INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-ICA-72

MISSION COAL WIND DOWN CO., LLC and GILBERT NATHAN, AS PLAN ADMINISTRATOR

Petitioner,

v.

JONATHAN RORRER, DIRECTOR OF THE OFFICE OF MINING AND RECLAMATION OF THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

APPEAL FROM THE WEST VIRGINIA SURFACE MINE BOARD

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE[1]

While the Respondent appreciates the Plan Administrator's predicament and understands his frustration with its consequences, the issue before the Department, the Director, the Surface Mine Board, and now this Court is simple and straightforward. The Petitioners' attempt to conflate, confuse, and complicate matters notwithstanding, resolution of the issue simply requires the Court, as the Department, the Director, and the Surface Mine Board all did before it, to apply the plain language of the surface mining laws to the extensive record and documented facts before it. That record establishes that the Plan Administrator has the sole and exclusive authority to act on behalf of the permit holder-operator and determine the manner in which the permit holder-operator and its contract operator conduct surface mining operations on the permit holder-operator's permits. As a result, the Plan Administrator falls easily within the definition of an owner or controller under the surface mining laws, as the Department, the Director, and the Board each concluded. And while the result may, as the Petitioners argue, seem "harsh and unfair" in this instance,[2] the rightful resolution of this Appeal has far-ranging implications for the Department's enforcement of the surface mining laws particularly in the bankruptcy context. To enable the Department to continue effectively to enforce the surface mining laws as mining companies pass through bankruptcy, the Respondent urges the Court to affirm the well-supported and demonstrably correct decisions of the Department, the Director, and the Surface Mine Board.

The Director issued coal mining permits to Pinnacle Mining Company or its predecessors on various dates as far back as 1981. From the beginning, the State's surface mining law

[1] Unless otherwise defined herein, capitalized terms used herein have the meanings ascribed to them in the Final Order of the Surface Mine Board that is the subject of this Appeal.

[2] *See* Petitioners' Brief, p. 24.

designated Pinnacle Mining as the operator under the permits[3] and required it to comply with the permits and all laws, regulations, and orders applicable to the operations thereunder.[4] If Pinnacle Mining failed to perform its obligations under the permits, applicable law, or the Director's orders issued in furtherance thereof, the statute imposed precisely the same obligations and liability on Pinnacle Mining's individual officers, directors, and agents.[5]

To facilitate enforcement of the surface mining law, the State Rules contemplated that the Department would track Pinnacle Mining's owners and controllers and permit violations over the life of the permits. The Rules required Pinnacle Mining to list all its owners and controllers in its applications for the mining permits.[6] The State Rules further required Pinnacle Mining to update its ownership and control information upon any changes.[7] The Department, as well as the federal Office of Surface Mining and Reclamation Enforcement, track ownership and control and permit violations information in separate databases.[8]

In this case, Pinnacle Mining did not update its ownership and control information for several years.[9] But when a former officer and manager who, along with all the other officers and

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[3] W. VA. CODE § 22-3-3(o).

[4] W. VA. CODE § 22-3-17(c) & (g).

[5] W. VA. CODE § 22-3-17(h).

[6] W. VA. CODE § 22-3-9(a)(4) ("If the applicant is a partnership, corporation, association or other business entity, [the application shall contain] [t]he names and addresses of every officer, partner, resident agent, director or person performing a function similar to a director . . ..").

[7] W. VA. CODE ST. R. § 38-2-3.26.a ("All changes . . . to the ownership and control data relating to a permittee . . . shall be reported to the Secretary.").

[8] *See generally* Saffer, Charles, *An Overview of the Ownership and Control Rule Under the West Virginia Surface Coal Mining and Reclamation Act*, 100 W.Va. L. Rev. 741 (1998). As the Petitioners correctly note, the Department tracks the contemplated information for West Virginia permit holders in its ERIS database. The federal agency tracks the contemplated information on a nationwide basis in its Applicant Violator System.

[9] *See* D.R.1475 [Hearing Transcript, 74:5-20 (Wheeler testimony)].

managers, resigned his position with the Mission Coal Debtors[10] in April 2019 requested that the federal agency to update the ownership and control information for one of the Mission Coal Debtors in April 2022,[11] the federal agency reviewed the information submitted, ended the former officer's association with the relevant Mission Coal Debtor in its ownership and control database,[12] "loaded" the Plan Administrator as a controller of that same Debtor in its database, and, as is its practice regarding companies operating only in West Virginia,[13] forwarded the same information to the Department for the Department's own review and consideration.[14] Upon receipt, the Department's ownership and control manager[15] reviewed the documentation the federal agency provided, examined what the federal agency had done with that information, conferred with the Department's lawyer, and determined that the Plan Administrator had replaced the former officers and managers as the Mission Coal Debtors' sole officer and manager.[16] Applying the plain language of the statute and the rules, she then "loaded" the Plan Administrator into the Department's own ownership and control database for one of Pinnacle Mining's sister entities.[17]

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[10] As the Petitioners point out, Mission Coal Company, LLC and its subsidiaries filed Chapter 11 bankruptcy cases in Alabama in October 2018. The subsidiaries included Pinnacle Mining Company, LLC. The Respondent uses the term "*Mission Coal Debtors*" to mean Mission Coal and all of its subsidiaries.

[11] *See* D.R.1731 [Hearing Transcript, 330:8-15 (Wheeler testimony)].

[12] *See* D.R.1732 [Hearing Transcript, 331:6-10 (Wheeler testimony)]. The fact that the federal agency ended a former manager-officer's association as of the date of his resignation highlights the error in the Petitioners' statement that the Department "ignore[d] . . . the people who drove Pinnacle Mining Company, LLC into bankruptcy." Petitioners' Brief, p. 2. In accordance with the mining laws, "the people who drove Pinnacle [] into bankruptcy" have no liability for violations that occurred *after* their resignation or removal from management.

[13] *See* D.R.1727 [Hearing Transcript, p. 326:15-24 (Wheeler testimony)].

[14] *See* D.R.1731-1732 [Hearing Transcript, 330:19 - 331:10 (Wheeler testimony)]. As Ms. Wheeler testified, the federal agency updates its database as to interstate mining companies, but it is the State's duty to update the ownership and control database as to West Virginia-only permitted companies. *See* D.R.1730-1732 [Hearing Transcript, 329:8-12 & 330:19 – 331:10 (Wheeler testimony)].

