

COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

COURT OF APPEAL FILE NUMBER: 2101- 0196AC

TRIBUNAL FILE NUMBER: Alberta Energy Regulator
Proceeding 1902073 and 1844520

REGISTRY OFFICE: Calgary

APPLICANT: Benga Mining Limited

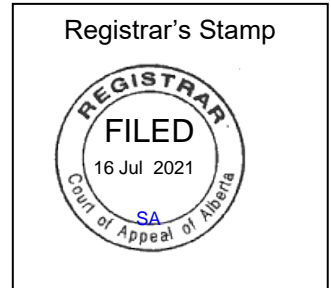
STATUS ON APPEAL: Appellant
STATUS ON APPLICATION: Applicant

RESPONDENTS: Alberta Energy Regulator and the
Joint Review Panel for the Grassy
Mountain Coal Project acting in its
capacity as the Alberta Energy
Regulator

STATUS ON APPEAL: Respondents
STATUS ON APPLICATION: Respondents

DOCUMENT: **APPLICATION FOR PERMISSION TO APPEAL
OF BENGA MINING LIMITED, APPLICANT**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT: **OSLER, HOSKIN & HARCOURT LLP**
Suite 2700, Brookfield Place
225 – 6th Avenue S.W.
Calgary, AB T2P 1N2



and

Attn: Martin Ignasiak/Sean Sutherland

Tel: (403) 260-7007/(403) 355-7458

Fax: (403) 260-7024

Email: mignasiak@osler.com /
ssutherland@osler.com

CONTACT INFORMATION OF ALL OTHER PARTIES:

Alberta Energy Regulator
 1000, 250 – 5 Street SW
 Calgary, Alberta T2P 0R4
 Attn: Meighan LaCasse/Barbara Kapel Holden
 Email: Meighan.lacasse@aer.ca
Barbara.KapelHolden@aer.ca

Joint Review Panel for the Grassy Mountain Coal Project

c/o Alberta Energy Regulator
 1000, 250 – 5 Street SW
 Calgary, Alberta T2P 0R4
 Attn: Meighan LaCasse/Barbara Kapel Holden
 Email: Meighan.lacasse@aer.ca
Barbara.KapelHolden@aer.ca

Joint Review Panel for the Grassy Mountain Coal Project

c/o Impact Assessment Agency of Canada
 160 Elgin Street, 22nd Floor
 Ottawa, ON K1A 0H3
 Email: IAAC.GrassyMountain.AEIC@canada.ca

NOTICE TO RESPONDENT(S):

Alberta Energy Regulator and the Joint Review Panel for the Grassy Mountain Coal Project acting in its capacity as the Alberta Energy Regulator, Respondents

AND NOTICE TO:

All registered participants in Alberta Energy Regulator Proceeding 1902073 and 1844520 as set out in Schedule A

Alberta Ministry of Justice and Solicitor General

WARNING

If you do not come to Court on the date and time shown below either in person or by your lawyer, the Court may give the applicant what it wants in your absence. You will be bound by any order that the Court makes. If you intend to rely on other evidence or a memorandum in support of your position when the application is heard or considered, you must file and serve those documents in compliance with the Rules. (Rule 14.41 and 14.43)

NOTICE TO RESPONDENT(S):

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: ~~----- August 26, 2021, or~~ **September 9, 2021** such other date as directed by this Honourable Court.
 Time: 9:30 a.m.
 Where: By video conference or audio telephone, as this Honourable Court directs.
 Before: Single judge of the court (Rule 14.37).

Nature of Application and Relief Sought:

1. The Applicant, Benga Mining Limited (“Benga”), seeks an order from this Honourable Court pursuant to section 45 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 (“*REDA*”):
 - (a) granting permission to appeal the decision of the Joint Review Panel (“JRP”) for the Grassy Mountain Coal Project in its capacity as the Alberta Energy Regulator (the “AER”) in *Decision 2021 ABAER 010: Benga Mining Limited, Grassy Mountain Coal Project, Crowsnest Pass* dated June 17, 2021 (the “Decision”);
 - (b) awarding the costs of this application against any registered participants identified in Schedule A that participate in this proceeding; and
 - (c) such further and other relief as this Honourable Court deems just.
2. In the Decision, the JRP, in its capacity as the AER, found that the Grassy Mountain Coal Project (the “Project”) is not in the public interest and therefore denied Benga’s applications under the *Coal Conservation Act*, RSA 2000, c C-17; *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (“*EPEA*”); *Water Act*, RSA 2000, c W-3; and *Public Lands Act*, RSA 2000, c P-40.
3. The AER’s conclusion and reasons are grounded in and contain material errors of law and contraventions of procedural fairness that warrant this Court granting permission to appeal.

