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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-SC-00029-D

KENTUCKY SOUTHERN COAL CORPORATION — APPELLANT

VS. **ON REVIEW FROM THE KENTUCKY COURT OF APPEALS**
CASE NO. 2008-CA-02229-MR
FRANKLIN CIRCUIT COURT NO. 06-CI-00081

COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET — APPELLEE

BRIEF FOR APPELLEE, ENERGY AND ENVIRONMENT CABINET

TAMARA J. PATRICK
Office of General Counsel
#2 Hudson Hollow Rd.
Frankfort, KY 40601
COUNSEL FOR APPELLEE
ENERGY AND ENVIRONMENT CABINET

CERTIFICATE OF SERVICE

I hereby certify that the record on appeal has not been removed from the Court of Appeals, and that a true and accurate copy of this Brief for Appellee, Energy and Environment Cabinet, was mailed, postage pre-paid, on the 8th day of July, 2011 to: Counsel for Appellant, Sam P. Burchett, 167 W. Main St., Suite 1107, Lexington, Kentucky 40507; Hon. Donna L. Dixon, Judge, Kentucky Court of Appeals, 423 South 28th Street, Suite B, Paducah, KY 42003; Hon. Denise G. Clayton, Judge, Kentucky Court of Appeals, 700 W. Jefferson St., Suite 1020 Louisville, KY 40202-4724; Hon. Kelly Thompson, Judge, Kentucky Court Of Appeals Warren County Justice Center, 1001 Center Street, Suite 204, Bowling Green, KY 42101; Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, Kentucky, 40601; and to Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, Kentucky 40602-0678.

TAMARA J. PATRICK

STATEMENT CONCERNING ORAL ARGUMENT

While oral argument may be beneficial to the Court, the Appellee does not believe that it is absolutely necessary in this case. While there is some dispute as to some facts, the facts are not complicated, and the case turns more on the application of law to the facts.

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COUNTERSTATEMENT OF THE CASE

The Appellee, the Energy and Environment Cabinet (formerly known as the Environmental and Public Protection Cabinet and hereinafter referred to as "the Cabinet"), does not accept the Appellant's characterization of the facts involved in this appeal. The Cabinet therefore sets forth the following matters essential to a fair and adequate statement of the case. References to the Franklin Circuit Court Record will be made as "FCC Record, p. ___." References to the Cabinet's Administrative Record (not paginated) will be made by docket item number as follows: "[A.R. #____, p.___]."

This action involves the Cabinet's denial of Kentucky Southern Coal Corporation's (herein "KSCC") 1999 application for renewal of its Surface Mining and Reclamation Operations Permit No. 854-5025 because of KSCC's failure to completely and accurately demonstrate its legal right to enter and mine the subject property, as required by KRS 350.060. Contrary to the statements made in the Appellant's Brief, the permit authorized surface area mining operations on the property at issue (located on Increment #2), and surface and underground mining operations on the permit as a whole. (Mining and Reclamation Plan (herein "MRP") Map, Cabinet's Renewed Motion for Summary Disposition, A.R. #81, Ex. B-6; 1994 MRP Map, Cabinet's Second Set of Request for Admissions to Intervening Respondents, A.R. #52, Exhibit #2; Jeff Reynolds Answers to Second Request for Admissions, A.R. #56.)

The original Permit No. 854-5002 was issued in 1984 to Norton Coal Corporation for 33.1 acres of surface and 250 acres of underground mining (Cabinet's Renewed Motion for Summary Disposition, A.R. #81, Ex. B-1). The permit was transferred to KSCC Permit No. 854-5011 in 1990 (Renewed Motion for Summary Disposition, A.R.

#81, Ex. B-2), and transferred again to KSCC Permit No. 854-5025 in May, 2000. There is approximately 43 acres of surface disturbance on the Permit. (Renewed Motion for Summary Disposition, A.R. #81, Ex. B-5.)

During review of KSCC's renewal application, the Cabinet received an objection to the renewal from Jeff and Marion Reynolds, stating that the surface lease agreement for their property had expired in January 2000 and they had executed no other lease to KSCC. (Cabinet's Motion for Summary Disposition, A.R. #61, Attachment B). The Cabinet's Division of Mine Permits (herein "DMP") faxed a copy of the Reynoldses' letter to Mary Facella, KSCC's Vice-President/Secretary. Ms. Facella replied, acknowledging the Reynoldses' ownership and stating that KSCC had not come to agreement with the Reynoldses on payment for a lease. (Cabinet's Motion for Summary Disposition, A.R. #61, Attachment B.)

The Reynoldses acquired the property from Harold and Georgia Bandy. The Bandys' grantor, Walter Crick, acquired the surface tract in 1936 by deed from Norton Coal Mining Company, which contained a mineral reservation or exception in favor of Norton. (Crick Deed, Hearing Officer's Exhibits, A.R. #86, Ex. 4). The reserved property was subsequently conveyed to Norton Coal Corporation (Hearing Officer's Exhibits, A.R. #86, Ex. 5), and later leased to KSCC in 1990. (A.R. #86, Ex. #7.)

A dispute apparently arose between Norton and the Bandys regarding the Crick deed, and Norton brought suit in Hopkins Circuit Court Civil Action No. 84-CI-339 styled Norton Coal Corporation v. Harold Bandy and Georgia Bandy. On March 13, 1985, the Court entered a Judgment declaring Norton to be the owner of certain coal seams, and granting Norton a 15-year surface lease for the Bandy property, effective

January 23, 1985. As the Reynoldses had stated, the lease expired by its terms on January 23, 2000. (Judgment Lease, Hearing Officer's Exhibits, A.R. #86, Ex. 3, copied in Appendix A herein). KSCC was the successor or assignee to the Judgment lease. (KSCC Reply to Request for Admissions, A.R. #54.)

During the Cabinet's review of the renewal application KSCC did not present any further documentation of a new lease agreement executed after January 2000, or other authorization for surface mining; nor did KSCC claim the right to enter and mine without the Reynoldses' consent. Likewise, the Reynoldses did not withdraw their protest to the renewal. (Cabinet's Motion for Summary Disposition, A.R. #61, Attachment B.) The Cabinet ultimately denied the renewal application in September 2000, because the expiration of the Judgment lease left KSCC without legal right of entry, and because of KSCC's failure to diligently pursue issuance of the renewal. (Denial Letter, Hearing Officer's Exhibits, A.R. #86, Ex. 1.)

