

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
	§	Chapter 11
	§	
WESTMORELAND COAL COMPANY,	§	Case No. 18-35672 (DRJ)
<i>et al.</i> , ¹	§	
	§	(Jointly Administered)
Debtors.	§	
	§	

LIMITED OBJECTION OF ROCK SPRINGS ROYALTY COMPANY TO THE EXPEDITED MOTION OF WESTMORELAND RESOURCES PARTNERS, LP AND ITS SUBSIDIARIES FOR ENTRY OF (I) AN ORDER (A) ESTABLISHING BIDDING PROCEDURES WITH RESPECT TO THE SALE OF THE KEMMERER MINE AND SUBSTANTIALLY ALL ASSETS RELATED THERETO, (B) AUTHORIZING THE ENTRY INTO A STALKING HORSE AGREEMENT AND THE PROVISION OF STALKING HORSE PROTECTIONS, (C) SCHEDULING AN AUCTION AND SALE HEARING AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF AND (D) GRANTING RELATED RELIEF; AND (II) AN ORDER APPROVING THE SALE OF SUCH ASSETS AND GRANTING RELATED RELIEF [RELATES TO DOC. NO. 1101]

Now comes Rock Springs Royalty Company LLC (“Rock Springs” or “RSRC”), and files this limited objection (the “Limited Objection”) to the *Expedited Motion of Westmoreland Resources Partners, LP and its Subsidiaries for Entry of (i) an Order (a) Establishing Bidding Procedures with Respect to the Sale of the Kemmerer Mine and Substantially All Assets Related Thereto, (b) Authorizing the Entry into a Stalking Horse Agreement and the Provision of Stalking Horse Protections, (c) Scheduling an Auction and Sale Hearing and Approving the Form and Manner of Notice Thereof and (d) Granting Related Relief; and (ii) an Order Approving the Sale*

¹ Due to the large number of debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company's service address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

of Such Assets and Granting Related Relief [D.I. 1101] (the “Motion”).² In support of this Limited Objection and in opposition to the Motion, Rock Springs respectfully states as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over these Cases and the Motion pursuant to 28 U.S.C. § 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

2. This is a core proceeding under 28 U.S.C. § 157(b)(2), and the Court has constitutional authority to enter final orders on the Motion under *Stern v. Marshall*, 564 U.S. 462 (2011) and its progeny. The statutory predicate for the relief requested in the Motion is 11 U.S.C. § 105, 363, 365, 544 and Bankruptcy Rules 4001, 6004, and 6006.

II. BACKGROUND

3. In 1983, Rock Springs entered into a Purchase Agreement (the “1983 Purchase Agreement”) with Gulf Oil Corp., a predecessor to Westmoreland, to sell interests in approximately 1440 acres in Lincoln County, Wyoming comprising the Kemmerer Coal mine—part of the so-called “Kemmerer Assets” that are subject to the present Motion. Under Article IX of the 1983 Purchase Agreement, Rock Springs reserved a royalty (the “Royalty”) for the coal mined on the premises in excess of 20 million cumulative tons. That condition was met by Westmoreland or its predecessor, and Rock Springs has received Royalty payments from the coal production at the Kemmerer mine since that time.

4. On October 9, 2018 (the “Petition Date”), the Debtors commenced these chapter 11 bankruptcy cases. Through the Motion, the Debtors assert that they have been marketing the Kemmerer Assets and other related assets for sale of a significant amount of time. The Motion seeks approval of Bidding Procedures and an ultimate sale of the Kemmerer Assets. The Kemmerer Assets include the Kemmerer Coal mine, which is subject to the Royalty reserved

² Unless otherwise defined herein, all capitalized terms shall have the meaning ascribed to them in the Motion.

under the 1983 Purchase Agreement. Westmoreland Kemmerer, LLC (the “Kemmerer Debtor”) is the successor to Gulf Oil under the 1983 Purchase Agreement.

5. The Kemmerer Debtor has listed the 1983 Purchase Agreement as an executory contract that may be assumed or rejected in the Debtors’ bankruptcy cases. [See D.I. 423] (Schedules B & G, Pages 37 & 89 of 148). As discussed below, Rock Springs does not agree that the 1983 Purchase Agreement is an executory contract.

