

Shannon Anderson (Wyo. Bar No. 6-4402)
Powder River Basin Resource Council
934 N. Main St., Sheridan, WY 82801
sanderson@powderriverbasin.org
(307) 672-5809

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In re Applications for Coal Mine Permit)	
Transfers – PT0214 & PT0428)	EQC Docket No. 18-4805 ¹
Blackjewel, LLC)	
)	

**POWDER RIVER BASIN RESOURCE COUNCIL’S MEMORANDUM ON
IMPLICATIONS OF THE BANKRUPTCY CODE’S AUTOMATIC STAY**

Pursuant to the Environmental Quality Council’s (“EQC”) July 1, 2019 Order, the Powder River Basin Resource Council (“PRBRC”) hereby files its memorandum on implications of the bankruptcy code’s automatic stay provisions.

As discussed below, the EQC should refrain from deciding this matter until the United States Bankruptcy Court for the Southern District of West Virginia (the “Bankruptcy Court”) enters an order granting relief from the automatic stay of 11 U.S.C. § 362(a).

I. Relevant Factual Background

On July 1, 2019, Blackjewel, LLC (“Blackjewel”) and four associated companies, including Revelation Energy, petitioned for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, in the Bankruptcy Court. (Bankr. S.D.W. Va., Case No. 3:19-bk-30289, *In re Blackjewel, LLC, et al.*, Docket No. 1-2).²

¹ Following the EQC’s decision at its hearing, EQC Docket No. 18-4803 is no longer consolidated with this docket.

² See <https://cases.primeclerk.com/blackjewel/>

In the few days since the bankruptcy cases were commenced, numerous events have transpired. The Eagle Butte and Belle Ayr Mines – the mines that are the subject of these proceedings – were shut down later in the day on July 1st, with no warning or prior notice to employees, local government, or the Department of Environmental Quality (“DEQ”). On July 2nd, after a five and a half hour-long hearing, the Bankruptcy Court denied a proposed bankruptcy financing proposal from Blackjewel CEO and owner Jeffrey Hoops. On July 3rd, a smaller financing proposal was approved, on an interim basis, with the condition that Jeffrey Hoops and any of his family members would resign and would no longer be authorized to act on behalf of Blackjewel in any capacity. The Bankruptcy Court appointed Dave Beckman as the Acting Chief Restructuring Officer.³

The bankruptcy proceedings are ongoing, and at the present time it is unclear whether the petition will be converted to a petition for relief under Chapter 7 of the Bankruptcy Code, starting a process of liquidation and possible permanent mine closure. What is clear is that the mines are currently shut down and Jeffrey Hoops is no longer CEO.

II. The Automatic Stay

Upon the filing of a petition under chapter 11 of the bankruptcy code, an “automatic stay” comes into effect barring the “commencement or continuation” of any “judicial, administrative, or other action or proceeding against the debtor that was . . . commenced before the commencement” of a bankruptcy case. 11 U.S.C. § 362(a)(1). None of the twenty-eight exceptions, including the “police and regulatory power exception”, apply to this proceeding. *See* 11 U.S.C. § 362(b). The “police and regulatory power exception” exempts governmental units from the automatic stay when such governmental units have commenced an action or proceeding

³ See https://trib.com/business/energy/blackjewel-ceo-resigns-as-judge-approves-million-in-emergency-financing/article_0370bd12-a921-5438-a59a-e9d99e5af7ed.html and associated filings and orders in the bankruptcy docket.

in furtherance of exercising their police and regulatory powers. 11 U.S.C. § 362(b)(4). Although the EQC is a governmental unit, and a decision in these proceedings would be an exercise of the EQC's "police or regulatory power", this proceeding was not initiated by the EQC as the plain language of the police and regulatory power exception provides. Instead, this proceeding was initiated by PRBRC which arguably does not have "police or regulatory power".⁴ Because the exception does not apply, PRBRC may try to seek relief from the automatic stay for "cause", under 11 U.S.C. § 362(d)(1), in order to continue to prosecute its objections against the proposed transfer of the permits before the EQC. However, as explained below, any such relief would need to be granted by the Bankruptcy Court.