KSCC filed a letter/petition with the Cabinet's Office of Administrative Hearings challenging the Cabinet's denial. (A.R. #1). The Reynoldses and others were granted leave to intervene in the administrative action. (A.R. #9, 10, 11, 13, 16.) After an Amended Petition was filed and some discovery was conducted, both KSCC and the Cabinet filed Motions for Summary Disposition. (A.R. #61 and 62.) During discovery, the Reynoldses confirmed that they still owned much of the surface they had acquired from the Bandys and had not consented to mining. (Response to Cabinet's Second Set of Requests for Admissions, A.R. #56.)

In its Motion for Summary Disposition filed February 5, 2003, KSCC argued *for the first time* that it had a <u>separate</u> right of entry based on the terms of the mineral

reservation in the Crick deed and did not need the Reynoldses' consent as surface owners to mine the permit. (A.R. #62.) Because of this new contention, the Hearing Officer entered Orders in March and September 2003 holding the administrative action in abeyance, pending the Division's review of KSCC's documentation of the new argument. (A.R. #70, 71.) After review of KSCC's submittals, on July 15, 2004 the DMP again determined that the permit renewal application was still not complete and accurate as required by law, because a *bona fide* property dispute existed as to KSCC's right to conduct surface mining on the property after expiration of the Judgment lease. (Hearing Officer's Exhibits, A.R. #86, Ex. 2.)

Both KSCC and the Cabinet then filed Renewed Motions for Summary Disposition and Responses in October and November 2004. (A.R. #78, #81). In April 2005, the Hearing Officer issued his Report and Recommended Order. The Hearing Officer concluded that the expiration of the 1985 Judgment surface lease created a genuine question regarding KSCC's right to conduct surface mining on the disputed property, and therefore the Cabinet properly determined that this question prevented the Cabinet from finding the renewal application to be complete and accurate for issuance. He further ruled that KSCC failed to present any evidence that the Reynoldses no longer disputed KSCC's right to enter and mine the property. (Hearing Officer's Report, A.R. #87).

Following the entry of the Hearing Officer's Report, KSCC filed a flurry of late motions and other pleadings in an attempt to invalidate the Report and Recommendation, including Exceptions to the Report, a Second Renewed Motion for Summary Disposition, a Motion to Dismiss Intervenors Jeff and Marion Reynolds, and a Motion to Remand the

action. (A.R. #89-91, #96.) In these pleadings, KSCC contended, *again for the first time*, that the property dispute was "moot" because the Reynoldses had conveyed away their interests in the property, even though KSCC still **failed to produce a surface lease with anyone** for the subject tract, **or to produce evidence of a judicial resolution** of the surface rights question.

KSCC also submitted, without any explanation why they could not have been discovered earlier, copies of several deeds conveying the Reynolds property, all of which were of record *three months before* KSCC filed its Renewed Motion for Summary Disposition, and *nine months before* the Hearing Officer's Report was entered. (A.R. #90 and 91) KSCC also argued for the first time that, as the mineral owner, it had an "unfettered" right to surface mine the property. The Cabinet responded to these pleadings, requesting that they be stricken as late and unauthorized, under KRS 350.0301 which allows only exceptions and responses to exceptions to be filed following the Hearing Officer's Report. (A.R. #92, #93, #94 and #98). On December 16, 2005, the Secretary entered a Final Order adopting the Hearing Officer's Report and affirming the Cabinet's permit denial. (A.R. #101, not numbered in Franklin Circuit Court docket.)

KSCC then filed an action in Franklin Circuit Court for review of the Cabinet's final Order and moved for Judgment. (FCC Record, pp. 1-38; pp. 54-64.) The Cabinet filed a Response to the motion for Judgment. (FCC Record, pp. 65-90.) KSCC did not file a reply. On November 3, 2008 the Franklin Circuit Court affirmed the Cabinet's final Order denying the renewal, holding that the Reynoldses' participation in the administrative proceedings was irrelevant and that the Cabinet had properly found that the expiration of the Judgment lease prevented KSCC from documenting its legal right to

enter and mine the surface property, leaving its renewal application incomplete. (FCC Record, pp. 92-98). The Court of Appeals affirmed the Franklin Circuit Court Judgment, largely adopting the same findings and legal conclusions. This Court granted discretionary review of the Court of Appeals' Opinion.

ARGUMENT

I. THE COURT'S SCOPE OF JUDICIAL REVIEW AND SCOPE OF RELIEF ARE LIMITED.

The scope of review of an administrative action requires that the decision be affirmed if there is substantial evidence of probative value to support the agency's factual findings and if it correctly applied the law to the facts. *Kentucky Retirement Systems v. Bowens,* Ky., 281 S.W.3d 776 (2009); *Competitive Auto Ramp Services, Inc. v. Kentucky Unemployment Ins. Com'n,* Ky. App. 222 S.W.3d 249 (2007). As long as there is substantial evidence in the record to support the agency's decision, a reviewing court must defer to the agency, even if there is conflicting evidence. *500 Associates, Inc. v. Nat. Resources and Env. Protection Cabinet*, Ky. App., 204 S.W.3d 121 (2006).

In this case, specifically, the Court must accept the Cabinet's factual findings that are supported by substantial evidence, under KRS 350.0305, and is therefore not authorized to weigh the facts again. As demonstrated herein, the material facts and substantial evidence of record fully support the Hearing Officer's Report, Secretary's Order, and both the Franklin Circuit Court and Court of Appeals Orders affirming. Further, the Cabinet and the courts below applied the correct rule of law to the facts. Accordingly, this Court must affirm the Cabinet's and the Franklin Circuit and Court of Appeals' final Orders.

