



COALEX STATE INQUIRY REPORT - 324

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TOPIC: SURFACE MINING PERMIT AS "PROPERTY OF THE ESTATE" OF BANKRUPT OPERATOR

INQUIRY: The regulatory authority wants to revoke the surface mining permit of a bankrupt operator because of outstanding violations. The operator claims the permit cannot be revoked because it is part of the "property of the estate". Please locate relevant case law.

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials in LEXIS. No SMCRA decisions addressing this issue were retrieved. However, a number of relevant federal court decisions discussing related issues plus a portion of a Federal Register preamble from SMCRA ownership and control regulations were identified. These are listed below. Copies are attached.

USCS SECTIONS

These are enclosed for background:

1. 11 USCS Sec. 541 (1994) Property of the estate.
2. 11 USCS Sec. 362 (1994) Automatic stay.

REGULATORY ITEM

53 FR 38868 (OCTOBER 3, 1988). Final rule. Ownership and control. [Excerpt]

"Thus, some actions, while otherwise within the scope of activities stayed by 11 U.S.C. 362(a), are exempt from a stay under 11 U.S.C. 362(b). The effect that a petition for liquidation or reorganization will have on a particular permit application will depend on the facts surrounding the violation and the application. Because of the complexity of the bankruptcy laws and the multitude of factual situations that are possible, regulatory authorities will deal with such applications on a case-by-case basis as they arise."



GENERAL DECISIONS

U.S. v WHITING POOLS, INC., 462 U.S. 198 (1983).

The IRS seized the swimming pool firm's property to satisfy a tax lien. Whiting then filed a petition for reorganization under the Bankruptcy Reform Act of 1978. In Bankruptcy Court, the United States moved for a "declaration that the automatic stay provision was inapplicable to the IRS or, in the alternative, for relief for the stay. Whiting counterclaimed for an order requiring the Service to turn the seized property over to the bankruptcy estate", intending to use the property to reorganize the business.

The Court held that the "reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization."

"Both the congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate."

IN RE: NATIONAL CATTLE CONGRESS, INC., 179 Bankr. 588, Bankr. L. Rep. (CCH) P76,455 (Bankr. N.D. Iowa January 20, 1995).

This recent case provides excellent analysis of issue with different types of licenses and permits [liquor license, airport landing slot, broadcasting license, racing license, etc.]

Following U.S. v WHITING POOLS, the court concluded that the Debtor's racing license was property of the estate. Debtor's license was "a property interest in which Debtor has, at a minimum, a proprietary interest to be administered by the Bankruptcy Court balanced against the State's legitimate interest in regulation of the subject matter of the license."

See these decisions, cited in case, above:

1. SMALL BUSINESS ADMINISTRATION v RINEHART, 887 F.2d 165, 168 (8th Cir. 1989).
"A primary purpose of the automatic stay provision is to afford debtors in Chapter 11 reorganizations an opportunity to continue their businesses with their available assets."
2. IN RE BRIGGS TRANSP. CO., 780 F.2d 1339, 1343 (8th Cir. 1985).
"The automatic stay is specifically designed to afford debtor a 'breathing spell' free from actions by creditors against the debtor's estate."
3. IN RE CENTRAL ARKANSAS BROADCASTING CO., 170 Bankr. 143, 146 (Bankr. E.D. Ark. 1994).
"A broadcasting license was found to be valuable, intangible property of a debtor's estate".



4. **IN RE ROCKY MOUNTAIN TRUCKING CO.**, 47 Bankr. 1020, 1021 (D. Colo. 1985).
"A certificate of public convenience necessary for a trucking company to do business is property of debtor's estate."
5. **IN RE DRAUGHON TRAINING INST., INC.**, 119 Bankr. 921, 926 (Bankr. W.D. La. 1990).
"A certificate of approval carrying a right to do business for a debtor operating a school is property of the debtor's estate."
6. **IN RE COMMONWEALTH COS.**, 913 F.2d 518 (8th Cir. 1990).
"[T]he Court held that Sec. 362(b)(4) is not limited to governmental actions to protect health or safety nor to instances where imminent and identifiable harm or urgent public necessity exist. In determining whether the governmental exception does apply, the Court considered the parameters of the 'pecuniary interest test'."
7. **IN RE BEKER INDUS. CORP.**, 57 Bankr. 611 (Bankr. S.D.N.Y. 1986).
"We thus hold that the scope of the control provision of Sec. 362(a)(3), as applicable to governmental regulation, is governed by the contours of Sec. 362(b)(4) as developed by case authority."

