IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:	**Case No. 09-10832-m11**
PLATINUM OIL PROPERTIES, LLC,	**Chapter 11**
Debtor.	

ADVISORY BRIEF REGARDING THE INTERACTION OF THE INDIAN MINERALS LEASING ACT AND THE BANKRUPTCY CODE

NOW COMES the United States Department of the Interior (DOI), by its counsel, Manuel Lucero, Assistant United States Attorney and Dori E. Richards, Special Assistant United States Attorney, and respectfully files this briefing regarding the Indian Mineral Lease Act (IMLA), 25 U.S.C. 396a-396d and its interaction with the bankruptcy code.

Preliminary Statement

Threshold issues regarding operating rights in two Indian oil and gas leases on the Jicarilla Apache Reservation must be addressed in this proceeding and in accordance with the IMLA. The IMLA prohibits the assignment and operation of leases without the approval of the Secretary of the Interior. This congressionally mandated prohibition and protection of Indian trust assets is easily reconciled with the authorities of the bankruptcy court at 11 U.S.C. § 365.

Lease/Operating Right History

1. At issue in the Action and in Debtor's chapter 11 case are the purported transfers of certain operating rights in Lease Nos. 71 and 363 on the Jicarilla Apache Reservation which Debtor seeks to assume and include in its estate. Operating rights in Indian oil and gas leases are subject to the requirements of the IMLA.

2. Relevant transactions concerning operating rights in Lease No. 71:

a. The agreement granting record title to tribal land under Lease No. 71 (the "No. 71 Assignment") covers an unsurveyed area of tribal land referred to as Tract No. 136 consisting of 1,920 acres of land described as "Township 23 North, Rage 4 West, Section 3, 4, 9, and 10: All." No. 71 Assignment was initially executed between JAN and Lynes & Slusky, effective March 14, 1951. The No. 71 Assignment was approved by the DOI, through United States Bureau of Indian Affairs (the "BIA") on March 21, 1951.

b. Through a series of DOI/BIA approved assignments, BP America Production Company presently holds record title to the tribal land described in Lease No. 71.

c. Chase Oil Company acquired the operating rights for certain sections of tribal land subject to Lease No. 71 through the execution of operating agreements by the prior record title holder. These assignments were approved by the BIA.

d. Chase Oil Company subsequently merged with a company and sought to transfer operating rights/working interests in Sec. 3, 9 and 10 of Lease No. 71 to Golden Oil Holding Co. (GOHC) (Golden Oil Co.'s subsidiary for its New Mexico operations) in exchange for stock in Golden Oil Co. The attempted transfer of operating rights to certain wells on Lease No. 71 to GOHC. was not approved by the BIA.

3. Relevant transactions concerning operating rights in Lease No. 363:

a. The assignment granting record title to the tribal land under Lease No. 363 (the "No. 363 Assignment") covered an unsurveyed area of tribal land referred to as Tract No. 6 consisting of 2,560 acres of land described as "Township 24 North, Rage 4 West, N.M.PM. .... Section 15, 16, 21, and 22: All" and was initially executed by JAN and Lynes & Slusky effective March 14, 1951. The No. 363 Assignment was approved by the BIA on March 21, 1951, effectively granting lessee record title to the tribal land designated in the assignment document/lease.

b. Through a series of DOI/BIA approved assignments, EnerVest presently holds record title to the tribal land described in Lease No. 363 and has held such title since approximately the early 1990's.

c. Chase Oil Company acquired the operating rights for certain sections of Lease No. 363 through the execution of operating agreements by the prior record title holder. These assignments were approved by the BIA.

d. Chase Oil Company subsequently merged with another company and sought to transfer certain operating rights/working interests of Lease No. 363 in Section 21 of the tribal lands to GOHC in exchange for stock in Golden Oil Co. The attempted transfer of operating rights to GOHC was not approved by the BIA.