The Court's scope of relief is likewise limited to either affirming the Cabinet and Franklin Circuit Court Orders, or remanding the matter for further proceedings or further review of the permit renewal application. KSCC has asked for a remand with instructions to *issue* the permit renewal. This the Court may not do. The Cabinet has been vested with the sole jurisdiction to issue or deny permit applications under KRS Chapter 350. The Court is not authorized to issue, or order the issuance of, a permit. Administrative agencies are created by statute, and they frequently decide matters which are outside the judicial function of courts. In such cases, remand is the only solution. *General Electric Co. v. Martin,* 574 S.W.2d 313 (Ky. App. 1978); *Natural Resources and Environmental Protection Cabinet v. J & D Coal Co., Inc.,* Ky. App., 817 S.W.2d 452 (1991); See also *Sahara Coal Co., Inc. v. Illinois Dept. of Mines and Minerals,* 431 N.E.2d 394 (1982).

II. THE FRANKLIN CIRCUIT COURT AND COURT OF APPEALS CORRECTLY FOUND THE REYNOLDSES' PARTICIPATION IN THE ADMINISTRATIVE ACTION TO BE IRRELEVANT.

A. The Cabinet's permit determination was the primary issue and the Cabinet was a primary party to the administrative action and thus did not maintain the Reynoldses' claim for them.

The Court of Appeals correctly adopted the Franklin Circuit Court's reasoning that the Reynoldses were not *required* to fully participate in the administrative proceeding, and therefore the continuation of the administrative action did not depend on their active participation. See Hearing Officer's Report, A.R. #87, par. 37, pp. 20-1; FCC Record, p. 94; Court of Appeals Opinion, p. 8. In this instance, the administrative action was instituted by Kentucky Southern to contest the Cabinet's determination to deny the permit

renewal application; the Cabinet was therefore the primary Respondent in the action. The Reynoldses were only intervenors. As intervenors, they did not have a right to control the administrative case. See, for instance, *Nizzardo v. State Traffic Com'n*, 788 A.2d 1158 (Conn. 2002); *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.*, 9 Cal.Rptr.2d 469 (1992). Even if they had not intervened at all, the administrative case would have proceeded between the Cabinet and KSCC in any event, because the Cabinet was entitled to continue to defend its decision to deny the permit renewal whether the Reynoldses participated or not.

Cabinet regulation 405 KAR 7:091, Section (3) provides the extent and the terms of an intervenor's participation, and states that an intervenor "...**may** participate in the proceeding as a full party or, **if desired**, in a limited capacity." (Emphasis added.) Clearly, then, the intervenor's full participation is not mandatory under the regulation. In fact, the regulation further provides that the scope of participation "shall be at the discretion of the hearing officer." Here, the Reynoldses made clear their objections to the permit renewal and the basis for those objections—the expiration of the Judgment lease. (Reynolds Answers to Interrogatories, A.R. #53). Mr. Reynolds appeared by phone at a status conference as late as September **2003**—not 2002 as erroneously stated in KSCC's Brief. (Order Scheduling Status Conf., A.R. #71.) Indeed, the Hearing Officer found the Reynoldses had actively participated at least as late as the summer of 2003 (Hearing Officer's Report, paragraph 3, p. 6, A.R. #87.) The Hearing Officer did not require the Reynoldses to do or submit anything during the time the action was held in abeyance from September 2003 to September 2004. (A.R., #71.)

In any event, since there was no question as to the Reynoldses' position, the Hearing Officer did not need any further pleadings from them in order to understand the issues they presented. Under Kentucky court rules and case law, the original proceeding could continue in the Reynoldses' name, even after transferring their interest, and their grantees would not be required to intervene, either. *Works v. Winkle*, Ky., 234 S.W.2d 312 (1950); Ky. Civil Rule 25.03. Therefore, neither the Reynoldses, nor their grantees, lost any "standing" in the administrative action.

B. The Cabinet may find a *bona fide* property dispute even if no civil litigation is pending.

KSCC appears to argue that, since there was no litigation pending during the Cabinet's review of the right of entry issue, the Reynoldses' claims were not *bona fide*, citing *Estate of Joseph Weddington v. NRPEC and Kentucky Mountain Power, LLC*, DWM-25351-037 (June 2, 2002). However, unlike this action, in *Weddington* the property dispute was not brought to the attention of the Cabinet until *after* the issuance of a waste disposal permit. When the property owner filed a Petition contesting the issuance of the permit, the Hearing Officer refused to hold the administrative action in abeyance pending the outcome of property litigation, stating "because there is no circuit court case between these two parties even pending, this Office would be remiss in holding this case in abeyance for the filing of a suit." (Hearing Officer's Report, *Estate of Joseph Weddington v. NRPEC and Kentucky Mountain Power, LLC*, DWM-25351-037, p.7). Accordingly, it was not the permit that the Hearing Officer refused in *Weddington* to hold in abeyance, but the subsequent <u>administrative action</u>.

Thus, the absence of pending litigation <u>does not</u> relieve the agency of its duty to review the information provided by both the applicant and the objector and <u>make a permit</u>

determination based upon that information. Hence, the absence of pending litigation does not automatically change the *bona fide* nature of a property rights dispute. KSCC as much as admitted this in its Reply to the Cabinet's Motion for Summary Disposition, stating "...it is conceivable that there would be a finding of a *bona fide* dispute without attendant litigation...." (A.R. #69, p. 6.)

C. The Reynoldses' later conveyance could not be properly considered below, but in any case does not affect KSCC's failure to sufficiently establish the legal right to enter and mine the property subject to the renewal application.

KSCC claims that its "new" evidence that the Reynoldses later sold their interest in the property somehow extinguishes the *bona fide* property dispute which prohibited the issuance of the permit renewal. This argument is unsound for several reasons and both the Franklin Circuit Court and the Court of Appeals rightly rejected it.

First, the conveyance of the Reynoldses' interest to others does not in any way alter the fact that KSCC utterly failed to produce a surface lease or other consent to mine the disputed property after the Judgment lease expired. Once the Reynoldses raised the issue of the Judgment lease expiration, the Cabinet could not ignore this fact since the lease, **on its face and by its own terms, had expired** January 23, 2000. Therefore, the "new" information did nothing to alter the fact that KSCC's renewal application lacked sufficient proof of its right to enter and mine the disputed property, and was therefore incomplete.

