

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRASURE CREEK MINING, LLC,
a West Virginia limited liability company,

Petitioner and Counterclaim Defendant,

v.

Civil Action No. 20-C-142(B)
Circuit Court of Fayette County, West Virginia
Hon. Paul M. Blake, Jr., Judge

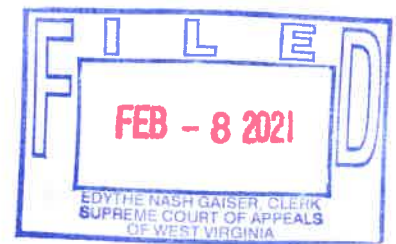
POCAHONTAS LAND LLC,
a Virginia limited liability company, and
POCAHONTAS SURFACE INTERESTS, LLC,
a Virginia limited liability company,

Respondents, Counterclaim Plaintiffs and
Third-Party Plaintiffs,

v.

DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,
a Delaware corporation,

Third-Party Defendants.



TO: THE HONORABLE CHIEF JUSTICE EVAN JENKINS

**RESPONDENTS, COUNTERCLAIM PLAINTIFFS AND THIRD-PARTY PLAINTIFFS'
MOTION TO REFER TO THE WEST VIRGINIA BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, Respondents, Counterclaim Plaintiffs and Third-Party Plaintiffs Pocahontas Land LLC and Pocahontas Surface Interests LLC, collectively referred to herein as “Pocahontas,” by counsel, respectfully move this Court to refer this civil action to the West Virginia Business Court Division (“*Motion to Refer*”). In support of its *Motion to Refer*, Pocahontas states as follows:

NATURE OF CASE

The present matter involves a dispute among four sophisticated business entities. The issues presented arise from a September 1, 2017 Coal and Surface Lease (the “Lease”) between Pocahontas and Third-Party Defendant Deep Water Resources, LLC (“Deep Water”). Count I and Count II of Pocahontas’ Counterclaim and Third-Party Complaint request declarations that Petitioner and Counterclaim Defendant Frasure Creek Mining, LLC (“Frasure Creek”) and Third-Party Defendant New Trinity Coal, Inc. (“New Trinity”) are bound by the Lease and required to arbitrate issues arising from the Lease. *Ex. 1* at pp. 10-13. Count III of Pocahontas’ Counterclaim and Third-Party Complaint also requests a declaration for piercing the veil of Deep Water, Frasure Creek, and New Trinity because of the entities’ failure to observe corporate formalities and failure to maintain distinct legal identities. *Id.* at pp. 13-15. Lastly, Pocahontas’ Counterclaim and Third-Party Complaint asserts claims of trespass against Frasure Creek and New Trinity, based on each entity’s unauthorized access of the property owned by Pocahontas subject to the Lease (the “Pocahontas property”). *Id.* at pp. 15-17.

The matters asserted in Frasure Creek’s *Verified Petition for Preliminary and Permanent Injunction* (the “*Verified Petition*”) also relate to the Lease, the mining permits under which Frasure Creek operated, and Frasure Creek’s statutory and administrative rights, if any, to enter upon the Pocahontas property to reclaim operations conducted under several revoked surface mine permits. *See generally, Ex. 2.* Moreover, the claims raised in Frasure Creek’s *Verified Petition* and Pocahontas’ Counterclaim and Third-Party Complaint are inextricably intertwined to the rights under the Lease, and the issues presented are exceedingly complex and require industry-specific knowledge.

This case originated on December 30, 2020, when Frasure Creek filed its *Verified Petition*, seeking entry of a preliminary and permanent injunction to access the Pocahontas property to complete reclamation obligations under its revoked permits. *Id.* Thereafter, Pocahontas served its *Response in Opposition to Petitioner's Verified Petition for Preliminary and Permanent Injunction* (the “*Response*”) on January 25, 2021, and Pocahontas served its Counterclaim and Third-Party Complaint on Frasure Creek, Deep Water, and New Trinity the same day. *Ex. 3, Ex. 1.*¹

The issues addressed by this action are intertwined with ongoing arbitration between Pocahontas and Deep Water.² Frasure Creek’s *Verified Petition* is an attempt to subvert the contractual obligations of the Lease to arbitrate all issues related thereto and arising therefrom, duplicating the parties’ costs by requiring overlapping issues to be litigated in two separate forums.

LEGAL STANDARD

West Virginia Code § 51-2-15 and West Virginia Trial Court Rule 29 provide that civil actions that constitute “business litigation” are eligible for transfer to the West Virginia Business Court Division (the “Business Court Division”). Under West Virginia Trial Court Rule 29, any party or judge may seek a referral of “business litigation” to the Business Court Division by filing a Motion to Refer with the Clerk of this Court after the time to answer the Complaint has expired. See W. VA. TR. CT. R. 29.06(a)(1)-(2). “A copy of the complaint, answer, docket sheet and any other documents that support referral under West Virginia Trial Court Rule 29.04(a) shall be attached to the motion.” W. VA. TR. CT. R. 29.06(a)(1).

¹ Frasure Creek’s counsel agreed to accept counsel on behalf of Deep Water and New Trinity on January 26, 2021.

² Pursuant to the September 22, 2020 *Arbitrators’ Decision and Award Phase 1*, the Lease was declared terminated by the arbitration panel. *Ex. 5.*

As required by West Virginia Trial Court Rule 29.06(a), a true and accurate copy of Frasure Creek's *Verified Petition* is attached hereto as *Exhibit 2*. A true and accurate copy of Pocahontas' *Response* is attached hereto as *Exhibit 3*, and Pocahontas' Counterclaim and Third-Party Complaint is attached as *Exhibit 1*. Finally, a true and accurate copy of the docket sheet is attached hereto as *Exhibit 4*.

ANALYSIS

The present case should be referred to the West Virginia Business Court Division for three reasons. First, civil actions eligible for transfer to the Business Court Division include matters in which "the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities." W. VA. TR. CT. R. 29.04(a)(1). At the heart of this dispute is a determination of the rights, duties, and obligations of the parties under the Lease, a commercial transaction governing the relationship between Pocahontas and Deep Water and the duties owed by Frasure Creek and New Trinity to Pocahontas pursuant thereto. Pocahontas and Deep Water are already involved in arbitration concerning the Lease, and the claims asserted by Pocahontas in Count I of the Counterclaim and Third-Party Complaint against Frasure Creek and New Trinity require a determination of the arbitrability of certain issues arising under the Lease. Thus, this action falls squarely within those contemplated to be referred to the Business Court Division by West Virginia Trial Court Rule 29.04(a)(1).

Furthermore, "business litigation" is defined as a dispute that "presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable." W. VA. TR. CT. R. 29.04(a)(2). The issues likely to arise in the present litigation are

nuanced and industry specific, requiring specialized knowledge of the coal industry, ranging from an interpretation of the contractual rights related to the Lease to the statutory and administrative rights set forth by law, in order for a fair, expedient, and reasonable resolution. As a result, this case falls within the subject matter defined as “business litigation” contemplated by West Virginia Trial Court Rule 29.

Third, the principal claims asserted in this litigation do not involve any of the categories of claims expressly excluded from the definition of “business litigation” provided by West Virginia Trial Court Rule 29.04(a)(3). Business Court Division’s jurisdiction does not include cases where:

the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the business Court Division.

W. VA. TR. CT. R. 29.04(a)(3). The claims asserted by Pocahontas and Frasure Creek do not relate to those matters specifically excluded from the Business Court Division’s jurisdiction by West Virginia Trial Court Rule 29.04(a)(3). Therefore, Pocahontas’s *Motion to Refer* should be granted.

CONCLUSION

For the reasons set forth herein, Respondents, Counterclaim Plaintiffs and Third-Party Plaintiffs Pocahontas Land LLC and Pocahontas Surface Interests LLC respectfully request that this Court grant its *Motion to Refer*.

POCAHONTAS LAND LLC and
POCAHONTAS SURFACE INTEREST LLC,

By Counsel,

A handwritten signature in dark ink, appearing to read 'J. Thomas Lane', is written over a horizontal line.

J. Thomas Lane (WVSB #2138)

Charles B. Dollison (WVSB #5499)

J. Mark Adkins (WVSB #7414)

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRASURE CREEK MINING, LLC,
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Petitioner and Counterclaim Defendant,

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Civil Action No. 20-C-142(B)
Circuit Court of Fayette County, West Virginia
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Respondents, Counterclaim Plaintiffs and
Third-Party Plaintiffs,

v.

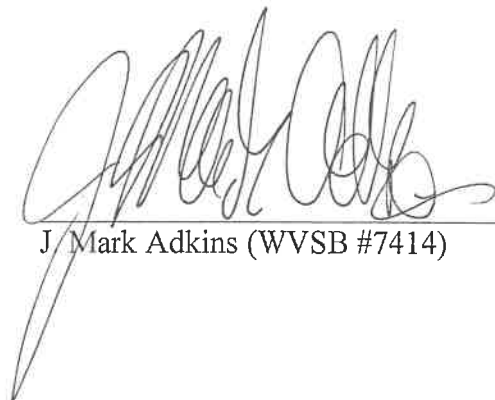
DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,
a Delaware corporation,

Third-Party Complaint Defendants.

CERTIFICATE OF SERVICE

I, J. Mark Adkins, do hereby certify that a true and accurate copy of the foregoing
***Respondents, Counterclaim Plaintiffs and Third-Party Plaintiffs' Motion to Refer to Business
Court Division*** was served upon the following counsel of record by United State Mail, postage
prepaid on the 8th day of February 2021:

R. Scott Long, Esq.
David F. Nelson, Esq.
Stephen E. Hastings, Esq.
HENDRICKSON & LONG, PLLC
214 Capitol Street
Post Office Box 11070
Charleston, West Virginia 25339



J. Mark Adkins (WVSB #7414)

CIVIL CASE INFORMATION STATEMENT
(Civil Cases Other than Domestic Relations)

I. CASE STYLE:

Case No. 20-C-142(B)

Plaintiff(s)

Judge: Paul M. Blake, Jr.

Frasure Creek Mining, LLC

EXHIBIT

1

vs.

Defendant(s)

Days to
Answer

Type of Service

Pocahontas Land LLC

Name

Street Address

City, State, Zip Code

II. TYPE OF CASE:

- ☒ General Civil
☐ Mass Litigation [As defined in T.C.R. 26.04(a)]
☐ Asbestos
☐ FELA Asbestos
☐ Other:
☐ Habeas Corpus/Other Extraordinary Writ
☐ Other:

- ☐ Adoption
☐ Administrative Agency Appeal
☐ Civil Appeal from Magistrate Court
☐ Miscellaneous Civil Petition
☐ Mental Hygiene
☐ Guardianship
☐ Medical Malpractice

III. JURY DEMAND: ☒ Yes ☐ No CASE WILL BE READY FOR TRIAL BY (Month/Year): 09 / 2021

**IV. DO YOU OR ANY
OF YOUR CLIENTS
OR WITNESSES
IN THIS CASE
REQUIRE SPECIAL
ACCOMMODATIONS?**

☐ Yes ☒ No

IF YES, PLEASE SPECIFY:

- ☐ Wheelchair accessible hearing room and other facilities
☐ Reader or other auxiliary aid for the visually impaired
☐ Interpreter or other auxiliary aid for the deaf and hard of hearing
☐ Spokesperson or other auxiliary aid for the speech impaired
☐ Foreign language interpreter-specify language:
☐ Other:

Attorney Name: J. Mark Adkins (WVSB #7414)

Firm: Bowles Rice LLP

Address: 600 Quarrier Street, Charleston, West Virginia 25301

Telephone: (304) 347-1768

Representing:

- ☐ Plaintiff ☒ Defendant
☐ Cross-Defendant ☐ Cross-Complainant
☐ 3rd-Party Plaintiff ☐ 3rd-Party Defendant

☐ Proceeding Without an Attorney

Original and _____ copies of complaint enclosed/attached.

Dated: 01 / 25 / 2021

Signature

Plaintiff: Frasure Creek Mining, LLC, et al Case Number: 20-C-142(B)
vs.
Defendant: Pocahontas Land LLC, et al

**CIVIL CASE INFORMATION STATEMENT
DEFENDANT(S) CONTINUATION PAGE**

Pocahontas Surface Interests LLC
Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Deep Water Resources, LLC, c/o New Trinity Coal
Defendant's Name

Post Office Box 100
Street Address

Oak Hill, West Virginia 25901
City, State, Zip Code

Days to Answer: 30

Type of Service: Secretary of State

New Trinity Coal, Inc.
Defendant's Name

Post Office Box 100
Street Address

Oak Hill, West Virginia 25901
City, State, Zip Code

Days to Answer: 30

Type of Service: Secretary of State

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FRASURE CREEK MINING, LLC,
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Petitioner and Counterclaim Defendant,

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Civil Action No. 20-C-142(B)
Hon. Paul M. Blake, Jr., Judge

POCAHONTAS LAND LLC,
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Third-Party Plaintiffs,

v.

DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,
a Delaware corporation,

Third-Party Defendants.

COUNTERCLAIM AND THIRD-PARTY COMPLAINT

Pursuant to Rule 13 and Rule 14 of the West Virginia Rules of Civil Procedure, Pocahontas Land LLC and Pocahontas Surface Interests LLC (collectively, "Pocahontas"), by counsel, state and aver, for their Counterclaim and Third-Party Complaint to this Honorable Court, as follows:

Parties

1. Counterclaim Plaintiff and Third-Party Plaintiff Pocahontas Land LLC is a Virginia limited liability company with a principal office address located at 800 Princeton Avenue, Bluefield, West Virginia 24701.

2. Counterclaim Plaintiff and Third-Party Plaintiff Pocahontas Surface Interests LLC is a Virginia limited liability company with a principal office address located at 800 Princeton Avenue, Bluefield, West Virginia 24701.

3. Counterclaim Defendant Frasure Creek Mining, LLC ("Frasure Creek") is a West Virginia limited liability company with a principal office address located at Post Office Box 100, Oak Hill, West Virginia 25901.

4. Third-Party Defendant Deep Water Resources, LLC ("Deep Water") is a West Virginia limited liability company with a principal office address located at Post Office Box 100, Oak Hill, West Virginia 25901, in care of New Trinity Coal, Inc.

5. Third-Party Defendant New Trinity Coal Inc. ("New Trinity") is a Delaware corporation with a principal office address located at 1058 McClellans Mountain Road, Kincaid, West Virginia 25119, and a mailing address of Post Office Box 100, Oak Hill, West Virginia 25119.

6. Deep Water and Frasure Creek are each wholly owned subsidiaries of New Trinity and are directly controlled by New Trinity.

Jurisdiction and Venue

7. Jurisdiction is appropriate with this Court pursuant to West Virginia Code § 51-2-2 and West Virginia Code § 56-1-1, because Deep Water is a West Virginia limited liability company, and New Trinity has a principal place of business in the State of West Virginia and is registered to do business in the State of West Virginia.

8. This Court possesses personal jurisdiction with respect to Frasure Creek because Frasure Creek voluntarily submitted to this Court's jurisdiction by the filing of its *Verified Petition for Preliminary and Permanent Injunction* on December 30, 2020.

9. Venue is appropriate with this Court because the real property owned by Pocahontas subject to the Lease, as defined herein, is located in Fayette County, West Virginia.

Operative Facts

A. Lease Information and Phase I Arbitration Decision & Award.

10. By the Coal Lease dated September 1, 2017 (the "Lease"), Pocahontas, as Lessor, leased to Deep Water, as Lessee, and New Trinity, as Guarantor, approximately 18,773.56 acres in Fayette County, West Virginia (the "Pocahontas Property").

11. Pocahontas leased to Deep Water the sole and exclusive right of mining and removing all seams of coal from the Pocahontas Property, including the right to use the surface of the Pocahontas Property for Deep Water's mining operations.

12. Section 5.2 of the Lease provides, in relevant part, that the Lessee "will, in its name and at its expense, promptly commence the necessary procedures with the appropriate state and/or federal agencies having jurisdiction of such mining operations and obtain and maintain in effect the requisite permit or permits for the conduct of such mining operations."

13. Section 5.2 of the Lease also provides that:

"[i]n the event this Lease shall be terminated or canceled for any reason prior to completion of operations hereunder and Lessee shall have obtained the requisite permit or permits for the conduct of such mining operations from [the appropriate states and/or federal agencies having jurisdiction], then Lessee hereby covenants and agrees that it shall promptly, upon request of [Pocahontas], assign and/or otherwise transfer said permit or permits, pursuant to W. Va. Code § 22A-3-19, *et seq.*, to such other party or parties as [Pocahontas] may designate."

14. Section 5.3 of the Lease provides the Lessor with the right to object to any person or entity other than the Lessee being named as a permittee of or designated operator on any permit issued by a governmental authority for the purpose of conducting mining operations, reclamation operations or any similar activities on the Pocahontas Property.

15. Section 5.3 of the Lease also requires the Lessee to obtain Pocahontas' prior written consent before causing or allowing any person or entity other than Lessee to be named as a permittee of or designated operator on any permit issued by a governmental authority for the purpose of conducting mining operations, reclamation operations or any similar activities on the Pocahontas Property.

16. Section 26(c) of the Lease states as follows:

After the expiration or termination of this Lease, including during the period that the Right of Entry is in effect, if [Pocahontas] so requests, Lessee agrees to transfer any permit that it then holds on all or any part or portion of the Leased Tracts to any designee thereof or to allow such designee thereof to overbond any permit area which may be necessary for any type of development or other activity as Lessor may request.

17. Section 27.5(b) of the Lease states as follows:

"[i]n the event that (i) this Lease is terminated by either of the Lessors due to the occurrence of an Event of Default as provided in Article XXIX hereof, . . . all of Lessee's equipment, buildings and other improvements and personal property located on the Leased Tracts shall, upon such termination, at the Lessor's option, either become the property of the Lessors without charge therefore or be disposed of by the Lessors at Lessee's costs and expense, and such equipment, buildings and other improvements and personal property shall not be removed from the Leased Tracts by Lessee after Lessee has received notice of such termination from either of the Lessors . . ."

18. Regarding arbitration, Section 32.1 of the Lease provides, in relevant part:

If there should arise any matters in dispute hereunder on which the Lessors and Lessee cannot finally agree, such matter or matters shall be referred to a board of arbitrators consisting of three (3) disinterested, competent persons, one selected by the Lessors and one by Lessee, as hereinafter provided, and the two thus selected shall select the third, who shall have the power of an umpire and be known as umpire-arbitrator. The decision and award of such arbitrators, or any two of them, or, in case of disagreement among all the arbitrators, of the umpire-arbitrator, shall be conclusive and binding upon the Lessors and Lessee and promptly complied with.

19. Between April 2018 and May 2020, Frasure Creek, acting by and through Deep Water, was issued numerous Notices of Violation from the West Virginia Department of Environmental Protection (the “WVDEP”).

20. Frasure Creek did not take any remedial action to abate, remediate, or correct the conditions of violation in response to the WVDEP’s Notices of Violation.

21. By letter dated April 3, 2020, Pocahontas provided a Notice of Termination to Deep Water and New Trinity to terminate the Lease because of Deep Water’s failure to mine, as required by the Lease, and Deep Water and New Trinity’s failure to remediate permitting and environmental violations as required by the Lease.

22. On May 5, 2020, Pocahontas submitted to Deep Water and New Trinity a Notice of Initiation of Arbitration pursuant to Article 32 of the Lease and requested that the arbitration be bifurcated into two phases:

- a. First, Pocahontas sought a determination that the Lease was terminated, and Deep Water was required to cause all permits to be transferred to Pocahontas’ designee; and
- b. Second, Pocahontas sought a determination of the damages owed by Deep Water to Pocahontas resulting from the violations of the Lease set forth in the Notice.

23. Phase 1 of the Arbitration was completed on August 13 and 14, 2020. Sept. 22, 2020 *Arbitrator’s Decision and Award Phase 1* (the “Arbitration Award”) at p. 1, attached hereto as *Exhibit 1*.

24. By its September 22, 2020 Decision and Award, the Arbitration Panel found that Deep Water defaulted under the Lease by failing to produce and ship 50,000 clean tons of coal for two consecutive calendar quarters, the condition of default existed as of Pocahontas’ April 2, 2020 Notice of Termination, the default was not curable, and the Lease terminated on Notice under Sections 29.1(c), 29.2, and 29.3 of the Lease. *Id.* at pp. 7-8.

25. The Arbitration Panel deferred consideration of the issue of transferring permits to Phase 2 arbitration proceedings. *Id.* at p. 8.

B. Permit Violations and Transfer of Permits and Coal Preparation Plant.

i. Transfer of Permits.

26. Frasure Creek, a wholly owned subsidiary of New Trinity, operated on the Pocahontas Property under the Deep Water Lease and various permits from the WVDEP, as alleged in Frasure Creek's *Petition*. *Id.* at p. 6, ¶ 28, Pet'r. Pet. at p. 2 at ¶ 4.

27. The Arbitration Panel found that Pocahontas did not give prior consent for permits to be held by Frasure Creek under the Lease. *Exhibit 2*, Dec. 18, 2020 Arbitrator's Decision and Award on Matters for Immediate Consideration, at p. 4.

28. The permits obtained by Frasure Creek with respect to the Pocahontas Property include 10 active permits and 4 inactive permits. *Id.*

29. Frasure Creek operated on the Pocahontas Property under the following permits: O-3007-01; S-3016-01; S-3013-09; S-3004-11; S-3017-05; S-3038-07; S-3003-11; U-3006-06; U-3012-06; and U-3008-01.

30. Frasure Creek also has held the following permits covering portions of the Pocahontas Property that are now inactive: O-3002-01; O-3011-10; O-6028-87; and U-3012-10.