III. Exclusive Jurisdiction

28 U.S.C. § 1334(a) provides that federal district courts shall have original and exclusive jurisdiction of all bankruptcy cases, and section 1334(e) gives district courts exclusive jurisdiction over property of debtors' bankruptcy estates. Federal district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under the bankruptcy code, or arising in or related to bankruptcy cases. 28 U.S.C. § 1334(b). Further, each district court may provide that all bankruptcy cases and any or all proceedings arising under the bankruptcy code or arising in or related to a case under the bankruptcy code shall be referred to the bankruptcy judges for the district.⁵ 28 U.S.C. § 157(a). In furtherance of the district court's referral, bankruptcy judges are empowered to hear and determine all "core proceedings" under

⁴ There is a split of authority on whether regulatory proceedings commenced by private parties can themselves fall, derivatively, under the "police power" exception of 11 U.S.C. § 362(b)(4). Compare *In re Chateaugay Corp.*, 118 B.R. 19, 21-22 (Bankr. S.D.N.Y. 1990) (citation omitted) (section 362(b)(4) should be "given a narrow construction ... to permit governmental units to pursue actions to protect the public health and safety"), with *United States Intl Trade Comm'n v. Jaffe*, 433 B.R. 538, 543-44 (E.D. Va. 2010) (regulatory action initiated by private parties that triggered a voluntary investigation by a government unit falls under section 362(b)(4)'s "police power" exception).

⁵ The United States District Court for the Southern District of West Virginia has, in fact, referred all matters identified in 28 U.S.C. § 157(a) to the Bankruptcy Court by Local Rule of Civil Procedure 83.13. <https://www.wvsc.uscourts.gov/pdfs/localrules/Local%20Rules%20of%20Procedure%20-%20June%202017.pdf>.

the bankruptcy code, or arising in a bankruptcy case. 28 U.S.C. § 157(b)(1). “Core proceedings” include, but are not limited to, “motions to terminate, annul, or modify the automatic stay.” 28 U.S.C. § 157(b)(2)(G). The EQC, along with federal and state courts, is an entity subject to the automatic stay.⁶ Although some legal authority exists which permits other courts and tribunals to determine whether the automatic stay applies to its pending prepetition actions and/or proceedings,⁷ any actions taken by such court or tribunal that are in violation of the automatic stay are *void*.⁸ Accordingly, the EQC, as an entity subject to the automatic stay, should not attempt to determine the extent of whether the automatic stay applies to this proceeding because if its determination is incorrect, any actions taken in furtherance of this would be void and merely waste the time, effort and resources of the parties. Instead, EQC

⁶ See, e.g., *Celotex Corp. v. Edwards*, 514 U.S. 300, 322 n.9 (1995) (stating that federal and state courts are subject to the automatic stay).

⁷ *Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp.)*, 765 F.2d 343 (2d Cir. 1985) (holding that a federal district court in which a prepetition action is pending has concurrent jurisdiction with the bankruptcy court to determine the applicability of the automatic stay); *In re Singleton*, 230 B.R. 533, 538 (6th Cir. BAP 1999) (the debtor confuses jurisdiction to grant relief from the stay under 11 U.S.C. § 362(d) with jurisdiction to determine whether the stay applies in the first instance). *But see In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) (concluding that the purpose of 28 U.S.C. § 157(b)(2)(G) “is not to create jurisdiction in non-bankruptcy courts, but to allow district courts in which the bankruptcy case is filed to adjudicate bankruptcy-related actions in which jurisdiction has been vested in other courts.”); *In re Rainwater*, 233 B.R. 126, 161 (Bankr. N.D. Ala. 1999), *vacated on other grounds*, 254 B.R. 273 (N.D. Ala. 2000) (the determination of the applicability of the automatic stay is squarely and exclusively within the purview of the federal courts).