Second, KSCC did not present this "new" evidence until **after** the Hearing Officer's Report had been filed, **without any explanation** why the proffered documents could not have been offered beforehand. Neither KRS Chapter 350, nor the Cabinet's

regulations, nor sound legal principles require that the Cabinet's Secretary consider such evidence under these circumstances. KRS 350.0301(5)(a) requires that the Hearing Officer's Report be based on "a preponderance of the evidence appearing in the record as a whole..." (emphasis added) and does not authorize the Hearing Officer to make findings outside the record. And while Subsection (6)(a) grants the Cabinet's Secretary the authority to remand a matter to the hearing officer, that authority is discretionary. *Alexander v. S & M Motors, Inc.*, Ky., 28 S.W.3d 303 (2000). The Secretary's decision not to remand the action to the Hearing Officer for consideration of additional evidence will stand unless that discretion has been abused. *Goodyear Tire and Rubber Co. v. Thompson,* Ky., 11 S.W.3d 575 (2000); *Commonwealth v. English,* Ky., 993 S.W.2d 941, 945 (1999). In this case the Secretary did not abuse her discretion since KSCC failed to show that it could not, with reasonable diligence, have discovered and produced the deeds before the Hearing Officer filed his Report and Recommendation.

More importantly, though, KSCC completely misses the point that the Cabinet may not issue a permit unless it "finds in writing on the basis of the information set forth in the application *or from information otherwise available*, that the permit application is accurate and complete." KRS 350.060 (2). (Emphasis added.) Once the Cabinet was apprised of the expiration of the Judgment lease (information otherwise available), it had clear evidence that a genuine question existed as to KSCC's legal right to mine the property, whether the Reynoldses continued to participate or not. In that circumstance, KRS 350.060 prohibits issuance of the permit, and the Franklin Circuit Court and Court of Appeals therefore correctly affirmed the Cabinet's denial of the permit renewal.

III. THE CABINET, THE FRANKLIN CIRCUIT COURT AND THE COURT OF APPEALS ALL CORRECTLY RULED THAT KSCC FAILED TO ESTABLISH THE RIGHT TO ENTER AND MINE SUFFICIENT TO SUPPORT THE ISSUANCE OF A PERMIT RENEWAL.

A. KSCC's permit called for both surface area mining and underground mining on the subject property.

KSCC *misrepresents* one critical fact by stating throughout its Brief to this Court that the Surface Mining and Reclamation Operations Permit at issue here was for underground mining operations only, even going so far as to claim that neither Norton nor KSCC performed any surface mining operations. (Appellant's Brief, pp. 2, 3, 7, 8, 9 and 13.) Notably, KSCC fails to reference any evidence of record to support these erroneous statements. This failure is likely because *there is no supporting evidence of record.* Accordingly, KSCC's claimed right of entry, dependent on deep mining only, falls like a house of cards.

On the contrary, the Hearing Officer and Cabinet Secretary made specific factual findings that the permit included surface area mining on the subject property, and that KSCC didn't offer any credible evidence that the property was not "strip mined." (Hearing Officer's Report, pp. 6-7, A.R. #87). KSCC never challenged these findings and is therefore prohibited from challenging them now. *Rapier v. Philpot*, Ky., 130 S.W.3d 560 (2004); *Whitaker v. Ky. Retirement System*, Ky. App., No. 2008-CA-000253-MR, 2009 WL 103221 (2009) (referenced pursuant to Ky. Civil Rule 76.28 (4)(c)).

More importantly, the Hearing Officer's findings are fully supported by the record. According to the permit MRP and other mine maps and face sheets in the record, KSCC's permit authorized surface area mining operations on the property at issue, located on Increment #2. (A.R. #52, Exhibit #2; A.R. #81, Ex. #B-2, #B-3 and #B-6;

A.R. #56.) Two of the face sheets for the permit specifically state that increment No. 2 includes 18.1 acres of surface disturbance and 0 acres underground mining. (A.R. #81, Ex. #B-2, #B-3.) The 1994 MRP permit map shows a shaded polygon of "area mining" covering both the former Bandy tract and an adjoining tract. (A.R. #52, Exhibit #2). "Area mining" is not specifically defined in the Cabinet's regulations, but is considered a surface mining method under 405 KAR 16:020, Section (2) (1). Even page 3 of KSCC's Surface and Coal Lease and Sublease Agreement with Norton Coal Corporation acknowledges "whereas, Norton is the owner of a certain Mining Permit No. 854-5002 *for surface and underground mining....*" (Emphasis added.) (Exhibit A-2, Cabinet's Renewed Motion for Summary Disposition, A.R. #81.) Since the record supports these factual findings, this Court is bound by the findings and cannot disturb them. *500 Associates, Inc. v. NREPC, supra.*

Further, KSCC presented absolutely no documentary or testimonial evidence that surface mining was not conducted on the disputed property. The Hearing Officer so found and referenced this in his Report as follows: "...Kentucky Southern states that the area was never 'strip mined.' However, Kentucky Southern did not offer an affidavit or other credible evidence supporting this assertion." (Hearing Officer's Report, p. 7, fn 3, A.R. #87.) In fact, Jeff Reynolds provided pictures of a 40-foot pit filled with water located on the property, confirming the presence of surface mining on the disputed tract (Reynolds' Additional Information, A.R. #24.) Therefore, KSCC's assertion that no surface mining occurred on the disputed property amounts to no more than the mere assertion of counsel in a Brief, which contradicts the established facts of this case. Arguments of counsel, absent underlying supporting proof, do not constitute evidence in

a case. *Jefferson County v. Zaring*, Ky., 91 S.W.3d 583, 595 (2002); *Bixler v. Com.*, Ky., 204 S.W.3d 616, 633 (2006). Moreover, factual allegations that do not appear in the record cannot be considered on appeal. *Jackson v. Jackson*, Ky. App., 571 S.W.2d 90 (1978); *Montgomery v. Koch*, Ky., 251 S.W.2d 235 (1952). Accordingly, the record clearly establishes that the permit covering the disputed property was for both underground and surface area mining operations, and establishes that surface mining operations were conducted on the property.

B. As the permit applicant, KSCC had the burden to establish its right to conduct surface mining operations on the subject property.

