inspect mine three. On a later visit to CWM in June 2004, Mr. Reynolds took Mr. Rogers into both mines three and four and discussed with Mr.

Rogers the hot spots and muddy conditions. But no one from CWM told Mr. Rogers that CWM considered these to be possible force majeure events.

**E. Purchase of Cover Coal by Aquila**

When CWM did not deliver all the coal required by the Contract, Aquila purchased coal on the "spot market" in 2004 and 2005. Once Aquila had been notified in April 2005 that CWM was canceling the Contract, Aquila found another long-term supplier, Consolidated Coal Company. Because the market price for coal had gone up since Aquila and CWM entered into the Contract, Aquila paid more for the replacement coal it bought.

The terms of the Consolidated Coal contract were less favorable to Aquila than those of the Contract. In addition to costing more, the coal from Consolidated Coal had a higher sulfur content than the coal called for in the Contract, which forced Aquila to buy sulfur emission credits before it could burn the coal.

**CONCLUSIONS OF LAW**

CWM does not dispute that it failed to deliver the required amount of coal. But CWM asserts several defenses that it claims excuse its failure to perform. It is CWM's burden to establish its affirmative defenses by a preponderance of the evidence. Gennari v. Prudential Ins. Co. of America, 335 S.W.2d 55, 60 (Mo. 1960).<sup>1</sup> CWM's chief defense is that its performance was excused under the Contract's force majeure provision.

**1. CWM has Failed to Prove that its Performance was Excused as a Force Majeure.**

Section 12(A) of the Contract defines "force majeure" as "any and all causes beyond the reasonable control of the party failing to perform . . . ." (Pl.'s Ex. 1, § 13(A).) The event must

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<sup>1</sup>The Contract provides that it will be construed and interpreted using Missouri law. (Pl.'s Ex. 1, § 13(A).)

“wholly or partly prevent or make unreasonably costly (I) the mining, delivering or loading of coal . . . .” (Id.)

If a party is experiencing a force majeure, section 13(B) excuses that party's performance with certain limitations:

If, because of any Force Majeure, either party hereto is unable to fulfill any of its obligations under this Agreement, and if such party shall promptly give to the other party concerned written notice of such Force Majeure, then the obligation of the party giving such notice shall be suspended . . . .

(Id. at § 13(B) (emphasis added).)

Although CWM maintains that its various problems were force majeure events under the Contract, that these events lasted six months and therefore, its performance was excused, the court concludes that CWM has failed to show that the force majeure provisions of the Contract excused its performance.

First, CWM never gave Aquila written notice that it considered the hot spot, the closure of the number one mine, the roof collapses or the muddy conditions force majeure events. The fact that Aquila knew of these other problems does not excuse CWM's obligation under the Contract to notify Aquila, in writing, that it considered these events as force majeure events. (Moreover, Aquila did not know that CWM considered these conditions as force majeure events.) The Contract specifically required, in Section 13(B), that written notice of any force majeure be given in writing. The necessity of written notice is repeated in Section 15(A): “[a]ny notice, request, consent, demand, report or statement which is given to or made upon either party hereto by the other party hereto under any of the provisions of this Agreement shall be in writing unless it is otherwise specifically provided herein . . . .” (Id. at § 15(A).)

Because the parties expressly agreed that written notice of a force majeure event must be given in order to excuse CWM's performance, and no written notice was given, CWM's failure to perform is not excused by the closure of the number one mine, the hot spots, muddy conditions and roof collapses.

Even though CWM did provide Aquila written notice of its labor problems, CWM has not met its burden of showing that the labor problems by themselves excuse CWM's failure to perform. Although the labor problems had some impact on CWM's coal production, how much impact is not clear. In fact, the evidence leads the court to conclude that CWM's failure to perform was caused, primarily, by its various geological problems and not by the labor dispute. Accordingly, CWM cannot rely on the force majeure provision of the Contract to excuse its failure to perform.

2. **CWM's Defenses of Impossibility of Performance, Frustration of Purpose, and U.C.C. § 2-615(a) Do Not Excuse CWM's Failure to Perform.**

In addition to its reliance on the force majeure provision of the Contract, CWM maintains that its performance is excused by the defenses of impossibility of performance, frustration of purpose and Uniform Commercial Code (hereinafter "U.C.C.") § 2-615(a). CWM points to the same conditions that were the basis of its force majeure defense to support these additional defenses, that is, the labor problems and various geological problems and conditions.