31. Upon information and belief, Deep Water, or its parent, New Trinity, caused Frasure Creek to renew permits O-3007-01, S-3016-01, S-3013-09, S-3004-11, S-3017-05, S-3038-07, S-3003-11, U-3006-06, U-3012-06, and U-3008-01 with the West Virginia Department of Environmental Protection, Division of Mining and Reclamation.

32. The Arbitration Panel found that Deep Water incurred numerous WVDEP Notices of Violations and Cessation Orders relating to operations conducted by Frasure Creek on the Pocahontas Property between 2018 and 2020. *Ex. 1* at p. 7, ¶¶ 29-31.

33. The Arbitration Panel also found that all of Frasure Creek's active mining permits are subject to Cessation Orders and are in a show-cause status. *Id.* at p. 7, ¶ 32.

34. The Cessation Orders expressly state that Deep Water, acting by and through Frasure Creek as the permittee, must "Cease all operations on the entire permit." *Id.*

35. By letter dated April 3, 2020, Pocahontas demanded that Deep Water comply with all laws, including compliance with all permits and remediate the violations under its permits.

36. Pocahontas gave Frasure Creek renewed rights for entry on the Pocahontas Property to remediate DEP violations by letter dated November 2, 2020.

37. Pocahontas' November 2, 2020 letter also demanded that Deep Water and New Trinity take all necessary action to effectuate the transfer of permits from Frasure Creek to Pocahontas or Pocahontas' designee.

38. Neither New Trinity nor its subsidiaries, Deep Water or Frasure Creek, took action to remediate any permit violation within the ten-day (10) period allowed by the Lease and as specified in Pocahontas' letter November 2, 2020 letter.

39. Instead, by letter dated November 18, 2020, Frasure Creek suggested alternate terms under which it would enter the Pocahontas Property, Frasure Creek and continued to challenge the obligations under the Lease.

40. Pocahontas contracted with Resilient Energy, LLC, to perform reclamation work on the Pocahontas Property and fully abate and remediate the Notices of Violation issued against Frasure Creek by the WVDEP.

41. As a result, Pocahontas Land sought immediate relief before the Arbitration Panel in its brief titled "*Frasure Creek and New Trinity Coal Are Bound to Arbitrate All Issues in*

Dispute,” requesting the Arbitrators enter an order declaring Frasure Creek and New Trinity to be bound by the Lease and subject to arbitration after having accepted benefits from the Lease and performing obligations pursuant to the Lease.

42. WVDEP declared Frasure Creek’s permits, and the associated bonds, to be forfeited on December 10, 2020 and December 14, 2020.

43. After its permits were revoked, Frasure Creek entered upon the Pocahontas Property without advance notice to Pocahontas.

44. Pocahontas asked Frasure Creek to leave the Pocahontas Property after receiving notice that Frasure Creek’s permits were revoked by WVDEP.

45. On December 18, 2020, the Arbitration Panel ordered Deep Water “to take all actions under its power to immediately cause the [p]ermits to be transferred to [Pocahontas] or others as directed by [Pocahontas].” *Ex. 2* at p. 5.

46. The Arbitrators’ December 18, 2020 *Decision and Award on Matters Raised for Immediate Consideration* did not address whether Frasure Creek and New Trinity were subject to arbitration under the Lease. *See generally, Ex. 2.*

47. Frasure Creek disclaims that it is bound by the terms of the Lease, including the requirement of transferring its permits to Pocahontas under Section 26(c) of the Lease and the requirement to arbitrate issues arising from the Lease under Section 32.1.

ii. *Transfer of Coal Preparation Plant.*

48. A coal preparation plant is located on the Pocahontas Property.

49. The coal preparation plant existed on the Pocahontas Property many years before the Lease.

50. Any improvements to the coal preparation plant by Deep Water or New Trinity were made under the terms of, and subject to, the Lease.

51. After the Lease was terminated, Pocahontas exercised its right under Section 27.5(b) of the Lease to retain all personal property located on the Pocahontas Property by its November 2, 2020 letter to Deep Water and New Trinity.

52. New Trinity did not assert any ownership of or interest in the preparation until after the Arbitration Award.

53. The personal property to be retained by Pocahontas included the coal preparation plant.

54. New Trinity made unsubstantiated claims of ownership of the coal preparation plant in or about December 2020.

55. Notwithstanding the language of Section 27.5(b) of the Lease, New Trinity has asserted ownership of the coal preparation plant and stated its ownership will impede Pocahontas' ability to operate on its property, even though New Trinity does not have any right to enter or operate on the Pocahontas Property, except as a Guarantor under the Lease.

56. On December 18, 2020, the Arbitration Panel ordered Deep Water "to take all actions under its power to transfer any interests it has to any and all equipment, buildings and structures comprising the coal preparation plant to Pocahontas or others as directed by Pocahontas and to take all actions under its power to cause no interference with the use and operation of the preparation plant by Pocahontas or others . . ." *Ex. 2 at p. 6.*

57. New Trinity disclaims that it is bound by the terms of the Lease, including the requirement of surrendering ownership of the coal preparation plant to Pocahontas under Section 27.5(b) of the Lease and the requirement to arbitrate issues arising from the Lease under Section 32.1.

**Count 1 – Declaration that New Trinity and Frasure Creek
are bound by the Lease and Subject to Arbitration**

58. Pocahontas realleges each and every allegation set forth in paragraphs 1-57 of the Complaint as if set out fully herein.

59. Pursuant to West Virginia Code § 55-13-1, *et seq.*, Pocahontas requests that this Court declare the rights, status, interests, and legal relations of Pocahontas and New Trinity and Frasure Creek under the Lease.

60. Specifically, Pocahontas seeks a declaration from this Court that New Trinity is bound by the Lease's terms and subject to arbitration pursuant to Article 32 of the Lease.

61. Pocahontas also seeks a declaration from this Court that Frasure Creek is bound by the Lease's terms and subject to arbitration pursuant to Article 32 of the Lease.

62. Pocahontas, as the Lessor under the Lease and owner of the Pocahontas Property, is an interested party who may seek the declaratory relief requested herein.

63. This action presents an actual controversy susceptible of judicial interpretation.

64. Frasure Creek assumed Deep Water's obligations under Article V of the Lease by holding the permits on the Pocahontas Property and conducting mining and other operations under the Lease.

65. Frasure Creek benefitted from the rights granted to Deep Water by Pocahontas to mine and remove coal from the Pocahontas Property.

66. Frasure Creek, expressly or implicitly, agreed with Deep Water to hold the permits and conduct mining and other operations on the Pocahontas Property.

67. As recently as November 18, 2020, Frasure Creek sought to avail itself of the rights granted to Deep Water under the Lease by requesting Pocahontas' permission to enter upon the Pocahontas Property to complete reclamation work and remediate its permit violations.

68. New Trinity utilizes Frasure Creek as its trade name for operations under the Lease.

69. New Trinity made minimum annual rental payments to Pocahontas under the Lease on Deep Water's behalf.

70. New Trinity employees, acting by and through Frasure Creek, performed Deep Water's obligations under the Lease.

71. Frasure Creek is bound by the terms of the Lease by holding permits and conducting mining and other operations under the Lease.

72. New Trinity is bound by the terms of the Lease after having acquiesced to performance of Deep Water's lease obligations, including making payment of the minimum annual rental and submitting tonnage forecasts to Pocahontas on Deep Water's behalf.

73. As a result, Pocahontas seeks a declaration from this Court:

- a. that New Trinity and Frasure Creek are bound by the terms of the Lease and are obligated to arbitrate issues arising under the Lease pursuant to Section 32.1;
- b. that the obligation to transfer Frasure Creek's permits to Pocahontas is subject to arbitration as an issue arising under Section 5.2 and Section 26(c) of the Lease; and
- c. that the issue of the transfer of ownership of the coal preparation to Pocahontas is subject to arbitration as an issue arising under Section 27.5(b) of the Lease.

**Count 2 – Declaration that Frasure Creek and New Trinity are Bound
By the Lease and Required to Transfer Permits and Coal Preparation Plant**

74. Pocahontas realleges each and every allegation set forth in paragraphs 1-73 of the Complaint as if set out fully herein.

75. Pursuant to West Virginia Code § 55-13-1, *et seq.*, Pocahontas requests that this Court declare the rights, status, interests, and legal relations of Pocahontas and New Trinity and Frasure Creek under the Lease.

76. Specifically, in the alternative, Pocahontas seeks a declaration from the Court that New Trinity is bound by the terms of the Lease and required to transfer the coal preparation plant to Pocahontas under Section 27.5(b) of the Lease.

77. Pocahontas also seeks a declaration that Frasure Creek is bound by this Lease and required to transfer its permits to Pocahontas under Section 5.2 and Section 26(c) of the Lease.

78. Pocahontas, as the Lessor under the Lease and owner of the Pocahontas Property, is an interested party who may seek the declaratory relief requested herein.

79. This action presents an actual controversy susceptible of judicial interpretation.

80. Upon termination of the Lease, Section 27.5(b) requires that all of Lessee's equipment, buildings and other improvements and personal property located on the Leased Tracts becomes the property of the Lessor.

81. After termination of the Lease, Section 5.2 and Section 26(c) provide that Lessee agrees to transfer any permit that it then holds on all or any portion of the Leased Tracts to any designee thereof, if Pocahontas so elects.

82. The Lease was terminated by the Arbitration Panel on September 22, 2020.

83. By its November 2, 2020 letter, Pocahontas requested that New Trinity surrender ownership of the coal preparation plant to Pocahontas.

84. By its November 2, 2020 letter, Pocahontas requested that Frasure Creek transfer its permits to Pocahontas.

85. The Arbitrators entered a decision requiring Deep Water to take all steps necessary to transfer the permits and the coal preparation plant to Pocahontas.

86. In the event this Court concludes that Frasure Creek and New Trinity are not subject to the Arbitration Panel, Pocahontas seeks a declaration from this Court:

- a. that New Trinity and Frasure Creek are bound by the terms of the Lease;
- b. that New Trinity is required to transfer ownership of the coal preparation plant to Pocahontas pursuant to Section 27.5(b) of the Lease; and
- c. that Frasure Creek is required to transfer its permits to Pocahontas pursuant to Section 26(c) of the Lease.

**Count 3 – Declaration Piercing the Corporate Veil
of Deep Water, New Trinity and Frasure Creek**

87. Pocahontas realleges each and every allegation set forth in paragraphs 1-86 of the Complaint as if set out fully herein.

88. Pursuant to West Virginia Code § 55-13-1, *et seq.*, Pocahontas requests that this Court declare that Deep Water, New Trinity, and Frasure Creek have failed to maintain separate legal identities and have operated as the alter ego of one another under the Lease.

89. The corporate identities of Deep Water, New Trinity, and Frasure Creek are, in substance, the same, and Frasure Creek is but the alter ego of New Trinity and Deep Water.

90. Frasure Creek and New Trinity act as conduits for performance of Deep Water under the Lease.

91. By acting by and through Frasure Creek and New Trinity, Deep Water seeks to circumvent the obligations and duties owed to Pocahontas under the Lease as a device to cause harm and prejudice to Pocahontas.

92. The following facts demonstrate that a unity of interest exists between Deep Water, New Trinity, and Frasure Creek such that the separate corporate identities of each no longer exist:

- d. Frasure Creek Mining is an operating name for New Trinity filed with the West Virginia Secretary of State;
- e. Deep Water, New Trinity and Frasure Creek were all organized by Gopinath Pai, who also serves as a member or officer of each entity;
- f. Gopinath Pai exercises a controlling influence over the business affairs and dealings of Deep Water, New Trinity and Frasure Creek without regard for the corporate formalities of each entity;
- g. Deep Water, New Trinity and Frasure Creek each utilize the same mailing address: Post Office Box 100, Oak Hill, West Virginia 25901;
- h. Deep Water and New Trinity renewed and maintained permits for mining operations for the Pocahontas Property under the Lease in Frasure Creek's name as a means of diverting assets from Deep Water and New Trinity and to avoid Deep Water and New Trinity's obligations and duties under the Lease;
- i. Deep Water, New Trinity and Frasure Creek failed to maintain arm's length transactions among the related entities with respect to mining operations undertaken pursuant to the Lease;
- j. New Trinity, Deep Water and Frasure Creek shared employees for the performance of Deep Water's obligations under the Lease;
- k. New Trinity, Deep Water and Frasure Creek utilized common corporate accounts to satisfy payroll obligations for each entity;

- l. New Trinity inadequately capitalized Deep Water and Frasure Creek for performance of its financial obligations under the Lease; and
 - m. New Trinity, Deep Water, and Frasure Creek utilized a common corporate account and commingled funds to make payments of minimum annual rentals and royalty payments under the Lease; and
93. Fraud, injustice, and an inequitable result will occur if the fiction of Deep Water, New Trinity, and Frasure Creek operating as separate and distinct entities is maintained, and Pocahontas is unable to fully enforce the obligations and duties owed by Deep Water and New Trinity under the Lease.

Count 4 – Trespass by New Trinity

94. Pocahontas realleges each and every allegation set forth in paragraphs 1-93 of the Complaint as if set out fully herein.

95. Pleading, in the alternative, for a claim of relief against New Trinity, Pocahontas alleges that New Trinity is liable to Pocahontas for trespass damages caused by New Trinity's unlawful entry upon the Pocahontas Property.

96. New Trinity is a party to the Lease as the Guarantor and is bound as a principal.

97. Pocahontas did not grant New Trinity authority or permission to enter upon the Pocahontas Property to own the coal preparation plant or to conduct any operations.

98. New Trinity caused damage to the Pocahontas Property by leaving the coal preparation plant in an inoperable condition on the Pocahontas Property.

99. The damages to Pocahontas' coal preparation plant were caused by New Trinity's unauthorized entry on the Pocahontas Property, and the damages are ongoing.

Count 5 – Trespass by Frasure Creek

100. Pocahontas realleges each and every allegation set forth in paragraphs 1-99 of the Complaint as if set out fully herein.

101. Pleading, in the alternative, for a claim of relief against Frasure Creek, Pocahontas alleges that Frasure Creek is liable to Pocahontas for trespass damages caused by Frasure Creek's unlawful entry upon the Pocahontas Property.

102. Frasure Creek is not a party to the Lease.

103. Pocahontas did not consent to Frasure Creek being named as a permittee of or designated operator on mining permits for the Pocahontas Property.

104. Pocahontas did not grant Frasure Creek authority or permission to enter the Pocahontas Property to conduct mining operations under the Lease.

105. Frasure Creek mined and removed coal from the Pocahontas Property without Pocahontas' permission.

106. Frasure Creek caused damage to the Pocahontas Property by leaving the property in a condition of violation under Frasure Creek's permits.

107. The conditions of violation under Frasure Creek's permits were caused by Frasure Creek's unauthorized entry upon the Pocahontas Property and have not been remediated and are ongoing.

WHEREFORE, Pocahontas respectfully requests that the Court enter an Order declaring:

a. that New Trinity and Frasure Creek are bound by the Lease and subject to arbitration as required by Section 32.1 of the Lease;

b. that Deep Water, New Trinity, and Frasure Creek failed to maintain separate corporate identities and operated as the alter ego of one another under the Lease, and, as a result, pierce the veil of each entity such that New Trinity and Frasure Creek are obligated to participate in the Phase II arbitration proceeding;

c. alternatively, Pocahontas requests that judgment be entered in its favor for damages to the Pocahontas Property caused by New Trinity and Frasure Creek's trespass, including pre-judgment and post-judgment interest;

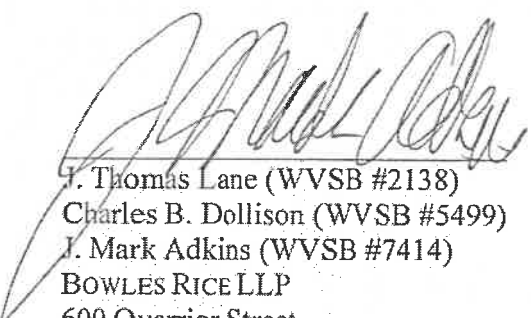
d. that Pocahontas be awarded its attorney's fees incurred in bringing this action; and

e. any and all other relief that this Court deems appropriate and just.

POCAHONTAS DEMANDS A JURY TRIAL

POCAHONTAS LAND LLC and
POCAHONTAS SURFACE INTEREST LLC,

By Counsel,



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Charles B. Dollison (WVSB #5499)
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ARBITRATION PROCEEDING

In Re:

POCAHONTAS LAND LLC and
POCAHONTAS SURFACE INTERESTS LLC

and

DEEP WATER RESOURCES, LLC and
NEW TRINITY COAL, INC.

ARBITRATORS' DECISION AND AWARD PHASE 1

Phase 1 of this matter came before the Arbitrators on August 13 and 14, 2020, and, having considered the testimony and evidence presented by the witnesses and the parties and the arguments of Counsel the Arbitrators hereby make the following Findings of Fact and render this Decision and Award with regards to Phase 1 of this arbitration:

Findings of Fact

1. On September 1, 2017, Pocahontas Land, LLC (formerly Pocahontas Land Corporation) and Pocahontas Surface Interests (formerly Pocahontas Surface Interests, Inc.) (collectively "PLC"), Deep Water Resources, LLC ("Deep Water") and New Trinity Coal, Inc. ("Guarantor"), entered into a Coal Lease (the "Lease"), covering approximately 18,773.56 acres in Fayette County, West Virginia (the "Deep Water Property").

2. By letter dated April 3, 2020, PLCs provided Notice of Termination to Deep Water and Guarantor thereby terminating the Lease based on the failure to mine 50,000 tons per quarter for two consecutive quarters as required under Article V, Section 5.1, a non-

curable condition of default and for failure to remediate permitting and environmental violations as required under Article IV, Section 4.3, 10.1, 15.1, 29.1, 29.2, and 29.3 of the Lease.

3. In a response dated April 8, 2020 Deep Water disputed the Lease termination and stated that “[y]our purported termination is void and of no effect. Deep Water Resources . . . continues to enjoy all rights under the Lease, including access to all facilities for any purpose, including environmental compliance.”

4. On May 5, 2020 PLC submitted to Deep Water and New Trinity a Notice and Initiation of Arbitration and requested that the arbitration be bifurcated into two phases:

Phase 1 – PLCs seek a determination as soon as practicable, but at a minimum within the time required by the Lease, that (i) the Lease is terminated and (ii) Lessee must immediately cause all permits to be transferred to a designee of PLCs,

and

Phase 2 – PLCs seek compensation for the damages caused by Lessee to PLCs based on violations of the Lease as set forth in the Notice.

5. Phase 1 hearing of the Arbitration was conducted on August 13 and 14, 2020 followed by an agreed briefing schedule. None of the parties briefed Phase 1 item (ii) regarding transferring permits and accordingly the Arbitrators have not addressed this issue but it is available to be addressed in the Phase 2 arbitration proceedings or by a written request from any of the parties for additional proceedings by the Arbitrators under the Phase 1 proceedings.

6. Sometime between August 2019 and October 2019, Deep Water ceased coal production from the Open Fork Surface Mine and the Taylor Branch Surface Mine on the Deep Water Property. According to Deep Water’s representative, Pranav Agarwal, the

primary reason Deep Water ceased coal production on the Deep Water Property and idled all mining activity was because Deep Water was unable to market and sell its coal.

7. On or about October 24, 2019, Deep Water sold its last remaining coal inventory on the Deep Water Property.

8. For 2019, Deep Water produced and sold the following tons of coal from the Deep Water Property:

Quarter	Tons
1st 2019	25,376
2nd 2019	14,947
3rd 2019	39,002
4th 2019	15,845
Total	95,170

9. From October 2019 to May 5, 2020, Deep Water did not mine or sell any coal from the Deep Water Property.

10. It is undisputed by the parties that during the 4th Quarter of 2019 and First Quarter of 2020, Deep Water did not mine, sell and ship 50,000 tons per quarter for two consecutive calendar quarters.

11. Lease Article V, Section 5.1 provides that beginning on the 2nd anniversary of the Lease "... Lessee shall be in default of this covenant to diligently develop and maintain operations within the Leased Coal Tracts if Lessee shall fail to produce and ship therefrom at least fifty thousand (50,000) clean tons of coal from the Leased Coal Tracts per calendar quarter for any two (2) consecutive calendar quarters."

12. Lease Article V, Section 5.1 further provides "Lessee shall report promptly in writing to PLC any suspension of operations, reasons therefor and expected duration thereof."

13. In 2019 Deep Water idled coal mining on the property,

14. Deep Water did not report in writing to PLC of this suspension of operations, reasons therefor and expected duration thereof.

15. Deep Water could not sell coal in the domestic met market because: (1) Deep Water was a "new entrant" having reopened in 2017 after 2 years being idle and they had lost their prior customers; (2) the domestic customers take bids and negotiate contracts in the period July – November for contract deliveries in the following year; (3) Deep Water was not operating in 2017 in time to make bids for 2018 delivery; and (4) in 2018 Deep Water made offers to sell coal for 2019, but did not win because existing producers did not give up their customers.

16. As a result of being unable to obtain a domestic sales contract, Deep Water was forced to rely on "spot market" sales to the export market and was unable to obtain new spot market sales.

17. Deep Water's last coal sales in October 2019 (during the 4th Quarter of 2019) were priced at:

- a) Met coal sales to Integrity - \$92.00 per ton
- b) Low-ash coal sales to Calgon - \$118.00 per ton
- c) Steam coal sales to Dominion - \$70.00 per ton

18. Deep Water's cost per ton of coal played a role in its decision to idle mining at the Deep Water Property. Deep Water introduced two charts which indicated that Deep Water's average net cost per ton was \$141.48 from January 2018 to May 2019 and \$135.98 from June 2019 to October 2019.