KRS 350.060 (2) requires that a permit application *affirmatively demonstrate* that the information therein is "accurate and complete and that all the requirements of [Chapter 350] have been complied with." A permit applicant must correctly identify surface and mineral owners and document its legal right to mine the property affected by the permit application. KRS 350.060 (3) (b) and (d); 405 KAR 8:010, Section 21. Additionally, because the permit here provided for surface area mining on the subject property, KSCC was required under 405 KAR 8:030, Section 4 and 405 KAR 8:040, Section 4 to provide in the application a copy of the surface owner's consent to the mining, or other documentation of its legal right to conduct surface mining on the property. Since this was an application for renewal, KSCC was required to demonstrate that its surface mining rights were still effective.

C. KSCC's mining lease had expired and was no longer effective.

The March 1985 Hopkins Circuit Court Judgment determined, based upon the agreement of the parties, the manner in which Norton (and subsequently KSCC) would

have a right of entry to the surface, and **formed a 15-year lease** between Norton and the Bandys for Norton's mining operations (Paragraph 12, Hearing Officer's Report, A.R. #87, p. 10; Judgment Lease, Appendix A, pp.1, 4.) The Judgment required Norton to make an advance payment to the Bandys of $27,500. (Par. 13, Hearing Officer's Report, A.R. #87, p.10; Judgment Lease, Appendix A, pp. 2-3.) In return, the Bandys relinquished further claims for haulage rights and royalties arising from Norton's use of the leased area (par. 13, Hearing Officer's Report, A.R. #87, p. 10; Judgment Lease, Appendix A, par. 2, p. 3), and gave up future protests to Norton's underground and surface permit. (Hearing Officer's Report, A.R. #87, p. 11; Judgment Lease, Appendix A, pp. 3-4.) Finally, the Judgment provided that at the end of the 15-year term, **the leasehold would be returned to the Bandys, fully reclaimed** (Par. 15, Hearing Officer's Report, A.R. #87, p. 10; Judgment Lease, Appendix A, par.6 (c), p. 5), and was made binding on the parties' successors (i.e. KSCC). (Judgment, Hearing Officer's Exhibits, A.R. # 86, Ex. 3, par. 9, p. 6.) Consequently, the fifteen-year lease term expired, <u>on its face</u>, in January, 2000. The Reynoldses also notified the Cabinet of the lease expiration during review of the renewal application. KSCC's 1999 permit application requested renewal for the statutory five-year term. (H.O. Report, par. 7, p. 7, A.R. #87.)

D. KSCC is bound by the terms of the Judgment Lease.

The Judgment states that the matter was before the Court "pursuant to the agreement of the parties…." (Judgment Lease, Appendix A, p. 1.) An agreement to settle legal claims is essentially a contract subject to the rules of contract interpretation. *Baker v. Coombs,* Ky. App., 219 S.W.3d 204 (Ky. 2007). An agreed judgment is binding on the

parties the same as if the claim was litigated and decided by the tribunal, *White v. Sullivan*, Ky. App., 667 S.W.2d 385 (1983), and operates as a merger of all claims and causes of action included. *Posey v. Lambert-Grisham Hardware Co.,* Ky., 247 S.W. 30 (1923). Moreover, an agreed judgment is binding on the parties' successors, as well. See *Cruse's Ex'r v. Haggard,* Ky., 44 S.W.2d 290 (1931). Therefore, the settlement terms of the Judgment formed a contract that was binding on KSCC as successor to Norton.

The primary object in construing a contract or compromise settlement agreement is to effectuate the intentions of the parties. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.,* Ky. App., 94 S.W.3d 381 (2002). As indicated above, the express terms of the Hopkins Circuit Court Judgment lease indicate the parties' intention that the use of the surface for the mining operations was intended to continue only for fifteen (15) years, at which time the mining operation was to be concluded and the property returned to the Bandys completely reclaimed. There is no question that the lease term was for fifteen (15) years only. Where there is no ambiguity, a written instrument is to be enforced according to its terms. *Island Creek Coal Co. v. Wells,* Ky., 113 S.W.3d 100 (2003). Accordingly, KSCC's right to use the surface for the mining operations also concluded at the end of the fifteen-year term. KSCC contends that the Hearing Officer's finding that the Bandys granted Norton a surface easement is sufficient to support right of entry to the property. Clearly, the Judgment lease was for a period of fifteen years, though, commencing January 23, 1985. Thus, any surface easement from the Judgment explicitly expired January 23, 2000.

KSCC's current effort to establish the right to continue mining operations beyond the explicit 15-year term is nothing more than an ineffective attempt to repudiate a contract to which it is bound. To allow KSCC to continue mining operations under the authority of a renewed permit would render the Judgment lease and attendant settlement agreement a nullity, despite the fact that KSCC explicitly agreed to assume all of Norton's obligations to surface owners in accordance with the original leases. (Exhibit A-2, Cabinet's Renewed Motion for Summary Disposition, A.R. #81, p.10).

E. Alternatively, KSCC failed to affirmatively establish the right to enter and conduct surface mining operations under a mineral severance deed.

As demonstrated above, KSCC is limited to surface lease rights by the Hopkins Circuit Court Judgment. However, even assuming KSCC is not so restricted, its assertion of mining rights based on a purported "dominant" mineral estate is misplaced. There is, in fact, no "dominant" estate apart from such provision in a mineral severance deed. *Stagg Indus. Dev. Corp. v. General Oil Field Supply Co., Inc.*, Ky. App., 743 S.W.2d 41 (1988). Both lower courts recognized this, stating that the rights of surface owners are <u>not</u> always subordinate to the rights of mineral owners. (Ct. Appeals Opinion, p. 9; FCC Opinion, p. 5). This legal conclusion is fully supported in Kentucky case law.

Although older Kentucky case law, now overturned, held the mineral estate to be the dominant estate, (see *Buchanan v. Watson*, Ky., 290 S.W.2d 40 (1956)), current Kentucky authority does not recognize the same "dominance." In non-broad form deeds, the rights of surface owners are not necessarily subordinate to the mineral owner. *Florman v. Mebco, Ltd. Partnership.*, Ky. App., 207 S.W.3d 593 (2006); *Commerce Union Bank v. Kinkade*, Ky., 540 S.W.2d 861 (1976), *overruled on other grounds by*

Akers v. Baldwin, Ky., 736 S.W.2d 294 (1987), *overruled by Ward v. Harding*, Ky., 860 S.W.2d 280 (1993). For instance, Kentucky follows the rule that, in the absence of an express agreement, the holder of coal rights cannot use the surface owned by his grantor or lessor in producing, cleaning, marketing or in any way handling coal produced on the lands of another. *Marlowe v. Marcum,* Ky., 171 S.W.2d 997 (1943).

