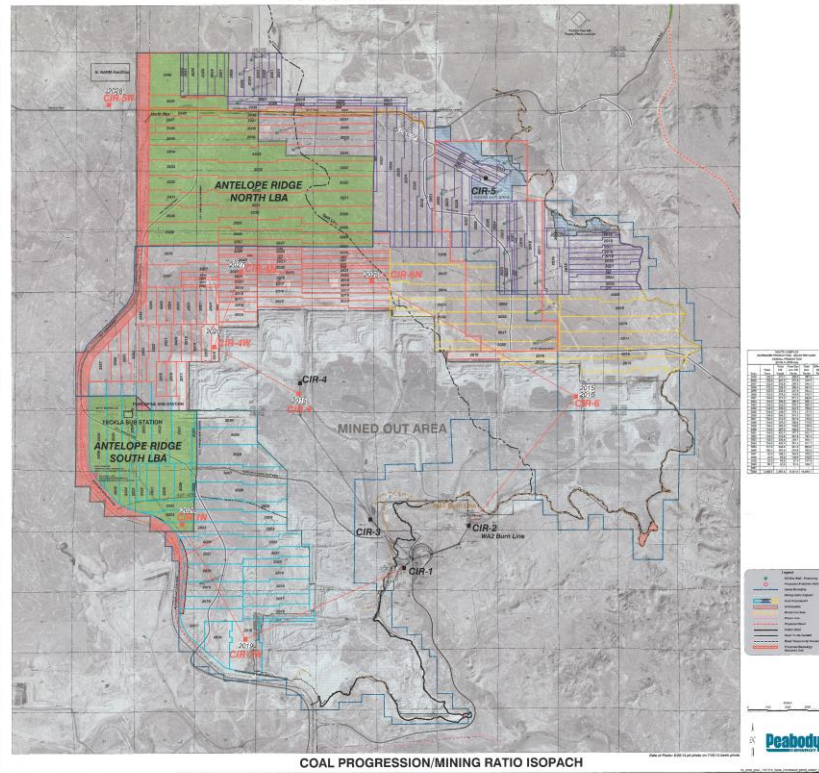


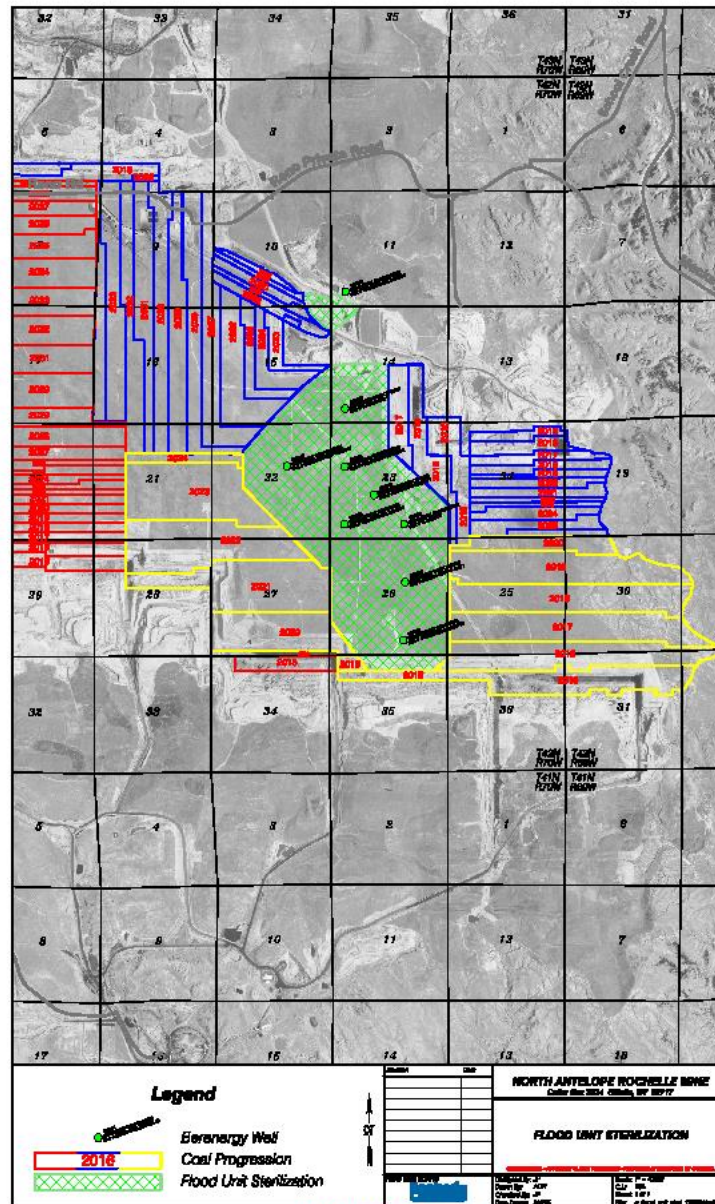
Energy, Law & Policy in the Rockies

Whose Lease Trumps, Oil or Coal?

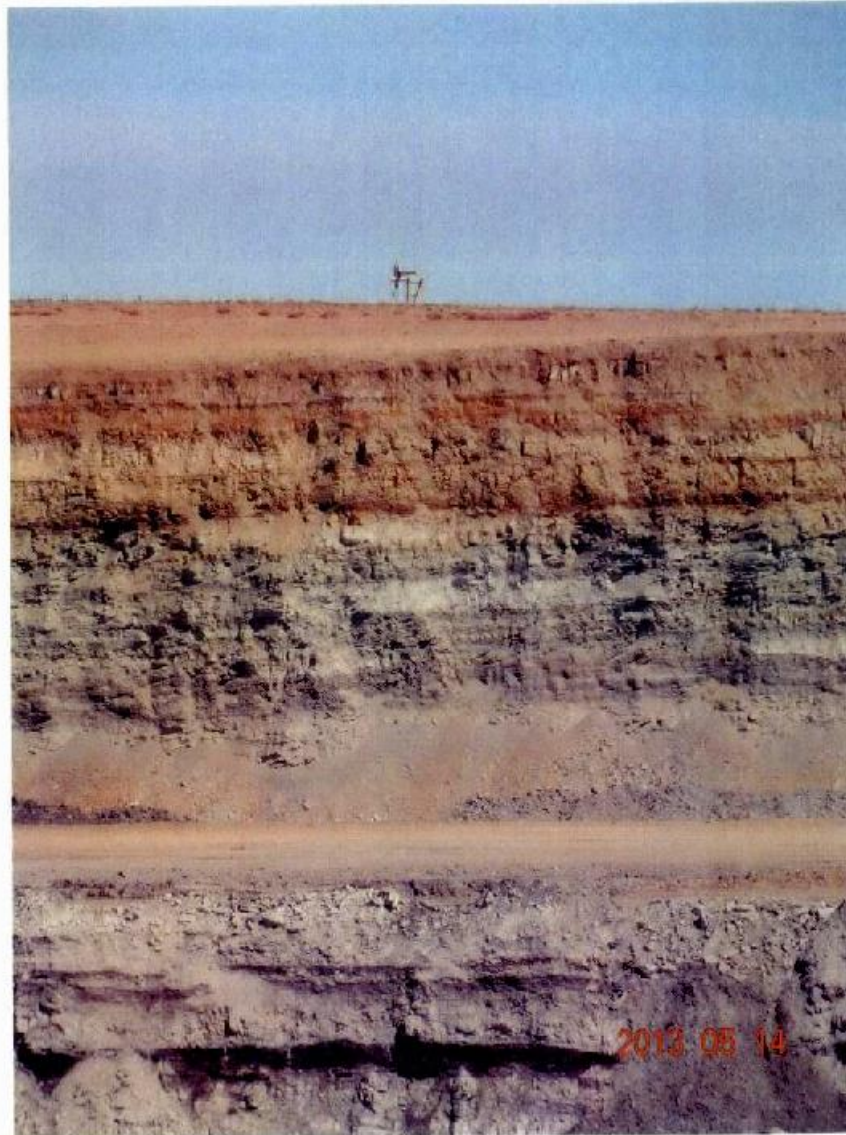
Peter C. Forbes

SOUTH COMPLEX
2015 LOM STRATEGIC PLAN
INCREASED PRODUCTION - SELECTED CASE





CONFIDENTIAL



NARM00841

OIL LEASE EXCERPTS

Sec. 1. *Rights of Lessee* — The lessee is granted the exclusive right and privilege to drill for, mine, extract, remove and dispose of all the oil and gas deposits, except helium gas, in the lands leased, together with the right to construct and maintain thereupon, all works, buildings, plants, water ways, roads, telegraph or telephone lines, pipelines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof for a period of 10 years, and so long thereafter as oil or gas is produced in paying quantities; subject to any unit agreement heretofore or hereafter approved by the Secretary of the Interior, the provisions of said agreement to govern the lands subject thereto where inconsistent with the terms of this lease.

Sec. 2 — The lessee agrees:

(j) *Diligence, prevention of waste, health and safety of workmen.* — To exercise reasonable diligence in drilling and producing the wells herein provided for unless consent to suspend operations temporarily is granted by the lessor; to carry on all operations in accordance with approved methods and practice as provided in the Oil and Gas Operating Regulations, having due regard for the prevention of waste of oil or gas or damage to deposits or formations containing oil, gas, or water or to coal measures or other mineral deposits, for conservation of gas energy, for the preservation and conservation of the property for future productive operations and for the health and safety of workmen and employees; to plug properly and effectively all wells drilled in accordance with the provisions of this lease or of any prior lease or permit upon which the right to this lease was predicated before abandoning the same; to carry out at expense of the lessee all reasonable orders of the lessor relative to the matters in this paragraph, and that on failure of the lessee so to do the lessor shall have the right to enter on the property and to accomplish the purpose of such orders at the lessee's cost: *Provided*, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

Sec 3. The lessor reserves:

(b) *Disposition of surface or surface resources.* — The right to lease, sell, use, permit the use of or otherwise dispose of the surface or surface resources of any of the lands embraced within this lease, which are owned by the United States, insofar as such use or disposition will not interfere with lease operations.

SEPTEMBER 1, 2015 MODIFIED COAL LEASE

Excerpt, *Section 2*

The Lessor in consideration of fair market value, rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, hereby grants and leases to Lessee the exclusive right and privilege to drill for, mine, extract, remove, or otherwise process and dispose of the coal deposits in, upon, or under the lands described below as being in Campbell County, Wyoming:

T. 42 N., R. 70 W., 6th P.M. Wyoming
Sec. 13: Lot 12.

(Containing 40.80 acres, more or less.)

containing within the lease, as modified, 4,294.563 acres, more or less, together with the right to construct such works, buildings, plants, structures, equipment and appliances and the right to use such on-lease rights-of-way which may be necessary and convenient in the exercise of the rights and privileges granted, subject to the conditions herein provided.

SEPTEMBER 1, 2015 MODIFIED COAL LEASE

Section 7

DAMAGES TO PROPERTY AND CONDUCT OF OPERATIONS

- Lessee shall comply at its own expense with all reasonable orders of the Secretary, respecting diligent operations, prevention of waste, and protection of other resources. Lessee shall not conduct exploration operations, other than casual use, without an approved exploration plan. All exploration plans prior to the commencement of mining operations within an approved mining permit area shall be submitted to the authorized officer. Lessee shall carry on all operations in accordance with approved methods and practices as provided in the operating regulations, having due regard for the prevention of injury to life, health, or property, and prevention of waste, damage or degradation to any land, air, water, cultural, biological, visual, and other resources, including mineral deposits and formations of mineral deposits not leased hereunder, and to other land uses or users. Lessee shall take measures deemed necessary by Lessor to accomplish the intent of this lease term. Such measures may include, but not limited to, modification to proposed siting or design of facilities, timing of operations, and specifications of interim and final reclamation procedures. Lessor reserves to itself the right to lease, sell, or otherwise dispose of the surface or other mineral deposits in the lands and the right to continue existing uses and to authorize future uses upon or in the leased lands, including issuing leases for mineral deposits not covered hereunder and approving easements or rights-of-way. Lessor shall condition such uses to prevent unnecessary or unreasonable interference with rights of Lessee as maybe consistent with concepts of multiple use and multiple mineral development.

OCT 18 2016

IN THE DISTRICT COURT FOR THE SIXTH JUDICIAL DISTRICT
CAMPBELL COUNTY, WYOMING

BERENERGY CORPORATION,

Plaintiff,

v.

BTU WESTERN RESOURCES, INC.;
SCHOOL CREEK COAL RESOURCES, LLC;
and PEABODY POWDER RIVER MINING,
LLC,

Defendants.

Civil Case No. 34642

FILED NO. _____
CIVIL ☐ PROBATE ☐ CRIMINAL ☐
ADOPT ☐ DEL ☐

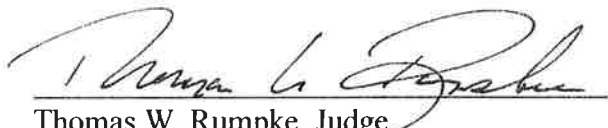
OCT 13 2016

JUDGMENT IN FAVOR OF DEFENDANTS
CLERK OF DISTRICT COURT

THIS MATTER, having come before the Court following bench trial, and the Court having considered the evidence and closing arguments of counsel, the Court hereby enters **JUDGMENT** in favor of the Defendants, BTU WESTERN RESOURCES, INC., SCHOOL CREEK COAL RESOURCES, LLC, and PEABODY POWDER RIVER MINING, LLC. Judgment is entered consistent with the Court's oral pronouncement of its order on September 30, 2016, and the written Order dated October 13, 2016.

All parties to bear their own costs.

DATED this 13th day of October, 2016.


Thomas W. Rumpke, Judge
Sixth Judicial District Court

Dist.: Darin Scheer
Peter Forbes
Tom Sansonetti
Matt Micheli
Pat Day

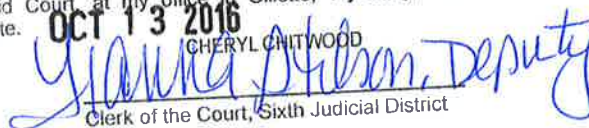
STATE OF WYOMING } s.s.
Campbell County }

CHERYL CHITWOOD, Clerk of the Court, within and for said county and state aforesaid, does hereby certify the foregoing to be a full, true and complete copy as the same appears on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Gillette, Wyoming, this date.