The defenses of force majeure, impossibility of performance, frustration of purpose, and U.C.C. § 2-615(a) are closely related, if not identical. The Restatement (Second) of Contracts treats them together under the heading "Discharge by Supervening Impracticability." Restatement (Second) of Contracts § 261 (1981). The importance of this is that the parties specifically set the terms and conditions, in the force majeure provisions of the Contract, when supervening events would excuse performance. Section 13(A) requires that the event must

“wholly or partly prevent or make unreasonably costly (I) the mining, delivering or loading of coal . . . .” (Pl.’s Ex. 1, § 13A.) And Section 13(B) imposes a written notice requirement. As discussed, CWM failed to establish that it met either of those requirements. And CWM cannot rely on common law defenses and the U.C.C., thereby circumventing the terms and limitations that the parties negotiated in the Contract.

Accordingly, because CWM has failed to establish that its performance is excused by the force majeure provisions, CWM’s performance is not excused under the defenses of impossibility of performance, frustration of purpose, and U.C.C. § 2-615(a).

**3. CWM has Not Proved Waiver or Estoppel.**

CWM contends that when Aquila continued to accept coal shipments from CWM that were less than the required amounts, it either waived its claim that CWM breached the Contract or is estopped from asserting its claim. Other than Aquila’s acceptance of the coal, CWM cites to no evidence in support of these arguments. And Aquila’s continued acceptance of incomplete shipments of coal from CWM is understandable in light of CWM’s continued assurances that its labor problems were temporary, thereby leading Aquila to believe that CWM would be in a position to ship all the coal that was required by the Contract.

Also, the plain language of the Contract does not support CWM’s argument:

The failure of either party hereto to insist in any one (1) or more instances upon strict performance of any provision of this Agreement by the other party hereto . . . shall not be construed as a waiver of it of any such provisions, or of the obligation to comply with such provisions in the future and the same shall continue and remain in full force and effect.

(Pl.’s Ex. 1, § 16(A).)

In addition, on August 25, 2004, Aquila sent a letter informing CWM “[f]or the avoidance of doubt, Aquila does not, with this letter and the requests contained herein, waive any

rights it has or excuse CoOp Mining from any obligations it has under the Agreement . . . .”

(Pl.’s Ex. 7.)

Based on the evidence above, the court concludes that CWM has failed to establish either that Aquila waived its claim or is estopped from asserting its claim.

4. **CWM has Not Shown that Aquila Failed to Mitigate its Damages.**

CWM appears to argue that Aquila failed to mitigate its damages in two ways. First, that Aquila did not accept CWM’s offer to enter into negotiations for a new coal supply agreement. Second, that Aquila could have purchased less expensive and better quality cover coal. Neither argument is persuasive.

In CWM’s letter of April 18, 2005, telling Aquila that CWM was canceling the Contract, CWM wrote, in the last paragraph, “[w]e would still be very much interested in discussing a new coal supply agreement . . . .” (Pl.’s Ex. 10.) Aquila did not accept because, as Philip Rogers testified, “I did not consider them [CWM] to be a viable supplier of coal.” (Feb. 12 Tr. 57.) Aquila’s response and decision was justified given CWM’s failure to perform its obligations under the Contract.

Aquila’s purchase of coal on the spot market was also justified. Aquila believed, based on the reassurances of CWM, that CWM’s failure to deliver the full amounts of coal was temporary. Aquila, did not want to enter into another long-term contract with another coal supplier because once CWM resumed complete deliveries, Aquila would be obligated to purchase more coal than it needed.

When CWM notified Aquila that it was canceling the Contract, Aquila entered into a long-term contract with Consolidated Coal. Abby Herl, who replaced Philip Rogers as director of coal procurement, explained the process Aquila followed in deciding whether to enter into the

agreement with Consolidated Coal. Based on Ms. Herl's testimony, the court concludes that Aquila carefully weighed its options and the competing bids and chose the contract that was the most advantageous to Aquila. CWM offered no persuasive evidence to counter that evidence.

Accordingly, the court finds that CWM has not shown that Aquila failed to mitigate its damages.

