

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO

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In re:	:	
	:	
KAISER STEEL CORPORATION,	:	Bankruptcy No. 87 B 01552 E
	:	(Jointly Administered)
Debtor.	:	

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Movants, the State of Utah Division of Oil, Gas and Mining ("Division") and the United States Office of Surface Mining Reclamation and Enforcement ("OSMRE"), by and through their undersigned attorneys, hereby reply to Respondents' Brief in Response to Motion for Relief from Automatic Stay, or in the Alternative for Adequate Protection and Request for Allowance and Payment of Administrative Claims as follows ("Brief").

I. INTRODUCTION.

As a short introduction, Movants wish to clarify their position regarding several statements made by Respondents in their Brief.

First, as will be discussed below, Movants do not by this action seek an injunction from this Court. Further, Movants have withdrawn their request for administrative expenses. Next, Movants deny that they agreed at any time to refrain from taking enforcement action at the Utah Properties, although Movants did, at a meeting on December 3, 1987, agree to refrain from filing the subject Motion until January 4, 1988. (See Brief at 3).

In addition, for the Court's information, IPA did not approve the purchase of the Geneva (Horse Canyon) Mine and the Wellington Preparation Plant at their meeting on April 26, 1988, but may do so sometime in the future. (See Brief at 4).

**II. RESPONDENTS MISSTATE THE PURPOSE OF MOVANTS' MOTION AND THE REQUEST FOR RELIEF.**

Throughout Respondents' Brief are references to the injunctive relief sought in this action by the Division and OSMRE ("Movants"), see e.g. pages 2 and 8 of the Brief. Respondents are mistaken in their belief that Movants are appearing before this Court for the purpose of seeking to enjoin Kaiser Steel Corporation, Kaiser Coal Corporation, Kaiser Coal Corporation of Utah, and Kaiser Coal Corporation of Sunnyside ("Kaiser") from continuing the operation of the Sunnyside Mine and to mandate the complete restoration of the Sunnyside Mine, the Geneva (Horse Canyon) Mine and the Wellington Preparation Plant ("Utah Properties"). Movants maintain that the proper forum for seeking such an injunction is the appropriate District Court within the State of Utah when the proper factual and legal arguments can be made for and against its imposition. In the current proceedings, Movants request only the concurrence of this Court that an action by the Division and OSMRE seeking to enforce their environmental laws through injunctive relief is excepted from the operation of the automatic stay provisions of 11 U.S.C. § 362(a) ("362(a)").

The analysis to determine whether Movants are entitled to the relief they request is clearly set out in the cases cited

in Movants' Memorandum in Support of Motion for Relief from Automatic Stay, or in the Alternative for Adequate Protection and Request for Allowance and Payment of Administrative Claims ("Memorandum"), especially in Penn Terra Ltd. v. Dept. of Environmental Resources, 733 F.2d 267 (CA3, 1984).

In Penn Terra, the Third Circuit systematically marks a path through the complex and sometimes conflicting legal and policy issues which seem to characterize these environmental cases. First, the Court found that its task was to determine:

...(1) whether DER's [the Pennsylvania equivalent to the Division in this action] actions come within the police or regulatory power of the state; if so, then it must further be determined (2) whether DER's actions are an attempt to enforce a money judgment."

Id. at 272. The Court found DER's actions to be within the police power authority. Id. at 274.

Next, as is discussed at length in Movants' Memorandum, the Court analyzed whether DER was, by its mandatory injunction action, attempting to enforce a money judgment. The test applied was:

...whether the remedy would compensate for past wrongful acts resulting in injuries already suffered, or protect against potential future harm.

Id. at 277. The Court concluded that DER's action was one to protect the affected land from further degradation and not to seek compensation for injuries already incurred. Id. at 278.

Respondent, in an attempt to diminish Penn Terra's importance to the outcome of this case, makes an effort to distinguish the facts leading to the Penn Terra decision from the facts present in this Kaiser matter. In fact, Respondent acknowledges that "...building demolition, regrading, backfilling, and revegetation of the building sites and operation sites, and then the monitoring and maintenance of the sites..." along with the sealing of mine shafts are all required reclamation activities at an underground mine site. Movants agree with Respondents' characterization of the underground mine reclamation requirements and point out that there is no real difference between Respondents' list of underground and surface mine categories of reclamation activities. See Brief at 10. The reality is that a total of approximately 690 acres are currently disturbed at the three Utah Properties which translates into spreading topsoil over coal waste piles, dismantling buildings, grading sedimentation ponds and drainage ditches, reseeding, and similar operations designed to protect and stabilize the sites.