OCT 13 2016

CHERYL CHITWOOD


Clerk of the Court, Sixth Judicial District

FILED NO. _____
CIVIL [] PROBATE [] CRIMINAL []
ADULT [] DEL []
IN THE DISTRICT COURT FOR THE SIXTH JUDICIAL DISTRICT
CAMPBELL COUNTY, WYOMING

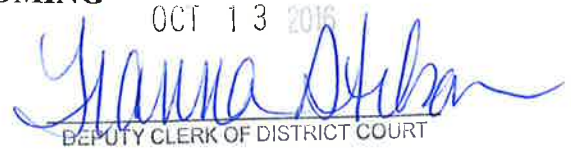
BERENERGY CORPORATION,

Plaintiff,

v.

BTU WESTERN RESOURCES, INC.;
SCHOOL CREEK COAL RESOURCES, LLC;
and PEABODY POWDER RIVER MINING,
LLC,

Defendants.

OCT 13 2016

DEPUTY CLERK OF DISTRICT COURT

Civil Case No. 34642

**ORDER DECLARING RIGHTS PURSUANT TO THE COURT'S SUMMARY
JUDGMENT ORDER DATED APRIL 1, 2015, AND GRANTING INCIDENTAL RELIEF
TO ENFORCE DECLARATION**

THIS MATTER, having come before the Court following bench trial, and the Court having considered the evidence and closing arguments of counsel, the Court hereby finds and orders as follows:

PROCEDURAL HISTORY

Following this Court's entry of the order granting in part and denying in part the parties' cross-motions for summary judgment on April 1, 2015, the Court set this matter for trial starting November 9, 2015, and continuing for four and one-half (4 ½) days. The parties completed their presentation of evidence on November 13, 2015.

At that time, all parties requested the opportunity to obtain and review the trial transcript before submitting written closing arguments. The Court gave the parties until two weeks after receipt of the official court reporter's transcript to file closing arguments. Berenergy and Peabody each filed their closing arguments on February 23, 2016. The parties each filed response arguments on March 8, 2016.

Two weeks after arguments were complete, Berenergy filed *Plaintiff's Notice of Peabody Going Concern Disclosure*. Berenergy expressed concern that Peabody's auditors had issued a going concern qualification in connection with its review of Peabody's financial statements and that Peabody had invoked the 30-day grace period available under its senior credit facility. Berenergy asked the Court to consider the need to escrow or otherwise secure from the effects of

a bankruptcy filing any payments Peabody might be required to make pursuant to the Court's final ruling in this matter.¹ On April 13, 2016 (just 21 days after Berenergy's motion and before Peabody's response was due under Wyo. R. Civ. P. 6), Peabody filed for bankruptcy protection.

On April 15, 2016, Peabody filed with this Court its Notice and alerted the Court that the automatic stay provision applied. Berenergy did not file any objection. Instead, the parties went to the Bankruptcy Court for the Eastern District of Missouri and obtained relief from the automatic stay. On July 20, 2016, Berenergy filed a notice of relief from the automatic stay and asked this Court to enter judgment. On September 30, 2016, the Court announced its decision on the record. The Court notified the parties that it would enter a written order consistent with its oral pronouncement within two (2) to three (3) weeks.²

INTRODUCTION

This case presents many unusual issues. First, the case involves two, competing rights to develop minerals on lands owned by the Bureau of Land Management (BLM). Consequently, the case involves simultaneous mineral development in an overlapping lease area, which this Court will refer to this as "concurrent mineral development." This matter has been thoroughly presented, briefed, and argued by very capable counsel. Through no fault of theirs, it appears the only "law" addressing concurrent mineral development in overlapping lease areas, is arguably an 1893 case from Pennsylvania, *Chartiers Block Coal Co. v. Mellon*, and a memorandum from the Department of Interior. In short, this is an issue, which it appears courts have not addressed.

The second curious aspect of this case is that despite all of the leases at issue being Federal leases, the BLM has not been brought in as a party to this case nor has it sought to intervene. To the contrary, the BLM seems content to allow a state court to determine how coal and oil and gas development will proceed on Federal lands. As the Court noted in its summary judgment order, the Court believes this is largely a political issue, which the BLM is tasked with answering. This is especially true since the Secretary of Interior, the administrative head of the BLM, is the "statutory guardian" of the public's interest in minerals. This Court is not aware of another situation wherein a federal agency has been so willing *not* to dictate to the State's how things will be done. Political issues can be thorny, but in this case the political issue of who should go first (oil and gas or coal) when concurrent mineral development on Federal lands may

¹ The Court is unsure how any transfer to an escrow agent would avoid any claimed preference under 11 U.S.C. § 547(b)(4).

² There is one additional conclusion contained in the Court's written order that is not included in the Court's oral order, but it is not inconsistent with the Court's oral announcement. It was simply omitted. The Court concludes that the \$13.1 in escrow is not a significant burden on Peabody's operations. (*See Conclusion # 39*).

not be possible, seems to be a thorny issue that the BLM should be answering. As Winston Churchill said, “The price of greatness is responsibility.”

The absence of the BLM, and its refusal to act in light of clear statutory authority (or duty) to do so is even more troubling in light of the BLM’s duty to ensure that the people’s resources, i.e., minerals, are “extract[ed] in accord with prudent principles of conservation.” *California Co. v. Udall*, 296 F.2d 385, 388 (D.C. Cir. 1961). Berenergy, rightfully so, is only interested in the financial impact allowing coal development may have on its bottom line. Likewise, and rightfully so, Peabody’s only interest is in its financial bottom-line. The entity charged with protecting the *public’s interest* has decided to sit this one out.

Finally, as pointed out in Peabody’s closing argument, this case has the unusual aspect that Berenergy’s proposed secondary development waterflood plan has neither been approved nor rejected by either of the agencies charged with reviewing such plans, namely the Wyoming Oil and Gas Conservation Commission (WOGCC) and the BLM. It is not entirely clear why, although there is evidence that the BLM took a “wait and see” approach, consistent with the R2P2. Peabody is correct that this Court has neither the knowledge or the expertise, nor the statutory authority to evaluate the competing expert testimony presented by Messrs. Hansen and Vine so as to determine if Berenergy’s waterflooding project is “feasible” as required under Wyo. Stat. Ann. § 30-5-110(e).

In the end, the parties have called upon this Court to determine what the parties may, and may not do, under their respective leases. Neither Peabody nor Berenergy may “unreasonably” interfere with the other party’s rights under their respective leases to develop coal and oil and gas. What is and is not a reasonable accommodation must be determined by all the facts adduced during the four and one-half day trial. With that standard in mind, the Court will announce its Findings of Fact, Conclusions of Law, and Analysis.

FINDINGS OF FACT

1. Defendant Peabody Powder River Mining, LLC (“Peabody”) operates two mines in Campbell County that are at issue in this case: the North Antelope Rochelle Mine and the School Creek Mine (herein “NARM” and “School Creek Mine,” respectively). All of the leases for these mines are Federal leases with the BLM.

2. Peabody holds State of Wyoming Permits to Mine and Licenses to Mine and conducts surface coal mining operations pursuant to the federal leases.

3. Plaintiff Berenergy Corporation (“Berenergy”) is a Delaware corporation with its principal place of business in Denver, Colorado. Berenergy is owned by liquidating trusts created by the Denver Probate Court in connection with the closing of the estate of Sheldon K. Beren, who was Berenergy’s founder and sole owner at his death.

4. Berenergy holds federal and (one) private oil leases in Campbell County, in an area known as the Payne Field (the “Berenergy Leases”).

5. The Payne field is in an area where Berenergy has rights to produce oil and gas and Peabody has rights to mine coal. This is the overlapping mine area or overlapping lease area.

6. As explained in more detail below, Peabody’s mining methodology requires removal of all overburden to the top of the coal seam, which can range between 200 and 250 feet below the surface. Berenergy has current surface operations, near which Peabody cannot conduct blasting necessary to mine the *in situ* coal. Consequently, Berenergy and Peabody cannot conduct simultaneous operations in the overlapping lease areas *using their current production methodologies*.

Relevant Facts Regarding Peabody’s Mining Plan

7. To mine coal, Peabody must strip topsoil ahead of the pits and move the overburden.

8. To do this, Peabody uses cast blasting to move most of the overburden material.

9. Peabody next creates either a cast bench or a truck shovel bench. Peabody engineers the benches to optimize its different types of equipment through the mine process, with the typical strip (or panel) being 220 feet.

10. Peabody utilizes large shovels and other various machines to dig at specific 55-degree angles. This requires extensive engineering because the walls are designed with 60-degree angles for geological, structural (equipment), and safety reasons.

11. After creating the benches, Peabody removes overburden (approximately 50 feet) from the surface to the top of coal using large draglines.

12. Peabody loads the coal onto trucks that travel on haul roads engineered at an eight (8) percent incline.

13. These trucks are massive and require building very wide roads to allow the coal to be removed to other equipment including, but not limited to crushers, to prepare the coal for loading on trains for shipment to customers.

14. Within its facilities on site, Peabody blends the coal to address each customer's needs.

15. To conduct blasting as described above, Peabody must remove any obstacles or engineered structures. In particular, this type of blasting cannot be used within 2,000 feet of engineered structures, including Berenergy's oil and gas wells, due to impacts caused by vibrations.

16. There is evidence that other blasting methods could be employed that would allow Peabody to get as close as 500 feet to any structure.

17. Still, the space required for Peabody's secondary operations (in-mine transport, crushing, and transport to rail) would require Peabody to bypass substantial amounts of coal if alternative mining operations were required.

18. The amount of bypassed coal (approximately 195 million tons total, 183 million tons of recoverable coal) would result in lost royalties of approximately \$320 million and significant other production taxes.³

19. These would affect both the State of Wyoming and the Federal governments.

20. Peabody can only complete mining in this area if the surface wells are plugged below the level of the coal.

21. Although theoretically the wells could be reopened and oil produced from those wells after the Peabody has mined through, the Court concludes this is not a temporary closure, as argued by Peabody, as to Berenergy's existing primary production facilities.

22. The evidence establishes that any plugging of the wells would be for decades, not months or even years.

23. Peabody amended its mining plan during the pendency of this action.

24. Under Peabody's latest mining plan, which anticipates that the Berenergy wells be removed and that no on-site secondary recovery plan is implemented, Peabody could realize significant cost savings. In particular, Peabody could realize approximately \$359 million in cost savings.

25. In addition, under Peabody's current mining plan, which assumes the Berenergy surface wells will be removed and there will be no on-site secondary recovery plan, would allow Peabody to mine high-sodium coal, which is vital for Peabody to service 7 to 10 existing coal contracts.

³ Although Peabody put forth estimates regarding lost revenue if Berenergy completed its waterflood, the Court did not consider these amounts since the waterflood project has not been approved by either the WOGCC or the BLM.

26. Finally, under Peabody's latest mining plan, removal of Berenergy's existing primary production facilities, *in situ* coal will not be stranded or abandoned.

Relevant Facts Regarding Berenergy's Existing and Proposed Oil and Gas Development

27. Berenergy has several existing oil wells within the overlapping lease area.

28. Relevant to the Court's conclusions, the Janzen Federal 2 well has a current, primary production value of \$68,393.

29. The Thornburg well has a current, primary production value of \$399,583.

30. The Klimoski Federal 2 well has a current, primary production value of \$11,318.

31. The Klimoski Federal 3 well has a current, primary production value of \$287,294.

32. The Klimoski Federal 4 well has a current, primary production value of \$28,191.

33. The Klimoski Federal 7 well has a current, primary production value of \$82,242.

34. According to Richard Vine's testimony, the Klimoski Federal 3 could continue to operate until 2032. However, Exhibit I indicates that blasting operations affecting that well will begin in 2030.

35. According to Vine, the economic limit date of the Klimoski Federal 3 well is 2031. However, Vine also indicated that the economic limit date could be as early as 2029, or as late as 2037.

36. In addition to primary production, various techniques exist to stimulate an oil reservoir and obtain oil in excess of its primary production. The additional oil produced through the use of such techniques is referred to as "secondary recovery."

37. One commonly used secondary recovery techniques involves the injection of water into the oil-producing formation to repressurize the reservoir and physically scour additional oil out of the producing formation. This secondary recovery technique is commonly referred to as "waterflooding."

38. Berenergy retained a petroleum engineer, Chris Hansen, to provide an assessment regarding the viability of such a waterflood project in the Payne Field.

39. The Court credits Hansen's testimony that a secondary recovery program would produce income in excess of expenses. In short, the waterflood of the Payne Field would make money, allowing for certain assumptions regarding oil prices, when compared to an appropriate analogue, namely the House Creek North Unit analogue used by Mr. Hansen.

40. A full off-site plan would produce the same oil production as the originally proposed secondary recovery, waterflooding plan proposed to the WOGCC.

41. A full off-site waterflood project would increase the costs of the secondary recovery plan by approximately \$13.1 million.

42. Additional findings of fact will be included in the Court's Conclusions of Law and Analysis as needed.

CONCLUSIONS OF LAW AND ANALYSIS

1. The purpose of the Declaratory Judgment Act is "to settle and to afford relief from uncertainty and insecurity with respect to legal relations" Wyo. Stat. Ann. § 1-37-114. "[A]ll persons shall be made parties who have or claim *any* interest which would be affected by the declaration." Wyo. Stat. Ann. § 1-37-113 (emphasis added). Courts may construe "[a] contract . . . either before or after there has been a breach thereof." Wyo. Stat. Ann. § 1-37-104.