**5. Aquila is Entitled to \$24,841,988 in Damages.**

Aquila claims damages of \$53,742,89. In support of its claim, Aquila called an expert witness, Michael Lewis. Mr. Lewis testified that Aquila was financially harmed by CWM's breach of the Contract and that it will continue to be harmed through 2008. Mr. Lewis testified that Aquila's damages were the result of two factors. First (and most significantly), Aquila was forced to buy coal in an "unfavorable market" because "coal prices have just gone up significantly since the contract was struck." (Feb. 13 Tr. 26.) For example, Mr. Lewis testified that from December through late summer in 2004, the Uinta Basin coal price increased "significantly, going from . . . \$17, \$18 a ton to \$30. And then again in July of '05—really June of '05 through the end of the year '05 the price of Uinta Basin coal went above about \$35 or \$37 a ton." (*Id.* at 28-29.) The second factor Mr. Lewis gave was that the replacement coal Aquila purchased had a higher sulfur content than the coal called for in the Contract. This forced Aquila to buy sulfur emission credits in order to burn the lower-quality coal.

Mr. Lewis separated his analysis of damages into three components. Mr. Lewis explained how he arrived at the first component:

In my terms it's a but for analysis. We look at what the cost of Aquila acquiring coal would have been from C.W. Mining had they performed under the Contract for the amount of tons Aquila actually burned in the two plants, and we compare that to the amount that Aquila spent to actually buy the cover coal burn in those two plants.

(Feb. 14 Tr. 31.) According to Mr. Lewis, the present day value of that amount is \$24,841,988.

(Id. at 39.)

Because Aquila had an option to extend the Contract for an additional two years (through December 2008), Mr. Lewis calculated the difference between what Aquila projects it will have to pay for coal during that time and what it would have paid under the Contract. This figure, \$15,893,379, is the second component. Mr. Lewis admitted that he didn't not know what the price of coal would be in 2008.<sup>2</sup> He also admitted that he did not know the sulfur content of the coal Aquila would purchase in 2008 and therefore, he did not know what would be the cost to Aquila of purchasing sulfur emission credits. Mr. Lewis averaged the price of coal for the last three years to arrive at a projected cost. He did the same to estimate the cost of purchasing emission credits.

The third component, Mr. Lewis explained, was based on the fact that Aquila had the right, under the Contract, to acquire more coal from CWM than it actually purchased and burned in 2004, 2005, and 2006. Mr. Lewis assumed, given the favorable terms of the Contract, that Aquila would have purchased the maximum amount of coal from CWM, had CWM performed, and either stockpiled the excess coal for later use or sold it to a third party, at market prices. Mr. Lewis testified that:

[w]hat we looked at in coming up with the damages from component three is we compared and focused only on the difference between what it would have cost them to acquire those tons versus what they would have been able to sell them for or the value in the market, and whether they actually had stockpiled them or sold them to another source.

(Id. at 44.) The component three amount is \$13,026,888.

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<sup>2</sup>In fact, as Mr. Lewis acknowledged, the price of coal, at least at the time of trial, was going down.

The component one damage amount, is the only component that is based on actual data. The price of coal and sulfur content were, as Mr. Lewis made clear, the two key factors in Aquila's loss. Mr. Lewis candidly admitted that he had to "forecast" what the price of coal would be in 2008. (Id. at 51.) Moreover, Mr. Lewis did not know the sulfur content of the coal that Aquila would be buying in the future, so, he had to estimate what Aquila would pay for emission credits.

The general rule of damages for breach of contract is that:

the compensation should be equal to the injury, subject to the condition that the damages be confined to those naturally and proximately resulting from the breach, and be not uncertain or speculative, nor outside the contemplation of the parties.

Mayfield v. Richardson Mach. Co., 231 S.W. 288, 293 (Mo. App. 1921).

This proposition, set forth many years ago, has not changed. The Missouri Court of Appeals stated, in describing a claim for future profits, that in support of such a claim, "the evidence must be sufficiently definite and certain for the jury to make a reasonably accurate estimate of the loss without resorting to speculation. Because future profits are considered 'too remote, speculative and too dependent upon changing circumstances', our courts have viewed the recovery of such losses cautiously." Chmielecki v. City Prod. Corp., 660 S.W.2d 275, 298 (Mo. App. 1983) (internal citations omitted).

Because the court concludes that Aquila's second and third damage components are too speculative, the court awards Aquila damages of \$24,841,988.

SO ORDERED this 30th day of October, 2007.