6. As discussed below, it is settled law in Wyoming that a mineral royalty is real property—not merely a lease, rent or executory interest. See *Denver Joint Stock Land Bank v. Dixon*, 122 P.2d 842, 849 (Wyo. 1942); see also *Williams v. Watt*, 668 P.2d 620, 626 (Wyo. 1983) (reiterating that, under *Denver Joint Stock*, mineral rights for an indefinite period of time “are realty”); *Maycock v. Maycock (Estate of Maycock)*, 33 P.3d 1114, 1118 (Wyo. 2001) (citing *Johnson v. Anderson*, 768 P.2d 18, 23 (Wyo. 1989); *Connaghan v. Eighty-Eight Oil Co.*, 750 P.2d 1321, 1324 (Wyo. 1988); *McGinnis v. McGinnis*, 391 P.2d 927, 929-30 (Wyo. 1964)). Because the Motion does not clearly set forth the Debtors’ intentions with respect to the Royalty, Rock Springs files this Limited Objection.

III. LIMITED OBJECTION - RELIEF REQUESTED

7. Rock Springs does not oppose the Court’s approval of the Bidding Procedures or the ultimate sale of the Kemmerer Assets. Nevertheless, because Wyoming state law is clear that mineral royalties are real property, not mere leases or executory interests, there is no basis under the Bankruptcy Code or applicable Wyoming state law to reject the 1983 Purchase Agreement or convey the Kemmerer Assets free and clear of RSRC’s royalties rights under the 1983 Purchase Agreement. Accordingly, the Kemmerer Assets cannot be sold “free and clear” of those rights, nor can such rights be rejected under section 365 of the Bankruptcy Code. Provided that those

limitations are expressly set forth in any order approving the sale of the Kemmerer Assets, Rock Springs does not oppose the Motion.

IV. ARGUMENTS AND AUTHORITY

A. *Debtors Cannot Meet § 363(f) Elements to Sell the Kemmerer Assets “Free and Clear.”*

8. Under the provisions of §363(f):

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363 (f)(1-5).

9. For the Debtors to sell the Kemmerer Assets free and clear of the Royalty, they must demonstrate a basis under one of the foregoing subsections to extinguish the Royalty. The Debtors cannot satisfy this burden.

10. By this Limited Objection, Rock Springs verifies its non-consent to a sale of the Kemmerer Assets free and clear of its Royalty. Thus, section 363(f)(2) is inapplicable.

11. Section 363(f)(4) is equally inapplicable, because there is no basis for the Debtors to claim a *bona fide* dispute of the Royalty. The phrase “bona fide dispute” is not defined in the Bankruptcy Code. In the context of §363(f)(4), courts have defined “bona fide dispute” as when there is an objective basis for a factual or legal dispute as to the validity of the asserted interest.

In re Patriot Place, Ltd., 486 B.R. at 815 (Bankr. W.D. Tex. 2013); *see also Subway Equip. Leasing Corp. v. Sims (In re Sims)*, 994 F.2d 210, 221 (5th Cir. 1993) (in the context of §303(b)(1) of the Bankruptcy Code, holding that a bona fide dispute exists if there is an objective basis for a factual or legal dispute as to the validity of a debt); *see also In re C-Power Prods., Inc.*, 230 B.R. at 804 (noting that Texas law restricts assignment of legal malpractice claims, and thus it cannot be subject to a bona fide dispute); *accord In re CDX Gas, LLC*, No. 08-37922-h3-11, 2009 Bankr. LEXIS 1391, at *6 (Bankr. S.D. Tex. 2009) (noting that there was “nothing to suggest a bona fide dispute” relating to the security interest of the party.). The “mere existence of pending litigation or the filing of an answer is insufficient to establish the existence of a bona fide dispute.” *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1066. (9th Cir. 2002). The Court must conduct a careful analysis of the underlying dispute to determine if the Debtor can demonstrate an objective basis for “either a factual or legal dispute as to the validity of the claim.” *Dewey Ranch Hockey, LLC*, 406 B.R. 30, 39 (Bankr. D. Ariz. 2009).