19. Based on the sales prices reported to PLC in its royalty statements and Deep Water's average net cost per ton of coal, Deep Water never earned a profit on the sale of coal from September 1, 2017 to October 2019 when mining operations were idled on the Deep Water Property.

20. Deep Water presented testimony through Mr. Agarwal on direct examination and adverse witness Greg Wooten on cross examination that their interpretation of a default under Lease Article V, Section 5.1 was conditional on the existence of fair prices being obtainable for coal produced from the leased property, a market to sell the coal existing and that the coal can be reasonably produced.

21. Deep Water presented testimony through Mr. Agarwal on direct examination and adverse witness Greg Wooten on cross examination that their interpretation of the Lease is before a termination of the Lease under Article V, Section 5.1 can occur a notice of default with right to cure had to be provided by PLC to Deep Water.

22. No notice of default with right to cure the default under Article V, Section 5.1 was provided to Deep Water by PLC.

23. The Deep Water Property contains approximately 69.8 million tons of recoverable coal reserves. Approximately 54 million tons of those are surface based reserves and approximately 15 million of those tons are deep-mine based reserves.

24. Mr. Whipkey presented financial models for the Open Fork Surface Mine, Taylor Branch Surface Mine and Deep Mine 11, setting forth his opinion on the mine production forecast, raw tons mined, clean tons produced, mining cost per ton for each of the 3 Deep Water mines and the EBITDA or earnings per ton using Deep Water's sales price and the costs from witness Seth Schwartz.

25. Mr. Whipkey testified that a prudent operator would have mined at least 50,000 tons of coal per quarter from the Deep Water Property for the last quarter of 2019 and first quarter of 2020 and done so at a profit.

26. PLC provided evidence from Seth Schwartz that the market price for Deep Water's metallurgical coal was similar to the price Deep Water obtained for its coal sales throughout the period of the Lease and that based on actual market data the weighted average market price for the relevant period (2019 through the 1st Quarter of 2020) for Deep Water's metallurgical coal was (i) for the year 2019 \$102.76 per ton FOB mine; and (ii) for the first quarter of 2020 \$94.46 per ton FOB mine.

27. Mr. Schwartz testified that effectively the year 2019 through first quarter of 2020, was the strongest market pricing for met coal in recent memory. World met markets fell in the third quarter of 2019 but to levels that met coal producers still considered to be favorable. Met coal world markets rallied and the first quarter of 2020 was a strong quarter for met coal prices and profitability.

28. Deep Water operated on the Deep Water Property under permits held in the name of Frasure Creek Mining LLC, a wholly owned subsidiary of New Trinity Coal, Inc. which consists of 10 active permits and 4 inactive permits relating to the Deep Water Property.

29. During the year 2018 through September 16, 2019, Deep Water incurred numerous WVDEP Notices of Violations and Cessation Orders.

30. During the period September 16, 2019 through December 18, 2019, Deep Water incurred numerous WVDEP Notices of Violations and Cessation Orders.

31. During the year 2020, Deep Water incurred numerous WVDEP Notices of Violations and Cessation Orders.

32. All Deep Water's active mining permits are currently subject to Cessation Orders and in a show cause status and each of these Cessation Orders expressly state that Deep Water must "Cease all operations on the entire permit".

33. Deep Water offered evidence and or testimony that a Consent Order with WVDEP, which provided a resolution process for the WVDEP Notices of Violations and Cessation Orders was pending but due to the termination of the lease by PLC a final Consent Order was not entered into by WVDEP with Deep Water.

34. Any Deep Water Defaults related to permit obligations under Article IV, Section 4.3 and Article X, Section 10.1LC are curable under Lease Article IV, Section 4.3 and Article X, Section 10.1 after PLC gives a Notice of Default.

35. No Notice of Defaults related to permit obligations were given to Deep Water by PLC.

Arbitrators Decision and Award

BY: Arbitrators Casey and McCuskey:

1. The interpretation of the language of the Lease is up to the Arbitrators.
2. Pursuant to Lease Article V, Section 5.1 of the Lease, the condition of default for failing to produce and ship at least 50,000 clean tons of coal from the Leased

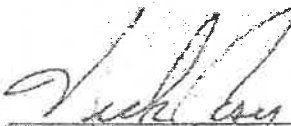
Premises for two consecutive calendar quarters existed as of the April 2, 2020 Notice of Termination, the default was not curable, and upon the Notice, the Lease terminated under Sections 29.1(c), 29.2 and 29.3 of the Lease.

3. A Notice of Default with right to cure was not required for the uncurable default under the Lease Article V, Section 5.1.

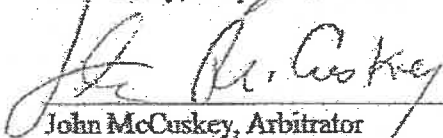
4. Due to the default under Lease Article V, Section 5.1 and the resulting termination of the Lease, whether Deep Water's failure to remediate permitting and environmental violations under the Lease is an independent basis for termination of the lease and whether such actions were subject to Notice of Default with rights to cure are not necessary for the Arbitrators to address.

5. Phase 1 item (ii) regarding transferring permits is not part of this Arbitrators Decision and Award but it may be addressed in the Phase 2 arbitration proceedings or by a written request from any of the parties for additional proceedings by the Arbitrators as part of the Phase 1 proceedings.

Dated September 22, 2020.



Nick Casey, Umpire Arbitrator



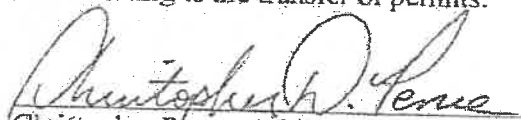
John McCuskey, Arbitrator

By Arbitrator Pence:

I interpret Article V., Section 5.1 of the Lease consistent with the testimony of PLC witness Greg Wooten and Deep Water in that the three conditions set forth therein must be met before the 50,000 ton requirement applies; namely whether (1) fair prices are obtainable, (2) Deep Water has the capacity to meet market demands, and to the extent (3) it can reasonably be done under the Lease. While I agree with Arbitrators Casey and McCuskey that the failure to produce 50,000 tons per quarter for two quarters is not curable under Sections 29.1(c) and 29.2 of the Lease, I find that these provisions must be read in conjunction with Sections 29.1(g)(iv) and Section 29.2. I find that PLC had actual knowledge that Deep Water was not producing sufficient tonnage in the 4th Quarter of 2019 and the 1st Quarter of 2020.

I therefore construe the Lease to require PLC to provide notice that PLC considered Deep Water's production or lack thereof in the 4th Quarter of 2019 and the 1st Quarter of 2020 as a violation of its obligation in Section 5.1 of the Lease to "diligently and energetically open, develop and maintain operations within the Leased Coal Tracts." While this could be an Event of Default per Section 29.1(g)(iv), it is curable per Section 29.2. I would therefore find that the Lease did not terminate because Deep Water was not provided with an opportunity to cure what PLC considered its inadequate production.

I concur with Arbitrators Casey and McCuskey on the aspect of their award dealing with the alleged failure to remediate permitting and environmental violations issues as well as the issue relating to the transfer of permits.


Christopher Pence, Arbitrator

ARBITRATION PROCEEDING

In Re:

**POCAHONTAS LAND LLC and
POCAHONTAS SURFACE INTERESTS LLC**

and

**DEEP WATER RESOURCES, LLC and
NEW TRINITY COAL, INC.**

ARBITRATORS' DECISION AND AWARD ON MATTERS RAISED FOR IMMEDIATE CONSIDERATION

Pocahontas Land, LLC (formerly Pocahontas Land Corporation) and Pocahontas Surface Interests (formerly Pocahontas Surface Interests, Inc.) (collectively "PLC"), Deep Water Resources, LLC ("Deep Water") and New Trinity Coal, Inc. ("Guarantor") participated in a telephonic and virtual hearing with the Arbitrators on December 2, 2020, in response to PLC's December 1, 2020 letter and Motion to Enforce Lease on two matters for immediate consideration:

1. Transfer of mining permits, and
2. Ownership of the coal preparation plant.

A preliminary matter raised by Deep Water and Guarantor is the scope of the Arbitrators' authority to consider the above two matters. Deep Water and Guarantor supplied the Arbitrators with case law to support their position and on the invitation of the Arbitrators the parties provided briefs in support of their respective positions on this preliminary matter.

The Arbitrators met telephonically on December 15, 2021 and, having considered the argument of Counsel and the parties' briefs make the following Findings of Fact and Decisions

and Awards with regards first as to the preliminary matter raised by Deep Water and Guarantor and secondly as to the above two matters raised by PLC.

Scope of Arbitrators' Authority to Consider

- 1. Transfer of mining permits, and**
- 2. Ownership of the coal preparation plant.**

Findings of Fact

1. On September 1, 2017, PLC, Deep Water and Guarantor entered the Lease covering approximately 18,773.56 acres in Fayette County, West Virginia (the "Deep Water Property").

2. The Lease Article XXXII Section 32.1 provides for arbitration if there should arise any matters in dispute under the Lease on which the lessors and lessees cannot finally agree.

3. PLC is lessor of the Lease.

4. Deep Water is lessee of the Lease.

5. There is a dispute under the Lease regarding transfer of mining permits ("Permits") and ownership of the coal preparation plant, Notice and Initiation of Arbitration, Section 10 and 8, respectively.

6. Lease Article XXVI Section 26.3(c) requires Lessee to transfer or cause to be transferred any permits that it holds to PLC.

7. Lease Article V, Section 5.2 requires lessee in its name and its expense to obtain and maintain Permits for the development and mining of coal subject to the Lease.

8. Lease Article XXII Section 12.1 provides mapping for the development and mining of coal will include all buildings and structures.

9. Lease Article XXVII Section 27.5 provides that equipment, buildings and other improvements on the leased properties shall remain on the property absent certain actions by PLC to require removal.

10. The coal preparation plant consists of equipment, buildings and structures.

11. Deep Water and Guarantor assert the Arbitrators do not have authority under the terms of the Lease to determine if the two disputed matters are subject to arbitration and such authority rests with a court of appropriate jurisdiction.

12. PLC asserts the Arbitrators do have authority to determine if the two disputed matters are subject to arbitration by the Arbitrators.

Arbitrators' Decision and Award on Scope of Arbitrators' Authority

1. The Lease provides any matters in dispute under the Lease are subject to Arbitration.

2. The Lease arbitration provision is valid and enforceable under state law. The parties, without objection, have in Phase 1 of this arbitration conducted hearings, submitted documentary and live witness testimony as evidence and received the Arbitrators' Decision and Award on matters in dispute under the Lease.

3. The Permits and transfer thereof to PLC and the coal preparation plant, being composed of equipment, buildings and structures, are identified in the Lease so that any disputes involving them are within the scope of the arbitration provisions of the Lease.

4. Case law provided to the Arbitrators supports arbitration as a preferred method to resolve disputes.

5. The Arbitrators under the Lease arbitration provisions have the authority to determine that any disputes related to Permits and the coal preparation plant will be arbitrated.
6. Disputes regarding the Permits and the coal preparation plant will be arbitrated before the Arbitrators.

Matters Raised for Immediate Consideration and Motion to Enforce Lease

- 1. Transfer of mining permits, and**
- 2. Ownership of the coal preparation plant.**

Findings of Fact

1. On September 1, 2017, PLC, Deep Water and Guarantor entered the Lease, covering the Deep Water Property.
2. Lease Article V, Section 5.2 requires Lessee in its name and its expense to obtain and maintain Permits for the development and mining of coal subject to the Lease.
3. Lease Article V, Section 5.3 provides the Lessee shall not without prior written approval of Lessor allow permits to be held by any entity other than Lessee.
4. Permits related to the development and mining of coal subject to the Lease are held in the name of Frasure Creek Mining ("Frasure Creek")
5. PLC did not give prior written consent for Permits to be in the name of Frasure Creek but did not and has not objected to Frasure Creek holding the Permits.
6. The Lease property was partially developed and mined during the term of the Lease under the Permits.

7. Lease Article XXII Section 12.1 provides mapping for the development and mining of coal will include all buildings and structures.

8. Lease Article XXVII Section 27.5 provides that equipment, buildings and other improvements on the leased properties shall remain on the property absent certain actions by PLC to require removal.

9. The coal preparation plant consists of equipment, buildings and structures.

10. The parties and Frasure Creek all could have benefited from the Lease, the Permits and the preparation plant.

11. The Lease and the directions of PLC require the Permits be immediately transferred as directed by PLC.

12. The Lease Article XXII Section 32.1 provides "any matters in dispute" are subject to arbitration.

Arbitrators' Decision and Award
Matters Raised for Immediate Consideration and Motion to Enforce Lease

1. Transfer of mining permits, and

2. Ownership of the coal preparation plant.

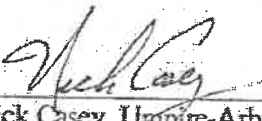
1. The Arbitrators order Deep Water to take all actions under its power to immediately cause the Permits to be transferred to PLC or others as directed by PLC. To facilitate the transfer PLC shall provide Deep Water's legal counsel with information necessary to make the transfers.

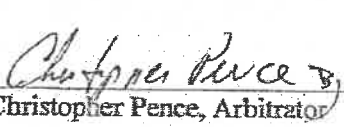
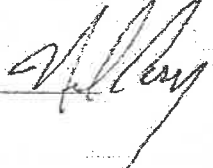
2. The parties shall report in writing, via email, to the Arbitrators and other parties, by close of business on December 30, 2020 as to all actions taken to cause the Permits to be transferred.

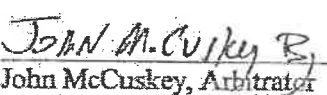

3. The Arbitrators order Deep Water to take all actions under its power to transfer any interests it has to any and all equipment, buildings and structures comprising the coal preparation plant to PLC or others as directed by PLC and to take all actions under its power to cause no interference with the use and operation of the preparation plant by PLC or others and to report in writing, via email, to the Arbitrators and other parties by close of business December 22, 2020 if it cannot effectuate the transfer.

4. If Deep Water contends it cannot effectuate the transfer as set out in the preceding item 3 then PLC and Deep Water will produce any documents or other evidence by affidavits which demonstrate ownership of the equipment, buildings and structures compromising the coal preparation plant, via email, to the Arbitrators and other parties by close of business on December 30, 2020.

Dated: December 18, 2020.


Nick Casey, Umpire-Arbitrator

  w/ Permission
Christopher Pence, Arbitrator

  w/ Permission
John McCuskey, Arbitrator

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FRASURE CREEK MINING, LLC,
a West Virginia limited liability company,

Petitioner and Counterclaim Defendant,

v.

Civil Action No. 20-C-142(B)
Hon. Paul M. Blake, Jr., Judge

POCAHONTAS LAND LLC,
a Virginia limited liability company, and
POCAHONTAS SURFACE INTERESTS LLC,
a Virginia limited liability company,

Respondents, Counterclaim Plaintiffs and
Third-Party Plaintiffs,

v.

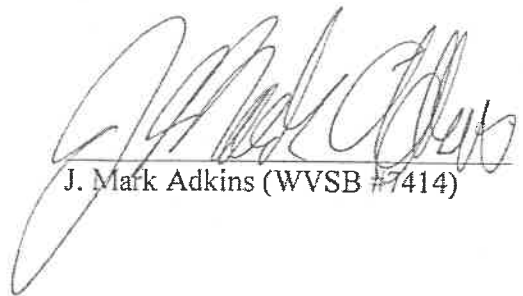
DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,
a Delaware corporation,

Third-Party Defendants.

CERTIFICATE OF SERVICE

I, J. Mark Adkins, do hereby certify that a true and accurate copy of the foregoing
Counterclaim and Third-Party Complaint was served upon the following counsel of record by
United State Mail, postage prepaid, on the **25th day of January 2021**:

R. Scott Long, Esquire
David F. Nelson, Esquire
Stephen E. Hastings, Esquire
HENDRICKSON & LONG, PLLC
214 Capitol Street
Post Office Box 11070
Charleston, West Virginia 25339


J. Mark Adkins (WVSB #7414)

Bowles Rice LLP
OPERATING ACCOUNT
P.O. BOX 1386
CHARLESTON, WV 25325-1386

United Bank
Charleston, WV

Check Number: 307587

307587

Check Date:
01/25/21

Check Amount: \$*****200.00

PAY TWO HUNDRED AND 00/100 DOLLARS

TO THE
ORDER
OF

FAYETTE COUNTY CLERK
FAYETTE COUNTY COURTHOUSE
P.O. BOX 569
100 COURT STREET
FAYETTEVILLE, WV 25840

Thomas A. Howard
Marc A. Montelone

⑈307587⑈ ⑆05600445⑆ 04312 2173⑈

Memo: FILING COUNTERCLAIM

Payee: FAYETTE COUNTY CLERK

Check Date: 01/25/21

Check Number: 307587

Invoice# 01252021
Inv. Date 01/25/21

Amount	Inv. Total
200.00	200.00

Invoice Totals: \$200.00 \$200.00

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

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a Virginia limited liability company,

Respondents, Counterclaim Plaintiffs and
Third-Party Plaintiffs,

v.

DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,
a Delaware corporation,

Third-Party Defendants.

To the above-named Third-Party Defendant: **New Trinity Coal, Inc.**
c/o Corporation Service Company
203 Capital Street
Charleston, West Virginia 25301

SUMMONS

IN THE NAME OF THE STATE OF WEST VIRGINIA:

You are hereby summoned and required to serve upon J. Mark Adkins, Plaintiff's attorney, whose address is 600 Quarrier Street, Post Office Box 1386, Charleston, West Virginia 25325-1386, an Answer to the Counterclaim and Third-Party Complaint filed against you in the above-styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer to the Counterclaim and Third-Party Complaint within thirty (30) days after service of this Summons upon you, exclusive of the date of service. If you fail to do so, judgment

by default will be taken against you for the relief demanded in the Complaint and you will be thereafter barred for asserting in another action any claim you may have which must be asserted by counterclaim in the above-styled civil action.

Dated: _____

Clerk

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FRASURE CREEK MINING, LLC,
a West Virginia limited liability company,

Petitioner and Counterclaim Defendant,

v.

Civil Action No. 20-C-142(B)
Hon. Paul M. Blake, Jr., Judge

POCAHONTAS LAND LLC,
a Virginia limited liability company, and
POCAHONTAS SURFACE INTERESTS LLC,
a Virginia limited liability company,

Respondents, Counterclaim Plaintiffs and
Third-Party Plaintiffs,

v.

DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,
a Delaware corporation,

Third-Party Defendants.

**To the above-named Third-Party Defendant: Deep Water Resources, LLC
Post Office Box 100
Oak Hill, West Virginia 25901**

SUMMONS

IN THE NAME OF THE STATE OF WEST VIRGINIA:

You are hereby summoned and required to serve upon J. Mark Adkins, Plaintiff's attorney, whose address is 600 Quarrier Street, Post Office Box 1386, Charleston, West Virginia 25325-1386, an Answer to the Counterclaim and Third-Party Complaint filed against you in the above-styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer to the Counterclaim and Third-Party Complaint within thirty (30) days after service of this Summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint and you will be

thereafter barred for asserting in another action any claim you may have which must be asserted by counterclaim in the above-styled civil action.

Dated: _____

Clerk

SUMMONS

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FRASURE CREEK MINING, LLC,
a West Virginia limited liability company,

Petitioner,

v.

CIVIL ACTION NO. 20-C-142(B)

POCAHONTAS LAND, LLC,
a Virginia limited liability company,
POCAHONTAS SURFACE INTERESTS, LLC
a Virginia limited liability company,

Respondents.

To the above-named defendant: **POCAHONTAS LAND, LLC**
c/o Joseph H. Carpenter IV, Registered Agent
3 Commercial Place
Norfolk, Virginia 235102108

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon R. Scott Long, Esquire, David F. Nelson, Esquire, and Stephen E. Hastings, Esquire, plaintiff's attorney, whose address is P. O. Box 11070, Charleston, West Virginia, 25339, an Answer, including any related counterclaim you may have, to the Verified Petition for Preliminary and Permanent Injunction filed against you in the above-styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Petition and you will be thereafter barred from asserting in another action any claim you may have which must be asserted by counterclaim in the above-styled civil action.

Dated: December 30, 2020

Cathy L. Garrett

Clerk of the Court

EXHIBIT
2

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FRASURE CREEK MINING, LLC,
a West Virginia limited liability company,

Petitioner,

v.

Civil Action No.

20-C-142(B)

POCAHONTAS LAND, LLC,
a Virginia limited liability company,
POCAHONTAS SURFACE INTERESTS, LLC
a Virginia limited liability company,

Respondents.

VERIFIED PETITION FOR PRELIMINARY AND PERMANENT INJUNCTION

Now comes Frasure Creek Mining, LLC ("Frasure Creek"), by counsel, R. Scott Long, David F. Nelson, and Stephen E. Hastings, of Hendrickson & Long, P.L.L.C., Rule 65(b) of the West Virginia Rules of Civil Procedure and hereby petitions this Court for a preliminary and permanent injunction that Respondents be enjoined from interfering with any and all efforts of Frasure Creek to meets its obligations to the State of West Virginia with respect to remediation activities to permits issues by the West Virginia Department of Environmental Protection ("WVDEP"). In support of its petition, Petitioner states as follows:

1. Frasure Creek is a West Virginia limited liability company licensed to and doing business in the State of West Virginia.
2. Pocahontas Land, LLC, is a Virginia limited liability licensed to and doing business in the State of West Virginia.
3. Pocahontas Surface Interests, LLC, is a Virginia limited liability licensed to and

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FAYETTE COUNTY
CLERK OF COURT

doing business in the State of West Virginia.

