

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

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

**OBJECTION OF WESTMORELAND MINING HOLDINGS LLC TO  
EXPEDITED MOTION OF WESTMORELAND RESOURCE PARTNERS, LP  
AND ITS SUBSIDIARIES FOR ENTRY OF AN ORDER (I) APPROVING THE  
SALE OF THE KEMMERER MINE AND CERTAIN OTHER ASSETS FREE  
AND CLEAR OF SUBSTANTIALLY ALL LIENS, CLAIMS, ENCUMBRANCES  
AND INTERESTS PURSUANT TO A CREDIT BID FROM SECURED LENDERS,  
(II) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION  
THEREWITH AND (III) GRANTING RELATED RELIEF**

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**[Relates to Docket No. 1863]**

Westmoreland Mining Holdings LLC and its affiliates (the “WLB Purchaser”)<sup>2</sup> object to the above-referenced Motion filed by Westmoreland Resource Partners, LP (“WMLP”) and WMLP’s subsidiaries (collectively with WMLP, the “WMLP Debtors”). In support of this objection, the WLB Purchaser respectfully states as follows:

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<sup>1</sup> 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](http://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.

<sup>2</sup> Westmoreland Coal Company (“WLB”) and its Debtor subsidiaries other than the WMLP Debtors (the “WLB Debtors”) and the WLB secured lenders consummated the sale of substantially all of WLB’s assets on March 15, 2019.

### **Summary of Objection**

1. The owner of any coal mine must post a bond to assure reclamation of the mine. The Credit Bid APA and Credit Bid Sale Order have “Required Bonding” as a condition to the purchase of the Kemmerer mine,<sup>3</sup> but they permit the Credit Bid Purchaser to *waive* the condition.

2. The Motion recites that the Credit Bid Purchaser is in discussions with certain sureties to obtain Required Bonding. The WLB Purchaser respectfully submits that the Court should not approve any sale of the Kemmerer mine unless (i) the Court finds that the Credit Bid Purchaser can obtain Required Bonding, based on written representations from sureties or their broker, and (ii) the order provides that the Purchaser’s obligations to obtain Required Bonding cannot be waived or amended except with the consent of the WLB Purchaser or upon further order of the Court.

3. The Motion also fails to allege facts sufficient to show adequate assurance of future performance. The Motion contains no allegations as to the Kemmerer mine’s available cash and no allegation that the Credit Bid Purchaser will have access to the financing required for it to operate the Kemmerer mine and fund a settlement of retiree medical benefits so that the United Mineworkers of America (“UMWA”) may continue to work the Kemmerer mine. If introduced into evidence, a financing commitment obtained by the Credit Bid Purchaser would help satisfy the obligation to provide adequate assurance of future performance in connection with the assumption of executory contracts, including transition services agreements, and also

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<sup>3</sup> The term “Kemmerer mine” in this Objection incorporates the “Kemmerer Assets,” as defined in the Motion. Defined terms in the Motion and proposed Credit Bid Sale Order are incorporated into this Objection unless otherwise noted.

would help show that there is money available to fund the UMWA settlement.<sup>4</sup> The WMLP Debtors also should agree to amend the Back-Office TSA (defined below) between WMLP and the WLB Purchaser to require that the Credit Bid Purchaser establish a bank account from which payments to the WLB Purchaser (and the WLB Debtors) under the agreement will continue to be debited. This will provide a mechanism ensuring that the Credit Bid Purchaser, as WMLP's assignee, makes timely payments under the Back-Office TSA.

4. Finally, the Credit Bid APA and the requested Credit Bid Sale Order contain numerous objectionable provisions, itemized in Exhibit A, attached hereto, including certain provisions that violate the transition services agreements agreed to between WMLP and the WLB Purchaser as contemplated by the Court's February 28, 2019 *Order Authorizing and Approving Intercompany Settlement Term Sheet* [Docket No. 1548] (the "Intercompany Settlement Order")<sup>5</sup> and approved by the Court's March 2, 2019 *Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Docket No. 1561] (the "WLB Confirmation Order"). The WLB Purchaser objects to the Motion unless such objectionable provisions are revised as set forth in Exhibit A.