2. In addition, under the Declaratory Judgment Act, "[f]urther relief based on a declaratory judgment may be granted." Wyo. Stat. Ann. § 1-37-110. Thus, "a district court maintains jurisdiction to consider and order further relief on matters addressed in a declaratory judgment action." *Ultra Res., Inc. v. Hartman*, 2015 WY 40, ¶ 24, 346 P.3d 880, 890 (Wyo. 2015). However, the Declaratory Judgment Act cannot serve as a substitute for administrative action. See *Snake River Brewing Co., Inc. v. Town of Jackson*, 2002 WY 11, ¶ 6, 39 P.3d 397, ¶ 6 (Wyo. 2002) ("The Act is an appropriate vehicle, not for prejudging issues that should be decided by an administrative agency, but for interpreting the statute or ordinance upon which the administrative action is based").

3. In *Ultra Resources*, the Wyoming Supreme Court cited approvingly from learned treatises concerning a court's jurisdiction to enter additional relief necessary to effectuate its declaratory judgment order:

In a proceeding for a declaratory judgment, the court may properly grant declaratory and nondeclaratory relief in a single action, when such relief is requested in the pleadings by the parties, or where the request for nondeclaratory relief is found to be supplemental to the declaratory relief. *A court generally has jurisdiction to grant further and necessary or proper relief, including any relief essential to effectuate the declaratory judgment entered by the court.* A court has the power, for example, to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract. In such a case, the court may enter such supplemental judgments and orders, from time to time, as are necessary to the supervision of the contract. . . .

Under a statute authorizing supplemental relief, the court may be permitted to reserve the right to make such further orders as might be necessary to effectuate

the judgment, even though no separate proceeding is initiated to obtain such relief.

Ultra Resources, ¶ 18, 346 P.3d at 889 (quoting 24 C.J.S. Declaratory Judgments § 171 (2015) (footnotes omitted and emphasis added by the Wyoming Supreme Court)).

4. Peabody argues that the doctrine of exhaustion of administrative remedies precludes this Court from considering Berenergy's proposed waterflooding plan because it would "prejudge" a decision by the WOGCC. (See Peabody's Proposed Conclusions of Law at 5). If the Court were to attempt to "approve" Berenergy's waterflooding plan, the Court agrees with Peabody that it would be taking the place of the agency entrusted with such authority under Wyoming law, namely the WOGCC. See Wyo. Stat. Ann. § 30-5-110; *Bonnie M. Quinn Revocable Trust v. SRW, Inc.*, 2004 WY 65, ¶¶ 16-17, 91 P.3d 146, 151 (Wyo. 2004). As in *Quinn Trust*, the WOGCC has the "expertise" and is the agency "best suited" to determine the "feasibility" of Berenergy's proposed off-site waterflooding plan. *Bonnie M. Quinn Revocable Trust*, ¶ 18, 91 P.3d at 151; Wyo. Stat. Ann. § 30-5-110(e)(ii).

5. Additionally, the BLM is the agency charged with administering all the leases, except the Superior leases. BLM, like the WOGCC, has expertise in the area of mineral development, especially multiple mineral development, far beyond that of this Court. Thus, it would seem that the BLM would be a proper agency to determine what constitutes a "reasonable use" or "accommodation" as required under all these Federal leases as construed by this Court under Wyoming law. However, the BLM has steadfastly denied any authority to make such a determination.

6. Instead, within the Resource Recovery and Protection Plan ("R2P2") applicable to the Peabody leases, the BLM states that conflicts will be resolved by "application of any statutory mechanisms[,] which are yet to be enacted. If there are no law changes, the BLM says the parties should use the "application of the common law doctrine of accommodation" to resolve disputes. If that does not work, then the parties try to negotiate agreements. If the parties cannot negotiate an agreement, the matter should be resolved through litigation. See Parties Stipulation Concerning Resource Recovery and Mining Plans entered Jan. 2, 2015.

7. Both the BLM and the United States District Court for the District of Wyoming have stated that these parties' relative rights must be determined by litigation in State court. In *BTU W. Res., Inc. v. Berenergy Corp.*, the District Court for the District of Wyoming determined that the BLM would not resolve any dispute between the claimants. *BTU W. Res., Inc.*, 300

F.R.D. 572, 575 (D. Wyo. Apr. 29, 2014) (“the Department of Interior and the BLM specifically refuse to adjudicate private disputes between rival mineral claimants” and that the BLM is “without authority” to determine disputes between rival mineral claimants). A few months later, the same Court determined that the dispute between the parties is a matter of State law and remanded these cases back to this Court due to a lack of federal question jurisdiction. *See BTU W. Res., Inc. v. Berenergy Corp.*, 31 F. Supp. 3d 1346, 1353 (D. Wyo. Jul. 15, 2014) (dismissing claims and remanding this matter back to state court due to lack of federal question jurisdiction).

8. In the end, the Court agrees with Berenergy that this Court does not have to approve or disapprove of its waterflooding plan to determine what is a “reasonable use” or reasonable “accommodation” as required under the leases as interpreted by the Court. Likewise, the Court does not have usurp the role of the Wyoming Department of Environmental Quality or the thus-far abdicated role of the BLM, to determine that certain mining operations must be employed.

9. Instead, the parties have asked this Court to determine, in accordance with the evidence presented during a four-plus day hearing, what constitutes a reasonable accommodation by each of the parties in light of the on-the-ground realities presented during the hearing.

10. In a State lease case, the Director of the Office of State Lands would weigh the parties’ evidence and determine which mineral claimant should move forward. Wyo. Admin. Code § LAND LC Ch. 18 § 18(d); Ch. 19, §18(d). In this case, involving the Federal lessor BLM, there is no agency that will make that decision. Instead, the BLM has specifically directed the parties to engage in litigation. *See Parties Stipulation Concerning Resource Recovery and Mining Plans* entered Jan. 2, 2015.

11. Thus, under the Declaratory Judgment Act, the Court concludes that it has jurisdiction to enter an order consistent with Wyoming law that will address what the parties must do to effectuate the Court’s order that each party accommodate the other’s uses and compensate the other party for any damage that may be done to that party’s interest.

12. As guidance, the Court looks to Wyoming’s regulations to see how this multiple use issue would be resolved if this case involved only Wyoming leases. The applicable Wyoming Regulations regarding multiple-use as it relates to coal and oil and gas explain how the Director of State Lands would resolve a mineral-to-mineral conflict.

13. First, “[i]f the Director determines that the operations can be carried out concurrently without materially reducing the quantity or value of the coal [or oil and gas], which will be produced, and either that the costs of operation of any prior lessee(s) will not be increased

significantly, or that if they are, such costs are capable of determination and if paid by the subsequent lessee will not constitute an unreasonable burden on the operation, he shall enter his decision approving a plan of operation and assessment of cost under which operations may be carried out concurrently.” Wyo. Admin. Code § LAND LC Ch. 18, § 18(d)(i); Ch. 19, § 18(d)(i).

14. Alternatively, “[i]f the Director determines that the proposed operations cannot be carried out concurrently and that the benefit which would be realized by the beneficiaries from initiating the proposed operation so far exceeds that which would be realized from the existing operation that it is clearly more beneficial to the beneficiaries that the existing operation be terminated or deferred and the proposed operation commenced, he shall enter his decision terminating the existing operation and allowing the commencement of the proposed operation, conditioned upon the payment by the lessee proposing the operation to the lessee whose operations are terminated of an amount equal to the value of the rights lost by that lessee determined in the same manner as if the right were being condemned in eminent domain proceedings.” Wyo. Admin. Code § LAND LC Ch. 18, § 18(d)(iii); Ch. 19, § 18(d)(iii).

Existing Primary Production Activities

15. As to the primary production, the Court concludes that the operations cannot be carried out concurrently and that the benefit which would be realized by the beneficiaries from initiating the proposed operations so far exceeds the benefit that would be realized from the existing operation that the existing operation should be terminated or deferred. Thus, Berenergy’s existing surface, primary production operations should be deferred so that Peabody can mine through the Payne Field.

16. As the Court’s findings of fact explain, Peabody has demonstrated that the surface operations and coal mining cannot occur concurrently. Although Berenergy presented some evidence that other mining operations could be implemented to mine “around” the existing surface operations, the Court concludes that Peabody’s evidence that such techniques are not (a) feasible in light of the infrastructure that must accompany open-pit mining, and (b) such techniques are cost prohibitive, is the better evidence.

17. The Court credits the testimony of Josh Price. In particular, the Court credits Price’s testimony that “bypassing” coal will result in substantial increase in costs insofar as Peabody would have to “re-open” the coal seam (the “virgin box-cut”) that would cause substantial expense. In addition, the Court credits Mr. Price’s testimony that processing facilities

would be “long gone” from that area causing additional costs that would result in over \$300 million in additional costs.

18. Under the guise that “anything is possible,” Peabody could theoretically mine individual pockets of coal to “accommodate” existing surface uses. However, under the totality of the circumstances, the Court finds that such a plan would not constitute a reasonable accommodation. Consequently, the Court concludes Berenergy’s primary recovery, surface operations and Peabody’s proposed mining operations cannot be completed concurrently.

19. The Court also concludes that the benefit which would be realized by the beneficiaries from initiating the proposed operations so far exceeds the benefit that would be realized from the existing operation that the existing operation should be terminated or deferred. *See* Wyo. Admin. Code § LAND LC Ch. 18, § 18(d)(iii); Ch. 19, § 18(d)(iii).

20. Under Wyoming regulations, “Beneficiaries” means “the common schools and those state institutions designated by Congress as beneficiaries of lands granted to the State of Wyoming.” Wyo. Admin. Code § LAND LC Ch. 18, § 2(a); Ch. 19 § 2(a). The amount of royalties and other taxes generated by Peabody’s operations is massive. There is little or no evidence as to the benefits that Berenergy’s continued primary recovery operations would provide to the “Beneficiaries.” Regardless, the Court concludes that Peabody’s proposed new operations offer a new source of benefits to the “Beneficiaries” while Berenergy’s existing operations reflect a gas field whose productivity is on the decline and the real value of which can be found in secondary recovery.

21. Having concluded that Berenergy’s proposed “bypass” theory is not a reasonable accommodation such that the two minerals cannot be developed simultaneously, and having found that the benefits of Peabody’s mine-through plan so far exceed the benefits from the continued, limited primary production of Berenergy’s existing operations, Berenergy is entitled to compensation.

22. The Court rejects Peabody’s proposal that only \$595,000 is the present current value of Berenergy’s primary production operations. During the trial, Peabody agreed that it would be risky to re-enter wells after they have been shut-in for a significant period of time. As a result, Peabody conceded that the full value of the Thornburg well should be compensated.

23. However, Peabody claimed that Klimoski Federal 3 well should be discounted because it would continue on-line for a significant amount of time, and therefore, the value should be greatly discounted. However, the evidence in this case established that Peabody changed its mining sequence to effectuate greater savings. There is nothing that would prevent

Peabody from again changing its sequencing so as to affect the Klimoski Federal 3 well at an earlier time. In fact, Mr. Vine's testimony and the exhibits thereto assumed that the Klimoski Federal 3 well could continue on-line until 2032, but Exhibit I indicates that blasting will affect the well in 2030.

24. Moreover, Mr. Vine's own evidence varied greatly about the economic limit date of this well. In June 2015, Peabody estimate the economic limit date of this well to be January 2029, but two months later he estimated that the economic limit date would be 2037. In light of this conflicting testimony the Court concludes that to mine through the Payne Field, Peabody needs to compensate Berenergy for the full, present value of the Klimoski Federal 3 well.

25. This conclusion is also consistent with Wyoming regulations that require the terminated, or deferred, operations be compensated as if those operations had been subjected to eminent domain. Wyo. Admin. Code § LAND LC Ch. 18, § 18(d)(iii); Ch. 19, § 18(d)(iii). This Court will require that Peabody provide Berenergy 180-days notice prior to any mining activity that one of its wells must be plugged and abandoned to allow mining operations to continue. Obviously, this Court will have continuing jurisdiction to enforce its order. Still, in light of the evidence in this case, the Court concludes that compensating Berenergy for the total value of the Klimoski Federal 3 well is required, due to the changing nature of when this well may reach its economic limit, as well as when Peabody may seek to invoke the relief afforded herein with regard to that well.

Proposed Secondary Operations

26. As to the secondary production values, as noted above, the Court rejects Peabody's argument that the Court is precluded from considering Berenergy secondary recovery waterflood plan because it has not been approved by the WOGCC. To be clear, this Court makes no determination on the *feasibility* of this plan. That is the WOGCC's statutory duty. *See* Wyo. Stat. Ann. § 30-5-110(e).

27. The Court does conclude that Berenergy has a right to recover all of the oil in the Payne Field for which it holds leases and that it has a right to pursue reasonable recovery of those reserves. The reasonable "accommodation" that Peabody has sought, and the Court has conditionally granted, has made Berenergy's ability to preserve its rights more expensive. The accommodation "doctrine," as applied by this Court in its summary judgment ruling, as well as Wyoming's regulations concerning multiple uses, requires Peabody to make a reasonable accommodation as well.

28. In a State lease situation, “[i]f the Director determines that the operations can be carried out concurrently without materially reducing the quantity or value of the coal [or oil and gas], which will be produced, and” any additional costs that affect the existing lessee’s rights to recover their interest can be determined, if the Director finds such costs “if paid by the subsequent lessee will not constitute an unreasonable burden on the operation” then the Director is empowered to approve a plan of operation, assess costs, and order the development be carried out concurrently. Wyo. Admin. Code § LAND LC Ch. 18, § 18(d)(i); Ch. 19, § 18(d)(i).

29. As noted above, the Court credits Berenergy’s evidence that its off-site waterflooding plan can produce oil. Furthermore, the Court concludes that Berenergy has shown that the off-site waterflooding plan can be done at the same time as Berenergy’s mine through plan, which the Court has concluded is a reasonable accommodation as to the primary production, so long as Peabody compensates Berenergy for the remaining limited value of such rights. The issue that remains is what Peabody must do to accommodate all of Berenergy’s rights, including whatever rights Berenergy has to recover secondary oil.

30. As to this issue, the difficulty is whether the State lands Director could “approve a plan of operation, assess costs, and order the developments be carried out concurrently[.]” As concluded above, this Court could not “approve” a waterflood plan. That is the province of the WOGCC. It follows, like day follows night, that in a state lease situation, the Director could not approve a waterflood plan. That remains the WOGCC’s prerogative. The crux is what constitutes a “plan of operation” under the applicable regulations. The term is undefined within the regulations.