[15] *See* D.R.1726-1727 [Hearing Transcript, 325:20 – 326:14 (Wheeler testimony)].

[16] *See generally* D.R.1731-1737 [Hearing Transcript, 330:19 – 336:12 (Wheeler testimony)].

[17] *See* D.R.1732-1733, D.R.1736-1737 [Hearing Transcript, 331:21 – 332:1, 335:13-18, & 336:1-4 (Wheeler testimony)]. The Plan Administrator attempts to avoid the plain language of the statute by suggesting that the Department had never loaded a bankruptcy trustee or plan administrator prior to loading the Plan Administrator. *See* Petitioners' Brief, p. 3. Leaving aside whether the evidence actually supports the Plan Administrator's statement, the

She made no changes at that time regarding Pinnacle Mining.[18] Thus, rather than singling out,[19] targeting,[20] and affirmatively permit blocking the Plan Administrator as to Pinnacle Mining's then-existing mining violations, the undisputed evidence shows that the Department's ownership and control manager, when presented by the federal agency with information in the ordinary course of her administration of the surface mining laws, simply applied the documented facts to the statutory definition and "loaded" the Plan Administrator in the Department's ownership and control database as to Pinnacle Mining's sister entity. There is no evidence whatsoever that the Department targeted or singled out the Plan Administrator, sought out the ownership and control information, intentionally permit blocked the Plan Administrator, or ignored the potential responsibility of others, as the Petitioners state.[21]

Upon the Plan Administrator's appeal of the Department's decision to "load" him into the Department's ownership and control database,[22] the Director considered all the information the Plan Administrator provided regarding his control of the Mission Coal Debtors, the Department's own records relating to the permits, and the agency's interactions with the Plan Administrator and issued a detailed, reasoned decision affirming the Department's decision that the Plan

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only question in this Appeal is whether the Board's decision affirming the Department's loading of this Plan Administrator based on the facts of this case was arbitrary and capricious. The Board's decision based on the record before it establishes that it was neither arbitrary, capricious, or wrong.

[18] *See* D.R.1737 [Hearing Transcript, 336:9-12 (Wheeler testimony)].

[19] *See* Petitioners' Brief, p. 3.

[20] *See id.* The Petitioners also suggest, without any citation to the record, that "DEP allowed Bluestone to wring all economic benefit out of the Pinnacle permits for three and a half years before ever notifying Mr. Nathan that he would ultimately be held personally responsible for cleaning up Bluestone's mess." Petitioners' Brief, p. 10. The Director denies that statement in its entirety, including particularly the notion that the Department never notified Mr. Nathan of his potential personal responsibility and liability for unabated violations; it repeatedly did over the entire three and one-half year period. For present purposes, however, the Respondent notes that there is no evidence in the record that the Department did anything of the sort alleged.

[21] *See, e.g.,* Petitioners' Brief, pp. 2-3.

[22] *See* D.R.0652-0653, D.R.0651 and D.R.0552-0557 [Letters between G. Nathan and J. Rorrer, dated May 19, 2022, May 20, 2022, and June 17, 2022].

Administrator controlled Pinnacle Mining's sister entity within the meaning of the surface mining laws and rules he is charged with enforcing, determined the same with respect to Pinnacle Mining, and directed the Department to load the Plan Administrator for both Pinnacle Mining and its sister entity.[23] Upon the Plan Administrator's further appeal only as to the ownership and control finding regarding Pinnacle Mining,[24] the Surface Mine Board, in its own detailed, reasoned, and fully supported Final Order that is the subject of this Appeal, affirmed the Director's decision.[25] Again, in neither case have the Petitioners cited to any evidence that the Director or the Board targeted, singled out, or intentionally permit blocked the Plan Administrator as opposed to simply applying the documented facts to the statutory definition of owner or controller.

Far from the arbitrary and capricious labels the Petitioners pin on the Department, the Director, and the Board, the decisions of each reflected a simple, straightforward, and demonstrably correct application of the facts of this case to the applicable law and regulation. The decisions are rational and supported by substantial evidence. And despite the Petitioners' unsupported and conclusory allegations to the contrary, there is simply no evidence the Board, the Director, or the Department singled out or targeted the Plan Administrator.

The Court should, accordingly, affirm the decisions and orders of the Department, the Director and the Surface Mine Board.

II. SUMMARY OF THE ARGUMENT

Each of the Petitioners' assignments of error fails to establish that the reasoned, detailed, and fully supported decisions of the Director and the Board are arbitrary or capricious or clearly wrong, and this Court should affirm those decisions in all respects.

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[23] *See* D.R.0550 [Decision and Order, p. 4].

[24] *See* D.R.0005 [Notice of Appeal (to the West Virginia Surface Mine Board), p. 1].

[25] *See* D.R.2144-2170 [Final Order, dated January 23, 2023].

A. THE COURT MAY REVERSE THE BOARD (AND THE DIRECTOR) ONLY UPON A SHOWING THAT ITS DECISION WAS ARBITRARY AND CAPRICIOUS

Although the State Administrative Procedures Act specifies other bases for overturning an administrative order, *see* W.VA. CODE § 29A-5-4(g), the Petitioners appear to rely upon only one—specifically, subsection (6), which contemplates reversal only if "the administrative findings, inferences, conclusions, decision, or order are . . . arbitrary or capricious." As the Supreme Court has stated, "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996). Inasmuch as the reasoned and detailed decisions of the Department, the Director, and the Board are supported by substantial evidence and have an eminently rational basis, this Court should affirm those decisions.

B. THE BOARD'S DETERMINATION THAT MR. NATHAN HAS A RELATIONSHIP GIVING HIM ACTUAL AUTHORITY TO CONTROL THE MANNER OF MINING AT THE PINNACLE MINE COMPLEX WAS NOT ARBITRARY OR CAPRICIOUS

The State Rules define "owns or controls" for purposes of the surface mining laws as, among other things, "having *any* . . . *relationship* which gives one person *authority directly or indirectly* to determine the manner in which *the permit holder, an operator or other entity* conducts surface mining operations."[26] After reviewing the evidence, the Department, the Director, and the Surface Mine Board all determined that the Plan Administrator had such a relationship. As exhaustively detailed and fully supported in the Board's Final Order, the record establishes a firm basis for that determination.