Golden Oil Chapter 11 Case

4. On August 12, 2003, Golden Oil Company commenced a chapter 11 in the U.S. Bankruptcy Court, Southern District of Texas, Case No. 03-36974-H2-11 ("Golden Oil Case").

5. On March 17, 2004, Golden Oil Company, on its own behalf and on behalf of GOHC, entered into a Settlement Agreement with McKay-Lotspeich Group ("MLG") with respect to operations under Assignment Nos. 71 and 363.

6. On July 10, 2004, the bankruptcy court in the Golden Oil Case issued an order approving the March 17, 2004 settlement agreement between Golden Oil Company and MLG (the "Golden Oil Settlement Agreement"). Pursuant to the Golden Oil Settlement Agreement, Golden Oil Company was authorized to transfer all of its interests in the operating rights granted under Lease No. 71 to MLG. Golden Oil Company was also authorized to transfer to MLG all of its interests in the operating rights granted under Lease No. 363, retaining for itself a five percent royalty interest in proceeds from production under Lease No. 363.

7. The DOI/BIA objected to the Golden Oil Plan (the "DOI/BIA Objection") primarily due to owed royalties. While the plan was eventually confirmed, neither the Court nor the DOI/BIA excused or otherwise waived the IMLA requirements of Secretarial approval to perfect transfers of Indian mineral interests.

8. On April 1, 2005, MLG took over operation of certain wells located on tribal lands described in Lease Nos. 71 and 363 without tribal or BIA confirmation. On May 9, 2005, Golden Oil Company filed a Motion to Enforce an earlier settlement agreement between MLG and Golden Oil Company, in bankruptcy court.

9. On June 20, 2005, the Southern District of Texas bankruptcy court entered a Stipulated

Order impacting MLG, Golden Oil Co. and Debtor, allowing Golden Oil Co. and MLG to transfer to Debtor a percentage of operating rights in certain wells on Lease Nos. 71 and 363. None of the companies complied with IMLA requirements to transfer operating rights.

10. Congress, in passing the IMLA, designated the Secretary of the Department of the Interior to protect Indian interests in issuing and managing Indian oil and gas leases, and make determinations regarding record title ownership and operating rights stemming from such leases. At no time post-confirmation, has Golden Oil or Platinum Oil Properties, LLC. complied with the statutory and regulatory requirements of the IMLA and sought the DOI's consent and approval for a transfer of operating rights for Lease Nos. 71 and 363.

ARGUMENT

I. The IMLA And It's Prohibition on the Assignment of Operating Rights Without the Secretary's Consent.

Congress enacted the IMLA to provide general governance of mineral leasing on Indian lands which requires all such leases, assignments and related agreements to be considered and approved by the Secretary of the Interior. The IMLA provides that:

> [Tribal lands] may, with the *approval of the Secretary of the Interior*, be leased for mining purposes, by authority of the tribal council . . . for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities, that [l]eases for oil and or gas-mining purposes . . . shall be offered to the highest responsible qualified bidder at public auction or on sealed bids.[1]

The purpose of the IMLA is to ensure that Indian mineral development occurs in a manner that maximizes an Indian owner's best economic interests and minimizes adverse environmental or cultural impacts from such development. 25 C.F.R. § 211.1(a). The federal courts have interpreted the IMLA as follows: "The

[1] *United States v. 9,345.53 Acres of Land, In Cattaraugus County, New York*, 256 F. Supp. 603, 605 (W.D.N.Y. 1966) (hereinafter "*Cattaraugus*")(quoting 25 U.S.C. §§ 396a-396d).

