

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

IN RE:)	CHAPTER 11
)	
CAMBRIAN HOLDING COMPANY, INC., <i>et al.</i> , ¹)	Case No. 19-51200
)	
Debtor.)	(Jointly Administered)
)	

JOINDER OF OBJECTION

The United States, on behalf of Department of the Interior’s Office of Surface Mining Reclamation and Enforcement (“OSMRE”), hereby files this Joinder to the Objection of the Commonwealth of Kentucky, Energy and Environment Cabinet (the “Cabinet”) to the Agreed Order Memorializing Waiver of Simultaneous Permit Issuance Agreement in Confirmation Order with Respect to Myra Resources, LLC Permit Transfers [Doc. No. 2250] (the “Agreed Order”).²

BACKGROUND

1. OSMRE oversees the protection of public health, mining operation and regulation, and the environment under various statutes including the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201, *et seq.* The Cabinet developed and obtained OSMRE approval of a regulatory program that meets the requirements of SMCRA. The Cabinet implements their programs through rules, regulations, and state statutes, including Kentucky Revised Statute

¹ The “Debtors” in these chapter 11 cases are (with the last four digits of their federal tax identification numbers in parentheses): Cambrian Holding Company, Inc. (8203), Cambrian Coal LLC (3394), Apex Energy, Inc. (3455), C.W. Augering, Inc. (2875), Marshall Resources, Inc. (9735), PLM Holding Company LLC (7427), Bear Branch Coal LLC (0674), Clintwood Elkhorn Mining LLC (6910), Gatliff Coal LLC (5768), Perry County Coal LLC (4382), Ray Coal LLC (0981), Whitaker Coal LLC (8270), Pike-Letcher Land LLC (8952), Premier Elkhorn Coal LLC (8951), Raven Rock Development LLC (1351), Rich Mountain Coal LLC (1974), S.T. & T. Leasing, Inc. (0340), T.C. Leasing, Inc. (7705), and Shelby Resources, LLC (5085).

² Capitalized terms used but not defined in this Joinder shall have the meanings ascribed to them in *Third Amended Joint Plan of Orderly Liquidation of Cambrian Holding Company, Inc. and its Affiliated Debtors under Chapter 11 of the Bankruptcy Code* (Docket No. 1539) (the “Plan”).

(“KRS”) Chapter 350, that regulate mining activities. The Cabinet is the primary regulatory authority for coal mining and coal exploration within the State of Kentucky, and OSMRE provides regulatory oversight of the Cabinet’s program.

2. On June 16, 2019, each of the Debtors filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code.

3. At the time of filing these bankruptcy petitions, the Debtors produced and sold metallurgical coal and thermal coal mining facilities in Kentucky and Virginia: (i) Perry County Coal; (ii) Premier Elkhorn Coal LLC; and (iii) Clintwood Elkhorn Mining LLC. *See Second Amended Joint Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code with respect to the Joint Plan of Orderly Liquidation of Cambrian Holding Company, Inc. and Its Affiliated Debtors Under Chapter 11 of the Bankruptcy Code*, (the “Disclosure Statement”) Dk. No. 1395 at Article II.A.

4. Following an auction of the Debtors’ mining assets, the Court entered an *Order (I) Approving the Sale of Substantially All of the Debtors’ Assets Related Thereto Free and Clear of All Non-Assumed Liens Claims, Encumbrances and Interests, (II) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and (III) Granting Related Relief* (Dk. No. 534)(the “Sale Order”).

5. The Sale Order authorized the Debtors to sell: (i) the Clintwood Elkhorn assets to the Clintwood JOD, LLC; (ii) the Premier Elkhorn assets to Pristine Clean Energy, LLC (“Pristine”); and (iii) the Perry County assets to Perry County Resources (collectively the “Purchasers”).

6. At the time of the sale the Purchasers were “permit blocked” under SMCRA’s Applicant/Violator System.³ For Pristine, not much has changed since the entry of the Sale Order, and it remains permit blocked in the Applicant/Violator System. Thus, Pristine is unable to meet the regulatory requirements for transferring the Permits it purchased.

7. In advance of the confirmation hearing, the United States and the Cabinet filed an Objection to the Debtors’ Plan. [Docket No. 1507]. The Objection raised concerns about the Purchasers’ ability to consummate the transfer of the Debtors’ Permits.

8. A mediation and private negotiations involving multiple parties resulted in a consensual confirmation of the Debtors’ Plan, and this Court entering on February 16, 2021, its *Findings of Fact, Conclusions of Law, and Order Confirming the Third Amended Joint Plan of Orderly Liquidation* (the “Confirmation Order”) [Docket No. 1542].