31. In light of the subject matter of these regulations, as well as Wyoming’s extensive statutory and administrative schemes for regulating mineral development, the Court concludes that this must mean something different than approving a particular proposal by a mineral developer that has already been approved by the governing state agency or board. Approving mine plans, waterflood plans, and the like are already vested in other agencies. Therefore, the Court concludes that this provision must mean that the Director may approve a plan of operation as to the parties involved in multiple-mineral disputes. That is, this must mean that the Director is empowered to direct the parties before the Director to operate a certain way in relationship to one another to allow reasonable accommodation.

32. In this case, the Court must enter an order that accommodates both parties and protects their interests to the greatest extent possible. Contrary to Berenergy’s argument, the Court now concludes it does not have the authority to order Peabody to vote a certain way in

regard to any upcoming application for a waterflood plan to the WOGCC. There are a myriad of factors that go into an interest owner's decision to consent to, or reject, a particular secondary recovery proposal. Under the Declaratory Judgment Act, the Court only has authority to grant additional relief to effectuate its declarations. In this case, the Court has no authority to declare that Berenergy's off-site waterflood plan is a valid secondary recovery proposal. Thus, the Court lacks authority to order Peabody to go along with any secondary recovery proposal based upon Berenergy's off-site waterflood plan.

33. However, the Court does have authority to declare that Berenergy's off-site waterflood plan is a reasonable accommodation to Peabody's mine through plan, so long as Peabody provides an opportunity to develop all of its oil and gas interests, including any interests in secondary recovery.

34. To make the Peabody mine-through plan a reasonable accommodation, in light of the Court's findings of fact, Peabody must not only (a) pay for the primary production values because those uses simply cannot co-exist, but also (b) account for the difference in cost between the on-site waterflood and the off-site waterflood plans caused by Berenergy's accommodation to allow Peabody to mine through. The latter is necessary so that Berenergy has an opportunity to develop all of its oil and gas interests that are developable. Without this accommodation on Peabody's part, Berenergy's accommodation of allowing Peabody to mine through would no longer be reasonable. It's simply unfair and would cause an absurd result wherein the larger value mineral would always be allowed to go ahead of the lower value mineral, even though the "beneficiaries" would benefit from both minerals being developed.

35. That is, it may not be most beneficial to Peabody's bottom-line to have to accommodate Berenergy's off-site waterflood plan, but Wyoming law requires that multiple mineral development account for the interests of the "Beneficiaries[.]" namely "the common schools and those state institutions designated by Congress as beneficiaries of lands granted to the State of Wyoming." This is consistent with the purposes of the Mineral Leasing Act:

The purpose of the Mineral Leasing Act was not to obtain sales for the gas from these reserves on Government land at any price. The Act was intended to *promote wise development of these natural resources and to obtain for the public a reasonable financial return on assets that 'belong' to the public.* The Secretary of the Interior is the statutory guardian of this public interest. He has a responsibility to insure that these resources are not physically wasted and that their extraction accords with prudent principles of conservation.

California Co. v. Udall, 296 F.2d 384, 388 (D.C. Cir. 1961) (emphasis added footnote omitted).

36. That being said, Berenergy is not entitled to have Peabody pay for its proposed profits from the waterflood. First, the amount of such damages is speculative. As noted above, this is not a situation where the concurrent development is not possible. Thus, the eminent domain principles of Subsection (d)(iii) of the Wyoming Board of Land Commissioners would not apply. As the Court sits here today, Berenergy has no enforceable right to make a secondary recovery. That requires approval from the WOGCC, which Berenergy has not obtained. Thus, Berenergy does not have the right to have Peabody to pay to Berenergy the potential additional “costs” associated with an off-site waterflood plan which has not been approved by the WOGCC.

37. Instead, Berenergy has the right to have Peabody make the potential additional costs associated with accommodating Berenergy’s right to pursue secondary recovery *available to* Berenergy when it applies to the WOGCC for approval of the off-site waterflood plan. That means, to accommodate reasonably Berenergy’s interests, Peabody must make nearly \$13.1 million dollars available for Berenergy to use in deferring the additional costs of the off-site waterflood so that Berenergy can present a secondary recovery application to the WOGCC that reflects the feasibility of the waterflood plan. To be perfectly clear, Berenergy is not entitled to a cash payment from Peabody based on this court-ordered accommodation to Peabody, namely allowing the mine through plan. Rather, Berenergy is entitled to have Peabody cover “costs” which have not been incurred and which this Court cannot order without Berenergy first obtaining approval for its off-site waterflood plan from the WOGCC.

38. That money must be made available for Berenergy’s use in conjunction with the plan of operation approved by the Court, namely Berenergy diligently pursuing an up-or-down vote on its application for the off-site secondary waterflood project in the Payne Field with the WOGCC. Such application should include this Court’s ruling that approximately \$13.1 million of the costs will be borne by Peabody from monies held in escrow.

39. In this case, the \$13.1 that Peabody must escrow does not constitute an “unreasonable burden” on its proposed mining operation. As concluded above, the volume of coal and accordant revenue and profits that Peabody may realize by mining through significantly outweigh this potential additional cost. *See* Wyo. Admin. Code § LAND LC Ch. 18, § 18(d)(i); Ch. 19, § 18(d)(i).

40. This leads the Court to the bankruptcy question. The limited relief from stay issued by the Eastern District of Missouri only lifts the stay “solely for the purpose of allowing entry of the Final Judgment in the Wyoming Litigation” and “does not authorize any party to the

Wyoming Litigation to take any other actions with respect to that litigation including, without limitation, taking any action to implement or enforce the Final Judgment.”

41. So as not to run afoul of the Bankruptcy Court’s Order, the Court will hereby declare and order as follows:

IT IS HEREBY ORDERED, consistent with the Court’s Order Granting in Part and Denying in Part Plaintiff’s Motions for Summary Judgment, and Granting in Part and Denying in Part Defendant’s Motion for Summary Judgment, that under Wyoming law a form of the accommodation doctrine applies to the leases at issue;

IT IS FURTHER ORDERED AND DECLARED, consistent with the Court’s findings of fact and conclusions of law herein that Peabody’s proposed operations and Berenergy’s current, primary production operations cannot be carried out concurrently;

IT IS FURTHER ORDERED AND DECLARED, consistent with the Court’s findings of fact and conclusions of law, that the benefits of Peabody’s proposed mine through plan so far exceed the benefits to the common schools and other institutions designated by Congress as beneficiaries of the land granted to Wyoming as compared to the benefits, if any, of the existing Berenergy primary recovery operations on the lands at issue, that Berenergy’s existing primary recovery operations should be terminated upon the payment of the value of such primary recovery operations;

IT IS FURTHER ORDERED AND DECLARED, consistent with the Court’s findings of facts and conclusions of law, that Berenergy’s right to secondary recovery and Peabody’s rights to recover its coal can be carried out concurrently without materially reducing the quantity or value of the coal, or oil and gas, which will be produced;

IT IS FURTHER ORDERED AND DECLARED, consistent with the Court’s findings of facts and conclusions of law, that additional costs that Berenergy would incur in seeking to enforce its right to recover the secondary oil reserves are capable of determination and if paid by Peabody will not constitute an unreasonable burden on Peabody’s mine-through operation;

IT IS FURTHER ORDERED AND DECLARED, consistent with the Court’s findings of facts and conclusions of law, that upon payment of \$878,021.00 from Peabody to Berenergy, and the payment by Peabody of \$13,051,084.00 to the Clerk of District Court for deposit in an interest-bearing account, Peabody may commence its mine-through plan;

IT IS FURTHER ORDERED AND DECLARED, consistent with the Court’s findings of facts and conclusions of law, that upon commencement of its mine-through plan, Peabody

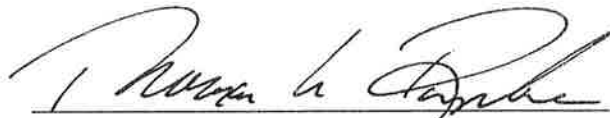
shall provide 180-days written notice to Berenergy that one or more of its wells must be temporarily or permanently plugged;

IT IS FURTHER ORDERED AND DECLARED, consistent with the Court's findings of facts and conclusions of law, that upon such notice, Berenergy shall turn over the control of such well, or wells, to Peabody for Peabody to arrange and pay for the plugging and abandonment of such well, or wells, and that Peabody shall hold Berenergy harmless for the costs, fees, and any other expenditures necessary for the proper plugging and abandonment of such well, or wells;

IT IS FURTHER ORDERED AND DECLARED that upon the satisfaction of the conditions stated immediately above, Berenergy shall diligently take all steps necessary, including but not limited to application with the WOGCC, to determine its rights under its current leases and Wyoming law, if any, to conduct secondary recovery within the Payne Field;

FINALLY IT IS ORDERED AND DECLARED that the Court will retain jurisdiction to determine the ultimate disposition of all monies held in escrow and that no funds held in escrow shall be disbursed without Court order.

DATED this 13th day of October, 2016.



Thomas W. Rumpke, Judge
Sixth Judicial District Court

Dist.: Darin Scheer
Peter Forbes
Tom Sansonetti
Matt Micheli
Pat Day

STATE OF WYOMING }
Campbell County } s.s.

CHERYL CHITWOOD, Clerk of the Court, within and for said county and state aforesaid, does hereby certify the foregoing to be a full, true and complete copy as the same appears on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Gillette, Wyoming, this date

OCT 13 2016

CHERYL CHITWOOD


Clerk of the Court, Sixth Judicial District

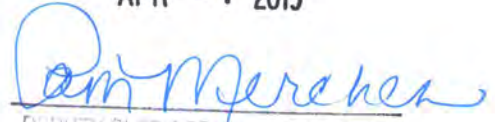
**IN THE DISTRICT COURT FOR THE SIXTH JUDICIAL DISTRICT
CAMPBELL COUNTY, WYOMING**

BERENERGY CORPORATION,)
)
Plaintiff,)
)
v.)
)
BTU WESTERN RESOURCES, INC.;)
SCHOOL CREEK RESOURCES, LLC;)
and, PEABODY POWDER RIVER)
MINING, LLC,)
)
Defendants.)

FILED NO. _____
CIVIL ☐ PROBATE ☒ CRIMINAL ☐
ADOPT ☐ DEL ☐

Civil Case No. 34642

APR - 1 2015


DEPUTY CLERK OF DISTRICT COURT

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTIONS
FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

THIS MATTER comes before the court following the United States District Court's Order Remanding Case based upon a lack subject matter jurisdiction. On December 12, 2014, the court conducted an argument-only type hearing on the parties presented competing motions for summary judgment. Darin Scheer argued Plaintiff, Berenergy's (herein "Berenergy") "Motion for Partial Summary Judgment Regarding Berenergy's Lease Operation Rights[.]" Peter Forbes argued Berenergy's "Motion for Partial Summary Judgment Regarding Right to Engage in Simultaneous Mineral Development Under Overlapping Mineral Leases[.]" Tom Sansonetti argued in response to both motions for Defendants: BTU Western Resources, Inc.; School Creek Resources, Inc.; and, Peabody Powder River Mining, LLC (herein "Peabody"). Mr. Sansonetti also argued Peabody's motion for summary judgment.

On January 2, 2015, pursuant to the court's request, the parties submitted a stipulation regarding BLM's approval of Peabody's mine use plan and their respective arguments on the impact of that approval. On February 20, 2015, the court conducted a supplemental, argument-only type hearing. Messrs. Forbes and Scheer argued for the Plaintiff and Messrs. Sansonetti and Matt Micheli argued for the Defendants. The supplemental hearing addressed questions posed by the court in an e-mail dated February 18, 2015. Having considered the oral arguments of counsel, all of the evidentiary materials, and the briefs submitted in support of their competing motions for summary judgment, the court hereby finds and orders as follows:

PROCEDURAL HISTORY

In its First Amended Complaint, Berenergy alleged one claim for relief and sought four declarations regarding its rights under its leases. Berenergy seeks declarations that:

- (1) with respect to the portion of Overlapping Lease Area where its Payne field oil leases are senior in time to Peabody's coal leases, Peabody does not have the right to engage in any mining-related activities that interfere with Berenergy's oil operations[;]
- (2) in that portion of the Overlapping Lease Area where its oil lease is senior in time to Peabody's coal lease, Peabody does not have the right to require Berenergy to suspend its oil operations, remove its surface facilities equipment, cut-off and cap its existing wellbores several hundred feet below the surface, bear the cost of taking those actions, absorb the lost revenues associated with any such cessation of operations, bear the cost of re-establishing operations, or otherwise interfere with Berenergy's first-in-time leases[;]
- (3) in all events, regardless of whether its Payne oil leases are senior or junior to the Peabody coal leases in any portion of the Overlapping Lease Area, with respect to any portion of the Overlapping Lease Area where Berenergy entered and established operations prior to Peabody's proposed entry, Peabody must conduct its operations in a manner that does not unreasonably interfere with Berenergy's previously established use[, and;]
- (4) Peabody may not force Berenergy to cease operations under the Janzen Lease to enable Peabody to engage in surface and subsurface operations intended to provide lateral support for coal extraction operations under the Section 35 Lease.

(First Am. Comp. ¶¶ 46–49).

In the first of its two motions for summary judgment, Berenergy argued that the language from three leases embracing eight wells (two under the Janzen Lease, five under the Klimoski Lease, and one under the Superior Lease)¹ did not reserve to the United States the right to lease the lands for coal production. In its “Motion for Partial Summary Judgment Regarding Berenergy's Lease Operation Rights[.],” Berenergy states the issue as follows:

[W]hen the same landowner issues leases for different minerals in the same lands and the holder of the first-in-time lease has already commenced operations, does the holder of the second-in-time lease have the right to force the first-in-time lessee to suspend its existing operations and forego its mineral development rights so that the second-in-time lessee can commence proposed operations and exercise its mineral development rights?