As the Board found, Mr. Nathan accepted and assumed his position as the Plan Administrator pursuant to his agreement with Mission Coal and Mission Coal's bankruptcy court-

[26] W. VA. CODE ST. R. § 38-2-2.85.c.

approved bankruptcy plan (the "*Bankruptcy Plan*").[27] In his agreement, Mr. Nathan expressly agreed to perform the functions of the Plan Administrator under the terms of the Bankruptcy Plan.[28] Under that plan, the Plan Administrator assumed the mantel of Pinnacle Mining's sole manager, director, and officer with the sole authority to represent and act on its behalf.[29] Thus, as the Board concluded,[30] the Plan Administrator assumed sole control of the permit holder and statutory operator of all of the Pinnacle Permits and, as its sole representative with all the powers of its managers, directors, and officers, has the exclusive authority to manage the permit holder-operator's permits and affairs, including the exclusive authority to determine how the permit holder-operator conducts surface mining operations on the permits.

Rather than contradict the Plan Administrator's authority, the fact that Pinnacle Mining had entered into an asset sale agreement[31] and a Contract Operator Agreement with Bluestone[32] establishes that Pinnacle Mining had, and the Plan Administrator assumed as its controller, the actual authority to determine the method and manner of mining of the Pinnacle Permits. Through the two agreements, Pinnacle Mining elected to employ Bluestone as its own contract operator to conduct surface mining operations on its permits pending the transfer of the permits to Bluestone.[33] Bluestone agreed with Pinnacle Mining to conduct those operations in accordance with the permits and the mining laws.[34] Even so, however, Pinnacle Mining and the Plan Administrator retained,

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[27] *See* D.R.2147 & D.R.2150-2151 [Final Order, ¶¶ 11, 12, 13, & 22-26] (citing Confirmation Order, Bankruptcy Plan, *Plan Administrator Agreement*, and the Plan Administrator's testimony).

[28] *See* D.R.2151 [Final Order, ¶ 26].

[29] *See* D.R.2151 [Final Order, ¶ 27].

[30] *See* D.R.2151 [Final Order, ¶¶ 27-29] & D.R.2162-2169 [Final Order, Conclusions of Law, Part C, ¶¶ 83 *et seq*.].

[31] The *Bluestone Sale Agreement* starts at D.R.0017.

[32] The *Contract Operator Agreement* starts at D.R.0565.

[33] *See* D.R.0566-0567 [*Contract Operator Agreement*, § 2].

[34] *See* D.R.0567 [*Contract Operator Agreement*, § 3].

as the Board expressly found, the rights and duties to maintain the Pinnacle Permits, including to remediate violations on the Pinnacle Permits,[35] and complete the transfers of the Pinnacle Permits.[36] Simply put, Pinnacle Mining, as the permit holder-operator of the Pinnacle Permits, elected to employ a contract operator to conduct mining activities on its behalf while Pinnacle Mining and the Plan Administrator retained the obligations to comply with the permits and the mining laws and exclusive oversight and control over its own contract operator under the Bluestone Sale Agreement and the Contract Operator Agreement.[37] In fact, the Plan Administrator employed his own mining engineer early in his tenure to advise and assist him in that regard.[38] And the record is replete with instances in which the Plan Administrator, acting on his own or through his mining engineer, exercised his rights under Pinnacle Mining's agreements with Bluestone to attempt to compel Bluestone to perform its obligations under those agreements.[39] Ultimately, in fact, the Plan Administrator brought legal proceedings in the Alabama bankruptcy court to compel Bluestone to perform its obligations under the Bluestone Sale Agreement and the Contract Operator Agreement.[40]

Thus, the facts and circumstances establish, as the Board ultimately concluded based on the extensive record before it,[41] that Mr. Nathan has relationships giving him the authority to

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[35] *See* D.R.2165-2166 [Final Order, ¶¶ 96-102].

[36] *See* D.R.2164-2165 [Final Order, ¶¶ 93-95].

[37] *See* D.R.2167 [Final Order, ¶ 103], citing the testimony of Mr. Nathan.

[38] *See* D.R.2166-2167 [Final Order, ¶¶ 101 & 106], citing the testimony of Mr. Nathan and Mr. Isabell.

[39] *See* D.R.2167-2168 [Final Order, ¶¶ 104-107]. The Petitioners claim that "[t]here is no dispute that the operations at the Pinnacle Mine Complex have been overseen exclusively by Bluestone since April 30, 2019." Petitioners' Brief, p. 7. The Respondent denies that claim and that statement. As stated in the text, the record is replete with instances in which the Plan Administrator oversaw—or at least attempted to oversee—Bluestone's operations on the Pinnacle Permits through his attempted enforcement of the Bluestone Sale Agreement and the Contract Operator Agreement.

[40] *See* D.R.2168 [Final Order, ¶¶ 109-111], citing the Plan Administrator's Motion for Enforcement and the testimony of Mr. Nathan.

[41] *See* D.R.2169 [Final Order, ¶¶ 112-113].

control the manner of mining at the Pinnacle Mine Complex through his direct authority over Pinnacle Mining, the permit holder and statutory operator under the permits, and his indirect authority over Bluestone as Pinnacle Mining's contract operator via his exclusive authority to enforce the terms of Pinnacle Mining's agreements with Pinnacle Mining's contract operator, Bluestone. Supported as it is with extensive citation to substantial evidence and a rational basis, the Board's decision in that regard is, therefore, not arbitrary, capricious, or clearly wrong and should be affirmed.