Federal Government's role in mineral leasing [on Indian lands] is pervasive and its responsibilities are comprehensive" so as to establish an enforceable trust relationship between the government and Indian tribal mineral owner.[2]

While "property" of the bankruptcy estate is comprised of "all legal or equitable property interests of the debtor in property as of the commencement of the case" (11 U.S.C. § 541(a)), non-bankruptcy law, in this case the IMLA, defines the scope and extent of that interest. *Paul v. Monts*, 906 F.2d 1468, 1475 (10th Cir. 1990); *In re Farmers Markets, Inc. (California v. Farmers Markets, Inc.)*, 792 F.2d 1400, 1402 (9th Cir.1986). *See also In re Transcon Lines*, 58 F.3d 1432, 1438 (9th Cir.1995) (noting that "nonbankruptcy law defines the nature, scope, and extent of the property rights that come into the hands of the bankruptcy estate"), *cert. denied sub nom. Gumport v. Sterling Press, Inc.*, 516 U.S. 1146 (1996).

The "property" at issue here is Platinum's alleged operating rights to extract federal trust minerals from federally protected trust land located on the Jicarilla Apache Nation's reservation[3] on Jicarilla Lease Nos. 71 and 363. Any property interests in oil and gas wells located on the Nation's reservation are created and governed solely and exclusively by the IMLA.[4] Thus, this Court must look to the IMLA and its

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[2] *Jicarilla Apache Tribe v. Supron Energy*, 728 F.2d 1555, 1564 (10th Cir. 1984), *see also Cattaraugus*, 256 F. Supp. at 603 ("[T]he United States, acting to safeguard the Indians in the conduct of their affairs, has established a comprehensive statutory and regulatory scheme covering mineral leasing on tribal lands.").

[3] Title to the land comprising the Nation's reservation, including the land underlying the Jicarilla Leases, is held in trust for the Nation by the United States of America. *See, Merrion v. Jicarilla Apache Tribe Amoco Prod. Co.*, 455 U.S. 130 (1982). Platinum claims no interest in the land itself. Rather, Platinum claims to hold exclusive lease and operating rights with respect to Lease Nos. 71 and 363.

[4] While in *Butner v. United States* 440 U.S. 48, 54 (1979), the Supreme Court stated:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."

440 U.S. at 55 (quoting *Lewis v. Mfrs. Nat'l Bank*, 364 U.S. 603, 609 (1961)), that situation is not akin to the one at hand which involves federal Indian Mineral leases.

implementing regulations to determine the "scope and existence" of the alleged property rights now asserted by Platinum.

The IMLA and its implementing regulations are a "comprehensive statutory and regulatory scheme covering mineral leasing on tribal lands" *See Cattaraugus*, 256 F. Supp. at 605-608 (holding mineral leases that did not comply with requirements of IMLA are void). The IMLA Regulations are set forth at Section 211.1, *ff.* of title 25 of the Code of Federal Regulations ("The regulations in this part govern leases and permits for the development of Indian tribal oil and gas, geothermal, and solid mineral resources . . . These regulations are applicable to lands or interests in lands the title to which is held by the United States or is subject to a restriction against alienation imposed by the United States").[5,6]

While the holder of record title to an oil and gas lease on Tribal Land ("Record Title") is permitted to assign or transfer interests in those leases, such assignment or transfer is not effective until it is approved by the Secretary of the Interior (the "Secretary") and in some cases the Indian Tribe that owns the land on which the lease is located (the "Indian Mineral Owner"). 25 C.F.R. § 211.53. No lease or operating interest in oil and gas wells on Tribal Land can be granted, and no transfer of such well interests is valid, except pursuant to the IMLA. 25 U.S.C. § 396a-396d; 25 C.F.R. § 211.53. In relevant part, 25 C.F.R. § 211.53 provides:

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[5] The IMLA Regulations describe, among other things, the authority and responsibilities of certain federal agencies (25 C.F.R. § 211.4-6); procedures for acquisition of an IMLA-governed lease (25 C.F.R. § 211.20-29); procedures related to the payment of royalties (25 C.F.R. § 211.40-43); provisions for the surrender, transfer or assignment of an IMLA-governed lease (25 C.F.R. § 211.51, § 211.53); and procedures for cancellation of leases and penalties for non-compliance with the regulations (25 C.F.R. § 211.54-55). In addition, the regulations provide that "leases, bonds, permits, assignments and other instruments relating to mineral leasing shall be on forms prescribed by the Secretary, that may be obtained from the superintendent or area director. . .." 25 C.F.R. § 211.57.