BY THE COURT:



Tena Campbell  
Chief Judge

**TAB 4**

**TAB 4**

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*Attorneys for COP Coal Development Company*

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**UNITED STATES DEPARTMENT OF THE INTERIOR**

**OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF LAND APPEALS  
801 North Quincy Street, Suite 300  
Arlington, Virginia 22203**

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**COP COAL DEVELOPMENT COMPANY**

*Re: (November 17, 2011 Decision Approving  
Minor Modification of R2P2, 4th Left Pillar,  
Castle Valley Mine No. 4, Castle Valley Mining,  
LLC, Operator)*

**IBLA 2011-111; 2011-112; 2012-039; AND 2012-  
052 (CONSOLIDATED)**

**DECLARATION OF  
CHARLES REYNOLDS**

**(ORAL ARGUMENT REQUESTED)**

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

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CHARLES REYNOLDS, being first duly sworn, upon oath and upon penalty of perjury, declares as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth herein, except as to those matters that are stated on information and belief.

## QUALIFICATIONS

2. Prior to its involuntary bankruptcy, I was the President of C.W. Mining ("CWM").
3. I received a bachelor's degree from the University of Utah in mining engineering. I have been involved in mining and mining operations since 1991:
  - a. From 1991 to 2001, I was the Chief Mining Engineer of CWM.
  - b. From 2001 to 2004, I was the Human Resource Manager for CWM; and
  - c. From 2004 to 2008, I was the Mine Manager, managing all aspects of the mining operation for CWM.
4. I have been involved in every aspect of the operation of the Mine since 2004 through at least the end of 2007. I hold a current professional engineer ("PE") license from the State of Utah, as well as mine Fireboss certification.
5. I am a consultant to C.O.P. Coal Development Company, ("COP"), the appellant herein, and the scope of my responsibilities include the Bear Canyon Mine, part of the Bear Canyon Logical Mining Unit (LMU) UTU-73342 (the "Mine"). I am authorized by COP to make this Declaration.
6. I have reviewed the Decision of the Bureau of Land Management ("BLM"), dated November 17, 2011, which is the subject of the above-captioned appeal (defined herein and in COP's Statement of Reasons, of even date herewith, as the "November 17 Decision").<sup>1</sup> A copy of the November 17 Decision is attached as Tab 1 to COP's Statement of Reasons, filed herewith.
7. In the November 17 Decision, the BLM indicates that Castle Valley Mining, LLC ("Castle Valley") submitted an application for modification on or about September 27, 2011. COP had no notice of that application prior to issuance of the November 17 Decision.

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<sup>1</sup> Except as otherwise indicated, abbreviated terms used herein shall have the same meaning as those used in my previous declarations, filed in Appeals IBLA 2011-111, 2011-112, 2012-39, and 2012-52 (the "Consolidated Appeals"), as well as in the Statements of Reasons and other pleadings filed in the Consolidated Appeals.

**REDUCTION OF RECOVERABLE COAL BASE UNDER CASTLE VALLEY'S R2P2.**

8. On or about July, 2006, while still operating the Mine, CWM submitted to the BLM a Resource Recovery and Protection Plan, relating to the Mine (the "CWM R2P2"). A copy of the CWM R2P2 is attached hereto as Exhibit A.

9. In that R2P2, CWM proposed to mine the Tank Seam using the Longwall method. CWM projected that by using that method, it would recover, from the Tank Seam, 2,958,627 tons of recoverable coal under Federal Coal Lease U-38727, and 6,433,459 tons of recoverable coal under Federal Coal Lease U-61049, for a total of 9,392,086 tons of Federal coal.

10. In 2008, CWM encountered a sandstone channel while mining in Panel 2 (i.e., 3<sup>rd</sup> Left) in the Tank Seam. Attached as Exhibit B is a map of the relevant portion of the Tank Seam, showing Federal Leases U-61049 and U-38727, as well as areas in which fee coal is located (the "Tank Seam Map").

11. After the discovery of the sandstone channel in early 2008, CWM lowered its projections for recoverable coal from the Tank Seam based primarily on the sandstone interference, as well as on other issues, such as areas where the seam thinned. The projections were prepared under my supervision and reviewed by me before they were submitted to the BLM on behalf of CWM (the "2008 Modifications"). The 2008 Modifications to the R2P2 were submitted in connection with the submittal of an annual map to the BLM. Mr. Steven Falk of the BLM gave verbal approval of the 2008 Modifications at the time they were submitted. A draft copy of the 2008 Modifications is attached hereto as Exhibit C

12. Under the 2008 Modifications, CWM projected that by using the Longwall method, it would be able to recover 2,117,208 tons from Federal Lease U-38727, and 5,233,480 tons from Lease U-61049, for a total of 7,350,688 tons of federal coal.