9. Paragraph 27(b) of the Confirmation Order provides the Cabinet with discretion to withhold the transfer applications for all Permits to a specific Purchaser until such time as all regulatory requirements for transferring that Purchaser’s Permits are satisfied:

Simultaneous Transfer of the Purchased Permits to Each Purchaser. Pursuant to an understanding between Continental and/or Debtors, and each Purchaser, and to which the Cabinet nor any other Governmental Unit are a party and are not bound, each Purchaser has agreed to, and shall, irrevocably submit all transfer applications with respect to each of its Purchased Permits, as required by that Purchaser’s respective Permit Operating Agreement, and each Purchaser must diligently prosecute its transfer applications consistent with its respective Permit Operating Agreement. Each Purchaser agrees that with respect to its Purchased Permits (to the extent final approval of the transfer application for each Purchased Permit has not occurred as of the date of this Order), the Purchasers

³ The Applicant/Violator System assists OSMRE and States in making a permit eligibility determination required under section 510(c) of SMCRA for applicants of surface coal mining permits. Section 510(c) of SMCRA prohibits issuance of a new permit to any applicant who owns or controls mining operations having unabated or uncorrected violations anywhere in the United States until those violations are abated or corrected or are in the process of being abated or corrected to the satisfaction of the agency with jurisdiction over the violation.

have agreed that the Cabinet or any Governmental Unit, in fulfilling its administrative functions may withhold issuance of final approval of the transfer of any Purchased Permit such that final approval of the application for the transfer of each Purchaser's remaining Purchased Permits occurs simultaneously, on a Purchaser-by-Purchaser basis. The Cabinet and any Governmental Unit is not liable in the event any final approval is issued non-simultaneously, including, but not limited to, if such issuance is due to neglect or the oversight of the Cabinet or other Governmental Unit.

Confirmation Order ¶ 27(b).

10. The Plan went effective on March 3, 2021. *See Notice of: (A) Entry of Order Confirming Plan of Orderly Liquidation, (B) Effective Date of Plan, and (C) Deadline for Filing Certain Claims* [Docket No. 1562].

11. On multiple occasions since the effective date of the Plan (*See e.g.*, Docket Nos. 1891, 1896, 1898, 1902, 1903, 1905, 1910, 1920, 1921, 1923, 1926, 1929, 1933, 1936, 1945, 1950, 1957, 2138, 2185, and 2239) Continental, the Liquidating Trustee of the Cambrian Liquidating Trust (the "Trustee"), Pristine, and various parties affiliated with Pristine (the "Pristine Parties") agreed to extend the Drop Dead Date for transferring the Permits that Pristine purchased. First through a series of status reports filed by Continental and then as part of the resolution of the Trustee's *Motion for an Order Extending Drop Dead Date and for Shortened Notice* [docket No. 1933], and *Motion to Extend Drop Dead Date and Motion to Compel Bonding* [Docket No. 2078]. The orders resolving the Trustee's motions contained the following sentence, "[t]he Cabinet's rights under the Confirmation Order, including Paragraph 27, are not modified by this Order and are preserved." *See* Docket No. 2138 at ¶14 and Docket No. 2185 at ¶4.

12. On February 24, 2023, the Cabinet filed its *Status Report for Permit Transfers to Pristine Parties* [Docket No. 2219]. The Status Report explains the violations of KRS Chapter 350 and other rules and regulations that regulate Surface Mining in Kentucky that Pristine and the

Pristine Parties must resolve before satisfying the regulatory requirements for transferring the Permits.

13. On April 7, 2023, Continental, the Trustee, Pristine, and the Pristine Parties filed an Agreed Order proposing to remove the simultaneous transfer provision contained in Paragraph 27(b) of the Confirmation Order.

14. On April 17, 2023, the Cabinet filed an Objection [Docket No. 2255] that outlines the reasons why the Court should not enter the Agreed Order and modify the Confirmation Order years after entry. None of the parties to the Agreed Order filed a motion or memorandum in support of the Agreed Order, and none of those parties filed a response to the Cabinet's Objection.⁴

JOINDER

The United States joins in the Cabinet's Objection. The negotiated language in the Confirmation Order was intended to secure the transfer of ALL the Debtors' Permits, and removing the simultaneous transfer provision undermines pre-confirmation negotiations and the finality of the Confirmation Order. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269, 130 S. Ct. 1367, 1376, 176 L. Ed. 2d 158 (2010). The removal of this provision would enable Pristine and the Pristine Parties to pursue transfer of only the valuable Permits, which is exactly what the Simultaneous Transfer Provision was intended to protect against. There is no basis for the parties to the Agreed Order to seek amendment of the Confirmation Order under Fed. R. Bank. P. 9023, or Fed. R. Bank. P. 9024 more than 2 years after entry, and the United States, on behalf of OSMRE, joins in the Cabinet's Objection.

⁴ On April 12, 2023, the Court entered an Order [Docket No. 2252] setting a hearing and deadline for filing responses to the Agreed Order. While the United States files this Joinder out of the time prescribed in the Order, no parties are prejudiced because no new arguments are raised and no party other than the Cabinet filed a response as of the filing of this Joinder.

CONCLUSION

The United States request that the Court refuse to enter the Agreed Order.

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2023 a true and correct copy of the foregoing *Joinder of Objection* was electronically filed with the clerk of the court by using the CM/ECF system which caused electronic service on all persons receiving notice in this case.

/s/Matthew C. Indrisano
Matthew C. Indrisano