¹ At oral argument, the parties agreed that Janzen Well #1 was not producing.

In its “Motion for Partial Summary Judgment Regarding Right to Engage in Simultaneous Mineral Development Under Overlapping Mineral Leases[.]” Berenergy argues that if the leases at issue did reserve to the United States the authority to lease the lands at issue for coal production, then the parties’ respective rights are governed by the first-in-time, first-in-right, principle of property law. There, Berenergy states the issue as:

When that same owner grants separate leases for different minerals in the same lands, but those leases do not address the question of simultaneous development, how are the development rights of the lessees to be determined?

Peabody filed its answer and counterclaim in Federal Court. In its counterclaim, Peabody asserted two claims for declaratory relief and requested the court declare that:

- (1) The parties’ rights to develop their respective leases are governed by the accommodation doctrine;
- (2) Berenergy be allowed to mine through the leased lands;
- (3) Berenergy’s wells be plugged and other surface equipment be temporarily removed during the mining process;
- (4) The court declare that Berenergy is unreasonably interfering with Plaintiff’s coal operations, and;
- (5) enjoin Berenergy from any further unreasonable interference.

(Peabody’s Counterclaim dated June 19, 2014, at 32-33).

Like Berenergy, Peabody did not ask this court for a partial summary judgment on any of its requested declarations. Instead, Peabody filed its own summary judgment motion asking the court to declare that:

The Berenergy federal leases contemplate multiple mineral development within the same parcel of land. The federal leases owned by Berenergy require them to give “due regard” to the development of coal and to conduct its oil and gas operations to achieve “minimum adverse effect on ultimate recovery” of coal[; and,]

These express limitations in the leases require the two mineral estates to work together in its operations and develop a plan that maximizes the production of both estates and minimizes harm to the other. If the parties are not able to reach an agreement voluntarily, the parties must present a plan of operations in phase two of this case that demonstrates compliance with the lease terms by maximizing the recovery of both coal and oil and gas.

Neither party sought to have BLM, the lessor in all of the leases, made a party to this litigation. *See* Wyo. R. Civ. P. 19. BLM has approved Peabody's mining plan. However, BLM has failed to make a decision whether one of Berenergy's wells needed to be shut-in despite stating in the application for permission to drill saying that such a decision would be made. (*See* Janzen Lease APD #2, Stipulation #1 ("a determination **will** be made as to whether the well should be shut-in . . ." in the event the well is producing when coal approaches) (emphasis added)). Instead, BLM stated in its approval of Peabody's Resource Recovery and Protection Plan (R2P2) that Peabody must seek resolution of any dispute with oil and gas producers (like Berenergy) by one of a variety of methods, including litigation. In other words, once again, BLM punted the issue.

Under Wyo. R. Civ. P. 56(a), a party seeking to obtain a declaratory judgment on a claim or counterclaim may move "for a summary judgment in the party's favor upon all or any part thereof." As noted above, neither party framed the issues in their Memoranda as seeking judgment in their favor "upon all or any part" of their respective claims or counterclaims. The court cannot answer a theoretical legal issue such as how development rights are prioritized. *Reiman Corp. v. City of Cheyenne*, 838 P.2d 1182, 1186 (Wyo. 1992) (court cannot answer purely philosophical question). Instead, the court must answer whether a party is entitled to the relief requested. Therefore, the court will analyze each of the requested declarations made by each party.

FACTS RELEVANT TO THE COURT'S DECISION

The facts are generally not in dispute. Berenergy operates multiple, producing wells in the Payne Oil Field within Wyoming's Powder River Basin. All of Berenergy's leases are Federal leases with the Bureau of Land Management (BLM).

Peabody operates two mines in Campbell County that are at issue in this case: the North Antelope Rochelle Mine and the School Creek Mine (herein "NARM" and "School Creek Mine," respectively). All of the leases for these mines are Federal leases with BLM.

Peabody holds State of Wyoming Permits to Mine and Licenses to Mine and conduct surface coal mining operations pursuant to the federal leases. Earth moving activities are not economical, nor would they be successful, without blasting the overburden. Blasting cannot occur within 500 feet of any petroleum or gas storage facilities, fluid-transmission pipelines, or gas or oil-collection lines (engineered structures). Peabody can only complete mining in this area if the wells are plugged below the level of the coal. Once the area has been mined through and operations are complete, the wells could be reopened and oil produced from those wells.

If Peabody is forced to mine around the wells, then, for purposes of maintaining the safety of both coal and oil and gas operations, Peabody would need to forego extracting coal within approximately 850 feet horizontally of the oil well boreholes and would also need to forego all surface disturbance. This represents a 500-foot allowance for all engineered structures and 350 feet for layback associated with overburden removal.

Peabody Leases

Peabody has acquired three federal coal leases that are at issue in this case. These leases cover lands within the Payne Oil Field and Berenergy's proposed South Payne Secondary Recovery Unit. These leases cover large sections of the Powder River Basin coal mining area, approximately 65 miles south of Gillette, Wyoming.

The North Antelope Rochelle Mine is moving north and is approaching Section 26 where two Berenergy wells are located. Peabody plans to mine coal from the lands adjacent to the NARM mine using surface mining techniques. The coal seam on these lands ranges from 60 to 80 feet in thickness and is about 150-350 feet below the surface. Peabody has already had to curb blasting activity and reduce and delay its surface disturbing activity to avoid damaging the Berenergy wells in Section 26. The adjustments that Peabody has made and will continue to make to its blasting and surface disturbing activities will cost Peabody significant money as they move forward.

From the north, Peabody's School Creek Mine is currently mining in Sections 13, 14, 23, and 24 of Township 42N, Range 70W. This mine is working west and is beginning to encroach on Berenergy's wells at the east side of the Payne Oil Field. Peabody plans to mine coal using surface mining techniques. The coal seam on lands adjacent to the School Creek Mine averages about 64 feet in thickness and lies about 150-250 feet below the surface of the ground.

BTU Lease

The first Peabody Lease at issue is the "BTU Lease" (WYW173408). Peabody entered into this lease on October 1, 2012. The lessor is BLM. This lease requires Peabody to:

Carry on all operations in accordance with approved methods and practices as provided in the operating regulations, **having due regard for the prevention of injury to life, health, or property, and prevention of waste, damage or degradation to any land . . . and other resources including mineral deposits and formations of mineral deposits not leased hereunder, and to other land uses or users. [Peabody] shall take measures deemed necessary by [BLM] to accomplish the intent of this lease term.** Such measures may include, but not limited to, modification to proposed siting or design of facilities, timing of operations, and specifications of interim and final reclamation procedures.

[BLM] reserves to itself the right to lease, sell, or otherwise dispose of the surface or other mineral deposits in the lands and the right to continue existing uses and to authorize future uses upon or in the leased lands, including issuing new leases for mineral deposits not covered hereunder and approving easements or rights of way.

(Peabody Mot. for Summ. J. at 0025 (NARM 00760) (emphasis added)).

The BTU lease contains a special stipulation regarding multiple mineral development. According to the BTU Lease, “[o]perations will not be approved which, in the opinion of the Authorized Officer, would unreasonably interfere with the orderly development and/or production from a valid existing mineral lease issue prior to this one for the same lands.” (Peabody MSJ 0030 (NARM 00765)).

School Creek Lease

The second Peabody Lease at issue is actually two leases WYW172414, which was modified in 2006, and WYW172413, which was modified in 2012.² These will be referred to as the “School Creek Lease” collectively. Peabody originally entered into this lease on December 1, 1966. On September 1, 2012, Peabody and the Bureau of Land Management (BLM) modified the lease to include additional lands. The modified lease requires Peabody to:

Carry on all operations in accordance with approved methods and practices as provided in the operating regulations, **having due regard for the prevention of injury to life, health, or property, and prevention of waste, damage or degradation to any land . . . and other resources including mineral deposits and formations of mineral deposits not leased hereunder, and to other land uses or users.** [Peabody] shall take measures deemed necessary by [BLM] to accomplish the intent of this lease term. Such measures may include, but not limited to, modification to proposed siting or design of facilities, timing of operations, and specifications of interim and final reclamation procedures. [BLM] reserves to itself the right to lease, sell, or otherwise dispose of the surface or other mineral deposits in the lands and the right to continue existing uses and to authorize future uses upon or in the leased lands, including issuing new leases for mineral deposits not covered hereunder and approving easements or rights of way.

(Peabody Mot. for Summ. J. at 0015 (NARM 00748) (emphasis added)).

Like with the BTU lease, the School Creek Lease contains a special stipulation regarding multiple mineral development. According to the School Creek Lease, “[o]perations will not be approved which, in the opinion of the Authorized Officer, would unreasonably interfere with the

² Both of these leases originate through the original base lease (W-321779), which was subdivided into lease W-76192. Therefore, these leases retain the original December 1, 1966, effective date. All of the leases contain nearly identical language, which the parties have not argued affects the court’s analysis.

orderly development and/or production from a valid existing mineral lease issue prior to this one for the same lands.” (Peabody MSJ 0007 (NARM 00867)).

Berenergy Leases

Berenergy has eight operating wells in the Payne Oil Field that are at issue in this matter. There are three different federal leases (the “Janzen Lease,” the “Klimoski Lease,” and the “Superior Lease”) that cover these wells. The parties agree, and the evidence establishes, that Berenergy’s wells on each of the leases at issue were producing, as that term is understood under the leases, at the time BLM leased the lands at issue to Peabody for coal development.

In addition to the production of primary reserves from the Sussex formation in the Payne Field, successful secondary recovery projects have also been undertaken in recent years in the Sussex formation in several nearby fields. Berenergy retained an independent petroleum engineer who has concluded that a secondary recovery project was both technologically and economically feasible for its wells in the Payne Oil Field. Additionally, both of the Berenergy wells in Section 26 would be necessary and beneficial to the proposed secondary recovery project. A significant portion of the proposed secondary recovery unit lies within the mine plans for the two mines.

Unlike the coal leases, which essentially contain identical language regarding BLM’s right to lease out other minerals, the Berenergy leases contain varying language concerning Berenergy’s rights and obligations with regard to extraction of oil. The leases at issue contain the following provisions that are particularly relevant to the court’s analysis.

Janzen Lease

Lease WYW4315 (the “Janzen Lease”) is dated March 1, 1967. The lands covered by this lease overlap with lands in Section 26 of the Peabody BTU Lease (WYW173408). The Peabody BTU Lease was effective October 1, 2012.

First, Berenergy “is granted the exclusive right and privilege to drill for, mine, extract, remove and dispose **of all the oil and gas deposits**” and provides Berenergy the right to “construct and maintain” appurtenant structures “necessary to the full enjoyment thereof” (Janzen Lease, § 1) (emphasis added). The Janzen Lease requires Berenergy to exercise its rights under the lease diligently and operate to prevent waste. (Janzen Lease § 2(j)).

In particular, Berenergy must give “**due regard** for the prevention of waste of oil or gas or **damage to deposits or formations containing oil, gas, or water or to coal measures or other mineral deposits . . .**” and use diligence in “the preservation and conservation of the property for **future** productive operations” (*Id.*) (emphasis added). The lease goes on to

state that Berenergy shall have “due regard . . . for the preservation and conservation of the property for future productive operations.” That means, Berenergy shall give due regard:

- (1) For the prevention of:
 - a. Waste of oil or gas, or
 - b. Damage to deposits or formations containing
 - i. Oil, gas, or water, or
 - ii. Coal measures or other mineral deposits.
- (2) The preservation and conservation of the property for future productive operations.

However, the 1959 regulations regarding oil and gas leases are different. According to the 1959 regulations, a lessee “shall take all reasonable precautions to prevent waste, damage to formations or deposits containing oil, gas, or water or to coal measures or other mineral deposits. Parsing out this language, Berenergy shall:

- (1) Take all reasonable precautions to prevent:
 - a. Waste
 - b. Damage to formations or deposits containing
 - i. Oil, gas, or water, or
 - ii. Coal measures or other mineral deposits.

The lease requires Berenergy to carry out, at its own expense “**all reasonable orders of the lessor relative to the matters in this paragraph**” and further provides “that on failure of the lessee so to do the lessor shall have the right to enter on the property and to accomplish for the purpose of such orders at the lessee’s cost[.]” (Janzen Lease § 2(j)) (emphasis added).

The Janzen Lease reserved to BLM the “right to permit for joint or several use easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing deposits described in the act” (Janzen Lease § 3(a)). BLM further reserved the “right to lease, sell, use, permit the use of or otherwise dispose of the surface or surface resources of any of the lands embraced within this lease, which are owned by the United States, **insofar as such use or disposition will not interfere with lease operations.**” (Janzen Lease § 3(b)) (emphasis added). Berenergy’s rights under the Janzen Lease are “subject to control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued

thereunder[.]” (Janzen Lease § 5). Such control includes the right to control the “rate of production from the lands covered by this lease.” (*Id.*).

In 1984, BLM placed conditions on Berenergy regarding Janzen Well #2. In particular, BLM placed the following condition on gas production under the Janzen Lease:

In the event the well is a producer and is producing during the time mining operations are proposed for the area in which the well is located, as the strip mining approaches the well, a determination will be made as to whether the well should be shut-in, the casing cut off, protective plugs set, and the area mined through, and the well reentered and production resumed. If a request for a suspension of operations and production is appropriate but is not filed, the oil and gas supervisor will suggest an application for suspension be submitted effective the date of temporary abandonment and to continue for the duration of the shut-in as negotiated by both the oil and gas operator and the mining operator.

(Janzen Lease APD #2, Stipulation #1).

Klimoski Lease

There are five producing wells on the Klimoski Lease (WYW276846). This Lease is dated December 1, 1963. The lands covered under this Lease overlap with lands contained in Peabody’s School Creek Lease (WYW172413) and NARM North Lease (WYW172414), which are dated December 1, 1966. The Klimoski Lease contains the following provisions that are particularly relevant to the court’s analysis:

Section 1 (the granting clause) of the Klimoski Lease is identical to the Janzen Lease (Klimoski Lease, § 1). Likewise, the Klimoski Lease requires Berenergy to exercise its rights under the lease diligently and operate to prevent waste. (Klimoski Lease § 2(j)). The “due regard” clause in the Klimoski Lease is identical to the “due regard” clause in the Janzen Lease.