13. In the 2008 Modifications, CWM also revised the projections for recoverable fee coal, again because of the impact of the sandstone channel on fee coal in Longwall Panels 3-5 (i.e. 4<sup>th</sup> Left, 5<sup>th</sup> Left, and 6<sup>th</sup> Left). In 2006, CWM projected 3,986,939 of recoverable fee coal in the Tank Seam. In 2008, CWM revised that projection down to 2,515,484 tons.

14. In a conversation with Mr. Falk in 2011, I reminded him of the 2008 Modifications to the R2P2. He had forgotten about them.

15. On or about January 1, 2011, Castle Valley submitted its modified R2P2 to the BLM ("Castle Valley R2P2"). In it, Castle Valley proposes to use only room and pillar mining in the Tank Seam. *See Index No. 4*, Index attached as Tab 2 to the Statement of Reasons.<sup>2</sup> As such, Castle Valley projects only 1,522,557 tons of recoverable coal under Lease U-38727 and 4,360,092 tons of recoverable coal under Lease U-61049, for a total of 5,882,649 tons of Federal Coal. Attached hereto as Exhibit D is a spreadsheet that I created, setting out the projections of recoverable coal from the CWM R2P2, CWM's 2008 Modifications, and Castle Valley's projections from its 2010 R2P2.

16. Castle Valley's projections in its R2P2 show a reduction in the overall recoverable coal base of the Federal Coal in the Tank Seam of approximately 1,468,039 tons, when compared to CWM's *reduced* projections in the 2008 Modifications.

17. I have also calculated that Castle Valley will recover less fee coal from the Tank Seam by using room and pillar mining. As shown in the attached spreadsheet I calculated the average percentage reduction in the recoverable Federal coal projections between the 2008 Modifications and the Castle Valley R2P2 projections. I then applied that same percentage reduction to CWM's 2008 projection of recoverable fee coal. Based on that calculation, it is my expert opinion, based on my experience with the

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<sup>2</sup> To avoid unnecessary duplication of materials, an Index is attached to the Statement of Reasons filed herewith, which Index identifies where particular exhibits may be located as attachments to previous pleadings.

Mine and the different mining methods involved, that Castle Valley will recover 502,379 tons less fee coal than the amount set out in CWM's 2008 projections.<sup>3</sup>

18. Consistent with other Declarations I have filed in recent appeals before the Interior Board of Land Appeals, based on my extensive experience in the Mine and my familiarity with the different mining methods at issue (as well as documentation and industry literature on the issue), it is my expert opinion that mining by room and pillar with continuous miners generally results in the recovery of approximately 25% less coal than mining by Longwall method.

19. Thus, based on those opinions, as well as the data provided in the R2P2's, I have calculated that Castle Valley projects to recover 1,970,418 *fewer* tons in the Tank Seam than what is projected in CWM's 2008 Modifications (1,468,039 + 502,379).

#### **LIMITED EXTENT OF SANDSTONE CHANNEL**

20. The sandstone channel discovered by CWM in 2008 was much less extensive than CWM or Castle Valley projected. As indicated in my previous declaration(s), Hiawatha Coal Company mined through the channel in Longwall Panel 2 (3<sup>rd</sup> Left) with relatively little impact on the saleability of the coal.

21. When Castle Valley began extracting coal, as I had predicted and advised them, after mining approximately 10 feet in a Northeast direction in the 1<sup>st</sup> North Mains, Castle Valley hit the sandstone channel in the left entry of that section.

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<sup>3</sup> Castle Valley believes that it will be able to recover an additional 1.3 million tons of fee coal using room and pillar method, but the area in which they propose to recover that coal is a seam only approximately 4 feet high, thus making those projections unrealistic, if not impossible. Thus, the total reduction in recoverable coal (both federal and fee) in the tank seam is 1.97 million tons of coal.

22. But by the time Castle Valley mined the fifth and sixth entries over from the left, the sandstone channel went up into the strata above the coal seam, out of the way of mining, leaving a coal seam approximately 7 feet high/thick.