5. Each of the WLB Purchaser's objections can be readily addressed. For example, the Credit Bid Purchaser for its own purposes must have agreements on Required Bonding and working capital financing – otherwise it will be unable to operate. In Section 8.6(b) of the Credit Bid APA, the Credit Bid Purchaser has already agreed to use “commercially reasonable efforts . . . to put in place . . . the Required Bonding necessary to permanently transfer the Transferred

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<sup>4</sup> The WLB Purchaser has already offered to contribute and lend funds towards the amount necessary to settle with the UMWA.

<sup>5</sup> The Intercompany Settlement Order is an exhibit to the WLB Chapter 11 Plan and is an exhibit to the WMLP Debtors' chapter 11 plan filed at Docket No. 1612.

Permits. . . . to Purchaser.” All the WLB Purchaser needs is assurance that such agreement (and other provisions negotiated by the WLB Purchaser) will not be waived. This Court should not approve a transaction based on evidence of Required Bonding and a promise to use it only to have the Required Bonding refused and that promise eliminated post-closing.

**Background**

6. In the settlement approved by the Intercompany Settlement Order, the parties agreed that

the WLB Debtors and the WLB Secured Lenders . . . agree to support, and to not directly or indirectly oppose, the sale(s) of (1) the Kemmerer Assets . . . unless such transactions or provisions thereof materially, adversely affect, as determined by each of, the WLB Debtors, the WLB Purchaser . . . or the WLB Secured Lenders; provided, that any such consent of the WLB Debtors, the WLB Purchaser . . . , or the WLB Secured Lenders with respect to the sale of the Kemmerer Assets . . . may not be unreasonably withheld.

Intercompany Settlement Order, Annex 1 at page 14.

7. The sale proposed by the WMLP Debtors under the Credit Bid Sale Order and Credit Bid APA “materially, adversely affect[s]” the WLB Purchaser.

8. The Credit Bid APA provides that consummation of the sale is subject to fulfillment of conditions including that “Purchaser shall have obtained replacement surety bonds necessary to allow the permanent transfer of Transferred Permits,” “with respect to the Purchaser’s operation of the Business during the Interim Period, Purchaser shall have obtained, or arrangements reasonably satisfactory to Purchaser shall be in place for obtaining, applicable regulatory approvals and any other material permits, licenses, authorizations or approvals required to operate the Purchased Assets,” and “with respect to the permanent transfer of the Transferred Permits, there shall be no reasonable basis to believe that the applicable regulatory

approvals, material permits, licenses, authorizations and approvals will not be obtained.” Credit Bid APA § 9.1(b) & (c).

9. However, the Credit Bid APA also provides that all closing conditions, including those relating to reclamation bonding, “may be waived by Purchaser in whole or in part in its sole discretion.” Credit Bid APA § 9.1.

10. Section 8.6(b) of the Credit Bid APA provides that “Purchaser shall use commercially reasonable efforts . . . to in place with the appropriate Governmental Body, as promptly as practicable . . . after the Closing Date, the Required Bonding necessary to permanently transfer the Transferred Permits . . . to Purchaser.” However, the Credit Bid Sale Order provides: “Subject to the terms of the APA, the APA and any related agreements may be waived, modified, amended or supplemented in accordance with the terms thereof, without further action or order of the Court. This Order shall not be modified by any chapter 11 plan of any of the Debtors.” Credit Bid Sale Order, page 34, ¶ 36.

11. As a result, the Credit Bid Sale Order and Credit Bid APA proposed by the WMLP Debtors permit the Credit Bid Purchaser to waive bonding requirements without a further court order or any party’s consent. The Motion therefore seeks an order permitting the sale of the Kemmerer mine without the purchaser having first obtained replacement reclamation bonding or an agreement to ensure that such bonding is obtained in the near future.

12. Reclamation bonding is required by law. The Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. §§ 1201 et seq., requires that land disturbed by coal mining be reclaimed to its pre-mining condition. SMCRA allows states to implement its reclamation program through federally approved programs. States where the WMLP Debtors and the WLB Purchaser operate have been granted authority by the United States Department of

Interior's Office of Surface Mining Reclamation and Enforcement to implement SMCRA according to state statutory, regulatory, and administrative programs.

13. To conduct mining, operators must obtain a permit from the SMCRA regulatory authority that includes a reclamation plan. 30 U.S.C. § 1256(a). To obtain a permit, an operator must post a bond to ensure completion of their obligations under the permit's reclamation plan. 30 U.S.C. § 1259(a). If the mine permittee fails to comply with the reclamation plan, which usually requires reclamation on an on-going basis, the SMCRA regulatory authority can call upon the bond to pay for reclamation costs. See ibid.