In fact, though, any perceived or real differences in reclamation categories or in types of mines is irrelevant to the analysis that the Court must make to determine whether Movants are subject to the automatic stay. In Penn Terra as well as other cases cited in Movants Memorandum (see e.g. United States v. F.E. Gregory & Sons, Inc., 58 B.R. 590 (W.D.Pa. 1986), and United States v. Standard Metals Corp., 49 B.R. 623 (D.Colo. 1985)) the focus was on the type of relief sought. In those

cases, as in the present case, reclamation of sites affected by coal mining activities is an activity intended to prevent the prolonged degradation of the affected site and, as such, is not an attempt at collecting compensation for injuries incurred.

**III. MOVANTS' ACTION IN REVOKING KAISER'S AUTHORITY TO SELF-BOND IS NOT A DISCRIMINATORY ACTION IN VIOLATION OF 11 U.S.C § 525(a).**

Movants have extensively briefed the issue of whether Respondents' inability to meet the requirements of the net capital rules discriminates against Kaiser (see Memorandum at page 19 et seq.) and wish only to point out that Kaiser's reliance upon In re Rath Packing, 35 B.R. 615 (Bankr. N.D. Iowa 1983) is misplaced. In Rath, the Court found that the government action took place for the sole reason that the debtor had filed a petition for bankruptcy. In Rath, unlike the present case, there was no evenhanded application of reasonable rules. There was merely the stand-alone governmental action of withdrawing the exemption allowing self-insured status.

As Movants have pointed out in their Memorandum, Respondents, by their own admission, did not meet Utah's net capital rules permitting self-bonding. To find, as Kaiser proposes, that debtors-in-possession should be exempt from the operation of Utah's rules regarding self-bonding, is to seek a "head start" rather than the "fresh start" contemplated by the Bankruptcy Code. (Memorandum at page 28, citing Duffy v. Dollison, No. C-2-81-1154 (S.D. Ohio Aug. 13, 1982).

#### IV. CONCLUSION.

Movants are cognizant of Kaiser's continued efforts to seek a financially responsible party to assume the operation of the mine and the reclamation obligation. Movants, however, have suffered the continued operation of the Sunnyside Mine for over one year on the basis that Kaiser would soon meet the requirements of the March 26, 1987 letter (Attachment 5 of the Motion) and supply a party willing to assume the reclamation obligation. Now, with depletion of the existing developed coal at less than one year away, Movants cannot stand by and allow the mine to be made essentially worthless and with little hope of reclaiming the sites. Kaiser may yet have an opportunity to sell the Utah Properties, but if, as Kaiser observed in its Brief at page 11, an inactive mine is less attractive to prospective buyers, then a depleted inactive mine is a white elephant.

Movants have a mandate to protect these disturbed areas from prolonged degradation resulting from a failure to reclaim. It is essential that the governmental agencies be permitted to exercise their authority to cause Kaiser to cease operations and begin to completely reclaim the Utah Properties.

Movants respectfully request that this Court concur with their position that such actions are not subject to the stay provisions of 362(a) and that no discrimination against Kaiser on

the basis of its action in filing for bankruptcy has occurred.

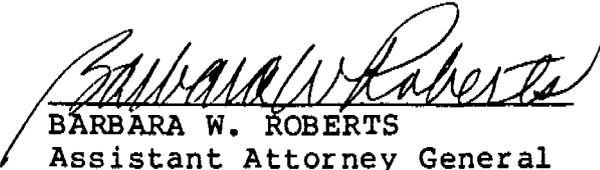
Respectfully submitted this 29th day of April, 1988.

MOYE, GILES, O'KEEFE,  
VERMEIRE & GORRELL

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JOHN O'BRIEN  
1225 17th Street  
29th Floor  
Denver, CO 80202

DAVID L. WILKINSON  
Utah Attorney General

  
BARBARA W. ROBERTS  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
(801) 538-1017

WATKISS & CAMPBELL

  
HERSCHEL J. SAPERSTEIN  
GLEN E. DAVIES  
Special Assistants Attorney  
General  
310 South Main Street  
Twelfth Floor  
Salt Lake City, Utah 84101-2171  
(801) 363-3300

ROBERT MILLER  
United States Attorney General

---

DAHIL GOSS  
Assistant United States Attorney  
1961 Stout Street  
Federal Office Building  
Suite 1200  
Denver, Colorado 80294  
(303) 844-2064  
FTS 564-2064

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STUART A. SANDERSON  
Department of Interior  
Office of the Regional Solicitor  
P.O. Box 25007  
Denver Federal Center  
Denver, Colorado 80225  
(303) 236-8443  
FTS 776-8443