12. Far from *disputing* the existence of the Royalty, the Debtors have *acknowledged* its existence by listing the 1983 Purchase Agreement as an asset under their schedules. [D.I. 423]. Moreover, the Debtors historically paid amounts due under Article IX of the 1983 Purchase Agreement, including making payments after the Petition Date. Thus, even if the Debtors dispute the amounts presently due or the proper calculation for future amounts that may come due, there is no basis for a factual bona fide dispute over the existence of the Royalty such that the Kemmerer Assets may be sold free and clear of the Royalty. As discussed below, there is no objective basis to dispute the legal existence of the Royalty under well-settled Wyoming state law. Accordingly, subsection (f)(4) provides no basis to sell the Kemmerer Assets free and clear of the Rock Springs Royalty.

13. The remaining provisions depend on state law. Under subsection (1), (3) and (5), the Debtors could sell the Kemmerer Assets free and clear of the Royalty if they can show that applicable state law would allow for a sale free and clear of the Royalty, if they could prove that the Royalty is a “lien” secured by an amount that will be paid from the sale proceeds, or if they could prove that Rock Springs may be compelled to accept money in satisfaction of the Royalty. None of these options applies to the Wyoming mineral Royalty.

14. As noted above, it is well-settled in Wyoming that this Royalty is a real property interest owned by Rock Springs. *See Denver Joint Stock Land Bank v. Dixon*, 122 P.2d 842, 849 (Wyo. 1942); *see also Williams v. Watt*, 668 P.2d 620, 626 (Wyo. 1983) (reiterating that, under *Denver Joint Stock*, mineral rights for an indefinite period of time “are realty”); *Maycock v. Maycock (Estate of Maycock)*, 33 P.3d 1114, 1118 (Wyo. 2001) (citing *Johnson v. Anderson*, 768 P.2d 18, 23 (Wyo. 1989); *Connaghan v. Eighty-Eight Oil Co.*, 750 P.2d 1321, 1324 (Wyo. 1988); *McGinnis v. McGinnis*, 391 P.2d 927, 929-30 (Wyo. 1964)). When Rock Springs conveyed the underlying land to Debtor Kemmerer’s predecessor, Rock Springs had the right to separate interests by grant or exception. *William v. Watt*, 668 P.2d 620, 624-25 (Wyo. 1983). By excepting the Royalty in Article IX of the 1983 Purchaser Agreement, Rock Springs reserved real property. Under Wyoming law, such a reservation does not create a lien, lease or executory interest—the Royalty reserves an interest in the real property itself. *Id.* (citations omitted). Accordingly, under the authorities cited herein, there is no basis under applicable state law to treat the Royalty as a “lien” that can attach to the sale proceeds or be extinguished by the payment of money.³

³ As this objection is limited, Rock Springs reserves the right to supplement this Limited Objection with additional authorities, arguments and briefing on these points should the Debtors dispute the law cited herein.

15. For all of these reasons, the Motion must be denied to the extent it seeks to sell the Kemmerer Assets free and clear of Rock Springs's Royalty. Only if the purchaser takes the Kemmerer Assets subject to the existing Royalty may the sale be approved under section 363(b) of the Bankruptcy Code.

B. *The 1983 Purchase Agreement Is Not Executory.*

16. Just as the Debtors cannot establish a basis to sell the Kemmerer Assets free and clear of the Royalty, they cannot establish a basis to “reject” the underlying 1983 Purchase Agreement that created the Royalty. In the Fifth Circuit, “executoriness” depends on mutual obligations which, “the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party.” *RPD Holdings, L.L.C. v. Tech Pharm. Servs. (In re Provider Meds, L.L.C.)*, 907 F.3d 845, 851 (5th Cir. 2018) (citations omitted).⁴

17. “A contract where the only thing left to do is payment of money is not an executory contract.” *In re Particle Drilling Techs.*, 2009 Bankr. LEXIS 2151 at *11-12 (Bankr. S.D. Tex. July 29, 2009) (quoting *In re Choate*, 184 B.R. 270, 273 (Bankr. N.D. Tex. 1995)); see also *In re Placid Oil Co.*, 72 B.R. 135 (Bankr. N.D. Tex. 1987)); *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046 (4th Cir. 1985) (“It is true that a contract is not executory as to a party simply because the party is obligated to make payments of money to the other party.”). In *Particle Drilling*, Judge Isgur rejected an argument that a royalty agreement was executory because the only thing left to do under the agreement was pay money.