4. Frasure Creek is a coal operator with respect to certain mining permits issued by the WVDEP pursuant to West Virginia Code § 22-3-1, *et seq.*, covering property located in or around Kincaid, Fayette County, West Virginia. Frasure Creek is also the holder of a National Pollutant Discharge Elimination System (NPDES) permits issued by the WVDEP with respect to the property at issue. Certain permits held by Frasure Creek are currently in revocation status, but the WVDEP is requiring Frasure Creek to continue remediation activities and water quality monitoring.

5. Pocahontas Land, LLC, and Pocahontas Surface Interests, LLC, (collectively, “Pocahontas”) are surface and/or mineral owners of the property upon which Frasure Creek holds the permits.

6. Frasure Creek does not have a lease with Pocahontas for coal mining operations.

7. Frasure Creek owes an obligation to the State of West Virginia for the reclamation of lands disturbed during mining operations.

8. West Virginia Code § 22-3-11(e) states that “[i]t is unlawful for the owner of surface or mineral rights to interfere with the present operator in the discharge of the operator’s obligations to the state for the reclamation of lands disturbed by the operator.”

9. Pocahontas first blocked all remediation activities in April 2020. Thereafter on or around the week of November 24, 2020, after multiple attempts to come to an agreement regarding access to the property, Pocahontas finally agreed to permit Frasure Creek to access the property.

10. Following the agreement with Pocahontas, Frasure Creek entered the property and began its remediation activities and conducted water sampling to comply with the NPDES permits.

11. On December 17, 2020, Pocahontas revoked the permission given to Frasure Creek to enter the property to satisfy its regulatory obligations and Frasure Creek immediately ceased remediation activities.

12. Pocahontas has confirmed that it will not allow Frasure Creek to access the property to conduct the reclamation activities.

13. Pocahontas actions in blocking Frasure Creek's access constitutes interference with Frasure Creek's efforts to discharge its obligations to the State of West Virginia in violation of West Virginia Code § 22-3-11(e).

14. An injunction is proper because there is a significant likelihood of irreparable harm to Frasure Creek if the injunction is denied because Frasure Creek will not be able to meet its obligations to the State of West Virginia resulting in severe and irreparable harm to Frasure Creek, the State of West Virginia, and the general public.

15. The likelihood of harm to Pocahontas if the injunction is granted is minimal. In fact, bringing the property into compliance with WVDEP regulatory compliance will be of benefit to Pocahontas.

16. There is a strong likelihood that Frasure Creek will succeed on the merits of this action pursuant to the plain language of West Virginia Code § 22-3-11(e).

17. It is in the public interest that an injunction be granted so that remediation activities at an idle mine site are remediated. The failure to remediate the property and conduct water sampling will likely result in severe and irreparable harm to Frasure Creek, Pocahontas, and the general public. Such injunction will also serve to deter Pocahontas and others from blocking remediation activities required by the State of West Virginia for the benefit of the State and its

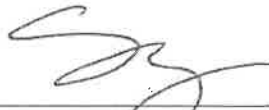
citizens.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant a preliminary and permanent injunction requiring Pocahontas to cease and desist from interfering with Frasure Creek's efforts to discharge its obligations to the State of West Virginia and to grant any such other and further relief as this Honorable Court may deem just under the circumstances.

Respectfully submitted,

FRASURE CREEK MINING, LLC,

By Counsel.



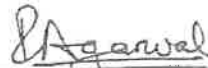
R. Scott Long, Esquire (# 2238)
David F. Nelson, Esquire (#5754)
Stephen E. Hastings, Esquire (#9065)
HENDRICKSON & LONG, PLLC
214 Capitol Street (zip 25301)
P.O. Box 11070
Charleston, West Virginia 25339
(304) 346-5500
(304) 346-5515 (facsimile)
scott@handl.com
dnelson@handl.com
shastings@handl.com

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to wit:

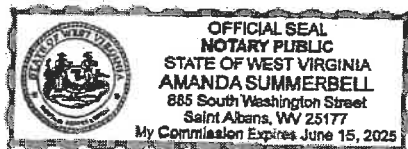
I, Pranav Agarwal, after being first duly sworn, state that the facts and allegations contained in the **“Verified Petition for Preliminary and Permanent Injunction”** are true, except as therein stated to be upon information and belief, and that as therein stated to be upon information and belief, I believe them to be true.



Pranav Agarwal
Frasure Creek Mining, LLC

TAKEN, SUBSCRIBED and SWORN to before me this 30th day of December, 2020.

My commission expires 6.15.2025.




NOTARY PUBLIC

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FRASURE CREEK MINING, LLC
a West Virginia limited liability company,

Petitioner

v.

Civil Action No. 20-C-142(B)

POCAHONTAS LAND, LLC,
a Virginia limited liability company,
POCAHONTAS SURFACE INTERESTS, LLC,
a Virginia limited liability company,

Respondents.

**RESPONSE IN OPPOSITION TO PETITIONER'S
VERIFIED PETITION FOR PRELIMINARY AND PERMANENT INJUNCTION**

Respondents, Pocahontas Land, LLC, and Pocahontas Surface Interests, LLC (collectively "Pocahontas"), by counsel, Bowles Rice LLP, and respectfully submits this *Memorandum of Law in Opposition to Petitioner Frasure Creek Mining, LLC's ("Frasure Creek"), Verified Petition for Preliminary and Permanent Injunction.*

INTRODUCTION

Frasure Creek previously held permits to conduct mining operations upon approximately 18,773.56 acres of land owned by Pocahontas in Fayette County, West Virginia, and under lease to its affiliated company, Deep Water Resources. Beginning in September 2019 the West Virginia Department of Environmental Protection (WVDEP) began issuing Notices of Violation so that by the spring of 2020 violations existed with respect to every critical mining permit on the property. Frasure Creek failed to take any remedial action to cure the violations within the time required and, as a result, DEP issued Cessation Orders with respect all of these permits so that by mid spring 2020 the Cessation Orders prohibited any mining on the property.

As a result Pocahontas sent a Notice of Termination of the lease dated April 3, 2020 and in that letter expressly stated the continuing obligation to comply with all laws, and that included all permit requirements. **Still no remedial action.**

The lessee challenged the termination of the lease and pursuant to the lease, all issues were submitted to arbitration. An arbitration trial was held in August 2020, and in September the Arbitrators ordered that the lease was terminated. The arbitration was then continued for consideration of remaining issues.

In October 2020 counsel for Deep Water, the lessee, and Frasure Creek, the permittee, requested for the first time permission to enter the property to remediate. In response Pocahontas gave permission for the entry by letter dated November 2, 2020. **Still no action.** Accordingly, Pocahontas engaged a contractor to perform remedial work on its property, and as this is written, the contractor is on the property with heavy equipment remediating permit violations in accordance with a punch list developed with WVDEP.

Ultimately, WVDEP revoked all permits and notified the bonding company that all associated bonds were forfeited by several notices all dated December 14, 2020.

Remarkably, after the permits were revoked either Deep Water or Frasure Creek sent a contractor to the property. Given the revocation of permits, the forfeiture of bonds and the fact that a contractor has been hired to perform remedial work, Pocahontas requested that the Deep Water/Frasure Creek contractor leave its property.

Accordingly, the Petition of Frasure Creek seeking immediate entry onto Pocahontas' property on a "preliminary" injunction basis calls the court to issue an extraordinary order. The underlying facts are that the lease under which operations were conducted has been terminated. Neither Frasure Creek or Deep Water have any property rights, and accordingly, no

right to enter Pocahontas' property. The permits, which would normally authorize remediation by a permittee and might preclude a landowner from interfering, have been revoked. Frasure Creek has no permits and the bond supporting the permits has been forfeited. Pocahontas has a contractor taking remedial action, and as this is written, is operating equipment on the property. All matters presented to the Court in this Petition rest upon the lease and are, accordingly, subject to the existing arbitration. To the extent Frasure Creek alleges its entry is "required" by the WVDEP, *See Verified Petition for Prel. and Perm. Inj.* at p. 2, ¶ 4, the assertion is false. *See*, WVDEP affidavit attached, which expressly denies the allegation.

The requisite basis for an injunction allowing either Frasure Creek or Deep Water to enter the property, 15 months after violations were noticed, about 12 months after Cessation Orders were issued, more than 9 months after the Notice of Termination and more than a month after the permits were revoked, simply does not exist. For the reasons stated herein the Court should deny the request for injunctive relief.

BRIEF STATEMENT OF FACTS

By Coal Lease (the "Lease"), dated September 1, 2017, Pocahontas, as Lessor, leased to Deep Water Resources, LLC ("Deep Water"), as Lessee, and New Trinity Coal, Inc. ("New Trinity"), as Guarantor, the sole and exclusive right to mine all seams of coal underlying the 18,773.56-acre property situate in Fayette County, West Virginia (hereafter the "Subject Property"). Frasure Creek, a wholly owned subsidiary of New Trinity, held the permits issued by the WVDEP on the Subject Property and conducted all operations these permits. *See Arbitrator's Decision and Award Phase 1*, Sept. 22, 2020, at p. 6, ¶ 28, attached hereto as *Exhibit 1*. These permits included ten (10) active permits and four (4) inactive permits. *See Arbitrator's Decision and Award on Matters for Immediate Consideration*, Dec. 18, 2020, attached hereto as *Exhibit 2*.

Although the Lease prohibited any entity other than the Lessee, Deep Water, from holding permits on the Subject Property, Frasure Creek, without consent of Pocahontas, held the permits and conducted mining operations.¹ Between September 2019 and early spring 2020, Frasure Creek incurred numerous violations under the permits, and when it failed to abate the violations, Cessation Orders were issued by WVDEP and these orders prohibited further mining on the property. *Ex. 1* at p. 7, ¶¶ 29-31. Later, as the violations went unaddressed, the WVDEP placed *all* of Frasure Creek's active mining permits on in a show-cause status. *See Arbitrator's Decision and Award Phase I*, Sept. 22, 2020, attached hereto as *Exhibit 1*. To Pocahontas' knowledge, Frasure Creek took no action in response to notices from the WVDEP issued on April 24, 2020, and May 27, 2020, advising it to demonstrate why the permits should not be revoked and the associated permit bonds forfeited (*See* WVDEP Ltrs. dated Dec. 14, 2020, attached hereto as *Exhibit 3*). Frasure Creek had from at least September 16, 2019, to conduct necessary remediation efforts, but instead of remediating, took no action resulting in violations *and* cessation orders on all critical permits, and, to date, has failed to provide any excuse for its noncompliance other than unfounded and untrue allegations that Pocahontas interfered with its ability to remediate the violations. In actuality, Pocahontas not only verbally confirmed Frasure Creek's right to enter the property during a phone call in October, 2020, but also provided Frasure Creek a written letter advising them of not only their right, but their *obligation*, to enter the Subject Property to perform reclamation. *See* Ltr. From Pocahontas Land dated November 2, 2020, attached hereto as *Exhibit 7*.

¹ Section 5.3 of the Lease states that:

Lessee *shall not*, without the prior written consent of PLC, which consent shall not be unreasonably withheld, cause or allow any person or entity other than the Lessee to be named as a permittee of or designated operator on any permit issued by a governmental authority for the purpose of conducting mining operations, reclamation operations[,] or any similar activities on the Leased Coal Tracts.

Finally, by the second quarter of 2020, the Subject Property had been so inadequately operated by Frasure Creek, Deep Water and New Trinity that Pocahontas sought termination of the Lease by a Notice of Termination issued on April 3, 2020. *See* Ltr. of Termination, attached hereto as *Exhibit 4*. The termination was challenged, and the dispute was brought under the purview of an Arbitration Panel pursuant to an arbitration clause contained with the Lease.² Ultimately, the Panel affirmed termination of the Lease on September 22, 2020 (*See Arbitrator's Decision and Award Phase I*, at p. 1, attached hereto as *Exhibit 1*), and less than two (2) months later the WVDEP revoked Frasure Creek's permits for failure to show cause that its permits should not be revoked. *See* WVDEP Revocation Ltr. dated Dec. 14, 2020, attached hereto as *Exhibit 4*.

After termination of the Lease, Pocahontas requested all mining permits be transferred to a designee of Pocahontas, in the interest of ensuring proper reclamation of its property and remediation of the existing permit violations. However, Frasure Creek maintained it was not subject to the Lease,³ despite having availed itself to the Lease in order to allow its affiliated entity, Deep Water, to conduct mining operations on the Subject Property, and both Deep Water and Frasure Creek refused to effectuate a transfer of the mining permits.

Then, sometime after the Lease was terminated and Frasure Creek's permits had been revoked on December 14, 2020, having taken no previous action to enter the Subject Property

² Section 32.1 of the Lease provides, in relevant part:

If there should arise any matters in dispute hereunder on which the Lessors and Lessee cannot finally agree, such matter or matters shall be referred to a board of arbitrators consisting of three (3) disinterested, competent persons, one selected by the Lessors and one by Lessee, as hereinafter provided, and the two thus selected shall select the third, who shall have the power of an umpire and be known as umpire-arbitrator. The decision and award of such arbitrators, or any two of them, or, in case of disagreement among all the arbitrators, of the umpire-arbitrator, shall be conclusive and binding upon the Lessors and Lessee and promptly complied with.

³ *See Ver. Petition*, at p. 2, ¶ 6.

and remediate its outstanding violations, Frasure Creek sent a contractor onto the land. By that time, Pocahontas had its own contractor in place, intending to pursue reclamation efforts itself so as to prevent unsatisfactory, and even potentially damaging, reclamation work from being performed on its lands, given Frasure Creek's track record. It was then, and only then, during verbal discussions on or about December 18, 2020, that Pocahontas ever requested Frasure Creek vacate the Subject Property.

Prior to this, Frasure Creek should not now be permitted to enjoin Pocahontas from preventing Frasure Creek to enter upon the Subject Property after Frasure Creek missed every opportunity to become compliant with its permit obligations, remediate its operations, and retain its permits before filing its *Verified Petition*.

STANDARD OF REVIEW

Unless an absolute right to injunctive relief is conferred by statute, the power to grant a preliminary or permanent injunction, whether preventative or mandatory, rests in the discretion of the court, according to the facts and circumstances of the particular case. *Sams v. Goff*, 208 W. Va. 315 (1999). The factors to be considered in determining whether injunctive relief is proper are (1) the likelihood of irreparable harm to the petitioner without injunction; (2) the likelihood of harm to the respondent with an injunction; (3) the petitioner's likelihood of success on the merits; and (4) the public interest. *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44 (2008).

ARGUMENTS

I. Frasure Creek is not entitled to injunctive relief because it failed to exhaust all available administrative remedies.

Frasure Creek must be denied the preliminary and permanent injunction sought by its *Verified Petition*, because it has failed to exhaust all administrative remedies as required for injunctive relief to be granted.

West Virginia case law generally recognizes that proceedings in equity for injunctions cannot be maintained when there is an administrative remedy provided by statute which is adequate and will furnish a proper remedy. *See Truby v. Broadwater*, 177 W. Va. 270, 272, 332 S.E.2d 284, 286 (1985). The West Virginia Supreme Court of Appeals has also recognized that administrative relief must be exhausted before injunctive relief can be sought from the courts. *Cowie v. Roberts*, 173 W. Va. 64, 66, 312 S.E.2d 35, 38 (1984). "The existence of administrative appeals is as important in determining the appropriateness of extraordinary remedies as is the existence of an alternative avenue for judicial relief." *Id.* at 67, 312 S.E.2d at 38. Requests for extraordinary equitable relief will be denied when adequate administrative remedies are available. *McGrady v. Callaghn*, 161 W. Va. 180, 187, 244 S.E.2d 793, 797 (1978).

To illustrate, in *Cowie*, an individual was arrested for driving under the influence, and, after a review of the individual's driving records, the Department of Motor Vehicles suspended the individual's license for ten years. *Id.* at 65-6, 312 S.E.2d at 36-7. A notice of suspension advised the individual of his appeal rights and a right to hearing but the record showed that the individual did not request a hearing or appeal the suspension. *Id.* at 66, 312 S.E.2d at 37. The court ultimately rejected the individual's appeal for a writ prohibiting the suspension from going into effect, because of the failure to exhaust available administrative remedies. *Id.* at 68, 312 S.E.2d at 39.

More broadly, trial courts will dismiss complaints seeking injunctive relief when the plaintiff failed to exhaust all administrative remedies before initiating litigation. *See Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 247, 183 S.E.2d 692, 694 (1971). The court recognized the “primary jurisdictional doctrine,” adopted by the United States Supreme Court in *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907),⁴ under which trial courts are without jurisdiction to grant relief for acts done or omitted that are within the rules and regulation of an administrative agency until such time as all administrative remedies have been exhausted. *Id.* at 694-95.

In the present matter, Frasure Creek’s right to enter the Subject Property derives from permits which it no longer holds, having failed to comply with WVDEP requirements or avail itself of the necessary administrative recourse to maintain the permits. The WVDEP provided Frasure Creek ample notice on April 24, 2020, and May 27, 2020, that its mining operations were in violation of the West Virginia Surface Mining Control and Reclamation Act, also advising Frasure Creek to show cause why its permits should not be revoked, and the associated bonds forfeited. *See* WVDEP Ltrs. dated Dec. 14, 2020, attached hereto as *Exhibit 3*. However, Frasure Creek ignored the notices, failed to show cause, and its permits were cancelled. *Ex. 3*. Consequently, Frasure Creek should not now be awarded an extraordinary remedy necessitated by its own neglect in pursuing available administrative remedy to prevent revocation of its permits, and correspondingly, its right to enter the Subject Property.

Moreover, as of January 21, 2021, an appeal of Frasure Creek’s permit revocations is pending with the WVDEP pursuant to W. Va. Code § 22-3-17(e). *See* Notice of Appeal, attached

⁴ The *Abilene Cotton* Court generally discussed that the authority to determine just and reasonable rates for interstate rail was conferred on the Interstate Commerce Commission for uniformity and consistency, and the courts lacked the authority to invalidate rates established by the Commission. *See Id.* at 439-40, 446-48.

hereto as *Exhibit 5*. Consideration of injunctive relief is therefore wholly improper as all administrative remedy afforded by statute have not yet been exhausted.

Thus, because Frasure Creek failed to pursue all administrative remedies available to prevent revocation of its permits from which its right of entry to the Subject Property derives, and because all administrative proceedings have not been exhausted as the permit revocations are pending appeal with the WVDEP, Frasure Creek has failed in its petition for preliminary and permanent injunction to state a claim upon which relief can be granted.

II. Frasure Creek's request for injunctive relief should be denied because Frasure Creek is unlikely to succeed on the merits of its case.

By its *Verified Petition*, Frasure Creek seeks to enjoin Pocahontas from preventing it from accessing the Subject Property to continue its remediation activities under revoked mining permits. Pet'r. Pet. at p. 2. Specifically, Frasure Creek baselessly claims that Pocahontas is interfering with its efforts to remediate its persistent and continuing permit violations as required by WVDEP, in violation of the West Virginia Surface Mining Control and Reclamation Act (WVSMCRA). Specifically, W. Va. Code § 22-3-11(e), which provides that, "[i]t is unlawful for the owner of surface or mineral rights to interfere with the present operator in the discharge of the operator's obligations to the state for the reclamation of lands disturbed by the operator," is not currently applicable because Frasure Creek is no longer afforded the right to conduct reclamation efforts on the Subject Property after its permits were revoked. And further, the end Frasure Creek seeks to achieve with its request for a preliminary and permanent injunction falls against the purpose of this law.

Under WVSMCRA, an “operator” is defined as a permittee. *See* W. Va. Code § 22-3-3(o).⁵ Without a permit, Frasure Creek is no longer an operator. Also, without a permit, it is unlawful for Frasure Creek to conduct surface mining activities upon the Subject Property. *See* W. Va. Code § 22-3-8. Surface mining activities explicitly include reclamation. *See* W. Va. Code § 22-3-3(u)(1).⁶ Thus, not only does Frasure Creek lack the right to conduct reclamation on the Subject Property having had its permits revoked, it would be unlawful for Frasure Creek to do so.

Moreover, the West Virginia Supreme Court has not further illuminated on the meaning and effect of W. Va. Code § 22-3-11(e). However, this law must be read in a way consistent with the federal Surface Mining Control and Reclamation Act (SMCRA), which holds a permittee responsible for the reclamation of its mining operations, including the abatement of violations, regardless of impediments raised by recalcitrant surface owners, and is intended to prevent a permittee from being excused of its obligations by reason of landowner interference. *See* 66 Fed. Reg. 33020 (June 20, 2001), citing *Elk Valley Mining Company v OSM*, Case No. NX6-65-R (March 31, 1988) (“It would be contrary to the purpose of the Act for the Applicant to be able to shield itself from enforcement . . . by his failure to reach a lease agreement with a private party”). The law must also be read in light of the general purpose of SMCRA, to protect the rights of surface estate owners. *See* 30 U.S.C. § 1202(b).⁷ Given the operative intent of the interference provision combined with the overarching context of SMCRA, it becomes apparent that the primary

⁵ W. Va. Code § 22-3-3 defines an Operator as: “any person who is granted or who should obtain a permit to engage in any activity covered by this article and any rule promulgated under this article and includes any person who engages in surface mining or surface mining reclamation operations, or both.”

⁶ Per W. Va. Code § 22-3-3(u)(1), “surfacing mining” or “surface mining operations” includes, *inter alia*, “reclamation.”