Also see:

1. **IN RE TERWILLINGER'S CATERING PLUS, INC.**, 911 F.2d 1168 (6th Cir 1990).

ENVIRONMENTAL LAW-RELATED DECISIONS

IN RE: KISH, 41 Bankr. 620, 11 Collier Bankr. Cas. 2d (MB) 888 (Bankr. D.C. Mich. 1984).

The lawsuit involved the post-petition activities of the debtor and trustee "carrying on" the debtor's landfill business and a citizens' group seeking to enjoin the operation, alleging violations of several acts. Could the citizens' group "bring suit without first obtaining a modification of the stay under 11 U.S.C. Sec. 362"? The Court held it could.

"Although the trustee's position that a public license is included within the broad definition of 'property of the estate' contained in 11 U.S.C. Sec. 541 is correct...it does not follow that a lawsuit seeking to destroy that property interest is an action to 'obtain possession' of that property. Any action to compel compliance with state regulatory provisions could devalue the property of an estate, even to the extent of destroying the property interest entirely. Its effect, however, does not transform the action from what is basically an enforcement action into one to 'obtain property of the estate'."

IN RE: PROFESSIONAL SALES CORP., 48 Bankr. 651 (Bankr. N.D. Ill. 1985). **IN RE: PROGESSIONAL SALES CORP.**, 56 Bankr. 753 (N.D. Ill. 1985).

PSC acquired title to a hazardous waste facility that had not been fully permitted (it had "interim status") and had a history of violating EPA standards. PSC filed for relief under



Chapter 11 of the Bankruptcy Code before it could complete the permit application or conduct the required clean-up. As a result, EPA terminated the facility's interim status.

The Bankruptcy judge, relying on his "inherent" powers to preserve the property of the estate, ruled that PSC would suffer "irreparable harm" if they were not granted injunctive relief: a prospective buyer was willing to purchase the site only if the interim status was intact. Creditors "will receive little, if anything" if relief was denied. "Conversely, the EPA will not suffer hardship due to judicial involvement at this point. No operations are taking place at the site...the site is presently in a dormant state posing no danger to the community and requiring no further superfund clean-ups."

The District Court vacated the Bankruptcy Court's order and remanded the matter to the Bankruptcy Court with instructions to dismiss PSC's complaint. The District Court determined that EPA's actions were lawful under RCRA.

"Here, the EPA's termination of interim status does not involve the taking of any tangible property from the debtor, nor has the EPA sought to bring an enforcement action which would compel PSC to expend funds on compliance. The termination in no way interferes with the bankruptcy court's exclusive jurisdiction over the debtor's property...Rather, the termination simply prohibits PSC from operating the property as a hazardous waste site until all regulatory requirements have been complied with. This is no more than is demanded of any business operating a hazardous waste site pending final approval of its application."

ATTACHMENTS

A. USCS SECTIONS

1. 11 USCS Sec. 541 (1994) Property of the estate.
 2. 11 USCS Sec. 362 (1994) Automatic stay.
- B. 53 FR 38868 (October 3, 1988). Final rule. Ownership and control. [Excerpt]
- C. U.S. v Whiting Pools, Inc., 462 U.S. 198 (1983).
- D. In re: National Cattle Congress, Inc., 179 Bankr. 588, Bankr. L. Rep. (CCH) P76,455 (Bankr. N.D. Iowa January 20, 1995).
- E. Small Business Administration v Rinehart, 887 F.2d 165, 168 (8th Cir. 1989).
- F. In re Briggs Transp. Co., 780 F.2d 1339, 1343 (8th Cir. 1985).
- G. In re Central Arkansas Broadcasting Co., 170 Bankr. 143, 146 (Bankr. E.D. Ark. 1994).
- H. In re Rocky Mountain Trucking Co., 47 Bankr. 1020, 1021 (D. Colo. 1985).
- I. In re Draughon Training Inst., Inc., 119 Bankr. 921, 926 (Bankr. W.D. La. 1990).
- J. In re Commonwealth Cos., 913 F.2d 518 (8th Cir. 1990).
- K. In re Beker Indus. Corp., 57 Bankr. 611 (Bankr. S.D.N.Y. 1986).
- L. In re Terwillinger's Catering Plus, Inc., 911 F.2d 1168 (6th Cir 1990).
- M. In re: Kish, 41 Bankr. 620, 11 Collier Bankr. Cas. 2d (MB) 888 (Bankr. D.C. Mich. 1984).
- N. In re: Professional Sales Corp., 48 Bankr. 651 (Bankr. N.D. Ill. 1985).



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