

Lloyd King



Honorable Lloyd King
United States Bankruptcy Judge

Entered on Docket
April 11, 2012

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re

AMERICAN WEST DEVELOPMENT,
INC., a Nevada corporation,

fdba Castlebay 1, Inc.
fdba Development Management, Inc.
fdba Fairmont 1, Inc.
fdba Glen Eagles 3, Inc.
fdba Heritage 1, Inc.
fdba Inverness 5, Inc.
fdba Kensington 1, Inc.
fdba Kingsbridge 1, Inc.
fdba Promontory Estates, LLC
fdba Promontory Point 4, Inc.
fdba Silverado Springs 1, Inc.
fdba Silverado Springs 2, Inc.
fdba Tradition, Inc.
fdba Windsor 1, Inc.,

Debtor.

Case No. BK-S-12-12349-MKN

Chapter 11

**FINAL ORDER (1) PROHIBITING
UTILITY PROVIDERS FROM
ALTERING, REFUSING OR
DISCONTINUING SERVICE; (2)
AUTHORIZING ORDINARY COURSE
PAYMENTS TO UTILITY PROVIDERS;
(3) DEEMING UTILITY PROVIDERS
ADEQUATELY ASSURED OF FUTURE
PERFORMANCE; AND (4)
ESTABLISHING PROCEDURES FOR
DETERMINING REQUESTS FOR
ADDITIONAL ADEQUATE ASSURANCE**

Hearing Date: April 10, 2012
Hearing Time: 9:30 a.m.

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1 The Court, having reviewed and considered Debtor's Motion [Docket No. 16] (the "Motion"),¹
 2 for an Order (1) Prohibiting Utility Providers From Altering, Refusing or Discontinuing Service; (2)
 3 Authorizing Ordinary Course Payments to Utilities Providers; (3) Deeming Utility Providers
 4 Adequately Assured of Future Performance; and (4) Establishing Procedures for Determining
 5 Requests for Additional Adequate Assurance (the "Utilities Motion") and the Omnibus Declaration of
 6 Robert M. Evans filed in support of Debtor's First Day Motions [Docket Nos. 56 and 57] (the
 7 "Omnibus Declaration"); all pleadings and evidence submitted in connection with the Motion at the
 8 hearing held on March 6, 2012; and the Court having approved Utilities Motion on an interim basis
 9 and entered the Interim Order (1) Prohibiting Utility Providers From Altering, Refusing or
 10 Discontinuing Service; (2) Authorizing Ordinary Course Payments to Utilities Providers; (3) Deeming
 11 Utility Providers Adequately Assured of Future Performance; and (4) Establishing Procedures for
 12 Determining Requests for Additional Adequate Assurance [Docket No. 118] (the "Interim Order"),
 13 and the Court having conducted a final hearing on April 10, 2012 (the "Final Hearing"), to consider
 14 the relief requested in the Utilities Motion on a final basis and any objections thereto; with no
 15 objections to the Utilities Motion or the Interim Order having been filed; and upon the record made by
 16 Debtor at the Final Hearing; with appearances as noted in the record; it appearing that this Court has
 17 jurisdiction to consider the Motion pursuant to 28 U.S.C. §§157 and 1334; it appearing that venue of
 18 this Chapter 11 Case in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it
 19 appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); notice of the Motion
 20 being good and sufficient and appropriate under the circumstances; and for good cause appearing,

21 **IT IS HEREBY ORDERED**, as to Debtor's existing utility accounts, that:

- 22 1. The Motion is GRANTED;
- 23 2. The utility providers (the "Utility Providers"), as listed on **Exhibit A** attached hereto,
 24 are hereby prohibited from altering, refusing and discontinuing service relationships or terms on
 25 account of prepetition invoices;

26
 27 _____
 28 ¹ All capitalized terms not otherwise defined herein shall have the same meaning ascribed in the Motion.