14. Permit transfer applications require posting a new, replacement bond sufficient to cover obligations assumed under the new permit – this is specifically required in Wyoming, where the Kemmerer mine is located. Wyo. Admin. Code 020.0006.12 § 1(b)(ii)(A). Until the permit transfer is finalized, the existing bond remains in place. See Wyo. Stat. §§ 35-11-408 & 35-11-417.

15. Zurich currently provides surety bonds backstopping reclamation obligations at several of the WLB Purchaser's mines and the WMLP Debtors' Kemmerer mine. Zurich holds in one collateral pool cash as security for all Westmoreland-related bonds that Zurich has outstanding, including cash posted by the WLB Purchaser and cash posted by the WMLP Debtors.

16. In March of 2019, the WMLP Debtors attempted to sell the Kemmerer mine to Western Coal Acquisition Partners, LLC ("Western Coal") without either an agreement with Zurich or a commitment to replace Zurich's bonds. Zurich informed the WLB Purchaser that it would allocate \$54 million of its collateral pool as additional collateral for the Kemmerer bond. The allocation would deplete collateral currently allocated to the WLB Purchaser's bonds, and

Zurich could demand that the WLB Purchaser post additional collateral to remedy the depletion “at any point in time.” March 25, 2019 Tr. 103:18-104:22 (Hodges). Such reallocation would effectively transfer the WLB Purchaser’s assets to the WMLP Debtors and the purchaser of the Kemmerer mine.

17. Moreover, the evidence showed that if the sale to Western Coal closed without an agreement on bonding, Zurich would require that the WLB Purchaser post \$54 million of additional collateral as a condition for Zurich to issue to the WLB Purchaser the replacement bonds the WLB Purchaser needs to obtain permits to operate its mines. See March 25, 2019 Tr. 86:5-19 (Micheletti), 106:21-107:4, 111:1-8 (Hodges).

18. The Credit Bid APA poses the same risks as the Western Coal transaction: failure to obtain replacement bonding, or an agreement with Zurich, exposes the WLB Purchaser to a collateral call from Zurich and Zurich’s withholding replacement bonds that the WLB Purchaser needs to obtain operating permits for its mines.

19. The Prior Sale Order and the Prior APA contained negotiated language – to which the WMLP Debtors agreed – protecting the WLB Purchaser and sureties from a sale of the Kemmerer mine to a purchaser who had not obtained replacement bonding or an agreement to obtain replacement bonding. The WMLP Debtors have removed these previously agreed-to protections from the Credit Bid Sale Order and Credit Bid APA.

20. For example, consistent with and to memorialize the rights negotiated under the Intercompany Settlement Order, the Prior Sale Order provided that “any amendment, restatement, supplement, modification or waiver of or under” the Prior APA that “materially, adversely affects the WLB Debtors, the WLB Purchaser (including its Canadian subsidiaries) or the WLB Secured Lenders . . . , as determined by each such party, requires the consent of such

party (such consent not to be unreasonably withheld).” Prior Sale Order ¶ 51, page 34. The purchaser therefore could not waive the bonding-related requirements of the Prior APA without the WLB Purchaser’s consent.

21. The proposed Credit Bid Sale Order replaces the WLB Purchaser’s previously agreed-to consent right with a provision permitting waiver of any and all of the APA’s terms without a further court order or the WLB Purchaser’s consent. See Credit Bid Sale Order ¶ 36; Credit Bid APA §§ 9.1, 11.6.

22. The WMLP Debtors also removed language protecting the sureties. As a result, sureties have filed objections to the WMLP Debtors’ Plan of Liquidation asking that language consistent with the Prior Sale Order be restored. See May 23, 2019 *Limited Objection of First Surety Corporation and Westchester Fire Insurance Company to Joint Chapter 11 Plan for the WMLP Debtors* [Docket No. 1870]; May 24, 2019 *Limited Objection of Travelers Casualty and Surety Company of American to Joint Plan of Liquidation for the WMLP Debtors* [Docket No. 1872]; May 24, 2019 *Statement and Reservation of Rights of Lexon Insurance Company, Sompo International Insurance and Bond Safeguard Insurance Company to the Joint Plan of Liquidation for the WMLP Debtors* [Docket No. 1873]; May 24, 2019 *Objection and Reservation of Rights of Zurich American Insurance Company and Affiliate to Joint Plan of Liquidation for the WMLP Debtors* [Docket No. 1877].<sup>6</sup>

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<sup>6</sup> Several of these objections apply to the Motion to approve the Credit Bid Sale Order and Credit Bid APA. See, e.g., May 24, 2019 *Objection and Reservation of Rights of Zurich American Insurance Company and Affiliate to Joint Plan of Liquidation for the WMLP Debtors*, ¶ 1 [Docket No. 1877] (“To the extent this Objections relates to the Kemmerer Sale Motion, it is specifically adopted as such.”).