⁷ 30 U.S.C. § 1202(b) provides in pertinent part that it is the purpose of the Surface Mining Control and Reclamation Act to, “assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;”

design of W. Va. Code § 22-3-11(e) is to protect the government's ability to compel the completion of reclamation work, not act as a measure for a former permit holder to force entry onto property where the landowner is choosing to perform all necessary remedial and reclamation activities himself. *See* "Statutory Easements and Rights of Entry," 33 E. Min. L. Found. § 15.04 (2012).⁸

In the present matter, the WVDEP has *not* compelled Frasure Creek to complete remediation or reclamation efforts upon the Subject Property as Frasure has alleged. Moreover, the government's interest in seeing permit violations abated and reclamation work properly performed is far better served by Pocahontas being afforded the opportunity to complete the work itself via its own capable contractor, ready and willing to perform the remediation and reclamation activities, as opposed to requiring the work be done by an operator with a proven record of neglecting its permit obligations. Enjoining Pocahontas from preventing Frasure Creek's further entry upon the Subject Property, and thereby preventing Pocahontas from putting a more capable contractor in place, would likely only further frustrate the government's interest in seeing mined lands remediated. Frasure Creek has operated the Subject Property in violation of its permits and the Act, and an injunction granted in this matter would only serve to force upon a landowner's property an incompetent operator who may well only further adversely affect his lands. Rather, the governments' interests, as well as Pocahontas' future enjoyment and development of its property, depends upon Frasure Creek's involvement with the Subject Property coming to an end, so that a suitable operator may take over remediation and reclamation efforts.⁹

⁸ Mississippi's Surface Mining and Reclamation of Lands, which must also be read in consistently with its federal counterpart, is telling of this intent. Mississippi Code § 53-7-35 (6) provides: "If a landowner, upon termination or expiration of a lease, refuses to allow the operator to enter onto the property designated as the affected area to conduct or complete reclamation in accordance with the approved reclamation plan, or if the landowner interferes with or authorizes a third party to disturb or interfere with reclamation in accordance with the approved reclamation plan, the landowner shall assume the permit and shall file a reclamation plan and post a performance bond as required under this chapter."

⁹ Frasure Creek's request for extraordinary relief in the present case is also wholly inappropriate because Frasure Creek does not have clean hands, as evidenced by the numerous notices of violations it received under its

III. Other than illusory allegations, Frasure Creek has not shown it will be irreparably harmed if injunctive relief is not granted, while injunction will pose risk of harm to Pocahontas.

When an injunction is sought, a Court must consider the likelihood of irreparable harm to the petitioner without the injunction. *See Jefferson County Bd. of Educ. v. Jefferson County Educ. Assoc.*, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990). Moreover, the granting or refusal of an injunction require the court exercise sound judicial discretion in view of all circumstances of the particular case, including a comparative analysis of the hardship or convenience to the respective parties involved. *See State ex rel. Donley v. Baker*, 112 W. Va. 263 (1932).

To this end, Frasure Creek has not plead any concrete irreparable harm warranting injunctive relief. Frasure Creek generally alleges its failure to remediate the Subject Property will cause irreparable harm to itself and the general public. *See Ver. Pet.*, at p. 3, ¶ 14, 17. However, Frasure Creek has incurred violations on its permits since at least 2018, and consistently failed to timely remediate those violations. Surely then Frasure Creek cannot now submit an inability to timely remediate would cause irreparable harm when it has never before concerned itself with such risk. Moreover, Frasure Creek arguably has nothing left to lose if it cannot remediate, having already lost its permits and the Lease on its own accord

Pocahontas, on the other hand, stands to be harmed if an injunction is granted, because Pocahontas will find itself at the mercy of an operator who has historically operated the

permits and the WVDEP's Cessation Orders levied against Frasure Creek, all of which led to the WVDEP revoking Frasure Creek's permits in December 2020. West Virginia courts have long recognized the maxim of equity that the party who seeks equitable relief must come with clean hands. *Pittsburgh & W. Va. Gas Co. v. Nicholson*, 87 W. Va. 540, 105 S.E. 784, 787 (1921). Generally, the doctrine of clean hands is recognized as a principle precluding a party from recovering equitable relief or asserting an equitable defense if the party has violated an equitable principle. *See Town of Cowen v. Cobb*, No. 15-0438, 2016 WL 2969917 *1, *11 n. 5 (May 20, 2016). Before a complainant can have standing in court, the complainant must show that it has a good and meritorious cause of action and that the complainant comes to court with clean hands. *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 244 (1933).

Subject Property in violation of its permits and failed to abate those violations. Moreover, Pocahontas is actively adverse to Frasure Creek in this civil action through its counterclaim as well as adverse to its related entities and third-party defendants, Deep Water and New Trinity in this matter and the pending arbitration. Frasure Creek's further entry onto the Subject Property adversely affects not only Pocahontas' ability to ensure all necessary remediation work is performed but also interferes with Pocahontas' further development and realization of income from its property. Thus, in a balance of hardships, denial of an injunction would not irreparably harm Frasure Creek while granting the injunction would most assuredly cause damage to Pocahontas. Thus, Frasure Creek's request for injunction should be denied.

IV. This dispute is subject to the arbitration rendering the requested relief from this Court inappropriate.

The Lease under which Frasure Creek has operated is under dispute before an Arbitration Panel, pursuant to Section 32.1 of the Lease which provides any disputes arising thereunder shall be governed by arbitration.¹⁰ The Arbitration was bifurcated into two phases, the first phase to determine whether the Lease was terminated for various factors including a failure to diligently mine and failure to remediate permit violations, while the second phase was left to determine the damages owed to Pocahontas for violations of the Lease. On September 22, 2020, the Arbitration Panel declared the Lease had terminated. *See Arbitrator's Dec. and Award* dated

¹⁰ Section 32.1 of the Lease provides, in relevant part:

If there should arise any matters in dispute hereunder on which the Lessors and Lessee cannot finally agree, such matter or matters shall be referred to a board of arbitrators consisting of three (3) disinterested, competent persons, one selected by the Lessors and one by Lessee, as hereinafter provided, and the two thus selected shall select the third, who shall have the power of an umpire and be known as umpire-arbitrator. The decision and award of such arbitrators, or any two of them, or, in case of disagreement among all the arbitrators, of the umpire-arbitrator, shall be conclusive and binding upon the Lessors and Lessee and promptly complied with.

Sept. 22, 2020, at p. 1, attached hereto as *Exhibit 1*. The assessment of damages is now pending before the Panel.

Frasure Creek's petition for preliminary and permanent injunction raises disputes under the Lease as to Frasure Creek's right to enter the Subject Property now that the Lease has terminated. This dispute should therefore be resolved by the existing Arbitration Panel which is already tasked with resolving the consequences and damages of the Lease termination.

Furthermore, though Frasure Creek was not a named party in the Lease, it is nonetheless bound by the terms therein after obtaining permits to mine the Subject Tract pursuant to the Lease and conducting mining operations that were granted exclusively to the Lessee.

A party, by its actions, can impliedly assume the obligations of a contract, lease or deed, and become bound thereby, *even if* the party does not execute the contract, lease or deed, and further, even if it is not named, based upon principles of adoption, estoppel and simple assumption. Thus, in *West Virginia C. & P.R. Co. v. McIntire*, 44 W. Va. 210 (1897), the West Virginia Supreme Court held that the acceptance by a lessee of a lease, signed only by the lessor, makes the lease binding upon the lessee. Conversely, and interestingly, the reverse can be true. In *Hamrick v. Nutter*, 93 W. Va. 115 (1923), the lessor was held bound to a coal mining lease signed only by the lessee, where the lessor accepted lease. Similarly, in case after case the West Virginia court had held that an entity that takes an assignment of rights under a lease becomes bound. See *Steele v. American Oil Dev. Company*, 80 W. Va. 206 (1917), and *Hefner v. Light Fuel & Power Co.*, 77 W. Va. 217 (1915).

Along the same line, other states are consistent in holding an assignee is deemed to have impliedly assumed the obligations of the lease, and thereby become bound to its provisions, when the assignee claims or asserts some benefit under the contract. See *Hodges v. Campbell*, 211

Or. 428, 437-38, 316 P.2d 312, 317 (1957); *Kunzman v. Thorsen*, 303 Or. 600, 610, 740 P.2d 754, 759-60 (1987); *See also Edwards v. Altmayer*, 31 Ala. Ct. App. 459, 463, 18 So.2d 471, 474 (1944) (holding assumption of tenant's obligations and liabilities under lease by assignee create privity of estate between the lessor and assignee who becomes liable as if he were original lessee); *Simons v. Van Ingen*, 86 Pa. 330, 332 (1878) (holding that by assignment a lessee transfers privity of estate to his assignee who holds in privity of estate with the original landlord).

Moreover, "A non-signatory may be estopped from avoiding arbitration where [he] knowingly accepted the benefits of an agreement with an arbitration clause," the benefits being, "direct – that is to say, flowing directly from the agreement." *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421 (2015).

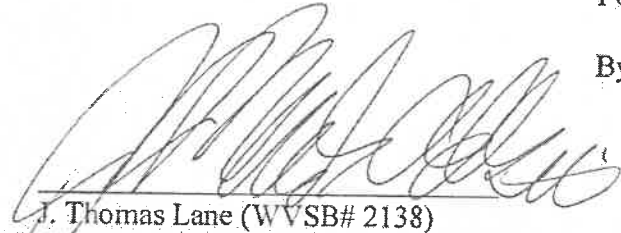
Thus, Frasure Creek, having obtained permits and operated the Subject Tract under rights exclusively granted to the Lessee, has so availed itself of the Lease that it can be presumed to have assumed the obligations contained therein, including the obligation to arbitrate Lease disputes. Therefore, Frasure Creek has failed to pursue relief which this Court may grant.

CONCLUSION

For the reasons set forth herein, Pocahontas respectfully submits that Frasure Creek must be denied its request for a preliminary and permanent injunction to enjoin Pocahontas from interfering with its entry onto Pocahontas's property to remediate permit violations Frasure Creek failed to timely remediate, under permits Frasure Creek no longer holds.

POCAHONTAS LAND LLC and
POCAHONTAS SURFACE INTERESTS LLC

By Counsel



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ARBITRATION PROCEEDING

In Re:

POCAHONTAS LAND LLC and
POCAHONTAS SURFACE INTERESTS LLC

and

DEEP WATER RESOURCES, LLC and
NEW TRINITY COAL, INC.

ARBITRATORS' DECISION AND AWARD PHASE 1

Phase 1 of this matter came before the Arbitrators on August 13 and 14, 2020, and, having considered the testimony and evidence presented by the witnesses and the parties and the arguments of Counsel the Arbitrators hereby make the following Findings of Fact and render this Decision and Award with regards to Phase 1 of this arbitration:

Findings of Fact

1. On September 1, 2017, Pocahontas Land, LLC (formerly Pocahontas Land Corporation) and Pocahontas Surface Interests (formerly Pocahontas Surface Interests, Inc.) (collectively "PLC"), Deep Water Resources, LLC ("Deep Water") and New Trinity Coal, Inc. ("Guarantor"), entered into a Coal Lease (the "Lease"), covering approximately 18,773.56 acres in Fayette County, West Virginia (the "Deep Water Property").

2. By letter dated April 3, 2020, PLCs provided Notice of Termination to Deep Water and Guarantor thereby terminating the Lease based on the failure to mine 50,000 tons per quarter for two consecutive quarters as required under Article V, Section 5.1, a non-

curable condition of default and for failure to remediate permitting and environmental violations as required under Article IV, Section 4.3, 10.1, 15.1, 29.1, 29.2, and 29.3 of the Lease.

3. In a response dated April 8, 2020 Deep Water disputed the Lease termination and stated that “[y]our purported termination is void and of no effect. Deep Water Resources . . . continues to enjoy all rights under the Lease, including access to all facilities for any purpose, including environmental compliance.”

4. On May 5, 2020 PLC submitted to Deep Water and New Trinity a Notice and Initiation of Arbitration and requested that the arbitration be bifurcated into two phases:

Phase 1 – PLCs seek a determination as soon as practicable, but at a minimum within the time required by the Lease, that (i) the Lease is terminated and (ii) Lessee must immediately cause all permits to be transferred to a designee of PLCs,

and

Phase 2 – PLCs seek compensation for the damages caused by Lessee to PLCs based on violations of the Lease as set forth in the Notice.

5. Phase 1 hearing of the Arbitration was conducted on August 13 and 14, 2020 followed by an agreed briefing schedule. None of the parties briefed Phase 1 item (ii) regarding transferring permits and accordingly the Arbitrators have not addressed this issue but it is available to be addressed in the Phase 2 arbitration proceedings or by a written request from any of the parties for additional proceedings by the Arbitrators under the Phase 1 proceedings.

6. Sometime between August 2019 and October 2019, Deep Water ceased coal production from the Open Fork Surface Mine and the Taylor Branch Surface Mine on the Deep Water Property. According to Deep Water’s representative, Pranav Agarwal, the

primary reason Deep Water ceased coal production on the Deep Water Property and idled all mining activity was because Deep Water was unable to market and sell its coal.

7. On or about October 24, 2019, Deep Water sold its last remaining coal inventory on the Deep Water Property.

8. For 2019, Deep Water produced and sold the following tons of coal from the Deep Water Property:

Quarter	Tons
1st 2019	25,376
2nd 2019	14,947
3rd 2019	39,002
4th 2019	15,845
Total	95,170

9. From October 2019 to May 5, 2020, Deep Water did not mine or sell any coal from the Deep Water Property.

10. It is undisputed by the parties that during the 4th Quarter of 2019 and First Quarter of 2020, Deep Water did not mine, sell and ship 50,000 tons per quarter for two consecutive calendar quarters.

11. Lease Article V, Section 5.1 provides that beginning on the 2nd anniversary of the Lease "... Lessee shall be in default of this covenant to diligently develop and maintain operations within the Leased Coal Tracts if Lessee shall fail to produce and ship therefrom at least fifty thousand (50,000) clean tons of coal from the Leased Coal Tracts per calendar quarter for any two (2) consecutive calendar quarters."

12. Lease Article V, Section 5.1 further provides "Lessee shall report promptly in writing to PLC any suspension of operations, reasons therefor and expected duration thereof."

13. In 2019 Deep Water idled coal mining on the property.

14. Deep Water did not report in writing to PLC of this suspension of operations, reasons therefor and expected duration thereof.

15. Deep Water could not sell coal in the domestic met market because: (1) Deep Water was a "new entrant" having reopened in 2017 after 2 years being idle and they had lost their prior customers; (2) the domestic customers take bids and negotiate contracts in the period July – November for contract deliveries in the following year; (3) Deep Water was not operating in 2017 in time to make bids for 2018 delivery; and (4) in 2018 Deep Water made offers to sell coal for 2019, but did not win because existing producers did not give up their customers.

16. As a result of being unable to obtain a domestic sales contract, Deep Water was forced to rely on "spot market" sales to the export market and was unable to obtain new spot market sales.

17. Deep Water's last coal sales in October 2019 (during the 4th Quarter of 2019) were priced at:

- a) Met coal sales to Integrity - \$92.00 per ton
- b) Low-ash coal sales to Calgon - \$118.00 per ton
- c) Steam coal sales to Dominion - \$70.00 per ton

18. Deep Water's cost per ton of coal played a role in its decision to idle mining at the Deep Water Property. Deep Water introduced two charts which indicated that Deep Water's average net cost per ton was \$141.48 from January 2018 to May 2019 and \$135.98 from June 2019 to October 2019.

19. Based on the sales prices reported to PLC in its royalty statements and Deep Water's average net cost per ton of coal, Deep Water never earned a profit on the sale of coal from September 1, 2017 to October 2019 when mining operations were idled on the Deep Water Property.

20. Deep Water presented testimony through Mr. Agarwal on direct examination and adverse witness Greg Wooten on cross examination that their interpretation of a default under Lease Article V, Section 5.1 was conditional on the existence of fair prices being obtainable for coal produced from the leased property, a market to sell the coal existing and that the coal can be reasonably produced.

21. Deep Water presented testimony through Mr. Agarwal on direct examination and adverse witness Greg Wooten on cross examination that their interpretation of the Lease is before a termination of the Lease under Article V, Section 5.1 can occur a notice of default with right to cure had to be provided by PLC to Deep Water.

22. No notice of default with right to cure the default under Article V, Section 5.1 was provided to Deep Water by PLC.

23. The Deep Water Property contains approximately 69.8 million tons of recoverable coal reserves. Approximately 54 million tons of those are surface based reserves and approximately 15 million of those tons are deep-mine based reserves.

24. Mr. Whipkey presented financial models for the Open Fork Surface Mine, Taylor Branch Surface Mine and Deep Mine 11, setting forth his opinion on the mine production forecast, raw tons mined, clean tons produced, mining cost per ton for each of the 3 Deep Water mines and the EBITDA or earnings per ton using Deep Water's sales price and the costs from witness Seth Schwartz.

25. Mr. Whipkey testified that a prudent operator would have mined at least 50,000 tons of coal per quarter from the Deep Water Property for the last quarter of 2019 and first quarter of 2020 and done so at a profit.

26. PLC provided evidence from Seth Schwartz that the market price for Deep Water's metallurgical coal was similar to the price Deep Water obtained for its coal sales throughout the period of the Lease and that based on actual market data the weighted average market price for the relevant period (2019 through the 1st Quarter of 2020) for Deep Water's metallurgical coal was (i) for the year 2019 \$102.76 per ton FOB mine; and (ii) for the first quarter of 2020 \$94.46 per ton FOB mine.

27. Mr. Schwartz testified that effectively the year 2019 through first quarter of 2020, was the strongest market pricing for met coal in recent memory. World met markets fell in the third quarter of 2019 but to levels that met coal producers still considered to be favorable. Met coal world markets rallied and the first quarter of 2020 was a strong quarter for met coal prices and profitability.

28. Deep Water operated on the Deep Water Property under permits held in the name of Frasure Creek Mining LLC, a wholly owned subsidiary of New Trinity Coal, Inc. which consists of 10 active permits and 4 inactive permits relating to the Deep Water Property.

29. During the year 2018 through September 16, 2019, Deep Water incurred numerous WVDEP Notices of Violations and Cessation Orders.

30. During the period September 16, 2019 through December 18, 2019, Deep Water incurred numerous WVDEP Notices of Violations and Cessation Orders.

31. During the year 2020, Deep Water incurred numerous WVDEP Notices of Violations and Cessation Orders.

32. All Deep Water's active mining permits are currently subject to Cessation Orders and in a show cause status and each of these Cessation Orders expressly state that Deep Water must "Cease all operations on the entire permit".

33. Deep Water offered evidence and or testimony that a Consent Order with WVDEP, which provided a resolution process for the WVDEP Notices of Violations and Cessation Orders was pending but due to the termination of the lease by PLC a final Consent Order was not entered into by WVDEP with Deep Water.

34. Any Deep Water Defaults related to permit obligations under Article IV, Section 4.3 and Article X, Section 10.1 LC are curable under Lease Article IV, Section 4.3 and Article X, Section 10.1 after PLC gives a Notice of Default.

35. No Notice of Defaults related to permit obligations were given to Deep Water by PLC.

Arbitrators Decision and Award

BY: Arbitrators Casey and McCuskey:

1. The interpretation of the language of the Lease is up to the Arbitrators.
2. Pursuant to Lease Article V, Section 5.1 of the Lease, the condition of default for failing to produce and ship at least 50,000 clean tons of coal from the Leased

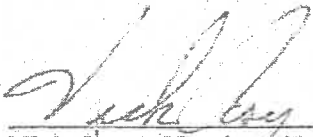
Premises for two consecutive calendar quarters existed as of the April 2, 2020 Notice of Termination, the default was not curable, and upon the Notice, the Lease terminated under Sections 29.1(c), 29.2 and 29.3 of the Lease.

3. A Notice of Default with right to cure was not required for the uncurable default under the Lease Article V, Section 5.1.

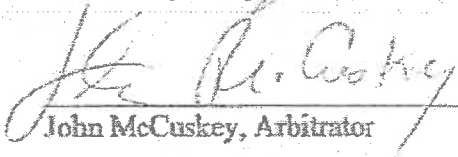
4. Due to the default under Lease Article V, Section 5.1 and the resulting termination of the Lease, whether Deep Water's failure to remediate permitting and environmental violations under the Lease is an independent basis for termination of the lease and whether such actions were subject to Notice of Default with rights to cure are not necessary for the Arbitrators to address.

5. Phase 1 item (ii) regarding transferring permits is not part of this Arbitrators Decision and Award but it may be addressed in the Phase 2 arbitration proceedings or by a written request from any of the parties for additional proceedings by the Arbitrators as part of the Phase 1 proceedings.

Dated September 22, 2020.



Nick Chsey, Umpire Arbitrator



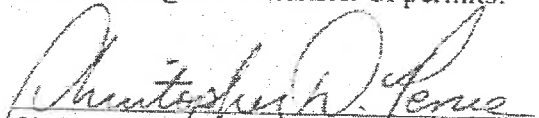
John McCuskey, Arbitrator

By Arbitrator Pence:

I interpret Article V., Section 5.1 of the Lease consistent with the testimony of PLC witness Greg Wooten and Deep Water in that the three conditions set forth therein must be met before the 50,000 ton requirement applies; namely whether (1) fair prices are obtainable, (2) Deep Water has the capacity to meet market demands, and to the extent (3) it can reasonably be done under the Lease. While I agree with Arbitrators Casey and McCuskey that the failure to produce 50,000 tons per quarter for two quarters is not curable under Sections 29.1(c) and 29.2 of the Lease, I find that these provisions must be read in conjunction with Sections 29.1(g)(iv) and Section 29.2. I find that PLC had actual knowledge that Deep Water was not producing sufficient tonnage in the 4th Quarter of 2019 and the 1st Quarter of 2020.

I therefore construe the Lease to require PLC to provide notice that PLC considered Deep Water's production or lack thereof in the 4th Quarter of 2019 and the 1st Quarter of 2020 as a violation of its obligation in Section 5.1 of the Lease to "diligently and energetically open, develop and maintain operations within the Leased Coal Tracts." While this could be an Event of Default per Section 29.1(g)(iv), it is curable per Section 29.2. I would therefore find that the Lease did not terminate because Deep Water was not provided with an opportunity to cure what PLC considered its inadequate production.