1 3. Debtor is authorized to (a) provide the Utility Providers, upon request, sums equal to
2 fifty percent (50%) of Debtor’s estimated monthly costs for utility services for each of the Utility
3 Providers (each sum, a “Utility Deposit”), based upon an average of Debtor’s monthly utility costs for
4 the six (6) months immediately preceding the Petition Date; and (b) pay in the ordinary course of
5 business amounts due to the Utility Providers for Utility Services (as defined in the Motion) provided
6 to Debtor prepetition (the “Ordinary Course Payments,” and together with the Utility Deposit, the
7 “Adequate Assurance Payments”);

8 4. Upon Debtor’s payment of the Adequate Assurance Payments, the Utility Providers
9 shall be deemed adequately assured of Debtor’s future performance pursuant to 11 U.S.C. § 366;

10 5. If any Utility Provider believes additional assurance is required, it may request such
11 additional assurance pursuant to the procedures set forth herein as follows:

12 5.1. If a Utility Provider is not satisfied with the assurance of future
13 payment provided by Debtor pursuant to the proposed Utility Deposit, the Utility
14 Provider must serve a written request (the “Request”) upon Debtor setting forth
15 the locations for which Utility Services are provided, the account numbers for
16 such locations, the outstanding balance for each account, a summary of Debtor’s
17 monthly historical utility use over the past six months on each account, and an
18 explanation of why the Utility Deposit is inadequate assurance of payment;

19 5.2. The Request must be actually received by Debtor and Debtor’s
20 counsel, Micaela Rustia Moore, Esq., Fox Rothschild LLP, 3800 Howard Hughes
21 Parkway, Suite 500, Las Vegas, Nevada 89169, within 45 days of the date of the
22 Interim Order granting the Motion (the “Request Deadline”);

23 5.3. Without further order of the Court, Debtor may enter into
24 agreements granting additional adequate assurance to a Utility Provider serving a
25 timely Request, if Debtor, in its discretion, determines that the Request is
26 reasonable;

27 5.4. If Debtor believes that a Request is unreasonable, then Debtor
28 shall, within 30 days after the Request Deadline date, file a motion pursuant to

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1 section 366(c)(2) of the Bankruptcy Code (a “Determination Motion”), seeking a
2 determination from the Court that the Utility Deposit, plus any additional
3 consideration offered by Debtor, constitutes adequate assurance of payment.
4 Pending notice and a hearing on the Determination Motion, the Utility Provider
5 that is the subject of the unresolved Request may not alter, refuse, or discontinue
6 services to Debtor nor recover or setoff against a prepetition date deposit; and

7 5.5. Any Utility Provider that fails to make a timely Request shall be
8 deemed to be satisfied that the Utility Deposit provided to it constitutes adequate
9 assurance of payment.

10 **IT IS FURTHER ORDERED** that:

11 6. If Debtor supplements the list on **Exhibit A** attached hereto, Debtor will serve a copy
12 of the Motion and the signed order granting the Motion on any Utility Provider that is added to the list
13 by such a supplement (the “Supplemental Service”);

14 7. Concurrently with the Supplemental Service, Debtor will file with the Court a
15 supplement to **Exhibit A** adding the name of the Utility Provider so served. The added Utility
16 Provider shall have 30 days from the date of service of the Motion and the signed order to make a
17 Request. In addition, Debtor may also provide a Utility Deposit to the Utility Provider that is added to
18 the list by such supplement without further order from the Court;

19 8. Debtor may terminate the services of any Utility Provider by providing written notice
20 (a “Termination Notice”). Upon receipt of a Termination Notice by a Utility Provider, the Utility
21 Provider shall immediately refund any Utility Deposit and/or prepetition deposit to Debtor, without
22 giving effect to any rights of setoff or any claims the Utility Provider may assert against Debtor. The
23 immediate refund of a Utility Deposit or prepetition deposit by a Utility Provider whose services are
24 terminated is fair and appropriate under the circumstances because the Utility Provider would no
25 longer require adequate assurance of future payment by Debtor;

26 **IT IS FURTHER ORDERED**, as to new accounts opened by Debtor as debtor-in-possession,
27 that:

28 ///

1 9. Utility Providers and any other company providing Utility Services to Debtor shall
2 treat Debtor like any other customer under applicable public utility regulations;

3 10. If a Utility Provider or any other company providing Utility Services to Debtor
4 discriminates against Debtor on account of its bankruptcy filing by seeking to impose an additional or
5 higher deposit or other requirements, the Court will consider a request for relief by Debtor with notice
6 to the utility provider on an expedited basis;

7 **IT IS FURTHER ORDERED** that:

8 11. Debtor is authorized and empowered to take all actions necessary to implement the
9 relief granted in this Final Order;

10 12. This Court shall retain jurisdiction to hear and determine all matters arising from the
11 implementation of this Final Order;