23. In connection with the Intercompany Settlement Order, WMLP and the WLB Purchaser entered into a back-office transition services agreement (“Back-Office TSA”) under which the WLB Purchaser provides back-office services related to the Kemmerer assets in exchange for a fee and certain reimbursements. Intercompany Settlement Order, Annex 1 at page 3. It is the understanding of the WLB Purchaser that, under the Credit Bid Sale Order and Credit Bid APA, the Credit Bid Purchaser intends to assume the Back-Office TSA and numerous other executory contracts and unexpired leases. To do so, the WMLP Debtors and the Credit Bid Purchaser must show adequate assurance of future performance under Section 365(b)(1)(C) and 365(f)(2)(B) and under the Intercompany Settlement Agreement:

**Assignment:** (a) The applicable WMLP Debtor shall have the right, after consulting in advance with the WLB Debtors and the WLB Purchaser, subject to the consent of the MLP Secured Lenders, to assign the Management TSA and the Back-Office TSA in connection with the sale of any mine complex or substantially all of the assets of any mine complex . . . to a purchaser or affiliate of purchaser (*which purchaser or affiliate may be requested by the WLB Purchaser in its sole discretion, to provide reasonable adequate assurance of future performance under the applicable assigned MLP TSA, the Bankruptcy Court shall determine any dispute regarding such adequate assurance*) . . . .

Intercompany Settlement Order, Annex 1 at page 7 (emphasis added).

24. The Motion fails to allege any facts relating to adequate assurance of future performance. The Motion alleges only that the Credit Bid Purchaser will cure existing payment defaults, which is required under Section 365(b)(1)(A) but is insufficient to show adequate assurance of future performance under Sections 365(b)(1)(C) and 365(f)(2)(B).

**Argument**

**I. The Proposed Sale Contravenes Section 363 Of The Bankruptcy Code**

25. Section 363(k) provides:

At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k).

26. The Court has discretion to modify or deny the credit bid “for cause.”

27. As noted, the WMLP Debtors’ proposed Credit Bid Sale Order and Credit Bid APA permit the Credit Bid Purchaser to waive bonding requirements and thus permit the sale of the Kemmerer mine without the purchaser having obtained replacement bonding or a commitment from a surety ensuring that such bonding is obtained in the near future.

28. Allowing an entity to acquire a coal mine under those circumstances contravenes public policy. Mine operators are unlikely to perform timely, required reclamation when they do not assume real risk for their failure to comply with laws designed to protect the environment. Cf. Hearing Transcript at 165-67, In re Shoreline Energy, LLC, Case No. 16-35571, Docket No. 472 (S.D. Tex. Feb. 15, 2017) (declining to confirm plan of liquidation where debtors had not shown how environmental-related liabilities for oil and gas wells that debtors planned to abandon would be funded); Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl Protection, 474 U.S. 494, 507 (1986) (bankruptcy trustee may not abandon property in contravention of laws or regulations designed to protect public health or safety).

29. Beyond the potential environmental consequences, a sale in which the purchaser has not obtained replacement bonding or an agreement to obtain replacement bonding would

damage the WLB Purchaser. This was demonstrated earlier this year when the WMLP Debtors sought to consummate the sale of the Kemmerer mine without the purchaser having first obtained replacement bonding or an agreement to obtain such bonding. The evidence showed that, if the sale had closed, the WLB Purchaser would have been required to post \$54 million of additional collateral as a condition for Zurich to issue to the WLB Purchaser the replacement bonds the WLB Purchaser needs to obtain operating permits for its mines. See March 25, 2019 Tr. 86:5-19 (Micheletti), 103:18-104:22, 106:21-107:4, 111:1-8 (Hodges). Closing the sale of the Kemmerer mine without the purchaser having obtained replacement bonding or an agreement to obtain replacement bonding also could subject the WLB Purchaser to a \$54 million collateral call “at any point in time.” See March 25, 2019 Tr. 103:18-104:22 (Hodges).