In this instance, the Crick deed mineral reservation does not grant such overwhelming rights that the mineral owner in fact has the right to use the entire surface of the land, and is therefore not a "broad form deed." For instance, the Crick deed does not grant the right to construct dams, shop buildings, or prep plants, or to dump mining refuse on the surface. See *Commerce Union Bank v. Kinkade*, *supra* at 864. In fact, the Crick deed specifically utilizes *underground mining* terms. The reservation states that

> ...but there is necessarily reserved and excepted from all lands hereby conveyed all the coal and other minerals and the mining and mineral rights and privileges, the right of subjacent support, and the rights of way for manways, air shafts, drainage shafts, drains, pipe lines, power lines, railroads, and railroad switches as may be convenient and necessary....

(Crick Deed, Hearing Officer's Exhibits, A.R.#86, Ex. 4.) The references in the Crick deed mineral reservation to "subjacent support" and air "shafts," together with the only allowable transportation being by "railroad and railroad switches," show that the parties to the Crick deed contemplated mining <u>by underground methods only.</u> In fact, "manway" has been defined as an underground mining term: "in the underground workings...the horizontal passages are described as 'drifts'...a 'manway' is a particular type of drift which is somewhat smaller and is used primarily for access between the ore body being worked and the drifts." See *National Lead Company v. Magnet Cove Barium*

Corporation, 231 F. Supp. 208, 215 (W.D. Ark. 1964); See also *Notice of Dept. of Labor, Mine Safety and Health Adm.*, 60 FR 35235, 35236-7 (July 6, 1995) (referencing a Petition to modify the use of an underground secondary escape route or "manway." Finally, the Crick mineral reservation does not contain the "easement granting power" like the deed which this Court reviewed in *Hazard Coal Corp. v. Knight*, Ky., 325 S.W.3d 290 (2010);overriding surface rights of way were not granted in the instant circumstances.

In *Commerce Union Bank v. Kinkade, supra*, the Court recognized that "[r]ealizing the potential fact that no two grants of mining rights may be identical, it is necessary that a proper construction of such rights be confined to a deed-to-deed interpretation of clauses in a mineral deed which grant or modify mining rights." *Id. at 863-64.* In fact, the *Kinkade* Court held that language similar to the instant mineral reservation *did not* constitute a "broad form" conveyance, but merely expressed the granting of rights which are primarily those necessary in the conducting of an *underground mining operation.* The language there, similar to the Crick deed mineral reservation, granted the right to mine the coal, allowed ingress and egress to open a coal mine, and rights of way for a railroad.

Compared with the following extensive language contained in the classic "broad form" or "Mayo" deed in *Flannery v. Utilities Elkhorn Coal Co.* Ky., 138 S.W.2d 988, 989 (1940):

> the right to construct, maintain and keep in repair and operate any and all railroads, tramways, haul-roads, canals, waterways, or coke ovens, dams or pipelines deemed necessary or convenient by the party of the second part, his heirs, vendees or assigns, to remove said products from said land as well as to remove the products taken out of any other land owned by the party of the second part, his heirs, vendees and assigns or from any land which they may

> hereafter acquire. Also the right to erect and maintain upon said land hereinafter described, and to alter, repair and remove all houses, shops, buildings, tanks, derricks, stables, hotels, store and warerooms by the party of the second part deemed necessary or expedient for the cheap and successful operation, removal, conversion and reduction of the products in and under said lands hereby conveyed

it is strikingly clear that the Crick mineral reservation did not, by its terms, purport to subordinate the surface. Accordingly, the Cabinet was not required by the language of the Crick deed to recognize this document as "surface owner consent" for KSCC's surface mining operations.

KSCC further argues that Section 19(2) of the Kentucky Constitution guarantees it a "right" to conduct surface mining on the subject property. Section 19(2) is, of course, the "broad form deed amendment," which was intended to prevent surface mining operations under a broad form mineral deed without the surface owner's consent. *Karst-Robbins Coal Co., Inc. v. Arch of Kentucky, Inc*, Ky. App., 964 S.W.2d 419 (1997). It requires that a broad form mineral deed be construed to allow that "the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed...." (Emphasis added).

Section 19(2) is only activated where a severance deed either fails to describe the method of coal operation or contains language subordinating the surface estate. As demonstrated above, the language of the mineral reservation in the Crick deed actually appears to authorize only deep mining methods. <u>Therefore Section 19(2) does not compel a deed interpretation authorizing surface mining in this particular instance.</u>

Moreover, Section 19(2) requires a finding that the mining method in question was "commonly known to be in use in the area affected" at the time of the severance. KSCC's oblique reference to the language "...except the salvage material belonging to the stripping operation heretofore conducted..." in the later Norton deed (Deed Book 141, Page 12, Hearing Officer's Exhibits, A.R.#86, Ex. 5, p. 21) is not **substantial evidence** that strip mining was "commonly known" in the area, but mere *conjecture* concerning such operations. A party must establish his cause of action by evidence which does more than support a mere guess as to the existence of the facts. *Thomas' Adm'r v. Eminence Distilling Co.*, Ky., 151 S.W. 47 (1912). Because KSCC failed to place in the administrative record any other evidence to support its contention, the Cabinet's final Order must be affirmed.

Finally, even assuming KSCC had provided sufficient evidence of surface mining in the area at the time of the reservation, this further highlights the limited language of the Crick mineral reservation which uses *underground mining language and terms*. This circumstance provides further evidence that the mineral reservation intended that the minerals be extracted by the underground mining method.

Therefore, since the Crick mineral reservation appears to limit coal recovery to underground mining methods, Kentucky Constitution Section 19(2) does not apply and KSCC was required to provide documentation of surface owner consent to surface mining operations on the subject property. KSCC failed to provide such documentation and therefore the Cabinet could not renew the permit.

F. The trust doctrine does not apply to this case.

KSCC claims that KRS 381.430 somehow "estops" a surface owner from refusing access to a "dominant" mineral estate. However, this statute is simply not applicable. The statute applies to adverse possession claims to minerals and has nothing to do with dominant or subservient estates. *Florman v. Mebco Ltd. Partnership, supra,* at 604, fn 60. The instant action does not concern any claim of adverse possession of the mineral estate and consequently the statute is not applicable here.