23. Thus, the sandstone channel only impacts Longwall Panels 3, 4, and 5 (i.e., 4<sup>th</sup> Left, 5<sup>th</sup> Left, and 6<sup>th</sup> Left). As shown in the Tank Seam Map, Longwall Panels 6, 7, and 8 would be completely unaffected by the sandstone channel. Those three Panels represent a massive portion of the mine, with much of the projected panel area northeast of where the sandstone channel completely disappeared into the strata above the Tank Seam. Where there is no interference from the sandstone, in my expert opinion, there is no justification for using the less productive method of room and pillar mining in those areas of the Seam.

24. Further, Castle Valley has subsequently mined through—and well beyond—the sandstone channel, with no further interruption or incursion.

25. According to data and my calculations, the sandstone channel would only reduce projected recovery in the Tank Seam by approximately 905,000 tons.

## **CASTLE VALLEY'S NONCOMPLIANCE WITH THE R2P2**

### **A. Switching from 4<sup>th</sup> Left to North Mains**

26. In its R2P2, Castle Valley indicated that it would mine Panel 3 (4<sup>th</sup> Left) during the year 2011.

27. But instead of commencing with that Panel, Castle Valley extended 1<sup>st</sup> North Mains, toward the northeast, using room and pillar method and completely bisecting Longwall Panels 5 through 8. This was a deviation from the R2P2. *See the Tank Seam Map.*

28. In the January Decision approving the R2P2, the BLM only authorized Castle Valley to drive entries in the Tank Seam that were not over the planned mining in the Hiawatha Seam. The BLM

also required that before it could continue mining 1<sup>st</sup> North Mains, Castle Valley had to provide a full analysis of the effects that the pillars would have on the seams below, and it also had to have its pillar recovery plan approved by the Mine Safety and Health Administration (“MSHA”). See *January Decision, Index No. 1*. Notwithstanding the fact that it had not satisfied that requirement, Castle Valley extended 1<sup>st</sup> North Mains anyway.

29. By request dated February 9, 2011,<sup>4</sup> Castle Valley sought approval—after the fact, to switch from 4<sup>th</sup> Left to North Mains, even though it had already done so.

30. At a meeting on or about April 13, 2011, I met with Castle Valley representatives and the BLM in its Price Field Office. At that meeting, Castle Valley presented a map, showing the extent of its continued development of the entries of 1<sup>st</sup> North Mains, even though it was not authorized to do so. At that time, the BLM should have been aware of Castle Valley’s non-compliance. Further, the BLM could have inspected the Mine and found that Castle Valley was, in fact, mining contrary to the R2P2.

31. In fact, in the BLM’s November 2 Decision, it states that it inspected the Mine on March 11, 2011 and again on June 16, 2011 and “verified the conditions reported by Castle Valley, especially the sandstone channel system in North Mains.” Had it properly inspected the Tank Seam in March or April of 2011 (and certainly by June) it would have not only discovered that Castle Valley was out of compliance with the R2P2, but it would have also discovered that the sandstone channel disappeared into the strata above the seam by the fifth entry in North Mains and, therefore, was not a significant issue in that area of the Mine. Castle Valley was aware by late January, 2011, at the latest, that the sandstone channel went up into the strata at that point.

32. But the BLM did not send a Notice of Noncompliance until July 2011, when it “became aware that Castle Valley was not in compliance with the R2P2 as then approved, because it had driven entries over the planned Hiawatha workings outside of the approved sequence of mining. This put the

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<sup>4</sup> In the November 2 Decision, the BLM mistakenly lists the date as “February 9, 2010”.

Main North entries and the associated barrier coal blocks to the main entries above the planned Hiawatha seam longwall panels.” *See November 2 Decision*, Statement of Reasons, Tab 3.

33. On or about August 1, 2011, the BLM approved Castle Valley’s February 9, 2011 request. It was not until its November 2 Decision, however, that the BLM explained that it deemed the February 9, 2011 request as well as the submittal of the technical reports, (defined in the November 2 Decision as the “ARM” and “MTT” Reports), to remedy the noncompliance detected in July, 2011. (*See Id.*)

34. Castle Valley also submitted a July 29, 2011 Request for Minor Modification (ostensibly in response to the Notice of Noncompliance), proposing to eliminate sub-mains off of 1<sup>st</sup> Main North and lengthen the room and pillar panels through those sub-main areas. That request was approved by the BLM’s November 2 Decision. According to the BLM, Castle Valley requested that modification to more efficiently mine the coal around the projected sandstone area, including in North Mains, even though the sandstone channel is not an issue for most of the 1st North Mains area.