30. Even if the Credit Bid Purchaser has a commitment from replacement surety providers, until the surety bonds are replaced and the permits are transferred, the existing surety bonds and existing indemnity agreements continue to govern – indemnity agreements under which the WLB Purchaser and the Kemmerer mine have shared collateral. The Credit Bid sale thus poses similar risks to the WLB Purchaser as the previous proposed sale. These risks are mitigated but not eliminated by written representations from new sureties that Required Bonding will be available: until the permit applications are filed, Required Bonding is provided to the Wyoming DEQ, and the Wyoming DEQ issues the new permits and releases Zurich’s bond, the WLB Purchaser remains on the hook to Zurich for bonding at Kemmerer.

31. The WLB Purchaser is not asking the Court to impose new restrictions on the sale of the Kemmerer mine. The Prior Sale Order and the Prior APA contained negotiated and agreed-to language protecting the WLB Purchaser and sureties from a sale in which the purchaser (i) fails to obtain replacement bonding or a commitment by a surety to provide such

bonding or (ii) waives such requirements. Like sureties that have filed objections to the WMLP Debtors' Plan of Liquidation, the WLB Purchaser only asks that the Court reinstate protections to which the WMLP Debtors and the MLP Secured Lenders previously agreed

## **II. The Proposed Sale Contravenes Section 365 Of The Bankruptcy Code**

32. Section 365(f)(2)(B) provides:

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if— . . . (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2)(B).

33. The WMLP Debtors admit that their Motion alleges no facts showing adequate assurance of future performance by the assignee of executory contracts and unexpired leases, which includes the Back-Office TSA between the WLB Purchaser and WMLP. See Motion ¶ 39; see also Motion ¶ 37 (quoting In re Dura Auto. Sys., Inc., 2007 WL 7728109, at \*97 (Bankr. D. Del. Aug. 15, 2007) (“[A] debtor-in-possession may assign an executory contract or an unexpired lease of the debtor if it . . . provides adequate assurance of future performance by the assignee.”)). The Motion therefore is legally deficient on its face.

34. The WMLP Debtors state that they “will . . . demonstrate adequate assurance of future performance at the hearing on this Motion.” Motion ¶ 39. The Motion should be denied unless they introduce evidence to support such demonstration. See Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1310 (5th Cir. 1985) (holding that factors used to assess adequate assurance of future performance under Section 365 include the financial ability to perform the contract, the general economic climate, and the existence of a guarantee); see also In re Resource Tech. Corp., 624 F.3d 376, 383 (7th Cir. 2010) (citing Richmond and noting

additional factors: the reputation of the party seeking to assume responsibility for the contract and past dealings between the parties).

35. The WMLP Debtors and Credit Bid Purchaser can easily meet their burden by (i) introducing into evidence a commitment for working capital financing from the MLP Lenders and (ii) agreeing to amend the Back-Office TSA to provide a mechanism under which payments to the WLB Purchaser (and the WLB Debtors) will continue to be debited from a bank account maintained by the Credit Bid Purchaser after assignment. A financing commitment provides required proof of adequate assurance of future performance and also supports the Credit Bid Purchaser's commitment to obtain Required Bonding. Amending the Back-Office TSA as noted above also provides proof of adequate assurance of future performance by helping ensure that the Credit Bid Purchaser will make timely payments to the WLB Purchaser under the assigned Back-Office TSA.

#### **Reservation of Rights**

36. There are other intercompany issues, separate and apart from the objections contained herein, related to the Kemmerer sale and the WMLP Plan that remain the subject of discussion and negotiation. The parties are endeavoring to resolve those issues prior to closing and the WLB Purchaser will raise any remaining concerns with the Court at the appropriate time if needed.

37. The WLB Purchaser also reserves its rights to further object or respond to the Motion on any grounds whatsoever, including the right to raise additional arguments at or before any hearings on the Motion.

WHEREFORE, the WLB Purchaser respectfully requests that the Court deny the Motion and grant such other and further relief the Court may deem proper.

Dated: June 3, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 3, 2019, a copy of the foregoing objection was served through the Court's CM/ECF notification system to all parties who have appeared in this case through counsel or who have submitted a request for service by CM/ECF.