G. The Cabinet properly utilized state and federal guidelines in reviewing KSCC's claimed right to enter and mine the subject property.

Both the Court of Appeals and Franklin Circuit Court recognized that, although the Cabinet cannot adjudicate property rights, it is at the same time *statutorily prohibited* by KRS 350.060 (2) from issuing a permit if the application is incomplete or inaccurate. (See, for instance, FCC Record, pp. 95-6; Court of Appeals Opinion, pp. 6-7.) See also, *Dept. for Natural Resources and Env. Prot. v. Stearns Coal and Lumber Co.,* Ky., 563 S.W.2d 471 (1978).

In an effort to harmonize the requirement of a complete and accurate permit application with the prohibition against adjudicating property disputes, the Cabinet's Secretary directed in a 1992 memorandum that "when a surface owner files a protest to the issuance of a permit, no permit should be issued until the cabinet has verified the right of the applicant to enter and mine…" and that "…the permit applicant should be required to address this issue by submitting further documentation of its right to enter and mine." (Hearing Officer's Exhibits, A.R. #86, Ex. 15). This directive was echoed by Cabinet Secretary Bickford's 1999 memorandum. (Hearing Officer's Exhibits, A.R. #86, Ex. 15).

Federal guidelines also encourage distinctive review of a permit application when there is a question about an applicant's legal right to mine property. The Interior Board of Land Appeals in *Marion Taylor*, 125 IBLA 271, 277 (Interior Bd. Land Appeals 1993), held that,

> ...Coal-Mac was unable to demonstrate (and DSMRE was unable to find), as required by section 510(b) of SMCRA, that Coal-Mac in fact had the legal right to mine the subject land by surface means: 'This was impossible because the source of [the] legal right to mine the coal by the method intended, when there is a property rights dispute, can only be a determination by an appropriate judicial authority' (Memorandum from Office of Field Solicitor to Director, Lexington Field Office, OSM, dated Nov. 13, 1990, at 9). Since the permit was issued despite this fact, DSMRE, in response to the TDN, should have suspended mining of the disputed land under the permit pending the outcome of the dispute...
>
> ...because "property rights...can only be [determined] by an appropriate judicial authority...by doing nothing and thus allowing the permit to stand and mining to proceed, [the agency] effectively adjudicated the dispute between the Taylors and Coal-Mac, thereby granting Coal-Mac a right to mine." *Id.*

(Emphasis added).

Accordingly, under both federal and state directives, when a *bona fide* dispute arises regarding right to mine, the Cabinet cannot issue a permit until the dispute is adjudicated by a circuit court or resolved by lease or other agreement with the surface owner. As demonstrated below, by utilizing these guidelines the Cabinet carried out its statutory duties appropriately.

In this case, the Cabinet requested additional information about the mining lease from KSCC during the initial application review, and received only the hand-written statement from KSCC President Mary Facella that

> Subject: 854-5025 RN-3/Protest by Reynolds/Jeffery A. and Marion M. Owners of record as of 5/31/2000. Purchased for $20,000. Mr. Reynolds called to ask us to

> lease land. Kentucky Southern Coal Corporation needs ingress/egress only, which should not require the $12,500 lease Reynolds are asking for.

(Nathan Morgan Affidavit, Cabinet's Motion for Summary Disposition, A.R. #61, Attachment B.) KSCC did not present any further documentation of a new lease agreement or consent to mine from the Reynoldses, nor did KSCC claim the right to enter and mine without the Reynoldses' consent.

While the administrative litigation was pending, KSCC began claiming that it had a right to conduct surface mining under the Permit based on the Crick mineral reservation, rather than the later Judgment lease. The action was held in abeyance while the Cabinet reviewed KSCC's new claim. But, as discussed above, KSCC is limited to the rights granted in the Judgment lease. And in any event, the mineral reservation does not appear to specifically grant surface mining rights. As discussed herein, the later Judgment lease did specifically address surface mining rights, but had expired at the time of KSCC's permit renewal application.

Thus, the Cabinet reviewed additional information from the Reynoldses and from KSCC. Because the record evidence created a genuine question whether KSCC still had a legal right to mine under the permit, the Cabinet rightfully denied the renewal application, and the Franklin Circuit Court and Court of Appeals both correctly affirmed this determination. Since the original documentation of KSCC's legal right to mine is no longer valid because the lease expired, the permit based on it can no longer be considered valid. *NFC Mining, Inc. v. Nat. Resources and Env. Protection Cabinet and John C. Lowe*, Administrative File Nos. PDH-23036-043 and PRA-23036-043 (December 9, 1997). It is therefore clear that the Cabinet properly reviewed KSCC's renewal

application within the bounds of both state and federal guidelines.

IV. THE FRANKLIN CIRUIT COURT AND COURT OF APPEALS CORRECTLY AFFIRMED THE CABINET'S FINDING THAT THE EXPIRATION OF THE JUDGMENT LEASE CREATED A *BONA FIDE* PROPERTY DISPUTE, PREVENTING ISSUANCE OF THE RENEWAL.

Despite KSCC's contention that the Crick Deed mineral reservation gives it, by implication, certain surface rights, the Hearing Officer recognized in Paragraph 12 of his Report, that the 1985 Hopkins Circuit Court Judgment also determined "...the manner in which Norton, and later Kentucky Southern, would have a right of entry to the surface." (H.O. Report, A.R. #87, p.10.) The Franklin Circuit Court affirmed this conclusion, holding that the existence of the Judgment lease created a *bona fide* property dispute regarding KSCC's right to mine the surface of the Bandy/Reynolds property. (FCC Record, p. 94). If the mineral reservation, itself, provided all the necessary surface mining rights, Norton had no need to agree to a limited 15-year surface lease in the Judgment. Accordingly, the very fact that a Judgment lease for surface rights was entered into calls into question what *surface rights* Norton and later KSCC held after the Judgment. And the patent expiration of the Judgment lease creates a genuine question whether any surface rights still exist.