Grounds for making this application:

Background

4. The Project is a proposed open-pit metallurgical coal mine in the Crowsnest Pass area of southwestern Alberta. The maximum production capacity of the Project is 4.5 million tonnes of metallurgical (steelmaking) coal per year over a mine life of approximately 23 years. If it proceeds, the Project will create hundreds of jobs in the construction and operations phases and generate economic benefits for nearby Indigenous groups that have agreed to support or not oppose the Project.
5. The Project requires an environmental impact assessment under Alberta's *EPEA* as well as a federal assessment under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 ("*CEAA 2012*"). It also requires certain provincial approvals under the *Coal Conservation Act*, *EPEA*, *Water Act*, and *Public Lands Act*.
6. On August 16, 2018, Canada's Minister of Environment and Climate Change and the AER announced a joint federal-provincial review process established by the *Agreement to Establish a Joint Review Panel for the Grassy Mountain Coal Project*. The Joint Review Panel (the "JRP") was tasked with discharging the responsibilities of the AER under *REDA*, the *Coal Conservation Act*, *EPEA*, the *Water Act*, and the *Public Lands Act*, and discharging the requirements of *CEAA 2012* and the panel's terms of reference.
7. The joint review process included: (i) the submission of regulatory materials by Benga, including various technical studies and assessments; (ii) various additional information requests from the JRP and government agencies; (iii) Benga's responses to information requests; (iv) an on-site visit; (v) public comment periods; and (vi) a public hearing in which Benga and other hearing participants presented evidence, cross-examined other parties' witnesses, and presented argument.
8. On June 25, 2020, following completion of the information request process and prior to the public hearing, the JRP issued a Completeness Determination letter informing Benga that it deemed the environmental impact assessment for the Project and additional information submitted by Benga complete pursuant to s. 53 of *EPEA*.

9. The public hearing began on October 27, 2020 using electronic means and continued for 29 sitting days. It concluded on December 2, 2020. The hearing record closed on January 15, 2021.
10. Many parties participated in the hearing including Benga, various federal departments and agencies, Indigenous groups, municipal governments, industry organizations, nongovernmental organizations, and individuals. In addition, there were groups, organizations, and individuals who engaged in the review process through written submissions but did not participate in the hearing.
11. The participation of Indigenous groups was limited because, as the JRP knew, those communities entered into agreements with Benga that created economic interests in the Project, including employment opportunities. As a result of those agreements, the Indigenous groups concluded that Benga had addressed their concerns in relation to the Project and, on that basis, support the Project and/or do not have concerns with it being developed. While the JRP did not know the exact terms of these agreements, it was aware that they provided, among other things, employment opportunities and economic benefits of sufficient importance to these Indigenous groups to openly support the Project, or to take no position on the Project, notwithstanding potential impacts on their Aboriginal and Treaty rights.

The Decision

12. In its capacity as the AER, the JRP declined to approve the Project because, in its view, the significant adverse environmental effects on westslope cutthroat trout and surface water quality likely to be caused by the Project outweigh the low to moderate positive economic impacts of the Project. Therefore, the JRP, in its capacity as the AER, concluded that the Project is not in the public interest. In light of this decision, the JRP, in its federal capacity, did not complete an assessment of mitigation measures because without provincial approval the Project cannot proceed.
13. The JRP agreed that the Project would have an overall positive economic impact. However, the JRP did not complete an assessment of the effects of the Project on the socioeconomic conditions for specific Indigenous groups due to a lack of information. Based on the

information before it, the JRP inferred that the Indigenous groups were of the view that the agreements adequately addressed the effects of the Project on their land use, cultural practices, and Aboriginal rights.

Errors of Law or Jurisdiction

14. Section 45(1) of *REDA* permits an appeal of an AER decision, with the permission of this Court, on a question of law or jurisdiction.
15. Benga seeks permission to appeal the Decision based on the following errors made by the JRP in its capacity as the AER, each of which raise a question of law or jurisdiction:
 - (a) The JRP, in its capacity as the AER, erred in law and denied Benga procedural fairness by finding that Benga submitted insufficient information on potential adverse environmental effects, mitigation measures and Project benefits after the JRP issued the Completeness Determination letter to Benga.
 - (b) The JRP, in its capacity as the AER, erred in law by failing to properly consider Alberta government policy as reflected in the South Saskatchewan Regional Plan, which it was required to do pursuant to the *Alberta Land Stewardship Act*, SA 2009, c A-26.8, and *REDA*.
 - (c) The JRP, in its capacity as the AER, erred in law by ignoring relevant evidence from Benga, or misconstruing that evidence, regarding surface water quality, the westslope cutthroat trout and habitat, and Project economics. As a result, the JRP, in its capacity as the AER, improperly found Benga's evidence and plans to be inadequately developed and potential benefits overstated.
 - (d) The JRP, in its capacity as the AER, erred in law by failing to consider the rules of evidence and principles on which they are grounded, including reliability concerns, and thereby improperly relied on layperson, non-expert and unfounded opinion evidence lacking any science-based support to unjustifiably dismiss or disregard Benga's expert evidence.