⁸ See, e.g., *Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3 (1st Cir. 2003) (“Of course, acts undertaken in violation of the automatic stay are not only void . . . but may expose the violator to monetary sanctions as well.”); *In re Colonial Realty Co.*, 980 F.2d 125, 137 (2d Cir. 1992) (“Indeed, so central is the § 362 stay to an orderly bankruptcy process that ‘actions taken in violation of the stay are void and without effect.’”); *Mar. Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1206-07 (3d Cir. 1991) (“[a]bsent relief from the stay, judicial actions and proceedings against the debtor are void *ab initio*.”); *In re Knightsbridge Dev. Co.*, 884 F.2d 145, 148 (4th Cir. 1989) (“According to the plain sense of § 362(a)(1) and case law that condones only rote post-petition activity, the bankruptcy court ought to have declared the arbitration award void as the product of a continuing pre-petition proceeding.”); *Middle Tenn. News Co. v. Charnel of Cincinnati*, 250 F.3d 1077, 1082 (7th Cir. 2001) (“Actions taken in violation of an automatic stay ordinarily are void.”); *Beeler v. Jewell (In re Stanton)*, 303 F.3d 939, 947 (9th Cir. 2002) (“The stay may be violated knowingly or unknowingly [] and we have explicitly held ‘that violations of the automatic stay are void, not voidable.’”); *Franklin Sav. Ass’n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994) (“[a]ny action taken in violation of the stay is void and without effect.”).

should instruct the parties hereto to procure an order from the Bankruptcy Court which clearly states that the automatic stay does not apply and this proceeding may continue.

Additionally, since this proceeding directly affects Blackjewel's rights in relation to the permits for the Eagle Butte and Belle Ayr Mines, which are clearly property involved in the bankruptcy case, the Bankruptcy Court may have exclusive jurisdiction over any claims or objections related to the permits and especially the complex relationship between Blackjewel and Contura in regard to reclamation liability. A party, including PRBRC, may seek relief from the Bankruptcy Court to allow that party to settle claims or objections related to the permits outside of the bankruptcy case, but any such relief has yet to be requested or granted.

IV. Other Reasons to Stay These Proceedings

Additionally, the EQC should also stay the current proceedings based on the factual situation described above. The mines are currently shut down and at the present time it is unclear if: (1) Blackjewel has the organizational capacity and financial ability to operate the Eagle Butte and Belle Ayr Mines; (2) the Eagle Butte and Belle Ayr Mines or other mines under common ownership with Blackjewel are in compliance with all permit terms and conditions; and (3) the mines will be sold to some other company or operator through the bankruptcy proceedings. The EQC should stay the current proceedings and re-initiate them only when Blackjewel regains operating status and affirmatively demonstrates it has the ability to operate the mines in full compliance with environmental and other laws into the future.

Respectfully submitted this 5th day of July, 2019.

/s/ Shannon Anderson
Shannon Anderson (Wyo. Bar No. 6-4402)
Powder River Basin Resource Council
934 N. Main St., Sheridan, WY 82801
sanderson@powderriverbasin.org
(307) 672-5809

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of July, 2019, the foregoing **MEMORANDUM ON IMPLICATIONS OF THE BANKRUPTCY CODE'S AUTOMATIC STAY** was served on the following parties via electronic mail and the EQC online docket system:

Meghan Lally, Chair
Wyoming EQC
2300 Capitol Ave.
Hathaway Bldg. 1st, Room 136
Cheyenne, WY 82002

James Kaste
Matt VanWormer
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
james.kaste@wyo.gov
matt.vanwormer@wyo.gov
Counsel for the DEQ

Eric Frye
General Counsel
Blackjewel, LLC
1051 Main St.
Milton, WV 25541
Eric.Frye@blackjewel.us

Isaac Sutphin
Jeffrey Pope
Holland & Hart, LLP
2515 Warren Ave., Suite 450
Cheyenne, WY 82001
INSutphin@hollandhart.com
jspope@hollandhart.com
Counsel for Contura

/s/Shannon R. Anderson
Shannon Anderson