[6] The IMLA regulations explicitly recognize that Indian tribes have inherent governmental authority to regulate the conduct of persons, businesses, operation or mining within their territorial jurisdiction, including with respect to oil and gas development. *See* 25 C.F.R. § 211.1(d). Moreover, *Merrion* affirms that tribal jurisdiction is not displaced by the IMLA. Rather, it is exercised concurrently with the Federal regulations. 455 U.S. at 149-152.

211.53 - Assignments, overriding royalties, and operating agreements.

(a) Approved leases or any interest therein may be assigned or transferred only with the approval of the Secretary. The Indian mineral owner must also consent if approval of the Indian mineral owner is required in the lease. If consent is not required, then the Secretary shall notify the Indian mineral owner of the proposed assignment. To obtain the approval of the Secretary the assignee must be qualified to hold the lease under existing rules and regulations and shall furnish a satisfactory bond conditioned for the faithful performance of the covenants and conditions of the lease.
(b) No lease or interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly, by working or drilling contract, or otherwise, without the consent of the Secretary.

In this case, records maintained by the Secretary show that BP American Production Company ("BP") is the last approved Record Title holder for Lease No. 71, and no subsequent assignment or transfer has ever been approved by the Secretary or the Nation. As such, BP is the last authorized Record Title holder for Lease Assignment No. 71. Records maintained by the Secretary show that EnerVest Energy Institution Fund IX, LP and EnerVest Energy Institution Fund IX-WI, LP (collectively, "EnerVest") is the last approved Record Title holder for Lease No. 363, and no subsequent assignment or transfer has been approved by the Secretary or the Nation. As such, EnerVest is the current Record Title holder for Lease No. 363. Debtor no longer disputes whom maintains record title for Jicarilla Lease Nos. 71 and 363.[7]

This formal approval procedure protects the Secretary and the Indian Mineral Owner by allowing each to determine whether the proposed assignee is acceptable.[8] *Cross Creek Corp.*, 131 IBLA at 37, n.11. *Alaska Statebank*, 111 IBLA at 308. Approval by the Secretary must be by an affirmative act taken

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[7] The assignment of Record Title creates a contractual relationship between the record title owner, the Secretary and the Indian Mineral Owner. *Cross Creek Corp.*, 131 IBLA 32, 37 (1994). No proposed transfer or assignment of Record Title is effective until it is approved, in writing, by the Secretary. 25 C.F.R. § 211.48(a); *Cross Creek Corp.*, 131 IBLA at 37.; *Alaska Statebank*, 111 IBLA 300, 308 (1989). After the transfer or assignment of a lease is approved, separate written permission must be secured from the Secretary before any operations are started on the leased premises. 25 C.F.R. § 211.48(b). This is akin to the assignment process for operating rights.

[8] Leases, bonds, permits, assignments, and other instruments relating to mineral leasing shall be on forms, prescribed by the Secretary. 25 C.F.R. § 211.57.

pursuant to the specific statutory duties and procedures provided in the IMLA Regulations. *Id;* 25 C.F.R. § 211.53. Silence or the failure to object by the Secretary does not waive or otherwise override these statutory requirements and in no way confers approval. *See, e.g.*, 25 C.F.R. § 211.53(b)[9]

The IMLA Regulations do not mandate time limits within which the Secretary must approve or deny applications for the transfer of Record Title, Operating Rights or the issuance of Entry Permits. Once the fully completed application is submitted, pursuant to and in full compliance with the IMLA Regulations, approval or denial may take several years. *See, Cross Creek Corp.*, 131 IBLA at 33 (approval by Secretary of transfer of Record Title from BP to Cross Creek took more than two years, and subsequent application for transfer of Record Title from Cross Creek to Dry Mesa Corporation was not approved or denied when the lease was terminated in 1992).[10] Similarly, there are no time restrictions on approvals of transfers of operating rights.