*/s/ John F. Higgins* \_\_\_\_\_  
John F. Higgins

**Exhibit A**

**WMLP Kemmerer Credit Bid Motion**  
**Westmoreland Mining Issues List**

In addition to those described in the Objection, below is a list of issues to the filed Credit Bid Motion and Credit Bid APA [Docket No. 1863]. Westmoreland Mining LLC (the “WLB Purchaser”) reserves its rights to further comment on, and object to, any modified, amended or supplemented versions of the Credit Bid APA and sale order when they become available.

<b><u>Section</u></b>	<b><u>Comment</u></b>	<b><u>Proposed Resolution</u></b>
<b><u>Credit Bid APA</u></b>		
<p>Treatment of Transition Services Agreements</p>	<p>The treatment of the Transition Services Agreements needs to be clarified to reflect that the Kemmerer Purchaser is assuming the obligations thereunder. The proposed sale order currently reads that the Transition Services Agreements are Purchased Assets but the assumption of the underlying obligations in the Transition Services Agreements are limited.</p>	<p>The proposed sale order should include the following language:</p> <ol style="list-style-type: none"> <li>1. “The Management TSA shall be assumed by the Sellers and assigned to the Kemmerer Purchaser (Kemmerer Operations, LLC) and upon Closing, be immediately terminated (subject to payment at Closing of any accrued and outstanding amounts by Recipient in connection with such termination (as defined in the Management TSA)). In connection with such assignment of the Management TSA to the Kemmerer Purchaser, the Kemmerer Purchaser shall assume all obligations and liabilities of the Sellers under the Management TSA, whether arising before, at the time of, or after the Closing.”</li> <li>2. “The Back-Office TSA shall be amended and assumed by the Sellers and assigned to the Kemmerer Purchaser (Kemmerer Operations, LLC) at the Closing and thereafter shall continue in full force and effect in accordance with its terms. In connection with such assignment of the Back-Office TSA to the Kemmerer Purchaser, the Kemmerer Purchase shall assume all obligations and liabilities of the Sellers under the Back-Office TSA, whether arising before, at the time of, or after the Closing.”</li> <li>3. “Prior to Closing, the Kemmerer Purchaser shall establish</li> </ol>

<u>Section</u>	<u>Comment</u>	<u>Proposed Resolution</u>
		<p>a bank account to serve as the new Control Account (as defined in the Bank-Office TSA) to fulfill the obligations under the Back-Office TSA upon assignment of the Back-Office TSA at Closing. The Account Debit (as defined in the Back-Office TSA) shall be in full force and effect as set forth in the Back-Office TSA.”</p> <p>4. “In the event of an inconsistency between the Back-Office TSA and the Intercompany Settlement Order or any other document, the terms of the Back-Office TSA shall control other than with respect to the Stipulation and the WMLP Expense Share (as set forth in section 9.5 of the Back-Office TSA. The Back-Office TSA shall not be modified by the Intercompany Settlement Order or any orders approving the confirmation of the WLB Plan or the WMLP Plan.”</p>
Section 2.1(b)(xii) – Intellectual Property Rights	The “Westmoreland” name was purchased by the WLB Purchaser and is being used by the WLB Purchaser and its affiliates in the operation of their business. The Sellers have no right to grant a post-closing license to the Kemmerer Purchaser to use the “Westmoreland” name.	<p>The proposed sale order should include the following language:</p> <p>“The Kemmerer Purchaser shall not have the right or authority to use the name “Westmoreland” or variations or derivations of the same from and after the Closing unless a separate license arrangement is agreed to by and between the Kemmerer Purchaser and WLB Purchaser on terms acceptable to WLB Purchaser in its sole discretion.”</p>
Section 2.2 – Excluded Assets Definition	The Excluded Assets definition should explicitly include the assets of WLB, the WLB Purchaser and their respective affiliates (excluding the Sellers).	<p>The proposed sale order should include the following language:</p> <p>“Excluded Assets shall include all assets, properties and rights of WLB Debtors and the WLB Purchaser and their respective Affiliates (other than, with respect to WLB’s Affiliates, the Sellers).”</p>
Definition of Employee	Definition of Employee should not include any employees of WLB Purchaser.	The Credit Bid APA should be revised to remove references to WLB Purchaser in the definition of Employee and in section 8.8(b).
Section 8.8 – Employee Matters	The Credit Bid APA provides that the Kemmerer	The Credit Bid APA should be revised to provide that offers of