**B. Turning 4<sup>th</sup> Left to the “Right” and Creating 4<sup>th</sup> Left North**

35. Once Castle Valley commenced mining the 4<sup>th</sup> Left Panel from the entry ways that had been created by Hiawatha Coal Company, then heading northwest, it encountered the sandstone channel, prompting the request for modification to the R2P2 that resulted in the November 17 Decision.

36. Based on my inspection of the Mine on January 3, 2012 (within the scope of my responsibilities as a consultant to COP), I discovered that as soon as Castle Valley had mined one or two pillars into following the new plan authorized by the November 17 Decision (as shown on the map attached thereto), it encountered coal with a higher ash content than it desired, on the left side of the section. Instead of continuing to mine that Panel toward the northwest, as authorized, it turned the section in a northeast direction, as shown on the map attached to the “February Decision” (defined in the

following paragraph). Thus, Castle Valley deviated from the R2P2—without BLM authorization—and abandoned substantial amounts of coal in the northwest section of that Panel. Attached as Exhibit E is a map provided to me by Castle Valley during my January 3, 2012 inspection, which map shows the right turn in Panel 4<sup>th</sup> Left.

37. On or about February 17, 2012, the BLM issued another “Decision – Approval of Minor Modification,” with reference to “Minor Modification to Resource Recovery and Protection Plan (R2P2), 4<sup>th</sup> Left North Pillar Section, Change #3, Castle Valley Mine #4, Castle Valley Mining, Operator” (the “February Decision”). *See Statement of Reasons*, filed herewith, at Tab 3. In that Decision, the BLM indicates that Castle Valley, after purportedly encountering high ash coal in panel 4th Left B, turned the development of the panel from a northwest heading, ninety degrees to the right, to a northeast heading, creating what the BLM now calls the “4<sup>th</sup> Left North” Panel.

38. In the February Decision, the BLM indicates that it approved that change in direction “in our January 6, 2012 letter.” The BLM, however, does not indicate when Castle Valley submitted an application relating to such change, or whether Castle Valley made the direction change unilaterally and then sought approval after.

39. Based on my inspection of the Mine in January, 2012, Castle Valley had made this change in direction unilaterally, prior to January 3, 2012.

40. COP never saw any application filed by Castle Valley relating to this change, nor did it ever receive a copy of the supposed January 6, 2012 Decision. It first it learned of it in the February Decision.

41. Further, at a hearing before the Bankruptcy Court on February 13, 2012 (in the Bankruptcy Case of CWM), counsel for COP explained to the court that Castle Valley had changed direction and was not mining according to the R2P2. Curiously, the day after, Castle Valley submitted an Application for Approval to drive an extra entry along the northwest edge of 4th Left North, and approval

of the final pillar retreat plan for that panel. The BLM received the application on February 15, and approved on February 17, 2012. It is signed on behalf of Patricia Claybaugh, Field Office Manager. Interestingly, the February Decision does not contain the typical language advising parties of right to appeal, nor does it contain the information with respect to appeal rights that is typically attached to the BLM decisions. A copy of relevant portions of the transcript of that hearing are attached hereto as Exhibit F.

42. COP was not aware, at the time of that hearing, of any approval of the BLM's decision to mine differently than the R2P2 by developing 4th Left North.

43. The February Decision grants Castle Valley's request to add the extra entryway on the northwest edge of the panel. The BLM then states "extra coal recovery from the additional West entry is encouraged. If additional mineable coal exists northwest of this extra entry, access is still available from planned panels to the Northeast."

44. Based on my experience with the Mine and the coal isopach, which shows low coal further to the northwest, as well as my familiarity with different mining methods and the requirements therefore, it is my expert opinion it will be impractical, if not impossible, to mine the coal north and west of 4th Left North. By creating 4th Left North, and by mining it by room and pillar method, Castle Valley will be required to have 200 foot barriers around that new panel. There will be no room to mine the additional coal because they have already begun to retreat those panels. The BLM Decision even acknowledges that. Further, the 4th Left North splits the adjacent panel completely in half and abandons any coal to the north and west of that panel. The BLM suggests that it can be reached by the panels to the northeast, but there is nothing in the proposed modification that reflects that. The R2P2 shows that it will be abandoned.<sup>5</sup>

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<sup>5</sup> In the R2P2, specifically, map/plate LMU-3, those additional panels are identified as P-22 and P-23, colored in blue on the colored map/plate.