I concur with Arbitrators Casey and McCuskey on the aspect of their award dealing with the alleged failure to remediate permitting and environmental violations issues as well as the issue relating to the transfer of permits.


Christopher Pence, Arbitrator

ARBITRATION PROCEEDING

In Re:

**POCAHONTAS LAND LLC and
POCAHONTAS SURFACE INTERESTS LLC**

and

**DEEP WATER RESOURCES, LLC and
NEW TRINITY COAL, INC.**

ARBITRATORS' DECISION AND AWARD ON MATTERS RAISED FOR IMMEDIATE CONSIDERATION

Pocahontas Land, LLC (formerly Pocahontas Land Corporation) and Pocahontas Surface Interests (formerly Pocahontas Surface Interests, Inc.) (collectively "PLC"), Deep Water Resources, LLC ("Deep Water") and New Trinity Coal, Inc. ("Guarantor") participated in a telephonic and virtual hearing with the Arbitrators on December 2, 2020, in response to PLC's December 1, 2020 letter and Motion to Enforce Lease on two matters for immediate consideration:

1. Transfer of mining permits, and
2. Ownership of the coal preparation plant.

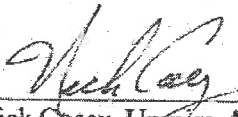
A preliminary matter raised by Deep Water and Guarantor is the scope of the Arbitrators' authority to consider the above two matters. Deep Water and Guarantor supplied the Arbitrators with case law to support their position and on the invitation of the Arbitrators the parties provided briefs in support of their respective positions on this preliminary matter.

The Arbitrators met telephonically on December 15, 2021 and, having considered the argument of Counsel and the parties' briefs make the following Findings of Fact and Decisions

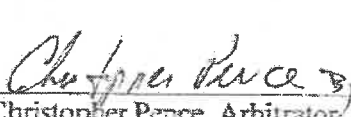
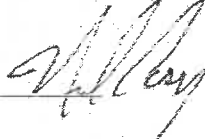
3. The Arbitrators order Deep Water to take all actions under its power to transfer any interests it has to any and all equipment, buildings and structures comprising the coal preparation plant to PLC or others as directed by PLC and to take all actions under its power to cause no interference with the use and operation of the preparation plant by PLC or others and to report in writing, via email, to the Arbitrators and other parties by close of business December 22, 2020 if it cannot effectuate the transfer.

4. If Deep Water contends it cannot effectuate the transfer as set out in the preceding item 3 then PLC and Deep Water will produce any documents or other evidence by affidavits which demonstrate ownership of the equipment, buildings and structures comprising the coal preparation plant, via email, to the Arbitrators and other parties by close of business on December 30, 2020.

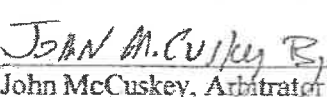
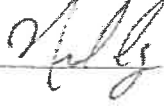
Dated: December 18, 2020.



Nick Casey, Umpire-Arbitrator

  w/ Permission

Christopher Pence, Arbitrator

  w/ Permission

John McCuskey, Arbitrator



west virginia department of environmental protection

Division of Mining and Reclamation
601 57th Street, Charleston, WV 25304
(304) 926-0490 Fax: (304) 926-0456

Austin Caperton, Cabinet Secretary
dep.wv.gov

December 10, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

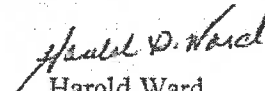
Re: Permit No. S300311 / SC #1657, 1810

Dear Operator:

On the 18th Day of April, 2020 and the 15th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number S300311 and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Jason Deal, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director – Div. of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
Jason Fox – Special Reclamation (Fayetteville)
Nathan Parks – Special Reclamation (Fayetteville)
Carla Poling- Special Reclamation (Philippi)



west virginia department of environmental protection

Division of Mining and Reclamation
601 57th Street, Charleston, WV 25304
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Austin Caperton, Cabinet Secretary
dep.wv.gov

December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

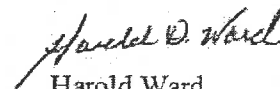
Re: Permit No. S301309 / SC #1556, 1573, 1600, 1655

Dear Operator:

On the 5th of September, 2019, the 19th of December, 2019, the 13th of March, 2020 and the 18th of April, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number S301309 and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Jason Deal, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director – Div. of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
Jason Fox – Special Reclamation (Fayetteville)
Nathan Parks – Special Reclamation (Fayetteville)
Carla Poling- Special Reclamation (Philippi)

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west virginia department of environmental protection

Division of Mining and Reclamation
601 57th Street, Charleston, WV 25304
(304) 926-0490 Fax: (304) 926-0456

Austin Caperton, Cabinet Secretary
dep.wv.gov

December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

Re: Permit No. S301705 / SC #1596, 1814

Dear Operator:

On the 13th Day of March, 2020 and the 15th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number S301705 and the associated bond forfeited.

Sincerely,

Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Jason Deal, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director – Div. of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
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December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

Re: Permit No. O500106 / SC #1812

Dear Operator:

On the 15th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number O500106 and the associated bond forfeited.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harold D. Ward".

Harold Ward
Director

HW/mms

ccs: Tim Justice, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Laurence R. Abbott, Environmental Inspector-in-Training
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director – Div. of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
Barry Curry– Special Reclamation (Charleston)
Carla Poling- Special Reclamation (Philippi)

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Austin Caperton, Cabinet Secretary
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December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

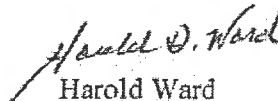
Re: Permit No. S303807 / SC #1572, 1592, 1595, 1811

Dear Operator:

On the 19th Day of December, 2019, the 26th Day of February, 2020, the 13th Day of March, 2020, and the 15th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number **S303807** and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Jason Deal, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director – Div. of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
Jason Fox – Special Reclamation (Fayetteville)
Nathan Parks – Special Reclamation (Fayetteville)
Carla Poling- Special Reclamation (Philippi)

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Austin Caperton, Cabinet Secretary
dep.wv.gov

December 14, 2020

Frasure Creek Mining LLC
P. O. Box 100
Oak Hill, WV 25901

Re: Permit No. O501502 SC 2004

Dear Operator:

On the 29th Day of October, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited.

Since you failed to request a hearing, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number O501502 and the associated bond forfeited.

Sincerely,

Harold Ward
Director

HW/mms

ccs: Dallas Runyon, Regional Assistant Director
Tim Justice, Environmental Supervisor
Laurence Abbott, Inspector-in-Training
John Flesher, Enforcement Coordinator
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting-HQ
Rob Rice, Director – Division of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
Steve Nestor-Special Reclamation
Barry Curry-Special Reclamation
Carla Poling, Philippi

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Austin Caperton, Cabinet Secretary
dep.wv.gov

December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

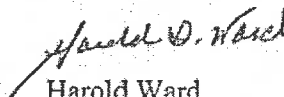
Re: Permit No. U301210 / SC #1661, 1827

Dear Operator:

On the 24th Day of April, 2020 and the 27th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number **U301210** and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Manuel Seijo, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Ryan Thomas, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director – Div. of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
Jason Fox – Special Reclamation (Fayetteville)
Nathan Parks – Special Reclamation (Fayetteville)
Carla Poling- Special Reclamation (Philippi)

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Austin Caperton, Cabinet Secretary
dep.wv.gov

December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

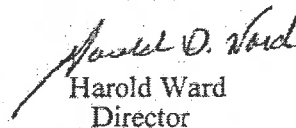
Re: Permit No. S301601 / SC #1564, 1565, 1597, 1654, 1813

Dear Operator:

On the 7th Day of November, 2019, the 3rd of December, 2019, the 13th of March, 2020, the 18th of April, 2020 and the 15th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number **S301601** and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor

Steve Sizemore, Assistant Director

Jason Deal, Environmental Inspector

Nicki Taylor, Assessment Officer

Samuel Coffey, Permitting (Charleston)

Amy Halstead, AVS

Rob Rice, Director – Div. of Land Restoration

Mike Sheehan, Manager – Special Reclamation (Philippi)

Jason Fox – Special Reclamation (Fayetteville)

Nathan Parks – Special Reclamation (Fayetteville)

Carla Poling- Special Reclamation (Philippi)

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(304) 926-0490 Fax: (304) 926-0456

Austin Caperton, Cabinet Secretary
dep.wv.gov

December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

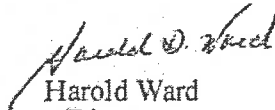
Re: Permit No. U300801 / SC #1598, 1658

Dear Operator:

On the 13th Day of March, 2020 and the 18th Day of April, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number U300801 and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Jason Deal, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director – Div. of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
Jason Fox – Special Reclamation (Fayetteville)
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Carla Poling- Special Reclamation (Philippi)

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(304) 926-0490 Fax: (304) 926-0456

Austin Caperton, Cabinet Secretary
dep.wv.gov

December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

Re: Permit No. S501006 / SC #1872

Dear Operator:

On the 10th Day of July, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number S501006 and the associated bond forfeited.

Sincerely,

Harold Ward
Director

HW/mms

ccs: Tim Justice, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Laurence R. Abbott, Environmental Inspector-in-Training
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director – Div. of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
Barry Curry– Special Reclamation (Charleston)
Carla Poling- Special Reclamation (Philippi)

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601 57th Street, Charleston, WV 25304
(304) 926-0490 Fax: (304) 926-0456

Austin Caperton, Cabinet Secretary
dep.wv.gov

December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

Re: Permit No. U300606 / SC #1656

Dear Operator:

On the 18th Day of April, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number U300606 and the associated bond forfeited.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harold W. Ward", is written over a horizontal line.

Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Jason Deal, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director – Div. of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
Jason Fox – Special Reclamation (Fayetteville)
Nathan Parks – Special Reclamation (Fayetteville)
Carla Poling- Special Reclamation (Philippi)

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601 57th Street, Charleston, WV 25304
(304) 926-0490 Fax: (304) 926-0456

Austin Caperton, Cabinet Secretary
dep.wv.gov

December 14, 2020

Frasure Creek Mining LLC
P. O. Box 100
Oak Hill, WV 25901

Re: Permit No. S502201 SC 2003

Dear Operator:

On the 29th Day of October, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited.

Since you failed to request a hearing, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number S502201 and the associated bond forfeited.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harold Ward", is written over a horizontal line.

Harold Ward
Director

HW/mms

ccs: Dallas Runyon, Regional Assistant Director
Tim Justice, Environmental Supervisor
Laurence Abbott, Inspector-in-Training
John Flesher, Enforcement Coordinator
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting-HQ
Rob Rice, Director - Division of Land Restoration
Mike Sheehan, Manager - Special Reclamation (Philippi)
Steve Nestor-Special Reclamation
Barry Curry-Special Reclamation
Carla Poling, Philippi

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Pocahontas Land LLC
P.O. Box 1517
800 Princeton Avenue
Bluefield, West Virginia 24701

Pocahontas Surface Interests LLC
P.O. Box 1517
800 Princeton Avenue
Bluefield, West Virginia 24701

April 3, 2020

Deep Water Resources, LLC
P.O. Box 100
Oak Hill, West Virginia 25901

Paul Saluja, Esquire
Saluja Law Office, PLLC
P.O. Box 3856
Charleston, West Virginia 25301

New Trinity Coal, Inc.
P.O. Box 100
Oak Hill, West Virginia 25901

→ Paul Saluja, Esquire
Saluja Law Office, PLLC
112 Capitol Street, Suite 400
Charleston, West Virginia 25301

Steven L. Thompson, Esq.
Barth & Thompson Law Offices
202 Berkeley Street
Charleston, WV 25302

Re: Notice of Termination

Gentlemen:

Deep Water Resources, LLC is in default under that certain Coal and Surface Lease (the "Lease"), dated September 1, 2017, between Pocahontas Land LLC (formerly Pocahontas Land Corporation) and Pocahontas Surface Interests LLC (formerly Pocahontas Surface Interests, Inc.), as Lessors, and Deep Resources, LLC, as Lessee, and New Trinity Coal, Inc., as Guarantor, for the following: (i) the failure to produce and ship fifty thousand tons of coal from the Leased Coal Tracts per calendar quarter beginning upon the second anniversary of the Lease, and otherwise to diligently develop and maintain operations within the Leased Coal Tracts, as required under Article V, Section 5.1, (ii) the failure failing to comply with permit obligations and environmental regulations and to cure violations cited by the West Virginia Division of Environmental Protection, and thereby failing to comply with all applicable laws of the State of West Virginia and the United States of America and all rules and regulations thereunder, as required under Article IV, Section 4.3 and Article X, Section 10.1 by, and (iii) by allowing an entity other than Lessee to hold or to be named as the permittee of or designated operator on any permit issued by a governmental authority for the purposed conducting mining operations, reclamation operations or any similar activities on the Leased Coal Tracts in violation of Article V, Section 5.3.

EXHIBIT

4

Deep Water Resources, LLC
New Trinity Coal, Inc.
Paul Saluja, Esquire
April 3, 2020
Page 2

The violations above under Article V, Sections 5.1 and 5.3 are not curable, and accordingly, both Lessors hereby declare that the Lease has terminated effective April 2, 2020 and do hereby provide this Notice of Termination. In addition, the termination effected hereby, and this Notice of Termination also terminates your Right of Entry.

All obligations that survive termination of the Lease shall continue in effect, including without limitation all indemnity obligations and all obligations to comply with laws.

Lessors are hereby exercising their rights to retain all equipment and improvements on the leased premises.

Lessors will be taking possession of the property on the date of this notice and installing their own security personnel.

Lessors have not performed a complete audit of Lessee's performance under the Lease, and accordingly, do not waive any rights with respect to any other failures that may exist and expressly reserve all further rights and remedies under the lease and at law and in equity including but not limited to the option to take over the permits or require an assignment thereof.

Pocahontas Land LLC

By: 

Its: Executive Vice President

Pocahontas Surface Interests LLC

By: 

Its: Executive Vice President

Cc: Paul Saluja, Esq.

WEST VIRGINIA SURFACE MINE BOARD

FRASURE CREEK MINING, LLC

Appellant,

v.

Appeal No. 2021-01-SMB

DIRECTOR, DIVISION OF MINING AND RECLAMATION
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

RECEIVED
Surface Mine Board

JAN 20 2021

Appellee.

RECEIVED
Surface Mine Board

NOTICE OF APPEAL

Appellant Frasure Creek Mining, LLC ("Frasure") is aggrieved by final orders issued by the West Virginia Department of Environmental Protection, Division of Mining and Reclamation ("DEP") dated December 10, 2020 and December 14, 2020, that declare forfeiture of the penal bonds associated with fourteen (14) different mining permits issued to Frasure ("Forfeiture Notices").¹ Frasure is also aggrieved by related final orders dated December 14, 2020 issued by DEP to the surety for the penal bonds addressed in the Forfeiture Notices demanding notification by the surety within thirty (30) days of whether the surety will complete reclamation in accordance with the approved reclamation plans or remit payment to DEP in the amount of the penal bonds ("Surety Demands").

The facts relevant to this appeal and the particular grounds on which the appeal is based, including questions of fact and law to be determined by the Board, are set forth in detail in

¹ Consistent with the Board's Procedural Rules, W.Va. C.S.R. § 49-1-1, Frasure files this single Notice of Appeal in order to perfect its appeal of each of the Forfeiture Notices and Surety Demands described herein, in a manner that is consistent with the orderly and efficient determination of these matters. Should it be determined that Frasure must file separate notices of appeal as to each such Forfeiture Order, Frasure asks that the Board treat this Notice of Appeal as having been filed separately as to each identified Forfeiture Order, and that (if necessary) the Board provide Frasure with a reasonable opportunity to file separate appeal documents for each such Forfeiture Notice and Surety Demand that has been appealed in this filing.

numbered paragraphs below. Amendment of this Notice of Appeal may be had only by leave of the Board, and only for good cause shown.

Frasure requests review of the Forfeiture Notices and Surety Demands, and that the Forfeiture Notices and Surety Demands be reversed and vacated.

Dated: January 20, 2021

Frasure Creek Mining, LLC
By Counsel



Robert M. Stonestreet (W. Va. Bar No. 9370)
Christopher B. Power (W. Va. Bar No. 4286)
Babst Calland Clements and Zomnir, P.C.
BB&T Square, STE 1000
300 Summers St.
Charleston, WV 25301
Phone: (681) 205-8888
Fax: (681) 205-8814
rstonestreet@babstcalland.com
cpower@babstcalland.com

I. ORDERS BEING APPEALED

1. By one letter dated December 10, 2020, DEP declared forfeited the penal bond associated with Article 3 Mining Permit No. S-3003-11 issued to Frasure for the Taylor Branch #2 mine in Fayette County, West Virginia.
2. By thirteen (13) separate letters dated December 14, 2020, DEP declared forfeited the penal bonds associated with the following additional thirteen Article 3 Mining Permits issued to Frasure:

Permit No.	Facility Name	County of Operation
O-3007-01	Open Fork Haulroad	Fayette
O-3011-10	Haulroad #1	Fayette
O-5001-06	Isaban Primary Haulroad	Mingo
O-5015-02	Twisted Gun Gap Haulroad	Mingo
S-3013-09	Open Fork #2 Surface Mine	Fayette
S-3016-01	Open Fork Surface Mine	Fayette
S-3017-05	Glenco Hollow Surface	Fayette
S-3038-07	Taylor Branch Surface	Fayette
S-5010-06	White Oak Surface Mine	Mingo
S-5022-01	Spring Fork Surface Mine	Mingo
U-3006-06	Glenco Conveyor	Fayette
U-3008-01	Big Eagle #1	Fayette
U-3012-10	Armstrong Creek Deep	Fayette

3. Frasure refers to all fourteen (14) letters collectively as the "Forfeiture Notices" and each separately as a "Forfeiture Notice." The Forfeiture Notices are collectively attached as

Exhibit A to this Notice. Frasure refers to all the mining permits addressed by the Forfeiture Notices collectively as the "Frasure Permits" and each separately as a "Frasure Permit."

4. Frasure received the Forfeiture Notices via certified mail on December 21, 2020.
5. The total amount of all the penal bonds declared forfeited by DEP in December, 2020 by the Forfeiture Notices is \$9,891,720.00.
6. By fourteen (14) separate letters dated December 14, 2020, DEP notified the surety for the penal bonds addressed in the Forfeiture Notices of the bond forfeiture declaration by DEP, and demanded notification by the surety within thirty (30) days of whether the surety will complete reclamation in accordance with the approved reclamation plans or remit payment to DEP in the amount of the penal bonds. Frasure refers to all these letters collectively as "Surety Demands" and each separately as a "Surety Demand." The Surety Demands are collectively attached as Exhibit B to this Notice.

II. NATURE AND GROUNDS OF APPELLANT'S CLAIMS

7. The Show Cause Orders that DEP issued to Frasure prior to issuance of the Forfeiture Notices did not provide an opportunity for Frasure to appeal the underlying finding of a "pattern of violations" before participating in the Show Cause process. Accordingly, Frasure raises as appeal grounds any objections to such a finding that Frasure might have made if it had been given that opportunity in a manner consistent with the West Virginia Administrative Procedures Act, W. Va. Code § 29A-1-1, et seq. and due process.
8. The DEP was required to issue orders revoking each of the Frasure Permits before issuing any Forfeiture Order pertaining to the bond for each such permit. Because none of the Frasure Permits was revoked, the Forfeiture Notices are invalid.

9. Prior to issuance of the Forfeiture Notices, DEP issued "Suspension Orders" dated September 21, 2020 and September 28, 2020 against twelve of the fourteen Frasure Permits ("Suspension Orders"). These Suspension Orders required Frasure to cease mining operations, submit a plan to abate all outstanding cessation orders, commence and complete reclamation, and maintain operations so as not to cause additional violations. DEP did not issue a suspension order applicable to Frasure's Mining Permits No. O-5015-02 (Twisted Gun Gap Haulroad) and No. S-5022-01 (Spring Fork Surface Mine).
10. Prior to and following issuance of the Suspension Orders, Frasure had been diligently working with the DEP to abate the conditions underlying the notices of violation and associated cessation orders issued against the Frasure Permits, as well as to comply with the terms of the Suspension Orders where applicable. Frasure regularly provided updates to the DEP concerning the status of field work and other activities undertaken to bring the operations governed by the Frasure Permits into compliance with regulatory requirements.
11. As DEP was aware when it issued the Forfeiture Notices, Frasure was involved in an ongoing dispute with the landowners who controlled the property in Fayette County governed by several the Frasure Permits: Pocahontas Land, LLC and Pocahontas Surface Interests, LLC (collectively "Pocahontas"). Starting in April, 2020, Pocahontas improperly prohibited Frasure and its contractors from accessing the property to perform activities necessary to abate conditions cited in violations issued by DEP.
12. In early December, 2020, Frasure received permission from Pocahontas to access the property. Frasure promptly commenced work to address the non-compliant conditions at the property.