Without the affirmative and written consent of the Secretary, the proposed transfer or assignment of operating rights is ineffective and the existing owner of Record Title and/or operator remains liable for all obligations to the Secretary or to the Indian Mineral Owner. *See, Cross Creek Corp.*, 131 IBLA at 34.

II. The IMLA and Section 365 of the Bankruptcy Code

While in general under 11 U.S.C. § 365 a debtor in possession could assume an executory contract with court approval - the operating rights at issue herein are not such executory contracts. See *In re Antweil*, 97 B.R. 65, 67, (Bankr. D. N.M. 1989), (this Court denied two related motions seeking: (i) a

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[9] In pertinent part, 25 C.F.R. § 211.53(b) provides: "To obtain the approval of the Secretary the assignee must be qualified to hold the lease under existing rules and regulations and shall furnish a satisfactory bond conditioned for the faithful performance of the covenants and conditions of the lease." 25 C.F.R. § 211.53(c) in pertinent part, provides: "Assignments of leases, and stipulations modifying the provisions of existing leases, which stipulations are also subject to the approval of the Secretary, shall be filed with the superintendent within five (5) working days after the date of execution."

[10] Absent the Secretary's approval of the assignment of Record Title, the existing Record Title holder remains ultimately liable for compliance with the terms of the lease. 43 C.F.R. 3106.7-2; *Cross Creek* 131 IBLA at 35. *See* 25 C.F.R. § 211.27.

determination that certain oil and gas leases were executory contracts that the debtor had "assumed" under a chapter 11 plan; and (ii) to compel payment to lessor of pre-petition defaults under the oil and gas leases. This Court rejected both arguments holding that the oil and gas leases were neither "leases" nor "executory contracts" capable of being "assumed" under § 365.)

Even assuming arguendo, that such agreements were executory contracts and could be assigned per 11 U.S.C. § 365, a court must first determine the extent that such operating rights exist. Because neither Golden Oil Co. nor Platinum perfected an interest in operating rights pursuant to the IMLA post-Golden Oil Bankruptcy, Platinum has no actual interest in Lease Nos. 71 and 363 and operating rights remain with either the former operator (Chase Oil) or the Record Title holder. The purported assignment of these leases and withdrawal of objections in the Golden Oil Bankruptcy proceeding did not serve to vitiate the requirements of the IMLA, that all assignments are ineffective and void *ab initio* unless the Secretary has approved that assignment.

11 U.S.C. § 365(c)(1) provides that:

> The Trustee [which includes the debtor in possession per 11 U.S.C. § 1107] may not assume . . . any executory contract . . . if . . . (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from . . . an entity other than the debtor or the debtor in possession . . . and (B) such party does not consent to such assumption.

Thus, "if non-bankruptcy law provides that the government would have to consent to an assignment of the [ ] contract to a third party, i.e. someone 'other than the debtor or the debtor in possession,' then . . . the debtor- in-possession cannot assume that contract. This provision limiting assumption of contracts is applicable to any contract subject to a legal prohibition against assignment." *In re West Electronics Inc.*, 852 F.2d 79 (3d Cir. 1988), *citing In re Pioneer Ford Sales, Inc.*, 729 F.2d 27 (1st Cir. 1984); *In re Braniff Airways, Inc.*, 700 F.2d 935, 943 (5th Cir. 1983). This standard has been referred to as the "hypothetical

test."

The IMLA, like Section 15 of Title 41 of the United States Code, at issue in *West Electronics,* is a law requiring the government's consent to assignment of Indian mineral leases and operating rights. Following the "hypothetical test" espoused by the Third[11], Fourth[12], Ninth[13] and Eleventh[14] Circuits, if the debtor in possession could not transfer the interest at issue to a third party, the bankruptcy court would be prohibited from allowing assumption and assignment of the subject leases.[15] Since any transfer of operating interests in Jicarilla Lease Nos. 71 and 363 requires the approval of the Secretary, application of the "hypothetical test" to interpret section 365 would prohibit assumption or assignment of operating rights in those leases.