- (e) The JRP, in its capacity as the AER, erred in law in finding that Alberta's Mine Financial Security Program was inadequate for Benga to rely on to address long-term water treatment costs.
 - (f) The JRP, in its capacity as the AER, erred in law by failing to engage with, seek further information from, consult with or suggest consultation with affected Indigenous groups when contemplating the rejection of the Project. As a result, the JRP, in its capacity as the AER, did not properly assess the impact of the rejection of the Project on Aboriginal rights and economic interests that accommodate potential impacts on those rights, notwithstanding that those Indigenous groups supported the Project and filed letters of support or no concern with the JRP.
16. Each of these errors was fundamental to the finding that the Project is not in the public interest and, together and independently, require the JRP, in its capacity as the AER, to reconsider Benga's application to approve the Project.
 17. These errors are of general importance, including importance to the practice and procedure before regulatory tribunals, because they transcend this particular case and should be clarified to provide future guidance to proponents, participants in AER and JRP review processes, future AER and JRP panels and Indigenous groups that support projects and stand to benefit economically from their approval.
 18. Each of the errors is to be assessed on a correctness standard of review and has arguable merit as will be expanded on in Benga's Memorandum of Argument, to be filed.
 19. Benga reserves the right to identify further and other grounds of appeal in its Memorandum of Argument, to be filed.

Material or evidence to be relied on:

20. One or more Affidavits and a Memorandum of Argument to be filed in accordance with Rule 14.40(2) of the *Rules of Court*. This Application has been filed without an accompanying Affidavit and Memorandum of Argument to preserve the time limitation to

file for permission to appeal pursuant to s. 45(2) of *REDA* and s. 5 of the *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013;

21. Decision 2021 ABAER 010: Benga Mining Limited, Grassy Mountain Coal Project, Crowsnest Pass;
22. Excerpts of the material and record before the JRP; and
23. Such further and other materials as counsel may advise and this Honourable Court may permit.

Applicable Acts, regulations and rules:

24. *Alberta Land Stewardship Act*, SA 2009, c A-26.8;
25. *Alberta Rules of Court*, Alta Reg 124/2010;
26. *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52;
27. *Coal Conservation Act*, RSA 2000, c C-17;
28. *Environmental Protection and Enhancement Act*, RSA 2000, c E-12;
29. *Public Lands Act*, RSA 2000, c P-40;
30. *Responsible Energy Development Act*, SA 2012, c R-17.3;
31. *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013;
32. *Water Act*, RSA 2000, c W-3; and
33. Such further and other Acts, regulations and rules as counsel may advise and this Honourable Court may permit.

Schedule A: Notice to Registered Participants

Environmental and Climate Change Canada (ECCC); Fisheries and Oceans Canada (DFO); Health Canada; Impact Assessment Agency of Canada; Natural Resources Canada	Robert Drummond Sydney McHugh	Robert.Drummond@justice.gc.ca Sydney.McHugh@justice.gc.ca
Ktunaxa Nation	Chief Kathryn Tennesse	kteneese@ktunaxa.org
Métis Nation of Alberta Region 3	Nicole Shepherd	nshepherd@metis.org
Stoney Nakoda Nations	Dean Cherkas	dcherkas@stoney-nation.com
Shuswap Indian Band	Lorena Tegart	ltegart@shuswapband.ca
MD of Ranchland No. 66	Michael Niven, QC Ryan Barata	niven@carscallen.com Barata@carscallen.com
Municipality of Crowsnest Pass	Alifeyah Gulamhusein	agulamhusein@brownleelaw.com
Town of Pincher Creek	Don Anderberg	reception@pinchercreek.ca cao@pinchercreek.ca
Alberta Chapter and Canadian Section of the Wildlife Society	Sarah Elmeligi	execdirector@actws.ca
Coal Association of Canada	Robin Campbell	campbell@coal.ca
Coalition of Alberta Wilderness Association (AWA) and Grassy Mountain Group	Ifeoma M. Okoye	iokoye@ackroydlaw.com
Crowsnest Conservation Society	Richard Cooke	rickcooke@shaw.ca
Canadian Parks and Wilderness Society (CPAWS)	Drew Yewchuk	drew.yewchuk@ucalgary.ca
Coalition of Alberta Wilderness Association (AWA) and Grassy Mountain Group	Richard C. Secord	RSecord@ackroydlaw.com

Eco-Elders for Climate Action	J. Gourlay-Vallance	ecoeldersyyc@gmail.com
Livingstone Landowners Group	Gavin Fitch, QC	gfitc@mross.com
Oldman Watershed Council	Shannon Frank	shannon@oldmanwatershed.ca
Timberwolf Wilderness Society	Michael Sawyer	sawyer@hayduke.ca
Trout Unlimited Canada	Lesley Peterson	lpeterson@tucanada.org
Barbara Janusz		vitalideas@shaw.ca
Ken Allred		gkallred@shaw.ca
Fred Bradley		bradleyf@telusplanet.net
Alistair Des Moulins		Aandgdesinfo@gmail.com
Gail Des Moulins		aandgdes@gmail.com
Monica Field		monicafield66@gmail.com
Michael Sawyer		sawyer@hayduke.ca
David McIntyre		ravensview@toughcountry.net
Jim Rennie		jrexplore@gmail.com