C. THE BOARD'S DETERMINATION THAT MR. NATHAN CONTROLS THE PERMIT HOLDER WAS NOT ARBITRARY OR CAPRICIOUS

In urging that Mr. Nathan does not control Pinnacle Mining, the Petitioners urge this Court to accept as fact a "legal fiction" that, solely for purposes of understanding and interpreting the implications of federal bankruptcy law, divides a single legal entity into three different "things." The Board expressly considered, and rejected, the very same contention.[42] As the Board noted, the Bankruptcy Plan and Mr. Nathan's own testimony support that conclusion.[43]

When a debtor company files for Chapter 11 bankruptcy, the Bankruptcy Code denotes the debtor company as a "debtor in possession"[44] and vests it with the powers and duties of a trustee[45] presiding over a "bankruptcy estate" created upon the filing of the bankruptcy petition.[46] When the debtor company subsequently exits bankruptcy, the property remaining in the bankruptcy estate "re-vests" in the debtor,[47] which is then denoted as a "reorganized debtor." For purposes of understanding

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[42] *See* D.R.2163 [Final Order, ¶ 86].

[43] *Id.*, citing D.R.0418 [*Bankruptcy Plan*, Art. IV, § I.1(a)] & D.R.1493-1494 [Hearing Transcript, 92:20-93:1 (Nathan testimony)].

[44] *See* 11 U.S.C. § 1101(1).

[45] *See* 11 U.S.C. § 1107(a).

[46] *See* 11 U.S.C. § 541(a).

[47] *See* 11 U.S.C. § 1141(b).

the bankruptcy-related consequences of the filing and effect of a bankruptcy case, the Bankruptcy Code creates out of a single legal entity "a legal fiction" of three different "things"—the debtor, the debtor in possession, and the reorganized debtor[48] Throughout that process, however, no new legal entities are created. The debtor continues to exist, first designated as a "debtor in possession," and then as the "reorganized debtor."[49] None of the cases the Petitioner cites contradict this conclusion or even imply that the reorganized debtor is, in fact, a separate legal entity.

In this case, Pinnacle Mining emerged from bankruptcy as the same legal entity, then still named Pinnacle Mining,[50] continuing in existence as a "reorganized debtor" and holding the very same permits it held when it filed bankruptcy.[51] It also held all the contracts that Pinnacle Mining had entered into with the Plan Administrator and Bluestone, including both the Bluestone Sale Agreement and Contract Operator Agreement.[52] Within two months *after* the Bankruptcy Plan became effective and the bankruptcy case ended, Pinnacle Mining changed its name to Pinn MC Wind Down LLC.[53] But the simple fact remains that the same legal entity that entered bankruptcy with the Pinnacle Permits exited bankruptcy with the Pinnacle Permits and still holds them today. Simply put, Pinn MC Wind Down LLC is Pinnacle Mining Company, LLC and is the same legal entity that entered bankruptcy in

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[48] *See Mesabi Metallics Co LLC v. B Riley FBR, Inc. (In re Essar Steel Minnesota, LLC)*, Adv. Proc No. 18-50833, 2023 WL 4163458, Slip Op. *1 (Bankr. D. Del., June 23, 2023).

[49] *See id.*; *Cross Media Marketing Corp. v. CAB Marketing, Inc. (In re Cross Media Marketing Corp.)*, 367 B.R. 435, 451 (Bankr. S.D. N.Y. 2007); *Tennessee Wheel and Rubber Co. v. Captron Corporate Air Fleet (In re Tennessee Wheel and Rubber Co.)*, 64 B.R. 721, 725 (Bankr.M.D.Tenn.1986), each of which is discussed in more detail below.

[50] *See* D.R.0676 and D.R.0683 [*Bankruptcy Plan*, Art. I, § A. 52 & 134] (defining the Reorganized Debtors as the Debtors, including, by name, Pinnacle Mining Company, LLC, from and after the Effective Date of the Plan).

[51] *See* D.R.0696 [*Bankruptcy Plan*, Art. IV, § I] ("On and after the Plan Effective Date . . ., the Debtors . . . shall . . . continue in existence for purposes of . . . complying with their continuing obligations under the Sale Transaction Documentation (including with respect to the transfer of permits to the Successful Bidder as contemplated therein)").

[52] *See* D.R.0696 [*Bankruptcy Plan*, Art. IV, § I (1)(e)].

[53] *See* D.R.1896 [Appellee Ex. 2, ¶ 6] ("Subsequent to the Date of Confirmation each of the Reorganized Debtors lawfully changed its name by recording [the required documents] in the offices of the Secretary of State of each of their respective State of formation."). Nothing in the motion and the order the Alabama bankruptcy court subsequently entered suggest that Pinn MC Wind Down LLC is a different legal entity than the Pinnacle Mining Company that entered, reorganized, and then emerged from bankruptcy; to the contrary it clearly states that Pinnacle Mining simply changed its name. *See also* D.R.1904-1906 [Appellee Ex. 3].

October 2018 then known as Pinnacle Mining Company, LLC. Indeed, as Mr. Nathan testified, Pinn MC Wind Down uses the very same tax identification number that Pinnacle Mining used.[54]

Thus, as the Board expressly concluded and the record fully supports, when Mr. Nathan assumed his role as the Plan Administrator under the Bankruptcy Plan, he assumed control of Pinnacle Mining which, under its new name, continues to hold the permits issued to Pinnacle Mining and designated for transfer to Bluestone, subject to the application of applicable nonbankruptcy law. The Board's decision in that regard is, therefore, not arbitrary, capricious, or clearly wrong and should be affirmed.

D. THE DEPARTMENT'S ACTIONS DID NOT UNDERMINE, AND INSTEAD FURTHERED, THE POLICY BEHIND THE MINING LAWS' PERMIT BLOCKING PROVISIONS AND THE APPLICANT VIOLATOR SYSTEM

Directly contrary to the Petitioner's argument, the facts of this case establish beyond per adventure that the actions of the federal and state regulatory authorities in "loading" Mr. Nathan into ownership and control *actually furthered* the policies underlying the permit blocking provisions of the mining laws. For more than three years before the federal agency and the Department "loaded" him into their respective databases, the Plan Administrator had simply encouraged or cajoled Bluestone to perform, all to little effect.[55] When, however, the federal agency and the Department loaded him into their respective ownership and control databases with the result that he became permit blocked, the Plan Administrator finally took legal action to enforce

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[54] *See* D.R.1470 [Hearing Transcript, 69:3-12 (Nathan testimony)]. In testifying about the filing of tax returns for the reorganized debtors, Mr. Nathan used language entirely consistent with the "legal fiction" surrounding the debtor, the debtor in possession, and the reorganized debtor.] *See* D.R.1470 [Hearing Transcript, p. 69:13-16] ("Q. Do you *treat* [the reorganized debtors] as distinct entities from the pre-bankruptcy debtors? A. *For all intents and purposes, for me,* they have to be distinct entities.") (emphasis added).