12 13. The terms and conditions of this Final Order shall be immediately effective and
13 enforceable upon its entry;

14 14. Except to the extent expressly provided herein and any actions taken pursuant hereto,
15 nothing herein shall be deemed: (i) an admission as to the validity of any claim against Debtor; (ii) a
16 waiver of Debtor's right to dispute any claim on any grounds; (iii) a promise or requirement to pay
17 any claim; (iv) an implication or admission that any particular claim is of a type specified or defined
18 hereunder; (v) a request or authorization to assume any agreement, contract or lease pursuant to
19 section 365 of the Bankruptcy Code; or (vi) a waiver of Debtor's rights under the Bankruptcy Code or
20 any other applicable law;

21 15. Except to the extent expressly provided herein and any actions taken pursuant hereto,
22 nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of,
23 any claim held by any person;

24 16. Debtor's banks and financial institutions are authorized and directed to process, honor
25 and pay, to the extent of funds on deposit, any and all prepetition checks, wire transfer requests or
26 intercompany transfer requests issued by Debtor, whether pre or postpetition, subject to, and in
27 accordance with, the terms of this Final Order, with respect to Utility Services. Debtor is authorized

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1 to reissue checks, wire transfer requests or intercompany requests where such method of payment has
2 been dishonored;

3 **IT IS FURTHER ORDERED** that:

4 17. U.S. Telepacific Corp. (aka TelePacific Communications) shall be provided with a
5 cash deposit in the amount of \$1,850 and, upon Debtor’s payment of such cash deposit, U.S.
6 Telepacific Corp. shall be deemed adequately assured of Debtor’s future performance pursuant to 11
7 U.S.C. § 366.

8
9 Prepared and respectfully submitted by:

10 **FOX ROTHSCHILD LLP**

11 By /s/ Micaela Rustia Moore

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13 Nevada Bar No. 5859
14 MICAELA RUSTIA MOORE, ESQ.
15 Nevada Bar No. 9676
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17 Las Vegas, Nevada 89169

18 *[Proposed] Counsel for American West Development, Inc.*

19 **CERTIFICATION OF COUNSEL PURSUANT TO LOCAL RULE 9021**

20 In accordance with Local Rule 9021, counsel submitting this document certifies as follows:

- 21 The Court has waived the requirement of approval in LR 9021(b)(1).
- 22 No party appeared at the hearing or filed an objection to the motion
- 23 I have delivered a copy of this proposed order to all counsel who appeared
24 at the hearing, any unrepresented parties who appeared at the hearing, and
25 each has approved or disapproved the order, or failed to respond, as
26 indicated below:
- 27 I certify that this is a case under Chapter 7 or 13, that I have served a
28 copy of this order with the motion pursuant to LR 9014(g), and that no
party has objected to the form or content of the order.

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EXHIBIT A
Utility Providers

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| <u>Account #</u> | <u>Debtor</u> | <u>Utility Provider</u> | <u>Service</u> |
|---------------------|---------------------------------|---------------------------|----------------|
| 211 - 7954026 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7954149 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7954810 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7955367 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7955475 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7955480 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7956158 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7956463 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7956797 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7957588 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7957982 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7960117 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7960390 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7960807 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7960845 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7961335 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7962592 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7963152 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7963772 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7966164 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7934254 - 001 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 211 - 7966943 - 002 | American West Development, Inc. | Southwest Gas Corporation | Natural Gas |
| 3-0620-1149730 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-1149858 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-1149860 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-1150001 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-1150004 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-1150009 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-1150011 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-1150013 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-1150016 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-2415969 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-2415976 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-2415974 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-2415972 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-2454449 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-2415980 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-2454451 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-2454450 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-2454453 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 3-0620-2454452 | American West Development, Inc. | Republic Services (REPUS) | Trash |
| 287015181411 | American West Development, Inc. | A T & T Mobility | Cell Phone |
| 001000253 | American West Development, Inc. | Nevada Power | Power |
| 154620345 | American West Development, Inc. | Sprint | Cell Phone |
| 765683414 | American West Development, Inc. | T-Mobile | Cell Phone |
| 18126 | American West Development, Inc. | Telepacific Comm | Cell Phone |
| 9005664001 | American West Development, Inc. | Valley Electric | Electric |
| 403350651 | American West Development, Inc. | Verizon | Cell Phone |