The Klimoski lease contains a provision that is not present in the other Berenergy Leases. The Klimoski Lease requires Berenergy to conduct its operations “for the protection and use of the land for the purpose for which it was reserved” so far as is consistent with the Klimoski Lease, and states that the purpose of the Klimoski Lease “shall be regarded as the dominant use unless otherwise provided herein or separately stipulated.” (Klimoski Lease, § 2(p)).

As in the Janzen lease, BLM reserved easements and rights-of-way “through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing deposits described in the act. . . .” (Klimoski Lease, § 3(a)). BLM specifically reserved the “right to lease, sell, or otherwise dispose of the surface of the lands under existing law or laws hereafter enacted[.]” but only “insofar as said surface is not necessary for the use of the lessee in the extraction and removal of the oil or gas therein, or to dispose of

any resources in such lands which **will not unreasonably interfere with operations under this lease.**” (Klimoski Lease, § 3(b)) (emphasis added).

Superior Lease

The third lease at issue is the Superior Lease (WYW-96554). There is one well on this Lease. This Lease is dated June 1, 1960. The lands covered by this Lease overlap with lands covered by Peabody’s School Creek Lease (WYW-172413), which is dated December 1, 1966.

The granting language of Section 1 of the Superior Lease is identical to the Janzen and Klimoski Leases. Likewise, the Superior Lease requires Berenergy to exercise its rights under the lease diligently and operate to prevent waste and damage. (Superior Lease § 2(j)). The “due regard” clause contained in Section 2(j) of the Superior Lease is identical to the “due regard” clauses in the other two leases. (*Compare* Superior Lease § 2(j) *with* Janzen Lease § 2 *and* Klimoski Lease § 2(j)).

In paragraph 3(a), BLM reserved the same rights to permit for several use easements as contained in section 3(a) of the Janzen and Klimoski Leases. (*Compare* Superior Lease § 3(a) *with* Janzen Lease § 3(a) *and* Klimoski Lease § 3(a)). The reservation of the disposition of surface resources is the same as the reservation in the Janzen Lease. (*Compare* Superior Lease, § 3(b) *with* Janzen Lease § 3(b)).

The Thornburg Lease

Peabody touched on the issue regarding its Thornburg Lease in its summary judgment materials. At hearing, Berenergy conceded that if the court determined that actual operations were not the touchstone, then Peabody would be entitled to develop its rights under the Thornburg Lease first.

Under the court’s analysis of the lease provisions at issue, the same rules will apply to the Thornburg Lease. The patent from the United States to Jack Thornburg conveyed all rights and “appurtenances thereof” to the 320 acres in question. Reading the granting clause in its entirety, the court concludes that the Thornburg Lease, like the other three Federal leases set out above, conveyed an express right to extract oil and gas. The patent reserved unto the United States all of the coal, which includes the rights necessary to develop the coal as implied under the reasoning in *Chartiers*, *infra*.

Additional undisputed facts will be included in the court’s analysis as necessary.

APPLICABLE LAW

(1) Declaratory Judgment

The purpose of the Declaratory Judgment Act is “to settle and to afford relief from uncertainty and insecurity with respect to legal relations” Wyo. Stat. Ann. § 1-37-114. “[A]ll persons shall be made parties who have or claim *any* interest which would be affected by the declaration.” Wyo. Stat. Ann. § 1-37-113 (emphasis added). Courts may construe “[a] contract . . . either before or after there has been a breach thereof.” Wyo. Stat. Ann. § 1-37-104.

There are four elements necessary to establish a justiciable controversy under the Uniform Declaratory Judgments Act:

1. The parties must have existing and genuine, as distinguished from theoretical, rights or interests;
2. The controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion;
3. It must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, or, wanting these qualities to be of such great and overriding public moment as to constitute the legal equivalent of all of them; and,
4. The proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues.

Reiman Corp., 838 P.2d at 1186.

(2) Summary Judgment

“Summary judgment is proper only when there are no genuine issues of material fact and the prevailing party is entitled to judgment as a matter of law.” *Moore v. Lubnau*, 855 P.2d 1245, 1248 (Wyo. 1993) (internal quotation marks and citations omitted). A motion for summary judgment places an initial burden on the movant to make a prima facie showing that no genuine issue of material fact exists and that summary judgment should be granted as a matter of law. *Id.* Once a prima facie showing is made, the burden shifts to the party opposing the motion to present specific facts showing that a genuine issue of material fact does exist. *Id.*

In the context of contract cases, summary judgment is appropriate when “no genuine issues of material fact exist, the provisions of the contract are unambiguous, and those provisions are controlling because the construction of the contract’s provisions is for the court to decide as a matter of law.” *Moncrief v. Louisiana Land & Exploration Co.*, 861 P.2d 516, 523 (Wyo. 1993). Ambiguity in a contract “gives rise to a genuine issue of material fact.” *Comet Energy Servs.*,

LLC v. Powder River Oil & Gas Ventures, LLC, 2008 WY 69, ¶ 14, 185 P.3d 1259, 1264 (Wyo. 2008). Indication of “doubt about the meaning of a contract creates a genuine issue of material fact and thereby renders summary judgment inappropriate.” *Martin v. Farmers Ins. Exch.*, 894 P.2d 618, 620 (Wyo. 1995). Ambiguity in a contract exists where there is obscurity in its “meaning because of indefiniteness of expression or because it contains a double meaning.” *Fremont Homes, Inc. v. Elmer*, 974 P.2d 952, 956 (Wyo. 1999). However, an ambiguity does not exist where the parties are disagreeing about the meaning of a contract term. *Id.*

(3) Choice of Law

Absent an actual conflict with federal law or the need to create new federal common law, the state law of the situs of the lease govern private disputes involving leases issued under the Mineral Leasing Act of 1920 (30 U.S.C. § 181 *et seq.*). *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966). The Mineral Leasing Act does not provide for rules of decisions in disputes involving federal mineral lessees, and therefore, state law governs such disputes absent a showing by a need to create federal common law. *Devon Energy Prod. Co., L.O. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195 (10th Cir. 2012).

(4) Wyoming Contract Law

In considering a contract, the “primary purpose” in construing a contract “is to determine the true intent and understanding of the parties at the time and place the agreement was made.” *Comet Energy Servs., LLC*, ¶ 13, 239 P.3d at 386. Where the contract language is clear and unambiguous, a court must limit its inquiry to the four corners of the agreement, giving the words contained in the contract their ordinary meaning. Under Wyoming precedent,

the words used in the contract are afforded the plain meaning that a reasonable person would give to them. When the provisions in the contract are clear and unambiguous, the court looks only to the “four corners” of the document in arriving at the intent of the parties. . . .

The determination of the parties’ intent is [the court’s] prime focus in interpreting or construing a contract. If an agreement is in writing and its language is clear and unambiguous, the parties’ intention is to be secured from the words of the agreement. When the agreement’s language is clear and unambiguous, [the court] consider[s] the writing as a whole, taking into account relationships between various parts. In interpreting unambiguous contracts . . . [courts] have consistently looked to surrounding circumstances, facts showing the relations of the parties, the subject matter of the contract, and the apparent purpose of making the contract.

Boley v. Greenough, 2001 WY 47, ¶¶ 10–11, 22 P.3d 854, 858–59 (Wyo. 2001) (internal quotation marks and citations omitted).

In construing a document granting a party an interest in minerals, the court “is to give effect to the general intent of the parties to the conveyance with regard to the exploitation of the mineral resources governed by the language expressed in context with the specific facts and circumstances surrounding the execution of the transferring document on a case-by-case basis.” *Caballo Coal Co. v. Fidelity Exploration & Prod. Co.*, 2004 WY 6, ¶ 22, 84 P.3d 311, 320 (Wyo. 2004). In that regard, “the parties to a contract are presumed to enter into their agreement in light of existing principles of law.” *Union Pacific Res. Co. v. Texaco, Inc.*, 882 P.2d 212, 222 (Wyo. 1994) “These existing principles of law enter into and become a part of a contract as though referenced and incorporated into the terms of the agreement.” *Id.* Consequently, the court concludes that the Wyoming Supreme Court would adopt the canon that ambiguities in land grants are construed in favor of the sovereign and that nothing passes except that which “is conveyed in clear language[.]” *Watt v. West. Nuclear, Inc.*, 462 U.S. 36, 59 (1983); *see also Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 880 (1999); *Powder River Basin Res. Council v. Wyoming Envtl. Quality Council*, 869 P.2d 435, 439 (Wyo. 1994) (statutes waiving sovereign immunity strictly construed in favor of government).

Since the Janzen, Klimoski, and Superior Leases, as well as the BTU and School Creek Leases, are federal leases made under the Mineral Leasing Act (MLA), 30 U.S.C. §§ 181 *et seq.*, the parties’ intent in entering into these leases must be construed as being consistent with the purposes of the MLA. Congress intended to promote wise development of natural resources and to obtain for the public reasonable financial returns on those assets, which belong to the public, under the MLA. *Mountain States Legal Found. v. Andrus*, 499 F.Supp. 383, 392 (D. Wyo. 1980); *California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961). “The Secretary of the Interior is the statutory guardian” of the public interest in minerals. *California Co.*, 296 F.2d at 388. “The public does not benefit from resources that remain undeveloped.” *Id.*; *but see Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 629 (1950) (indicating that the Secretary may withhold lands from lease because the public interest would be injured by impairing private business through excess production capacity). Under the MLA, the Secretary of the Interior has a responsibility to insure that these resources are not physically wasted and that their extraction accords with prudent principles of conservation. *California Co.*, 296 F.2d at 388. To this end,

the MLA allows Secretary of the Interior to “restrict a lessee’s production to an amount commensurate with market demand[.]” *Id.*

(5) Wyoming Mineral Law

Wyoming law establishes that the mineral estate is the dominant estate when the mineral estate is severed from the surface estate. *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537 (Wyo. 1988). The Wyoming Supreme Court explained traditional common law’s establishment of the right of “reasonable use” by the mineral estate as the dominant estate when severed from the other estates of land:

The law long has recognized an initial, irrefutable principle that there must be a legitimate area in which the owner of the minerals of necessity has inherent rights to the surface relating to the opportunity to find and develop minerals. The control of access on the part of the owner of the mineral estate was the imposition of a standard of reasonableness, i.e., **the mineral owner or operator is permitted to use only so much of the surface as is reasonably necessary or incident to his finding, developing and producing the minerals.**

Belle Fourche Pipeline Co., 766 P.2d at 544 (emphasis added citations omitted).

It follows from *Belle Fourche* that multiple mineral owners owning various mineral interests in the same leased land would be under a duty “to use only so much of the surface as is reasonably necessary or incident to his finding, developing and producing the minerals” as to the other mineral interest owners. Since 1955, Wyoming’s policy on State leases required cooperation among all owners of interests in State lands:

All mineral leases issued pursuant to this section [now Wyo. Stat. Ann. § 36-6-101] shall be separate and distinct from each lease of the same land for grazing or agricultural purposes, issued by the board, and rules and regulations adopted by the board as herein authorized, shall provide for joint use of such lands for grazing and agricultural or mineral purposes without **undue interference** by the lessees under **any such class of leases with lessees under any other such class.**

1955 Session Laws, Ch. 84 (emphasis added).

In construing this language, the Board of Land Commissioners adopted rules governing cooperation between Oil and Gas and Coal lessees. Wyo. Bd. of Land Comm’rs, Rules and Regs., Ch. 18, § 18; Ch. 19, § 18. These rules address multiple uses by concurrent mineral interest holders by providing a mechanism whereby the Director of the State Board of Land Commissioners can resolve disputes.

ANALYSIS AND CONCLUSIONS

Jurisdiction Under the Declaratory Judgment

Before the court can declare any rights, the parties must establish that they have met the requirements of the Declaratory Judgment Act. The case is in a unique posture insofar as Berenergy filed two motions for summary judgment, which stated issues separate, and apart from their requested declarations. Peabody sought two declarations in its summary judgment motions. Regardless, the requirements of the Declaratory Judgment Act have been met.

First, the parties clearly have real, genuine interests. Each party has adequately proven, and neither dispute that the other also has, validly issued leases from BLM regarding the lands in dispute. These leases seem to grant interests that are in real conflict. Therefore, the court may construe the leases.

Second, a judgment by this court as to the relative rights of the parties under the contracts (leases) at issue may effectively operate. Again, despite the fact that Berenergy did not seek summary judgment on the declarations sought in its First Amended Complaint, the court concludes that answering the questions regarding the construction of the leases will effectively allow the parties to move forward with their dispute.

Third, this case involves determining a controversy, which will have the force and effect of a final judgment upon the parties' respective rights under the lease at issue. A construction of one's rights under a contract is a proper inquiry for a declaratory judgment action. Wyo. Stat. Ann. § 1-37-103. Interpreting the language of the leases at issue presents the kind of dispute, which a court may, and should, decide under the facts of this case. Since neither party sought to join BLM, any declaration by the court will not bind BLM. *See* Wyo. Stat. Ann. § 1-37-113.

Finally, the purpose of the Declaratory Judgment Act is "to settle and to afford relief from uncertainty and insecurity with respect to legal relations" Wyo. Stat. Ann. § 1-37-114. These parties are clearly adversarial. Although their respective counsel have briefed and argued this case with utmost decorum and professionalism, there is a real dispute between these two parties over who may mine or drill on the land at issue. The volumes of briefs and supporting materials clearly establish that there is real uncertainty about whether Peabody can enter upon the overlapping lease area to the detriment of Berenergy and that the parties genuinely dispute this. Therefore, the court concludes that there is a real controversy, which the court must resolve as to the first claim for a declaration.

SUMMARY OF THE DECISION

Berenergy argues that its Federal leases do not contain any limitation based upon a later grant of developmental rights. From there, Berenergy claims that Peabody has no right to interfere with its ongoing operations. The court disagrees. Reading all of the clauses within the Berenergy Federal Leases *in pari material*, the court concludes that the “due regard” clauses establish that Berenergy may not engage in operations that waste other minerals, including coal, located on the leased lands.