[55] *See* D.R.2167-2168 [Final Order, ¶¶ 104-107], citing testimony of Mr. Nathan and Mr. Isabell.

the agreements against Pinnacle's contract operator.[56] Simply put, the agencies' actions in loading Mr. Nathan into the ownership and control databases spurred the Plan Administrator to do what the law otherwise required him to do—take actions to try to secure transfer of the permits and, in the meantime, bring Pinnacle Mining into compliance with the permits and applicable law. Rather than undermining the permit blocking program, the agencies' actions in loading Mr. Nathan into ownership and control did precisely what the statute contemplates—spurred the controller of a permit holder to take action to bring the permit holder he controls into compliance with its permits and law.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

While the Respondent would welcome oral argument before the Court, the Respondent believes that oral argument is unnecessary to decide this Appeal in accordance with Rule 18(a)(4). The briefs and the record on appeal, including the extensive, reasoned, and fully supported decisions of the Director and the Board, fully present the facts and legal arguments. The Respondent contends that the decisions below involved a straightforward application of documented facts to the standards established under the statute and the State Rules and, accordingly, denies that the decisions below involve either a novel application of settled law or narrow issues of law. As a result, the Respondent does not believe that oral argument would significantly aid this Court's decisional process.

IV. ARGUMENT

The State Rules define the terms Owned or Controlled and Owns or Controls as, among other things, "[h]aving any other relationship which gives one person authority directly or

[56] *See* D.R.2159 [Final Order, ¶ 64] (noting that DEP loaded the Plan Administrator as a controller of Pinnacle on August 1, 2022) & D.R.2168 [Final Order, ¶ 109] (noting the Plan Administrator filed a motion to enforce the Bluestone agreements on September 27, 2022).

indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface mining operations."[57] The parties agree that the proper application of that definition lies at the heart of this Appeal.

As set forth in its Final Order, the Surface Mine Board examined the extensive record before it, considered the documentary and testimonial evidence before it, and concluded, with extensive citation to the documents and testimony, that "the Plan Administrator has relationships with Pinnacle Mining and, through Pinnacle Mining, with Bluestone that have given, and continue to give, him the authority directly or indirectly to determine the manner in which Pinnacle Mining and Bluestone conduct surface mining operations on the Pinnacle Permits during the period of time beginning on his appointment as Plan Administrator on April 30, 2019 and continuing through the approval, if any, of the transfer or replacement of the Pinnacle Permits as contemplated under the Bluestone Sale Agreement."[58] In support of that decision, the Board made the following additional findings:

- the Plan Administrator has the exclusive authority to act on behalf of Pinnacle Mining, the holder of, and the operator under, each of the Pinnacle Permits;[59]
- through Pinnacle Mining, the Plan Administrator has the exclusive authority to complete the transfer of the Pinnacle Permits to Bluestone;[60]
- through Pinnacle Mining, the Plan Administrator has the authority to maintain, and remediate violations on, the Pinnacle Permits;[61] and

[57] WV CODE ST. R. §§ 38-2-2.85(c).

[58] *See* D.R.2169, [Final Order, ¶ 112].

[59] *See* D.R.2163 [Final Order, § C.1., ¶¶ 86-89].

[60] *See* D.R.2164-2165 [Final Order, § C.2., ¶¶ 90-95].

[61] *See* D.R.2165-2167 [Final Order, § C.3., ¶¶ 96-102].

- the Plan Administrator has exercised his authority to cause Bluestone to comply with its agreements to take the transfer and remediate violations of the Pinnacle Permits.[62]

The Petitioners have failed to demonstrate that the Board's decision was, in any way, arbitrary or capricious or clearly wrong.

A. THE PLAN ADMINISTRATOR HAS EXCLUSIVE AUTHORITY TO CONTROL THE PERMIT HOLDER-OPERATOR'S OPERATIONS ON THE PERMITS

Fundamentally, the Petitioners' argument is premised upon a misconstruction of the law. Contrary to the Petitioners' entire focus on the Plan Administrator's purported lack of *ability* to mine or control the mining operations, the proper standard under the State Rules focuses on relationships that give one the *authority* to determine the method and manner of mining, not the *ability* to actually mine. *See* WV CODE ST. R. §§ 38-2-2.85(c). The Supreme Court[63] made precisely the same point in a different context in *West Virginia Division of Environmental Protection v. Kingwood Coal Co.*, 200 W.Va. 734, 490 S.E.2d 823 (1997), a decision cited by the Petitioners.[64] In that decision, the Court noted specifically that the applicable standard did *not* require proof that one "*actually controlled* [the] mining operations." *Id*. 200 W.Va. at 737, 490

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[62] *See* D.R.2167-2169 [Final Order, § C.4., ¶¶ 103-111].

[63] The Petitioners cite to and rely upon statements in the federal regulations under the federal law. *See* Petitioners' Brief, pp. 15-16. Particularly in light of the Supreme Court's express interpretation of the statutory standard and explicitly resolved the question of whether *actual authority* or *actual control* is the appropriate standard, the Respondent submits that the statements in the federal regulations have no relevance here. But the Respondent further submits that the federal agency's use of the word "control" does not mean what the Petitioners suggest it means. There is no indication that it requires a showing that the permit holder has employees and equipment to conduct mining, as opposed to simply having control to determine a permit holder-operator's manner of mining, as the Plan Administrator does in this case. In fact, the quoted language in the Petitioners' own Brief suggests the federal agency was simply trying to distinguish between "total control of a surface mining operation" (as exists where the controller controls the permit holder-operator itself) and control over "one aspect such as handling or selling coal" (as was the case in *Kingwood*). *Id.*, p. 16.

[64] The Petitioners' reliance on *Kingwood* is misplaced. That case involved the presumption of control that arises from one's ownership of the coal and having the right to receive the coal after mining. *See* 200 W.Va. at 748, 490 S.E.2d at 837. The Court concluded that Kingwood had rebutted the presumption by establishing that it did not have the actual authority to control the manner of mining. *See* 200 W.Va. at 748, 490 S.E.2d at 837. That case, however, did not involve, as this one does, an individual with actual, indeed, exclusive authority to act on behalf of the permit holder-operator itself and enforce the permit holder-operator's contracts.