A judgment should be read as a whole to determine its meaning. *Deboe v. Brown*, Ky., 22 S.W.2d 111 (1929). In this case, the Hearing Officer's findings of fact and conclusions of law are based upon the language of the 1985 Judgment lease as a whole, which constitutes substantial evidence in the record. The Judgment determined that Norton was the owner of certain coal seams and mineral rights underlying the surface owned by the Bandys. (Paragraph 11, H.O. Report, A.R. #87, pp. 9-10; Judgment Lease,

Appendix A, p.1.) The Hearing Officer's conclusions of law regarding the effect of the Judgment are fully supported by the administrative record and by the Judgment itself. Norton apparently agreed to enter into a lease rather than assert surface rights under the mineral reservation in the Crick deed. (Hearing Officer's Report, A.R. #87, par. 34, p. 19.) The existence of an agreed-upon surface lease in the Judgment, **by itself**, confirms this conclusion. An agreed surface lease would have been unnecessary if Norton intended to proceed under the mineral reservation alone.

That Norton apparently intended to retain something less than "unfettered" surface rights is also apparent from both the terms of the Judgment and a comparison of the Judgment with the rights set forth in the mineral reservation. First, the judgment states that the Bandys are leasing to Norton "**the surface rights** to 18.1 acres." (Judgment Lease, Appendix A, par 2, p. 2). (Emphasis added). Second, the lease is for a finite period of time—15 years, and then "the Bandy leasehold **will be returned** to the Bandys reclaimed...." (Judgment Lease, Appendix A, par. 2, p. 2, and par.6 (c), p. 5) (Emphasis added.) Third, the lease is granted for the "right to strip mine the property **and** perform any mining or associated operation thereon...." (Judgment, Hearing Officer's Exhibits, A.R. # 86, Ex. 3, par. 2 p. 2). (Emphasis added). Clearly, strip mining is not the only mining operation covered by the lease agreement, or this sentence would have ended with "the right to strip mine." Fourth, the Bandys relinquished further claims for haulage rights arising from Norton's use of the leased area (par. 13, Hearing Officer's Report, A.R. #87, p. 10). Fifth, it is obvious from the Bandys' promise in the Judgment to discontinue objecting to the surface and underground mining permits that there was some pending dispute regarding the Cabinet's issuance of the surface and underground permit.

Next, the mineral reservation states that "the right of subjacent support" is excepted from the surface conveyance (Crick Deed, Hearing Officer's Exhibits, A.R.#86, Ex. 4), but the Judgment lease provides that Norton agrees to protect the Bandys' residences from mining damages and further agrees to "leave sufficient pillars in place to protect them from subsidence." (Judgment Lease, Appendix A, par. 6 (a), pp. 4-5). Finally, the Judgment lease was made binding on all the parties, their heirs, successors and assigns, showing a clear intent for the Judgment lease agreement to have binding effect past the immediate parties to the suit (par. 13, Hearing Officer's Report, A.R. #87, p. 10).

Since it can be reasonably inferred from the language referred to above that Norton retained less surface rights after entry of the Judgment, and that the Judgment lease defined Norton's surface rights with respect to the Bandy property, the Hearing Officer, the Franklin Circuit Court and the Court of Appeals all correctly applied the law to interpret the Hopkins Circuit Court Judgment Lease in finding that there is a *bona fide* question regarding KSCC's right to mine after the Judgment surface lease expired. And since the Cabinet is prohibited by KRS 350.060 from issuing a permit based on an incomplete or inaccurate application, the Hearing Officer, and lower courts also correctly concluded that this *bona fide* dispute prevented the issuance of the renewal permit.

V. KSCC DID NOT ACCURATELY AND COMPLETELY DEMONSTRATE A RIGHT TO ENTER AND MINE THE DISPUTED PROPERTY SUFFICIENT TO SUPPORT ISSUANCE OF THE RENEWAL PERMIT.

The Hearing Officer recognized that "...the Cabinet had to consider the permit renewal as a whole and make some kind of determination as to whether there was a *bona fide* dispute as to the ability of Kentucky Southern to access the permit in its entirety."

(Original Emphasis.) (Hearing Officer's Report, A.R. #87.) KSCC presented neither a valid surface lease for the property in question, nor a mineral deed sufficient to allow surface mining operations, nor a circuit court ruling that a surface lease is not necessary. By requesting and then waiting for such documentation, the Cabinet avoided the adjudication of any property rights.

In this case, Norton's and subsequently KSCC's mining permit provided for surface area mining on the disputed property. (Hearing Officer's Exhibits, A.R. #86, Ex. 10, 12, and 13). Jeff Reynolds provided pictures of a 40-foot pit filled with water located on his property, confirming the presence of surface mining in the disputed tract (Reynolds' Additional Information, A.R. #24).

Additionally, since the language of the Crick deed mineral reservation appears to grant only limited surface use for underground operations, there is obviously a dispute as to what KSCC's rights are to disturb the surface property at issue, particularly after the expiration of the later Judgment lease. Such a *bona fide* dispute prevented the Cabinet from making the required finding that KSCC's demonstration of its legal right to mine the property was complete and accurate.

KSCC erroneously argues that the lower courts "demanded" that only a surface lease "will be sufficient" to demonstrate KSCC's legal right to mine. (Appellant's Brief, pp. 5, 6). In actuality, the Franklin Circuit Court and the Court of Appeals found that KSCC failed to provide a surface lease "...or judgment from a court of competent jurisdiction...or other legal authority that supports its right to mine this property." (FCC Record, p. 96). KSCC always had, and continues to have, every opportunity to resolve

the surface rights question in a court of law, as an alternative to agreement with the surface owner, but failed to take advantage of that opportunity.

CONCLUSION

Based on the foregoing, this Court must find that the Cabinet's final Order is supported by substantial evidence appearing in the record and that the Cabinet applied the appropriate law to the facts so found. Therefore, the Franklin Circuit Court and Court of Appeals correctly affirmed the Cabinet's final Order upholding the denial of KSCC's application for renewal of its Surface Mining and Reclamation Operations Permit (herein "Permit") No. 854-5025. This Court must therefore affirm the Court of Appeals decision.

Respectfully submitted,

TAMARA L. PATRICK
Office of General Counsel
#2 Hudson Hollow Rd.
Frankfort, KY 40601
COUNSEL FOR ENERGY AND
ENVIRONMENT CABINET