13. Notwithstanding Frasure's performance and ability to regain access to the Fayette County property, DEP abruptly and without warning issued the Forfeiture Notices on December 10 and 14, 2020.
14. On December 18, 2020, which was four days after the date of most of the Forfeiture Notices, Pocahontas rescinded Frasure's permission to access the property. Upon information and belief, Pocahontas did so in response to the Forfeiture Notices.
15. Contrary to the provisions of W. Va. C.S.R. § 38-2-12.4.a.2, DEP failed to advise Frasure of the conditions under which forfeiture may be avoided prior to issuance of the Forfeiture Notices.
16. Contrary to W. Va. C.S.R. § 38-2-20.4.h, the Suspension Orders required that Frasure commence and complete reclamation of the permit areas subject to those orders.
17. Forfeiture of penal bonds associated with coal mining permits is a severe form of enforcement action that is historically reserved only for exceptional circumstances in which a permittee demonstrates a blatant refusal or inability to achieve compliance with regulatory provisions. According to Directive #339 issued by the federal Office of Surface Mining Reclamation and Enforcement (attached as Exhibit C), resort to bond forfeiture should only occur "whenever the appropriate official determines that other enforcement actions have not been or will not be effective to ensure compliance with SMCRA."
18. DEP has not, and cannot, properly determine that other enforcement actions have not been, or will not be, effective to ensure Frasure's compliance with West Virginia's coal mining statutory and regulatory requirements.
19. DEP has treated Frasure markedly different than other coal operators who have experienced compliance issues. DEP has not declared forfeiture of penal bonds posted by

- other coal operators who have demonstrated similar or more egregious degrees of non-compliance compared to Frasure.
20. DEP abused its discretion, acted in an arbitrary and capricious fashion, and otherwise acted contrary to law in issuing the Forfeiture Notices.
21. The Surety Demands arise from the Forfeiture Notices. The impropriety of the Forfeiture Notices negates any obligation by the surety of the relevant penal bonds to complete reclamation or tender payment of the bond amounts to DEP.
22. If the surety is required to commence reclamation, Frasure will be unfairly prejudiced in its ability to abate any outstanding violations and seek approval to resume mining operations.
23. If the surety is required to tender the penal bond amounts to DEP, Frasure will be unfairly prejudiced by no longer having bond coverage in place, which is necessary to seek approval to resume mining operations.
24. If the DEP is permitted to complete the bond forfeiture process, Frasure will be unfairly prejudiced by being "permit-blocked" under the DEP Mining Regulations and unable to obtain or maintain mining permits, which is necessary for the resumption and continuation of any mining operations.

III. Questions of Fact

25. Prior to issuance of each Forfeiture Notice and Surety Demand, did Frasure refuse to conduct reclamation of an unabated violation at the operation governed by the relevant penal bond?

26. Prior to issuance of each Forfeiture Notice and Surety Demand, was Frasure unable to conduct reclamation of an unabated violation at the operation governed by the relevant penal bond?
27. Prior to issuance of each Forfeiture Notice and Surety Demand, was Frasure provided with an opportunity to challenge whether there were adequate grounds for issuance of the Show Cause Orders associated with each respective Frasure Permit?
28. Prior to issuance of each Forfeiture Notice and Surety Demand, did DEP revoke each associated Frasure Permit?
29. Prior to issuance of each Forfeiture Notice and Surety Demand, was Frasure diligently working to abate the conditions giving rise to violation notices and cessation orders issued against the operation governed by the relevant penal bond?
30. Prior to issuance of each Forfeiture Notice and Surety Demand, did Frasure provide updates to the DEP concerning the status of field work and other activities undertaken to bring the operation governed by the relevant penal bond into compliance with regulatory requirements?
31. Prior to issuance of each Forfeiture Notice and Surety Demand, was Frasure in compliance with the terms of any applicable Suspension Order issued to the operation governed by the relevant penal bond?
32. Prior to issuance of each Forfeiture Notice and Surety Demand, did DEP provide assurances to Frasure representatives that the agency was satisfied with Frasure's performance to achieve compliance with regulatory requirements and, in light of that performance, would not take action to forfeit the penal bond associated with the relevant Frasure Permit?


33. Prior to issuance of each Forfeiture Notice and Surety Demand, did DEP notify Frasure that the agency was unsatisfied with Frasure's performance to achieve compliance with regulatory requirements at the operation governed by the relevant penal bond?
34. Prior to issuance of each Forfeiture Notice and Surety Demand, did DEP notify Frasure that the agency intended to forfeit the penal bond associated with the relevant Frasure Permit?
35. Prior to issuance of each Forfeiture Notice and Surety Demand, did DEP advise Frasure and the surety for the relevant penal bond of the conditions under which forfeiture may be avoided?
36. Prior to issuance of each Forfeiture Notice and Surety Demand, did DEP determine that other enforcement actions have not been or will not be effective to ensure compliance with regulatory requirements at each operation governed by the relevant penal bond?
37. Prior to issuance of each Forfeiture Notice, did Frasure have access to the property such that actions could be taken to abate the conditions cited in violations issued by DEP?
38. Have other enforcement actions been effective to ensure compliance with regulatory requirements at each operation governed by the penal bonds?
39. With respect to each Forfeiture Notice and Surety Demand, did DEP act consistently with its treatment of other mining permittees who have experienced similar or more egregious degrees of non-compliance issues?
40. Will the surety's compliance with the Surety Demands unfairly prejudice Frasure?

IV. Questions of Law

41. Did DEP comply with the provisions of the West Virginia Surface Coal Mining and Reclamation Act in issuing each Forfeiture Notice and Surety Demand, and in all proceedings prior to issuance of each such Forfeiture Notice and Surety Demand?
42. Did DEP comply with the provisions of the regulations implementing the West Virginia Surface Coal Mining and Reclamation Act in issuing each Forfeiture Notice and Surety Demand, and in all proceedings prior to issuance of each such Forfeiture Notice and Surety Demand?
43. Did DEP abuse its discretion in issuing each Forfeiture Notice and Surety Demand?
44. Was DEP's decision to issue each Forfeiture Notice and Surety Demand arbitrary and capricious?
45. With respect to each Forfeiture Notice and Surety Demand, did DEP comply with guidance issued by the federal Office of Surface Mining Reclamation and Enforcement for when bond forfeiture is an appropriate enforcement action?

WHEREFORE, Frasure requests that the Board reverse and vacate the Forfeiture Notices and Surety Demands, reinstate the penal bonds associated with all the relevant permits, and award any further relief the Board deems appropriate.

Frasure Creek Mining, LLC
By Counsel



Robert M. Stonestreet (W. Va. Bar No. 9370)
Christopher B. Power (W. Va. Bar No. 4286)
Babst Calland Clements and Zomnir, P.C.
BB&T Square, STE 1000
300 Summers St.
Charleston, WV 25301

Phone: (681) 205-8888
Fax: (681) 205-8814
rstonestreet@babstcalland.com
cpower@babstcalland.com

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FRASURE CREEK MINING, LLC,
a West Virginia limited liability company,

Petitioner and Counterclaim Defendant,

v.

Civil Action No. 20-C-142(B)
Hon. Paul M. Blake, Jr., Judge

POCAHONTAS LAND LLC,
a Virginia limited liability company, and
POCAHONTAS SURFACE INTERESTS LLC,
a Virginia limited liability company,

Respondents, Counterclaim Plaintiffs
and Third-Party Plaintiffs,

v.

DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,
a Delaware corporation,

Third-Party Defendants.

AFFIDAVIT OF JONATHAN RORRER

I, Jonathan Rorrer, having been duly sworn and advised, hereby state as follows:

1. I am at least eighteen years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matters stated herein.
2. The information set forth herein is based on my own personal knowledge and understanding.
3. I am the Acting Director of the Division of Mining and Reclamation for the West Virginia Department of Environmental Protection (the "Department").

4. I have reviewed the allegations asserted by Frasure Creek Mining, LLC ("Frasure Creek") in the *Verified Petition for Preliminary and Permanent Injunction* (the "*Verified Petition*") filed in this Court on December 30, 2020. Specifically, I am aware that Frasure Creek alleges in paragraph 4 of the *Verified Petition* that "... the [Department] is requiring Frasure Creek to continue remediation activities and water quality monitoring."

5. I am aware that Frasure Creek is the permittee of the following mine permits in Fayette County issued by the Department's Division of Mining and Reclamation: S300311; U301210; S301309; S301601; S301705; U300801; S303807; and U300606 ("Deep Water permits").

6. By letters dated December 10, 2020, and December 14, 2020, the Department declared Deep Water permits permits, and the associated bonds, forfeited. The Department's letters declaring Frasure Creek's permits and associated bonds forfeited are attached hereto as *Exhibit 1* (the "Department's revocation letters").

7. The Department is not aware of any reclamation or remediation efforts taken by Frasure Creek at the Deep Water permits, and the Department is not aware of any activities undertaken by Frasure Creek to correct the conditions of violation referenced in the Department's revocation letters for the Deep Water permits except for reinstatement of personal injury and property damage insurance protection, and cleaning out a ditch at Permit No. S300311.

8. The conditions of violation that caused the revocation of Deep Water permits have not been corrected or remediated in more than a year, except for reinstatement of personal injury and property damage insurance protection, and Frasure Creek failed to respond to the Department by demonstrating why its Deep Water permits should not be revoked.

9. Contrary to Frasure Creek's allegation in paragraph 4 of the *Verified Petition*, the Department has not taken any additional enforcement action to require Frasure Creek to begin or complete remediation activities or water quality monitoring at the Deep Water permit sites on Pocahontas' property, and the Department is unaware of, and has not agreed to, any reclamation plans proposed by Frasure Creek to remediate its permit violations and notes that the WVNPDES

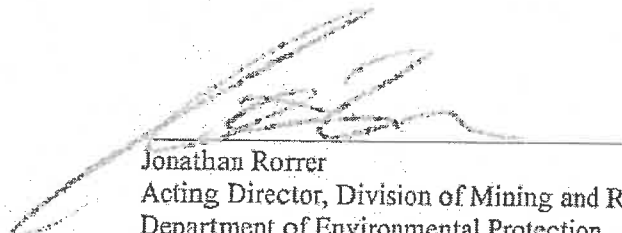
permits for the Deep Water sites, with administrative penalty order, remain in effect which does require certain remediation and water quality monitoring

10. Contrary to Frasure Creek's allegation in paragraph 4 of the *Verified Petition*, the Department has not ordered, directed, or required Frasure Creek to commence or continue remediation activities and water quality monitoring at the Deep Water permits since sending the Department's revocation letters on December 10, 2020 and December 14, 2020, except for transmittal of the previously referenced administrative penalty order at NPDES permits held by Frasure Creek in an administrative proceeding commenced July 11, 2019.

11. By letter dated January 8, 2021, Pocahontas Land, LLC and Pocahontas Surface Interests, LLC ("Pocahontas"), the property owner whose property is subject to Frasure Creek's permits, advised WVDEP that it was not aware of Frasure Creek, or any related entity, having taken any remediation action under the permits in response to the Department's notices of violation at the Deep Water permits.

12. Pocahontas informed the Department of an entity with whom it has contracted to commence remediation work on Pocahontas' property and correct the persisting status of violation which exists under Frasure Creek's permits. Pocahontas' January 8, 2021 letter states its goal of remediating Frasure Creek's violation within sixty (60) days and having Frasure Creek's permits reissued to its designee as quickly as possible.


FURTHER THE AFFIANT SAYETH NAUGHT.



Jonathan Rorrer
Acting Director, Division of Mining and Reclamation,
Department of Environmental Protection

STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA; to-wit

Taken, subscribed, and sworn to before me this 25th day of January 2021.



My Commission Expires:

Notary Public

July 3, 2021

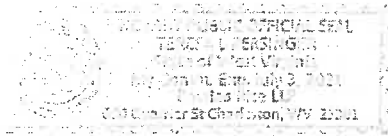


Exhibit I



west virginia department of environmental protection

Division of Mining and Reclamation
601 57th Street, Charleston, WV 25304
(304) 926-0490 Fax: (304) 926-0456

Austin Caperton, Cabinet Secretary
dep.wv.gov

December 10, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

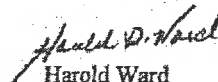
Re: Permit No. S300311 / SC #1657, 1810

Dear Operator:

On the 18th Day of April, 2020 and the 15th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number S300311 and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor

Steve Sizemore, Assistant Director

Jason Deal, Environmental Inspector

Nicki Taylor, Assessment Officer

Samuel Coffey, Permitting (Charleston)

Amy Halstead, AVS

Rob Rice, Director - Div. of Land Restoration

Mike Sheehan, Manager - Special Reclamation (Philippi)

Jason Fox - Special Reclamation (Fayetteville)

Nathan Parks - Special Reclamation (Fayetteville)

Carla Poling- Special Reclamation (Philippi)

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December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

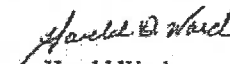
Re: Permit No. S301309 / SC #1556, 1573, 1600, 1655

Dear Operator:

On the 5th of September, 2019, the 19th of December, 2019, the 13th of March, 2020 and the 18th of April, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number S301309 and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor

Steve Sizemore, Assistant Director

Jason Deal, Environmental Inspector

Nicki Taylor, Assessment Officer

Samuel Coffey, Permitting (Charleston)

Amy Halstead, AVS

Rob Rice, Director - Div. of Land Restoration

Mike Sheehan, Manager - Special Reclamation (Philippi)

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December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

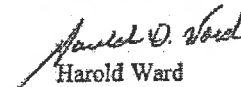
Re: Permit No. S301601 / SC #1564, 1565, 1597, 1654, 1813

Dear Operator:

On the 7th Day of November, 2019, the 3rd of December, 2019, the 13th of March, 2020, the 18th of April, 2020 and the 15th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number S301601 and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Jason Deal, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director - Div. of Land Restoration
Mike Sheehan, Manager - Special Reclamation (Philippi)
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December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

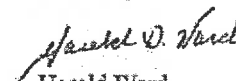
Re: Permit No. S301705 / SC #1596, 1814

Dear Operator:

On the 13th Day of March, 2020 and the 15th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number **S301705** and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Jason Deal, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director - Div. of Land Restoration
Mike Sheehan, Manager - Special Reclamation (Philippi)
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December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

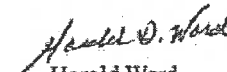
Re: Permit No. S303807 / SC #1572, 1592, 1595, 1811

Dear Operator:

On the 19th Day of December, 2019, the 26th Day of February, 2020, the 13th Day of March, 2020, and the 15th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number S303807 and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Jason Deel, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director – Div. of Land Restoration
Mike Sheehan, Manager – Special Reclamation (Philippi)
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Austin Caperton, Cabinet Secretary
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December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

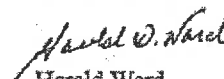
Re: Permit No. U300606 / SC #1656

Dear Operator:

On the 18th Day of April, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number U300606 and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor

Steve Sizemore, Assistant Director

Jason Deal, Environmental Inspector

Nicki Taylor, Assessment Officer

Samuel Coffey, Permitting (Charleston)

Amy Halstead, AVS

Rob Rice, Director - Div. of Land Restoration

Mike Sheehan, Manager - Special Reclamation (Philippi)

Jason Fox - Special Reclamation (Fayetteville)

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December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

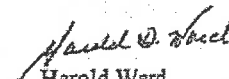
Re: Permit No. U300801 / SC #1598, 1658

Dear Operator:

On the 13th Day of March, 2020 and the 18th Day of April, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number U300801 and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Larry Dunn, Environmental Inspector Supervisor

Steve Sizemore, Assistant Director

Jason Deal, Environmental Inspector

Nicki Taylor, Assessment Officer

Samuel Coffey, Permitting (Charleston)

Amy Halstead, AVS

Rob Rice, Director - Div. of Land Restoration

Mike Sheehan, Manager - Special Reclamation (Philippi)

Jason Fox - Special Reclamation (Fayetteville)

Nathan Parks - Special Reclamation (Fayetteville)

Carla Poling- Special Reclamation (Philippi)

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Austin Caperton, Cabinet Secretary
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December 14, 2020

Frasure Creek Mining, LLC
P. O. Box 100
Oak Hill, WV 25901

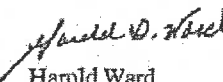
Re: Permit No. U301210 / SC #1661, 1827

Dear Operator:

On the 24th Day of April, 2020 and the 27th Day of May, 2020, the Department of Environmental Protection notified you that the above referenced mining operation was in violation of Article 3, Chapter 22 and the rules and regulations promulgated thereunder. You were further advised to show cause why said permit should not be revoked and associated bond forfeited. A Suspension Order was issued on September 21, 2020. Frasure Creek Mining, LLC has failed to comply with the terms and conditions of the Suspension Order.

Therefore, I hereby find and conclude that you have failed to show cause why the operation on the above referenced permit should not be revoked. Therefore, pursuant to the West Virginia Code, 22-3-17(b), I declare Permit Number U301210 and the associated bond forfeited.

Sincerely,


Harold Ward
Director

HW/mms

ccs: Manuel Seijo, Environmental Inspector Supervisor
Steve Sizemore, Assistant Director
Ryan Thomas, Environmental Inspector
Nicki Taylor, Assessment Officer
Samuel Coffey, Permitting (Charleston)
Amy Halstead, AVS
Rob Rice, Director - Div. of Land Restoration
Mike Sheehan, Manager - Special Reclamation (Philippi)
Jason Fox - Special Reclamation (Fayetteville)
Nathan Parks - Special Reclamation (Fayetteville)
Carla Poling- Special Reclamation (Philippi)

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**Pocahontas Land, LLC
Pocahontas Surface Interests, LLC
800 Princeton Avenue
Bluefield, West Virginia 24701**

November 2, 2020

Deep Water Resources, LLC
Post Office Box 100
Oak Hill, West Virginia 25901

New Trinity Coal, Inc.
Post Office Box 100
Oak Hill, West Virginia 25901

Re: Terms for Resolution: Pocahontas Land v. Deep Water

Gentlemen:

Your counsel, Mr. Steve Hastings, in conversations with our counsel, Tom Lane, outlined Deep Water's and New Trinity's position on certain issues and suggested that the parties explore an arrangement that will involve Essar in future operations. In addition, Mr. Hastings has stated that Frasure Creek Mining, LLC, wishes to enter the property covered by the 2017 Coal and Surface Lease (the "2017 Lease") under West Virginia Code § 22-3-11(e), which provides that an owner of property may not "interfere" with the "operator's obligations to the state for the reclamation of lands disturbed by the operator." This letter will respond to the issues presented by Mr. Hastings and will make certain requests and demands based upon termination of the 2017 Lease.

At the outset know that Pocahontas Land's goals are and have been to put the leased property to productive use as soon as possible. To that end Pocahontas Land will have a new operator prepared to commence mining to meet coal sale orders, and accordingly, hopes to clear any impediments that would prevent Pocahontas Land from commencing mining in December 2020 to meet orders in January 2021. An orderly transition is very important as a lot will be at stake.

So that Deep Water and New Trinity have a clear answer to the issues you raised and a clear understanding of Pocahontas Land's position the following is provided.

Issue 1. Continued Involvement of Essar.

The Arbitration Award is clear that the 2017 Lease is terminated, and, accordingly, the leased property is now unencumbered. Pocahontas Land will not enter any new lease or other arrangement with an Essar affiliated entity.

Issue 2. Resolution of Property and Permit Issues as a Condition for New Operations.

You stated that there must be resolution of property and permit issues before operations on the property can resume.

EXHIBIT

7

In response, Pocahontas Land states, first, that no restrictions exist regarding Pocahontas Land leasing or otherwise developing its property.

With respect to personal property, the terminated 2017 Lease provides that upon termination for default, the Lessor has the option to take any personal property, or to remove the property at Deep Water's cost. Pocahontas Land is hereby exercising its right to retain all such personal property located on the leased premises, including any mining equipment, coal inventory, the preparation plant and component parts and any other equipment and property of any kind located on the premises covered by the 2017 Lease.

The 2017 Lease requires, at the option of Pocahontas Land, that Deep Water transfer all, or any of the permits designated by Pocahontas Land, covering any portion of the leased premises to Pocahontas Land's designee. Pocahontas Land recognizes that under the Lease, its designee must post the bonds for those permits it elects to have transferred. Pursuant to these provisions Pocahontas Land hereby demands that Deep Water take all action as necessary to effect the transfer of all such permits designated by Pocahontas Land immediately upon the request of Pocahontas Land. To the extent permits may be held by an affiliate, Frasure Creek Mining, LLC, demand is hereby made that New Trinity Coal Inc., as Guarantor under the 2017 Lease, cause Frasure Creek Mining to take action as necessary to effect such permit transfers.

Issue 3. Damages and Rebate of Rent.

Pocahontas Land is entitled to damages for Deep Water's failure to diligently mine coal from the property. Stantec has quantified the tons that should have been mined under the terms of the lease and the royalty attributable to those tons in the amount of \$14,658,452, as shown on the chart enclosed. With a recoupable credit of \$3,000,000, the amount due Pocahontas Land is \$11,658,452. Accordingly, demand is made for \$11,658,452, as damages.

Deep Water challenged the termination of the 2017 Lease and thereby made the effective time of termination of the 2017 Lease the date of the Arbitration Award. As a result no rebate of the annual minimum rent is due, and in addition, rent under the 2017 Lease will continue until Pocahontas Land can find a new tenant. Accordingly, the Advance Minimum Annual Rental of \$1,000,000 due in advance of September 1, 2020, is now past due. Pocahontas Land recognizes that, to the extent a new tenant pays rent during the remainder of the term, a rebate may be required.

Perhaps most importantly, Pocahontas Land has been unable to put its property to productive use, although it has plans for mining to start by December 2020 and projected sales for January 2021.

Issue 4. Dispute Venue.

You have suggested that neither Frasure Creek nor New Trinity are bound to the arbitration provisions of the 2017 Lease, and any dispute with those parties will be resolved in a civil action, which, you assert could take a year.

Pocahontas Land disagrees. New Trinity is a party to the 2017 Lease and accordingly is bound by its terms, and specifically is bound as a principal. As such it was named as, and is, a party to the current arbitration. As guarantor, New Trinity is obligated to perform or cause the performance of all obligations in the 2017 Lease. To the extent permits existed in Frasure Creek, a wholly owned subsidiary of New Trinity, New Trinity is obligated to cause Frasure Creek to make permit transfers as required in the 2017 Lease.