S.E.2d at 837 (emphasis in original). Rather, the Court stated, "[i]n determining *whether* [one] had *control* over [the mining operation], *the test to be applied is the actual authority of [that person] over the operations of [the mining company]*. *Id.* (emphasis in original).

In this case, the Respondent acknowledges that Mr. Nathan does not *actually control* the actual mining for any number of reasons. But Mr. Nathan does have, as the Department, the Director, and the Board determined, relationships that give him actual *authority* to determine the manner in which the permit holder-operator and its contract operator conduct surface mining operations on the Pinnacle permits as contemplated in the applicable test.

First, Mr. Nathan has an agreement with the Mission Coal Debtors that gives him *exclusive authority* to act on behalf of Pinnacle Mining, the permit holder and statutory operator under the Pinnacle Permits.[65] Pursuant to that agreement, Mr. Nathan assumed the role of the court-approved Plan Administrator under the Mission Bankruptcy Plan that makes him the *sole* manager and officer of Pinnacle Mining and vests him with *exclusive authority* to act on Pinnacle Mining's behalf.[66]

Second, for better or for worse, Pinnacle Mining and the Mission Coal Debtors, which Mr. Nathan controls, entered into the Bluestone Sale Agreement and the Contract Operator Agreement. Pursuant to those agreements, Pinnacle Mining agreed to sell its assets to Bluestone, transfer the Pinnacle Permits to Bluestone subject to subsequent regulatory approval, maintain the Pinnacle Permits pending their transfer, and give Bluestone as its contract operator actual day-to-day operations under the Pinnacle Permits in the interim.[67] The Department, however, is not a party

[65] *See* D.R.2151-2152 [Final Order, ¶¶ 26-29], citing the Bankruptcy Plan, the Plan Administrator Agreement, and the testimony of Mr. Nathan.

[66] *See* D.R.2151-2152 [Final Order, ¶¶ 27-29], citing the Bankruptcy Plan and the testimony of Mr. Nathan].

[67] *See* D.R.2153-2154 [Final Order, ¶¶ 34 & 36-38], citing the Bluestone Sale Agreement and the Contract Operator Agreement.

to either of those agreements. The agreements do not bind the Department. And under the surface mining laws, those agreements and Bluestone's designation as a contract operator do not shift the responsibility for the Pinnacle Permits or compliance with the permits and the law from Pinnacle Mining or the Plan Administrator who controls it to Bluestone.[68]

Thus, as the Board expressly concluded based upon Mr. Nathan's exclusive authority over Pinnacle Mining via his Plan Administrator Agreement and the Bankruptcy Plan and, through Pinnacle Mining, the enforcement of the Bluestone Sale Agreement and Contract Operator Agreement, Mr. Nathan alone has the authority to determine the manner in which Pinnacle Mining and Bluestone conduct surface mining operations.[69]

Further, as the Board expressly found, Mr. Nathan has, since taking his position on April 30. 2019, exercised that authority to determine the manner of surface mining operations. Mr Nathan employed a mining consultant to advise and assist him.[70] He received and acted upon notices of violations and orders of the Director.[71] Either directly or through his representatives, he has interfaced with the Department regarding the conduct of mining operations, violations, and issues on the Pinnacle Permits.[72] Either directly or through his mining engineer, the Plan Administrator has directed his contract operator to remedy violations and issues on the permits.[73]

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[68] *See* W. VA. CODE § 22-3-17(c) & (g). The Petitioners suggest that the Department should take enforcement actions against its own contract operator rather than itself as the permit holder-operator. The Department, however, does not have direct regulatory authority over a contract operator. Sections 17(c) and (g) authorize enforcement only against the permit-holder operator.

[69] *See* D.R.2169 [Final Order, ¶ 112].

[70] *See* D.R.2166 [Final Order, ¶ 101], citing the testimony of Mr. Nathan and Mr. Isabell.

[71] *See* D.R.2155 [Final Order, ¶¶ 43-44], citing the testimony of Mr. Nathan and Mr. Isabell testimony.

[72] *See* D.R.2155-2156 [Final Order, ¶¶ 43-44 & 46-48], citing the testimony of Mr. Nathan and Mr. Isabell and Appellee's Exs. 5 & 6.

[73] *See* D.R.2155 [Final Order, ¶ 44], citing the testimony of Mr. Nathan and Mr. Isabell.

On occasion, his mining engineer visited the site or met with Bluestone to discuss violations.[74] And more recently, he has taken steps to enforce the Bluestone Sale Agreement and Contract Operator Agreement.[75] That his efforts have, so far, been unsuccessful does not alter the conclusion that he has the actual authority to direct and determine the manner of surface mining operations on the Pinnacle Permits.

Although the Director determined, and the Board affirmed, that Mr. Nathan actually has the authority to determine the method of mining operations, another provision of the mining laws also supports the notion that Mr. Nathan is an owner and controller. Under the applicable State Rule, a corporate officer is presumed to constitute an owner or controller. W. VA. Code St. R. § 38-2-2.85.d.1. Inasmuch as Mr. Nathan is the Debtor's sole officer, Section 2.85.d.1 provides an alternate basis on which to affirm the Director's and the Board's decisions. Mr. Nathan has not rebutted, and cannot rebut, the presumption under Section 2.85.d.1., as he does have the *authority* directly or indirectly to determine the manner in which the relevant surface mining operation is conducted as the Department, the Director, and the Board all found.

As the foregoing amply demonstrates, Mr. Nathan properly constitutes an owner or controller under the applicable State Rules and, accordingly, the Department's, the Director's, and the Board's determinations thereof are neither arbitrary, capricious, nor clearly wrong.

B. PINN MC WIND DOWN IS THE PERMIT HOLDER AND THE PLAN ADMINISTRATOR CONTROLS ITS OPERATIONS

In arguing that the Plan Administrator does not control the permit holder, the Petitioners appear to rely upon the contention that Pinn MC Wind Down is not the Pinnacle Mining Company that holds the Pinnacle Permits. *See* Brief, pp. 19-20. As noted above, that assertion, premised on

[74] *See* D.R.2156 [Final Order, ¶ 45], citing the testimony of Mr. Isabell.