<u>Section</u>	<u>Comment</u>	<u>Proposed Resolution</u>
	Purchaser will make offers of employment to Kemmerer Employees on a date specified by the Purchaser that is not later than the expiration date of the Transition Services Agreements. The Kemmerer Purchaser should be required to make offers of employment that become effective as of the Closing.	<p>employment to the Kemmerer mine employees should be effective as of the Closing.</p> <p>In the event that the Credit Bid APA is not modified as set forth above, the Back-Office TSA shall be amended to provide the Recipient (as defined in the Back-Office TSA), including any assignee thereof, shall be responsible for any obligations or claims arising out of the continued employment of the Kemmerer mine employees by the WLB Debtors post-Closing.</p>
Insurance Policies	The Credit Bid APA is not clear as to the overall treatment of Insurance Policies in connection with the sale.	<p>The proposed sale order should include the following provision:</p> <p>“Pursuant to the Assumption and Assignment Agreement by and between Chubb and the WLB Purchaser, the insurance policies governed under such agreement (the “Previously Transferred Chubb Policies”) are the property of the WLB Purchaser and the Sellers have no other rights under or related to the Previously Transferred Chubb Policies, <u>provided, that</u>, (1) Sellers shall continue to have the right to make claims under the Previously Transferred Chubb Policies for losses incurred prior to March 15, 2019 in accordance with the terms of the Assumption and Assignment Agreement and (2) the Insurance Policies, Seller Insurance Policies and Purchased Assets shall not be deemed to include any other rights, interests or liabilities under the Previously Transferred Chubb Policies”</p>
Interim Permit Operating Agreement	WLB Purchaser should have the right to review the Interim Operating Agreement in light of its potential treatment of surety bonds during the Interim Period. The agreement could, among other things, possibly afford the Kemmerer Purchaser with the right to operate the Kemmerer mine under the Seller’s permits and bonds for an indefinite period (which closing conditions regarding surety bonds may be waived in the Kemmerer Purchaser’s sole discretion).	<p>The proposed sale order should include the following provision:</p> <p>“The Interim Operating Agreement will be subject to the review and reasonable satisfaction of WLB Purchaser.”</p>
Non-Recourse	No recourse to any past director, officer, employee,	The Credit Bid APA should be revised to include reference to WLB

<u>Section</u>	<u>Comment</u>	<u>Proposed Resolution</u>
	incorporator, member, partner, equityholder, incorporation, manager, agent, attorney, Representative of Affiliate of the parties to the Credit Bid APA should expressly include WLB and the WLB Purchaser and their respective Affiliates.	and WLB Purchaser and their respective Affiliates in the first sentence of Section 11.11.
<b><u>Proposed Sale Order</u></b>		
Surety Language	The proposed order does not include the language negotiated by the surety providers, the WLB Debtors, the WLB Purchaser, the WMLP Debtors and the MLP Secured Lenders in connection with the WLB Chapter 11 Plan and the prior order approving the sale of Kemmerer.	Paragraphs 24-30 of the prior order approving the sale of Kemmerer should be incorporated into the proposed sale order.
Amendments – Paragraph 36	Paragraph 36 of the proposed sale order eliminates the rights negotiated under the Intercompany Settlement Order, which has been incorporated into the WLB Chapter 11 Plan and the proposed WMLP chapter 11 plan.	<p>Paragraph 36 of the proposed sale order should be replaced with the following:</p> <p>“Subject to the terms of the Credit Bid APA, the Credit Bid APA and any related agreements may be waived, modified, amended or supplemented in accordance with the terms thereof, without further action or order of the Court, <u>provided</u>, <u>however</u>, that any amendment, restatement, supplement, modification or waiver of or under the Credit Bid APA or this Order that materially, adversely affects the WLB Debtors or the WLB Purchaser (including its Canadian Subsidiaries), as determined by each such party, requires the consent of such part (such consent not to be unreasonably withheld).”</p> <p>In addition, any amendments and waivers of provisions of the Credit Bid APA or Credit Bid Order should be on notice to the WLB Purchaser three (3) business days before the amendment or waiver is effective, and to the extent there is a dispute regarding an amendment or waiver, then the matter will be brought before the Bankruptcy Court on an emergency basis.</p>