Therefore, Berenergy’s operations may be limited insofar as Peabody can prove that Berenergy’s operations unreasonably cause injury to (i.e., waste) Peabody’s interest in the leased lands, namely the coal. The converse would be true as to any actions by Peabody, which Berenergy can demonstrate cause unreasonable injury to (i.e., waste) Berenergy’s interest. Whether any such existing operations or proposed operations “unreasonably” interfere with the other’s interest in the leased lands is a question of fact that the court will answer following trial.

In their alternative motion for summary judgment, Berenergy argues for the application of a “first-in-time, first-in-right” doctrine. Berenergy argues that if Peabody is entitled to develop its coal rights, then it may only do so insofar as such operations do not interfere with Berenergy’s already-existing operations. Again, the court disagrees.

The “first-in-time, first-in-right” doctrine does not apply to the leases at issue. Under the plain language of the Leases at issue, each lessee received the right to extract their respective mineral. Included in that grant is the right to make use of so much of the leased lands as is reasonably necessary for the full enjoyment of the Lessee’s right to extract. Reserved from that grant is the right of the lessor to grant another lessee the right to extract other minerals. Included, within that reservation, is the right to interfere with the first-in-time lessee’s rights so long as such interference is reasonable. Excluded from each grant, by the “due regard” clause, is the authority to cause waste of any other minerals retained by the lessor. Thus, Berenergy’s Federal Leases were limited by the “due regard” clauses from their inception by a servitude, albeit limited by the terms of the lease, in favor of all other mineral interest owners.

The servitude imposed upon each mineral estate exists from the time of the grant. It is not that BLM conveyed away its right to allow other mineral developers to use the same lands leased to Berenergy. To the contrary, BLM retained those sticks (from the bundle of sticks), and therefore, Berenergy’s leases were taken subject to that servitude which has always existed, just

as Peabody's leases were taken subject to a known servitude owed to Berenergy. Thus, the "first-in-time, first-in-right" doctrine is not applicable.

Instead, the court agrees with Peabody's assertion that the Leases at issue contemplate multiple mineral developments. Additionally, the court agrees with Peabody's assertion that each lease requires the other lessees to work together to develop plans of operations that balance the right to fully enjoy the rights under each lease while giving "due regard" to avoiding waste of other minerals. The court disagrees that the accommodation doctrine applies, since the accommodation doctrine involves a servient and dominant estate, and this case involves two dominant estates. More to the point, the court disagrees that "maximum ultimate economic recovery of oil and gas with minimum waste and with minimum adverse effect on ultimate recovery of other mineral resources" is the only consideration. While this may be a factor in the ultimate determination of this case, the touchstone is "reasonable use" so as not to cause waste of other minerals contained in the leased lands.

**BERENERGY'S FIRST AND SECOND REQUESTED DECLARATIONS and
PEABODY'S SECOND AND THIRD REQUESTED DECLARATIONS**

Berenergy seeks a determination that Peabody does not have any right to interfere with Berenergy's oil operations in the Overlapping Lease Area. As a follow-up, Berenergy seeks a determination that Peabody does not have the right to require Berenergy to suspend its oil operations, remove its facilities and equipment, and cut and cap its existing wellbores. In its counterclaim, Peabody essentially seeks the opposite relief, i.e., a declaration that the accommodation doctrine applies, that it may mine through Berenergy's operations, and that Berenergy must plug its wells and move its equipment. Neither party is entitled to the relief requested on summary judgment.

- (A) **The plain language of the leases reserved the right of BLM to lease the coal to Peabody and the corresponding development rights so long as Peabody's coal-related activities do not unreasonably interfere with Berenergy's oil-related activities.**

Although Berenergy states the issue as whether BLM's unambiguous grant of lease rights to Berenergy can be "limited by the grant of later-in-time lease," the first question the court must answer is what BLM granted each of these lessees. The question of whether BLM retained any "stick" constituting a right to develop coal to hand over to Peabody when it leased the coal rights

logically follows (and does not precede) the question of what did BLM grant Berenergy because a grant from a sovereign must be construed to grant only what is expressly granted with all other rights being reserved. *Watt*, 462 U.S. at 59. The court concludes that BLM retained a development right, from its bundle of sticks, to hand over to Peabody when it leased the oil and gas to Berenergy, albeit a limited one.

The lease language in the Berenergy and Peabody leases is not ambiguous. Therefore, the court will interpret the leases by determining the parties' intent in executing the leases. The court will consider the Leases documents, as well as the facts and circumstances surrounding the execution of the Leases, within the context of existing law at the time the leases were executed. *Boley*, ¶¶ 10–11, 22 P.3d at 858-59.³

The intent of the parties in Berenergy Leases was for the United States to lease and for Berenergy to develop oil and gas interests in the lands at issue (including the “Overlapping Lease Area”) consistent with the MLA. This means that every clause in the leases must be construed to allow development of all minerals. To this end, the United States only granted Berenergy “the exclusive right and privilege to drill for, mine, extract, remove and dispose **of all the oil and gas deposits[.]**” (All Leases, § 1) (emphasis added). The United States intended to reserve all other minerals, including coal. *See Watt*, 462 U.S. at 59. In addition to reserving the coal, the United States reserved all the rights necessary for its lessee to remove the coal. *See Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893) (affirming trial court’s decision that surface owner retained a right of way by necessity through the previously leased minerals to reach other minerals despite there being no reservation in the conveyance documents).

This construction of the lease is confirmed by express provisions within the Berenergy Leases. The United States expressly reserved the surface. (Berenergy Leases, § 3(b)). The United States reserved the right to grant easements through Berenergy’s leasehold as may be necessary for the working of those lands containing deposits of coal. (Berenergy Leases, § 3(a)). The leases limit these reservations insofar as subsequent lessees’ easements or uses of the surface will not “interfere with lease operations” (Janzen and Superior Leases) or “unreasonably interfere operations under this lease” (Klimoski Lease). Moreover, the United States expressly reserved the right to control the rate of development and production to that which is in the public

³ *But see* Footnote 5, *supra*.

interest. (Janzen Lease, §5). Reading all of the provisions *in pari material*, the oil and gas (as well as the coal) leases at issue reserved the right of the United States to lease the other minerals and to allow for their development, subject to the terms of the leases.

Berenergy points the court to *Penroc Oil Corp.*, 84 IBLA 36 (1984), for the proposition that the “BLM cannot infringe on rights granted in earlier lease through granting a subsequent lease[.]” (Berenergy Resp. to Def. Mot. for Summ. J. at 20). Berenergy’s misapprehends *Penroc*. First, *Penroc* did not involve two mineral leases, but instead involved a request for a right of way by a stranger to the lease who (a) had no rights in the leased lands, and (b) sought to use someone else’s abandoned well as a disposal well. *Penroc*, 84 IBLA at 42.

More importantly, in *Penroc* the IBLA construed identical language, as contained in paragraph 3(a) of the Berenergy Leases, as not allowing BLM to grant an easement to a stranger through leased lands because the interference was unreasonable. As the administrative law judge noted in *Penroc*, there was no evidence that the right of way was necessary or appropriate to other lands covered by the MLA. In this case, the parties agree that any use easement granted to Peabody would be necessary for Peabody’s development of lands containing deposits covered by the MLA. Thus, *Penroc* does not stand for the proposition that BLM could not grant Peabody development rights in the leased lands. Instead, it stands for the proposition that BLM could grant Peabody development rights in the leased lands so long as the grant does not unreasonably interfere with Berenergy’s rights.

There is also an issue of whether the Berenergy Leases allow Peabody to “interfere” at all, or whether only “unreasonable” interference” is prohibited. The word “interfere” and the phrase “unreasonably interfere” must be construed in light of the parties’ intent in executing the contract and the plain meaning of the term. As to intent, the parties intended the Secretary to lease and develop all minerals under the MLA. The word “interfere” or “interference” is defined as “to check; hamper; hinder; infringe To enter into, or to take part in, the concerns of others.” *Black’s Law Dictionary*, 814 (6th Ed. 1990). Implicit within this definition is a materiality, or reasonableness, requirement.

That is, to construe the Klimoski Lease to allow no interference (no infringement whatsoever) would be contrary to the purpose of the MLA (allowing mineral development in areas that have been opened to mineral development) by placing an absurd condition on one of the parties. See *Schaffer v. Standard Timber Co.*, 331 P.2d 611, 616 (Wyo. 1958) (contract will

not be construed to place an absurd condition on one of the parties). The words “hamper,” “hinder,” and “infringe” all imply that the acts of interference have a tangible affect on the party being interfered with. Therefore, although the Janzen and Superior Leases omit the word “reasonably,” the term “interfere” or “interference” must mean that some interference is permissible so long as it is not unreasonable. To hold otherwise would place an unreasonable condition on Peabody and any other party wishing to make any use of the leased lands.

Thus, the court concludes that the plain language of the lease allows Peabody to engage in mining-related activities so long as such mining-related activities do not unreasonably interfere with Berenergy’s otherwise lawful oil-related operations. To this extent, Berenergy’s motion for summary judgment as to its first requested declaration is denied. The court’s construction of the Leases does not lead to the conclusion that Peabody does have the right to engage in mining-related activities that interfere with Berenergy’s existing uses.

(B) The “due regard” clauses place upon all parties the obligation to make “reasonable use” of the leased lands in their operations so as to avoid unreasonable injury (i.e., waste) to the other minerals contained within the leased lands.

Having determined what the parties did, and did not, receive through their leases, the court must determine the impact of the “due regard” clauses on those limited grants given to each lessee by the Leases at issue. The court concludes that the “due regard” clauses place a limitation on each lessee to only use so much of the leased lands as is reasonably necessary for the development of their rights, which includes not causing waste to other minerals.

As outlined above, the regulations, in place at the time the Berenergy leases were issued, required oil and gas lessees to avoid waste. 30 C.F.R. § 221.18 (1959). Thus, although the language of the Berenergy Leases require it to give “due regard” to the prevention of “waste of oil and gas[,]” the applicable regulations required Berenergy to “take all reasonable precautions to prevent waste” to any mineral reserved by the United States.

While the court will not re-write a lease, the Berenergy Leases must be read to be consistent with the regulations governing such leases. *See* 30 C.F.R. §221.1 (Introduction and (f)). Otherwise, the lease would be *ultra vires*, which no one is claiming. Therefore, the court concludes that the “due regard” clause establishes a duty on the part of each lessee not to waste other minerals. Additionally, to read the contract as controlling over the regulations would place

an absurd condition on the lessor. If Berenergy's leases are read to control over the regulations in place at the time the leases were entered, Berenergy would be permitted to waste any other mineral (save helium) that the United States reserved. Therefore, the court will construe the Berenergy leases to include a duty to prevent "waste" in general.

Thus, the "due regard" clauses place on each of the lessees a "reasonable use" requirement. See *Belle Fourche Pipeline Co.*, 766 P.2d at 544. Under the "due regard" clauses, each mineral interest owner's operations are permitted to make reasonable use of the leased lands but only insofar as they do not commit waste of the other mineral interests. That is, under the coal and oil and gas leases at issue, the lessee is permitted to "use" the leased lands as they see fit, so long as they do not commit waste or damage the other's interest. (All Berenergy Leases, § 2(j); Peabody Leases, § 7). The issue becomes what constitutes waste.

The 1959 regulations define "waste" in the context of oil and gas as including the ordinary meaning of "waste." 30 C.F.R. § 221.1(n). The ordinary meaning of "waste" is an "[a]ction or inaction by a possessor of land causing **unreasonable** injury to the holders of other estates of land." *Black's Law Dictionary*, 1589 (6th Ed. 1990) (emphasis added). The total preclusion of the development of the coal on the leased lands is contrary to the purposes of the MLA that minerals be developed for the public's benefit. As one court noted, the public does not benefit from minerals that remain undeveloped. *California Co.*, 296 F.2d at 388. Therefore, total preclusion or unreasonable delay in development *could* constitute an unreasonable injury to either Peabody's coal interest or Berenergy's gas interest if either Berenergy or Peabody is using more than a reasonable amount of the leased lands to enjoy fully their its right to extract minerals. As the court in *Chartiers* concluded, an accommodation had to be made by both mineral interest holders to develop their interests, but such accommodation could not destroy the grant of the first-in-time interest holder, "nor even seriously depreciate its interest without ample compensation." *Chartiers*, 25 A. at 598.

By stating that the lessee may not waste other minerals in operations, the "due regard" clauses state the conditions under which it can be invoked by the lessor, and by extension any other mineral interest owner against his fellow mineral interest owners. In particular, the "due regard" clauses allow BLM to put in place "reasonable orders" relative to the prevention of waste of other minerals, which would include coal and oil and gas. The clause also permits BLM to put in place "reasonable orders" for the "preservation and conservation of the property

for future productive operations[.]” but this is not a proper area for another mineral interest owner, or the courts, to make a determination.⁴

Finally, reading the “due regard” clause to allow BLM to put in place reasonable orders, and by extension allow a fellow mineral interest owner to seek injunction, that would limit Berenergy’s operations to avoid “waste” means that BLM (or its assignee, Peabody through litigation) can limit a lessee’s operations to the extent Peabody can prove that Berenergy’s operations use a larger portion of Peabody’s coal estate than is reasonably necessary for Berenergy to fully enjoy its lease rights. (All Berenergy Leases, § 1). Not only is this reading of Section 2(j) consistent with the plain and ordinary language of the Leases, it is also consistent with how Berenergy and BLM have read this clause in regard to the Janzen Lease. In the recent stipulation regarding deepening the Janzen #2 well, BLM included a condition that:

In the event the well is a producer and is producing during the time mining operations are proposed for the area in which the well is located, as the strip mining approaches the well, a determination **will be made** as to whether the well should be shut-in, the casing cut off, protective plugs set, and area mined through, and the well reentered and production resumed.

(Peabody MSJ 000199 (Exhibit G)).