[75] *See* D.R.2168 [Final Order, ¶ 109], citing Appellee Ex. 4 and the testimony of Mr. Nathan.

a fundamental misunderstanding of bankruptcy law, the Bankruptcy Plan, and the cited case law, is simply wrong, as the Board expressly concluded in its Final Order.

The Petitioners' argument centers on the notion that Pinnacle Mining Company emerged from bankruptcy as a new entity. But, as a bankruptcy judge in one of the seminal bankruptcy courts in the country very recently explained, that concept is just a "legal fiction:"

> Chapter 11 of the Bankruptcy Code depends on an important legal fiction. A successful chapter 11 reorganization (involving a single debtor) typically involves only one actual legal entity – the corporation chartered under state law that was the prepetition debtor. *That same state-law legal entity serves as the debtor in possession during the bankruptcy and emerges at the end of the case as the reorganized debtor.* Federal bankruptcy law, however, treats that entity as three different things. It is, first, the prepetition debtor before the petition date; second, the "debtor in possession" in the period between the petition date and the effective date of the confirmed plan; and third, the reorganized debtor upon its emergence from bankruptcy following the effective date. The "separateness" of each of these three (fictional) "entities" is a central feature of federal bankruptcy law [for purposes of determining the treatment of claims against the debtor and the debtor's power to bind successors].

Mesabi Metallics Co LLC v. B Riley FBR, Inc. (In re Essar Steel Minnesota, LLC), Adv. Proc No. 18-50833, 2023 WL 4163458, Slip Op. *1 (Bankr. D. Del., June 23, 2023) (emphasis added); *see also Cross Media Marketing Corp. v. CAB Marketing, Inc. (In re Cross Media Marketing Corp.)*, 367 B.R. 435, 451 (Bankr. S.D. N.Y. 2007) (noting that the plan in that case made clear that the debtor continued as the reorganized debtor after the effective date of the plan); *Tennessee Wheel and Rubber Co. v. Captron Corporate Air Fleet (In re Tennessee Wheel and Rubber Co.)*, 64 B.R. 721, 725 (Bankr.M.D.Tenn.1986) ("The 'debtor' and 'debtor-in-possession' in this case was a corporation, Tennessee Wheel and Rubber Company. The 'reorganized debtor' is the same corporation indistinguishable from the 'debtor' for § 1123 purposes"). As the court in *Mesabi*

Metallics further explained, that legal fiction serves to determine when a claim arises for purposes of determining the rights and priority of creditors and the debtor's ability to bind successors.[76] *Id.*

The legal fiction that the Bankruptcy Code creates for limited bankruptcy-related purposes does not alter the fact, as expressly stated by the Delaware bankruptcy court in *Mesabi Metallics*, that the bankruptcy "*involves only one actual legal entity*" that enters and exits bankruptcy. No new entity is created. The debtor continues to exist, and when it exits bankruptcy, any and all property remaining in the bankruptcy estate revests in the debtor.[77] The debtor company, now a former debtor in possession, is simply referred to as the "reorganized debtor." The same conclusion attains, moreover, whether the result is a reorganization or a liquidation of the debtor as in the Mission Coal case. *See, e.g., In re Boston Regional Medical Center, Inc.*, 410 F.3d 100, 104 n.1 (1st Cir. 2005) (noting that the debtor and the reorganized liquidating debtor "are not distinct legal entities" and that the liquidating debtor "is the continuation of [the debtor] as reorganized," and "distinguish[ing] between them solely for purposes of clarity). Neither the Plan Administrator's own self-serving testimony[78] nor the decisions the Petitioners cite and quote in a footnote[79] contradict this conclusion set out in the statute itself.

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[76] As Mr. Nathan testified, the legal fiction also applies to the reporting and filing of taxes. *See* D.R.1470 [Hearing Transcript, p. 69:13-16 (Nathan testimony)].

[77] *See* 11 U.S.C. § 1141(c) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.").

[78] *See* Petitioners' Brief, p. 20.

[79] *See* Petitioners' Brief, p. 20, n. 5. The quoted language from the opinions, which ignore the actual issue involved in each case, reflect the legal fiction referred to above and simply reflect that the debtor is no longer a debtor in possession and its assets are no longer part of the bankruptcy estate. The cases simply stand for the proposition, as best stated in the *Commercial Millwright* case, that "[t]he reorganized debtor *operates* as a new entity, free of its preconfirmation [debt] obligations except as provided in the plan." 245 B.R. at 606. None of the cases stand for the proposition that the debtor is, in fact, an *entirely different legal entity*, as the Petitioners state. But, in any event, the Plan Administrator does not, and cannot, deny that the permits revested in Debtor Pinnacle Mining and that the Plan gave him sole authority over Debtor Pinnacle Mining and the permits it continued to hold.

In fact, the Bankruptcy Plan in the Mission Debtors' bankruptcy case makes explicit what the Bankruptcy Code expressly provides. Inasmuch as the transfer of permits from permit holder to a buyer takes time to complete, the Bankruptcy Plan expressly provided for the continued existence of the Debtors, expressly including Pinnacle Mining,[80] for the purposes of completing the permit transfers and then winding down.[81] And, as noted, the Bankruptcy Plan vested sole and complete authority over Pinnacle Mining in the Plan Administrator.[82] Thus, after the Bankruptcy Plan went effective, the debtor, Pinnacle Mining, continued in existence and continued to hold the permits that remained in its name, pending their transfer to Bluestone, under and in accordance with the express terms of the Bankruptcy Plan. At some point *after* it emerged from bankruptcy, Pinnacle Mining simply changed its name to Pinn MC Wind Down, LLC.[83] That simple name change notwithstanding, the Bankruptcy Plan confirms that the same entity that entered bankruptcy and subsequently exited bankruptcy still holds the Pinnacle Mining permits pending their transfer.