Issue 5. Preparation Plant.

You have asserted that the plant and improvements to the plant are owned by New Trinity and Pocahontas Land has no claim to New Trinity property.

In this case the preparation plant was constructed and placed on the property by a predecessor lessee and was owned by Pocahontas Land prior to any lease or sublease to a New Trinity entity. Moreover any improvements or additions that may have been made to the plant during the term of the 2017 Lease were added under the terms of, and subject to, the provisions of the 2017 Lease, including the provision that upon default, all such improvements or additions and any other property became subject to Lessor's option to retain such property. As indicated above Pocahontas Land is exercising its option to retain all property and equipment located on the leased premises, and this includes the preparation plant and all property associated with the plant and all other equipment of any kind located on the terminated 2017 Lease premises.

Issue 6. Bonds and Interference with Contract with Bonding Company.

You have asserted that Pocahontas Land should not be contacting Frasure Creek's bonding company and that any efforts to affect the contractual relationship between Frasure Creek and its bonding company will constitute interference with contract.

Pocahontas Land will have its designee take all permits covering its property and to that end has contacted OneBeacon to determine its interest in providing bonds as necessary under the existing permits to a new permit owner. It has not taken and will not take any action that interferes with Frasure Creek's contracts. Further, Pocahontas Land or its designee may contact other bonding companies or other vendors and does so in furtherance of placing the property into production and will not seek your permission to do so.

Issue 7. Transfer of Permits.

You asserted that Pocahontas Land cannot require Frasure Creek to transfer permits because Frasure Creek is not a party to the lease.

As stated above and without waiving any rights under the 2017 Lease, New Trinity, as Guarantor is obligated to cause the transfer of all permits in question.

Issue 8. Access to Property for Permit Compliance:

Finally, you assert that Frasure Creek, as the holder of permits, seeks entry upon the property for the purpose of complying with regulatory obligations, citing West Virginia Code § 22-3-11(e) for the proposition that it is “unlawful for the owner of surface or mineral rights to interfere with the present operator in the discharge of the operator’s obligations to the state for the reclamation of lands disturbed by the operator.” We understand that such entry is sought without providing insurance, indemnity and other protections to Pocahontas Land.

In response, Pocahontas notes that the only ‘disturbance’ of its property under the 2017 Lease was by Deep Water, as the “operator”/Lessee, and that Deep Water had ample opportunity to comply with “the operator’s obligations” while the 2017 Lease was in effect and this opportunity continued after the April 3, 2020 Notice of Termination. In fact, not only did the Notice of Termination expressly provide that Deep Water’s obligations “to comply with laws” survived any termination, but Deep Water’s near immediate response on April 8, 2020, was that the 2017 Lease was not terminated. Thus, consistent with both the Notice of Termination and Deep Water’s own position, Deep Water could, and should, have taken the action presently sought “to comply with laws.” Under the notice of default given in the Notice of Termination, Deep Water had ten days after April 3, 2020, to comply with its permit obligations, but if failed to do so. Those ten days have expired.

Nevertheless, Pocahontas Land recognizes that Deep Water has asserted that it was not provided the right of entry to the property and has raised the issue for Phase II of the arbitration. In addition, you have requested, somewhat urgently, that Frasure Creek, as the holder of permits on Pocahontas Land’s property, be granted entry to comply with “regulatory obligations,” and curiously have asserted that such entry by Frasure Creek is not by and under Deep Water or the 2017 Lease.

The 2017 Lease prohibited any entity other than Deep Water from holding permits covering the leased premises, and to the extent permits were held by Frasure Creek, the 2017 Lease was violated. Additionally, in order to obtain and renew permits with DEP, the permit holder is required to have the requisite property rights to operate on the permitted property and to certify such rights to DEP on each five-year renewal. Pocahontas Land assumes that this regulatory requirement was met, either through an operator assignment with DEP or, given the relationship of the New Trinity parties, an internal agreement between Deep Water and Frasure Creek. Finally, Pocahontas Land assumes that Frasure Creek is in compliance with the West Virginia surface mining act requirements that it have liability insurance and workers compensation coverage, as required by each permit. Finally, Pocahontas Land assumes that any work performed on its property is covered by the indemnity and the guarantee of New Trinity made in the 2017 Lease.

To the extent an entry on Pocahontas Land is authorized below, Pocahontas Land elects under Section 26.3 of the 2017 Lease, to have the Leased Tracts left “in such condition that mining or other activities by another person or entity might begin immediately after the expiration or termination” of the 2017 Lease.

Upon the foregoing and the assumptions made, Pocahontas Land agrees that Deep Water or Frasure Creek, as a wholly owned subsidiary of New Trinity, may enter the premises covered by the 2017 Lease on the following terms and conditions:

1. If the entry is made by Deep Water, Deep Water will continue to have an operator assignment or other agreement from Frasure Creek so that it fully complies with all regulatory requirements to operate under Frasure Creek permits; and correspondingly, if the entry is made by Frasure Creek, Frasure Creek will do so under contract with Deep Water in order to comply with the regulatory requirement that it have the right to operate on the property, and in either case, so that all operations comply with the terms of the 2017 Lease.
2. That the party entering the property have liability insurance with limits required by the 2017 Lease or the permits, whichever are greater, and workers compensation coverage as required both by the 2017 Lease and the permits.
3. That there be no mining or disturbance of coal.
4. That the party entering the property fully comply with Pocahontas Land's election to have the Leased Tracts left "in such condition that mining or other activities by another person or entity might begin immediately after the expiration or termination" of the 2017 Lease.
5. That the party entering the property provide advance notice of all work and allow monitoring by Pocahontas Land.
6. That, without waiving any default asserted, any right or any claim in the pending arbitration, this authorization for entry is made by Pocahontas Land as a written request to Deep Water under Section 28.2 of the Lease, to comply with all environmental and reclamation requirements under all permits, including taking all remedial action required by DEP to cure all notices of violation that have been issued, within ten (10) days from your receipt of this request.

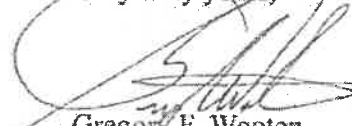
In the event that you fail to comply with such requirements and to cure all violations within the 10 day period, Pocahontas Land will seek a release of escrow funds to reimburse it for all costs of performing such obligations and requirements.

Moreover, unless the violations are cured the cessation orders will prohibit operations on all permitted sites on Pocahontas Land's property, and they thereby prevent Pocahontas Land from meeting its current plan to restore mining operations and filling sales orders. Accordingly, timing is critical.

In any event Pocahontas Land demands that the permit transfer process commence immediately, and in the event Deep Water, is unable to complete all remedial work within ten days, the transferee of the permits will become responsible.

Stephen E. Hastings, Esq.
November 2, 2020
Page 6

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Gregory F. Wooten', written over a horizontal line.

Gregory F. Wooten
Executive Vice President

GFW/cjt

cc: J. Thomas Lane, Esq.
Charles B. Dollison, Esq.
Mark J. Adkins, Esq.
Stephen E. Hastings, Esq.

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FRASURE CREEK MINING, LLC,
a West Virginia limited liability company,

Petitioner and Counterclaim Defendant,

v.

Civil Action No. 20-C-142(B)

Circuit Court of Fayette County, West Virginia
Hon. Paul M. Blake, Jr., Judge

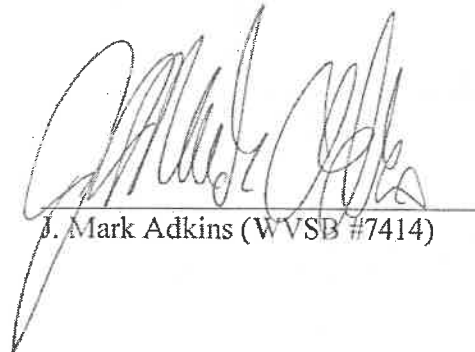
POCAHONTAS LAND LLC,
a Virginia limited liability company, and
POCAHONTAS SURFACE INTERESTS, LLC,
a Virginia limited liability company,

Respondents, Counterclaim Plaintiffs and
Third-Party Plaintiffs,

CERTIFICATE OF SERVICE

I, J. Mark Adkins, do hereby certify that a true and accurate copy of the foregoing
*Response in Opposition to Petitioner's Verified Petition for Preliminary and Permanent
Injunction* was served upon the following counsel of record by United State Mail, postage prepaid,
on the 25th day of January 2021:

R. Scott Long, Esq.
David F. Nelson, Esq.
Stephen E. Hastings, Esq.
HENDRICKSON & LONG, PLLC
214 Capitol Street
Post Office Box 11070
Charleston, West Virginia 25339



J. Mark Adkins (WVSB #7414)

Case number : 20-C-142.

Action Log

FRASURE CREEK MINING, LLC vs. POCHAHONTAS LAND, LLC

Line	Date	Action / Results
1	12/30/20	COMPLAINT FILED; S/C TO ATTY
2	01/25/21	PLT'S NOTICE OF HEARING--01/27 @ 11
3	01/27/21	CORRES FROM ATTY STEPHEN HASTINGS TO COURT
4	01/27/21	POCAHONTAS LAND LLC COUNTERCLAIM AND THIRD PARTY COMPLAINT,
5		RESPONSE IN OPPOSITION TO PLT'S VERIFIED PET FOR PRELIMINARY
6		AND PERMANENT INJUCTION
7	02/01/21	LETTER TO LAW CLERK FROM J. MARK ADKINS

C=Chg D=Del 1-4=Scr M=Menu T=Chg Line# PgUp PgDn P=Prt A=Add I=Image

ARBITRATION PROCEEDING

In Re:

**POCAHONTAS LAND LLC and
POCAHONTAS SURFACE INTERESTS LLC**

and

**DEEP WATER RESOURCES, LLC and
NEW TRINITY COAL, INC.**

ARBITRATORS' DECISION AND AWARD PHASE 1

Phase 1 of this matter came before the Arbitrators on August 13 and 14, 2020, and, having considered the testimony and evidence presented by the witnesses and the parties and the arguments of Counsel the Arbitrators hereby make the following Findings of Fact and render this Decision and Award with regards to Phase 1 of this arbitration:

Findings of Fact

1. On September 1, 2017, Pocahontas Land, LLC (formerly Pocahontas Land Corporation) and Pocahontas Surface Interests (formerly Pocahontas Surface Interests, Inc.) (collectively "PLC"), Deep Water Resources, LLC ("Deep Water") and New Trinity Coal, Inc. ("Guarantor"), entered into a Coal Lease (the "Lease"), covering approximately 18,773.56 acres in Fayette County, West Virginia (the "Deep Water Property").

2. By letter dated April 3, 2020, PLCs provided Notice of Termination to Deep Water and Guarantor thereby terminating the Lease based on the failure to mine 50,000 tons per quarter for two consecutive quarters as required under Article V, Section 5.1, a non-

curable condition of default and for failure to remediate permitting and environmental violations as required under Article IV, Section 4.3, 10.1, 15.1, 29.1, 29.2, and 29.3 of the Lease.

3. In a response dated April 8, 2020 Deep Water disputed the Lease termination and stated that “[y]our purported termination is void and of no effect. Deep Water Resources . . . continues to enjoy all rights under the Lease, including access to all facilities for any purpose, including environmental compliance.”

4. On May 5, 2020 PLC submitted to Deep Water and New Trinity a Notice and Initiation of Arbitration and requested that the arbitration be bifurcated into two phases:

Phase 1 – PLCs seek a determination as soon as practicable, but at a minimum within the time required by the Lease, that (i) the Lease is terminated and (ii) Lessee must immediately cause all permits to be transferred to a designee of PLCs,

and

Phase 2 – PLCs seek compensation for the damages caused by Lessee to PLCs based on violations of the Lease as set forth in the Notice.

5. Phase 1 hearing of the Arbitration was conducted on August 13 and 14, 2020 followed by an agreed briefing schedule. None of the parties briefed Phase 1 item (ii) regarding transferring permits and accordingly the Arbitrators have not addressed this issue but it is available to be addressed in the Phase 2 arbitration proceedings or by a written request from any of the parties for additional proceedings by the Arbitrators under the Phase 1 proceedings.

6. Sometime between August 2019 and October 2019, Deep Water ceased coal production from the Open Fork Surface Mine and the Taylor Branch Surface Mine on the Deep Water Property. According to Deep Water’s representative, Pranav Agarwal, the

primary reason Deep Water ceased coal production on the Deep Water Property and idled all mining activity was because Deep Water was unable to market and sell its coal.

7. On or about October 24, 2019, Deep Water sold its last remaining coal inventory on the Deep Water Property.

8. For 2019, Deep Water produced and sold the following tons of coal from the Deep Water Property:

Quarter	Tons
1st 2019	25,376
2nd 2019	14,947
3rd 2019	39,002
4th 2019	15,845
Total	95,170

9. From October 2019 to May 5, 2020, Deep Water did not mine or sell any coal from the Deep Water Property.

10. It is undisputed by the parties that during the 4th Quarter of 2019 and First Quarter of 2020, Deep Water did not mine, sell and ship 50,000 tons per quarter for two consecutive calendar quarters.

11. Lease Article V, Section 5.1 provides that beginning on the 2nd anniversary of the Lease "... Lessee shall be in default of this covenant to diligently develop and maintain operations within the Leased Coal Tracts if Lessee shall fail to produce and ship therefrom at least fifty thousand (50,000) clean tons of coal from the Leased Coal Tracts per calendar quarter for any two (2) consecutive calendar quarters."

12. Lease Article V, Section 5.1 further provides "Lessee shall report promptly in writing to PLC any suspension of operations, reasons therefor and expected duration thereof."

13. In 2019 Deep Water idled coal mining on the property.

14. Deep Water did not report in writing to PLC of this suspension of operations, reasons therefor and expected duration thereof.

15. Deep Water could not sell coal in the domestic met market because: (1) Deep Water was a "new entrant" having reopened in 2017 after 2 years being idle and they had lost their prior customers; (2) the domestic customers take bids and negotiate contracts in the period July – November for contract deliveries in the following year; (3) Deep Water was not operating in 2017 in time to make bids for 2018 delivery; and (4) in 2018 Deep Water made offers to sell coal for 2019, but did not win because existing producers did not give up their customers.

16. As a result of being unable to obtain a domestic sales contract, Deep Water was forced to rely on "spot market" sales to the export market and was unable to obtain new spot market sales.

17. Deep Water's last coal sales in October 2019 (during the 4th Quarter of 2019) were priced at:

- a) Met coal sales to Integrity - \$92.00 per ton
- b) Low-ash coal sales to Calgon - \$118.00 per ton
- c) Steam coal sales to Dominion - \$70.00 per ton

18. Deep Water's cost per ton of coal played a role in its decision to idle mining at the Deep Water Property. Deep Water introduced two charts which indicated that Deep Water's average net cost per ton was \$141.48 from January 2018 to May 2019 and \$135.98 from June 2019 to October 2019.

19. Based on the sales prices reported to PLC in its royalty statements and Deep Water's average net cost per ton of coal, Deep Water never earned a profit on the sale of coal from September 1, 2017 to October 2019 when mining operations were idled on the Deep Water Property.

20. Deep Water presented testimony through Mr. Agarwal on direct examination and adverse witness Greg Wooten on cross examination that their interpretation of a default under Lease Article V, Section 5.1 was conditional on the existence of fair prices being obtainable for coal produced from the leased property, a market to sell the coal existing and that the coal can be reasonably produced.

21. Deep Water presented testimony through Mr. Agarwal on direct examination and adverse witness Greg Wooten on cross examination that their interpretation of the Lease is before a termination of the Lease under Article V, Section 5.1 can occur a notice of default with right to cure had to be provided by PLC to Deep Water.

22. No notice of default with right to cure the default under Article V, Section 5.1 was provided to Deep Water by PLC.

23. The Deep Water Property contains approximately 69.8 million tons of recoverable coal reserves. Approximately 54 million tons of those are surface based reserves and approximately 15 million of those tons are deep-mine based reserves.

24. Mr. Whipkey presented financial models for the Open Fork Surface Mine, Taylor Branch Surface Mine and Deep Mine 11, setting forth his opinion on the mine production forecast, raw tons mined, clean tons produced, mining cost per ton for each of the 3 Deep Water mines and the EBITDA or earnings per ton using Deep Water's sales price and the costs from witness Seth Schwartz.

25. Mr. Whipkey testified that a prudent operator would have mined at least 50,000 tons of coal per quarter from the Deep Water Property for the last quarter of 2019 and first quarter of 2020 and done so at a profit.

26. PLC provided evidence from Seth Schwartz that the market price for Deep Water's metallurgical coal was similar to the price Deep Water obtained for its coal sales throughout the period of the Lease and that based on actual market data the weighted average market price for the relevant period (2019 through the 1st Quarter of 2020) for Deep Water's metallurgical coal was (i) for the year 2019 \$102.76 per ton FOB mine; and (ii) for the first quarter of 2020 \$94.46 per ton FOB mine.

27. Mr. Schwartz testified that effectively the year 2019 through first quarter of 2020, was the strongest market pricing for met coal in recent memory. World met markets fell in the third quarter of 2019 but to levels that met coal producers still considered to be favorable. Met coal world markets rallied and the first quarter of 2020 was a strong quarter for met coal prices and profitability.

28. Deep Water operated on the Deep Water Property under permits held in the name of Frasure Creek Mining LLC, a wholly owned subsidiary of New Trinity Coal, Inc. which consists of 10 active permits and 4 inactive permits relating to the Deep Water Property.

29. During the year 2018 through September 16, 2019, Deep Water incurred numerous WVDEP Notices of Violations and Cessation Orders.

30. During the period September 16, 2019 through December 18, 2019, Deep Water incurred numerous WVDEP Notices of Violations and Cessation Orders.

31. During the year 2020, Deep Water incurred numerous WVDEP Notices of Violations and Cessation Orders.

32. All Deep Water's active mining permits are currently subject to Cessation Orders and in a show cause status and each of these Cessation Orders expressly state that Deep Water must "Cease all operations on the entire permit".

33. Deep Water offered evidence and or testimony that a Consent Order with WVDEP, which provided a resolution process for the WVDEP Notices of Violations and Cessation Orders was pending but due to the termination of the lease by PLC a final Consent Order was not entered into by WVDEP with Deep Water.

34. Any Deep Water Defaults related to permit obligations under Article IV, Section 4.3 and Article X, Section 10.1LC are curable under Lease Article IV, Section 4.3 and Article X, Section 10.1 after PLC gives a Notice of Default.

35. No Notice of Defaults related to permit obligations were given to Deep Water by PLC.

Arbitrators Decision and Award

BY: Arbitrators Casey and McCuskey:

1. The interpretation of the language of the Lease is up to the Arbitrators.
2. Pursuant to Lease Article V, Section 5.1 of the Lease, the condition of default for failing to produce and ship at least 50,000 clean tons of coal from the Leased

Premises for two consecutive calendar quarters existed as of the April 2, 2020 Notice of Termination, the default was not curable, and upon the Notice, the Lease terminated under Sections 29.1(c), 29.2 and 29.3 of the Lease.

3. A Notice of Default with right to cure was not required for the uncurable default under the Lease Article V, Section 5.1.

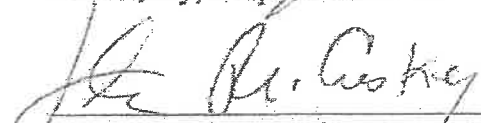
4. Due to the default under Lease Article V, Section 5.1 and the resulting termination of the Lease, whether Deep Water's failure to remediate permitting and environmental violations under the Lease is an independent basis for termination of the lease and whether such actions were subject to Notice of Default with rights to cure are not necessary for the Arbitrators to address.

5. Phase 1 item (ii) regarding transferring permits is not part of this Arbitrators Decision and Award but it may be addressed in the Phase 2 arbitration proceedings or by a written request from any of the parties for additional proceedings by the Arbitrators as part of the Phase 1 proceedings.

Dated September 22, 2020.



Nick Casey, Umpire Arbitrator



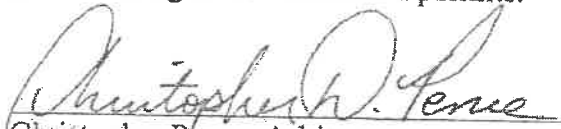
John McCuskey, Arbitrator

By Arbitrator Pence:

I interpret Article V., Section 5.1 of the Lease consistent with the testimony of PLC witness Greg Wooten and Deep Water in that the three conditions set forth therein must be met before the 50,000 ton requirement applies; namely whether (1) fair prices are obtainable, (2) Deep Water has the capacity to meet market demands, and to the extent (3) it can reasonably be done under the Lease. While I agree with Arbitrators Casey and McCuskey that the failure to produce 50,000 tons per quarter for two quarters is not curable under Sections 29.1(c) and 29.2 of the Lease, I find that these provisions must be read in conjunction with Sections 29.1(g)(iv) and Section 29.2. I find that PLC had actual knowledge that Deep Water was not producing sufficient tonnage in the 4th Quarter of 2019 and the 1st Quarter of 2020.

I therefore construe the Lease to require PLC to provide notice that PLC considered Deep Water's production or lack thereof in the 4th Quarter of 2019 and the 1st Quarter of 2020 as a violation of its obligation in Section 5.1 of the Lease to "diligently and energetically open, develop and maintain operations within the Leased Coal Tracts." While this could be an Event of Default per Section 29.1(g)(iv), it is curable per Section 29.2. I would therefore find that the Lease did not terminate because Deep Water was not provided with an opportunity to cure what PLC considered its inadequate production.

I concur with Arbitrators Casey and McCuskey on the aspect of their award dealing with the alleged failure to remediate permitting and environmental violations issues as well as the issue relating to the transfer of permits.


Christopher Pence, Arbitrator