The “due regard” clauses, read *in pari material* with the surface use and easement clauses in the Leases establish that Berenergy, like Peabody, must make only such use the other mineral estates so as not to cause waste of those other resources. The United States retained rights appurtenant to the coal necessary to develop the coal. Just as Peabody took its coal rights with knowledge that Berenergy had development rights to the oil and gas in the Payne Filed, Berenergy accepted its mineral leases with the knowledge that the United States maintained the right to lease the coal, including a limitation in the “due regard” clauses that Berenergy could only develop its oil and gas interests in a manner that did not waste (cause unreasonable injury

⁴ The court is not the proper authority to determine if particular operations by Berenergy must be ordered to preserve and conserve the property for future productive operations. The Secretary of Interior, not a state district court judge nor Peabody, is tasked, by Congress, with that determination. “The Secretary of the Interior is the statutory guardian” of the public interest in minerals subject to the MLA. *California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961). The Secretary of the Interior “has a responsibility to insure that these resources are not physically wasted and that their extraction accords with prudent principles of conservation.” *Id.* Whether Berenergy’s operations, insofar as they conflict with Peabody’s interests, are consistent with prudent “principles of conservation” is a political question and one over which Congress has vested the Secretary of Interior with primary jurisdiction. Although the Secretary’s decision in such a matter may be subject to some sort of judicial review, it is not a question that a court can answer in the first instance.

to) any other mineral interests. To hold otherwise would frustrate the purpose of the MLA, which requires development of all minerals in the public interest, and would be inconsistent with Berenergy and BLM's understanding of the Leases as evidenced by the stipulation regarding Janzen #2 well.

For the foregoing reasons, the court concludes that there are issues of fact that preclude the court from granting Berenergy's second requested declaration. The same issues of fact preclude summary judgment on Peabody's second and third requested declarations. Whether any of Berenergy's activities violate the "due regard" clauses, and therefore can be enjoined by this court, requires further factual development.

**BERENERGY'S THIRD REQUESTED DECLARATION and
PEABODY'S FOURTH AND FIFTH REQUESTED DECLARATIONS**

As to Berenergy's third-requested declaration, the court agrees that all operations by competing mineral interest owners require reasonableness. The "due regard" clauses only prohibit "waste" of the other mineral interest owner's estate. By definition, "waste" only prohibits unreasonable injury to other party's interest. Therefore, any actions by either lessee only allow for reasonable interference.

As Berenergy acknowledges, mineral estate owners owe reciprocal servitudes to one another. (Berenergy's Mem. in Support of Mot. for Summ. J. Regarding Simultaneous Development at 20-21). The legal relationship between two mineral interest owners is not the same as that of surface and mineral owners. For that reason, the Tenth Circuit's decision in *Transwestern* does not control. Unlike the situation in *Transwestern* wherein the government placed on the surface estate an "implied servitude" for the benefit of the mineral lessee, in this case the government placed an express servitude on each mineral owner for the benefit of the other mineral owners. See *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878, 882-83 (10th Cir. 1974).

In this case, two, equal dignity estates have the obligation not to waste one another's estate. Each mineral estate conveyed by the United States includes an implied right to develop that interest, the parameters of which are set by the "due regard" clauses. See *Chartiers*, *supra*. This means that each mineral interest owner owes all other mineral interest owners a duty to conduct its operations in such a manner as not to interfere unreasonably with the other owners' ability to develop their resources. The interests conveyed in the Berenergy leases, as well as the Peabody leases, place an implied servitude in favor of development of all minerals located within

the lease area, which means that Berenergy and Peabody both have an obligation to accommodate one another. This is also consistent with the plain language of Sections 3(a) and 3(b) of the Berenergy Leases, as well as Section 7 of the Peabody Leases.

Therefore, Berenergy is entitled to summary judgment as to its third requested declaration. Peabody is not entitled to its fourth and fifth requested declarations because issues of fact preclude determining whether either party's current, or proposed, operations constitute an unreasonable interference. However, the real issue is how the court will analyze the "reasonableness" of any interference, which leads the court to Peabody's first requested declaration.

PEABODY'S FIRST REQUESTED DECLARATION

Peabody asks the court to determine that the accommodation doctrine applies. In support of this argument, Peabody claims that 43 C.F.R. § 3162.1 provides the only basis for ordering an accommodation in the upcoming "Phase II" of the litigation. The court agrees that a "second Phase" of litigation is necessary because each mineral interest owner has a duty to limit its interference to "reasonable" interference with the other mineral owners. Therefore, a version of an "accommodation doctrine" is applicable. The court disagrees that 43 C.F.R. § 3162.1 is the only consideration. Therefore, Peabody is not entitled to its first requested declaration.

Because each mineral interest owner owes the other a servitude, which exists from the time of the original lease, the court disagrees with Berenergy that the "first-in-time, first-in-right" doctrine means that the first user to begin developing its mineral has the right to continue to develop its mineral to the exclusion of the other mineral interest owners. As *Chartiers* instructs, even when the owner does not expressly reserve the right to develop the other minerals, such a right is reserved by necessity. Thus, only if the Berenergy Leases can be read to mean BLM conveyed away the coal development-rights stick by giving Berenergy the oil and gas-development stick, can Berenergy's claim of "first-in-time, first-in-right" priority against Peabody prevail.

Although Berenergy argues that its leases conveyed all the development rights, the court disagrees. (*See* Berenergy's Resp. to Peabody's Mot. for Summ. J. at 20). As analyzed above, BLM did not convey away all its right to develop coal by the express terms of the Berenergy Leases. On the contrary, BLM imposed a "reasonable use" standard on both Berenergy and Peabody when it included the "due regard" clauses in both sets of leases. As examined above,

the Berenergy Leases cannot be read to give away expressly the United States' rights to access the coal interests it reserved.

Like the MLA, Wyoming mineral law embodies the concept of reasonable use. In the mineral-surface conflict situation, that means that a dominant mineral estate owner may only use so much of a servient surface owner's estate as is reasonably necessary to develop the dominant estate. There is no reason to believe that Wyoming law would not apply this same principle to mineral versus mineral conflicts. See 1955 Session Laws, Ch. 84. The current regulations regarding state leases embody this principle. Rather than adopting "first-in-time, first-in-right" rules based upon the 1955 legislation, the Wyoming Board of Land Commissioners adopted rules that allowed for the balancing of competing mineral interests. If Wyoming law required a "first-in-time, first-in-right" regime, the Board of Land Commissioners would not have adopted a system that requires accommodation. For those reasons, the court concludes that the "due regard" clauses and the reciprocal servitudes imposed on each mineral interest owner preclude a finding that "first-in-time, first-in-right" applies.

Instead, the court looks to whether the competing mineral owners' use is "reasonable." In the context of mineral-surface conflicts, "[t]he reasonableness of the method and manner of using the dominant mineral estate may be measured by what are usual, customary and reasonable practices in the industry under like circumstances of time, place and" other equal dignity, dominant estate uses. See *Kartch v. EOG Resources, Inc.*, Case No. 4:10-cv-014, 2011 WL 5509076, at *4 (D.N.D. Nov. 10, 2011). In that context, "reasonable use" requires balancing of factors. *Id.* The court concludes that the same balancing of factors should apply to the mineral-mineral conflict scenario. What may constitute a reasonable use by Peabody regarding a surface use, may not be a reasonable use in light of the existing use by Berenergy of an equal-dignity estate. As the *Kartch* court noted in its mineral-surface dispute, the court "cannot ignore the condition of the surface itself and the uses then being made by the servient surface owner." *Id.* It follows, like day follows night, that this court cannot ignore the existing uses by a fellow dominant estate holder like Berenergy when reviewing any plan proposed by Peabody.

Unlike the situation involving a mineral-surface dispute, even if the manner of development proposed by Peabody "is the only reasonable, usual and customary method that is available for developing and producing the minerals on the particular land[.]" Berenergy does

not necessarily have to yield. *Id.*⁵ Instead, like the court in *Chartiers*, this court will have to develop a *de facto* accommodation that adequately protects both, equal dignity mineral interests. Such a plan would have to include just compensation by each party for the part of the other party's mineral claim that is being wasted. That is, if a proposal eventually adopted by the court allows for Peabody operations in certain areas to the exclusion of Berenergy, Peabody must compensate Berenergy for the value of the mineral interest lost from that area since Peabody will be committing waste. Similarly, if the proposal adopted by the court allows Berenergy operations to continue in a given area to the exclusion of Peabody, then Berenergy must compensate Peabody for any loss of its mineral interests from that area.

The quantitative, relative economic impact, as contained in 43 C.F.R. § 3162.1, is a proper factor for the court to consider. Berenergy is correct that its leases contain no such requirement. However, Section 5 of the Berenergy Leases allows the Secretary of Interior to "turn off" a lease when it is in the public interest. The public interest includes, but is not limited to, the other mineral interest owners. Thus, the court concludes all the Leases at issue allow the court to consider a quantitative, relative economic impact analysis.

Berenergy's argument that this proceeding resembles a condemnation proceeding is not without merit. Obviously, the court believes that it has correctly construed the leases in light of the applicable law. The result is that each party may, in the end, have a reasonable infringement on their mineral interest, just not an unreasonable one. The "reasonableness" will be judged from a totality of the circumstances. Still, under *Chartiers*, the party causing even a reasonable infringement must pay for it. For that reason, the court concludes that some of the factors relevant to condemnation proceedings may be relevant to the determination of any ample compensation that may be required by any party reasonably infringing on the other party's rights. See *Arkansas Game and Fish Comm'n v. United States*, __ U.S. __, 133 S.Ct. 511, 523 (2012).

In the end, whether or not the first-in-time mineral interest owners' exploitation of its interest is a "reasonable use" or it constitutes "waste" of the coal interests is a fact-sensitive

⁵ This may be true as to the lands covered by the Klimoski lease. Section 2(p) of that lease establishes a priority for the oil and gas operations as the "dominant" use of the "land." The court concludes that the term "land" is ambiguous. The term "land" or "leased lands" is used throughout the lease, including within Section 3(b) of the Klimoski Lease wherein the term refers to the surface. The term "leased lands" is also used in the royalty clause stating that the royalty is based upon the amount of "production removed or sold from the leased lands. . . ." Obviously, no oil or gas is taken from the surface. In light of this ambiguity, it is not proper for the court to grant summary judgment. *McNeiley v. Ayres Jewelry Co.*, 855 P.2d 1242, 1243-44 (Wyo. 1993).

inquiry. Although it is hard to envision how Berenergy's use of his leasehold in a matter that is currently producing paying quantities of oil would constitute waste (i.e., unreasonable use of Peabody's coal interest), the current record does not allow a determination one way or another. Likewise, how much accommodation in the form of different development plans, if any, would be required of either lessee is a fact intensive inquiry, which the court cannot answer at this juncture. *See Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997) ("[h]ow much accommodation is necessary will, of course, vary depending on surface uses and on the alternatives available to the mineral rights holder).

For the foregoing reasons, Peabody's motion for summary judgment as to its first requested declaration is denied. The court concludes that 43 C.F.R. § 3162.1 provides one factor that the court may consider in making its reasonableness determination, but it is not the only factor the court may consider.

BERENERGY'S FOURTH REQUESTED DECLARATION

As to Berenergy's fourth requested declaration regarding lateral support, the court concludes that the plain language of Berenergy's Leases does not include a servitude for neighboring lands. However, the court will not declare that Berenergy has no duty to provide lateral support of neighboring lands based upon the state of the record.

As outlined above, the "due regard" clauses require each mineral interest owner to use only so much of the leases lands as is reasonably necessary. There is nothing in that clause to indicate that this servitude extends beyond the lease boundaries so as to require Berenergy to provide lateral support to non-leased lands. The duty under the "due regard" clause is to not commit waste on the leased lands, not a duty to not commit waste elsewhere. This construction is reinforced by Section 2(q) of the Berenergy leases, which only require protecting the surface on the leased lands.

Still, the factual record does not adequately explain to the court whether the requested lateral support is required to avoid waste of coal on the leased lands. Since this issue was not directly addressed in the briefing, the court will deny Berenergy's motion for partial summary judgment at this time with regard to this requested declaration.

For the foregoing reasons,

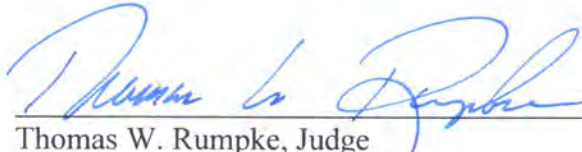
IT IS HEREBY ORDERED that Berenergy's Motion for Partial Summary Judgment Regarding Berenergy's Lease Operation Rights is **GRANTED in Part**, and **DENIED in Part**. Consistent with the analysis above, Berenergy is not entitled to an affirmative declaration to the

issue posed in its motion. To the extent Berenergy seeks a declaration that any interference by Peabody regarding Berenergy's oil-related activities must be reasonable, the motion is **GRANTED**. The law of this case will be that any use of the Overlapping Leased Areas must only allow for reasonable interference with any of the mineral estates, which the court will determine in a later hearing. To the extent the motion seeks any other relief, the motion is **DENIED**;

IT IS FURTHER ORDERED Berenergy's Motion for Partial Summary Judgment Regarding Right to Engage in Simultaneous Mineral Development Under Overlapping Mineral Leases is **DENIED**. Consistent with the analysis above, Berenergy is not entitled to an affirmative declaration that the first-in-time, first-in-right principle governs multiple mineral development;

IT IS FURTHER ORDERED that Peabody's Motion for Summary Judgment is **GRANTED, in Part**, and **DENIED, in Part**. Consistent with the analysis above, Peabody is only entitled to a declaration that the Berenergy federal leases contemplate multiple mineral development. To the extent Peabody's motion seeks such relief, the motion is **GRANTED**. The law of the case will be that the Berenergy federal leases will be construed consistent with this Order. To the extent the motion seeks any other relief, the motion is **DENIED**.

DATED this 1st day of April, 2015.


Thomas W. Rumpke, Judge
Sixth Judicial District Court

Dist.: Darin Scheer
Peter Forbes
Tom Sansonetti
Matt Micheli
Pat Day