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[80] *See* D.R.0398 [Plan, Art. I, § A.52] (defining Debtors to include Pinnacle Mining Company, LLC)]. The Plan also provided for the issuance of new equity interests in the Debtors to the Liquidating Trust established under the Plan for the benefit of the Debtors' secured postpetition lenders. *See* D.R.0402 [Plan, Art. I, § A.102] (defining Liquidating Trust Assets as including "100% of the new equity interests in each of the Reorganized Debtors to be held in trust by the Liquidating Trustee for the DIP Lenders").

[81] *See* D.R.0418 [Plan, Art. IV, § I] ("On and after the Plan Effective Date . . ., *the Debtors* . . . shall . . . continue in existence for purposes of . . . winding down the Debtors' businesses and affairs as expeditiously as reasonably possible, including taking all necessary steps to close the Sale Transaction in respect of the Pinnacle Mining Complex . . . and complying with their continuing obligations under the Sale Transaction Documentation (including with respect to the transfer of permits to the Successful Bidder as contemplated therein) . . ..").

[82] *See* D.R.0419 [Plan, Art. IV, § K] ("On and after the Plan Effective Date, the Plan Administrator shall act for the Debtors in the same fiduciary capacity as applicable to a board of managers, directors, and officers, . . . succeed to the powers of the Debtors' managers, directors, and officers . . . [and] shall be the sole representative of, and shall act for, the Debtors.").

[83] *See* D.R.1896 [Appellee's Ex. 2, p. 2, ¶¶ 5 & 6] (noting that the Debtors had each become reorganized debtors and lawfully changed its legal name in their respective states of formation) & Ex. A (noting that Pinnacle Mining Company had changed its name to Pinn MC Wind Down Co, LLC). If nothing else, the timing of the filing of the motion to recognize the Debtors' name changes contradicts the Petitioners' statement that "Mr. Nathan was never given authority over Pinnacle Mining Company, LLC while it existed." Petitioners' Brief, p. 20. In the Plan that went effective in April 2019, Mr. Nathan was granted authority over the Debtors which, as defined in the Plan, expressly included Pinnacle Mining Company, LLC, and the motion to reflect the name change was not filed until June 2019.

Thus, Pinn MC Wind Down, LLC, formerly known as Pinnacle Mining Company, LLC, is, in fact, the permit holder-operator of the Pinnacle Permits. The Plan Administrator, and the Plan Administrator alone, holds all the corporate power and authority of the permit holder-operator of the Pinnacle Permits. And thus the Plan Administrator, and the Plan Administrator alone, has "the authority directly or indirectly to determine the manner in which [the permit holder-operator of the Pinnacle Permits] conducts surface mining operations," as the Department, the Director, and the Board all determined.

Once again, the Board's determination that Pinn MC Wind Down is the permit holder-operator over which Mr. Nathan holds all control is both rational and supported by both law and fact and, therefore, neither arbitrary, capricious, nor clearly wrong.

C. THE DEPARTMENT'S "LOADING" OF THE PLAN ADMINISTRATOR FURTHERED ENFORCEMENT OF THE STATE'S PERMIT BLOCKING SYSTEM

In what seems to be their principal attack on the Department's actions in this case, the Petitioners argue strenuously throughout their Brief that the Department's "loading" of the Plan Administrator into the ownership and control database undermines enforcement of the permit-blocks the statute and the State Rules contemplate. However, the statute and the facts and circumstances of this case completely undercut the Petitioners' argument.

It is a fundamental precept of corporate law that a corporation acts only through its authorized agents. *See, e.g., State ex rel. Van Nguyen v. Berger*, 199 W.Va 71, 74, 483 S.E.2d 71, 74 ("a corporation obviously acts, and can act, only by and through its member agents and it is their conduct which criminal law must deter and those agents who in facts are culpable") (citations omitted). The State's surface mining law reflects that very notion in imposing the same civil penalties, fines and imprisonment that may be imposed upon a corporate permit holder-operator for violating a permit issued thereunder upon any director, officer or agent of the permit holder-

operator if the corporate permit holder fails to comply. W. VA. CODE § 22-3-17(h). Thus, holding corporate officers, directors, and other agents of a corporate permit holder-operator responsible for the actions of the corporate permit holder-operator is a fundamental, specifically enumerated element of enforcement that underlies the statute and is consistent even with corporate law in the criminal law context. *See, e.g.,* Saffer, Charles, *An Overview of the Ownership and Control Rule Under the West Virginia Surface Coal Mining and Reclamation Act*, 100 W.Va. L. Rev. 741 (1998) (noting that the ownership and control provisions seek "to ensure that coal operators act responsibly in extracting coal."). With the Plan specifically vesting the Plan Administrator with the powers and fiduciary obligations of Pinnacle Mining's managers, directors, and officers and designating him as the Debtors' sole representative and actor,[84] the Department's loading of the Plan Administrator into its ownership and control database for Pinnacle Mining is, at a minimum, completely consistent with the statutory intent and purpose.

Moreover, the facts and circumstances of this case establish that holding this controller responsible for the actions of Pinnacle Mining worked, worked well, and worked as the statute intended: "loading" Mr. Nathan into Pinnacle Mining's ownership and control database, which automatically associated Pinnacle Mining's violations with him, induced Mr. Nathan to finally assert Pinnacle Mining's contractual rights vis-à-vis its contractor after three and a half years of passing and passive attempts to get its contractor to act.

To overturn the Department's decision in this case would deprive the Department of its statutory authority to hold directors, officers, managers, and others in control of a permit holder-operator responsible will also leave the State at risk in this and other bankruptcy proceedings. If a bankruptcy court-appointed individual with full corporate authority over the management and

[84] *See* D.R.0419 [Plan, Art. IV, § K].

affairs of a mining permit holder-operator can escape the responsibility imposed on every other manager, director, and officer of a corporate mining permit holder-operator, the Court's ruling in that regard would open up a gaping hole in the enforcement of the State's surface mining law at the very time it needs it most—when a permit holder-operator throws up its hands and declares bankruptcy.

V. CONCLUSION

To ensure the continued full and effective enforcement of the State's surface mining laws, the Court should affirm the decisions of the Department, the Director, and the Surface Mine Board.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July 2023, I caused the foregoing pleading to be filed on the Court's electronic filing system which caused the same to be served electronically by electronic notice to the Petitioners' counsel.

/s/Kevin W. Barrett