In *Aerobox*, the bankruptcy court for the District of New Mexico rejected the "hypothetical test" espoused in *West Electronics* and *Catapult Entertainment, Inc.* in the context of determining that a patent and technology license agreement entered into by two private companies (Tubus Bauer) and the Debtor (Aerobox Composite Structures, LLC) could be assumed or assigned. In this particular context, Judge McFeeley applied the "actual test" articulated in *Institute Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997) and the reasoning of the court in *In re Footstar, Inc.*, 323 B.R. 566 (Bankr. S.D.N.Y. 2005) in determining whether section 365(c)(1) precluded a debtor-in-possession from assuming an executory contract. In following this test, however, the court appeared to limit its analysis to whether the executory contract could be *assumed* by the debtor-in-possession - "[w]here the particular transaction

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[11] *In re West Electronics, Inc.*, 852 F.2d 79 (3d Cir. 1988).
[12] *In re Sunterra Corp.*, 361 F.3d 257 (4th Cir. 2004).
[13] *Catapult Entertainment, Inc.*, 165 F.3d 747 (9th Cir. 1999).
[14] *In re James Cable Partners*, 27 F.3d 534 (11th Cir. 1994).
[15] Indeed, since Platinum has no employees, funds nor resources those wells would necessarily be operated by a different entity than the debtor.

envisions that the debtor-in-possession would assume and *continue to perform* under and executory contract, the bankruptcy court cannot simply presume as a matter of law that the debtor-in-possession is a legal entity materially distinct from the prepetition debtor with whom the nondebtor party . . . contracted." *citing In re Leroux*, 69 F.3d 608, 613-14 (1st Cir. 1995)(emphasis added). The court reached this determination based on *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) in which the Supreme Court found that "it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition" and found that "it is appropriate to determine whether the nondebtor party is actually being forced to accept performance under its executory contract from an entity other than the debtor." *Aerobox*, 373 B.R. 135 at 5 (*Bankr.* N.M. 2007). Thus, applying the logic in *Aerobox* a "court must make a case-by-case inquiry to determine 'whether the nondebtor party . . . *actually* was being 'forced to accept performance under its executory contract from someone other than the debtor party with whom it originally contracted.'" *Aerobox*, 373 B.R. at 2 *citing Cambridge Biotech*, 104 F.3d at 493, internal citations omitted.

In this case, and applying the "actual test" the result would be to force the Jicarilla Apache Nation to allow an entity on its reservation to operate certain oil and gas wells that it has never operated before; as well as preventing the DOI from performing its congressionally mandated review of the viability of a proposed operator in the interests of protected tribal trust assets. There is no contract in place between the DOI and debtor, nor JAN and debtor. Thus to allow assumption and/or assignment of Jicarilla Lease Nos. 71 and 363 would result in exactly the concern raised in *Aerobox* - whether a nondebtor party is actually being forced to accept performance from an entity with whom it had no prior relationship before filing a bankruptcy proceeding, i.e. no pre-petition executory contract exists because Platinum never sought DOI approval to validate a contractual arrangement for the operation of the subject wells.

CONCLUSION

Applying either the "hypothetical test" or "actual test" reaches the same result in this case. Platinum has no interest in Jicarilla Lease Nos. 71 and 363 and thus cannot assume them pursuant to section 365. This conclusion creates harmony between the Bankruptcy Code, the Indian Minerals Leasing Act and the legal authorities mandating the interpretation of federal law to be for the benefit of Indian tribes.

Respectfully submitted,

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I HEREBY CERTIFY that on June 15, 2010, I filed the foregoing pleading electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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