45. In fact, COP takes the position that what Castle Valley is doing is essentially improperly “highgrading” the coal by taking only the most desirable coal and abandoning less desirable coal so that it cannot be mined in the future.

46. I met with Steven Rigby of the BLM during the spring of 2011 to voice these very concerns. I expressed the concern of COP with respect to the January 7 Decision and the approval of the R2P2, generally, including the fact that the R2P2 covered mining activity well after the expiration of the Operating Agreements. I also expressed COP’s concern that Castle Valley was highgrading the coal in both the federal leases and the fee coal on COP’s property. Mr. Rigby indicated that he agreed with me. I then inquired why Castle Valley’s plans were being approved under those circumstances, and he stated to me, essentially, that it was out of his hands and that his superiors were making those decisions.

#### NON-RECOVERY OF COAL

47. The 2006 CWM R2P2 contemplated that CWM would extract all recoverable coal from the LMU before the termination of the Operating Agreement.

48. Castle Valley’s R2P2, on the other hand, does not. In fact, based on the projections in its R2P2, as well as the bankruptcy court testimony of its representatives, Castle Valley would not complete mining the LMU until the year 2050—28 years after expiration of the Operating Agreements.

49. Castle Valley’s modified R2P2 and its attached maps (plates LMU-3, -4, and -5 all show Castle Valley’s proposal for mining in the various seams, which proposals extend to 2030--well beyond the expiration of the Operating Agreements. *See Castle Valley R2P2 and LMU Plates, Index Nos. 3 and 4.*

50. Attached as Exhibit G is my expert report, dated June 21, 2010 (with tables but not appendices). In my expert report, I express the following opinions:

1. The proposed mining of [Castle Valley] fails to meet the maximum economic recovery requirement of the Operating Agreements with COP and ANR. Without meeting this [Castle Valley] cannot provide an assurance of future performance under the Operating Agreements.

2. The proposed mining schedule of Castle Valley does not finish mining the reserves of COP prior to the expiration of the Operating Agreement, which is part of the approved R2P2 and the MER.
3. The proposed mining schedule of [Castle Valley] does not even begin mining the reserves of ANR prior to the expiration of the Operating Agreement, completion of which is part of the approved R2P2 and the MER.
4. The proposed mining schedule of [Castle Valley] does not comply with the federal requirement to mine all of the reserves by 2030.

As a point of clarification, the Castle Valley R2P2 does, indeed, propose to finish mining the LMU by 2030, as required. But in order to satisfy that requirement, the R2P2 sets forth a mining schedule that is not economically feasible. It proposes, after the year 2022, to mine 3.5 million tons a year. In my expert opinion, that would require the operation of nine sections simultaneously, and there simply is insufficient room in the Mine for that many sections. Further, Castle Valley's plans after 2022 are irrelevant because it will not be in possession of the Mine after February 28, 2022.

51. My expert report further elaborates and provide support for those opinions, including Table 2, setting forth the calculations of the reduction of recoverable coal by room and pillar mining in each of the seams and the various portions of the LMU.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 20<sup>th</sup> day of March, 2012.



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CHARLES REYNOLDS

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing **DECLARATION OF CHARLES REYNOLDS**, was delivered via federal express, email, or first class mail as noted below on the 20<sup>th</sup> day of March, 2012, in accordance with the applicable rules, to the following:

Interior Board of Land Appeals  
Office of Hearing and Appeals  
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Arlington, VA 22203  
Fax: (703) 235-8349  
*(Via FedEx)*

Regional (Field) Solicitor  
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U.S. Department of the Interior  
6201 Federal Bldg.  
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Salt Lake City, UT 84138-1180  
*(Via US Mail)*

U.S. Department of Interior  
Utah State Office  
440 West 200 South, Suite 500  
Salt Lake City, UT 84101  
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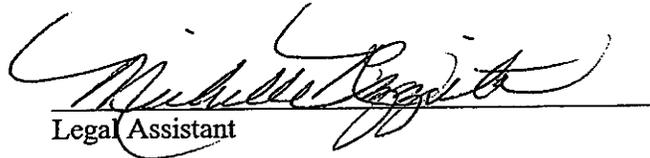
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Legal Assistant