⁴ State law confirms this executory definition, making clear that the 1983 Purchase Agreement is not an executory contract or unexpired lease. Wyoming state law treats such royalties as real property. See *Denver Joint Stock Land Bank v. Dixon*, 122 P.2d 842, 849 (Wyo. 1942); see also *Williams v. Watt*, 668 P.2d 620, 626 (Wyo. 1983) (reiterating that, under *Denver Joint Stock*, mineral rights for an indefinite period of time “are realty”); *Maycock v. Maycock (Estate of Maycock)*, 33 P.3d 1114, 1118 (Wyo. 2001) (citing *Johnson v. Anderson*, 768 P.2d 18, 23 (Wyo. 1989); *Connaghan v. Eighty-Eight Oil Co.*, 750 P.2d 1321, 1324 (Wyo. 1988); *McGinnis v. McGinnis*, 391 P.2d 927, 929-30 (Wyo. 1964).

18. The same rationale applies to the 1983 Purchase Agreement. Rock Springs has no obligations due under the agreement—material or otherwise. Rock Springs merely collects royalty payments when coal is mined by Gulf Oil or the Debtors (as successors to Gulf Oil). Not even the Debtors’ obligations are material under the “Countryman” definition. There is no obligation for the Debtors to mine the Kemmerer mine. Because there are no bilateral material obligations remaining under the 1983 Purchase Agreement, it is not “executory” and subject to rejection. Accordingly, the Motion should be denied to the extent the Debtors seek to avoid future obligations to pay the Royalty reserved under Article IX of the 1983 Purchase Agreement.

V. CONCLUSION AND PRAYER

WHEREFORE, Rock Springs respectfully requests that this Court enter an Order limiting any sale of the Kemmerer Assets such that the purchaser takes the property subject to Rock Springs’s Royalty described herein, and granting such other and further relief as is just and proper under the circumstances.

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Dated: February 1, 2019.

Respectfully submitted,

/s/ Deborah D. Williamson

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2019, a true and correct copy of the foregoing document was served by electronic notification by the Electronic Case Filing system for the United States Bankruptcy Court for the Southern District of Texas and/or by electronic mail or U.S. first-class mail to the parties on the attached Service List, which includes the following:

(a) the Office of the United States Trustee for the Southern District of Texas; (b) the indenture trustee under the WLB Debtors' 8.75% senior secured notes due 2022; (c) the ad hoc group of lenders under the WLB Debtors' prepetition term loan due 2020 and the WLB Debtors' 8.75% senior secured notes due 2022; (d) the administrative agent under the WLB Debtors' prepetition term loan facility due 2020; (e) the administrative agent under the WLB Debtors' bridge loan facility due 2019; (f) the administrative agent under the WMLP Debtors' term loan facility due 2018; (g) the ad hoc committee of certain lenders under the WMLP Debtors' term loan facility due 2018; (h) the administrative agent under the WLB Debtors' debtor-in-possession financing facility; (i) the lenders under the WLB Debtors' debtor-in-possession financing facility; (j) the Creditors' Committee and any other statutory committee appointed in these cases; (k) the United States Attorney's Office for the Southern District of Texas; (l) all taxing authorities having jurisdiction over any of the Kemmerer Assets, including the Internal Revenue Service; (m) the United States Environmental Protection Agency and similar state environmental agencies for the State of Wyoming; (n) the Stalking Horse Bidder (if any); (o) all sureties that have issued bonds relating to the Kemmerer Assets; (p) all parties that are known or reasonably believed by the WMLP Debtors to have asserted any lien, encumbrance, claim or other interest in the Kemmerer Assets; (q) governmental agencies that are known or reasonably believed by the Rock Springs to be an interested party with respect to any Sale Transactions; (r) the Pension Benefit Guaranty Corporation; (s) the United Mine Workers of America; and (t) any party that has requested notice pursuant to Bankruptcy Rule 2002.

/s/ Aaron M. Kaufman

Aaron M. Kaufman